

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

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**Prehearing 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 THE HUBBARD CREEK BETWEEN THE U.S.  
FOREST SERVICE BOUNDARY TO THE DEER TRAIL 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 Program ("ISF Rules"), the Bureau of Land Management ("BLM") hereby submits its prehearing statement in support of the Colorado Water Conservation Board ("CWCB") staff's recommendations for an instream flow appropriation on Hubbard Creek between the U.S. Forest Service Boundary and the Deer Trail Ditch Headgate. The BLM supports the appropriation on the reach in the locations, timing, and amounts adopted by the CWCB at its January 2013 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 2013 CWCB regularly scheduled board meeting.

**A. FACTUAL CLAIMS**

1. There is a natural environment that can be preserved on the subject reach of Hubbard Creek. The finding of a natural environment is based upon fish and riparian surveys conducted by the BLM.
2. The instream flow location, amount and timing originally recommended by the CWCB staff at the January 2013 board meeting:
  - a) is based upon an accurate application of the R2Cross hydraulic modeling procedures
  - b) is based upon an accurate application of hydraulic criteria for instream flow determinations utilizing the R2Cross methodology
  - c) is required to preserve the natural environment to a reasonable degree.
3. The natural environment on the subject reach of Hubbard Creek:
  - a) includes native and introduced fishes, aquatic macroinvertebrates, riparian communities, and amphibians.

- b)** can be preserved with an instream flow appropriation that is based upon the flow needs of trout, because that species is an indicator species for other elements of the natural environment that rely upon a hydrograph with a natural shape
  - c)** will be preserved to a reasonable degree with the proposed ISF water right, and
  - d)** can exist without material injury to existing water rights, including conditional surface water rights and conditional storage rights.
- 4.** The water availability analysis conducted by the CWCB in support of the January 2013 instream flow appropriation:
  - a)** is based upon scientifically accepted hydrologic analysis procedures
  - b)** relies upon data from multiple historic gaging sites, all of which demonstrate that sufficient water is available for the proposed appropriation
  - c)** reflects an amount of water that is available for appropriation as an ISF right, utilizing standard procedures employed by the CWCB to evaluate a range of hydrologic year types
  - d)** reflects the operation of diversion and storage facilities located upstream from the proposed ISF reach
- 5.** The BLM supports the staff recommendations as set forth in the January 2013 Staff Report and Recommendation on the subject reach of Hubbard Creek.
- 6.** The BLM hereby adopts the factual claims set forth in the CWCB staff's Prehearing Statement.

## **B. LEGAL CLAIMS**

- 1.** The BLM is a party to these proceedings pursuant to Rule 5l(4) of the ISF Rules.
- 2.** Because ISF water rights are nonconsumptive and do not divert water from the stream, the CWCB can appropriate an ISF right that is based upon the flow of water that will be diverted downstream by a senior water right.
- 3.** Even though the proposed ISF will be junior to existing water rights on the stream system, the CWCB can make appropriations based on water availability at the time of the proposed appropriation, without subtracting flow rates or volumes that have been adjudicated to conditional or presently unexercised water rights.
- 4.** The proposed instream flow water right will not deprive the people of the State of Colorado of their right to develop the volume of water allocated to the State of Colorado under the Colorado River Compact. The proposed instream flow water right leaves substantial water volumes available for new junior water rights and future water development.

5. In determining the amount of water available for an instream flow appropriation, the CWCB is not limited to the amount of water available during drought years. Instead, the CWCB may consider the amount of water available in a range of hydrologic conditions.
6. The CWCB has the discretion to determine amount and timing of water necessary to preserve the natural environment to a reasonable degree.
7. The original CWCB staff ISF recommendation for the subject reach of Hubbard Creek meets all of the substantive and procedural requirements outlined in the ISF Rules.
8. The CWCB's appropriation of an instream flow water right on the subject reach of Hubbard Creek would further the express intent of Section 37-92-103(3), C.R.S. to "correlate the activities of mankind with some reasonable preservation of the natural environment."
9. The BLM hereby adopts the legal claims set forth in the CWCB staff's Prehearing Statement.

**C. EXHIBITS TO BE INTRODUCED AT HEARING**

1. January 2013 Staff Analysis and Recommendation on the subject reach of Hubbard Creek. This report, along with its appendices, contains maps of the proposed reach, proposed ISF amounts and timing, and water availability calculations. This report and supporting appendices is available for review on the CWCB's website at:  
<http://cwcbweblink.state.co.us/weblink/0/doc/193599/Electronic.aspx?searchid=80a9ab84-c99a-42a1-b65a-273942f60023>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 1**.

2. Recommendation letter from the BLM, along with supporting field data, photographs, maps, and water availability analysis. This information set includes BLM fish sampling reports on the subject reach, completed in 2007. It also includes R2Cross Survey Field Notes and Modeling Results from cross sections collected in 2007, 2008, and 2012. This document appears as supporting data for the CWCB Staff Analysis and Recommendation on the subject reach and is available for review on the CWCB website at:  
<http://cwcbweblink.state.co.us/weblink/0/doc/193584/Electronic.aspx?searchid=80a9ab84-c99a-42a1-b65a-273942f60023>

In the hearing, BLM will refer to these documents as **Exhibit 2**.

3. Development of Instream Flow Recommendations in Colorado Using R2Cross for Microsoft Excel. This document is available for review on the CWCB website at:  
<http://cwcbweblink.state.co.us/weblink/0/doc/195727/Electronic.aspx?searchid=db6c45ac-7f02-4dbb-9354-d10724934564>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 3**.

4. . Gregory D. Espegren, Development of Instream Flow Recommendations Using R2Cross, dated January, 1996. This document is available for review on the CWCB website at:  
<http://cwcbweblink.state.co.us/weblink/0/doc/158688/Electronic.aspx?searchid=e14efb21-664b-47ed-92fc-fe9be91dbda8>

In the hearing, BLM will refer to this report and its appendices as **Exhibit 4**.

5. The BLM may introduce demonstrative, rebuttal, or other exhibits as allowed by the CWCB or agreed upon by the Parties.

6. The BLM hereby adopts all Exhibits listed in the CWCB staff's Prehearing Statement.

7. The BLM may rely upon exhibits introduced or disclosed by any other party to this hearing.

#### **D. WITNESSES**

The following witnesses may testify at the hearing as described below, may give rebuttal testimony, and may be available at the hearing to answer questions from the CWCB.

1. Roy Smith, water rights and instream flow coordinator for the BLM (resume available upon request). Mr. Smith may testify about data collection methods, selection of data collection sites, R2Cross modeling efforts, how the BLM formulates ISF recommendations, and specifically how he formulated the BLM's recommendation for the subject reach of Hubbard Creek.

2. Jedd Sondergard, BLM hydrologist for the Uncompahgre Field Office (resume available upon request). Mr. Sondergard may testify about data collection methods, selection of data collection sites, and hydrologic characteristics of the subject reach of the San Miguel River. In addition, Mr. Sondergard may testify regarding channel morphology, riparian characteristics, and fishery characteristics of Hubbard Creek.

3. Tom Fresques, BLM Colorado fisheries biologist (resume available upon request). Mr. Fresques may testify concerning the fishery composition of Hubbard Creek, the life history and habitat needs of the various fish species found in Hubbard Creek, the relationship between riparian habitat and fish habitat, and data collection methods for the fishery surveys completed in Hubbard Creek.

4. The BLM may call any witness declared by any other party to this hearing.

#### **E. WRITTEN TESTIMONY**

BLM does not seek to enter any written testimony at this time. The BLM hereby adopts any written testimony listed in the CWCB staff's Prehearing Statement.

#### **F. LEGAL MEMORANDA**

## BLM Prehearing Statement – Hubbard Creek ISF Appropriation

BLM does not seek to enter any legal memoranda at this time. The BLM hereby adopts any legal memoranda listed in the CWCB staff's Prehearing Statement.

BLM Prehearing Statement – Hubbard Creek ISF Appropriation

Respectfully submitted this 30th day of June, 2014.

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