

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

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**Rebuttal Statement of the United States of America, Department of the Interior,  
Bureau of Land Management**

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**IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN INSTREAM  
FLOW APPROPRIATION ON TERROR CREEK BETWEEN THE CONFLUENCE OF  
EAST AND WEST TERROR CREEK AND THE TERROR CREEK DITCH  
HEADGATE, WATER DIVISION 4**

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Pursuant to Rule 5n(2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level, 2 CCR 408-2 ("ISF Rules"), the U.S. Department of the Interior, Bureau of Land Management ("BLM") hereby submit its rebuttal statement in support of the Colorado Water Conservation Board ("CWCB") Staff's recommendation for an instream flow ("ISF") appropriation on Terror Creek between the confluence of East and West Terror Creek and the Terror Creek Ditch Headgate, Water Division 4. The BLM supports the appropriation on the reach in the locations, timing, and amounts adopted by the CWCB at its January 2015 regularly scheduled board meeting. The CWCB adopted the locations, timing, and amount set forth in the CWCB staff recommendation report made available to the CWCB and the public at the January 2015 CWCB regularly scheduled board meeting.

**REBUTTAL TO OPPONENT'S LEGAL AND FACTUAL CLAIMS**

1. The opponents assert that the proposed instream flow water right infringes upon future proposed legal changes to existing senior water rights.

1A. The proposed instream flow water right does not foreclose future changes to existing senior water rights. Proposed changes may be decreed to the extent that such changes allow for continued exercise of the instream flow water right at the rates and timing decreed by the water court. The proposed instream flow water right seeks flow rates that are equal to or less than the amount of water available in Terror Creek on a median basis. By definition, this means that flows in Terror Creek will exceed the proposed instream flow water right 50 percent of the time. In addition, the proposed instream flow water right seeks substantially less flow than what is available under median hydrology during the snowmelt runoff period. Overall, the proposed flow rates leave substantial opportunities to decree proposed changes of water rights.

1B. Under Colorado water law, no water right holder enjoys unfettered ability to change an existing decreed water right. All senior water rights owners are subject to maintaining

stream conditions as they existed at the time that junior appropriations were made. Accordingly, the proposed instream flow water right will not introduce restrictions on proposed changes where no restrictions previously existed. Rather, future changes of water rights on Terror Creek will already be subject to junior water rights that have been established in downstream locations on the North Fork of the Gunnison River and the Gunnison River. If proposed changes of senior water rights on Terror Creek alter the timing of diversions, amount of water consumed, and the rate and timing of return flows, it is likely that the proposed changes will already be subject to terms and conditions to protect downstream junior water rights.

2. Opponents assert that flows in Terror Creek rise and fall at the total discretion of Terror Creek Ditch Company and the local water commissioner, and that the proposed instream flow will interfere with the administration of these water rights.

2A. By definition, the proposed instream flow water right is a junior water right. If the instream flow water right is decreed, the Colorado Water Conservation Board will not have authority to direct how senior water rights are administered, provided that such administration is within the range of historical water administration practices. (See C.R.S. Section 37-92-102 (3) (b) and Colorado Water Conservation Board v. City of Central 125 p.3d 424, 439 (Colo. 2005) which states “Because instream flows are administered within the priority system, the instream flow cannot take water away from existing uses and the senior will always be able to make its diversion for its decreed beneficial uses.”

2B. The water availability analysis conducted by the CWCB reflects administrative practices associated with existing senior water rights because the water availability analysis relies upon historic gage data. Even with the variations in the rate and timing of flows associated with historic water rights administrative practices, the gage data shows that water is available for the proposed appropriation.

3. Opponents assert that other than flood water season, all of the water in Terror Creek is fully decreed, and that the CWCB is merely trying to share in the priority dates of existing senior water rights.

3A. Colorado statutes do not prohibit appropriation of water that is traveling toward the diversion points of downstream senior water rights, provided that the proposed use is nonconsumptive. For example, a hydropower operator may appropriate water destined for downstream senior water rights, provided that the hydropower use does not change the timing and rate of flow enjoyed by senior water rights. Similarly, the CWCB’s water use is non-consumptive, and all water used to preserve the natural environment remains available for downstream use in accordance with prior decrees. The ability to appropriate water destined for downstream senior water rights is absolutely essential to the success of the instream flow program, because most river systems in Colorado are fully appropriated by downstream senior water rights.



3B. Attempting to share or rely upon the priorities of existing, downstream senior water rights would not accomplish the objectives of the instream flow program. By definition, downstream senior water rights are decreed for purposes other than preserving the natural environment. As such, senior rights are likely to have different flow rates and timing of diversions than would be necessary to effectively preserve the natural environment. In addition, the owners of senior water rights have the legal option to choose to change their water rights, in which case the protection afforded by the senior right may cease. Finally, senior water rights owners have the legal right to not exercise their water right during periods when water is not needed, and they have the legal right to not exercise their water right at all. Since preserving the natural environment requires continuous flow rates, reliance upon a senior water right cannot accomplish the instream flow program objectives.

4. Opponents assert that the proposed flow rates exceed the amount of water needed for the survival of the fish population.

4A. The objective of the instream flow program is to “preserve the natural environment to a reasonable degree.” The BLM interprets this directive to mean that the CWCB should appropriate flows that preserve fish populations in a manner that such populations have similar population sizes, distribution, and species diversity to what is present in the stream when the instream flow appropriation is made. While fish populations have behavioral mechanisms that allow them to survive occasional low flow events, flow rates that allow only for survival will not accomplish objectives for fish reproduction, distribution, and diversity.

4B. The BLM utilized R2CROSS methodology to develop its instream flow recommendation. R2CROSS is a standard methodology employed by the CWCB to identify flow rates that are needed to preserve the natural environment to a reasonable degree. By definition, such flows exceed flow rates necessary for fish survival, and instead identify flow rates that are needed to complete all of the life stages necessary for cold water fish reproduction.

5. Opponents assert that a concealed purpose of the proposed instream flow appropriation is to later pursue takings of senior rights to better protect the fish population

5A. The CWCB has no statutory authority to acquire senior water rights by eminent domain for inclusion in its instream flow program. (See C.R.S. Section 37-92-102 (3). Rather, the statutes authorizing CWCB activities restrict the CWCB to pursuing acquisition of water rights from willing sellers.

5B. The BLM has observed that the current operation of existing water rights on Terror Creek is consistent with the preservation of the natural environment above the points of diversion for those water rights. The BLM’s instream flow recommendation is designed to maintain this arrangement, while still providing senior water rights holders with the

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ability to change senior water right consistent with preservation of the environment on Terror Creek. The BLM did not recommend to the CWCB that it acquire the senior water rights on Terror Creek.

Respectfully submitted this 15th day of August, 2015.

A handwritten signature in dark ink, appearing to read "Roy E. Smith", written over a horizontal line.

Roy E. Smith  
Water Rights and Instream Flow Coordinator  
Bureau of Land Management  
Colorado State Office  
2850 Youngfield St.  
Lakewood, CO 80215  
Telephone: 303-239-3940  
Fax: 303-239-3933  
E-Mail: r20smith@blm.gov