

BEFORE THE COLORADO WATER CONSERVATION BOARD  
STATE OF COLORADO

---

HEARING

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IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION  
IN WATER DIVISION 4: SAN MIGUEL RIVER

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This hearing was held before the Colorado  
Water Conservation Board on September 13, 2011, in  
Grand Junction, Colorado.

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1 P R O C E E D I N G S

2 THE CHAIR: A point of business that's left  
3 over from this morning, initially we had tabled the  
4 reconsideration of the Flaming Gorge proposal until  
5 the end of the meeting tomorrow. We have talked with  
6 representatives from the conservation groups as well  
7 as the proponent.

8 It's the intent because of logistics  
9 tomorrow to take that up at 8:00 tomorrow morning. So  
10 it will be first on the agenda item tomorrow morning.  
11 I know that's a burden to staff to get ready for that.  
12 But in talking with board members and so forth, that  
13 appeared to be the best avenue to take.

14 So tomorrow morning at 8:00 we will take up  
15 the agenda item 5-J, the Flaming Gorge proposal for  
16 the process that we discussed earlier this morning.

17 With that, we have before us this afternoon  
18 a hearing on the instream flow proposed for the San  
19 Miguel River from Calamity Creek down to the  
20 confluence with the Dolores River.

21 And there have been a number of procedural  
22 things done and a representative from the attorney  
23 general's office, Casey Shpall, is going to try to  
24 keep me on track here. And as was said earlier this  
25 morning, even if I'm on the right track, I don't want

1 to get run over.

2 So we will try to proceed through the  
3 hearing. One of the first things that is up for the  
4 board's consideration is a motion to allow  
5 cross-examination of witnesses and presenters as part  
6 of the hearing.

7 I think Ms. Shpall has an alternative that  
8 was discussed during some of the prehearing meetings,  
9 and she'd like to go over that with us. And we'd ask  
10 for the board motion to direct our course of action  
11 during the hearing.

12 MS. SHPALL: Under your procedure rules, you  
13 generally do not allow cross-examination in instream  
14 flow hearings. It's a notice and comment hearing  
15 pursuant to the statute.

16 However, the Board of Commissioners of  
17 Montrose County requested the opportunity to  
18 cross-examine. Staff of CWCB noted that in previous  
19 hearings there had been sort of compromise position  
20 whereby if somebody wants to ask a question in  
21 cross-examination, they submit it to the chair and the  
22 chair will determine whether or not it's appropriate,  
23 and the chair would ask the party the  
24 cross-examination question.

25 So that cuts down a little bit on the, you

1 know, Perry Mason kind of activity. It also might  
2 save some time. So the compromise position that they  
3 reached was that any party can request a CWCB chair to  
4 direct questions to a particular witness or other  
5 party in writing during this hearing.

6 All such questions should identify the  
7 person asking it and the person whom it is directed.  
8 And the chair will hold all such questions until the  
9 completion of that party's presentation, and at that  
10 time will determine whether or not to ask such  
11 questions.

12 And they should be questions that are geared  
13 toward eliciting evidence. And argumentative  
14 questions will be disfavored.

15 So the process will be if that one witness  
16 is testifying and somebody from another party feels  
17 that they misstated something or they want  
18 clarification or they want to challenge them, they can  
19 write up a question.

20 And if you just bring them to me, I can get  
21 them up to the chair. So that will be less  
22 disruptive. And then at the end of the presentation  
23 of that particular party, the chair will determine  
24 whether or not to ask the question.

25 THE CHAIR: I would ask the board for input

1 on that procedure. If the board is comfortable with  
2 that procedure, I would entertain a motion.

3 Director Trick.

4 MR. TRICK: I make a motion that we accept  
5 the procedure just outlined by the attorney general's  
6 office.

7 THE CHAIR: I have a motion by Director  
8 Trick.

9 MR. HAMEL: Second.

10 THE CHAIR: I have a second by Director  
11 Hamel. Any discussion?

12 Seeing none, all those in favor, please  
13 signify by saying aye.

14 SEVERAL VOICES: Aye.

15 THE CHAIR: Opposed?

16 (No response)

17 THE CHAIR: Thank you. Motion carries. So  
18 that's how we'll handle it. And please direct your  
19 questions to Ms. Shpall.

20 MS. SHPALL: I have one more issue. One of  
21 the witnesses has got to go on by I think 4:00 today.  
22 So if we're running behind schedule, I think the  
23 Western Resource Advocates requests that John Woodling  
24 be allowed to speak out of turn if we're not to him  
25 yet.

1 THE CHAIR: Okay.

2 MS. SHPALL: Okay.

3 THE CHAIR: With that, I'd go over the  
4 second prehearing order that we have under  
5 consideration here. We have allocated time for the  
6 hearing of, with all good intentions, five and a half  
7 hours.

8 Proponents for the instream flow will have a  
9 three-hour total presentation time. With Colorado  
10 Water Conservation Board staff are allocated one hour.  
11 Colorado Parks and Wildlife and Bureau of Land  
12 Management allocated one hour. Sheep Mountain  
13 Alliance allocated ten minutes. Western Resource  
14 Advocates and the Wilderness Society combined  
15 allocated 30 minutes. And reserved time 20 minutes.

16 Moving on, the opponents to the instream  
17 flow have two hours in total presentation time. Board  
18 of County Commissioners in Montrose County have 55  
19 minutes. Farmers Water Development Company has ten  
20 minutes. Southwest Water Conservation District,  
21 Norwood Water Commission, and Lone Cone Ditch and  
22 Reservoir Company combined have 55 minutes.

23 Yes?

24 FEMALE: Farmers Water Development Company  
25 had reserved ten minutes for themselves. But because

1 of financing, they're unable to be here today. So  
2 they are ceding their ten minutes to the other  
3 opponents in the group.

4 THE CHAIR: In any particular preference or  
5 just --

6 FEMALE: No, just whoever needs it, I guess,  
7 they can fight over it.

8 THE CHAIR: Okay. And then we will have  
9 comments from contested hearing participants and  
10 public comment for 30 minutes. So that is how it's  
11 outlined.

12 Any questions? With that, I guess we'll  
13 start with the Colorado Water Conservation Board staff  
14 presentation. Ms. Bassi.

15 MS. BASSI: Good afternoon. Is this on?

16 MALE: Yeah.

17 MS. BASSI: Linda Bassi, Stream and Lake  
18 Protection Section. I'm just going to give you a  
19 brief roadmap of where our presentation will go.

20 First, Susan Schneider will address the  
21 board on legal issues related to this hearing. After  
22 that, Jeff Baessler will give a history of the  
23 recommendation and an overview of our factual claims  
24 in support of the three determinations that the board  
25 needs to make today. Owen Williams will then go over

1 the water availability analysis.

2 After staff's presentation, Colorado Parks  
3 and Wildlife and BLM will give a joint presentation.  
4 Mark Uppendahl, Roy Smith and Rick Anderson will  
5 address the natural environment and the quantification  
6 analyses for this instream flow recommendation.

7 And, as you just heard on the prehearing  
8 order, staff, Parks and Wildlife, and the AG's office  
9 have reserved 20 minutes for a rebuttal presentation.

10 I think you're all painfully aware that  
11 we've provided you two notebooks. And those are the  
12 hearing notebooks. They contain everything, all the  
13 documents related to this matter with the exception of  
14 the second prehearing order which is in the regular  
15 board notebook.

16 So staff is requesting that the board  
17 formally accept all the material in those notebooks  
18 plus that order into the record for this hearing. And  
19 I don't have a copy to give you all. You have your  
20 own and I'm sure you've lovingly read every page.

21 THE CHAIR: So do we need to note on the  
22 record that we've accepted those exhibits? Okay,  
23 they're accepted, noted.

24 MS. BASSI: Thank you. CWCB staff, the AG's  
25 office, Colorado Parks and Wildlife and BLM and the

1 other proponents of this instream flow water right  
2 will provide testimony and evidence today that will  
3 support the board's statutory determinations that for  
4 this recommended instream flow, a natural environment  
5 exists. That natural environment will be preserved by  
6 the water available for the recommended appropriation,  
7 and no material injury to other water rights will  
8 occur.

9 We'll refer to those determinations in  
10 shorthand as the three determinations throughout the  
11 hearing. So you don't want to hear us recite them  
12 every time.

13 With that, I will turn it over to Jeff  
14 Baessler for his testimony. Oh, to Susan Schneider.  
15 Thank you, Jeff.

16 MS. SCHNEIDER: Susan Schneider with the  
17 attorney general's office. So instream flow rule  
18 5-J-3 limits this contested hearing to the three  
19 determinations that are outlined in section  
20 37-92-102(3)(c).

21 Nevertheless, you will hear legal arguments  
22 opposing this instream flow. And instead of fighting  
23 introduction of those arguments, we have decided to  
24 fight the arguments on the merits.

25 The first of those arguments is that this

1 instream flow would deprive the people of the  
2 beneficial uses of waters available by law and  
3 interstate compact. This argument has no merit.

4 First of all, this board provided the users  
5 in the water basin a very significant amount of time  
6 in which to file for all of the water rights that it  
7 could possibly develop. This instream flow was first  
8 discussed in 2005. It was formally noticed and  
9 recommended in 2008 and delayed another year to allow  
10 further water rights filings in the basin.

11 Since 2008, there have been extensive amount  
12 of water rights filing, as Jeff Baessler will outline  
13 for the board. Montrose County alone, one of the  
14 objectors in this case, has filed for six different  
15 water rights with a total yield of 6,400 acre feet of  
16 fully consumable and usable water.

17 In other words, there is a significant  
18 amount of potential development and water rights  
19 filing that have already occurred which go against the  
20 argument that this instream flow would deprive the  
21 people of the beneficial uses of the waters. They've  
22 already had significant time to do that.

23 Secondly, as staff will also demonstrate,  
24 there will be a significant amount of water that  
25 remains in the basin for further water rights filings

1 and development after the instream flow appropriation.

2           Objectors simply allege deprivation but show  
3 no actual harm. The supreme court has already  
4 reviewed this type of allegation and held that mere  
5 speculation or alleging harm is insufficient, but that  
6 harm must be proven with specificity.

7           The objectors have interchanged the word  
8 "deprive" with "impair" in some of the prehearing  
9 statements with regard to this legal issue, which is  
10 very interesting because impair is a term tied to  
11 RICDs. RICDs aren't allowed to be decreed if the RICD  
12 would impair compact development.

13           It's a similar term to the deprivation of  
14 beneficial use of waters of the state in interstate  
15 development. However, common sense tells us that  
16 deprive is a much stricter standard to meet than  
17 impair. If you impair one's ability to find food,  
18 they may still eat. If you deprive them of food  
19 altogether, there is no food available.

20           Nevertheless, in this state, and this board  
21 in particular, we'll recall that we have seen many  
22 RICDs in excess of 1,500 CFS up to 2,000 CFS. We're  
23 seeking a mere 325 here. Many of those RICDs have  
24 resulted in basins being overappropriated and,  
25 nevertheless, not one court has found that an RICD has

1     impaired compact entitlements or development of  
2     compact beneficial use of the waters.

3             So, clearly, in this case where we've  
4     provided ample time to file for as much water as the  
5     basin users can show the court that they can put to  
6     beneficial use, and where there is a significant  
7     amount of water remaining in the stream, it's  
8     impossible that they could prove in a court of law or  
9     before this board that there is a deprivation of the  
10    beneficial use of waters of the state by law or  
11    interstate compact.

12            Nevertheless, objectors failed to provide in  
13    the prehearing statements and the rebuttal statements  
14    certain terms and conditions that they will be  
15    presenting today. And they gave us those terms and  
16    conditions last week, and we've had a look at them,  
17    and we find them highly inappropriate for many  
18    reasons.

19            One term and condition is somewhat similar  
20    to the term and condition that this board reviewed  
21    last board meeting for the Colorado River instream  
22    flow. However, while staff in the -- the various  
23    staffs of the various sections in the instream flow  
24    program reviewed that, as did the various sections of  
25    the attorney general's office, and found that term

1 appropriate there, it's highly inappropriate here for  
2 several reasons.

3 First of all, the inclusion of that term and  
4 condition for the Colorado River instream flow  
5 appropriation was based upon years of compromise and  
6 negotiation and detailed Wordsmithing among many  
7 stakeholders and very different stakeholders of varied  
8 cross-sections.

9 Here we have one sample representative, the  
10 objectors, requesting an inclusion of a term and  
11 condition that isn't a result of negotiation and  
12 settlement.

13 Secondly, that language was dependent on  
14 much larger flow rates than what we would call the  
15 objectors in that case or the users would have liked.  
16 It was a compromise term.

17 Third, it was put in the proposed decree or  
18 it will be put in the proposed decree in an effort to  
19 avoid a wild and scenic designation.

20 And, most importantly, this term and  
21 condition that will be proposed goes well beyond that  
22 term and condition within the Colorado River instream  
23 flow appropriation.

24 This term and condition will result in a  
25 selective subordination that will benefit just a

1 select few as opposed to the broader category in the  
2 Colorado River instream flow.

3 As this board has heard on many occasion,  
4 the state engineer's office has issued a policy that  
5 disfavors selective subordination and they have  
6 informed the water community that they will treat a  
7 selective subordination, a subordination to a select  
8 few, as a general subordination which in effect would  
9 eviscerate this water right.

10 Further, the term and condition would  
11 unnecessarily bind the state engineer to a certain  
12 administration that may not be beneficial either for  
13 the state or for the state engineer's office. And the  
14 state may devise a more effective and efficient means  
15 for administration.

16 Finally, the select few who are requesting  
17 inclusion of this term and condition may be the very  
18 people who would oppose curtailment rules or statutes  
19 in order to maintain a superior position and a general  
20 subordination of this instream flow.

21 The next issue you'll hear about is the need  
22 of the board to correlate the needs of mankind with  
23 the reasonable preservation of the natural  
24 environment.

25 For the same reasons I just stated, the

1 reasons why the instream flow does not deprive the  
2 people of the beneficial use of the waters of the  
3 state, this board did in fact correlate the needs of  
4 mankind with reasonable preservation of the natural  
5 environment by waiting a significant amount of time to  
6 let the water users file for their oh-so-many water  
7 rights applications prior to our instream flow  
8 appropriation.

9 Further, the significant amount of water  
10 that remains in the stream also will allow further  
11 development in future years.

12 The supreme court has reviewed the requests  
13 or arguments similar to the objectors where they have  
14 suggested that this instream flow be subordinate to  
15 future exchanges, future changes, or future water  
16 rights. And the supreme court has stated that the  
17 whole legislative purpose of instream flows would be  
18 destroyed if the instream flow weren't given a proper  
19 priority in the Colorado priority system.

20 Again the objectors will present to you a  
21 term and condition to allow future changes even though  
22 the instream flow would be injured. This term and  
23 condition is also inappropriate for many reasons.

24 First, again it would result in a selective  
25 subordination which we have tried and bent over

1 backwards in other cases to avoid.

2 Second, and the objectors will explain it on  
3 their time, this term and condition would have the  
4 board approving changes to stream conditions that may  
5 injure other water users and render the priority  
6 system ineffective.

7 In other words, they are going to suggest  
8 that we take injury during the nonirrigation season  
9 and they could replace their return flows at other  
10 times, whereas -- wherein the board would be giving a  
11 sign of approval to something that other water users  
12 may be injured by or would in effect reorder the  
13 priority system.

14 Finally, any changes, any future changes as  
15 suggested by the objectors would result in an injury  
16 and that injury could be resolved. The applicants,  
17 just as any applicant for a water court's application,  
18 can come to the board and suggest an injury with  
19 mitigation which this board has seen and approved on  
20 many of occasion.

21 In summary, as you will hear, this instream  
22 flow meets the three determinations, does not violate  
23 any legal reasoning, and should not be subject to the  
24 terms and conditions as suggested by the applicants  
25 because that would result in selective subordination,

1 injury to the instream flow, and establish precedent  
2 that isn't based upon negotiation or settlement. It's  
3 based upon the objectors hoping to eviscerate this  
4 instream flow.

5 Any questions?

6 THE CHAIR: Questions from the board?

7 MS. SCHNEIDER: Thank you for your time.

8 THE CHAIR: Thank you.

9 MR. BAESSLER: Good afternoon. For the  
10 record, Jeff Baessler, Water Conservation Board staff.

11 My testimony today, I'm going to provide you  
12 a brief history on this appropriation. I'm also going  
13 to provide you an overview of the data and the  
14 analyses that staff performed that then provides you  
15 the factual basis so that you can make those three  
16 determinations.

17 I'm going to begin with a map of the area  
18 and just reorient you to some features on the map.  
19 First of all, this is the instream flow reach. It  
20 goes from Calamity Draw down to the confluence with  
21 the Dolores River.

22 Down in the lower left-hand corner you can  
23 see the appropriation or the recommendation that was  
24 made by both the BLM and Colorado Parks and Wildlife.  
25 It's all in Montrose County. It's for 17.24 miles,

1 and you can see the flow amounts on the right side of  
2 that table there.

3 A couple of other features, if you look at  
4 the yellow lines on here, these are existing instream  
5 flow appropriations that already exist on the books.  
6 There are a number of appropriations on tributaries  
7 and on the main stem of the San Miguel River and the  
8 Upper Basin of the San Miguel River.

9 One of the most recent ones is an  
10 appropriation on the main stem. That's a 2002  
11 appropriation, and it goes from Fall Creek down to  
12 just above the confluence with Horsefly Creek.

13 There are three gauges that you'll see on  
14 this map. One is located at Uravan. That's the gauge  
15 the staff primarily relied on to do its water  
16 availability analysis.

17 We also have a gauge at Uravan. That's a  
18 historic gauge; it's not in use today. But staff also  
19 looked at that. And then we have the Placerville  
20 gauge which is much higher in the basin, and staff  
21 also looked at that one.

22 You'll notice that there's a reach of the  
23 San Miguel River that has no appropriation and there's  
24 been no recommendation on it. And that goes from  
25 basically Horsefly Creek down to Calamity Draw. The

1 reason for that is that there is a perceived water  
2 availability problem there by the recommenders.  
3 That's why they haven't recommended anything.

4 And that's because you have a very senior  
5 water right, the CC Ditch, which takes water out at  
6 this point and delivers it over primarily to this area  
7 right here between Nucla and Naturita. And that's a  
8 big irrigation area, and then return flows come back  
9 into the San Miguel River at Calamity Draw.

10 Appropriation again is all in Montrose  
11 County, but it affects both San Miguel and Montrose  
12 County.

13 This recommendation, as Susan Schneider had  
14 said, was originally discussed at an instream flow  
15 workshop as far back as 2005. There was discussion  
16 with that. Dan Merriman walked us around the state  
17 and talked about it in a number of different venues.

18 However, it wasn't formally brought to the  
19 Water Conservation Board until 2008. Our process that  
20 we go through again is this workshop, then we provide  
21 notice. We provide two notices; we provide a notice  
22 in March and then again in November.

23 And during that time period staff does an  
24 analysis period where they look at water availability,  
25 they look at the recommendation, look at the merits of

1 the recommendation. We also have a public input  
2 process. And then the following year or the following  
3 January, we can then go to the board if we have  
4 sufficient information and ask the board to form its  
5 intent to appropriate.

6 We could have done that in January of 2009.  
7 Staff and the recommending entities decided not to do  
8 that because there was a lot of discussion going on, a  
9 lot of concern from the stakeholders in the basin.  
10 And so we recommended to the board that we delay it by  
11 another year.

12 And so we waited another year, and so this  
13 process started over again. And this is the red lines  
14 on here and the red dots.

15 So we took additional public comment during  
16 that period. In January of 2010 we could have brought  
17 it back to the board again and asked the board to form  
18 their intent to appropriate.

19 At that time San Miguel County, Montrose  
20 County, a number of other stakeholders asked this  
21 board for an additional delay so that they could look  
22 at their future water uses and that they could have  
23 time to see what was needed and potentially apply for  
24 additional water rights. The board granted that and  
25 took us to January of 2011.

1           At that time staff asked the board to form  
2   its intent to appropriate, which they did. We are now  
3   in September because those appropriations were  
4   contested in March 31st, and we're at the star right  
5   here right now with the formal hearing.

6           Since 2008 the recommenders -- or, I'm  
7   sorry, the opponents have filed for over 69 water  
8   rights totaling 800 CFS and over 90,000 acre feet.  
9   There has been a -- the opponents have claimed that  
10  the needs of mankind, as Susan Schneider had said,  
11  have not adequately been balanced with preservation of  
12  the natural environment. That's also in their  
13  prehearing statements.

14           But, as you can see from this slide right  
15  here and all of those black dots on there, this is  
16  what has occurred since the board and since staff  
17  delayed these appropriations until 2011.

18           One of your determinations is whether or not  
19  a natural environment exists. And both the Parks and  
20  Wildlife and the BLM have surveyed the Sweetser Stream  
21  and they have determined that a natural environment  
22  does exist.

23           The natural environment on the San Miguel  
24  River consists of the entire existing water dependent  
25  ecosystem, and that's not only the fish but aquatic

1 macroinvertebrates, all the species that rely and  
2 interact with each other on the river.

3           You can see from this slide here you have  
4 river otter, you have various riparian communities,  
5 mottled sculpin, speckled dace, northern leopard frog.

6           You also have these three species over on  
7 the left-hand side which I'm going to refer to as  
8 indicator species. These are the species that  
9 Division of Wildlife and BLM quantify the instream  
10 flow on. And these are species of special concern or  
11 BLM-sensitive species that if their numbers continue  
12 to decline, there's concerns that there could be an  
13 ESA listing.

14           And so in looking at these species, this is  
15 how they came up with a quantification of the minimum  
16 amount of water necessary to preserve the natural  
17 environment to a reasonable degree. The assumption is  
18 if you preserve the natural environment for these  
19 species right here, that you will also be preserving  
20 the natural environment for all the other species that  
21 rely on that river.

22           Parks and Wildlife and the BLM are going to  
23 give you a very in-depth explanation of the  
24 quantification signs that's used to determine the  
25 minimum instream flow amounts. I just want to review

1 it.

2 The purpose of this slide is just again a  
3 brief overview of the rationale of how the PHABSIM  
4 model is utilized to quantify the minimum amounts of  
5 water necessary for reasonable preservation.

6 And if you look at the word "reasonable,"  
7 reasonable, the synonyms for are logical or rational.  
8 And so I'm going to go through sort of this logical  
9 construct of how the biologists look at this and make  
10 this determination.

11 First off, instream flow objective is  
12 preservation of the existing natural environment with  
13 a minimum amount of water. We can say that  
14 preservation of the fishery requires protection of  
15 optimum available habitat under average flow  
16 conditions.

17 Optimum habitat is defined as the most  
18 favorable condition for the growth and reproduction of  
19 an organism. Therefore, diminution of habitat is  
20 likely to produce harmful changes in distribution,  
21 biomass or health of the fishery, whereas of course  
22 maintaining or preserving the optimum habitat will  
23 ensure that the fishery is preserved.

24 Therefore, CPW's recommendation is the  
25 minimum flow that PHABSIM model indicates will

1 preserve the existing optimum habitat. I think  
2 there's been some confusion with the opponents in that  
3 they've claimed in their prehearing statement that how  
4 can this be the optimum when you have a program that's  
5 supposed to be the minimum amount of water.

6 We're not talking about that. We're talking  
7 about -- we're not talking about optimum flows. We're  
8 talking about optimum habitat. That's the minimum  
9 amount.

10 Owen Williams is going to give you a  
11 detailed analysis or detailed overview of our water  
12 availability analyses. This is another one of your  
13 statutory determinations.

14 This slide simply shows the results of  
15 staff's standard analysis. You've seen this before  
16 where we talk about the statistic which is the  
17 geometric mean. And as long as a recommendation is  
18 either below or within the confidence intervals of  
19 that statistic, the geometric mean, then this board  
20 can and has on numerous times in the past determined  
21 that water is available for appropriation.

22 Going back to correlating the activities of  
23 mankind with reasonable preservation, again in their  
24 prehearing statements they've claimed, the opponents  
25 have claimed that this has not occurred.

1           Staff would assert that the instream flow  
2   has adequately balanced the needs of the people and  
3   the environment by, first, providing, again as Susan  
4   had said, more than four years for water users to file  
5   for additional senior water rights to meet future  
6   needs. Also by limiting Parks and Wildlife and the  
7   BLM quantified flows for reasonable preservation to  
8   water available under average conditions.

9           A lot of times the R2CROSS or PHABSIM  
10   methodology will actually recommend flows that are  
11   higher than is actually available under average  
12   conditions. And so there's a restriction there. That  
13   restriction also provides for correlation because they  
14   could claim that full amount and ask you to pump out  
15   the beneficial use.

16           Third thing, considering the fact that  
17   additional water is left under the instream flow  
18   depleted hydrograph for future development -- I'm just  
19   going to go back to the hydrograph real quickly.

20           If you integrate the area between the  
21   geometric mean daily flows and the lines on here which  
22   show the depleted instream flow, so you subtract this  
23   area out, you integrate this area, you see that  
24   there's a sufficient amount of water still available  
25   for appropriation and for use in the future. And a

1 number of the proponents will go into more detail on  
2 this and quantify that for you.

3 The last determination you have is that  
4 there's no material injury. The proposed instream  
5 flow water right is entitled to conditions that exist  
6 at the time of appropriation, just as any other junior  
7 water right. As as a junior water right, it will not  
8 impact any existing water rights. Therefore, there is  
9 no injury.

10 In summary, staff asserts that it's a fact  
11 that there is a natural environment, that water is  
12 available for appropriation, that no material injury  
13 to water rights will occur. And then finally with  
14 regard to the statutory requirement, the activities of  
15 mankind have been correlated with the reasonable  
16 preservation of the natural environment. Thank you.

17 THE CHAIR: Questions of Jeff?

18 Director Trick.

19 MR. TRICK: Jeff, can you go back to the  
20 slide that shows all the recent water filings. Can  
21 you update me on what the stat -- are those all  
22 conditional water rights at this date?

23 MR. BAESSLER: A large portion of those are  
24 conditional water rights. Not all of them are.

25 MR. TRICK: Some of them have been perfected

1 since the time that this was initiated?

2 MR. BAESSLER: That's correct.

3 MR. TRICK: Are the uses mostly irrigation,  
4 or are they M&I, or what's --

5 MR. BAESSLER: There's a variety of  
6 different uses. I have a spreadsheet that I can  
7 provide to you that outlines what all those uses are,  
8 if you would find that helpful.

9 MR. TRICK: But you would say that the  
10 majority of those are conditional at this point?

11 MR. BAESSLER: The majority are conditional.

12 THE CHAIR: Director Smith.

13 MR. TRAVIS SMITH: Thank you, Mr. Chairman.  
14 Jeff, would you go back to the slides talking about  
15 the minimum and the optimum habitat, that discussion.

16 You gave a brief explanation. The minimum  
17 amount of water needed and then that optimum. Can you  
18 talk about that a little bit more.

19 MR. BAESSLER: I'll give you a real brief  
20 overview again. I prefer to let the biologist go  
21 through that. Mark Uppendahl is going to go into a  
22 lot of detail with regard to that and Rick Anderson  
23 and Roy Smith.

24 But what we are saying here, what I'm saying  
25 here is that you have -- we're quantifying on optimum

1 habitat. And this board throughout its history when  
2 we've looked at R2CROSS or looked at PHABSIM, we've  
3 always looked at those optimum numbers.

4 What's optimum? You've had a number of  
5 recommendations that have come through where there  
6 have been increases.

7 And what's the purpose of that increase?  
8 You always have been looking at two or three criteria.  
9 In the early years of the program, recommenders came  
10 back in and said no, we need to optimize the habitat,  
11 we need to get the maximum habitat so that we can  
12 preserve this fishery. And so we've come in with  
13 increases to preserve the natural environment to a  
14 reasonable degree.

15 And so what we're talking about is that this  
16 is the optimum, this is the minimum amount that  
17 preserves an optimum amount of habitat. Because if  
18 you start to diminish that optimum amount of habitat  
19 that exists there today that those fish are relying  
20 on, then you create diminution and you start to cut  
21 into that. And then when you have that diminution,  
22 you can expect changes in the fishery and its biomass  
23 and its ability to reproduce.

24 MR. TRAVIS SMITH: Just to clarify on that  
25 one more time. Are you saying you need optimum

1 habitat to preserve the environment to a reasonable  
2 degree? If you have less than optimum, you cannot  
3 preserve the environment to a reasonable degree?

4 MR. BAESSLER: Yeah, I think what I'd like  
5 to do is let the Division of Wildlife answer that more  
6 thoroughly. There's a lot of slides that address  
7 that.

8 MR. TRAVIS SMITH: Good.

9 THE CHAIR: Any other questions? Thank you.

10 MR. BAESSLER: Thank you.

11 MR. WILLIAMS: For the record, Owen Williams  
12 with the CWCB staff. My role in this has been to  
13 quantify the amount of water available for  
14 appropriation, specifically for the appropriation of  
15 the instream flow.

16 I'm going to largely stay with the text  
17 there because the testimony stuff I've already put  
18 together, I don't want a conflict with what I've  
19 written.

20 The staff determined that -- forgive me for  
21 repeating this -- that water is available for this  
22 appropriation. This junior appropriation could be  
23 made without material injury to existing water rights,  
24 both decreed and undecreed. That there is  
25 unappropriated water available for the appropriation

1 and for future use.

2           We reached this conclusion using our  
3 standard analysis. Although the board has approved of  
4 its use in the past, I'm going to give a step-wise  
5 discussion because there are some new members on the  
6 board.

7           First we create a baseline hydrograph at the  
8 stream gauge. And in this case we're talking about  
9 the stream gauge being on the instream flow reach.

10           That baseline hydrograph is created from the  
11 gauge record at the USGS gauge, water rights and use  
12 records that come from the state's database. And the  
13 discharge record is modified both in terms of pluses  
14 and minuses to account for changes in daily depletions  
15 from both evapotranspiration and other kinds of  
16 consumptive uses as well as into basin transfers.

17           With that information in hand, we transform  
18 our values -- this is where this geometric mean  
19 business comes in. Following USGS guidelines the  
20 adjusted discharge -- by that, I mean the discharge  
21 that has been modified by the gains and losses -- are  
22 then transformed into a logarithmic form. And that's  
23 used then for the rest of the process.

24           The importance of that is we're going to  
25 produce something that's equivalent to -- more or less

1 equivalent to a median which is not dramatically  
2 affected by individual or rare large flow events that  
3 tend to shift an average. The median looks at trying  
4 to get at more of a measure of central tendency.

5           The next step is to create the baseline  
6 geometric daily mean hydrograph for the gauge station.  
7 Now we've got the transformed data, we took the  
8 adjusted discharge values, transformed them into  
9 logarithms, and from that now we're going to create  
10 the hydrograph when then can be transformed back into  
11 normal, if you want to call them that, values.

12           We establish the confidence limits, the  
13 purpose of which is to provide a better understanding  
14 for the board when they make their decisions as to the  
15 variability of the data around which the confidence  
16 limits are created.

17           With that then, we create the baseline  
18 geometric daily mean hydrograph for the instream flow  
19 basin. Basically what we're going to do here is take  
20 the -- we're going to prorate the data from the  
21 discharge at the gauge station and then apply that to  
22 the ungauged instream flow basin.

23           In this case we've got the gauge at some  
24 place upstream of the point of quantification or the  
25 lower terminus. And in my example here, I described a

1 situation where you have the instream flow basin being  
2 twice the size of the gauge basin. What we would be  
3 doing would be doubling the adjusted values of the  
4 gauge station to come up with a baseline hydrograph  
5 for the instream flow segment.

6 Do you want to see this hydrograph, same  
7 hydrograph? But basically this is the product of that  
8 effort. And as you well understood, this is the  
9 recommended amount. These are the confidence bands.

10 And, as you can see and as you would expect  
11 -- going the wrong way, I'm sorry -- during the spring  
12 flow period, we have dramatic changes in flow amounts  
13 year to year. During the low flow periods, the  
14 variation is nowhere near as great. But that's why we  
15 get that kind of wide spread at the peak of the  
16 hydrograph.

17 So getting back to this particular case, the  
18 analytic approach that we used was based upon the  
19 tools and cautions. In terms of my nomenclature,  
20 cautions are used to -- that word "caution" is used to  
21 describe the errors that the USGS identifies in such  
22 tools as ScreenStats and in the statistics themselves,  
23 the data created at the gauging station, all of which  
24 have certain kinds of errors.

25 The data that was retrieved from the state's

1 decision support system and the national water  
2 information system are all government approved, if you  
3 will, and are available to any interested party.

4 The board has been fully briefed on this  
5 analytical approach in the past. And forgive me, the  
6 new members, it wasn't a very good explanation, but  
7 there is a time thing.

8 We routinely use this approach in all of our  
9 water availability analysis, at least over the last  
10 few years. And it's tied to the use of a mean or  
11 median flow which has been the process used by the  
12 board for -- I've been told -- since the beginning of  
13 the program, but certainly has been since I've been  
14 with the program that's been the case too.

15 The mean or median flow characterizes the  
16 long-term hydrology of the natural environment  
17 including the indicator species that we're describing.  
18 In this case these particular fish that the --  
19 Division of Wildlife I keep wanting to say -- Parks  
20 and Wildlife identified as being of specific interest  
21 or concern for the state.

22 The one point that I've been asked to  
23 reinforce is the fact that our water availability  
24 analysis for the purpose of preserving the natural  
25 environment differs from the usual process of

1 determining water availability for water development,  
2 domestic use and that sort of thing, where you're  
3 looking at firm yield.

4 We can deviate from this amount with some  
5 frequency and not lose the population of fish or the  
6 natural environment where it impacts our -- or may be  
7 felt for a short term but not long term. However, in  
8 a municipal development or something like that, the  
9 water has to be there for the project for the users.

10 Our view is that the opposers' critiques are  
11 largely incorrect, insufficient or irrelevant to what  
12 we've done. This is the hydrograph again. So this  
13 constitutes our specific request.

14 In terms of the review of our testimonies  
15 and prehearing statements, critiques were made that  
16 the claimed flows are unavailable about half the time.  
17 And I just sort of addressed that point a minute ago,  
18 that the recommended flows are considered available if  
19 they're there roughly at the 50 percent exceedence  
20 level.

21 Another critique has been that we should  
22 have used the gauge station and not extrapolated down  
23 to the lower terminus. Our determination was at  
24 the -- our purpose was the determination of water  
25 availability for the whole basin. Using just the

1 gauge record would have eliminated about 58 square  
2 miles from consideration along with any human  
3 influences that that area might contain.

4 We use the gauge data, but we prorate it to  
5 the larger watershed area. And by so doing, we can  
6 bring in the impacts, if there were any, into the  
7 analysis.

8 Another critique was that the recommended  
9 reach is a gain in reach and, therefore, the amounts  
10 that were calculated at the downstream end may be  
11 unavailable at the upstream end.

12 As a matter of policy, our water  
13 availability analysis is computed at a single point,  
14 and that point is at the lower terminus. If  
15 sufficient water is found there, the indicator fish  
16 and the environment that they represent can be  
17 protected.

18 Reaches can contain both influent and  
19 effluent cord segments. We don't have any information  
20 really, scientific information, to substantiate the  
21 degree, timing and location of influent or effluent  
22 effects either one.

23 So if we were to try to characterize these  
24 various changes in water delivery process in the  
25 reach, we would look at setting up multiple points of

1     quantification besides the lower terminus which would  
2     be infeasible or at least impractical.

3             In addition, the gauge data above the upper  
4     terminus also shows that water is in fact available.  
5     So even aside from those other issues, water is  
6     sufficient in the amounts coming in at the upper  
7     terminus.

8             Another critique was that the precipitation  
9     volume ratio should have been used rather than the  
10    area ratio. The example I gave you there was a basin  
11    twice the size as the gauge basin. We simply multiply  
12    the hydrograph by two to come up with a new hydrograph  
13    for the larger basin.

14            A ratio, any ratio, is going to be limited  
15    by the data that's used to create it. It's an obvious  
16    statement. The area ratio is created from data with  
17    less likelihood of significant errors both in  
18    measurement and other statistical kinds of errors that  
19    introduce variability into data and can lead us to  
20    wrong conclusions.

21            One thing more is that there is little or no  
22    measurable precipitation in this basin. Actually  
23    there's about six data points in the basin for  
24    precipitation. But a basin is characterized with the  
25    use of isohyets that describe the amount of precip

1 between two lines of equal precipitation. And that's  
2 displayed over the entire basin.

3 Those areas are summed to come up a total  
4 volume of precipitation over the basin. There are  
5 many points in the creation of that at which errors  
6 can and do occur in computing the amount of  
7 precipitation overlying that particular basin.

8 Another critique point was that  
9 extrapolation -- in other words, looking at the whole  
10 basin at the lower terminus as opposed to just at the  
11 gauge -- would lead to an inflated estimate of  
12 discharge because the added area, the 58 square miles,  
13 has less precipitation falling on it than the  
14 remainder of the watershed and, therefore, the  
15 estimate is being increased by the larger basin size  
16 while not being reduced for the less precipitation  
17 over that area.

18 First off, our work applies to the entire  
19 basin. The precipitation over that additional area  
20 has about the same pattern as roughly about half of  
21 the basin. And, therefore, it's not an especially dry  
22 part of the basin and, therefore, doesn't affect the  
23 summation.

24 The other thing is that water availability  
25 is computed on a discharge-per-acre basis. And that

1 means that the contributing basin really assumes an  
2 average precipitation over the area, really an average  
3 discharge over the area.

4           Precipitation and discharge are not  
5 necessarily linearly related. The precipitation that  
6 falls on the basin may get diverted into other forms  
7 such as groundwater that are not picked up and  
8 measured by the gauge. So, therefore, it's not a  
9 direct relationship of precipitation to discharge.

10           This area is the part that we added, the  
11 lower terminus being down here, the gauge being here.  
12 Forgive me, that was the wrong presentation. I had a  
13 slide to show you the isohyets. But I think you're  
14 all familiar enough with isohyets to know that they're  
15 large bands of representations of precipitation.

16           And where you place those exact lines is  
17 largely a matter of judgment as opposed to having  
18 actual data. There are only seven points in the basin  
19 that measured precipitation. Extrapolating the  
20 precipitation amounts for those seven points over the  
21 entire basin involves a lot of assumptions and  
22 potentially erroneous measurements.

23           Our conclusions, we use a standard analysis  
24 approach that uses USGS gauge data, the Division of  
25 Water rights and uses records, as well as USGS

1 statistical tools and guidelines in TWI text that the  
2 USGS puts out.

3 The differences between the staff's and  
4 opposers' analysis outcomes were small and  
5 overwhelmingly probable measurements -- and  
6 overwhelming, excuse me, by probable measurement and  
7 other forms of error.

8 My point is that a difference of a few  
9 percentage points between two analysis outputs is  
10 minimal when you consider that a good discharge  
11 measurement according to the USGS standards is plus or  
12 minus five percent.

13 Whether using the CWCB approach or some  
14 other approach, whether at the Uravan gauge as  
15 suggested or at the lower terminus where we did it,  
16 water remained available for appropriation after  
17 subtracting the amount of discharge that would be  
18 dedicated to instream flow if this water right is  
19 established.

20 We found no instance of injury to existing  
21 water rights whether decreed or not. I think that's  
22 my last.

23 Questions?

24 THE CHAIR: Questions?

25 FEMALE: CWCB has about ten more minutes in

1 their presentation.

2 FEMALE: And, Mr. Chair, if I could just  
3 remind folks that stand at the podium, I know you'd  
4 like to walk around and talk, but we are on the record  
5 here so we need you to be within range of the mike.  
6 Thanks.

7 MR. ROY SMITH: Hello, for the record my  
8 name is Roy Smith. I'm the water rights and instream  
9 flow coordinator for the Bureau of Land Management.  
10 And I'll be starting and concluding the presentation  
11 from the Bureau of Land Management and the Colorado  
12 Division of Parks and Wildlife.

13 This particular recommendation I think  
14 exemplifies the level of cooperation that has been  
15 developed between BLM, the Division of Wildlife and  
16 the Colorado Water Conservation Board. We started  
17 collecting data for this instream flow recommendation  
18 more than ten years ago in the late 1990s and have  
19 been working on bringing this to you throughout that  
20 time.

21 And it's an extension of an earlier effort  
22 that we had, as Jeff Baessler mentioned, in 2002. We  
23 had similar collaboration on instream flow  
24 appropriation between Fall Creek and Horsefly Creek.

25 And so after that successful collaboration

1 effort, we decided to keep working and bring this  
2 recommendation to you. So we feel like it's an  
3 outstanding example of federal and state cooperation  
4 on managing a resource and sensitive species.

5           So what we're going to do today, I'll give  
6 you a roadmap like Linda did. First of all, we're  
7 going to talk about the BLM and the Division of Parks  
8 and Recreation's conservation strategy for these  
9 species, the legal authority and the management  
10 approach. I'll be covering that.

11           Also going to be talking about the reach  
12 characteristics of this particular appropriation  
13 because it's a long reach with a lot of variation  
14 characteristics, and we want the board to feel  
15 absolutely confident that we selected a good  
16 representative location for doing the stream flow  
17 modeling because the channel's shape and size can have  
18 an enormous influence on the numbers that are  
19 ultimately recommended to the board.

20           Now I'm going to turn it over to Mark, and  
21 he's going to talk about the biological justification  
22 and explain to you how we arrived at our numbers.  
23 He's also going to summarize scientific studies that  
24 have been done relative to the biology of these  
25 species that point to the kinds of flow regimes that

1 we need to have to be able to represent that the flows  
2 will indeed preserve this outstanding fish community  
3 and riparian community that we have.

4           Then Mark's going to talk about the  
5 recommended flow rates and where our recommendations  
6 differ from those of experts that have been put forth  
7 by the opposers. And we're going to specifically talk  
8 about habitat suitability curves and tell you why we  
9 believe our use of those curves was appropriate.  
10 Because that's one of the major areas where the  
11 opposers disagree with how we applied our methodology.

12           Then we're going to talk about some of the  
13 other issues that the opponents brought up. And then  
14 we're going to have Rick Anderson stand up and give a  
15 brief presentation. Rick Anderson worked for the  
16 Colorado Division of Parks and Wildlife for 26 years.

17           He was a fisheries biologist researcher and  
18 worked on a two-dimensional modeling study that was  
19 designed to correlate flow rates to the biomass and  
20 population size of the species that are found in this  
21 segment of river. And so we believe that Rick is  
22 probably the foremost expert in the state on the needs  
23 of these particular three species.

24           And then I'm going to get back up after Rick  
25 and very briefly run through some conclusions. So,

1 first of all, one of the things that Jeff mentioned is  
2 that we have a particular conservation strategy that's  
3 involved with this appropriation.

4 Our number one goal is to prevent listing of  
5 these three species under the Endangered Species Act.

6 And I'm going to talk about that more in a minute.

7 But there's a lot of other legal and policy  
8 underpinnings to our conservation strategy.

9 First of all, the Division of Parks and  
10 Wildlife is vested with the responsibility to protect,  
11 preserve and enhance and manage the wildlife and their  
12 environment for the use, benefit and enjoyment of the  
13 people of the state and its visitors. And this is a  
14 direct flow from that legislated responsibility.

15 The CWCB relies upon the Division of Parks  
16 and Wildlife to help the board determine what amount  
17 of flow would preserve the natural environment to a  
18 reasonable degree. So the board is instructed to gets  
19 its information and recommendations from the Division  
20 of Wildlife.

21 The BLM is participating in this process  
22 because of the Federal Land Policy and Management Act  
23 which is the BLM's organic act. And under section 102  
24 of that act, it says that public lands will be managed  
25 in a manner that will provide food and habitat for

1 fish and wildlife.

2           So the Division of Wildlife is responsible  
3 for managing the populations and numbers of the  
4 species, and the BLM where we have public lands is  
5 responsible for providing the habitat. And that's why  
6 we're working jointly together on this.

7           Another section of FLPMA says the secretary  
8 may conduct investigation, studies and experiments in  
9 cooperation with others involving the management,  
10 protection, et cetera, of public lands. So again our  
11 organic act tells us to be doing these kinds of things  
12 with state agencies.

13           This is the most critical piece of the  
14 strategy that we're following. You are seeing a cover  
15 page from a six-state agreement on the three species  
16 of concern, the flannemouth sucker, the bluehead  
17 sucker and the roundtail chub.

18           The state wildlife agencies in the states  
19 where these species occur took the lead in creating a  
20 conservation strategy. And they created that strategy  
21 and then asked for others to be signatories to it as  
22 well.

23           So Department of Interior agencies such as  
24 the BLM and Bureau of Reclamation have signed on to  
25 this strategy as well as several tribes throughout the

1 west. So where we are right now is that basically the  
2 State of Colorado and the BLM have signed on the  
3 dotted line saying we are going to do what we can to  
4 conserve these species and prevent a listing under the  
5 Endangered Species Act.

6 Specifically under the conservation actions  
7 that are listed in this plan, there specifically calls  
8 out protection of habitat and protection of flows that  
9 are necessary to support these species. So we are  
10 asking you to do something that flows from a direct  
11 commitment that the state and the federal government  
12 have made under this conservation strategy.

13 So now I'd like to transition into reach  
14 characteristics. There's quite a bit of variation in  
15 habitat on this reach, and we want you to be  
16 absolutely confident that we selected the right  
17 location to collect data to bring you this  
18 recommendation. And the objectors question whether we  
19 did that appropriately, so I want to walk through that  
20 with you very quickly.

21 We took a lot of time in selecting out of  
22 the 17 miles of reach of a couple hundred feet that we  
23 thought would work for this modeling effort. And  
24 there are two main things that we wanted to do, is we  
25 wanted to provide a snapshot of an unmodified stream

1 channel with intact hydrologic processes.

2 The San Miguel River is fairly  
3 hydrologically intact. The overall shape of the flow  
4 regime has not been changed a lot, but there are  
5 portions of the stream bank and bed that have been  
6 modified. So we had to keep that in mind.

7 And we also wanted a stream reach that was  
8 representative of the San Miguel River between  
9 Calamity Draw and the confluence with the Dolores  
10 River when you look at hydraulic parameters and fish  
11 habitat parameters.

12 So, more specifically, some of the things  
13 that we looked at is in this 17-mile reach, we have  
14 portions of the reach that have been modified by  
15 historic mining activity. You might be aware of the  
16 historic Uravan superfund site. And the channel has  
17 been fairly significantly modified in that location.

18 Downstream from that you actually have roads  
19 on both sides of the channel, a state highway on one  
20 side and county roads on the other. Those  
21 modifications make the channel smaller and have  
22 introduced some sediment and substrate into the  
23 channel.

24 Closer to Calamity Draw, we have other human  
25 influences in the way of bridges and agricultural

1 operations. And those influence the size and shape of  
2 the channel as well. But in the middle of this reach  
3 for about nine miles, we have a fairly unmodified  
4 channel, and that's where we decided to focus on our  
5 reach selection.

6 The other thing that we wanted is a  
7 confirmed presence of the native riparian communities.  
8 You may have heard about some of the outstanding  
9 riparian communities on the San Miguel River.

10 And there is quite a bit of property in this  
11 nine-mile piece of the river that's owned by the  
12 Nature Conservancy. And they purchased those  
13 properties specifically to preserve and protect those  
14 riparian communities.

15 And the riparian communities I'm talking  
16 about are Fremont cottonwood, narrowleaf cottonwood  
17 and then a skunk brush shrub community, and a New  
18 Mexico privet shrub community. And some of those  
19 communities have been determined to be globally  
20 imperiled.

21 And so we wanted a reach that had that full  
22 representation of these kind of communities. So we  
23 selected a location on one of those Nature Conservancy  
24 owned pieces along the river.

25 The other thing that we wanted was we wanted

1 to make sure that what we are looking at had the fish  
2 that we were looking at. So we selected a site that  
3 was only about a mile and a half upstream from a site  
4 that was sampled by the Division of Wildlife near --  
5 they sampled near the mouth of Tabawash Creek, and  
6 we're just slightly upstream from that.

7 And we also determined that other parties  
8 had done fish sampling just immediately upstream from  
9 our sample site. And so we determined that there were  
10 no known barriers between those sample sites and our  
11 site. So we were fairly confident that we had the  
12 three species utilizing the habitat that we were  
13 looking at.

14 Oops, excuse me. Another thing that we were  
15 more specifically concerned about in terms of fish  
16 habitat criteria is we wanted to make sure that we had  
17 representation of the habitat types that are important  
18 for these fish.

19 Rick Anderson when he did his studies  
20 identified 16 different habitat types that are used by  
21 these fish. And in this particular reach that we  
22 selected, and this is a picture of part of the  
23 modeling reach, we found 11 of those habitat types.

24 And that was more than we could find in any  
25 concentrated location elsewhere on the river. So that

1 led us to conclude that this was probably one of the  
2 best locations.

3           Importantly, this kind of cobble bar habitat  
4 is extraordinarily important for the species that  
5 we're looking at. In particular the bluehead sucker  
6 really likes to spawn in those habitats, and the  
7 flannelmouth sucker will spawn there as well. So we  
8 felt like we had a good representation for habitat  
9 purposes.

10           Another thing that we took a look at was the  
11 gradient of the stream reach that we are looking at.  
12 Because given how steep the stream gradient is, that  
13 can seriously affect your modeling. And so we took a  
14 look at the overall gradient between Calamity Draw and  
15 Dolores River confluence and determined that it was  
16 .47 percent gradient, meaning that the river loses .47  
17 feet for every 100 feet that the river flows.

18           In our modeling reach we were at between .4  
19 percent and .5 percent on the cross-sections that we  
20 collected. So we felt like we were right in that  
21 average piece of the river in terms of gradient.

22           Oops, boy, this thing is sensitive. Okay.  
23 And the piece of the river that we sampled is right  
24 about in this area. So, you know, you observe it's a  
25 fairly average reach in terms of gradient. It's not

1 in one of these really steep little staircase sections  
2 that you see right here, but it's in more of an  
3 average part of the river.

4 One other -- before I get to this slide, one  
5 other thing we did is that we also wanted to make sure  
6 that the reach had a typical width. So we went up and  
7 down the river and took measurements at multiple  
8 locations up and down the river and said what is the  
9 bankfull width at these locations.

10 And we identified from 75 to 99 feet when we  
11 did those measurements up and down the river. And our  
12 modeled section has cross-section widths ranging from  
13 79 to 103 feet.

14 So we're only -- we're in that range. And  
15 on one end we're only about four feet outside of what  
16 we identified when we went up and down the river. So  
17 we felt like our cross-sections were a really good  
18 representation of the channel widths.

19 So overall we felt like and concluded that  
20 we had a really good modeling location because it met  
21 all of our qualitative criteria for a natural stream  
22 channel and it met the quantitative criteria that I  
23 just discussed for width and gradient.

24 And so, with that, I'm going to let Mark  
25 start talking about our biological justification for

1 the flow rates.

2 MR. UPPENDAHL: For the record, my name is  
3 Mark Uppendahl. I'm the instream flow program  
4 coordinator for the Colorado Parks and Wildlife.

5 The Colorado Parks and Wildlife management  
6 strategy is focused on maintaining healthy adult  
7 populations. Healthy reproducing adult populations  
8 ensure that other life stages, specifically fry and  
9 juvenile, are present within the natural system in a  
10 quantity to guarantee the survival of the species.

11 FEMALE: Mark, you want to make sure that  
12 microphone is turned around to you. Thanks.

13 MR. UPPENDAHL: A large adult population can  
14 spawn throughout the river channel when conditions are  
15 optimal for spawning and recruitment which does not  
16 occur every year. If a thriving adult community is  
17 present, it indicates that fry and juvenile are  
18 successfully recruited into the adult community and  
19 that fry and juvenile are finding suitable habitat in  
20 the variety of flow rates.

21 The BLM and Parks and Wildlife used the  
22 PHABSIM methodology to identify the physical habitat  
23 available in the river. The results of the PHABSIM  
24 study indicated that the optimum weighted usable area  
25 for flannelmouth suckers occurred at a flow of 325

1 CFS, and the optimum weighted usable area for bluehead  
2 sucker occurred at 450 CFS.

3 We also compared the results of our PHABSIM  
4 analysis with our R2CROSS analysis. That indicated  
5 that 350 CFS was necessary to preserve the natural  
6 environment to a reasonable degree.

7 The differences between these two  
8 methodologies is the methodologies on the left-hand  
9 side incorporate biological characteristics of fish  
10 and their specific needs. The R2CROSS analysis is  
11 strictly a hydraulic model.

12 Balancing the needs of both the flannelmouth  
13 sucker and the bluehead sucker and considering the  
14 needs of the roundtail chub, BLM and Parks and  
15 Wildlife made the following instream flow  
16 recommendation. So we recommended 325 CFS from the  
17 time period of April 15th through June 14th. That is  
18 the only time period that the optimal habitat for the  
19 flannelmouth sucker is being met.

20 It is also less than the optimum habitat  
21 available to the bluehead sucker. This is one of the  
22 reasons why we believe that this is the minimum flow  
23 amount necessary to preserve the natural environment  
24 to a reasonable degree.

25 The other time periods were 170 CFS from

1 June 15th through July 31st, 115 CFS from August 1st  
2 through August 31st, 80 CFS from September 1st through  
3 February 29th, and 115 CFS through March 1st through  
4 April 14th.

5           The scientific studies. To confirm the  
6 results of our PHABSIM and the R2CROSS studies, BLM  
7 and Parks and Wildlife reviewed existing scientific  
8 studies including studies completed by retired CDOW  
9 researcher Rick Anderson and the flow recommendation  
10 study completed by the biology committee of the San  
11 Juan River basin implementation program.

12           The biology committee of the San Juan  
13 program consisted of individuals representing a wide  
14 range of organizations and interest including the  
15 Bureau of Indian Affairs, the states of Colorado and  
16 New Mexico, the Bureau of Reclamation, the Fish and  
17 Wildlife Service and water users.

18           The native fish instream flow  
19 recommendations for the San Juan River were the result  
20 of a seven-year study that was designed and performed  
21 by the biology committee of the San Juan program. The  
22 existing studies contradict the assumptions and  
23 hypothesis in the Conklin report that native species  
24 prefer low flows over high flows.

25           The San Juan program study did not develop

1 any specific habitat suitability curves for any live  
2 stages of the roundtail chub, speckled dace, bluehead  
3 sucker or flannelmouth sucker, but it did provide  
4 specific observations regarding what flows provide  
5 these species with better reproductive success.

6           The results of this seven-year study  
7 indicated that the young of bluehead sucker and  
8 speckled dace were found in greater numbers during  
9 high flow years compared with low flow years. And  
10 bluehead sucker and speckled dace reproductive success  
11 increased with increasing duration of flows equal to  
12 or exceeding bankfull conditions.

13           If the recommendation of the San Juan  
14 program study to protect bankfull flows were followed  
15 in the San Miguel River, the BLM and Parks and  
16 Wildlife recommendation would be considerably higher  
17 than what we have recommended.

18           BLM and Parks and Wildlife have estimated  
19 that the bankfull conditions on the San Miguel River  
20 at Uravan occur at a flow of approximately 2,520 CFS.  
21 In addition to being important to the reproductive  
22 success of native species, Dr. Miller pointed out in  
23 his instream flow report regarding the Colorado River  
24 peak flows are most important for habitat creation and  
25 maintenance. Peak flows of bankfull and higher are

1 required at regular frequency for proper ecosystem  
2 function.

3           These are the points that I think Jeff was  
4 trying to get out earlier. The flows that we are  
5 recommending are flows that preserve the habitat of  
6 the native species. They are not the optimum flows  
7 that preserve the natural environment or the natural  
8 -- the whole entire system. So there's quite a bit of  
9 distinction here.

10           When you look at the optimum flows to  
11 preserve the natural environment, you're talking about  
12 flows that are approximately 2,500 CFS. We're only  
13 recommending flows of 325 CFS which preserve the  
14 optimum amount of habitat for fish.

15           In addition, mimicry of the natural  
16 hydrograph is the foundation of the flow  
17 recommendation process for the San Juan River.  
18 Scientists have recently recognized that temporal  
19 intra and intra-annual flow variability is necessary  
20 to create and maintain habitat and to maintain a  
21 healthy biological community in the long term.

22           This was proposed by the biology committee  
23 of the San Juan Recovery Program. The BLM and Parks  
24 and Wildlife agree with this statement. We also  
25 assume that Dr. Wesche agrees with this statement

1 since he was a member of the biology committee of the  
2 San Juan program.

3 This same concept is implied by Mr. Conklin  
4 several times in his report where he states  
5 recommended minimum flows that mimic current flows  
6 would preserve the existing healthy fish community and  
7 the fish populations in the river at present are being  
8 preserved with the historical flow regime that has  
9 occurred over the years without designated minimum  
10 flows.

11 The figure below shows the flows recorded at  
12 the Uravan gauge for 2008 and 2009, the years of GEI's  
13 fish sampling effort. Flows clearly exceeded 1,600  
14 CFS or five times the recommended instream flow of 325  
15 CFS without any negative effects to the native fish  
16 community.

17 Conklin stated in his report that the native  
18 fish populations during this time period were common  
19 to abundant based on GEI's own fish sampling data.

20 Now I want to talk about the recommended  
21 flows. Opponents state that the proposed instream  
22 flow amounts are not reflective of flows in this  
23 section.

24 We looked at the gauge data at the Naturita  
25 gauge which Jeff pointed out earlier was approximately

1 four miles upstream of our upper terminus. It had 53  
2 years of record. And we looked at the gauge data at  
3 the Uravan gauge which is located within the middle of  
4 our segment which had 55 years of record.

5 The median and average hydrographs are shown  
6 on these charts. Both clearly indicate that the  
7 recommended flows are available within the proposed  
8 reach.

9 Another thing to consider is both of these  
10 gauges and the data they record are after everyone in  
11 the basin has potentially taken all the water that  
12 they needed.

13 Dr. Wesche questioned if the roundtail chub  
14 habitat needs were considered. We considered the  
15 needs of all three species. As we indicate in this  
16 graph, the flannelmouth suckers spawn in spring and  
17 early summer, typically during May and June and on the  
18 ascending limb or the peak of the hydrograph.  
19 Bluehead sucker and roundtail chubs spawn in mid-June  
20 to mid-July, typically during the descending limb of  
21 the hydrograph.

22 Dr. Wesche was specifically concerned about  
23 the mid-June to July time period. Our flow  
24 recommendation specifically calls out that time period  
25 where we recommend a flow of 100 CFS from June 15th to

1 July 31st, more of a descending limb of the hydrograph  
2 time period.

3 We attempted to provide a minimum hydrograph  
4 which would provide spawning cues to the native fish  
5 community.

6 The main difference between the BLM and  
7 Parks and Wildlife recommendation and the Wesche  
8 recommendation is during the April 15th to June 15th  
9 time period. As you can see, Parks and Wildlife  
10 recommended 325 CFS during this time period. Dr.  
11 Wesche only proposed 170 CFS.

12 It is specifically this important time  
13 period where the expert opinions vary. The San Juan  
14 River program recommendation recommended flows of over  
15 2,000 CFS. Anderson who looked at these  
16 recommendations and recommended a flow of 600 CFS to  
17 optimize the amount of habitat and varying types of  
18 habitat available in the system.

19 Dr. Woodling recommended 500 CFS during this  
20 time period to maximize the adult bluehead weighted  
21 usable area habitat. The BLM and Parks and Wildlife  
22 recommendation of 325 CFS is in the middle of all the  
23 recommendations, was based on the adult flannelmouth  
24 habitat and our R2CROSS method.

25 Don Conklin's recommendation was based -- of

1 200 CFS was based on the habitat suitability curves of  
2 east slope fish species, specifically the white sucker  
3 and longnose dace habitat. Rick Anderson is going to  
4 go into a more in-depth analysis of why that was an  
5 inappropriate use of using those species in the San  
6 Miguel River.

7 Dr. Wesche uses an equal amount of weighted  
8 usable area method to come up with his flow of 170 CFS  
9 for this time period. We could not find any  
10 scientific literature that supported such a  
11 justification.

12 In addition, according to Montrose County's  
13 consultants, they specifically state in their Exhibit  
14 M that average monthly flows during this time period  
15 are in excess of the instream flow recommendation or  
16 approximately 600 CFS, 800 CFS and 690 CFS,  
17 respectively. They go on further to state that  
18 without large diversion capacities and storage  
19 reservoirs, a large portion of the peak runoff flows  
20 such as those experienced in the months of April, May  
21 and June cannot be put to beneficial use.

22 This slide shows that the flows proposed by  
23 Woodling and Anderson for the time periods of April  
24 15th to May 15th and then May 15th to June 15th of 500  
25 and 600 CFS are both available if the board chose to

1 make that appropriation.

2 All the opponents were concerned that  
3 spawning flows were not considered in their prehearing  
4 statements. It is our belief if the opponents were  
5 truly interested in providing stream flow for spawning  
6 and fry life stages, as their prehearing statements  
7 have indicated, they would be recommending that the  
8 BLM and Parks and Wildlife increase their instream  
9 flow recommendations to at least 339 CFS, the minimum  
10 flow during the April 1st to July 1st spawning season  
11 period for the median year. So, as you can see, this  
12 is the minimum amount during the spawning seasons.

13 Opponents question the use of the Anderson  
14 and Stewart habitat suitability curves on the San  
15 Miguel River. As Roy Smith indicated earlier,  
16 Anderson and Stewart separate the habitat on the Yampa  
17 and Colorado Rivers into 16 different distinct habitat  
18 types.

19 BLM and Parks and Wildlife identified 11 of  
20 those 16 different habitat types in the modeled reach  
21 over the range of flows that we selected for our  
22 representative reach. Only the white columns over  
23 here are the reaches that we could not identify in our  
24 segment.

25 BLM and Parks and Wildlife also compared the

1   hydraulic conditions Anderson and Stewart used to  
2   develop the habitat availability curves to the  
3   hydraulic conditions we modeled in the San Miguel  
4   River.

5               As you can see by this slide, it shows that  
6   the San Miguel River flows fall between the flows  
7   modeled on the Colorado River down here and the flows  
8   modeled on the Yampa River up here, indicating that  
9   the range of flows modeled by the Anderson and Stewart  
10  studies clearly contemplate the use on the San Miguel  
11  River.

12              In addition, BLM and Parks and Wildlife also  
13  compared the relative composition of the native fish  
14  communities at the Anderson and Stewart study sites  
15  with the composition of the native fish community on  
16  the San Miguel River. This chart up here shows the  
17  relative composition of the native fish community on  
18  the San Miguel River.

19              It is almost exactly the same percentage  
20  that you'd find at Corn Lake on the Colorado River and  
21  very nearly the same that you'd find at the Clifton  
22  site, also located on the Colorado River.

23              Opponents argue the depth and velocity  
24  criteria applied in the R2CROSS modeling were  
25  improperly applied. They also argue that the analysis

1 of the flow which maximum weighted usable area for  
2 bluehead and flannelmouth sucker species is flawed.

3 BLM and Parks and Wildlife compared results  
4 from their PHABSIM study with the results using the  
5 R2CROSS methodology with their developed bluehead  
6 sucker standard criteria.

7 The difference between the flow amounts  
8 recommended by the PHABSIM study and the R2CROSS study  
9 using the one-foot depth and 1.3 foot per second  
10 velocity criteria in riffles resulted in R2CROSS  
11 overestimating flows needed for flannelmouth sucker  
12 habitat by seven percent but underestimating flows  
13 required for bluehead sucker habitat by 23 percent.

14 But, as you can see, the results of the  
15 R2CROSS analysis comes or falls right in between the  
16 two different biological habitat studies. In our  
17 opinion, this further validates the criteria we used  
18 in the R2CROSS study was appropriately applied.

19 Further modeling by the opponents produced a  
20 slightly difference in the maximum weighted usable  
21 area totals. In our model, our maximum weighted  
22 usable area was recorded at 325 CFS. Opponents used a  
23 different model and came up with a value of 310 CFS.

24 For bluehead sucker, our maximum amount was  
25 450 CFS. They came up with a 435 CFS value.

1           The differences in these flow amounts  
2 identified are less than five percent. That  
3 difference is less than any standard discharge  
4 measurement error that could occur while doing a  
5 measurement.

6           Opponents have made the following arguments.  
7 BLM and Parks and Wildlife assert that the previous  
8 slides have contradicted these arguments. We have  
9 shown that we considered, one, the multiple life  
10 stages of the bluehead sucker and flannelmouth sucker;  
11 two, the relative abundance of the sampled species;  
12 three, the habitat requirements of the roundtail chub;  
13 and, four, the suitability of using the habitat curves  
14 developed by Anderson and Stewart on the San Miguel  
15 River.

16           Next up, Rick Anderson will illustrate some  
17 further differences.

18           FEMALE: DOW has about half an hour left.

19           MR. ANDERSON: My name is Rick Anderson,  
20 retired Division of Wildlife fish researcher. I've  
21 been retired for about five years, but I spent a  
22 considerable amount of my career studying these three  
23 species on four different rivers and making habitat  
24 suitability determinations.

25           I was a Division of Wildlife researcher

1     tasked with determining habitat suitability criteria  
2     for bluehead sucker, flannelmouth sucker and roundtail  
3     chub. This research provided data that were  
4     specifically meant to be applied to development of  
5     instream flow recommendations in the Upper Colorado  
6     River basin.

7             My general conclusions from the San Juan  
8     River fish data are that the San Miguel River's  
9     bluehead and flannelmouth sucker population structure  
10    was similar to other rivers where habitat suitability  
11    criteria were identified. The number of non-native  
12    species in the San Miguel River is comparatively low  
13    making it an important conservation population for the  
14    Colorado River system.

15            So in the fish sampling efforts, they did  
16    not find white suckers, they did not find carp, and  
17    they did not find smallmouth bass. All these are  
18    problematic species throughout the other rivers I was  
19    working on.

20            Roundtail chub numbers and percentages, it's  
21    lower in the San Juan River, whereas channel catfish  
22    numbers are relatively higher. And I found this to be  
23    the case in the Yampa River where there were a high  
24    population of channel catfish that they seemed to be  
25    hampering or competing with roundtail chub. If the

1 channel catfish weren't there, I think we'd have a  
2 much stronger chub population.

3 The use of roundtail chub habitat  
4 preferences will not assist in justifying instream  
5 flow recommendations. And that's because of their  
6 biology and the way they select habitat. They're  
7 multi-habitat species.

8 They live in deep pools during the day.  
9 They like cover. They forage in the evening so at  
10 night or during turbid conditions they move into  
11 riffles and runs to forage. And this has been  
12 determined by radio tracking. So it's hard to really  
13 identify which habitat is most critical to their  
14 well-being because they're using the entire river,  
15 most habitats that are available.

16 The bluehead sucker is a riffle obligate  
17 species, which is the reason it is nearly ideal for  
18 modeling the flow needs of the entire community. So a  
19 riffle obligate means that it spends most of its time  
20 and energy in these riffles.

21 The more riffle habitat is available, the  
22 more bluehead suckers we find. The less riffle, the  
23 lower quality riffle habitats had lower numbers and  
24 abundance of bluehead sucker.

25 So maybe I'll take just a minute and try to

1 address that question about optimal habitat. The way  
2 I use optimal habitat was to -- as a category to  
3 describe a different range.

4           So the poorest habitat would be considered  
5 unsuitable. And this would be where you have very  
6 shallow, low velocity areas, maybe around the margins  
7 of the river. And so that was classified as  
8 unsuitable or unusable. Unsuitable would be in a  
9 range of maybe from four inches to eight inches of  
10 depth, and again low velocity areas.

11           Sometimes we caught bluehead sucker in these  
12 real shallow conditions, but I don't think this was  
13 where they were selecting habitat, where they wanted  
14 to be. We might have pushed them in there with our  
15 sampling effort.

16           Marginal habitat runs from around one-foot  
17 depth up to around two-feet depth and has higher  
18 velocity. So smaller bluehead suckers will select for  
19 these habitats if there isn't enough optimal habitat  
20 in the river.

21           And optimal habitat simply refers to the  
22 conditions where these fish are going to select where  
23 they would prefer to live. And so optimal means in  
24 the range of two and a half feet depth or two and a  
25 half feet velocity foot per second and anything over

1 around foot and a half depth.

2 So optimal is kind of ambiguous if you're  
3 using it to describe habitat or if you're using it to  
4 describe the peak amount of habitat that is available  
5 over a range of flows.

6 The R2CROSS method identifies riffles as  
7 first limiting habitat and, therefore, the most  
8 critical habitat to protect. And bluehead sucker  
9 represent riffle habitat and riffle habitat quality.

10 The prime important of riffle habitat  
11 availability was also confirmed by the 2-D modeling  
12 study of means of habitat availability by Mr. Stewart  
13 and myself.

14 Depth velocity and wetted perimeter criteria  
15 were appropriately chosen in my opinion by the CDOW  
16 and BLM staff who are thoroughly familiar with R2CROSS  
17 modeling and fluvial geomorphology.

18 The larger bluehead sucker occupy riffle  
19 habitat and it's correct to use the habitat needs for  
20 this species for R2CROSS criteria. And, in fact, when  
21 they selected the criteria to use, they actually  
22 picked habitat that described marginal habitat, not  
23 optimal habitat. So they selected criteria that were  
24 one-foot depth and 1.3 foot per second velocity which  
25 is at the low end of marginal habitat quality.

1           So again these are the three species. The  
2   specific depth and velocity criteria of one-foot depth  
3   and 1.3 foot per second velocity were extracted from  
4   my study. These numbers represent the minimum values  
5   of habitat defined as marginally suited for adult  
6   bluehead sucker.

7           In my opinion, the proposed flow  
8   recommendations are correct to focus on the adult life  
9   stages because they provide the clearest information  
10   concerning flow needs that will perpetuate the entire  
11   community.

12           Don Conklin had a couple criticisms about if  
13   speckled dace and if fry life stages had been  
14   calculated with PHABSIM, then the flow recommendations  
15   might have been lower because these are smaller fish  
16   and they occupy shallower areas of the river.  
17   Speckled dace are a small-size fish about four inches  
18   and occupy a niche as bottom dwellers and riffle  
19   habitats primarily with cobble substrates.

20           Substrates velocity or velocity in the  
21   substrate is usually much less than just a few inches  
22   above in the water column. Therefore, cobble  
23   substrates might be more critical habitat than depths  
24   and velocities for habitat suitability.

25           Another criticism was with the lack, the

1 nonuse of native fry curves. And so he said they were  
2 not considered in the analysis. If these data were  
3 available, the issue would become how do you interpret  
4 the need for fry habitat. When biological reality  
5 does not indicate a problem with recruitment -- in  
6 other words, there is sufficient fry survival to  
7 recruit into the juvenile stage and sufficient  
8 juvenile survival to recruit into the adult stage --  
9 then inclusion of this fry life stage data isn't  
10 really that informative.

11           Mr. Conklin substituted data for white  
12 sucker fry since habitat availability curves for  
13 bluehead sucker fry and flannelmouth sucker fry were  
14 not available. Any conclusions made from white sucker  
15 fry weighted usable area curves are of no value in  
16 this process.

17           The white sucker adults occupy pool habitat,  
18 not run through riffles. They spawn later in the  
19 summer, and their fry are present during late summer  
20 or I have heard of them in September on the Front  
21 Range when flows are usually much less than earlier in  
22 the season. So these fry are going to naturally find  
23 more suitable habitat later in the summer than in the  
24 spring.

25           I disagree with Dr. Wesche's conclusion that

1 spring flow recommendations require biological  
2 justifications based on spawning weighted usable area  
3 habitat curves. Flows during the spawning period or  
4 in the spring are very important and should not be  
5 ignored.

6           The spring flow recommendation of 325 CFS  
7 appears to address the minimum depth requirements for  
8 adult bluehead and flannelmouth sucker. So this is a  
9 depth where they can still stage up for spawning  
10 activity and return to after spawning is completed.

11           Neither Dr. Wesche nor Mr. Conklin has  
12 provided any scientific evidence indicating how  
13 maintaining below average flows in perpetuity would  
14 preserve the natural environment to a reasonable  
15 degree.

16           A specific example of just such a case, this  
17 is the Dolores River below McPhee Reservoir. The  
18 natural environment and the existing fish community  
19 below the McPhee Reservoir are severely affected by  
20 lack of high flows associated with the natural  
21 hydrograph.

22           So I have looked at a stream where minimum  
23 flows were quite low, peak flows have been topped off,  
24 and there was a significant effect on the fish  
25 population and probably on their genetics.

1           The fish community of the Dolores River  
2   appeared to be highly stressed. Riffles and runs had  
3   large silt deposits, and both forage and habitat  
4   potential seemed to be unnaturally low.

5           If the Colorado River can be used as an  
6   example of a high quality habitat and fishery, the  
7   Dolores River can be useful as an example of very poor  
8   quality habitat conditions.

9           So the conclusions will be made by  
10  (inaudible).

11           MR. ROY SMITH: What I'd like to do is just  
12  summarize very briefly what you've heard during the  
13  past few minutes.

14           First of all, and I'll sort of characterize  
15  this in the discussion that we've had about optimum  
16  habitat versus optimum flow. So what have we learned  
17  during this process?

18           First of all, existing studies have  
19  indicated to us that high snowmelt runoff flows and  
20  variability of flows are very important for the  
21  reproductive success of these sensitive fish species.  
22  In addition, we have a river very close by, the  
23  Dolores River, that gives us an example of what  
24  happens when you remove really high flows.

25           So those channel-forming processes are gone,

1 silt-removing processes are gone. So when you look at  
2 this in terms of optimal flows versus optimal habitat,  
3 we're not recommending optimal flows which would be  
4 those optimal flows that would be enough water to  
5 maintain the channel, to remove sediments, to provide  
6 overbank flows, to recharge the aquifers for the  
7 riparian community.

8           Instead we have focused on a much lower  
9 number which is the optimum habitat for the fish,  
10 keeping in mind that during certain periods of the  
11 year the fish need a full amount of habitat to  
12 complete their life cycles.

13           The third point that we made was that the  
14 habitat suitability curves that were developed on  
15 other rivers in Colorado can appropriately be applied  
16 to the San Miguel River. When we did that application  
17 to the San Miguel River, we used velocity and depth  
18 criteria that were in the low end of the range of the  
19 conditions preferred by those two fishes.

20           You just heard Rick talk about that if you  
21 really want to get into what these fish would really  
22 like to see, you would be looking at velocities and  
23 depths that are in excess of two feet per second or  
24 two-foot depth.

25           And we used criteria that were significantly

1 below that. So that's another reason why we think  
2 that our numbers do represent the minimum because we  
3 went down to the low end of the range of what these  
4 fish prefer and analyzed that.

5 Another argument supporting that these are  
6 the minimum is that we had two different methods, one  
7 that's based on hydraulics and one that's based on  
8 fish habitat, and both methodologies gave us a number  
9 that was in the same neighborhood. And when you look  
10 at those numbers, we had three different numbers that  
11 those two methodologies produced, and we chose the  
12 lowest of those three numbers.

13 Another thing I would like to remind the  
14 board of is that when we talk about optimizing  
15 habitat, remember that we're only optimizing habitat  
16 during that two-month snowmelt runoff period. During  
17 the remainder of the year for ten months of the year,  
18 we are not optimizing habitat because our flow  
19 recommendations were reduced because of water  
20 availability problems.

21 So we feel like it's extraordinarily  
22 important to provide optimal habitat conditions during  
23 that two-month window when the fish are spawning so  
24 that they have that opportunity to keep the adult  
25 population going.

1           So that's kind of where we ended up with our  
2 conclusions. But if you are still unconvinced that  
3 this is not the minimum, we'd like you to consider a  
4 couple of other pieces of information.

5           This chart shows the instream flow  
6 recommendations versus what's available in this reach  
7 of the San Miguel River. So this column here shows  
8 the average daily flow at the Uravan gauge that's in  
9 excess of the instream flow.

10           So for every month of the year on average,  
11 we have flows that are significantly in excess of the  
12 instream flow. And during this April through June  
13 period which seems to be the period where we have  
14 discomfort with our flow recommendation, that is  
15 actually when we by far have the most water available  
16 for appropriation for other uses.

17           If you look at it in the aggregate  
18 volumetric sense, in this column, this is how much  
19 volume of water is available above and beyond the  
20 instream flow on an average year, 167,000 acre feet.  
21 And even in a drought year, you still have tens of  
22 thousands of acre feet available for appropriation.

23           So keep that in mind when you're thinking  
24 about whether or not we're appropriating the minimum  
25 here.

1           And, last, what we would like you to  
2   consider is that all these studies have concluded the  
3   biology and the natural system that we see on the San  
4   Miguel River was formed by a range of flows.  Oops,  
5   excuse me.

6           So that range -- this represents the average  
7   monthly high flows, this top solid line here.  And  
8   then these are the average low monthly flows on the  
9   bottom line.  And so this variability that we're  
10  talking about is this whole area in here.

11           What we're asking for in this instream flow  
12  appropriation is to preserve a very, very small  
13  percentage of that variability.  This is the bump in  
14  the hydrograph that we're asking for.

15           And the reason that we're asking for that  
16  bump is because all the studies that have been done  
17  indicate that if you don't have those high flows that  
18  the fish can use for that critical reproduction  
19  period, you start losing the elements of the fishery  
20  including biomass and population numbers.

21           So if we're going to represent to the world  
22  that we've done a good job maintaining and preserving  
23  this fish community, the BLM and Division of Wildlife  
24  believe that we need this modest amount of variability  
25  in the flow.

1           So, with that, we're open to any questions  
2   from the board.

3           THE CHAIR: Questions for Colorado Parks and  
4   Wildlife presentation and BLM presentation? Director  
5   Montgomery.

6           MS. MONTGOMERY: Just one quick question. I  
7   know you're talking about the importance of the  
8   hydrograph to the fish, but is it appropriate to talk  
9   about it in terms of the riparian communities?

10          MR. ROY SMITH: It is. We have the site  
11   where we did our modeling was also the site of a study  
12   done by Dr. David Cooper who is a known expert in  
13   Colorado on riparian systems. And he did a study that  
14   looked at the amount of water in the riparian  
15   community trees and the amount of water in the  
16   alluvial aquifers next to the river, and he identified  
17   that there is a direct relationship between the flow  
18   rate in the river and the amount of water in the  
19   alluvial aquifer and the amount of water in the trees  
20   along the river.

21          So there is that direct correlation. And,  
22   in fact, during August and late summer, early fall, he  
23   identified that the existing riparian community  
24   already experiences quite a bit of stress during that  
25   period because of the low base flow rate.

1           So we just don't feel like you can go any  
2   lower than the base flow rates that we're suggesting  
3   and be able to maintain that outstanding riparian  
4   community that we have.

5           THE CHAIR: Other questions by the board?

6           Now I'm faced with a little bit of a dilemma  
7   here. We have Mr. Woodling needing to testify before  
8   4:00. No?

9           MALE: Actually the necessity is no longer  
10  in place.

11          THE CHAIR: Wonderful.

12          MR. ROY SMITH: All right, if there's no  
13  other questions, thank you for your time.

14          THE CHAIR: No, wait.

15          FEMALE: There's more questions.

16          MR. ROY SMITH: Oh, there is more questions.  
17  Okay.

18          THE CHAIR: If there's no other questions by  
19  the board, I do have questions by the participants in  
20  the hearing that are in the audience.

21                 Questions for Mr. Uppendahl or Mr. Smith.  
22  Do you agree that the fish caught during the 2008 San  
23  Miguel sampling included a broad range of sizes and  
24  ages within each of the species caught?

25          MR. ROY SMITH: Do you want to answer that,

1 Mark?

2 THE CHAIR: You can consult a friend.

3 FEMALE: This is a question that's coming  
4 from Montrose County, and so the answers get counted  
5 against Montrose's time.

6 THE CHAIR: Okay.

7 MR. ROY SMITH: Yeah, we agree with that.

8 THE CHAIR: Okay. Next, again questions for  
9 Mr. Uppendahl or Mr. Smith. Is optimum habitat the  
10 same as 100 percent of weighted usable area on a  
11 habitat availability curve?

12 MR. ROY SMITH: I would say no, we did not  
13 identify it as 100 percent of weighted usable area  
14 because, as you noted, we based our recommendation on  
15 100 percent of weighted usable area for flannelmouth  
16 sucker, but that same flow rate is not 100 percent of  
17 the weighted usable area for the bluehead sucker.

18 So we don't advocate that you just uniformly  
19 apply 100 percent weighted usable area in every  
20 circumstance. It does require some professional  
21 judgment to interpret the results.

22 Do you want to add anything to that, Mark?

23 MR. UPPENDAHL: The only thing I would like  
24 to add is, you know, as we showed in our presentation  
25 that, you know, spawning flows were not even

1 considered in our analysis which could indicate that  
2 optimum habitat may be much higher than what we are  
3 proposing based on just the adult population habitat.

4 THE CHAIR: Don't go away. Again from  
5 Montrose County. Do flows above and below peak of  
6 habitat curve result in less than optimum habitat?  
7 Would you like me to repeat the question?

8 MR. ROY SMITH: Yeah.

9 THE CHAIR: Do flows above and below peak of  
10 habitat curve result in less than optimum habitat?

11 MR. ROY SMITH: I guess I'm still not clear  
12 on the question.

13 THE CHAIR: You have the aid of a friend.

14 MR. ANDERSON: On my 2-D modeling, there's  
15 more of a GIS approach. And so biology is built into  
16 PHABSIM using simple probability values. And on my  
17 GIS approach, habitat did not drop off at this peak.  
18 Habitat would stay high or maybe even increase beyond  
19 that peak at higher flows, and then it would take  
20 nearly a bankfull or a half-bankfull condition before  
21 habitat would begin to drop off again in reality.

22 So the interpretation of the weighted usable  
23 area curve seems somewhat similar to the inflexion  
24 point on my project where habitat would increase and  
25 increase to a certain level, and then on my study it

1 did not decrease but it stayed high. On the PHABSIM  
2 approach it does drop down because the suitability  
3 values are fixed to a certain probability that doesn't  
4 change as flows change.

5 So say the peak of the weighted usable area  
6 curve may not represent maximum habitat availability  
7 at flows above, but it probably is a good indication  
8 that habitat is improving up to that point.

9 THE CHAIR: Okay.

10 MALE: Can we get a clarification?

11 THE CHAIR: Yes.

12 MALE: I need a clarification of that. In  
13 other words, at 325 CFS we are saying that that is  
14 optimum habitat. If we get to 500 CFS, what you're  
15 saying is optimum habitat is not falling off, it's  
16 still on the increase?

17 MR. ANDERSON: Probably. I don't have the  
18 data. I didn't do a channel analysis.

19 MALE: Well, why do we call 325 optimum  
20 habitat then instead of minimum habitat or whatever?

21 MR. ANDERSON: Well, it should be called the  
22 peak of the curve would be a neutral way to look at  
23 it. I think we're calling it optimum because in most  
24 methodologies, they select that as an objective way to  
25 identify a flow recommendation.

1           Calling it optimum is relative to marginal  
2 or unsuitable habitat. I guess you could say it's  
3 optimal and maximizes habitat availability.

4           MALE: Still confused.

5           MR. ANDERSON: It's very confusing. But the  
6 peak of the curve usually identifies the flow at which  
7 you're not going to -- yeah, they're kind of as good  
8 as you can expect in this low flow range. If water is  
9 not available, then sometimes you're forced to come  
10 down from that peak of the curve.

11           THE CHAIR: Next question again from  
12 Montrose County. Are PHABSIM results highly sensitive  
13 to the habitat suitability curve used? Are PHABSIM  
14 results highly sensitive to the habitat suitability  
15 curve used?

16           MR. ANDERSON: That really is difficult to  
17 answer. I wasn't involved in modeling. I wasn't  
18 involved in where the cross-sections were selected.  
19 It is sensitive to the placement of where the  
20 cross-sections are, and it is highly sensitive to the  
21 suitability probabilities that are assigned for each  
22 depth and velocity.

23           So if you're confident that the station was  
24 established to be representative of all habitats that  
25 are available and you're using published suitability

1 values, then it's the best information we have. And I  
2 don't think we can say anything beyond that.

3 THE CHAIR: Other questions by the board?

4 With that, if we could -- I would like to  
5 move on to the Sheep Mountain Alliance before we take  
6 a break, and we'll take a break right after Sheep  
7 Mountain Alliance.

8 And my accounting of time is that CWCB still  
9 has 13 minutes left in their allocation. Colorado  
10 Parks and Wildlife and BLM combined still have nine  
11 minutes left. And we have taken six minutes off of  
12 Montrose County.

13 Ms. Russell.

14 MS. RUSSELL: Good afternoon. Jen Russell  
15 on behalf of Sheep Mountain Alliance. And I'm going  
16 to give you a little bit of a different perspective,  
17 not a biological one. So hopefully you'll stay awake.

18 Sheep Mountain Alliance is a nonprofit  
19 entity representing members in the entire San Miguel  
20 River Basin. That includes members whose businesses  
21 are entirely dependent on maintaining instream flows  
22 -- excuse me -- and the natural environment.

23 And that includes businesses directly  
24 dependent on the river like fly fishing, river  
25 running, kayaking, bird watching, that sort of thing.

1 But also our entire economy actually revolves around  
2 the river.

3 We don't have the kind of deep economy that  
4 a lot of you all have in the counties that you  
5 represent and the basins that you represent. We have  
6 a very tourist-based economy, and the river is the  
7 center of that.

8 The San Miguel River is a very special  
9 place. It arises in the high San Juan Mountains and  
10 runs through stunning alpine and canyon ecosystem  
11 until it reaches its confluence with the San Miguel  
12 River. It is one of very few undammed rivers in the  
13 state which is why its natural environment can be  
14 preserved to a reasonable degree.

15 There is broad public support for this  
16 instream flow. And there's been a lot of public  
17 process over the last year, year and half, two years.

18 As you know, when House Bill 05-1177 was  
19 passed -- that's the IBCC legislation -- the  
20 legislature tasked all of the basins with determining  
21 their nonconsumptive needs.

22 The Southwest Basin's roundtable went  
23 through a very intensive public process including  
24 meetings throughout the basin both to determine our  
25 nonconsumptive needs and determine projects that met

1 our nonconsumptive needs.

2 This instream flow was identified as one of  
3 those processes. And our listing of nonconsumptive  
4 projects to protect our nonconsumptive needs was  
5 approved by the entire roundtable. And that included  
6 this instream flow.

7 There's also recently been a wild and scenic  
8 process that went almost simultaneously with this.  
9 And that also identified this reach as worthy of wild  
10 and scenic protection.

11 On the other hand, it may appear that there  
12 is quite a bit of opposition, but I think I wanted to  
13 put that in perspective. That opposition is actually  
14 quite narrow. And a lot of that stems in large part  
15 from the Southwest Water Conservation District.

16 After the CWCB agreed to delay the  
17 appropriation for a year, the Southwest District began  
18 traveling through our basin trying to develop  
19 opposition to the instream flow and support for a  
20 carve-out.

21 They managed to convince Lone Cone Ditch and  
22 Reservoir and the Norwood Water Commission to oppose  
23 the instream flow but only because the district paid  
24 their legal bills which is why they are represented by  
25 the same attorneys as the district. They appear to

1 not oppose the instream flow enough to put their own  
2 money behind the effort.

3           The Southwest District's opposition is  
4 particularly troubling because it is directly contrary  
5 to a commitment that they made to the San Miguel  
6 County commissioners. The San Miguel County  
7 commissioners, we do have a commissioner here who can  
8 speak on behalf of our county, unanimously and  
9 strongly support the instream flow, and they made that  
10 view known to the district.

11           As a member of the district, the county  
12 believed, and rightfully so, that the district would  
13 at least maintain their commitment to remain neutral  
14 in their proceedings. They have not done so and I  
15 think that's quite to -- they appear to say that they  
16 are representing their member districts, but that's  
17 not the case. And that's clearly not the case with  
18 San Miguel County who is the second largest provider  
19 of revenues to the district.

20           In terms of Montrose County, we're puzzled  
21 by their opposition. They -- excuse me -- they are  
22 not joined by the municipalities of their county that  
23 are in the basin or by the water districts that are in  
24 the west end of Montrose County.

25           Moreover, the population of the basin in the

1 west end of Montrose County is approximately 2,000  
2 people. They have just applied in 2010 for 6,400 acre  
3 feet of water. So clearly they have provided through  
4 a pending water rights application for more than  
5 enough water for their growth.

6 San Miguel County and the Sheep Mountain  
7 Alliance request that you support the instream flow.  
8 It's critical to our economy. The staff have done a  
9 good job of supporting their recommendations.

10 We'd like to see more. But we think that  
11 what they're proposing both protects the environment  
12 to a reasonable degree and provides water for the fish  
13 that we actually do not want to see an endangered  
14 species listing. That is really what we are more  
15 afraid of than anything else. Thank you.

16 THE CHAIR: Ms. Russell.

17 MS. RUSSELL: Oh, I'm sorry.

18 THE CHAIR: Questions of Ms. Russell? Well,  
19 I guess false alarm. Thank you very much.

20 MS. RUSSELL: Thank you.

21 THE CHAIR: With that, if we could take a  
22 break and let's try to be back -- I know I'm dreaming  
23 -- but five till 4:00, 3:55.

24 (Recess)

25 MR. HARRIS: Thank you. My name is Robert

1 Harris, and I'm appearing on behalf of Western  
2 Resource Advocates and the Wilderness Society. We are  
3 parties to this instream flow hearing, and we are in  
4 favor of staff's proposal.

5 TWS and WRA have strong interest in  
6 protecting Colorado's rivers throughout the state and  
7 protecting in particular the special status fish  
8 species like the ones we've heard about this  
9 afternoon, and making sure that they don't become  
10 listed under the Endangered Species Act.

11 We'd also like to express our appreciation  
12 to the board. I know it's been a long day and so  
13 we're going to do our best to keep our comments brief  
14 and to the point. And, furthermore, I'd like to just  
15 quickly thank staff and the other parties who have  
16 worked so hard on this hearing.

17 First of all, I just want to reiterate that  
18 you just heard from staff, DPW, BLM and Sheep Mountain  
19 Alliance why this instream flow right meets each of  
20 the criteria, the three criteria, and why the proposal  
21 should be confirmed. We incorporate their  
22 presentations in their entirety.

23 We just target our comments on two issues  
24 within the second determination, namely, one, that  
25 this instream flow water right is needed to preserve

1 the environment to a reasonable degree and, two, that  
2 there's ample water available for this proposed  
3 instream flow water right.

4 In just a few moments you're going to hear  
5 testimony from John Woodling, Ph.D., a fisheries  
6 biologist who started his work with these three fish  
7 species nearly four decades ago.

8 Dr. Woodling will testify that this water  
9 instream flow right is necessary to preserve existing  
10 populations of those three species in the San Miguel  
11 River. But he will also testify that a higher flow  
12 would do more to protect the fish and, in fact, it  
13 ought to be higher to protect existing populations of  
14 those fish in the river.

15 You're also going to hear from Ms. Laura  
16 Belanger, a licensed professional water resources and  
17 environmental engineer, who has prior experience  
18 evaluating water supply availability for both  
19 environmental flows and for other water uses.

20 Ms. Belanger will testify that water is  
21 available for each of the proposed flow periods and  
22 that there is ample excess water above and beyond that  
23 is physically available.

24 And I'd like to take this opportunity just  
25 to quickly highlight the optimization issue. You're

1 going to, you know -- to use a car analogy, I come  
2 from a family that loves Fords in particular. And,  
3 you know, my family knows that if you have a Ford and  
4 you optimize its performance, maybe give it race  
5 tires, change its oil, you know, it's still not going  
6 to turn into a Ferrari.

7 And I suggest that that's a similar  
8 situation to what we have here. Let's look under the  
9 hood. The two things I really want you to focus on on  
10 this issue, one, is the spring peak flow. You're  
11 going to hear from Ms. Belanger that the speed flow is  
12 much less water than is available during that time of  
13 year in virtually all water types, water year types.

14 On the second part regarding the winter  
15 flows, you're going to hear from Dr. Woodling that  
16 that winter flow is actually less than what is  
17 marginally suitable habitat for the bluehead sucker in  
18 particular which is one of those three fish species  
19 that we've heard about.

20 This proposed instream flow right is a Ford  
21 and not a Ferrari. So without any more words, I'd  
22 like to hand it over to Dr. Woodling.

23 DR. WOODLING: Good afternoon. For the  
24 record, my name is John Woodling. I used to work for  
25 the Colorado Division of Wildlife. It wasn't the

1 Parks and Wildlife at that time.

2 And I'm going to try and take a different  
3 tact here, and I'm not going to talk about PHABSIM or  
4 R CROSS; I'm going to talk about water depth.

5 But the one thing that I want to stress is  
6 you've got three fish species here, the bluehead  
7 sucker, flannelmouth and roundtail. I disagree, these  
8 are kind of Ferraris.

9 These are big river fish. They evolved in  
10 the Colorado River Basin, that's where they're  
11 endemic. They evolved in rivers that flood. They  
12 evolved in rivers that have drought. They have a life  
13 cycle that is dependent upon that type of frequency.

14 I'd like to start by saying there's only 45  
15 percent of these things left. Colorado has done  
16 pretty good. We've lost them out of the Gunnison  
17 River drainage. But the idea is to make sure these  
18 things don't get listed.

19 Fish need water. And I saw you ask a  
20 question. If I'm going to go out and I could take  
21 anybody here that's interested out, I have influence  
22 with a field biologist at Parks and Wildlife, they'd  
23 love to have some help to go out and sample these  
24 fish.

25 If you want to wade for them, you get into

1 water that's this deep. That's where you start  
2 finding the flannelmouth suckers. You want water  
3 that's one meter deep, 3.3 feet, and deeper. I don't  
4 make it to two meters so I need taller people to go  
5 down the middle of the river.

6 All right. In comparison, what we're  
7 talking about here is fish -- this ought to be  
8 interesting -- fish need water. They need water  
9 that's of a certain depth.

10 Bluehead suckers like riffles. That means  
11 they're going to be in the parts of the rivers that  
12 are shallowest. If it's a small river, it's going to  
13 be the shallow water. If it's a big river, like the  
14 main stem Colorado right here in Grand Junction, it's  
15 going to be deeper. But you're going to find them  
16 when the water gets deeper. They're going to select  
17 for the deepest water of the habitat they like.

18 Okay, I said that they like water that's one  
19 meter deep. This is briefly what Rick Anderson told  
20 you is marginally acceptable for these species, it's  
21 eleven and a half inches. He's talking about 12  
22 inches being marginally acceptable for these fish  
23 species.

24 This is the depth at 60 CFS. Now this is  
25 average throughout a riffle so there will be deeper

1 areas. But you're still talking about you're diving  
2 deeper and deeper down.

3 Now if you will notice, I've got that word  
4 up there, optimum. I wish it were yesterday. That  
5 word wouldn't be there. All right. Because part of  
6 what you're going to find from listening to me and  
7 everybody else is words are dangerous things, and you  
8 can't bring them back once you say them.

9 And so part of what I'm talking about here  
10 is semantics. The thing is this isn't as good as  
11 this, and this is not as good as that.

12 Now the trouble with doing something like  
13 this, I'm going to skip over this except for one  
14 thing. When you get rivers too low in the west out  
15 here, in western Colorado, you start breaking down the  
16 barriers between fish species.

17 So when the water gets too shallow in the  
18 riffles, the blueheads move out into the deeper riffle  
19 areas -- I mean the deep riffle areas. When that gets  
20 too shallow, they move out into pools.

21 And that's where you start getting things to  
22 break down like they were talking about in the Dolores  
23 and the Yampa. That's when where you have white  
24 suckers, you start getting hybridization.

25 So the idea is not that you just need

1 minimum stream flows. The idea is that you need these  
2 2,300 CFS flows to maintain the dynamics of that  
3 channel and to maintain this habitat.

4           So when they're talking about decreasing the  
5 max flow down to 325, or as I would suggest 500,  
6 you're still talking a significant decrease of what's  
7 there naturally and what these fish are expected to  
8 do.

9           I'm just going to skip over some of this  
10 because it's been talked about. What fish need and  
11 what these species need are flows, but these flows  
12 differ at different times of the year. During  
13 spawning season they need high flows. During base  
14 flow they need places to hide. During wintertime  
15 periods -- and this all changes.

16           And what you're having to try and do is  
17 protect what's reasonable. Not the word optimum, not  
18 the word maximize, but what's reasonable, because  
19 that's what the regulation says.

20           This is hardly reasonable in comparison to  
21 3.3 feet. But if that's what's available to be  
22 allocated, that's what's there.

23           So there is a difference between the 60 and  
24 80 CFS, the 60 suggested by Montrose, the 80 during  
25 the low flow period by Division of Parks and Wildlife

1 and BLM.

2 I would suggest flows more like what are up  
3 there right now, 500 for the springtime and an  
4 elongated springtime, 150, 170 for June through July  
5 31st, and 115 for the rest of the year. That takes  
6 your average flow in the riffles up to .8 feet which  
7 is still less than what Rick Anderson says is  
8 marginally acceptable.

9 And I want to emphasize Rick Anderson knows  
10 what he's talking about. He is one fine researcher.  
11 So when he says one foot is marginally acceptable as  
12 the depth, that's what's marginally acceptable.

13 This brings you back to the hydrograph we've  
14 seen so many times. I took this out of Don Conklin's  
15 testimony and rebuttal, figure number 1.

16 During the high spring runoff, there's a lot  
17 more water there right now than they're asking for.  
18 You could appropriate the 500 CFS for the springtime  
19 flow. That still doesn't negate the fact that  
20 periodically you need a lot higher waters.

21 If you'll remember in the Grand Canyon,  
22 periodically they blow the heck out of that thing to  
23 move sand around because the sand beaches erode, the  
24 dams keep the sand from building up. So the river  
25 needs the same thing.

1           You have to watch very carefully how much  
2 water you take out of it. And remember this minimum  
3 stream flow could become the new maximum in several  
4 years. So you have to be careful of what you set up.

5           Now for the rest of the year, lower flows  
6 are being proposed. Here is the flow proposal brought  
7 forth by Don Conklin for the latter part of the year,  
8 from September through December.

9           Here are the median flows. This proposal is  
10 significantly lower than the median flows that he  
11 talks about in his document as being important.  
12 That's the average depth.

13           So at a minimum, it would seem to me that  
14 you should consider more Parks and Wildlife's  
15 recommendation of 80 CFS. I would ask you to consider  
16 my recommendation of 115 CFS for this same time  
17 period.

18           What you need, however, between a  
19 recommendation and the biology is a connection. Some  
20 of you may have heard the word a nexus. So you need  
21 to connect the flows that are being proposed with some  
22 of the information.

23           Conklin's proposal is based on four fish  
24 species. He included the speckled dace and the white  
25 sucker. There's no physical habitat data available

1 for the speckled dace so he reached out, which I would  
2 have too, to the longnose dace which is native to the  
3 eastern slope.

4 If you want to collect longnose dace in  
5 Clear Creek in Denver, Colorado -- I mean if you want  
6 to collect a longnose dace in Denver, Colorado, you go  
7 to Clear Creek. And you electroshock the riffles.  
8 And you're walking through water, it's about this  
9 shallow.

10 Literally these fish, longnose dace, will  
11 come tumbling down to you like leaves in a stream,  
12 scores and scores of these fish. The longnose dace is  
13 a shallow water riffle species.

14 Okay, it's not quite appropriate to consider  
15 that in the light of looking at the San Miguel River  
16 where you're talking about three big river fish that  
17 need high flows. The speckled dace is perhaps one of  
18 two native fish species on the west slope of Colorado  
19 that's not in some degree of decline.

20 So it's not quite appropriate in my mind to  
21 use information from the speckled dace, the surrogate  
22 being the longnose dace, to try and justify lower  
23 flows.

24 You heard Rick Anderson very capably inform  
25 you about the white sucker being a fish that's found

1 in deep water pools, spawns a little later. So it's  
2 not quite appropriate to use habitat needs for larva  
3 of that fish species in describing what happens to the  
4 larva of these three fish species.

5 I want to take a second and remind you to  
6 take a look back at that hydrograph where periodically  
7 we're up at 2,300, 2,500 CFS. These fish species are  
8 doing quite nicely at this.

9 Remember these are long-lived fish species.  
10 They can get up to 20 years. I honestly don't know  
11 how old the fish in the San Miguel get to be. I'm  
12 sorry, I don't know that.

13 But you can have fish in the San Miguel  
14 right now that were born in 1991. So they've been  
15 through a lot as far as flow events.

16 Now remember that if the population of the  
17 earth, human population was to remain stable, we just  
18 have to replace ourself one time. So that means every  
19 fish out of the San Miguel River in its lifetime has  
20 to reproduce successfully once.

21 These critters, these three species probably  
22 don't reproduce successfully each year. I know for  
23 sure brown trout on the Eagle River get blown out  
24 during a high flow event.

25 I'm equally sure from what I've read from

1 Rick Anderson's work and other studies that I cited in  
2 my documentation that if you get low enough flows, you  
3 probably don't get these big river fishes reproducing.  
4 They do like big spring bankfull flows to spawn.

5 Conklin's proposal is also based on eight  
6 years of data. And I just touched on this. Remember  
7 these are long-lived critters so you can have fish way  
8 older in the river right now that are not included in  
9 the information, the flow data that Conklin presented.

10 I'm going to take a crack at this. I'm  
11 going to live to regret this. But I'm going to take a  
12 crack at this increasing flow and the decreasing  
13 weighted usable area explanation.

14 You've got an -- this is good. You've got  
15 an ecosystem, and this ecosystem has evolved over  
16 millennia with the critters that are there. There are  
17 13 or 14 native fish species in the west slope of  
18 Colorado. We're talking about three of them. All  
19 right.

20 They've been here an awfully long time.  
21 They all have different habitat needs. In other  
22 words, the optimal flow, and I'm talking about depth,  
23 the optimal depth for one critter is not going to be  
24 the same as another critter.

25 So as you go through the scheme of things,

1 in each annual runoff you're going to have conditions  
2 that might favor the roundtail chub one year, the  
3 bluehead sucker the other year, and might obliterate  
4 all reproduction one year because it's a 2,600 CFS,  
5 it's a bankfull event. It's optimal flow to create  
6 the habitat of that river, to maintain that river.  
7 It's not optimal flow for those fish right now.

8 So when you get to these curves that go up  
9 and down, Conklin said there was never an optimal flow  
10 of 325 CFS, I'm thinking for flannelmouth sucker. I  
11 might be wrong here with this fish. Yeah, that's true  
12 because it's probably going to be more or less than  
13 that all the time.

14 So what you're getting is you're getting an  
15 ecosystem, you're getting a species assemblage that  
16 survives in the totality of the flows over a long  
17 period of time. And what you're doing is setting some  
18 minimum stream flows with the idea of reasonable  
19 protection.

20 Does that get a little bit farther, sir, in  
21 your --

22 MALE: Somewhat.

23 DR. WOODLING: You're going to need someone  
24 smarter than me then.

25 Both Conklin and I agree, and everybody has

1     quoted this, fish populations in the river at present  
2     are being preserved with an historical flow regime  
3     that has occurred over the years without designated  
4     minimum flows. I couldn't agree with that more. In  
5     no way I could agree with that more.

6             But you don't want to cut it down to where  
7     you get to something like this. You need a reasonable  
8     protection. Reasonable protection does not mean  
9     peeling it to the bottom.

10            So with that in mind, I would ask you for  
11     115 CFS during the late flow events, not the 60 or the  
12     80. And I thank you for your attention.

13            THE CHAIR: Board questions? Director  
14     Blakeslee.

15            MR. BLAKESLEE: So I've heard the argument  
16     that occasionally these flows get much lower than the  
17     height of that dollar bill and these fish survive.  
18     How can they get through that -- I mean what is the  
19     mechanism for getting them through those decreased  
20     flows?

21            First of all, I'm convinced that those don't  
22     happen that often so there's some mechanism in place  
23     that allows them to make it through those periods, but  
24     it's not optimum.

25            DR. WOODLING: There's a theory in ecology

1 called a bottleneck event where everything funnels  
2 down to something really bad, all right. Let's assume  
3 that the San Miguel River just flat goes dry. You  
4 know, the drought of 2002 was so bad, it just goes dry  
5 entirely. There's no pools. In other words, those  
6 fish are wiped out.

7 That kind of happened back in time when they  
8 had the uranium facility down there. I'm so old I  
9 remember working the fish there. I can't find the  
10 data, but I remember there were very few fish.

11 Now you've got this lovely population of  
12 fish. So over a longer period of time, fish from some  
13 refugia came back in and colonized that regardless of  
14 flow.

15 So if you have a low enough flow event, you  
16 can wipe out everything. That doesn't happen that  
17 often. And what you get is a stepping stone, probably  
18 both ways in flow as a matter of fact.

19 If you have the flow event of 2002, you're  
20 going to lose some fish. I'm sure there was a fish  
21 kill in 2002 because of height water temperatures,  
22 I'd bet money, in the San Miguel River.

23 But over the long course of it, there were  
24 fish that lived through that. They found a deeper  
25 hole.

1           To extend this to the absurd, once back  
2 before any of you in this room were born and I was in  
3 graduate school, we sampled the Salt River. And what  
4 we did was we poisoned it. We electrocuted it. We  
5 blew it up with dynamite. We sat there for about a  
6 few hours, and we poisoned it again. We found more  
7 fish.

8           So somewhere there were fish that stuck  
9 their nose in a crevice or something and had enough  
10 salt water -- fresh water. So that's the point. When  
11 you get down low enough, it crashes. I'm imagining if  
12 you go high enough like that flood event up in the Big  
13 Thompson, there was some pretty serious stuff that  
14 happened there.

15           But you get enough that go through that over  
16 the course of generations, they build this population  
17 back up. Remember, this is -- a stochastic event  
18 happens infrequently. And you're not playing to that  
19 with that with this minimum stream flow. You're  
20 trying to provide reasonable protection and allow for  
21 development of water.

22           THE CHAIR: Other questions?

23           Thank you, Dr. Woodling.

24           DR. WOODLING: Thank you very much.

25           THE CHAIR: Ms. Belanger.

1 FEMALE: Western Resources has ten minutes  
2 left.

3 MS. BELANGER: Okay, great. I'm Laura  
4 Belanger with Western Resource Advocates. I'm a  
5 licensed professional water resources engineer.

6 And prior to joining Western Resource  
7 Advocates, I worked for two engineering consulting  
8 firms, most recently for Headwaters Corporation which  
9 manages the Platte River recovery implementation  
10 program where my primary responsibility was evaluating  
11 water supplies and projects to provide target flows  
12 for four species of concern.

13 Today what I'm going to do briefly is follow  
14 up on some of what was already presented by CWCB staff  
15 and also the Parks and Wildlife and BLM and talk about  
16 water availability for the instream flow as well as  
17 for other water users in the basin.

18 And the CWCB staff talked about water  
19 available at the lower terminus. And Deere & Ault,  
20 Montrose County's consultant, suggested that it might  
21 also be appropriate to look at the Uravan gauge data  
22 to see if water were available at that location. And  
23 that's what these results here are showing.

24 So using that Uravan gauge data, the  
25 instream flow recommendation would be available more

1 than 50 percent of the time for all the periods. The  
2 lowest period is the month of August where the flow  
3 would be available 55.5 percent of the time, and in  
4 the other periods it's available significantly more,  
5 up to almost 90 percent during that peak flow period.  
6 We're talking about the mid-April to mid-June period.

7 Also, which I believe Parks and Wildlife  
8 mentioned, that some of the parties were concerned  
9 about water availability at the upper terminus of the  
10 reach. And that based in large part on a report by  
11 Bikis Water Consultants who was one of Farmers Water  
12 Development consultants.

13 And they did an analysis where they looked  
14 at the Naturita gauge which is -- I measured it was  
15 about five miles upstream of the upper terminus. I  
16 believe BLM said it was four miles upstream. But it's  
17 above the upper terminus of the reservoir.

18 They took that gauge data and compared it to  
19 the Uravan gauge data and found that over the six  
20 months, September to February, period that the reach  
21 was losing an average of 10.2 CFS. They then  
22 concluded that that was due to evenly distributed  
23 shallow groundwater inflows occurring throughout that  
24 stretch of river.

25 And they, as a result, proposed lowering the

1 instream flows stating that if you need 80 CFS at  
2 Uravan, if the reach is gaining, you don't need that  
3 much at the upper terminus.

4           And this analysis in my opinion was very  
5 preliminary, very high level. It didn't take into  
6 consideration the various components of the system in  
7 the area. They did one spot tributary reading on  
8 Tabawash Creek which had a low flow in the month of  
9 October and came to the conclusion that there were no  
10 significant tributary inflows so all tributary inflows  
11 could be neglected.

12           Also I think that you need a much finer  
13 resolution analysis both spatially throughout the  
14 reach as well as temporally over the six-month period  
15 to really understand what's going on.

16           I looked at the gains on a monthly basis for  
17 this period and found that most of that was occurring  
18 in September and October. And there's a lot of  
19 irrigation near the Nucla area, and I expect that  
20 return flows from that area would accrue above the  
21 upper terminus but below the Naturita gauge and that  
22 that could cover some of this gains.

23           And the fact that most of these occur in  
24 September and October towards the end of the  
25 irrigation period, that that could be showing that

1 that is in fact irrigation return flows from that  
2 area.

3           Additionally, Dr. David Cooper who was  
4 referred to earlier has done a lot more intensive  
5 studies of the San Miguel River looking at the  
6 interactions between groundwater and the river levels.  
7 And he found at all of the San Miguel River study  
8 sites, that the river was actually losing water to the  
9 groundwater, not gaining water from the groundwater.

10           And CWCB staff also questioned that this  
11 reach was gaining, saying that if the reach gains it  
12 would be most unusual. Most streams in arid and  
13 semiarid settings are implement losing.

14           So I think that there are a lot of questions  
15 about this Bikis report. I think it was a very high  
16 level preliminary report and I don't think in my  
17 opinion that it should be referred to when evaluating  
18 this instream flow recommendation.

19           And then again regardless of what's actually  
20 occurring, going on in the river, what the dynamics  
21 are with the surface water and the groundwater, the  
22 Colorado Division of Parks and Wildlife and BLM went  
23 ahead and did look at that upstream Naturita gauge  
24 data and did find that the instream flow water would  
25 be available for the appropriation looking at that

1 gauge.

2 And so that was talking about water  
3 available for the instream flow recommendation. There  
4 have also been a lot of concerns raised about water  
5 available for other water users in the basin.

6 And what I did was on a daily basis using  
7 the Uravan gauge data, I compared the flows to the  
8 instream flow recommendation. And then any water  
9 above the instream flow, I considered an excess flow.  
10 So that's water potentially available for use by other  
11 water users in the basin. And then I summed that by  
12 water year and came up with what you're seeing here  
13 which is an exceedence curve.

14 And this shows the probability based upon  
15 the historical Uravan gauge data that a certain volume  
16 of excess flows would occur in a given year. And so  
17 to look at some of the range there, what you're seeing  
18 towards the left end of that is that you'd expect  
19 excess flows of 350,000 acre feet or greater to occur  
20 in about 13 percent of years, and then towards the  
21 right end in about 84 percent of years excess flows of  
22 50,000 acre feet or more would be present.

23 On average, there would be 167,000 acre feet  
24 of excess flows available for potential appropriation  
25 by other water users.

1           And I think with that I just will quickly  
2 call attention to Deere & Ault, Montrose County's  
3 consultant. They reviewed and agreed with my  
4 findings, but they suggested that the median excess of  
5 123,000 acre feet might be a better metric versus the  
6 average because the average was shifted due to several  
7 high water years.

8           And I'd just like to conclude saying that  
9 whether you're looking at the average of 167,000 or  
10 the median of 123,000, that's still a lot of water  
11 available for other water users in the basin. Thank  
12 you.

13           THE CHAIR: Questions? Director Wolfe.

14           MR. WOLFE: Just back to your first slide,  
15 if I can just get some clarification on that.

16           MS. BELANGER: Sure.

17           MR. WOLFE: Was that the Uravan gauge?

18           MS. BELANGER: Yes, this is the --

19           MR. WOLFE: Is that actual recorded values,  
20 or is that a synthesized figure?

21           MS. BELANGER: No, this is actual. And that  
22 was why I used this gauge. Deere & Ault, they were  
23 questioning the methodology used to develop those  
24 synthetic lower terminus gauge data or synthetic flow  
25 data. And they recommended that Uravan be used, the

1 actual historical data.

2 MR. WOLFE: How is that computation made?

3 Is it for the average for that entire period there, or  
4 is it for that percentage represent on each of those  
5 days during that period that that's the minimum?

6 MS. BELANGER: The way I did this analysis  
7 was I took the entire historical record, and on a  
8 daily basis I compared what was present in the river  
9 with the instream flow. And if the instream flow was  
10 met, I considered that it was available. And then  
11 these percentages are over the entire historical  
12 period.

13 MR. WOLFE: So it may not mean that for the  
14 period of record on September 1st that it was -- I  
15 can't read it from here -- 64 percent or whatever on  
16 that particular day?

17 MS. BELANGER: Right, it's for that period.

18 MR. WOLFE: It's for that period. So  
19 there --

20 MS. BELANGER: Yes. Like for -- yes, that's  
21 possible. September 1st maybe was only met 30 percent  
22 of the time and maybe February 29th was met 90 percent  
23 of the time. And there could be a range in there.

24 MR. WOLFE: So does that mean if the  
25 standard is that you have to meet this 50 percent of

1 the time to protect it to a reasonable degree, that if  
2 you're below 50 percent that you're not there, that  
3 you have not met that? And would that be the lower  
4 cap during those periods?

5 MS. BELANGER: Could you repeat that.

6 MR. WOLFE: Well, if you're saying on  
7 September 1st that if you looked at that particular  
8 day during that period of record and it's only 30  
9 percent of the time that it meets that minimum flow,  
10 that's not at the 50 percent.

11 So does that become the lower limit on that  
12 flow during that period for that day? I know they're  
13 blocked into that entire period, but I'm just thinking  
14 about for a given day, how is that represented to  
15 protect the environment?

16 MS. BELANGER: Well, I'm not a biologist,  
17 first of all, and I didn't do the analysis on a daily  
18 basis. So that 30 percent was just an example. I  
19 know that in the draft BLM DOW, with the information  
20 they provided to CWCB staff, and that is included as  
21 part of the record, that they looked at it -- they did  
22 break it down to a monthly basis, not to a daily  
23 basis. And it was always still above 50 percent of  
24 the time.

25 Down to a daily basis, I haven't looked at

1 it. And I think at that point you're starting to get  
2 into more how the CWCB applies their rules and  
3 regulations, and I'd have to defer that question to  
4 them.

5 MR. WOLFE: And I'll probably ask for a  
6 reclarification again from staff just to make sure  
7 were they relying on this gauge. I thought it was a  
8 different, two other gauges.

9 MS. BELANGER: They were relying on the  
10 lower terminus gauge. The reason I looked at this  
11 gauge was because Montrose County's consultants  
12 suggested that it be looked at to see how different  
13 the results were from the CWCB staff findings. And  
14 they're actually very consistent.

15 MR. WOLFE: All right, thank you.

16 MS. BELANGER: Anything else?

17 THE CHAIR: Other questions?

18 (No response)

19 MS. BELANGER: Great. Thank you.

20 THE CHAIR: Seeing no questions from the  
21 audience on the proponent's side, my records are  
22 showing I have 13 minutes left for CWCB staff and nine  
23 minutes left for Colorado Parks and Wildlife, with 20  
24 minutes reserved for the proponents.

25 Moving on to the opponents, we have a total

1 of two hours, and I'm showing an hour and 54 minutes  
2 left of that. So with that, Board of County  
3 Commissioners of Montrose County.

4 Oh, Southwest is going to go first. Okay.

5 MR. SPEAR: Good afternoon. My name is  
6 Barry Spear. I am a partner with Maynes, Bradford,  
7 Shipps & Sheftel. My firm represents Southwestern  
8 Water Conservation District, Norwood Water Commission,  
9 and Lone Cone Ditch and Reservoir Company.

10 At this point my comments will be focused on  
11 behalf of Southwestern, and we will have Dr. Wesche  
12 follow me, followed by Bruce Whitehead, and then we  
13 will move into Norwood where Jim Wells will present to  
14 the board. And then I will follow up after Mr. Wells.

15 As you know, the San Miguel River is located  
16 in counties within the geographic area of  
17 Southwestern. And in 1941 the legislature created  
18 Southwestern to promote the health and general welfare  
19 of the State of Colorado for the conservation, use and  
20 development of the water resources in the San Juan and  
21 Dolores Rivers and their principal tributaries.

22 The legislature also gave Southwestern such  
23 powers as may be necessary to safeguard for Colorado  
24 all waters to which the State of Colorado is equitably  
25 entitled.

1           Included in those powers is the power to  
2   investigate the best manner of utilizing stream flows  
3   within the district and the amount of such stream flow  
4   in other water supply, and to initiate appropriations  
5   for the use and the benefit of the ultimate  
6   appropriators, and to perform all acts necessary or  
7   advisable to secure and ensure an adequate water  
8   supply present and future for irrigation, mining,  
9   manufacturing and domestic purposes within the  
10   district. Those are statutory charges.

11           The CWCB in this proceeding has the charge  
12   under CRS 37-92-102(3) to recognize the need to  
13   correlate the activities of mankind with some  
14   reasonable preservation of the natural environment.  
15   And the board is hereby vested with the exclusive  
16   authority to appropriate such waters as the board  
17   determines may be required for minimum stream flows or  
18   for natural water levels to preserve the natural  
19   environment to a reasonable degree.

20           The emphasis there is to the reasonable  
21   degree because in both the -- and later in the same  
22   statute, 37-92-102(3)(c) the staff has already cited  
23   the three areas, but I'd like to cite them again that  
24   you are supposed to determine. The board is to  
25   determine that there is a natural environment that

1 will be preserved to a reasonable degree, not an  
2 optimum degree, to a reasonable degree by water  
3 available for appropriation for the appropriation to  
4 be made.

5           The board is also to decide if there is a  
6 natural environment, not that just exists as the staff  
7 said, but there is a natural environment that can be  
8 preserved to a reasonable degree. And such  
9 environment can exist without material injury to the  
10 water rights.

11           The story that I'm going to tell you a  
12 little bit, and I think the rest of the Southwestern  
13 witnesses will tell you about, is a little different  
14 than the Sheep Mountain Alliance story. Because what  
15 Southwestern did is it followed the CWCB's process for  
16 seeking an instream flow on the San Miguel River since  
17 the public list was initiated in 2008.

18           At that time Southwestern approached the  
19 matter in a manner similar to the way CWCB is charged  
20 by statute with addressing the instream flow. This  
21 includes how the instream flow correlates with other  
22 uses on the San Miguel River.

23           CRS 37-92-102(3) states that the instream  
24 flow must correlate the activities of mankind with  
25 some reasonable preservation of the natural

1 environment. And it authorizes the CWCB to  
2 appropriate waters as may be required to preserve the  
3 national -- excuse me, natural environment to a  
4 reasonable degree.

5           Southwestern looked at how future needs  
6 could be met while the demands were met for the  
7 instream flow. It decided to investigate if there was  
8 an arrangement similar to how the RICD in the Animas  
9 River works with a water right that is senior to the  
10 RICD but allows for development of future water uses.  
11 Southwestern holds, along with La Plata County, such a  
12 water right on the Animas River.

13           Southwestern authorized its engineer to  
14 conduct engineering in the San Miguel River basin to  
15 develop a basin-wide approach that would identify  
16 future water uses on the San Miguel River while  
17 allowing the instream flow.

18           The CWCB did defer considering an  
19 appropriation while this work was ongoing. The extra  
20 time was to allow the CWCB staff to work with water  
21 users on the San Miguel River to determine and  
22 identify future water demands that may need protection  
23 while securing the instream flow.

24           Engineering work was completed in the summer  
25 of 2010. And Southwestern began efforts to draft an

1 application that would be filed in 2010 and address  
2 the future water needs of the San Miguel River basin.  
3 The intent was to have a consensus of the San Miguel  
4 River water users and the environmental community for  
5 a water right enabling future water development in  
6 concert with the instream flow.

7 This plan was stopped in the fall of 2010  
8 when the San Miguel County Board of County  
9 Commissioners expressly informed water users who had  
10 been relying on the application for water to address  
11 future needs that it would not support Southwestern's  
12 proposal for an application for a future water rights  
13 allocation.

14 Therefore, the water users were left on  
15 their own to scramble to determine their own needs and  
16 file their respective applications to secure the water  
17 right in 2010. They had two months.

18 In line with the statutory charge,  
19 Southwestern had a continuing interest in the instream  
20 flow process even if the future uses water right  
21 application had been scuttled. Pursuant to their two  
22 enabling statutes, Southwestern still wanted to ensure  
23 that the instream flow was appropriated in accordance  
24 with 37-92-102 which included a proper balancing  
25 between the activities of mankind and the preservation

1 of the natural environment to a reasonable degree.

2           It hired Dr. Tom Wesche and gave him the  
3 charge to review the CWCB staff proposal.  
4 Southwestern requested Dr. Wesche to determine if the  
5 CWCB staff recommendation met the statutory standard  
6 that the instream flow had to have, the minimum flows  
7 necessary to preserve the natural environment to a  
8 reasonable degree.

9           Southwestern decided that it would endorse  
10 the findings of Dr. Wesche. And if they supported the  
11 CWCB staff, then that would be Southwestern's  
12 position. If Dr. Wesche's findings did not support  
13 the staff's proposal, then Southwestern would advocate  
14 to the full CWCB that it adopt Dr. Wesche's  
15 conclusions.

16           We are here today because Dr. Wesche  
17 determined that the minimum flows necessary to  
18 preserve the natural environment to a reasonable  
19 degree are considerably less than those proposed by  
20 the CWCB staff, BLM and CPW.

21           Southwestern advocates Dr. Wesche's figures  
22 because they are the result of an objective review, a  
23 review with no ulterior motive and no desire to  
24 earmark as much water as possible in the river for the  
25 instream flow. Southwestern maintains the Wesche

1 numbers comport more of the statutory requirement for  
2 the minimum stream flows while balancing the  
3 activities of mankind.

4 One reason Dr. Wesche's proposed flows  
5 comply with the statutory requirements more than the  
6 CWCB proposal is the difference in how to determine  
7 minimum flows necessary to preserve the natural  
8 environment to a reasonable degree.

9 The CWCB staff is attempting to achieve a  
10 goal of 100 percent protection of the existing  
11 habitat. The weighted usable area for the two species  
12 -- or two of the species the CWCB staff considered  
13 were 100 percent for flannelmouth sucker and 90  
14 percent for the bluehead sucker. Habitat of this size  
15 allows both species to thrive, according to the BLM  
16 and the CPW, and achieves 100 percent protection of  
17 the existing habitat.

18 The problem with this is that the  
19 legislature did not authorize the CWCB to appropriate  
20 water to maintain existing conditions to their full  
21 extent. It authorized the CWC to appropriate water to  
22 preserve the natural environment to a reasonable  
23 degree.

24 The staff's position is that preserving  
25 existing habitat with zero diminution is preservation

1 to a reasonable degree. However, the statute does not  
2 state that the CWCB should appropriate the minimum  
3 stream flows necessary for 100 percent protection,  
4 optimal or maximum protection to protect existing  
5 conditions as proposed by the CWCB staff.

6 The statute states that the minimum stream  
7 flows are those to preserve a natural environment to a  
8 reasonable degree. Southwestern suggests that 100  
9 percent optimum, maximum protection. That is not what  
10 the legislature had anticipated. It anticipated  
11 appropriating a minimum amount of water necessary to  
12 sustain the fish population.

13 Dr. Wesche's proposed water quantities, as  
14 he will further identify and support in a minute, are  
15 sufficient to maintain the fish population; that is,  
16 to preserve the natural environment to a reasonable  
17 degree.

18 In addition to ensuring the minimum stream  
19 flows as required by the statute, Southwestern is also  
20 concerned with ensuring that the instream flow is no  
21 more than the minimum required to preserve the natural  
22 environment to a reasonable degree because of the  
23 reach's proximity to the state border. Because of its  
24 location in the southwest corner of the state,  
25 Southwestern's territory includes nine rivers which

1 leave the state at the border.

2 The confluence of the San Miguel River and  
3 the Dolores River is within 35 miles of the border  
4 with Utah. The San Miguel River is the first river in  
5 the Southwestern territory where the CWCB is proposing  
6 to impose an instream flow near the state line.

7 If more than the minimum amount as needed to  
8 preserve the natural environment to a reasonable  
9 degree is included in the instream flow, then more  
10 water will ultimately leave the state and not be able  
11 to be put to other uses within the state. This will  
12 create an environment which may cause injury to the  
13 ability to develop the state's compact allocation as  
14 water is called through the system and exported out of  
15 state.

16 For this reason the CWCB must approve an  
17 instream flow with flows no higher than the minimum  
18 needed as required by the statute.

19 Okay, at this time I would also like to  
20 point to the fallacy of CWCB staff's suggestion that  
21 the balancing test between the activities of mankind  
22 and preserving the natural environment to a reasonable  
23 degree was met when the CWCB deferred the instream  
24 flow appropriation for a year purportedly to afford  
25 affected communities the opportunity to engage in

1 accelerated water supply planning for the next 50  
2 years.

3 This transfer of the obligation to recognize  
4 and incorporate the activities of mankind to the water  
5 users rather than being part of the CWCB's  
6 consideration of an instream flow is contrary to the  
7 statute.

8 The CWCB is charged with engaging in the  
9 balancing of the activities of mankind and the  
10 environment. The CWCB staff failed to recognize this  
11 charge and, in fact, did not investigate the  
12 correlation between the two, only focusing on the  
13 water levels needed to preserve the natural  
14 environment.

15 The mere filing of many applications by  
16 water users in the basin does not remove the  
17 obligation of the CWCB to engage in that balancing  
18 act.

19 As stated in the Southwestern rebuttal  
20 statement, the instream flow program was never  
21 intended to be used as a sword against local  
22 communities but rather as a shield to ensure that some  
23 reasonable provision be made for environmental needs  
24 rather than allowing every last drop to be  
25 appropriated for consumptive uses.

1           The better approach would have been for  
2   staff to collaboratively ascertain future needs, not  
3   let everybody ascertain it, but to help in  
4   ascertaining what the future needs would be and limit  
5   the proposed instream flow appropriation in a manner  
6   that would allow such future development rather than  
7   leaving local affected communities to the vicissitudes  
8   of an uncertain rush to water. My partner Adam wrote  
9   that.

10           Mr. Wesche will be the next witness for  
11   Southwestern. And the figures that he is proposing  
12   are the same as the staff's for two periods of the  
13   year which are June 15th through July 31st and  
14   September 1st through February 29th.

15           The shoulder seasons in August and March 1st  
16   through April 14th, the difference is 115 to 100 CFS.  
17   The big area of dispute is the April 15th to the June  
18   14th time period where the CWCB proposes 325 CFS and  
19   Southwestern proposes 170.

20           Southwestern presents these numbers to you  
21   as a viable alternative to the numbers proposed by the  
22   CWCB staff in an effort to ensure that we have the  
23   minimum stream flows necessary for the preservation of  
24   the natural environment to a reasonable degree, not  
25   maximum, not optimum.

1 Southwest, believe it or not, does not come  
2 to you today as an adversary, but rather as an entity  
3 with similar statutory charges to the CWCB for  
4 addressing water needs in our state. It presents its  
5 case not from a biased or prejudiced point of view.

6 Southwestern approached its investigation  
7 into the proposed instream flow by seeking a  
8 correlation or a balance between the activities of  
9 mankind and the minimum stream flows necessary to  
10 preserve the natural environment to a reasonable  
11 degree. Southwestern believes that with Dr. Wesche's  
12 findings, this has exactly been done.

13 Southwestern hopes you, the CWCB, will give  
14 careful consideration to the water flows suggested by  
15 Dr. Wesche and endorsed by Southwestern. And I would  
16 like to turn the floor over to Dr. Wesche now unless  
17 there are questions.

18 THE CHAIR: Director Gimbel.

19 MS. GIMBEL: Barry, I just want to make sure  
20 I understand your argument about -- are you suggesting  
21 that CWCB staff should be determining how all the  
22 basins develop their water? I mean that's what I  
23 thought I heard you say.

24 MR. SPEAR: No, no, no. I don't think they  
25 should be determining how all the basins should be

1 developing the water, no. But I do think that they  
2 should interview, investigate what the water needs  
3 might be by going to all the different water users and  
4 determining what their needs might be and trying to  
5 develop that so that there can be a balance.

6 And I do not think that the CWCB staff does  
7 the balancing. They're just seeking the support for  
8 the minimum flows, that they believe are the minimum  
9 flows necessary for protecting, preserving the natural  
10 environment.

11 DR. GIMBEL: Okay, I'm just trying to take  
12 this to the bigger picture throughout the state as we  
13 pursue other instream flows. And that seems to be --  
14 I am imagining CWCB staff going in and helping people  
15 decide how they're going to develop their water  
16 rights.

17 And that's just not going to play. So  
18 that's what I'm thinking about.

19 MR. SPEAR: Okay, and I see that there are  
20 problems with that. But what I'm doing, Director  
21 Gimbel, is I'm reading the statute. The statute  
22 charges the CWCB with balancing activities of mankind.  
23 The staff is not doing that right now.

24 I mean it's open for discussion how the  
25 balancing activities of mankind should be done. I

1 think that's true. But I think that some effort  
2 should be made to balance the activities of mankind,  
3 and it was not done in the San Miguel River basin.

4 DR. GIMBEL: Okay, thank you.

5 THE CHAIR: Director Blakeslee.

6 MR. BLAKESLEE: So are you suggesting that  
7 the CWCB should not have provided that opportunity of  
8 a year to -- I mean to allow you to determine what  
9 your needs are in an effort to help facilitate  
10 balancing the needs of the environment with the needs  
11 of mankind, to paraphrase?

12 MR. SPEAR: No, I think my clients, I think  
13 the basin thanks the board for the additional time to  
14 look at that. I think what happened, though, is in  
15 that additional time period the staff did not look at  
16 anything to do the balancing test with the activities  
17 of mankind.

18 They just stood back and said you guys take  
19 it to court, you guys go ahead and try to perfect your  
20 water rights, try to establish those without working  
21 with the water users to determine exactly what those  
22 activities may or may not be and balancing that with  
23 the instream flow.

24 And I do again -- I mean, to come back, the  
25 minimum flows are the requirement of the statute. And

1 I think Dr. Wesche's numbers show you the minimum  
2 flow. Because in that minimum flow, the habitat can  
3 be preserved to a reasonable degree, not an optimum  
4 degree, but to a reasonable degree.

5 THE CHAIR: I'm sorry. Go one more, only  
6 one more.

7 MR. BLAKESLEE: Okay, but the amount  
8 recommended by staff still leaves water available for  
9 development, right?

10 MR. SPEAR: It does. It does.

11 MR. BLAKESLEE: Okay.

12 MR. SPEAR: But I mean the map that Director  
13 Trick commented on about all the conditional water  
14 rights, the thing to remember about those is those are  
15 filings. I mean for Norwood alone there are 25  
16 statements of opposition including the CWCB. There is  
17 no guarantee that any of these water right filings are  
18 going to succeed, none at all.

19 And so it's not the sort of thing that if  
20 you file, it's automatically a given. I mean there's  
21 a lot left. And after you get the water right, you  
22 got to have access across federal lands that you have  
23 to get, you have to find funding to build the storage,  
24 as you guys know.

25 So I mean it's not just a matter of, hey,

1 you guys can file for your water rights and you got  
2 them. It goes way beyond that.

3 THE CHAIR: Director Davis.

4 MS. DAVIS: My question has been answered.

5 THE CHAIR: Director Smith.

6 MR. TRAVIS SMITH: Thank you, Mr. Chairman.

7 Barry, I'm wrestling with a couple of comments that  
8 you made. And Director Blakeslee asked one of the  
9 questions.

10 The other, refresh my memory, when we  
11 addressed the issue about postponing and engaging in  
12 the instream flow process, the question about  
13 Southwest and their completion of their basin needs  
14 assessment was -- and I guess I envision that as  
15 being, you know, the process we're currently in now,  
16 allowing the basins to identify their needs.

17 And I guess I'm struggling a little bit with  
18 a couple of comments about that somehow the CWCB erred  
19 in this process that we're addressing today in  
20 allowing the basin to address their needs, allowing  
21 the water users to go to the courthouse, allowing  
22 Southwest to do its work.

23 Can you clarify that for me a little bit?

24 MR. SPEAR: I certainly can. I think that  
25 the way that I would respond to that is again to say

1 that I think the additional time was something that  
2 the area really appreciates, and it was something that  
3 the basin did utilize, did -- yes, Southwestern went  
4 ahead and its engineer developed not -- I mean he  
5 developed a water availability sort of overview.

6 But that was for the basis for the  
7 application that would have been filed that was  
8 basically a carve-out or a bucket, as they called it  
9 over there, for future water needs.

10 And everybody really -- or there were a  
11 number of entities that did -- that wanted to follow  
12 Southwest's lead and go with that sort of approach to  
13 solving the question of having their needs met while  
14 also allowing the instream flow to be met.

15 It's just that at a certain time the support  
16 for the Southwestern's approach dissolved. And that's  
17 not CWCB's fault at all.

18 If there is fault that I'm finding, the only  
19 fault that I find is with the staff for not trying to  
20 identify and correlate and balance the activities of  
21 mankind. I think that the staff only concentrated on  
22 securing and identifying the water that it thought was  
23 the minimum needed for the instream flow.

24 THE CHAIR: Director Trick.

25 MR. TRICK: I'd like to make a few comments

1 here in defense of staff. I agree with you that I  
2 don't think they look at that aspect of a recommended  
3 instream flow.

4 At this point I don't know that there's any  
5 mechanism or any way that they can do that. When this  
6 issue with the San Miguel came up, in fact I think I  
7 was one that advocated we turned it over to Southwest  
8 to do that for staff, and staff agreed with that  
9 approach because I don't want to get in a situation  
10 where staff is going, as Jennifer said, going to each  
11 basin and dictating what their -- how they develop  
12 their water.

13 So we left it up to Southwest to come up  
14 with that information and come up with a recommended,  
15 as you called it, carve-out which would have been much  
16 more appropriate than these conditional rights that  
17 probably will never be developed.

18 So I think it's not appropriate to lay that  
19 whole blame on staff. I think Southwest has some  
20 responsibility there also because they failed to do  
21 it. For whatever reasons, whether they couldn't get  
22 the water users in their district to cooperate or  
23 whatever, the ball was dropped.

24 MR. SPEAR: Well, and I appreciate that,  
25 Director Trick, to the point that it didn't play out.

1 Nothing played out.

2 And the reason it didn't play out, I do not  
3 believe it was because of Southwestern's failure to  
4 follow through. Southwestern was poised and ready to  
5 file an application for a carve-out. It wanted the  
6 support of the water users in the basin, and that  
7 support dissolved for reasons that the people in that  
8 basin can tell you about.

9 And I don't mean to criticize the staff  
10 specifically because I think that the approach that  
11 was taken by the staff is to go ahead and allow the  
12 water users to go ahead and file their rights.

13 But I will also say that there was a lot of  
14 discussion with staff about a carve-out. And the  
15 water users were told there's no way that carve-out is  
16 going to be part of the instream flow.

17 So the only way -- I mean the word from the  
18 staff was you go file your applications. There was  
19 nothing on the part of the staff's position that said,  
20 hey, let's put it together within the instream flow.  
21 And that was suggested to staff.

22 THE CHAIR: Director Trick.

23 MR. TRICK: I don't think it was put in as  
24 part of the instream flow because nothing was ever --  
25 nothing ever came back from Southwest. There was

1 never any figure to my mind, and it should have been  
2 presented to the board as an alternative for this  
3 filing, and we wouldn't have probably had to go  
4 through this hearing today.

5 So I don't know that anything ever came  
6 back. And my understanding from Southwest was that  
7 they couldn't get the water users to agree, that  
8 Montrose County wanted to go their own way, and so  
9 they just dropped the ball.

10 MR. SPEAR: And, Director Trick, that's a  
11 lesson we learned. We will know where to bring it to  
12 next time.

13 THE CHAIR: Director Montgomery.

14 MS. MONTGOMERY: This may not be the right  
15 time, but I just need to get on the record that I am a  
16 San Miguel County representative of Southwestern Water  
17 Conservation District. But during all of these votes  
18 regarding the instream flow, I did recuse myself and  
19 did not participate in executive sessions.

20 THE CHAIR: Director McCLOW.

21 MR. McCLOW: Mr. Spear, I'm still troubled  
22 by this statement. And I think at least once you said  
23 you put the fault on the staff for their approach.

24 Let me make one thing clear. The one year  
25 hiatus, the no carve-out issue was not decided by the

1 staff. It was decided by this board. So if you want  
2 to lay fault, don't lay it on the staff. They  
3 followed our direction.

4 And I'm very sensitive to that because these  
5 are hard-working people who do what we tell them to  
6 do. They don't make those decisions; we do. That's  
7 number one.

8 Number two, I would like you to give me an  
9 example, if you could, of what it is, just  
10 hypothetically perhaps, how they could have done this  
11 differently, how they could have reached out to do  
12 this balancing that you say they failed to do. Give  
13 me an example of what they could have done that they  
14 did not do that would have addressed your concern.

15 MR. SPEAR: I do think that the -- well, let  
16 me address the first, the first one. And I will take  
17 steps backwards. I think the CWCB has a great staff,  
18 and I think they are very good to work with, and I  
19 have nothing but the best things to say about the  
20 staff.

21 All I am pointing out is that there is a  
22 statutory obligation, and I don't think the statutory  
23 obligation was followed. That's all. That's all.

24 MR. McCLOW: Put that on us.

25 MR. SPEAR: Okay. The -- what was your

1 second point?

2 MR. McCLOW: Give me an example of what they  
3 could have done that they did not do that you're  
4 suggesting that they should have done.

5 MR. SPEAR: I think additional discussions  
6 regarding the carve-out would have been appropriate  
7 within the instream flow which has been done before by  
8 this board in different instream flows.

9 I think the board's consideration of terms  
10 and conditions that will be presented to it may be a  
11 way to lessen the impact on the water users and to  
12 address a balancing act between the activities of  
13 mankind and preserving the natural environment.

14 Those are two examples.

15 MR. McCLOW: Thank you.

16 THE CHAIR: Other questions of Mr. Spear?  
17 Thank you.

18 MR. SPEAR: Thank you.

19 THE CHAIR: Welcome, Dr. Wesche. Please  
20 identify yourself for the record.

21 DR. WESCHE: Good afternoon. I'm Tom  
22 Wesche, and I certainly appreciate the opportunity on  
23 behalf of Southwest to testify at the hearing on the  
24 San Miguel this afternoon.

25 By way of introduction since I haven't had

1 the opportunity to address the board prior to this  
2 time, I'm a fishery biologist and hydrologist by  
3 trade. I spent much of my career at the University of  
4 Wyoming. I retired from there in 1998 and --

5 MS. GIMBEL: Go Cowboys.

6 DR. WESCHE: There we go, 2 and 0 now. They  
7 may be 1AA wins, but we're 2 and 0.

8 THE CHAIR: Point of order, Director Gimbel.

9 DR. WESCHE: So, let's see, lost my train of  
10 thought. I won't repeat anything to do about the  
11 University of Wyoming.

12 Since my days, since retirement from there,  
13 I work as a consultant around the west on a variety of  
14 aquatic habitat, stream issues, some dealing with  
15 instream flows, some dealing with river restoration.  
16 In all over my career, I've had the opportunity to  
17 spend about 38 years working on instream flow issues.

18 So a little closer to home here, most  
19 recently have been involved in developing the Grand  
20 County stream management plan. And then, as Mr.  
21 Uppendahl mentioned earlier, I've also had the  
22 opportunity to sit on the San Juan Recovery Program  
23 biology committee for approaching almost 20 years now.  
24 So that makes me feel old every time I have to recall  
25 all those years.

1           My charge in this matter was very simply to  
2 provide Southwest with an independent review and  
3 evaluation of the San Miguel instream flow reports and  
4 documentation that were out there as of last spring  
5 and early summer. I was also asked that if warranted  
6 to develop alternative flow prescriptions, and that's  
7 where I'll spend most of my time here this afternoon  
8 with you.

9           The end product that came out of this work  
10 was a technical memo to the board describing my  
11 findings. And that was dated the end of June of this  
12 year. So what I would like to present then is really  
13 a brief summary of my findings that you'll find in a  
14 bit more detail in that June 29th memorandum.

15           First off, I'd like to compliment the  
16 agencies on their selection of their methodologies in  
17 this study. They chose to use the standard R2CROSS.  
18 They also chose to use PHABSIM, a somewhat more  
19 rigorous approach to instream flow analysis.

20           And certainly their selection of using --  
21 their decision to use both methodologies indicates to  
22 me as a reviewer that they place a lot of importance  
23 on the San Miguel River, its flows and its fishery and  
24 well as its natural environment. And I'm certainly in  
25 agreement with them on their selection of

1 methodologies and the importance of the fish  
2 populations in that river.

3           My second point, I raised several concerns  
4 in my technical memorandum about some of the matters  
5 relating to their application of the PHABSIM and the  
6 R2CROSS procedures. I raised these points in my memo  
7 because primarily at that point in time when I was  
8 doing my review there was not clear documentation of  
9 many of these matters.

10           These matters included some you've heard  
11 something about already this afternoon, site location,  
12 the representativeness of the study site to the entire  
13 reach, verification of habitat suitability curves, and  
14 then to some extent the biological justification that  
15 has been provided to support the recommendations.

16           So in particular I'd like to thank Mr.  
17 Uppendahl. Mark was very forthright and very sharing  
18 in answering many of my questions early in the  
19 process. And I say in reviewing many of the rebuttal  
20 documents that are out there and you've heard about  
21 this afternoon, many of my concerns have been  
22 addressed in those articles. So I'm not going to  
23 spend a lot of time on those any further this  
24 afternoon.

25           So overall regarding the flow

1 recommendations, I am in agreement with the agencies  
2 over certainly a vast majority of the water year. And  
3 I'll point those out here in just a few minutes. So  
4 keep in mind I'm supportive of the flow  
5 recommendations, and my review indicates that I'm in  
6 agreement with much of what has been recommended  
7 before you.

8 Now the one area where I do tend to disagree  
9 and have some discrepancies with the agency  
10 recommendations are in the springtime of the year,  
11 that period that's been discussed today from April  
12 15th to June 14th. This is where I had my greatest  
13 disagreement with the agency flow rates.

14 I found that the 325 CFS was presented more  
15 as a flow to maximize or optimize adult habitat in the  
16 river rather than as a flow for reasonable  
17 preservation of the natural environment. The 325 CFS,  
18 as has been mentioned, provides 100 percent maximum  
19 habitat for flannelmouth suckers and about 90 percent  
20 of maximum habitat for bluehead suckers.

21 However, there's two things to keep in mind  
22 here. First, in a dynamic river system, that having  
23 an optimum flow actually present in that river is a  
24 very ephemeral event. We know that flows are dynamic  
25 and the actual optimum habitat and the flow that

1 provides it is not present at all times.

2           It's an ephemeral event. And as flow  
3 increases or decreases -- excuse me -- that amount of  
4 habitat can very well change. You can lose habitat as  
5 flow increases as well as you can lose habitat when  
6 flow decreases. So the optimums are an ephemeral  
7 value out there.

8           Now, secondly, these percentages, the 100  
9 percent and the 90 percent, represent vastly different  
10 amounts of habitat for the two key species that have  
11 been discussed here. For example, for the  
12 flannelmouth sucker at 100 percent of the optimum,  
13 there is roughly 24,000 square feet of habitat per  
14 1,000 feet of stream out there in the river.

15           While for the bluehead sucker at 90 percent  
16 of maximum, there's roughly 40,000 square feet of  
17 habitat per 1,000 feet of stream. So there's a vast  
18 difference between the amount of habitat being  
19 provided, even though one's at 100 percent and one's  
20 at 90 percent.

21           There's a 67 percent difference in the  
22 amount of habitat that is being provided to these  
23 species. So a lot more for the bluehead, considerably  
24 less for the flannelmouth.

25           So in reviewing the relevant -- the relative

1 abundance information on the fishery that was provided  
2 in the documentation, I found that both flannelmouth  
3 and blueheads were present in roughly equal numbers to  
4 the study site through the breach that has been  
5 electrofished (phonetic). And also that the agencies  
6 based upon my reading place equal importance by  
7 assigning the same status to both of these species.

8           So as a matter of logic then, it occurred to  
9 me, and I attempt to do this in instream flow studies  
10 that I perform where I have two species of equal  
11 importance, I attempt to balance the amounts of  
12 habitat that will be present in the river for these  
13 species in the instream flow recommendation in an  
14 attempt in the future to attempt to keep the balance  
15 in the population.

16           So it's a logical approach that I've used in  
17 the past. I can't cite anything in the literature to  
18 document that necessarily right off the top of my  
19 head, but it's something that I've done for years and  
20 something that I was looking for in my review of the  
21 spring flow recommendation.

22           So my basic point is I did not see the words  
23 "minimum" being used. I saw the words "optimum,  
24 maximum" being used in the flow recommendations for  
25 the spring period.

1           So from my review then of the agency PHABSIM  
2 analyses, I looked at their flow plots and their  
3 relationships between flow and available habitat for  
4 the two species. And I looked for a flow that would  
5 balance habitat and was still available during that  
6 period of the year.

7           And in my analysis I determined that 170 CFS  
8 provided almost equal amounts of habitat for both  
9 species during the -- let's see, that's the April 15th  
10 to June 14th. It was also the same flow that is being  
11 recommended by the agencies for the late June and all  
12 of July period.

13           So it was in my recommendations the 170 CFS,  
14 I would recommend a consistent 170 from April 15th  
15 through the end of July. And in my opinion, that flow  
16 would help to provide reasonable preservation of the  
17 natural environment.

18           As I mentioned in my introductory remarks,  
19 I'm in agreement throughout much of the year with the  
20 agency flow recommendations. As I just mentioned, for  
21 the June 15th through July 31st period, I'm in  
22 agreement with the agencies that 170 CFS will provide  
23 for a reasonable preservation of the natural  
24 environment.

25           We have a slight discrepancy for the August

1 1st through 31st and the March 1st to April 14th  
2 period where, once again using the equitable habitat  
3 approach, I determined 100 CFS as the instream flow in  
4 comparison to the agency's recommendation of 115 CFS.

5           So again in my experience of recommending  
6 flows, I attempt to be as consistent as I can between  
7 different seasons in the logic that I apply in  
8 determining what my recommendation might be. And so  
9 for all of the seasons involved, I've attempted to do  
10 my best to keep equitable habitat between two species  
11 that appear to be equal relative abundance and equal  
12 importance, keep those in mind.

13           Finally, for the winter period I'm in  
14 agreement once again with the agency recommendations.  
15 80 CFS once again balances available habitat between  
16 the two species, and in my opinion will provide for  
17 reasonable preservation of the natural environment.

18           So, with that, I will conclude my remarks on  
19 this very important matter. I appreciate your  
20 attention and would be happy to answer any questions.

21           THE CHAIR: Director Biggs.

22           MS. BIGGS: Dr. Wesche, I apologize if you  
23 addressed this in your testimony. There's a lot of  
24 stuff in these two binders, and I may not remember all  
25 of it.

1           You've recommended a consistent 170 CFS  
2 throughout the spring runoff well into the summer  
3 period. And it would seem to me one of the big  
4 differences between that approach and the approach  
5 that the Division of Wildlife -- or Parks and  
6 Wildlife, sorry, Parks and Wildlife and BLM took is  
7 that they wanted to more closely reflect the natural  
8 hydrograph, you know, capture a higher flow during  
9 those heavy spring runoff months.

10           As a fisheries biologist, you don't see the  
11 need for that as a minimum protection for the aquatic  
12 life, capturing that higher flow?

13           DR. WESCHE: Well, I see the 170 CFS that I  
14 have recommended as a flow which does reasonably  
15 provide protection for the natural environment. The  
16 325 provides somewhat more habitat. It provides far  
17 more habitat for bluehead suckers than it does for  
18 flannelmouth suckers.

19           I'm not sure that -- in the report I saw no  
20 written documentation that the 325 was intended to be  
21 a flushing flow or a channel maintenance flow,  
22 hydration types of flows which we use for building and  
23 maintaining the physical structure of stream channels,  
24 maintaining sediment transport processes.

25           So the agency looked at it strictly from

1 habitat. I looked at it from habitat. And in my  
2 opinion, they were optimizing. And I looked more at  
3 something a little bit lower than optimum but still  
4 that provided good amounts of habitat for the two  
5 species.

6 MS. BIGGS: I had a second question but I  
7 don't remember what it was. It's gone now.

8 THE CHAIR: While Director Biggs is  
9 remembering, is there any other questions? Director  
10 Cables.

11 MR. CABLES: Thank you. I just want to  
12 understand your methodology. So the bluehead was 100  
13 percent you cited and the flannelmouth was 67, so by  
14 balancing, as you said, you reduced the bluehead to 67  
15 percent. Is that what you mean by balancing?

16 DR. WESCHE: Let's see, if I can remember,  
17 the flannelmouth on the agency recommendation was at  
18 100 percent, and the bluehead was at 90 percent of the  
19 maximum weighted usable area.

20 But those percentages, while they're very  
21 close percentage-wise, led to substantial differences  
22 in the amount of habitat for the two species that were  
23 out in the river. There was a lot more bluehead  
24 habitat being provided than what there was for the  
25 flannelmouth.

1           So in my approach I looked at more  
2   equitability between the two species based upon their  
3   relative abundance and their status with the agencies  
4   and attempted to, within water availability, balance  
5   the habitat between the two species. And that led me  
6   to the 170 CFS figure which also happened to be the  
7   same figure that one of the agencies had recommended  
8   for the late runoff to early summer period.

9           MR. CABLES: And in that analysis, how did  
10   you factor in the fact that during the April to June,  
11   the hydrograph was -- there was a lot of water above  
12   the 325 or the 170 as you suggested. How did you  
13   factor that into this equitability or balancing  
14   methodology?

15           DR. WESCHE: Well, I looked at in my  
16   experience recommending instream flows, and I've done  
17   some over the years, generally what I look at is a  
18   range, what we call target range of flows that goes  
19   from the optimum habitat value to some lower flow  
20   value which still provides what we feel is a  
21   reasonable amount of habitat for the species of  
22   interest.

23           So I picked a minimum or lower flow and then  
24   the optimum flow as the upper end of the target flow  
25   range. Now in my approach if I am asked then to

1 recommend a minimum flow, then I would pick the lower  
2 range. If I'm asked to select an optimum flow, then I  
3 would pick that flow that maximizes available habitat.

4 MR. CABLES: And reasonable is somewhere in  
5 between?

6 DR. WESCHE: I would consider the low end to  
7 be reasonable for preservation of the natural  
8 environment. And the optimum to move toward  
9 optimizing the natural environment.

10 MR. CABLES: Okay, thank you.

11 THE CHAIR: Further questions? Director  
12 Montgomery or Director Biggs.

13 MS. BIGGS: You remembered. Time's up. Dr.  
14 Wesche, I believe you've been involved in the San Juan  
15 Recovery Program for 20 years, I think you said?

16 DR. WESCHE: I think going on that long,  
17 yes.

18 MS. BIGGS: There seemed to me to be a  
19 significant amount of information provided in the  
20 documents regarding the decline -- you know, that  
21 these species are declining significantly in many  
22 river streams or in many stream systems throughout the  
23 southwest and that the San Miguel might be one of the  
24 last really healthy populations of both the species.

25 DR. WESCHE: Yes.

1 MS. BIGGS: Would you see that preservation  
2 of that healthy population and avoiding further  
3 declines in the species and potential listing as a  
4 justification for a higher minimum, you know, a higher  
5 minimum flow as the minimum?

6 DR. WESCHE: Well, potentially it could be  
7 if the habitat and related data supported that. In my  
8 analysis I found that the lower flow would still  
9 provide a reasonable amount of flow to protect the  
10 natural environment.

11 MS. BIGGS: Can I ask one more follow-up?

12 THE CHAIR: Director Biggs.

13 MS. BIGGS: And again I apologize if this  
14 was in your report and I'm just not remembering. Did  
15 you actually go out on the river and do any --

16 DR. WESCHE: On the San Miguel?

17 MS. BIGGS: On the San Miguel.

18 DR. WESCHE: All that I was able to do was  
19 to stop on my travels through to a San Juan meeting,  
20 as a matter of fact, and visit the river, take a few  
21 photographs. I did no actual field measurements other  
22 than that.

23 MS. BIGGS: Okay, thank you.

24 THE CHAIR: Director Montgomery.

25 MS. MONTGOMERY: I was just wondering in

1 your analysis how you address -- we heard earlier the  
2 need for spawning cues and the descending and the  
3 ascending hydrograph. And by your recommendation of  
4 sort of flattening the hydrograph, how are spawning  
5 cues going to occur?

6 DR. WESCHE: Well, there is a -- to my  
7 knowledge there is no formal definition of how much a  
8 flow must be increased to create a spawning cue. I'm  
9 not aware of it anyway. It may be out there, but I'm  
10 not aware.

11 In my recommendations I would go from the  
12 100 to 170 along about mid-April when flannelmouth are  
13 starting to spawn, and then the 170 would continue  
14 pretty much through bluehead spawning which spawn  
15 after the peak of the hydrograph. So there would be a  
16 spawning cue there; it would occur in mid-April.

17 But in answer to your question, I'm not -- I  
18 can't define what is needed to officially serve as a  
19 spawning cue.

20 THE CHAIR: I would like to follow up on  
21 some questions that Director Cables asked. In just  
22 writing down some notes here, I had that for the  
23 flannelmouth you had at 100 percent habitat you had  
24 about 20,000 square feet. Is that --

25 DR. WESCHE: Let me check my --

1 THE CHAIR: And for the bluehead you had  
2 about 40,000.

3 DR. WESCHE: For flannelmouth I had 24,000.

4 THE CHAIR: Okay.

5 DR. WESCHE: And for the bluehead,  
6 approximately 40,000 square feet.

7 THE CHAIR: Just to follow up a little bit  
8 on Director Cables's questions, when you equalized  
9 that, did you equalize it to the 24,000 square feet to  
10 bring the blueheads more in line with the  
11 flannelmouth, or did you do it the other way around to  
12 bring the flannelmouth more in line with the blueheads?

13 DR. WESCHE: Really I didn't go into it with  
14 any preset notion. I looked at the weighted usable  
15 area versus stream flow curves which the agencies had  
16 provided and looked for the flow which provided  
17 approximately equal amounts.

18 Now in the case of the flannelmouth, it was  
19 not possible to go up to the level of the bluehead.  
20 So it was obvious the bluehead was going to come down  
21 some if we were going to find a happy medium as far as  
22 habitat and flow.

23 THE CHAIR: At the 170 CFS, were you still  
24 able to maintain the 24,000 square feet for the --

25 DR. WESCHE: For flannelmouth it dropped to

1 22,000.

2 THE CHAIR: Okay.

3 DR. WESCHE: So there was about an eight  
4 percent reduction there. So it was still pretty close  
5 to optimum.

6 THE CHAIR: Okay, thank you. Other  
7 questions? Thank you very much. Appreciate it.

8 DR. WESCHE: Thank you.

9 MR. WHITEHEAD: Good afternoon, good after  
10 long noon. For the record, I'm Bruce Whitehead. I'm  
11 the executive director of Southwestern Water  
12 Conservation District. I am also an engineer adviser  
13 on the Upper Colorado River Commission.

14 I also previously served on this board with  
15 some of you. And in addition to that, I also served  
16 in the state senate and dealt with many of you in the  
17 state senate and some of them on instream flow issues.

18 And then also I worked for the Colorado  
19 Division of Water Resources for 25 years. So I  
20 understand some of the administrative concerns that  
21 are being raised.

22 Just wanted to give a little background  
23 again about Southwest Water Conservation District. I  
24 know there were some comments made earlier that I  
25 disagree with and take some issue with.

1           But we were created in 1941 to look at water  
2   development to protect and utilize existing and future  
3   supplies as well as conservation. And we believe  
4   we've tried to do that in this case.

5           I think we need to go on record and make  
6   sure that you know, because there's been a lot of talk  
7   about opposers in the case, we support the instream  
8   flow. We supported it all along.

9           I addressed this board in January and said  
10   we support the instream flow. But we believe it  
11   should be the minimum amount necessary to protect the  
12   natural environment.

13           And that's why we hired Dr. Wesche to do an  
14   independent look at the numbers that were out there,  
15   at the work that the staff did. And what we found out  
16   is, you can see, there's a lot of variance in the  
17   numbers.

18           We have worked with Dr. Wesche on a number  
19   of issues on the San Juan Recovery Program, that  
20   they're having good success on recovery of the species  
21   in our area, and thought that he could give a good  
22   independent review.

23           We didn't predetermine his outcome. We  
24   didn't tell him what we were looking for. We asked  
25   him just to look at the numbers and then to make his

1 own recommendations based on his expertise. And his  
2 expertise is extensive.

3 In regards to a comment that was made  
4 earlier by Sheep Mountain Alliance about support for  
5 the instream flow from the Southwest roundtable, that  
6 was a nonconsumptive need that was listed as an IPP in  
7 there. And if you took that argument a little  
8 further, I'm assuming then that the entire Southwest  
9 basin roundtable supports all of the consumptive and  
10 nonconsumptive IPPs.

11 They have never discussed this issue in  
12 particular. It was just included on a list. So I  
13 just wanted to clarify that, that there has not been  
14 as broad of support as what might have been brought  
15 before you.

16 The other thing I'd like to touch on that  
17 has been addressed already, and I'll try and keep my  
18 comments brief because we would like to give Norwood  
19 time to comment as well, but the compact issues. Our  
20 board felt it was important to come to you and not  
21 just deal with staff because we believe the balance is  
22 up to you, not up to the staff.

23 We believe there could be compact issues  
24 here due to the proximity of the state line, and we do  
25 have eight or nine other rivers that all run out of

1 state and are even closer to the state line.

2 We dealt with this hand in hand with the  
3 Colorado Water Conservation Board on an RICD  
4 application in Durango. Came up with a reasonable  
5 resolution to that case with a carve-out. Not a  
6 carve-out really, a future development allocation.  
7 And it's worked, and it's worked well.

8 Also while I was in the state senate, due to  
9 concerns that were brought with me, I coordinated with  
10 Senator Josh Penring to look at the Dominguez  
11 settlement that this board has also addressed that did  
12 have a future development or carve-out provision.

13 And so it was a little concerning when we  
14 were told by staff that a future development  
15 allocation was off the table. And, excuse me,  
16 Director Trick, that did play into where Southwest  
17 decided to go after the first of the year when the  
18 Montrose BOCC made their own application and San  
19 Miguel County commissioners notified us that they  
20 wanted just to move forward and let the instream flow  
21 appropriation move forward under the channels that are  
22 laid out.

23 But I would note as well that we were  
24 invited into the basin by our Southwest board member  
25 as well as the San Miguel BOCC to try and address

1 these future use issues. We didn't go in and try and  
2 take over the basin. We were invited in.

3 And, in fact, as recent as our last board  
4 meeting not quite two months ago, one of the San  
5 Miguel County commissioners came to us, to our board  
6 meeting, and said do all you can to try and help these  
7 people in the Norwood area.

8 This has created quite a difficulty for them  
9 there. They don't have a lot of resources. As it was  
10 said, there are a number of objections in the case.  
11 CWCB may move forward with its application, get its  
12 instream flow. Those people will be fighting water  
13 court issues for probably the next five to ten years.

14 And so again we believe that there are  
15 issues with future development. There's no certainty  
16 in these other applications. But because everybody  
17 did move forward with their other applications and  
18 CWCB staff saying that was a nonstarter, Southwest  
19 didn't have anywhere else to go.

20 Now there is still time before the end of  
21 the year. I guess we could look at that in the future  
22 if you think that's the right direction to go. And  
23 that's something the board can consider.

24 I'd also like to touch on the balance,  
25 balancing the needs of mankind while protecting the

1 environment. I believe it really is the duty of this  
2 board. We're dealing with future water use in the  
3 state of Colorado. We believe that there is a need to  
4 protect these species.

5 Southwestern Water Conservation doesn't want  
6 to see another federal listing. But again we believe  
7 it should be the minimum amount necessary. And you  
8 should balance those needs while protecting the  
9 environment.

10 And actually Southwest has had quite a bit  
11 of success at sitting down and working on  
12 collaborative efforts in our basin to achieve that,  
13 getting all parties at the table, not coming to  
14 hearings like this and hearing legal testimony and  
15 biology and the definition of, let's see, minimum and  
16 optimum.

17 And I'm a fairly simple minded kind of  
18 person, but those raised concerns on my part when I  
19 looked at the executive summary and some of the other  
20 documentation. So I decided to get online back here.  
21 iPhones are a wonderful thing.

22 My definition of optimum is the most  
23 conclusive to a favorable outcome, the best. Let me  
24 get to minimum, the minimum amount necessary -- sorry,  
25 I thought it was a good thing. Here we go. Minimum,

1 the least possible quantity or degree, the lowest  
2 degree or amount reached or recorded.

3 We're looking at the minimum amount  
4 necessary to protect the natural environment, not the  
5 optimum. Not the optimum amount that's available  
6 there. And we're in agreement, we're in agreement  
7 with you as a board, we are in favor of the instream  
8 flow. But it should meet the statutory definition,  
9 and that's the minimum amount necessary to protect the  
10 environment to a reasonable degree.

11 That's it for my comments. Thank you.

12 THE CHAIR: Director McCLOW.

13 MR. McCLOW: Well, welcome once again, Mr.  
14 Whitehead. We seem to see you at every meeting, but  
15 that's all right. We enjoy it.

16 MR. WHITEHEAD: I get around.

17 MR. McCLOW: Seriously for a moment, though,  
18 as to the science, it's apparent that reasonable minds  
19 can differ. And these men and ladies are all  
20 professionals. So it's difficult for me not having  
21 that training to decide which is the better position.

22 But on the balancing issue, I'm hearing  
23 today the numbers 167,000 acre feet on an average or  
24 at a median flow 123,000 acre feet available for  
25 appropriation after this, if it's taken as proposed.

1 I mean isn't 123,000 acre feet a substantial  
2 accommodation of the needs of the community?

3 MR. WHITEHEAD: Those are excellent  
4 questions, Director McCloy, as usual. You always have  
5 those.

6 I'm a little confused by the numbers myself.  
7 Because in the executive summary published by your  
8 board, it says San Miguel River flows, 240,000 acre  
9 foot per year due to snowmelt. Maybe that's the  
10 differentiation.

11 And I think it's important to get on the  
12 record what kind of application your board is looking  
13 at, when we start kicking around numbers about that  
14 water available for appropriation. If you go with the  
15 325 CFS April 15th through June 14th, 170 CFS June  
16 15th through July 31st, 115 CFS August 1st through  
17 August 31st, 80 CFS September 1st through February  
18 29th, 115 CFS March 1st through April 14th, your  
19 appropriation will be 101,387 acre feet that will  
20 leave this state. That's on an average.

21 Now to answer your question, that water may  
22 not be available every year. And in fact it may only  
23 be available about 50 percent of the time. So in  
24 those years when it's not available, it's likely that  
25 the amount that you're talking about may not be

1 available either on top of that.

2 Those are the dry years really that are the  
3 concern. And it will drive this basin, it will force  
4 it into administration. And so I don't, looking at  
5 the numbers we see here, 101,000 acre feet, that we'll  
6 be able to place a call and be administered in  
7 priority, that water will leave the state.

8 Now whether it's 167,000 is one of the  
9 numbers -- you know, magic with statistics. These are  
10 averages. You know and I know there's dry years in  
11 Colorado, and there's wet years in Colorado. And that  
12 can drive the average higher.

13 THE CHAIR: Director McCLOW.

14 MR. McCLOW: Well, then can you tell me --  
15 your calculation is quick. That's what division  
16 engineers do, right?

17 MR. WHITEHEAD: Previous division engineers,  
18 yes.

19 MR. McCLOW: I want to be serious, though,  
20 and not waste anyone's time. What's the difference in  
21 volume between what Dr. Wesche is proposing and what  
22 the staff is proposing?

23 MR. WHITEHEAD: I just have to give one  
24 caveat here. These were calculations made on my  
25 iPhone at 6:00 in the morning as I was getting ready

1 to leave to come here. But the number that I talked  
2 about with the appropriation that is being proposed by  
3 the staff is 101,387.

4 And with the changes that Southwest stands  
5 behind, and they do have broad consensus on this, and  
6 probably if there are other appropriations made in the  
7 future may be involved because all of our rivers are  
8 state lined, that change would be 74,223 acre foot  
9 which is a difference of 27,164 acre foot per year on  
10 average.

11 MR. McCLOW: Average or median?

12 MR. WHITEHEAD: I'm sorry?

13 MR. McCLOW: Was it average or median you're  
14 talking about?

15 MR. WHITEHEAD: These are just taking the  
16 straight numbers assuming they're there all the time  
17 and assuming they're there throughout the year. So  
18 some years it will be less than that because this  
19 again was just the numbers that your staff is  
20 recommending to you and taking the numbers that our  
21 expert, Dr. Tom Wesche, is recommending for us for  
22 your consideration.

23 MR. McCLOW: The difference again, please.

24 MR. WHITEHEAD: 27,164 acre feet additional  
25 water that could be developed to meet this balance.

1 I believe it was also mentioned about terms  
2 and conditions that may be proposed in other  
3 testimony. In regards to the compact, I think it's  
4 important in this state that we protect water rights  
5 that existed prior to the 1922 compact.

6 And I think it's appropriate that we look at  
7 a date that you can work with in some way where we  
8 don't impact the movement of water in that basin in  
9 the protection of those water rights. And I would  
10 suggest the date that was ratification of the 1922  
11 compact.

12 I think that's an issue that's important to  
13 Colorado and that we should start taking a position  
14 on. I think that too could provide some of the  
15 balance. If you would agree not to object to changes  
16 of water rights or precompact water rights, in my mind  
17 defined as anything that was preratification of the  
18 1922 compact, I think that would help achieve that  
19 balance in addition to these reduced flows.

20 THE CHAIR: Director Gimbel.

21 MS. GIMBEL: April, if you don't mind if I  
22 just hop in here because I want to clarify because you  
23 hit exactly what I was going to ask about. And that  
24 is you came and you said Southwest supports the  
25 instream flow, but we disagree apparently on one flow

1 rate.

2 MR. WHITEHEAD: Actually a great question,  
3 Director Gimbel. We actually disagree on a couple of  
4 different periods. And again is this art or is this  
5 science? I mean there's lots of varying opinions.

6 But the first period that we have some  
7 differences, would like to make a different  
8 recommendation, your staff has recommended April 15th  
9 through June 14th at 325. And then June 15th through  
10 the 31st is 170. Dr Wesche has proposed that the  
11 reasonable environment can be protected at 170 through  
12 that entire period.

13 And then the other two differences are  
14 August 1st through August 31st which the staff is  
15 recommending 115 CFS, and Dr. Wesche has recommended  
16 100 CFS. And then March 1st through April 14th, it's  
17 the same, the staff recommended 115 CFS, and Dr.  
18 Wesche recommended 100 CFS.

19 So that's what my calculations were based  
20 on.

21 MS. GIMBEL: And to follow up on that, if  
22 the board were to make those changes, would Southwest  
23 agree?

24 MR. WHITEHEAD: I'm sorry?

25 MS. GIMBEL: If the board made those flow

1 changes in times, would Southwest then agree with the  
2 instream flow?

3 MR. WHITEHEAD: Yes. And again I think  
4 there's some other balancing --

5 MS. GIMBEL: I heard you say conditionally.  
6 I mean you started talking about compacts and  
7 carve-outs, and so that's what I'm trying to get at.  
8 If the board just changed the flows.

9 MR. WHITEHEAD: Only the flows, no  
10 conditions, no terms and conditions?

11 MS. GIMBEL: No conditions.

12 MR. WHITEHEAD: You know, Director Gimbel,  
13 you work for a board and I work for a board. I think  
14 that's something I'd have to take to the board. But  
15 the issues for them was to make sure that you  
16 understood where Southwestern was at and probably will  
17 be at in the future. And the issues really for them  
18 were in regards to flows.

19 THE CHAIR: Director Montgomery.

20 MS. MONTGOMERY: Bruce, not to be  
21 argumentative, but since I was implicated in your  
22 testimony, I feel like I need to just give a  
23 difference of opinion that you were invited -- I  
24 invited you into Southwest basin because we were  
25 talking about climate change and the implications of

1 heavy runoff and high -- the possible need for high  
2 altitude storage. It was before the instream flow was  
3 even on the commissioners' radar screen.

4 And, two, Commissioner Goodtimes came to the  
5 meeting. And it was my understanding that his asking  
6 Southwest to help in all means Norwood was really to  
7 help them find funding in order to help in their court  
8 case for their conditional water rights. Just wanted  
9 to clarify that in my opinion.

10 MR. WHITEHEAD: Thank you, Director  
11 Montgomery. If you'd give me a chance to respond,  
12 there was probably discussion about climate change and  
13 the need for storage, but definitely if we look back  
14 at the dates, the instream flow was on the table. And  
15 that's why in particular County Commissioner Goodtimes  
16 requested that we were there, was to talk about their  
17 future needs in the San Miguel basin.

18 THE CHAIR: Director Trick.

19 MR. TRICK: Bruce, let me clarify again what  
20 Jennifer asked you in my mind. It's getting late in  
21 the day.

22 MR. WHITEHEAD: It's evening.

23 MR. TRICK: You can't commit for your board  
24 if we were just to change the flow rates to your  
25 recommendations without conditions, correct?

1 MR. WHITEHEAD: You know, Director Trick,  
2 the president of the board is here. And we --

3 MR. TRICK: Just answer yes or no.

4 MR. WHITEHEAD: I'm sorry, I can't commit  
5 personally. It is a board decision. But I think that  
6 that would go a long ways in settling Southwest's  
7 issues given the past discussion we've had as a board.

8 MR. TRICK: But didn't I hear you also say  
9 that you would accept the flow rates the staff is  
10 recommending if we put conditions on pre '22 compact  
11 rights?

12 MR. WHITEHEAD: No, Director Trick, that's  
13 not what I said. I thought that that would also go a  
14 long ways in helping to provide --

15 MR. TRICK: (Inaudible)

16 MR. WHITEHEAD: Right, reduce flows and I  
17 believe that would be an important condition to put in  
18 there for the state as a whole so we can help protect  
19 those precompact water rights for use in the future.

20 So again, but Southwestern, the direction we  
21 were given was based on the flows and to try and  
22 resolve those issues. We stand behind Dr. Wesche's  
23 numbers. And I think we could probably query and come  
24 up with a direct answer to your question, if you'd  
25 like.

1           MR. TRICK: Okay, well, that's what I wanted  
2 to clarify because I thought I heard you say you would  
3 accept staff's with those conditions.

4           MR. WHITEHEAD: Did not say that. And in  
5 fact --

6           MR. TRICK: Okay, and that's fair enough.  
7 Do you feel that there is more jeopardy for listing  
8 these species as endangered if we go to the 170 CFS  
9 flow?

10          MR. WHITEHEAD: Based on the expert  
11 testimony and the person that we hired and is highly  
12 respected in the field, I don't believe that will  
13 increase the jeopardy. He's comfortable that that's  
14 an amount that will protect the natural environment to  
15 a reasonable degree. And I think that's the statutory  
16 charge that you face as a board member is to make that  
17 determination and to provide that balance.

18          THE CHAIR: Director Biggs.

19          MS. BIGGS: I promise I won't belabor this,  
20 but I do feel obligated to point out, Bruce, you've  
21 got Dr. Wesche's recommendations at 170 during --  
22 you've got the staff or the Colorado Parks and  
23 Wildlife, BLM recommendation. But you also have Dr.  
24 Woodling who came in with a completely different who  
25 also is very experienced in the field and, you know,

1 has tremendous experience with these species that  
2 recommended an even higher number.

3 So there are -- there's clearly room for  
4 experts in this field to come to different  
5 conclusions.

6 MR. WHITEHEAD: I think that's correct,  
7 Director Biggs, and it had been described to me it's  
8 as much art as science. And the more I've learned  
9 about this, the more I agree with that. And I think  
10 if my wife and I get together, me being the scientist  
11 licensed professional engineer and she being the  
12 artist, we might have a career ahead of us.

13 THE CHAIR: With that, I see no other  
14 questions. And we are running up against the time you  
15 have consumed. Now Farmers Water Development  
16 Company's time. I do have on my agenda still Norwood  
17 Water Commission and the Lone Cone Ditch and Reservoir  
18 Company yet.

19 So I'm going to leave it up to whoever wants  
20 to present next, please identify yourself.

21 MR. WELLS: Thank you, Mr. Chairman. My  
22 name is Jim Wells, and I'm on the Norwood Water  
23 Commission.

24 I've talked to you, this board, before. I  
25 think I spoke to you in Denver one time and then spoke

1 to you in this room.

2 Norwood is a town of about 500 people, but  
3 Norwood Water Commission serves a greater area. We  
4 have about 780 households in our service area.

5 Basically the water commission does three  
6 things. We have to find source water, raw water; we  
7 have to turn that raw water into drinking water and  
8 then we send it out in the distribution system.

9 We have been and we were -- I've been on the  
10 water commission I think, I don't know if I told you,  
11 for about ten years. And we've been busy over the  
12 last number of years developing our water quality  
13 system and our distribution system.

14 Water quality keeps changing because all the  
15 new state regulations and federal regulations that  
16 come out keep squeezing harder and harder on small  
17 water systems to purify the quality of their water.

18 We just finished a project with refurbishing  
19 one of our big tanks. We just finished an expensive  
20 project with our water disinfection system.

21 And while this was going on, of course, we  
22 became aware of the instream flow question. And  
23 suddenly we were faced with the fact that there was a  
24 proposal for an instream flow to be put on the San  
25 Miguel River. How is this going to affect our first

1 order of business, finding raw water?

2           So we were concerned that it would affect  
3 raw water for future development, and we at that point  
4 talked with Farmers Water Development Corporation  
5 because we do get some water for our system from them.  
6 And we talked with other people, and we decided that  
7 we would come to the CWCB and express concern about  
8 the instream flow.

9           In the first meeting -- it was the first or  
10 second meeting -- we got the one-year grace period.  
11 And we talked to the San Miguel County commissioners  
12 because we knew that in order to get anywhere, we were  
13 going to have to have our county commissioners working  
14 with us too. And so we talked with the county  
15 commissioners.

16           And they said they would support the idea of  
17 a one-year grace period, but it wasn't a delay tactic,  
18 during that time we should get something done. And  
19 that one-year grace period was used to work with  
20 Southwest. And the Southwest engineer came up with  
21 this idea of possibly a reserve or a carve-out or  
22 whatever you want to call it.

23           And at the same time we were trying to  
24 establish what our future needs would be. And this  
25 sort of happened fast. But it looked to us like that

1 carve-out idea might work with all the basin users and  
2 all the water users there.

3 And I'm not speaking now for anybody but the  
4 town of Norwood. Not for the ag users or anybody  
5 else, but just for us as the Norwood Water Commission  
6 and the town of Norwood. But we thought that the  
7 carve-out would be a good idea.

8 When I came back to this meeting, and I  
9 can't remember exactly when that was, but anyway it  
10 was at this meeting that I found out that the San  
11 Miguel County commissioners didn't support the  
12 carve-out idea anymore. Without their support, it  
13 did, that carve-out idea just went away.

14 And as I was walking out that door, I was  
15 advised by many people, you know, you guys better just  
16 go ahead and file. You know, God bless the child that  
17 has his own. Go ahead and start filing so that you're  
18 covered in the future.

19 Well, now we just had a really short time.  
20 And so people look at it like it was a mad scramble to  
21 file without engineering done and without this done.  
22 But we didn't have much time. We just spent the  
23 previous year working on the whole carve-out idea.

24 We were also then spending money that we  
25 thought we were going to spend on our water quality

1 development -- or time anyway on trying to locate  
2 future water sources.

3 We have a good source of raw water with  
4 Farmers Water Development. They have a good domestic  
5 water decree which is good now, but -- and we talked  
6 to them and said what about in the future. I mean we  
7 just in ascertaining our future needs we came up with  
8 a figure of about 1,000 acre feet.

9 We have to look at things like are they  
10 going to build a mill in Uravan, we don't know. Is  
11 some land developer going to come in and build a lot  
12 of housing? We don't know.

13 But we came up with a round figure, if we  
14 had another 1,000 acre feet, we could probably be  
15 okay. They can't promise us that. Farmers Water  
16 can't promise us that. They can't promise it legally  
17 or physically. So we can't rely on it.

18 So we had to go out and file, make some new  
19 filings. Well, when we do that, now we're stepping on  
20 the toes of our friends and neighbors. They have to  
21 oppose just like you had to oppose. So we're spending  
22 a lot of time and effort and money just to try to keep  
23 our future needs, what can I say, viable.

24 I guess what it comes down to for Norwood,  
25 we support the terms and conditions that will be

1 presented by Montrose County when Montrose County gets  
2 to talk. I mean, as I've said before at other  
3 meetings, if you're firmly 100 percent convinced that  
4 this instream flow is in the best possible interest of  
5 Colorado, then I would say, you know, go ahead and  
6 move forward.

7 But if there's any doubt at all that there's  
8 things in here that are going to cause injury to  
9 municipalities and to water users in the future, then  
10 what I would ask for is, again, is more time to get  
11 this thing figured out correctly or, if that's not  
12 possible, then, like I say, we would support the  
13 figures that Montrose County is going to present to  
14 you which means, you know, reduced flows in the  
15 instream flow appropriation.

16 Now usually I walk away, and then they go,  
17 no, no, somebody wants to ask questions, so --

18 THE CHAIR: Questions for Mr. Wells?

19 FEMALE: We got you.

20 THE CHAIR: I guess you can walk away.

21 Okay, thank you very much.

22 MR. WELLS: Thank you.

23 THE CHAIR: I would propose now that we take  
24 about a ten-minute break. I tell you ten minutes so I  
25 can get you back in fifteen. So try to be back by

1 five after 6:00, if you could, please. Then we'll  
2 move on to -- I assume there's no one here from Lone  
3 Cone.

4 Is there anybody here from Lone Cone?  
5 Anybody here from Lone Cone? No? Okay, we'll resume  
6 then with the presentation by the Board of County  
7 Commissioners of Montrose County, 49 minutes.

8 (Recess)

9 THE CHAIR: We need to sit down and go.  
10 Okay, we're going. If the audience could be quiet,  
11 we're going to start the presentation, please.

12 MR. HAYES: So I guess we've crossed the  
13 threshold where I'll say good evening instead of good  
14 afternoon. For the record, my name is David Hayes.  
15 I'm here today appearing on behalf of Montrose County.

16 To kind of follow what some of the other  
17 folks have done, I'll give you a roadmap of what we're  
18 going to do. You're going to hear from three  
19 witnesses from the county today, Don Conklin, our  
20 biology expert; Dan Ault, our engineer, water  
21 engineer; and County Commissioner Ron Henderson is  
22 here today who will speak last.

23 Real quickly before we do that, I will try  
24 not to beat too many dead horses here, but there's  
25 just a couple quick points I want to go over. Like

1 Southwestern, the county here is not here as an  
2 opponent in the sense of trying to kill this instream  
3 flow.

4           The county and its citizens recognize the  
5 importance and the interest in preserving the  
6 environment and being good environmental stewards.  
7 They recognize the potential benefits associated with  
8 forestalling an ESA listing of the three fish species.  
9 But it's a county, seventeenth most populace of the 64  
10 in the state, and it has obvious, you know, concerns  
11 about the ability to develop its water supplies for  
12 the future of its citizens and its future economic  
13 well-being.

14           You've heard about the balance this board  
15 needs to strike in appropriating an instream flow and  
16 recognizing the needs of man. And the county is here  
17 because we're concerned that the proposed numbers  
18 don't strike that balance.

19           If you've been able to stay awake through  
20 the presentations this afternoon, you probably figured  
21 out that there's not really a magic gospel single  
22 number that can really be applied from a scientific  
23 perspective to this instream flow. There's kind of a  
24 spectrum here that the experts vary on a little bit  
25 that could be deemed reasonable.

1           And so the question maybe to help focus you  
2   on your deliberations coming up soon is what is that  
3   spectrum. Well, I'd submit that the ceiling of that  
4   spectrum is the staff's numbers.

5           WRA's rebuttal statement on the first page  
6   says they agree that the staff's recommended instream  
7   flow rates are the minimum amount necessary to  
8   reasonably protect the environment. I think that's an  
9   admission. And anything you're hearing from Dr.  
10   Woodling testifying on their behalf is asking you to  
11   go beyond that admitted statutory minimum amount. So  
12   that's the ceiling.

13           The floor. We've got numbers from Dr.  
14   Wesche, from our expert, Don Conklin. You've heard  
15   from Dr. Wesche. You'll hear from Dr. Conklin  
16   shortly.

17           As you're thinking about those numbers and  
18   grappling with those, three points I kind of want you  
19   to keep in mind. One question that you need to  
20   satisfy yourself to is: Is there any ulterior motive  
21   or driver that would give incentive to raise these  
22   numbers?

23           You know, Roy Smith talked about the  
24   statewide agreement and sort of there's a lot of  
25   basin-wide objectives here. A lot of the documents

1 attached to the initial recommendation letter talked  
2 about the peril of the Dolores and what a poor fishery  
3 it is. Well, the San Miguel is sort of a pipeline  
4 into the Dolores.

5           So given your kind of statutory  
6 determinations you have to make and the fact that  
7 they're limited to the San Miguel, you need to satisfy  
8 yourself that we're not really trying to help the  
9 Dolores here.

10           The second thing to think about, we've heard  
11 about the filings made in 2010. And, yes, that's  
12 good. The opportunity to do that was appreciated.  
13 But I don't think that's the full story. Those are  
14 applications. They've only been filed. They're not  
15 decreed.

16           You have people in this room who are  
17 opposing those applications very vigorously and have  
18 not shown an incentive -- or a willingness to settle.  
19 You have one of the recommending agencies, the BLM,  
20 who's opposing those applications.

21           So the county is in a tough position here.  
22 We're being asked to accept the instream flows on the  
23 basis that, oh, we've been reasonable and let you  
24 file. But at the same time the other fist with the  
25 hate tattoo is being wielded in the court, the water

1 courts. So think about that.

2 The third thing to think about is this is a  
3 bit of a unique filing. This isn't a headwaters  
4 instream flow. I remember ten years ago when the RICD  
5 controversy was sort of in full boil, the specter that  
6 was raised before the supreme court, before the courts  
7 was, oh my God, you could have a state line RICD  
8 filing nonconsumptive use that will, you know, shoot  
9 that water straight across the border.

10 Well, here you've got the same concern in  
11 some sense. You got a nonconsumptive filing that's  
12 close to the state line. That raises compact  
13 concerns. I don't think you can turn your back on  
14 those.

15 So with that in mind, I've asked Ms. Shpall  
16 to circulate some proposed terms and conditions. And  
17 we would ask that the board consider these and I guess  
18 make them part of the record of its consideration.

19 I'm going to let our witnesses go ahead and  
20 talk. But I think kind of those unique situations  
21 where this being a nonheadwaters RICD and the pending  
22 filings add some importance to the need for those  
23 terms and conditions. And I think it's important to  
24 keep in mind that, you know, the statute 102(4) allows  
25 this board to adopt terms and conditions as part of

1 its appropriations.

2 So, with that, to try and speed things  
3 along, I'll have Mr. Conklin come up.

4 THE CHAIR: Mr. Conklin, welcome. Please  
5 identify yourself for the record.

6 MR. CONKLIN: My name is Don Conklin, and I  
7 work for GEI Consultants representing Montrose County.  
8 I have a short presentation, not very long. It's  
9 getting late, getting past my bedtime.

10 Before I get to it, I left this slide up  
11 here because this illustrates one of the points I'm  
12 talking about. And I want to thank you for doing some  
13 of this work.

14 What this slide shows is historical daily  
15 flows over the period of record, 1954 to 2000, okay,  
16 long period, about 60 years worth of time. It shows  
17 the recommended flows, and it also shows the percent  
18 of the time that they would be met.

19 And this is one of my points about  
20 availability is, you know, is the glass half full or  
21 half empty here. Up to 45 percent of the time on some  
22 of these time periods, the flow is not there to meet  
23 the recommended instream flows.

24 And this is using historic gauge flow data,  
25 the Uravan gauge. I don't really understand the

1 synthetic flow quite that much, being a fish  
2 biologist, but I'm sure I couldn't explain it to the  
3 fish out there.

4 I've got to switch this off and get on, and  
5 I'm not real good at this so give me a second here.

6 THE CHAIR: Stop.

7 FEMALE: Somebody come help.

8 THE CHAIR: Heinz will help you.

9 FEMALE: Heinz is on the way.

10 (Discussion about the equipment.)

11 MR. CONKLIN: All right, a little bit about  
12 my background real quick. I've had basically the same  
13 job since 1984. A couple of name changes and office  
14 changes and a couple of new desks, but still I've been  
15 working since 1984 with either GEI or (inaudible)  
16 Ecological Consultants.

17 I had the PHABSIM volume training going back  
18 to the '80s so I can speak that language pretty well.

19 My main points I want to get to, the  
20 agency's recommendations in my opinion are just a  
21 little bit too high. We're not off a lot. I mean for  
22 most of the year, we're talking about a difference of  
23 about 15 CFS, so not a lot. Some of the other times  
24 of the year, maybe we got a little bit more to talk  
25 about.

1 I also want to talk a little bit about  
2 meeting the instream flows and past flow records. I  
3 think we had a nice drought period here, if you can  
4 call it a nice drought period, we had a drought  
5 period. That does tell us something about the  
6 fishery, and I'll get into that a little bit. And, of  
7 course, I think my recommendations are just a little  
8 bit better than the agency recommendations.

9 There is one thing I hope I can clear up a  
10 little bit here today is what are we actually talking  
11 about, what do these numbers mean. Are they minimum  
12 flows, are they a flow regime, are these flows we  
13 expect, or are these kind of a bottom level of flows  
14 that once we get down to them they start causing us  
15 concern for the resource?

16 And I think I wanted to find is how I'm  
17 treating this is I am not treating the recommendations  
18 that I come up with as a flow regime. I'm assuming  
19 flows will be higher or lower, especially higher in  
20 many cases, than what I'm recommending. And I think  
21 the history and the records will prove that out.

22 I think some other presenters up here have  
23 kind of gone back and forth between, you know, is this  
24 what's going to happen every day or is this sort of an  
25 instream flow that we've got to be concerned about.

1           The fall, winter recommendation of the  
2 agency is 80. I think that's not meant for long  
3 periods of the year. And December especially, late  
4 winter, December through February, and I'll get into  
5 that a little bit real quick. Also the early spring,  
6 late summer flow, a little bit too high. They're not  
7 meant for long periods, and we'll get into that real  
8 quick.

9           This comes out of one of my memos from  
10 August. What we have again is gauge records in the  
11 black line. Those are daily median gauge records, so  
12 it's not synthetic flow. The red line is the agency's  
13 recommendations, and the blue line is my  
14 recommendations.

15           And I want to point out this goes to the  
16 slide that was up before I got up here. There's long  
17 periods of the time, especially late winter, when even  
18 median flows aren't meeting the agency's  
19 recommendations. You also got some periods here in  
20 the summer and here in December, early winter where  
21 the median flow records at the gauge, not synthetic  
22 hydraulic, gauge records at Uravan are saying the flow  
23 is not there.

24           And median, of course, as you know, half of  
25 it is above and half of it is below. So in some of

1 these late winter periods, less than half the time it  
2 will be there. Also in some of the summer periods,  
3 less than half the time it will be there.

4 I think that confusion between is this a  
5 flow regime or is this a minimum flow has kind of  
6 clouded the issue quite a bit. From what I'm looking  
7 at, some of the arguments I've heard today from the  
8 agencies, it seems to be that some of these flows that  
9 they've recommended are intended to enhance the  
10 population which is a fine goal for the agency.

11 That's fine, but it's not what we're here  
12 to look at. We're here to look at minimum instream  
13 flows, not necessarily enhancement flows. If they  
14 want to work with the water users and come up with  
15 enhancement flows, as a biologist I'm all for that.  
16 But that's not what we're looking at here today.

17 They also might look at flows on paper.  
18 Real world benefits, if they're not being met in a  
19 third, 40 percent, half the time, I can't imagine that  
20 a recommendation of 80 in winter when it's not there  
21 more than half the time does much good. It's a paper  
22 flow.

23 Designed to protect habitat levels, I'll get  
24 to that in the next couple of slides. But the idea of  
25 protecting habitat, I'll get into that a little bit,

1 but it's come up in some of the statements. And I  
2 have a problem with that concept, and I'll get to that  
3 in a little bit.

4 And also I've been criticized quite a bit,  
5 but I'll go into a little bit on this. Don't take  
6 into account other species and life stages.

7 These are the (inaudible) curves, PHABSIM  
8 curves we've all been arguing about. The two blues  
9 ones are the ones you've seen before. The  
10 flannelmouth sucker, the lower one, the bluehead  
11 sucker is the higher one, those are the two that have  
12 been circulated that everyone's talking about.

13 I also modeled two others that I got  
14 criticized a little bit for. We'll get into that in a  
15 little bit. And that is the surrogate for speckled  
16 dace. I used longnose dace because we didn't have  
17 data for speckled dace, and I use white sucker fry  
18 because we don't have data for bluehead or  
19 flannelmouth sucker fry.

20 But I think they're reasonable surrogates.  
21 Maybe the numbers would move a little bit to the left  
22 or a little bit to the right or a little bit up or a  
23 little bit up or a little bit down if they were, you  
24 know, flannelmouth sucker curves or if they were  
25 speckled dace curves. But I think in general it kind

1 of gives us an idea of where those two species and  
2 life stages would kind of fall here on the spectrum.

3 And I heard lots of arguments that they  
4 don't like it, but I don't really know if I heard a  
5 good argument that says I can't use them. I do think  
6 they're pretty good surrogates for at least giving us  
7 an idea if there's something else going on in the  
8 basin besides adult bluehead and adult flannelmouth  
9 suckers.

10 Optimum flow. It's been passed around a lot  
11 today, what is optimum flow, what does it mean. The  
12 old definition -- I heard a bunch of definitions  
13 today, some of them pretty interesting. Some of them  
14 sound pretty promising actually. But the old  
15 definition of optimum flow was you pick the peak and  
16 you go down, and there's your optimum flow.

17 So looking at optimum flow, as Dr. Wesche  
18 said, it's kind of ephemeral. It's here, it's not  
19 there, it's whatever. Optimum flow is one flow. But  
20 on any day of the year, it's either going to be higher  
21 or lower than the optimum flow.

22 So optimum is kind of a hard concept in  
23 fishery biology to say, yes, we're going to have  
24 optimum. You're always going to be away from optimum  
25 somewhere. You're always going to be on the high end

1 of the curve at high flows or at the low end of the  
2 curve over here on low flows, and something is going  
3 to be different than optimum just about every time of  
4 the year.

5           The protecting concept. What I've heard is  
6 325 CFS will protect the habitat level. Well, we've  
7 seen from the flow records that high flows out here  
8 especially can get very high over 1,000 CFS. So 325,  
9 you're not protecting habitat because as you get in  
10 those wetter years, you're way down on the curve. The  
11 same with bluehead sucker, you're not protecting a  
12 level of habitat, you're way up here on the curve on  
13 high flow seasons.

14           Also low flows can get, as we'll get into in  
15 a few minutes here, low flows can get very low out  
16 here. You're way down here on the curve. So you can,  
17 you know, put on paper 325 that's what we need or 80  
18 in the winter that's what we need, but you're on this  
19 part of the curve anyway. You're far below that on  
20 many days of the year.

21           I found it a little bit interesting in the  
22 agencies to say, well, the bluehead sucker curve, we  
23 came up with that and we're going to use that, and the  
24 flannelmouth sucker curve, we're going to come up with  
25 that and we're going to use that. And that's fine. I

1 mean I speak this language too. I use this in the  
2 daily part of my career, and that's fine.

3 I find it a little interesting that they  
4 said, oh, yeah, now, by the way, this longnose dace  
5 curve that's a surrogate for the speckled dace curve,  
6 now that's no good, you know, because they're using  
7 different habitat. Well, I don't know. I mean if  
8 these are good enough curves for making a judgment on,  
9 I think this is at least a good enough curve to at  
10 least say, well, there's something else going on here,  
11 and I wouldn't discount that curve.

12 The same with the fry curve. I know it's  
13 white sucker fry, and they're on the east slope. But  
14 I've shocked a lot of white suckers, I've shocked a  
15 lot of bluehead suckers, I've shocked a lot of  
16 flannelmouth suckers. And fish that are about an inch  
17 or two long, they're behaving pretty similarly.

18 So although this may not be exactly right,  
19 it's probably, you know, getting us a little bit in  
20 the neighborhood. And I think it's something to  
21 consider. And I did consider it taking this into  
22 account when I came up with my recommendations.

23 Bluehead suckers, 150 years ago used to be a  
24 bunch of them out there. Then we ignored their  
25 habitat, ignored their needs, and in a lot of streams

1 they went away.

2 Flannelmouth suckers, you know, there used  
3 to be, 150 years ago they were probably pretty common  
4 all throughout the basin. You know, we ignored their  
5 habitat, ignored their needs, and many streams they've  
6 gone away. Not the San Miguel River, but many other  
7 streams they've gone away.

8 And, you know, I tend to think that the  
9 agency is discounting the dace curve, you know. If we  
10 ignore it, will they go away too? And the fry curve,  
11 you know, if we ignore the younger life stages, maybe  
12 that's not a good idea either. So I have a little  
13 trouble with that concept that only the bluehead  
14 adults and only the flannelmouth adults are the ones  
15 we need to be looking at.

16 All right, John Woodling came up with a good  
17 word, nexus. Here's the nexus. I like that word.  
18 2001 Division of Wildlife went out and shocked fish,  
19 got a lot of bluehead suckers, got a lot of  
20 flannelmouth suckers. Everything looked happy.

21 We had a drought in 2002. The next time  
22 they went out to get data was 2008. The fish looked  
23 pretty good, had a good range of sizes and ages,  
24 plenty of bluehead suckers, plenty of flannelmouth  
25 suckers, some longnose dace, a few other species. The

1 community looked pretty good.

2 2000 data will tell us that, yes, the fish  
3 spawned and survived over multiple years. We had  
4 multiply aged classes out there. So there were fish  
5 probably from 2007, 2006, 2005, 2004, maybe some of  
6 those other years.

7 And that tells me that successful spawning  
8 and successful reproduction and successful survival  
9 happened over those years. It's not just a few old  
10 fish that are just hanging on for the species, you  
11 know, just to get the species to the next drought  
12 period. We had pretty good success over those years.

13 The fish looked healthy throughout the whole  
14 drought period is what I can assume because we have  
15 different ages through that period. We do have good  
16 flow data at the Uravan gauge, daily data. Therefore,  
17 we can use this information, this nexus, to tell us  
18 what's going on out there over a pretty stressful  
19 period.

20 And I would suggest that although we argue  
21 about PHABSIM numbers, daily and backwards and  
22 forwards and sideways, I would say a nice real world  
23 experiment when we have good flow data and we have  
24 good fish data saying the fish were in pretty good  
25 shape going into the period and we have fish coming

1 out of the period that are in pretty good shape, I  
2 think that's a good natural experiment.

3           So this is what I came up with. These are  
4 -- you've seen this before, the agency flow  
5 recommendations. What I did is I looked at median  
6 daily flows through the drought period. We had data  
7 from 2001 to 2008. I looked at that period.

8 0           In March the recommendation is 95 -- I mean  
9 115 in March through April. The minimums over that  
10 period -- what I did is I looked at periods of five,  
11 six, eight days, a couple of weeks or so to see how  
12 low flows had gotten and how the fish had gotten  
13 through that.

14           And so we had periods in 2001-2008 that got  
15 down to about 95, maybe even lower than 90 CFS for  
16 quite a while. In April had some pretty good flow  
17 years in there, averaged out to 550, about 600 CFS.

18           In June came down quite a bit through this  
19 period, 90. Still a lot lower than the  
20 recommendation. August, 80 to 100, we had a few  
21 periods in there. Still a lot lower than the  
22 recommendation.

23           And through the winter period, fall and  
24 winter, 65 to 70 CFS for periods and again a lot lower  
25 than the agency recommendation.

1                   2002, an actual drought. I've been accused  
2 of proposing drought flows. Well, let's see what the  
3 drought really looked like. Didn't really hit too  
4 hard in the spring yet. You had 65 to 70 CFS runoff  
5 during the drought was very low. These aren't daily  
6 minimums. Again these like weekly or five, six,  
7 eight-day period minimums.

8                   75 CFS during runoff, that's pretty low. 10  
9 CFS in the middle of the summer, less than 10 CFS. A  
10 lot of single digits in there. Less than 10 CFS in  
11 early August. And less than 10 CFS in the early part  
12 of the fall, although all through the winter is about  
13 40 CFS. The fish survived through this period. These  
14 are drought flows.

15                  I'm not recommending drought flows. What I  
16 recommended was 65 CFS which is more of an extension  
17 of the winter flow, 200 CFS is much higher than  
18 drought periods and I think provides adequate habitat,  
19 as I've said in my statements for using the PHABSIM  
20 curves.

21                  Throughout the middle of the summer 90 CFS.  
22 90 is about what the fish have gotten through in this  
23 period. It's not drought flows, it's not disaster  
24 flows, it's not survival flows. It's what has been  
25 there throughout that period where at the end of that

1 period we still have nice fish populations.

2 And the winter flow, fall and winter, 65 CFS  
3 is my recommendation. That's kind of pretty similar  
4 to what we've had through that dry period where the  
5 fish went in looking good, they came out looking good.

6 So to me that's telling me this is what the  
7 fish need as a minimum. To me, in my judgment, this  
8 is where this is coming from. So my flow regime is  
9 based on the PHABSIM curves, but it's also based quite  
10 a lot on what I call this natural experiment here.

11 I don't intend for this to be a flow regime.  
12 I mean I fully assume that parts of the year will be  
13 much higher than 65, you know, in the spring. I fully  
14 assume that some runoff years will be over 1,000. I  
15 fully assume that, you know, some summer periods will  
16 have higher flows than this, and I fully assume that  
17 in the winter period it will be over 65 sometimes.

18 You know, I'm not recommending a flow regime  
19 with these numbers. But I'm recommending these as  
20 minimum instream flows that I think are needed and  
21 have been demonstrated to protect the environment  
22 through a pretty representative period.

23 So those are my conclusions. I think  
24 reasonable preservation, I think it preserves the  
25 natural flow pattern especially if you take into

1 account that there will be wet years, there will be  
2 dry years, there will natural flow patterns.

3           There will be a variety of wet and dry  
4 years. These are not drought or survival flows. I  
5 saw someone saying that I'm proposing drought flows in  
6 perpetuity. No, that's not what I'm talking about.  
7 I'm talking about instream flows as a guide to give us  
8 an idea of when fish are starting to get stressed,  
9 when we might be thinking about, you know, flows are  
10 getting too low but not as a flow regime.

11           I think my recommendation is a little bit  
12 below the agency's, not by much, but I think theirs is  
13 designed to enhance which is fine as a goal, but  
14 that's not the goal of the instream flow program. So  
15 with that, I'll conclude my testimony.

16           THE CHAIR: Questions of Mr. Conklin?  
17 Travis -- or Director Smith, sorry.

18           MR. TRAVIS SMITH: Thank you. You made a  
19 comment early in your presentation about a nice  
20 drought period. Now I know a little bit about  
21 drought. But what is a nice drought period?

22           MR. CONKLIN: That was probably a  
23 misstatement. It's not very -- but from a fishery  
24 standpoint, it's telling me something.

25           So from a scientific standpoint, it is a

1 nice drought period because it's telling me something  
2 about what's going on with the resource. So in the  
3 scientific kind of way of looking at it, it was a nice  
4 drought period. It's informative to me.

5 THE CHAIR: Director Davis.

6 MS. DAVIS: Do you know how many fish  
7 survived in 2002?

8 MR. CONKLIN: No, but --

9 MS. DAVIS: Do you know how many died?

10 MR. CONKLIN: No. John Woodling said he  
11 suspected there was fish kills, but I don't know that  
12 I heard any reports, any reports of fish kills at the  
13 time.

14 I will tell you there was -- I did do some  
15 sampling here, not in this section of the river, I was  
16 a little bit upstream in Naturita while we were  
17 working for the power plant in Naturita, and some  
18 facts were said about that in my sampling. I did  
19 sampling in 2008 and 2009. Division of Wildlife was  
20 there helping us out a little bit.

21 And those facts were portrayed in testimony  
22 today by Rick Anderson. He said that we've got lots  
23 of fish in 2008, and we did. And we got lots of fish  
24 in 2009, and we did. And we were near Naturita a  
25 little bit upstream from where we are now. And he

1 said that, well, the flows were over 1,000 CFS during  
2 runoff in that period, and that's true. All those  
3 things are true.

4 But the facts he left out were that in 2008  
5 when we were sampling, the flow was about down to I  
6 think about 20, 30 CFS. And the fish made it through  
7 to 2009 because we got many more fish in 2009 than we  
8 did in 2008.

9 And in 2009 the facts that he left out were  
10 that we were sampling and it was about 6 CFS, not 60,  
11 6 CFS. And we got plenty of fish. In fact, we got  
12 hundreds of bluehead and flannelmouth suckers.

13 And some of you know a little bit about  
14 shocking fish, but when you shock fish, you get a  
15 whole bunch of fish, you get them in a bucket and you  
16 got to count them before you can go home. Count them,  
17 identify them, weigh them, measure them if you want.

18 And it's getting dark, and we're in  
19 Naturita. And my crew is looking at me, and we're  
20 counting fish by the hundreds by the headlights of the  
21 truck. And the restaurants were all closing in  
22 Naturita, and my crew was saying, you know, are we  
23 going to be able to eat tonight. Well, not till we  
24 get all these fish done.

25 But it was 6 CFS. And those fish can get

1 through these periods.

2 Now I am not at all, I'm not at all  
3 advocating 6 CFS as a minimum flow. But what I am  
4 saying is they can get through some pretty low flows  
5 once in a while. And if you're treating these minimum  
6 flows as a minimum that you hit sometimes and then you  
7 look for ways to get above it, that's okay. I'm not  
8 advocating a 6 CFS flow regime or even a 65 CFS flow  
9 regime. I'm looking at it as a minimum flow.

10 THE CHAIR: Director Montgomery.

11 MS. MONTGOMERY: I don't doubt at all what  
12 you're saying. But wouldn't you agree that the fish  
13 don't necessarily know where the water is coming back  
14 in its stream? And when you're talking about this  
15 portion that we're looking at, we have flows, return  
16 flows coming back in.

17 MR. CONKLIN: Right.

18 MS. MONTGOMERY: The portion that you're  
19 talking about is right below the CC Ditch, above these  
20 return flows. And that section historically dries up  
21 in the summer. We know that.

22 And what I'm saying is just that if I was a  
23 fish, I mean there's healthy, you know, water below  
24 that in the section that we're talking about. So  
25 easily those fish could swim up into that upper level

1 above the return flows, and that may be the reason why  
2 there were so many fish because there's a healthy  
3 habitat below.

4 MR. CONKLIN: Well, I'd almost say that  
5 you're speculating a little bit.

6 MS. MONTGOMERY: I am, but I think you are  
7 too.

8 MR. CONKLIN: Well, I'm not speculating  
9 because I counted hundreds of fish there and not just  
10 at one site. We had four sites in there, and we had  
11 hundreds of fish at every one of the sites. So I mean  
12 that is a fact.

13 So I mean and a lot of those fish were  
14 younger than a year, small and I'll say that I can't  
15 speculate that one and a half, two, two and a  
16 half-inch fish are really swimming from Calamity Draw  
17 up past Naturita. I would find that a little hard to  
18 believe that those young fish were swimming that far.

19 THE CHAIR: Director King.

20 MR. KING: How long -- and you probably said  
21 this -- how long after it was at 6 CFS did you shock?

22 MR. CONKLIN: It had been dropping through  
23 the summer. I don't have the exact numbers, but in my  
24 mind I'm thinking that it was dropping through the  
25 summer from like late July through August. And we

1 were out there early September. It had been 6 for  
2 probably -- it had been low, maybe less than 20 for a  
3 few weeks, and had been 6 for probably, you know, a  
4 week or so.

5 MR. KING: And so how long after it was 6  
6 did you shock?

7 MR. CONKLIN: It had been 6 for about a week  
8 before we showed up.

9 MR. KING: So within a week of that river  
10 being at 6 CFS you were shocking and getting hundreds  
11 of fish?

12 MR. CONKLIN: Yes.

13 THE CHAIR: Director Biggs.

14 MS. BIGGS: Now are you going to run down  
15 there with your fishing pole?

16 MR. CONKLIN: Well, a lot of them are small.  
17 I mean you're not going to catch them with your  
18 fishing pole, but there were bigger ones too. It was  
19 a balanced population.

20 MS. BIGGS: A couple of things if I could,  
21 Mr. Chair.

22 THE CHAIR: Yes.

23 MS. BIGGS: Don, there had to have been  
24 pools.

25 MR. CONKLIN: Yeah, there were some pools.

1 MS. BIGGS: It's a big wide river. I mean  
2 I'm no expert on the San Miguel, but it's a pretty big  
3 wide river. So there had to have been pools where  
4 they were hiding.

5 MR. CONKLIN: Yes, there were.

6 MS. BIGGS: And I think what's the minimum  
7 you'll get in the river. I won't let my guys get in  
8 the river to shock fish unless flows in the South  
9 Platte River are 200 CFS or below because it's just  
10 not safe. So I think that's -- you don't go in the  
11 river to shock fish when it's 1,000 CFS.

12 MR. CONKLIN: No, you can't do that. I  
13 don't have a number in mind, but when we went out it  
14 was appropriate. I mean 6 isn't giving us much  
15 trouble, I'll tell you that.

16 THE CHAIR: Director Cables.

17 MR. CABLES: Yes, would you mind flipping  
18 back a couple slides to that table you had, right,  
19 right, no -- yeah, right there. And did you use the  
20 term under the 2001-2008 column that it was a natural  
21 experiment?

22 MR. CONKLIN: Yeah, sure, it's a natural  
23 experiment. We have data from the river on flow. We  
24 have data from the river on fish. It's, you know,  
25 PHABSIM has a way of making judgments about these

1 things, but here I have the proof.

2 MR. CABLES: So the column in the right-hand  
3 side is based on the natural experiment that is in the  
4 column there.

5 MR. CONKLIN: Partially, yes.

6 MR. CABLES: And is that a peer-approved  
7 methodology for estimating flows for fish?

8 MR. CONKLIN: I'll have to say that I've not  
9 seen it written out that way, but I'll say that, you  
10 know, these techniques are pretty plastic. You can do  
11 a lot with these techniques. You see that today. I  
12 mean a lot of people are looking at it in different  
13 ways.

14 Peer approved? I don't know. I think, no,  
15 I haven't written it up or I haven't seen it written  
16 up.

17 MR. CABLES: Thanks.

18 THE CHAIR: Any further questions? Thank  
19 you very much.

20 MR. CONKLIN: All right.

21 THE CHAIR: I would just point out that we  
22 have about 20 minutes left in the Montrose County  
23 presentations.

24 MR. AULT: I won't talk that long. Thank  
25 you. Thank you, members of the board. I'm Dan Ault,

1 Deere & Ault Consultants. I'm representing Montrose  
2 County. I've been working here in Colorado as a water  
3 resources engineer for 35 years now, worked all over  
4 the state on various water rights issues.

5 Let me get this -- excuse me, let me get  
6 this slide up.

7 THE CHAIR: Heinz. Wait, wait, wait.

8 MR. AULT: I'd like to start out with a line  
9 diagram or schematic diagram of the San Miguel River  
10 just to put some of this in perspective. And the  
11 first point I want to talk about is compact compliance  
12 and how we see this instream flow right as potentially  
13 affecting that.

14 So let's start at the top. This black  
15 section here is the upper San Miguel with an instream  
16 flow right claim in that reach. Here's Fall River  
17 coming in. And you'll notice there's no instream flow  
18 filing in this reach all the way down to -- this is  
19 the Brooks gauge here. This is Naturita right here.  
20 It's hard to read this diagram.

21 And this purple section here is this  
22 proposed instream flow reach with the Uravan gauge  
23 sitting about right here. This is about a 16 1/2 mile  
24 long reach of the river. And the Uravan gauge at this  
25 point is about six miles upstream of the confluence

1 approximately. So just to put it in perspective.

2 If we are ever under the misfortune of  
3 having a compact call which would mean that the water  
4 rights junior to November 24th, 1922 would be called  
5 out. The water rights that I've shown down in this  
6 lower reach that are in this instream flow reach that  
7 could be called out are these different water rights  
8 shown here in yellow.

9 Of course, we've got the Johnson ditch,  
10 you've got the Blake and Payson pump station here  
11 water right, and the Richards pump station water  
12 right. If a lot of these water rights in the San  
13 Miguel are called out that are junior to 1922, we see  
14 an increasing need to somehow make use of these water  
15 rights that are senior to 1922 in this reach.

16 One possible way of using those would be to  
17 operate future exchanges where that water could be  
18 exchanged up to points of depletion further up the  
19 river. If the instream flow is in place in this  
20 reach, it could preclude future exchanges of those  
21 1922 water rights to further points upstream.

22 And I believe that one of the terms and  
23 conditions that's been proposed is to not have the  
24 instream flow water right compete with those  
25 exchanges.

1           This is one of the hydrographs we've looked  
2   at a lot today with the proposed instream flow  
3   recommendations plotted against the average year  
4   hydrograph at the Uravan gauge. And we've heard a lot  
5   of comments about 167,000 acre feet of water being  
6   available for appropriation over and above the  
7   instream flow rights.

8           Well, yes, that's the volume under the  
9   curve. The question is: Are there facilities in  
10  place to capture that water? Montrose County did not  
11  file on any mainstream water rights nor did any other  
12  water user file -- excuse me, mainstream storage  
13  rights. To catch this amount of water between 325 CFS  
14  and up here to well over 1,000 CFS, you're going to  
15  need a big instream on-channel storage reservoir to  
16  catch that water.

17           This analysis that was discussed by the  
18  Western Resources Advocates doesn't take into account  
19  the actual capacities of what has been filed on.

20           Now I assisted Montrose County and our firm  
21  in making water rights applications. We're looking at  
22  water availability. You can't catch these quantities  
23  of water without large on-channel storage facilities.  
24  You can't catch it with a 1 CFS or 3 CFS at a pump  
25  station. You can't catch these quantities of water on

1 the off channel on the tributary storage reservoirs  
2 that have been filed on by Montrose County.

3 No one has looked at the dry year  
4 hydrograph. This is during the years 1954 through  
5 2010 at the Uravan gauge. We looked at the five  
6 driest years of record during that particular period.  
7 That included the years 1959, 1977, 1981, 1990 and  
8 2002.

9 Now let's look at this. These proposed  
10 instream flows in these five dry years, the average of  
11 those five dry years are well above what the actual  
12 flow was here in the shoulder months except for some  
13 period here, October through about the first week of  
14 November. It's the winter storage season that  
15 basically is preempted by having these instream flow  
16 rights in here.

17 Yes, there are a few peaks in here. But  
18 these peaks come on so rapidly that unless you have a  
19 large on-channel facility on the San Miguel which  
20 Montrose County purposely did not file on because they  
21 did not believe that that would be something that  
22 would ever be able to be permitted in the environment  
23 that we have, we're working with right here.

24 So these spikes are almost impossible to  
25 catch except for a small period here during October

1 prior to the winter storage, you could get some water.

2 Now let's look at an even drier year. Let's  
3 look at 2002. This is the 2002 mean daily discharge  
4 of the San Miguel River at the Uravan gauge.

5 You can see what happens to the availability  
6 of water in a very dry year as a result of these  
7 instream flow filings. There are a few peaks. These  
8 are peaks that are, as I said before, very difficult  
9 if not impossible to catch these peak flows when they  
10 hit unless you have a mainstem reservoir.

11 So all of the discussions about how there's  
12 plenty of water, there's 167,000 acre feet of excess  
13 water available, might be true in an average year if  
14 you had the facilities to catch them. This is not  
15 true in the drought years. And it's in the drought  
16 years where the rubber hits the road and where these  
17 cities and municipalities and water districts need  
18 that water crucially.

19 We've heard that Montrose County has filed  
20 on 6,400 acre feet of water which has been compared to  
21 the fact that there's only 2,000 people that live in  
22 Nucla and Naturita. These water filings made by  
23 Montrose County are not just for Nucla or Naturita.

24 They are also for power generation, future  
25 power generation, future uranium milling, augmentation

1 of other future development on larger acre sites in  
2 rural Montrose County. So we have other water demands  
3 that Montrose County has filed on besides just the  
4 domestic and municipal uses.

5 And as has already been discussed, Montrose  
6 County water filings have not yet been adjudicated.  
7 So we have opposition by some of the parties in this  
8 room. We have no guarantee in Montrose County that  
9 these water rights will be granted.

10 I'd just like to briefly point out one  
11 concern that stuck out at me when looking at the  
12 synthetic hydrology at the downstream terminus of the  
13 instream flow reach. They've gone through quite an  
14 elaborate hydrological procedure to compute the flow  
15 at the downstream terminus.

16 I don't have any problem with computing the  
17 flow as long as the results look correct. I do not  
18 believe that the results look correct for the  
19 downstream terminus as I will point out here.

20 This is the entire basin that's feeding  
21 water into this reach. This section down here, this  
22 little piece down here at the end, is the part -- this  
23 is from one of the -- I can't remember who put this  
24 out, but this is one of the proponents' diagrams from  
25 their materials.

1           We have this piece of the basin that's not  
2   been gauged. So through their hydrology they've  
3   attempted to come up with what would be the flow down  
4   at the lower terminus.

5           This table shows the comparison of the mean  
6   daily discharge at the Uravan gauge for the whole  
7   study period, 1954 through 2007, at during each month  
8   the average flow in CFS. Now the next column shows  
9   the CWCB statistical hydrology at the lower terminus.  
10   And then we show the amount of adjustment to flow.

11           And bear in mind here, we're talking about  
12   six miles from the Uravan gauge down to the lower  
13   terminus. We have very little irrigation return flows  
14   that come in that reach. Most of the large bulk of  
15   the irrigation return flows come in upstream of the  
16   Uravan gauge.

17           So when I look at these numbers, I see the  
18   adjustment in flow. In March, 45 CFS lower. In  
19   April, 147 CFS lower. May, 33 CFS lower. Then June,  
20   90 CFS higher, so forth. July, 74 CFS higher.  
21   August, 79 CFS. September, 61 CFS. October, 47 CFS  
22   higher. And then in November it drops lower.

23           This type of analysis and the numbers I'm  
24   seeing here beg the question how can this be possible.  
25   How do you generate another 62 CFS on top of 130

1 during the entire month of September on average? I  
2 would claim that there's something amiss with this  
3 analysis.

4 I don't know whether it makes any difference  
5 here because I believe the, you know, Uravan gauge  
6 speaks for itself. But I would question the lower  
7 terminus analysis that we've seen.

8 With that, I believe that's all I've got to  
9 present.

10 THE CHAIR: Director Biggs.

11 MS. BIGGS: Dan, can you go back to your dry  
12 year, like the 2002 hydrograph. I mean the 2002 year  
13 was even worse but, you know, a dry year hydrograph.

14 How relevant -- yeah -- how relevant is a  
15 2011 instream flow going to be under those conditions?

16 MR. AULT: How relevant will it be?

17 MS. BIGGS: Yeah, we're going to be so  
18 junior to every other water right in the basin.

19 MR. AULT: Well, there will be times even in  
20 a drought where some water rights occasionally get in  
21 priority. Even in junior years, there may be water  
22 during these spikes where someone might get in and get  
23 a little bit of water.

24 If this is lowered from 80 down to 65, you  
25 can see there will be more water that might be

1 available during some of these periods. So I would  
2 say --

3 MS. BIGGS: I guess my point is for big  
4 blocks of time, we're going to be out of priority  
5 because there's going to be less water in the stream  
6 than the instream flow. So the instream flow is going  
7 to ultimately be irrelevant.

8 MR. AULT: Well, I think it's still in  
9 priority for whatever amount is there, is my  
10 understanding, isn't it? I mean if there's only -- if  
11 you've claimed 80 and you only have 70 in the stream,  
12 you still can call your 70, is my understanding how  
13 this works unless I'm sadly mistaken.

14 THE CHAIR: Director McCLOW.

15 MR. McCLOW: Well, but I think the same  
16 argument applies to this hydrograph that you made with  
17 respect to the wet year hydrograph. That is, you say,  
18 well, there's a lot of water out there, but we can't  
19 use it because we can't capture it.

20 On a hydrograph like that, I would say a  
21 direct diverter can't get much use out of it, at least  
22 not for a domestic supply without a place to capture  
23 those spikes. I mean that kind of an interruptable  
24 supply is not going to be any help to Norwood unless  
25 they've got some place to catch the spikes.

1           The same is true of those large volumes of  
2 water, saying, well, we can't use that 160,000 acre  
3 feet because we can't capture it. But that's true  
4 whether or not we have an instream flow, isn't it?

5           MR. AULT: Well, we've got -- Montrose  
6 County has filed on two storage rights on Maverick  
7 Draw right near Norwood so we can --

8           MR. McCLOW: And they will be senior to this  
9 instream flow, won't they, once they're approved?

10          MR. AULT: Assuming they're approved. But  
11 we have opposition there. We don't know what's going  
12 to happen.

13          MR. McCLOW: That's the way of the world,  
14 sir. Every water right ever filed has opposition in  
15 my experience.

16          MR. AULT: Sure.

17          MR. McCLOW: If it's a valid application  
18 that meets the statutory criteria, I don't see why we  
19 should be concerned about opposition. Mostly  
20 opposition is just to make sure that those other  
21 rights are protected. So long as you meet the  
22 statutory standard for a conditional water right, I  
23 don't see the opposition as a threat.

24          But that's just the way of life. Our  
25 application may be opposed as well.

1 THE CHAIR: Other questions of Mr. Ault?

2 Thank you.

3 MR. AULT: Thank you.

4 THE CHAIR: We have just a few minutes left  
5 on Montrose County.

6 MR. HENDERSON: Good afternoon, ladies and  
7 gentlemen. Ron Henderson, a county commissioner of  
8 Montrose County.

9 Doing a great job of covering several areas  
10 today. I'd like to address one that's particularly  
11 near and dear to the residents of Montrose County, and  
12 that is the residents of Montrose County.

13 Last night I spent the evening in Naturita  
14 with about 100 -- by the count of the sign-in sheet  
15 148 residents who are deeply concerned about their  
16 future economically and socially in the west end.  
17 Part of that concern involves water.

18 Today we've heard several issues brought  
19 forward that underline the reason why the concern that  
20 is in their minds, in my mind as a county  
21 commissioner, and the people that Montrose County has  
22 come forward to go ahead and bring our case before you  
23 and the water court.

24 The problem really does revolve around the  
25 fact of what we can do for ourselves. And if we do

1 not have the ability to go ahead and provide for our  
2 future, we're sunk, especially in the west end.

3 We look forward to working towards that end.  
4 But we have a lot of opposition. Some of it has a  
5 little bit of legitimacy. But like today we have  
6 heard over and over again there's a meeting of  
7 artistry and intellectualism and scientific knowledge,  
8 and that's been bantered about quite a bit.

9 And really all we're really interested in is  
10 providing a future for not only the residents of the  
11 west end of Montrose County but for United States of  
12 America and the rare earths development.

13 You may or may not know that some rare  
14 earths are totally in the hands of China nowadays.  
15 And as recently as last week, I learned that one of  
16 them -- there's 17 -- that China has complete hold of.  
17 And if you export that particular mineral or metal, it  
18 costs you \$138,000 a ton to export it. But if you  
19 move into China with your company and use the metal in  
20 china, it's \$3,800.

21 And that's kind of the future that's shaping  
22 up right now. And we're not doing ourselves any favor  
23 by not providing those same kind of elements for the  
24 success in Montrose County and America.

25 In a lot of ways I would like to end with,

1 you know, one more comment. The west end of Montrose  
2 County is very poor. Montrose County is very poor.  
3 Norwood is poor. And it's a very daunting experience  
4 to come forward and to present an argument in front of  
5 this state board to, you know, ask for some water when  
6 you have no money and you have no way of getting to  
7 any money.

8 And so you're hugely hesitant, just as  
9 Montrose County was hesitant before we went ahead and  
10 decided to move forward. Because we really do feel  
11 like we had no choice in the matter.

12 If we do not go ahead and make a plea for  
13 some of the water in the San Miguel-Dolores River  
14 drainage basin, we're lost. We have no future.

15 And when you have no economic funds to go  
16 ahead and plead your case, which it takes nowadays. I  
17 mean it's a remarkable thing. I wonder, just as a  
18 side note, whether or not you folks have these chairs  
19 shipped along wherever you go because they're so  
20 ergonomically supportive. I know that you exceed my  
21 ability to sit through something like this all day.

22 So given the facts, that really is the case  
23 today. Basically good old honest fear and lack of  
24 money had an awful lot to do with how this thing came  
25 together and the way it was. And really I'll go ahead

1 and apologize for everybody for creating that kind of  
2 confusion that, you know, made things look awkward.

3 But, doggone it, from our standpoint this is  
4 an awkward situation. But we're going to go ahead and  
5 move forward even at, you know, sacrifice. I really  
6 don't have anything else to say.

7 THE CHAIR: Questions for Commissioner  
8 Henderson? Director McCLOW.

9 MR. McCLOW: Commissioner Henderson, I'm  
10 sure that all of us here are sympathetic to your  
11 concerns about economic development. But first of  
12 all, if there were no instream flow filing, if this  
13 had never happened and you wanted to develop water in  
14 the west end of Montrose, you would still have to go  
15 to water court and you would still have opposition.  
16 Don't you think that's true?

17 Whether this flow were there or not, those  
18 water rights you're trying to develop would require a  
19 filing and would generate the same opposition. So  
20 that fact really is not related to this appropriation.  
21 Do you think that's fair?

22 MR. HENDERSON: Not necessarily, and this is  
23 the reason why. I'm not saying that your argument  
24 does not have a great deal of validity and probably is  
25 absolutely true.

1 But the fact of the matter is in the minds  
2 of the individuals who live in Montrose County and  
3 especially the west end of Montrose County and Norwood  
4 really do not have the nexus, I guess is the word of  
5 the day, to be able to get from the problem, the  
6 solving of the problem, using money, to go ahead and  
7 find the experts that are necessary to go ahead and  
8 make a proper application.

9 And in their minds, for the last 50 years or  
10 several generations actually, that really was not an  
11 issue. Everybody was just doing whatever they needed  
12 to do. But that's changed.

13 Everything changes. And I have no -- I'm  
14 not here to argue against change. But the fact of the  
15 matter is when nothing seems to be bothering anything,  
16 why do anything about it?

17 MR. McCLOW: Well, my second question, sir,  
18 is what do you suggest that we do? What is your idea  
19 of an equitable resolution of this situation here?  
20 You've heard all the testimony I think. You've  
21 enjoyed that with us all afternoon I think.

22 MR. HENDERSON: Amen.

23 MR. McCLOW: Tell us what you think we  
24 should do from your point of view, your citizens'  
25 point of view.

1           MR. HENDERSON: Well, truthfully, I think we  
2 are actually very close to having the answer and the  
3 solution. My short-term memory never was any good,  
4 and now that I'm getting older it's really gone to  
5 hell.

6           But the fact of the matter is, the biologist  
7 from the Southwest Water District, whatever, I can't  
8 remember his name, but he had a good presentation.  
9 And I think what he was considering and wanted to  
10 bring forward would go a long ways towards being very  
11 acceptable to Montrose County.

12           And given -- and I also want to give credit  
13 to Mr. Conklin. His comments were very well done.  
14 And I guess I would go ahead and be supportive of the  
15 Southwest Water District biologist mostly because he's  
16 not our biologist.

17           MR. McCLOW: So my final question,  
18 Commissioner, would be the same question Director  
19 Trick asked of the Southwestern District, and that is:  
20 If we were to modify the staff recommendation to the  
21 lower flows, would you agree that Montrose County  
22 wouldn't oppose that filing?

23           MR. HENDERSON: I think that it would be  
24 really scary how close we'd be ready to go ahead and  
25 sign the document. I do not have the level of

1 expertise to go ahead and say that Montrose County  
2 would be able to go ahead and sign it immediately.

3 And that's why we have, you know, our  
4 attorney. But they've given us nothing but good  
5 advice. Our advisers have given us nothing but good  
6 advice. And I don't see any reason why we can't do  
7 this very rapidly.

8 MR. McCLOW: Well, let me make it clear, I'm  
9 not asking you to sign anything right here. I just  
10 want to get --

11 MR. HENDERSON: Thank you, sir.

12 MR. McCLOW: I just want to get a sense of  
13 your feeling of equity here.

14 MR. HENDERSON: No, we're eager to get this  
15 thing cleared up legitimately.

16 THE CHAIR: Director Smith.

17 MR. TRAVIS SMITH: Commissioner Henderson,  
18 thank you for serving the citizens of Montrose County  
19 and enduring this with us. But I want you to know  
20 these chairs belong to Larry Cleaver and Ute Water  
21 Conservancy District.

22 FEMALE: We usually have metal folding  
23 chairs.

24 MR. HENDERSON: I understand, or very hard  
25 plastic. I've sat in a couple of your meetings in

1 very hard plastic. But this is a wonderful facility,  
2 much better than what I experienced in Denver.

3 So, and by your reaction, I think you agree.

4 MR. TRAVIS SMITH: Well, thank you.

5 MR. HENDERSON: Thank you.

6 THE CHAIR: Thank you very much. That,  
7 according to my notes, expires the time available for  
8 the opposition. We have 30 minutes available for  
9 public comment on this, and we'll take that now.

10 And I have three requests for public  
11 comment. The first one is Joan May. We appreciate  
12 you --

13 MS. MAY: Hi, thank you. I apologize in  
14 advance, I'm going to be reading from notes because  
15 for all of us it's kind of late, and I don't want to  
16 miss some of my points.

17 I'm Joan May. I'm chair of the San Miguel  
18 County Board of Commissioners. Thank you very much  
19 for your hard work on this issue over the years, and  
20 thank you for the opportunity to address you again.

21 On behalf of our board of county  
22 commissioners, we unanimously support the  
23 recommendations of your staff, the BLM and Parks and  
24 Wildlife especially preserving the 325 CFS from April  
25 to June to preserve the hydrograph. The health of the

1 San Miguel River is extremely important to the county  
2 and to our region's economy.

3 I would have left my comments at that except  
4 I feel compelled to respond to some of the comments  
5 that have been made this afternoon and tonight,  
6 especially by Mr. Spear and Mr. Whitehead on behalf of  
7 Southwest Water Conservation District and Mr. Wells on  
8 behalf of Norwood Water, and now actually on behalf of  
9 Mr. Henderson who was speaking for Norwood when  
10 actually that's in our county, and I would like to  
11 reserve Norwood to speak on behalf of.

12 Just to clarify the record, Southwest has  
13 not met with our board of commissioners. Southwest  
14 Water has not reported to our commissioners or  
15 consulted with us about any actions they've taken on  
16 this issue nor the position they've stated today.

17 I've attended Southwest meetings where the  
18 San Miguel instream flow has been on the agenda. The  
19 issues were discussed in executive session so I  
20 couldn't attend that. I did stay to listen to the  
21 reports out of executive session, and there was never  
22 any response or report on any of the decisions or  
23 actions that Southwest was intending to take.

24 I was always told Southwest will not be  
25 taking a position on the instream flow. And that was

1 all the information we've gotten from that.

2           It's been stated that Director Montgomery is  
3 San Miguel County's representative to Southwest Water  
4 and that she's had to recuse herself from those  
5 meetings. And she does report to us, but of course  
6 not on that issue because she couldn't attend so that  
7 she could preserve her vote for here.

8           I want to state that the majority of the San  
9 Miguel River that's the subject of this instream flow  
10 that exists in Southwest Water Conservation District's  
11 area actually lies in San Miguel County, not in  
12 Montrose County. And yet San Miguel County does not  
13 feel represented by Southwest's positions as stated  
14 today. In fact, this is the first I've heard of them.

15           Southwest claims that they support an  
16 instream flow on the San Miguel River but not the  
17 agency's recommendation. I just want to say on the  
18 record that San Miguel County does support the  
19 agency's recommendations.

20           San Miguel County did support the one-year  
21 delay of this appropriation so that those with  
22 legitimate water rights could file those. And we did  
23 invite those applicants to work with Southwest on  
24 making that happen.

25           We never supported speculative uses or

1 carve-outs which we feel are not supported by state  
2 law. We did support filings for legitimate rights  
3 within that year.

4 Again I want to thank you for your very  
5 serious time and consideration of this very important  
6 issue. And I ask you on behalf of unanimous support  
7 by my board of county commissioners to appropriate the  
8 instream flow that's been recommended by your staff,  
9 the BLM and Parks and Wildlife. Thank you.

10 THE CHAIR: Thank you, Commissioner May.  
11 Any questions of Commissioner May? Thank you very  
12 much for your patience in waiting.

13 MS. MAY: Sure.

14 THE CHAIR: Next I have Kevin Cook.  
15 Welcome, Mr. Cook, and could you state your name for  
16 the record.

17 MR. COOK: Yes, my name is Kevin Cook, and I  
18 live in Dolores, Colorado. And I want to thank the  
19 board for the opportunity to take advantage of the  
20 public comment section to voice my thoughts on this  
21 particular issue.

22 Basically I'm here to advocate for the  
23 position that was previously endorsed by the San  
24 Miguel County commissioners. And I think that what we  
25 have here is we have a tension here between this

1 particular request for water use and more traditional  
2 people who feel that it's necessary to strongly  
3 protect and advocate for more traditional uses of  
4 Colorado water, agriculturists, mining, et cetera.

5 I'm here to suggest, and I know that this  
6 isn't a question that has an easy answer, but I think  
7 it's something that you can consider. I'm here to  
8 suggest whether those interests aren't actually better  
9 protected by allowing the increased instream flows  
10 that are being considered here.

11 We heard a lot about the native fish. But  
12 one of the things I'd like to point out is that the  
13 native fish are, of course, they're a key component of  
14 the environment but they're not the environment  
15 itself. I was always under the impression that when  
16 you're talking about the environment or the river that  
17 you might generally say that the river is the  
18 environment.

19 Dr. Wesche said that you can preserve the  
20 natural environment with flows that are far below that  
21 which the natural environment would provide. And as I  
22 pointed out, the fish are simply components. They're  
23 a key component. I know they're a key component  
24 because I live in the Dolores River valley, and I know  
25 that the very same species that they talked about here

1 are being considered as threatened and very close to  
2 the edge of extinction.

3 And I feel that it would even better protect  
4 the uses, the traditional uses of water right in the  
5 Dolores valley in general if these instream flows were  
6 allowed.

7 I think that there's -- I pointed out that  
8 there was a lot of confusion among people who are  
9 advocating for protection because they want to protect  
10 the more traditional uses. I think that that is amply  
11 demonstrated by a couple of people came up here and  
12 suggested that these water rights that you're  
13 considering, these instream flow rights that you're  
14 considering, shouldn't be considered because they  
15 might endanger requests for water that haven't even  
16 been made yet.

17 I think that the board is fully capable of  
18 considering those future requests when and if they  
19 should be made. And I think that the board is fully  
20 capable of prioritizing them.

21 I'd just like to say, in conclusion, that  
22 you shouldn't try to maintain the minimum flow -- the  
23 minimal advocates of the minimal flow, I should say.  
24 Because if you make a little mistake there, it's oops.

25 Thank you for the opportunity to support the

1 recommendation.

2 THE CHAIR: Thank you, Mr. Cook. Any  
3 questions of Mr. Cook? Thank you. Appreciate it.

4 Next I have John Porter. Welcome, Mr.  
5 Porter. Could you state your name for the record.

6 MR. PORTER: Yes, my name, is John Porter.  
7 I'm president of the Southwest Water Conservation  
8 District. I thank you for your perseverance and your  
9 attention to a tough issue. Instream flows on the  
10 lower end of the river, down below a lot of  
11 development, those are tough issues and important  
12 issues.

13 I apologize, Mr. Chairman, if I'm going to  
14 be redundant on some issues, but I promise you I'll be  
15 short. Southwest supports instream flows. We are not  
16 an opposer in this filing. We filed as a party so  
17 that we could listen, give our comments.

18 And I grant that CWCB was really  
19 accommodating in delaying this a year, allowing users  
20 to file rights that would be senior to this. That's  
21 very important. There's a lot of rights filed, and we  
22 all know that probably the percentage that will be  
23 adjudicated and decreed are a lot smaller than what  
24 was filed.

25 But my testimony is one thing. And that

1 goes to the statute. The minimum amount of water to  
2 satisfy the environment to a reasonable degree. And  
3 I've heard that 170 CFS during that April through June  
4 time frame is that amount of water.

5 And, therefore, I think 325 is in excess of  
6 that. And that's my comments, Mr. Chairman.

7 THE CHAIR: Thank you very much, Mr. Porter.  
8 Any questions? Seeing none, thank you very much.

9 MR. PORTER: Thank you.

10 THE CHAIR: Appreciate it. With that I am  
11 showing time reserved for the proponents, particularly  
12 CWCB staff and Colorado Parks and Wildlife total 22  
13 minutes plus the reserve time of 20 minutes. And I  
14 would hope that --

15 FEMALE: Yeah, strongly urge you not use it  
16 all.

17 MS. SCHNEIDER: Susan Schneider. Staff  
18 intends to keep its rebuttal under seven minutes  
19 excluding questions.

20 I provided you with the legislation, section  
21 37-92-102. To let the board know in Aspen Wilderness  
22 case there was an allegation or a legal argument made  
23 that the board failed to consider maximum utilization  
24 and conservation of waters. And the court made it  
25 clear that the board has three determinations to make,

1 and only three determinations.

2           This correlation argument, this legal  
3 argument we told you wasn't an argument that you're  
4 supposed to consider. This statute says, and you can  
5 read section 3, it says: Further recognizing the need  
6 to correlate the needs of mankind with the  
7 environment, the legislature hereby vests the CWCB  
8 with the authority to establish instream flows.

9           In other words, the legislature has  
10 correlated the needs of mankind. It's already done  
11 it. It's not the CWCB's duty to make that  
12 correlation.

13           And if that isn't clear by that one  
14 sentence, then if you look at 102(2), the legislature  
15 is recognizing the need to balance surface and  
16 groundwater. And in recognizing the need to balance  
17 surface and groundwater uses, under D, it's provided  
18 the futile call doctrine.

19           And as Director Wolfe will inform you, in  
20 administering a futile call doctrine, the division  
21 engineer doesn't balance surface and groundwater. It  
22 doesn't recognize the previous and existing laws.

23           This same recognition under 2 is the same as  
24 3. It's the legislature doing its job of recognizing  
25 the need to correlate the needs of mankind.

1           So the board should just be considering  
2 whether this is the minimum instream flow to preserve  
3 the natural environment to a reasonable degree.

4           With that said, the CWCB staff believes  
5 strongly that the evidence has shown that the flow  
6 rates suggested by staff, the Division of Parks and  
7 Wildlife and BLM are the minimum amount, and that the  
8 terms and conditions shouldn't be accepted at all.

9           However, if the board is considering  
10 lowering the flow rates, it should not. Those flow  
11 rates should stay the same.

12           If the board is considering accepting some  
13 of the proposed terms and conditions, which staff  
14 believes are not necessary, then staff would suggest  
15 that, A -- and again we're only conditioning the  
16 approval on certain terms and conditions, we're  
17 conditioning that on accepting the proposed flow rates  
18 as provided. So we would accept A.

19           We would accept on the first sentence of B  
20 because the rest of it is a selective subordination.  
21 So we'd accept the first sentence only.

22           We'd accept C, D, E and F, again  
23 conditioning acceptance of those only on the  
24 acceptance of the flow rates as suggested.

25           Again G and H are selective subordinations

1 as well as part 2 for anything besides the first  
2 sentence of B.

3 THE CHAIR: Director McCLOW.

4 MR. McCLOW: Go through the list again,  
5 please, Susan.

6 MS. SCHNEIDER: A is okay with staff,  
7 conditioned upon acceptance of the flow rates as --

8 MR. McCLOW: Yeah, I heard that part. I  
9 just wanted to make sure I've got the rest of it.

10 MS. SCHNEIDER: B, the first sentence  
11 starting with "During" and ending with "if any,"  
12 period.

13 MR. McCLOW: Got it.

14 MS. SCHNEIDER: C, D, E and F.

15 THE CHAIR: Other questions of Ms.  
16 Schneider. I have one. Oh, I'm sorry, Director  
17 Gimbel.

18 MS. GIMBEL: I'm getting tired so I'm going  
19 to (inaudible). Isn't it true that C, D and E are  
20 just restatements of the laws or the rules as they  
21 apply now?

22 MS. SCHNEIDER: Excuse me, Director Gimbel.  
23 C is broader than the current rule. So C is broader  
24 than the current rule. We have the right to determine  
25 whether we're going to file a statement of opposition

1 here. We agreed not to. So it's limiting us.

2 D, you're correct. We will evaluate upon  
3 request any injury with mitigation. And E, that was  
4 again one of the terms and conditions from the  
5 Colorado River instream flow, and the intent of that  
6 is that -- go ahead.

7 MS. GIMBEL: So, okay, so I didn't read E  
8 carefully enough. The first sentence in E is just a  
9 restatement of the law. It's the second statement is  
10 not, that is not appropriate for consideration as a  
11 stream flow standard in any other context; is that --

12 MS. SCHNEIDER: Correct.

13 MS. GIMBEL: Do I have that right?

14 MS. SCHNEIDER: That's for the benefit of  
15 the objectors.

16 MS. GIMBEL: Okay, thank you.

17 THE CHAIR: Director Blakeslee.

18 MR. BLAKESLEE: But C doesn't -- I mean C  
19 basically repeats our de minimus rule anyway, right?  
20 I mean it's in compliance --

21 MS. SCHNEIDER: It's a little more  
22 restrictive on staff. Under the de minimus rule --  
23 oh, I'm sorry, did you say C? The de minimus rule.

24 Under the de minimus rule, it's staff's  
25 discretion whether to file or not. And here we're

1 staying out of the cases. So it's narrower. We're  
2 limiting ourselves to a certain extent.

3 MR. BLAKESLEE: To that one percent? I mean  
4 we will not file if --

5 MS. SCHNEIDER: Correct, total depletive  
6 effect.

7 MR. BLAKESLEE: Right.

8 THE CHAIR: Director Trick.

9 MR. TRICK: Where did these come from?

10 MS. SCHNEIDER: Montrose County.

11 THE CHAIR: Director --

12 FEMALE: Whatever your name is.

13 MR. TRICK: -- Davis. It's been a long day.  
14 It's been a long day. Forgive me.

15 MS. DAVIS: I just want to confirm the  
16 second sentence in E, that the instream flow -- I  
17 guess I'm not clear what it means. The instream flow  
18 water right decreed herein is not appropriate for  
19 consideration as a standard in other administrative or  
20 regulatory permitting context.

21 Meaning if there's a 404 or NEPA process,  
22 the federal agencies cannot use this instream flow as  
23 a standard? I don't even understand what this means.

24 MS. SCHNEIDER: This is the same language  
25 that was developed and included within the Colorado

1 River instream flow. It's an attempt by the objectors  
2 -- and again they acknowledge that the feds will  
3 require permitting in any event and perhaps may  
4 require mitigation in the form of bypass flows in the  
5 same amount of the instream flow. But it's an attempt  
6 for them to hold it in front of the feds and say you  
7 shouldn't impose bypass flows. This instream flow  
8 wasn't effected for that purpose.

9 THE CHAIR: Wait.

10 MS. SCHNEIDER: Okay. Seven minutes.

11 THE CHAIR: I get to ask some questions.  
12 The first question that I have concerns about is the  
13 first one. I know that by statute, statute says that  
14 we must recognize existing uses and exchanges that are  
15 in place. And I'm going to probably ask Director  
16 Wolfe to step in on this.

17 If those recognized uses are never decreed,  
18 I have a little bit of paranoia. If they're never  
19 decreed, state statute says that they're to be  
20 administered as though junior in the time of a call.  
21 If they're never decreed and they're considered the  
22 most junior right on the stream and we in essence are  
23 recognizing them, have we subordinated on a rolling  
24 subordination basis?

25 MS. SCHNEIDER: Our opinion is no, that once

1 -- we say that in the 102(3)(b) decrees. We  
2 explicitly state that while we will subordinate to  
3 them, they're going to be administered in the priority  
4 system.

5 So basically this is something the  
6 legislature has required of us, and we have to give up  
7 that little portion of water, but we give it up to the  
8 stream. And we tell them that they're going to be  
9 administered, and that's part of the decree.

10 So, no, it's not a rolling -- it's a  
11 subordination that we basically -- the next person in  
12 line in effect can pick it up.

13 THE CHAIR: All right.

14 FEMALE: It's required by the legislation.

15 THE CHAIR: I know it's required by the  
16 legislation. It's just the way subordinations are  
17 administered, and an undecreed water right is the most  
18 junior right on the stream. That's what worries me.

19 Director McClow.

20 MR. McCLOW: Well, to follow up on that, I  
21 saw, and I can't put my finger on it right now in this  
22 small book of papers you have, but another draft of  
23 these conditions I saw had another paragraph that  
24 provided a procedure whereby persons who claim this  
25 priority had to make an application within six months

1 after the decree or something like that.

2 Do you remember that?

3 MS. SCHNEIDER: Yes, that was --

4 MR. McCLOW: Why did we take that out? That  
5 seemed to me to be a good idea. It would solve  
6 Director Wilkinson's problem.

7 THE CHAIR: That's where I was headed.

8 FEMALE: Let me -- we are not proposing  
9 these. Montrose is.

10 MR. McCLOW: I understand that, but she said  
11 this was acceptable.

12 FEMALE: Right, but what you're referring to  
13 is something that went beyond this record.

14 MR. McCLOW: No, no, it was in here.

15 FEMALE: It was in there?

16 MR. McCLOW: Yes, ma'am. It was one of the  
17 proposed conditions in one of these --

18 MS. SCHNEIDER: I thought it was in a  
19 previous Montrose County.

20 FEMALE: I thought it was -- yeah.

21 MR. McCLOW: No, no, it was in here.

22 MS. SCHNEIDER: No, but, yeah, I thought it  
23 was in one of the Montrose County documents in here.

24 THE CHAIR: Ms. Bassi.

25 MS. BASSI: It was contained in prehearing

1 statements. And I think where staff comes out on it  
2 is that while that procedure is laid forth, we didn't  
3 want to include all that in the decree itself when we  
4 spoke about this.

5 THE CHAIR: Ms. Shpall.

6 MS. SCHNEIDER: It wasn't a limitation for  
7 six months. They could come in any time. We said  
8 that we would include it within the decree as long as  
9 they did it within six months, but it was a burden on  
10 the decree, it was a burden on us, so we took out that  
11 six month. They can do it at any time. Once they get  
12 a decree, then we have to recognize that. But we  
13 didn't want to include it in the decree, Director  
14 McCLOW.

15 THE CHAIR: But that -- I'm sorry.

16 MR. McCLOW: You go ahead.

17 THE CHAIR: That's my point. If they never  
18 get a decree, I'm afraid of how that's going to be  
19 administered. If they never get a decree and we  
20 recognize that use and the state engineer or the  
21 division engineer administers that water right without  
22 a decree as the most junior right in the stream and we  
23 have to recognize -- I know you're shaking your head.  
24 I know that.

25 But what I'm asking is there a way to remedy

1 that so we don't have to worry about that in the  
2 future? Because I understand what you're saying and I  
3 accept your opinion, but I'm not saying it's cast --  
4 I'm not having the comfort that it's cast in stone.

5 MS. SCHNEIDER: We've done 102(3)(b)s a lot,  
6 and never have they occurred without a decree. I  
7 don't believe that they ever would because they  
8 couldn't call -- they couldn't have us be administered  
9 without having the state division engineers -- them  
10 calling us out or somebody else out. So it's never  
11 happened without them seeking that late decree.

12 THE CHAIR: All right, I'll just settle with  
13 this, you're not giving me any comfort.

14 Director Wolfe.

15 MR. WOLFE: Just to quickly add to that.  
16 I'm glad you brought up the point because I was going  
17 to raise this issue too. Because currently the San  
18 Miguel in this reach is not overappropriated.

19 And so to get to Director McClow's point  
20 too, a lot of these people who may come in and make  
21 appropriations don't go to water court because it is  
22 not under administration. We ran into the same issue  
23 on the Animas River when the RICD came in and these  
24 people found themselves, maybe felt unprotected by not  
25 having a decree in place.

1           And so what we look at now and I presume --  
2   I have not heard staff state this -- what gauge they  
3   would use to administer this call, but I assume it's  
4   the Uravan gauge based on the actual reading not the  
5   synthetic hydrograph that's created at the lower  
6   reach.

7           Just, for example, today the flow is such  
8   that it would not meet that minimum flow today. And  
9   if the CWCB were to place a call under that right, it  
10   would potentially cause that system to go under  
11   administration just by virtue of the instream flow  
12   right today if it were in place.

13           THE CHAIR: Other questions? Director  
14   McClow.

15           MR. McCLOW: It's not a question. I'm just  
16   going to make a statement here. My preference is to  
17   leave A out. I mean if it's -- I think Director  
18   Wilkinson makes a very valid point. By giving it  
19   special recognition, I think we create more problems  
20   than we solve.

21           So I'm going to suggest that in addressing  
22   these conditions, that we delete A as well. That's  
23   just my suggestion while we're on the subject.

24           THE CHAIR: We do have the statutory  
25   requirement, though, to --

1 MS. SCHNEIDER: These are Montrose County's  
2 terms and conditions. We will accept any further  
3 modifications as long as you keep the instream flow  
4 amounts as they are. We're fine with that.

5 MR. McCLOW: I understand where the staff  
6 position is, Ms. Schneider. I'm just -- to conclude  
7 this discussion on the conditions, I'm going to say to  
8 the board that I will not support including condition  
9 A.

10 MS. SCHNEIDER: Thank you, Director McCLOW.

11 THE CHAIR: Seeing no other questions, thank  
12 you, Ms. Schneider. No, I do see another question.  
13 Director Stull.

14 MR. STULL: You predicated this agreement on  
15 the stream flow of 325?

16 MS. SCHNEIDER: Correct.

17 MR. STULL: We heard testimony of three  
18 other suggested rates. Is there something magic about  
19 325?

20 MS. SCHNEIDER: I think we have -- Roy and  
21 Mark and Jeff will be up very shortly, I mean one  
22 minute, two minutes each to address that issue. And,  
23 yes, it is a scientific basis. But not from me.

24 THE CHAIR: Thank you, Ms. Schneider. Jeff.  
25 Mr. Baessler, sorry.

1           MR. BAESSLER: Just real briefly. You've  
2 heard a lot of testimony today with regard to water  
3 availability, and I just want to make the one point  
4 that water is available for your determination whether  
5 you look at the lower terminus where I had Owen  
6 calculate it which is our standard or even as Montrose  
7 County's engineer said, he thinks that the Uravan  
8 gauge speaks for itself. I had Owen calculate the  
9 geometric mean at the Uravan gauge. Water is  
10 available.

11           The recommending entities looked at the  
12 median flow which is very close to the geometric mean  
13 upstream at the Naturita gauge. Water was available.  
14 Water is available for this appropriation per your  
15 standard.

16           One other point is that on page 7 of staff's  
17 rebuttal, we calculated the area under that  
18 hydrograph. And there's a figure in there, you've  
19 heard a lot of testimony how much water is left to  
20 develop. We have a figure in there that's 35,000  
21 acre feet left to develop under the geometric mean.

22           That is incorrect. I had Owen just check  
23 it. That number is actually 138,000 acre feet so  
24 that's significant. And that was brought to my  
25 attention because some of the other proponents and

1 also Deere & Ault were saying under median flow  
2 conditions there was 167,000 acre feet left.

3 So geometric mean is a little bit more  
4 conservative. So I just want to make sure that you  
5 have the correct numbers. 167,000 acre feet under  
6 median. Under the geometric mean which the board  
7 uses, it's 138,000 acre feet. Thank you.

8 THE CHAIR: Director Davis.

9 MS. DAVIS: One quick question. That number  
10 assumes that the -- does it assume that the rights  
11 filed by the folks prior to the instream flow right  
12 will be granted or not?

13 MR. BAESSLER: No, they would have to be  
14 subtracted out, the conditional rights. If they were  
15 on the books when Owen did his calculation, then he  
16 would have taken them into account because he used  
17 CDSS. But if they're not on the books and they're  
18 just conditional water rights, then they were not  
19 considered.

20 THE CHAIR: Director Biggs.

21 MS. BIGGS: But, Jeff, it would have taken  
22 into account, your water availability analysis does  
23 take into account any undecreed uses that are in place  
24 that would reduce the amount of flow at the gauge?

25 MR. BAESSLER: Undecreed uses?

1 FEMALE: Anything that we're aware of.

2 MS. BIGGS: Or if there's uses -- I mean  
3 you use the actual data at the gauge, correct?

4 MR. BAESSLER: Actual data at the gauge,  
5 yes.

6 MS. BIGGS: So if there were uses in the  
7 basin that don't have decrees, you know the issue we  
8 ran into in the North Fork and in other places, those  
9 would have been reflected in the data at the gauge?  
10 Okay.

11 THE CHAIR: Yes, they're reflected in the  
12 data obtained from the gauge itself if they were being  
13 exercised at that time. Director Montgomery.

14 MS. MONTGOMERY: And I was going through my  
15 papers crazy because I just wanted to maybe get out.  
16 There was something that I read in your brief that  
17 talked about the difference between optimum flow and  
18 optimum habitat and the fact that we generally when we  
19 look at instream flows, we actually have consistently  
20 determined that 100 percent of habitat is the minimal  
21 amount necessary. Can you go into that? It was in  
22 your brief.

23 MR. BAESSLER: I think Mark Uppendahl would  
24 be better to address that issue. He'll tell you that  
25 PHABSIM and R2CROSS are very similar and that we have

1 consistently applied the methodology in all of our  
2 appropriations. But I'll let him give you the more  
3 detailed response to that.

4 MS. MONTGOMERY: Thanks.

5 THE CHAIR: Any other questions of Mr.  
6 Baessler before he sits down? Seeing none, we need to  
7 hear from either Mr. Uppendahl or Mr. Smith to answer  
8 Director Montgomery's question.

9 MR. ROY SMITH: Okay, Roy Smith from the  
10 BLM. I'll be very brief.

11 Two questions have been asked. Why is the,  
12 you know, 325 CFS the magic number? And the reason  
13 is, is that we used standard methodology to arrive at  
14 that number. We used PHABSIM which is a widely  
15 accepted instream flow methodology and we used  
16 R2CROSS. Those two methodology produced mutually  
17 reinforcing results that told us that we are in the  
18 right neighborhood.

19 The parties who are suggesting lower numbers  
20 used methodologies that are based more on personal and  
21 professional judgment. Mr. Wesche talked about his  
22 balancing of the weighted usable area. That's not  
23 necessarily an approach that's widely used in the  
24 instream flow world.

25 And then Mr. Conklin talked about just

1 looking at a very dry period from 2001 through 2008,  
2 so sort of focusing in on a very narrow set of years  
3 to develop his recommended flow rate.

4 And so we just feel like our 325 CFS number  
5 is based on standard methodology, and we've got two  
6 different methodologies telling us that we are in the  
7 right neighborhood.

8 When you have an instream flow appropriation  
9 that the board might be more familiar with that's  
10 based on R2CROSS, what you do in that is you say we  
11 need to provide the correct hydraulic parameters to  
12 make as much habitat available as possible for the  
13 fish.

14 And when you apply those three hydraulic  
15 parameters, depth, wetted perimeter and velocity,  
16 you're saying we are attempting to make all that  
17 habitat available for the fish. And it may not be 100  
18 percent of that habitat, but you use those three  
19 hydraulic parameters to say this is a substantial  
20 amount of habitat that the fish need to maintain their  
21 current composition.

22 So it's a hydraulic method. It's a little  
23 bit different way of looking at it, but you arrive at  
24 a number that protects a very high percentage of the  
25 habitat.

1           The other two points that I want to make is  
2   that a lot of concern here is about future  
3   development, and I want to say the Division of  
4   Wildlife and BLM -- or Parks and Wildlife and BLM, we  
5   get that. That's why we so carefully looked at the  
6   numbers that we recommended to the board.

7           We knew that there had to be flows available  
8   for future economic development. And so that's why,  
9   Jeff just mentioned, we have about 138,000 acre feet  
10   in an average year under the geometric mean available  
11   for future development.

12           And even in the driest ten percent of years,  
13   we still have tens of thousands of acre feet available  
14   for future development. So we feel like we've  
15   acknowledged that source.

16           And we feel like by putting this instream  
17   flow appropriation forward, what we're doing is  
18   actually, we hope, making life easier for those  
19   residents in the west end of Montrose County to  
20   implement future water development. Because if you  
21   have a species listing under the Endangered Species  
22   Act in place, everything becomes far more complex and  
23   far more expensive.

24           And I think if Larry's here sitting in the  
25   back of the room, he can talk about the experience

1 that we've had on the Colorado River. And if you have  
2 limited funds for future water development, you don't  
3 want to be spending it on that process. And we're  
4 hoping to avoid that process.

5 So, in closing, I think the board has a  
6 policy decision to make. And I want to go back to  
7 what Mr. Conklin was talking about, and he talked  
8 about, you know, the fish got through that period, the  
9 fish survived that period.

10 That is not our objective here. We have one  
11 of the last undammed major rivers in the state. It  
12 has a thriving native fish community, and we want that  
13 population to be thriving, not just surviving.

14 We want to be able to represent to the Fish  
15 and Wildlife Service, if that day comes, that we have  
16 done a good job protecting this resource. And we can  
17 do that and still have a lot of water available for  
18 future development and address those needs. That's  
19 it.

20 THE CHAIR: Director Trick.

21 MR. TRICK: Roy, there was a slide put up,  
22 and I don't remember who did it now, that showed that  
23 under your recommendation, the staff's recommendation,  
24 that the water was only available 60 to 80 percent of  
25 the time. You don't agree with that, I assume?

1 MR. ROY SMITH: No, I mean I think the  
2 standard that we're using is that the amount of water  
3 that we're requesting is available at least 50 percent  
4 of that time. And that slide that was put up --

5 MR. TRICK: It was the one that showed your  
6 recommendations that were only --

7 MR. ROY SMITH: Right, right.

8 MR. TRICK: Why are we asking for a flow  
9 rate that is only available 60 percent of the time?

10 MR. ROY SMITH: We're using the standard  
11 procedure that the board employs which is we recommend  
12 flow rates that are available at least 50 percent of  
13 the time. So that's -- I guess my answer is that  
14 we're doing what the board procedure has asked us to  
15 do.

16 MR. TRICK: Thank you.

17 THE CHAIR: Director Biggs.

18 MS. BIGGS: I was just going to say, Carl,  
19 if you really look at the hydrographs, the water  
20 availability analyses for many instream flows, you'll  
21 see periods when, you know, under certain conditions  
22 the flows aren't going to be available. That's not  
23 unusual to this filing.

24 MR. TRICK: I realize it's not unusual, and  
25 most instream flows are not as controversial either as

1 this one.

2 MS. BIGGS: You just haven't been on the  
3 board quite as long as I have.

4 THE CHAIR: Any other comments, other than  
5 I'd like to say this is becoming reminiscent of RICD  
6 hearings.

7 MS. BIGGS: Yes, it is.

8 THE CHAIR: If we hit 8:00, it will be real  
9 reminiscent.

10 MS. BASSI: We just wanted to give staff's  
11 recommendation.

12 THE CHAIR: Please.

13 MS. BASSI: Which I don't know if you want  
14 me to read it to you. It's up there. Basically we're  
15 asking you to make the three determinations, to take  
16 final action on this water right, establish January  
17 25th, 2011 as the appropriation date, and request the  
18 AG's office to file the necessary water rights  
19 application.

20 So we are recommending that you appropriate  
21 it as in the amounts recommended by CPW and BLM.  
22 Thank you.

23 THE CHAIR: Questions of Ms. Bassi? We are  
24 now at the place on the schedule where it says CWCB  
25 will deliberate upon the close of presentations,

1 testimony and public comment. We have arrived.

2 FEMALE: But you should also look at the  
3 sunset first.

4 MALE: No.

5 THE CHAIR: I'm sorry, but I think we missed  
6 it. I think we missed that. Director Gimbel.

7 MS. GIMBEL: I'd like to respond to just a  
8 couple of things, and I had at least one board member  
9 ask me. Mr. Whitehead is a very respected member and  
10 adviser to me as the Colorado River commissioner.

11 And so I take seriously his approach to  
12 things and always have. Not that I always agree with  
13 him, but I want to first thank Bruce for his service  
14 because he's put in a lot of time and effort helping  
15 us on Colorado River matter.

16 I want to remind you of something the staff  
17 said originally when they started, and that is that  
18 the standard under the statute is that nothing shall  
19 -- that nothing in the article shall be construed as  
20 authorizing any state agency to acquire by eminent  
21 domain or deprive, deprive the people of the state of  
22 Colorado the beneficial use of those waters available  
23 by law in interstate compact.

24 And if you'll recall, Susan talked about the  
25 difference between deprive and impair. And it is my

1 personal opinion that this does not deprive the people  
2 of water available for interstate compacts.

3 I think it's clear on the record that it  
4 does affect exchanges as any junior right does. And  
5 so I think that you've all heard the arguments. We've  
6 heard there is water available on San Miguel to  
7 develop.

8 We know that there are -- some of us think  
9 we know there's water in the basin as a whole to  
10 develop. And so I don't think we've hit that deprive  
11 statute.

12 And with respect to the state line issues,  
13 it's 30, 38 miles away from state line; is that right?  
14 I'm not sure other than just saying that what that  
15 means because the water is going to go downhill anyway  
16 if nobody takes it. And if we're in a 2002 type year,  
17 instream flow is not going to be in priority anyway.

18 So I just wanted to go on the record. Jeff,  
19 does that explain your --

20 MR. BAESSLER: Yes.

21 MS. GIMBEL: Okay, thank you.

22 THE CHAIR: Director Montgomery.

23 MS. MONTGOMERY: I just really want the  
24 board and the opponents to know that if I thought this  
25 instream flow would hurt my community where I live, I

1 wouldn't be able to vote for it. And I have been  
2 thinking about this instream flow since the day I got  
3 on the board.

4           And I feel very strongly that this  
5 application is not going to hurt the San Miguel basin.  
6 I feel strongly that it is in our best interest, and  
7 that has a lot to do with the fact that if we had an  
8 Endangered Species Act on that river, it would be  
9 devastating for our economy and for all the water  
10 development that we want to happen.

11           I also believe that by helping us to  
12 preserve our natural hydrograph which is the basis of  
13 our economy, which is the basis of our livelihoods,  
14 that that will be a benefit to us.

15           I realize that there is a fear that this  
16 instream flow is going to limit our community's  
17 ability to change senior water rights, that it's going  
18 to limit our ability to use our water in the future.  
19 But I think it's been clearly shown that we do have  
20 water available after this instream flow.

21           I also think it's been clearly shown that we  
22 have a lot of water rights that have been filed which  
23 are in excess of the gap that we have in our basin.

24           I also think that, as a reminder, that these  
25 changes to senior water rights, the instream flow

1 obviously is going to be participating like any other  
2 water right, and there's a lot of other water rights  
3 before this instream flow as was demonstrated by all  
4 that have been filed that are going to be and  
5 objecting before this instream flow.

6 I also think that, you know, I recognize  
7 that our basin has done a great job of preserving this  
8 river and keeping these fish to such a great degree.  
9 But, unfortunately, I'm not sure we could do that in  
10 the future.

11 Because if you look at the examples that we  
12 have, right between this proposed instream flow,  
13 upstream we have the CC Ditch that basically sometimes  
14 diverts so that it's a dry stretch just above this  
15 instream flow.

16 And then just -- well, in the Dolores River  
17 up to the dam, you know, we have an area that we know  
18 is an example of what you don't want to do in order to  
19 preserve the fish. So I think this is a chance that  
20 we have to give these fish in this section.

21 You know, I want you to know I do not like  
22 voting against some of my neighbors and some of the  
23 people that are in my community. But I think the fact  
24 that this instream flow is part of a five-state  
25 agreement and that we've given it so much time and so

1 much thought that I think at this time it is important  
2 to protect what I know we all consider to be a really,  
3 really special river.

4 And with that, if there's no other questions  
5 or comments, I could make a motion.

6 THE CHAIR: Well, we have some. Director  
7 Trick.

8 MR. TRICK: Well, as the gentleman said  
9 earlier, I wish this was yesterday and I had never  
10 heard of the word optimal. And I also wish it was  
11 tomorrow and this was over. But I'm probably not  
12 going to get any of my wishes.

13 I really understand now why we have so much  
14 controversy over climate change. We had four  
15 supposedly scientists or whatever give us four  
16 different opinions on what the flow should be in the  
17 San Miguel River. And honestly I don't know which one  
18 is right.

19 I hear staff is recommending a flow that's  
20 not going to be there but more than 50 or 60 percent  
21 of the time. I'm certainly sensitive of instream  
22 flows and their consequences on a community,  
23 especially when they're in the lower end of a basin.  
24 I see that every two months when I get the board  
25 packet and I see the consent agenda. So I have

1 sympathies for the communities that are objecting  
2 here.

3 At this point I don't know that I can accept  
4 the recommended flow. I think probably there has to  
5 be something in between. But I think one point that  
6 to me is very important is the point that Mr.  
7 Whitehead brought up, and these pre '22 water rights  
8 on the Colorado River are important in some manner.

9 And I'm not sure that this stipulation here  
10 that Susan said she would accept protects those. But  
11 I think this board needs to be looking at that issue  
12 because we're thinking of a water bank of those pre  
13 '22 rights.

14 And if we don't recognize them in some  
15 fashion, I think we should. So I think we should look  
16 at those in some fashion. And I don't know what it  
17 is. If Bruce is willing to, you know, propose some  
18 kind of language that we could look at, like I said,  
19 I'm not confident that this language protects it.

20 And nobody else has seen it besides us and  
21 Montrose County. So that's my two cents worth.

22 THE CHAIR: Director Cables.

23 MR. CABLES: I'd just like to make a comment  
24 on the science. Because when the U.S. Fish and  
25 Wildlife Service looks at these species, and they've

1 already been petitioned, at least some of them for  
2 listing, they're not going to look at artistry and  
3 they're not going to look at unproven methodologies.

4           They're going to look at the methodologies  
5 that have been proven, the standard and the staff  
6 and -- our staff at CWP but the staff and the BLM  
7 folks here used the standard that they're going to  
8 use. And the worst outcome here is the listing.

9           So, you know, whether it's minimal, optimal,  
10 whatever, you know, kind of twisted, tortured language  
11 we want to use about that, we in my view, the board  
12 needs to really consider the standard that will be  
13 used by the Fish and Wildlife Service and ensure that  
14 we're taking the precautionary measures necessary so  
15 these species don't get listed.

16           And I really compliment everyone. I think  
17 it's been a very respectful dialogue today from both  
18 sides. I particularly am impressed in reading through  
19 the analysis that the staff and our folks did on this  
20 using those proven methodologies.

21           But that really to me is the essence of this  
22 decision. And it's really crucial. Thank you.

23           THE CHAIR: Comments?

24           FEMALE: I just want to build, if I could, I  
25 just want to build on what Director Cables just said

1 because I couldn't agree more. You know, I'm seven  
2 months into a section 7 consultation, a streamlined  
3 section 7 consultation, to move effluent 20 miles. No  
4 depletions whatsoever, just to move the point of  
5 discharge 20 miles. Seven months and counting on a  
6 streamlined section 7 consultation.

7           The other thing I want to add on the science  
8 is we've got, you know, Parks and Wildlife and BLM  
9 that were out on this river multiple years using, you  
10 know, approved, peer-reviewed, vetted methodologies.  
11 I have a tremendous amount of respect for the other  
12 people who looked at it.

13           Dr. Wesche is clearly an expert, but he used  
14 best professional judgment and stopped by and looked  
15 at the river. I have hired Don Conklin. I have  
16 tremendous respect for Don Conklin, but he doesn't  
17 work with our instream flow program very often, and he  
18 used a different, completely unrelated methodology.

19           What happens to -- I mean we've done  
20 hundreds, if not thousands, of instream flows in this  
21 state using the methodology that BLM and Parks and  
22 Wildlife applied in this instance.

23           We can't just arbitrarily decide that in  
24 this instance we're just going to pick a different  
25 methodology. I think we'd open ourselves up to

1 tremendous vulnerabilities for being arbitrary and  
2 capricious. But that's just -- so my two cents.

3 THE CHAIR: Director King.

4 MR. KING: Thank you, Director Wilkinson.  
5 Real quick. I think that back in January when we  
6 moved this forward, we had some of the same  
7 discussion. And the process is always so critical  
8 and finding that balance.

9 And I think that where I find myself is  
10 saying, okay, we provided a timeout, we gave the  
11 community the opportunity to file rights and get in  
12 priority ahead of this instream flow. We're going to  
13 have water available, you know, 50 percent if not more  
14 going forward after the instream flow is in place.

15 And my concern is, you know, our objective  
16 is to have a meaningful instream flow program where  
17 we're protecting our natural resources to a reasonable  
18 degree. If that's to mean anything, at some point you  
19 have to say, you know, this is the time.

20 And I think to cut it in half one more time  
21 puts us at jeopardy of saying the only time we can  
22 have an instream flow is when it's left over and it  
23 won't do what we need it to do. And so I think we're  
24 there. For me, we're there and I think we've struck  
25 that balance.

1 THE CHAIR: Director Montgomery. Hang on a  
2 minute. Director Trick.

3 MR. TRICK: I was just handed some language  
4 by Southwest that says CWCB agrees not to file  
5 statement of opposition for any change of water rights  
6 used prior to the date of ratification of the Colorado  
7 River Compact.

8 That's pretty plain and to the point.

9 FEMALE: Would you read that again?

10 MR. TRICK: You want me to read it again?  
11 CWCB agrees not to file statement of opposition for  
12 any change of water rights used prior to the date of  
13 ratification of the Colorado River Compact.

14 THE CHAIR: Used prior to, used prior to.

15 MR. TRICK: Pre '22.

16 THE CHAIR: Are they trying to incorporate  
17 perfected by use prior to 1922? Is that the reason  
18 for that language? Not appropriated but used prior  
19 to.

20 MR. TRICK: Do you want to call him up and  
21 ask him?

22 THE CHAIR: No.

23 MR. TRICK: Well, I can't answer the  
24 question.

25 THE CHAIR: Okay.

1 MR. TRICK: I think it's important to  
2 protect in some manner those pre '22 water rights. If  
3 that's -- I don't know what the state has in mind with  
4 a water bank, et cetera, et cetera, but if there are  
5 not some protection or some measure to recognize them  
6 in some fashion, I don't know how we can deal with  
7 them.

8 THE CHAIR: Director Gimbel.

9 MS. GIMBEL: Here's what I would suggest.  
10 We are going through a compact compliance study  
11 looking at these rights, where they are, how they can  
12 be analyzed. And I think that, Carl, I recognize your  
13 concern because we want to protect our pre 1922 water  
14 rights. However, I feel very uneasy about a carte  
15 blanche on that at this point.

16 What I would suggest is that maybe we as a  
17 board, for staff and then bringing it to board, start  
18 talking about some policies and procedures to address  
19 that issue. But I just feel it's a little premature.

20 And Ted's shaking his head so I think he  
21 knows the compliance study. So I'm just a little  
22 concerned about doing that right now.

23 THE CHAIR: Director Trick.

24 MR. TRICK: Didn't we have that same concern  
25 on the Colorado River instream flow, and we did

1 protect the pre '22 rights in some degree; is that not  
2 correct?

3 THE CHAIR: No.

4 MR. TRICK: No?

5 MS. GIMBEL: Go ahead.

6 THE CHAIR: No. What we did on the --  
7 you're talking the wild and scenic on the Colorado  
8 River? What was done there was if there wasn't a  
9 criterion established for the administration of the  
10 instream flow water right during the period of compact  
11 compliance, then the instream flow had no effect at  
12 the time of compact compliance if there wasn't rules  
13 and regulations put in place to deal with the  
14 administration of the instream flow at the time of a  
15 compact compliance enforcement.

16 Is that a fair representation? I'm getting  
17 a positive on that.

18 The one thing that I would say about the  
19 language that was proposed, I have very significant  
20 reservations about that unless it was to realize the  
21 beneficial use of that water at a time of compact  
22 compliance.

23 Otherwise, you're giving carte blanche to a  
24 change of water rights pre 1922 that could be changed  
25 for any purpose whatsoever. If it's being changed for

1 the purpose of realizing an alternate beneficial use  
2 at the time of a compact compliance enforcement  
3 action, then I could probably see going along with  
4 that.

5 But that's too, at least for me as a board  
6 member, that's too broad for me. Any other comments?

7 MR. TRICK: Respond?

8 THE CHAIR: Yes, please.

9 MR. TRICK: And I agree with you, and I'm  
10 not a lawyer and I don't pretend to come up with the  
11 language that's acceptable. All I'm doing is trying  
12 to get the board to recognize, and if they are  
13 recognized in the same fashion that they were under  
14 the wild and scenic, I think that's appropriate.

15 But I think that the state needs to  
16 recognize those in some fashion so that they can be  
17 used or transferred or something for the benefit of  
18 the state under a compact call if one ever arises.

19 THE CHAIR: Director Hamel.

20 MR. HAMEL: I guess a question of the board,  
21 in the language we used in the Colorado River instream  
22 flow and the similar language we used in the Pitkin  
23 County RICD, is it applicable to include in this  
24 filing?

25 THE CHAIR: Director McCLOW.

1 MR. McCLOW: I think he asked a question.

2 FEMALE: So are you going to answer it?

3 MR. McCLOW: I thought he was going to  
4 answer it. I was going to speak to Director Trick.

5 MS. GIMBEL: Here's Jennifer Gimbel's take  
6 on it. The RICDs are -- you can't even compare them  
7 to the stream flows in my mind. So it's not even  
8 comparable.

9 I don't think the Colorado River is  
10 comparable either because that was an alternative to a  
11 wild and scenic proposal.

12 And so what I, quite honestly, am concerned  
13 about is that every instream flow right from here on  
14 out is going to ask for that language. I just don't  
15 think it's appropriate.

16 MR. HAMEL: Thank you.

17 THE CHAIR: Now Director McCLOW and then  
18 Director Biggs.

19 MR. McCLOW: Well, I think that Director  
20 Trick has raised a very important point. But I think  
21 Director Gimbel has offered us a solution, and that is  
22 to say that between tonight and the time there is a  
23 decree issued for this appropriation, there is time  
24 for us to adopt some policies that relate to that  
25 issue which would enable the staff and our legal

1 counsel to incorporate that policy into this decree.

2 And if we just tell them that that's our  
3 desire, I think that we can work on protecting those  
4 pre '22 rights which all of us are interested in. So  
5 that's what I suggest that we do for tonight is try to  
6 work on the policy that Director Gimbel has suggested  
7 in the near future giving the staff the opportunity to  
8 offer that protection within the decree for this water  
9 right.

10 THE CHAIR: I've got Director Biggs and then  
11 Director Montgomery.

12 MS. BIGGS: I was just going to -- I think  
13 Director McCloy covered pretty much exactly what I was  
14 going to say. Rather than trying to craft language  
15 for every individual instream flow that's always going  
16 to be a little different, and then we're going to end  
17 up with this patchwork out there, it would be much --  
18 we'd be much better off to just -- it's a global  
19 problem, and we need to deal with it with a global  
20 policy.

21 THE CHAIR: Director Montgomery.

22 MS. MONTGOMERY: Go ahead -- yeah, let --

23 THE CHAIR: Director Gimbel.

24 MS. GIMBEL: I'm reflecting on what Director  
25 King talked about. And we certainly can bring a

1 proposal to you. That's not an issue. But I think --  
2 I hear in this conversation an automatic protect all  
3 1922 -- I don't know if all of them can be protected,  
4 although my official statement to Nevada is they can.

5 But that's why I talked about -- here's the  
6 problem. That's what we're looking at with the  
7 compact compliance study, where they are, what are the  
8 good ones, what are, you know, the ones that can be  
9 used for exchanges most effectively. And so I can't  
10 get all that done by this decree.

11 I hear what you're saying, Director McCLOW.

12 MR. McCLOW: (Inaudible)

13 THE CHAIR: Director Montgomery.

14 MS. MONTGOMERY: Well, a couple of things  
15 here. I think -- I fail to see how this instream flow  
16 decree with this appropriation date is going to be the  
17 problem with the change case for a pre '22 water  
18 right. There are so many other water rights that are  
19 going to be objecting before this one.

20 And I think by making a policy, by tying our  
21 hands that we can't object to a pre '22 water right,  
22 well, what about the other hundreds that may be. And  
23 so I think this just goes again to how can we  
24 subrogate our water right.

25 I also think that for the board to have a

1 discussion about this policy is a great idea. But I  
2 would never ask staff to put in some more time tonight  
3 and to rush that policy for --

4 MALE: (Inaudible)

5 MS. MONTGOMERY: Well, what I heard was that  
6 this was going to be part of this instream flow. And  
7 I don't think that it should be. I think we're once  
8 again not treating this instream flow as any other  
9 water right, and that's the way it should be treated.  
10 And I have a hard time with policies for that.

11 MR. McCLOW: I withdraw my suggestion.

12 MS. MONTGOMERY: Thank you.

13 MR. McCLOW: Completely, I withdraw my  
14 suggestion.

15 THE CHAIR: Director Smith. Director Smith.

16 MR. TRAVIS SMITH: Thank you, Mr. Chairman.  
17 We're in the twelfth hour here of this meeting. And  
18 one thing I've learned with the time on the board, an  
19 instream flow is not a second-class water right.

20 And I think what we're -- and I'm not  
21 interested in eleventh hour deals. And so we've --  
22 there's been a lot of time spent on this application.  
23 It starts in '05, '08. I know it's created heartburn  
24 in local communities. I know it's been a strain and  
25 maybe a hardship for some.

1           But I have confidence in the process that  
2   we've just gone through here today and the  
3   thoughtfulness for this board in the deliberation.  
4   And so I'm interested in completing the process of --  
5   it's not a second-class water right. And that's what  
6   I've learned by being on this board.

7           And I know there's other issues with studies  
8   that are out there. But here we are, it's -- we  
9   struggle at times to make -- and it's not without  
10  controversy, and I think that's to be expected as the  
11  instream program goes forward. Applications are going  
12  to have more controversy involved. And so I'm  
13  interested in making a decision here tonight.

14           FEMALE: Is that a motion?

15           THE CHAIR: No. Director Montgomery.

16           MS. MONTGOMERY: And, with that, I would be  
17  prepared to make a motion. I would like to recommend  
18  that we approve staff's recommendation with the flow  
19  amounts recommended by the staff, the BLM and the  
20  Colorado Parks and Rec with the addition of certain  
21  conditions as provided by Montrose County, and those  
22  would include condition number B, first sentence.

23           FEMALE: No (inaudible).

24           THE CHAIR: It's her motion.

25           MS. MONTGOMERY: If I'm wrong. Okay, B

1 first sentence, C, D, E and F. With staff's  
2 recommendation, we find that there's a natural  
3 environment that does exist, that water is available  
4 in the subject reach of the San Miguel River, the  
5 natural environment will be preserved to a reasonable  
6 degree, and that such appropriation can be made  
7 without injury to water rights.

8 Also that we would establish January 25th,  
9 2011 as the appropriate date, and that we request the  
10 attorney general to find the necessary water right  
11 application.

12 MR. BLAKESLEE: Second.

13 THE CHAIR: I have a motion by Director  
14 Montgomery, a second by Director Blakeslee to accept  
15 staff recommendation and in addition to accept the  
16 provisions provided in the proposed terms and  
17 conditions for the San Miguel River instream flow  
18 decree as has been distributed to the board. And  
19 those provisions are recorded so I will not go back  
20 through them.

21 Discussion? Director Wolfe.

22 MR. WOLFE: Just a clarification. It looks  
23 like there's been proposed terms and conditions for a  
24 proposed decree, but isn't there the whole process to  
25 go through to get the application filed, and there's a

1 time frame which parties can work out terms and  
2 conditions? It seems like you're going to fall short  
3 of suggesting just these, and there could be a whole  
4 vast array of others that need to be incorporated out  
5 there.

6 I'm just wondering why we're struggling over  
7 trying to get all these proposed terms and conditions  
8 in there at this stage of the game.

9 THE CHAIR: I cannot speak for Director  
10 Montgomery.

11 MS. MONTGOMERY: You can.

12 THE CHAIR: I can?

13 MS. MONTGOMERY: Just this time.

14 THE CHAIR: I think what Director Montgomery  
15 was trying to do is state the intent of the board at  
16 the time of appropriation to move forward with this  
17 water right. And I understood from her motion that,  
18 if I'm not mistaken and I don't know how to paraphrase  
19 this, but that the discussions would continue for the  
20 formulation of the application, the necessary water  
21 rights application. Is that correct?

22 MS. MONTGOMERY: I'm assuming that's the way  
23 it works, yeah.

24 THE CHAIR: Does that answer your question,  
25 Director Wolfe?

1 MR. WOLFE: Yeah, I just want to make sure,  
2 I mean was this intended to bind the board when they  
3 filed an application that they had to put these in  
4 there verbatim and be bound by these, or is it really  
5 an intent to get this -- your intent to cross that  
6 recognizing these could vary somewhat?

7 Because I've been through this enough that,  
8 you know, we can all look at this tonight, and then  
9 you'll look at it tomorrow and somebody is going to  
10 suggest a change to it. So I'm just trying to  
11 understand what this is doing when we're acting on  
12 this as part of the motion.

13 MS. MONTGOMERY: I would have to defer to  
14 staff as to how they normally deal with these  
15 conditions.

16 THE CHAIR: Go ahead, if you want to answer  
17 that. I guess I'm as a board member going to say what  
18 my interpretation is. I think it's along the same  
19 lines as what we did on the Colorado River wild and  
20 scenic, that the motion was saying this isn't the  
21 straightforward instream flow water right with those  
22 recommendations; that during the intent to  
23 appropriate, this is the intent of the board in that  
24 appropriation of that water right that these  
25 conditions somehow be worked into the application, is

1 the way I interpreted it as a board member.

2 MR. WOLFE: And that's fine. The title on  
3 here says proposed terms and conditions for the  
4 decree. So I just want to make sure that's clear on  
5 the record what you're adopting.

6 THE CHAIR: Director McCLOW. We're in the  
7 discussion phase of the motion right now, to clarify.

8 MR. McCLOW: I understand. And I'm going to  
9 ask Director Montgomery if she would accept a friendly  
10 amendment to her motion to delete the reference to  
11 these conditions.

12 MS. MONTGOMERY: Yes, I would delete the  
13 conditions.

14 MR. McCLOW: All right, I would move to  
15 amend the motion to delete the discussion of these  
16 conditions to the decree. Second that?

17 THE CHAIR: Is there a second, or does the  
18 second accept that amendment?

19 MR. BLAKESLEE: Yes.

20 THE CHAIR: Okay, we've got an amended  
21 motion now in front of the board that we will discuss  
22 in its amended form. In other words, as I understand,  
23 the amended motion is it's exactly what is stated on  
24 the screen and contained in the staff's recommendation  
25 to the board. No other expression of intent in that

1 regard.

2 And it is acceptable to the second so we  
3 have an amended motion on the floor. Seeing no  
4 further discussion, all those in favor of the amended  
5 motion on the floor, please signify by saying aye.

6 SEVERAL VOICES: Aye.

7 THE CHAIR: Opposed.

8 ONE VOICE: Aye.

9 THE CHAIR: Motion carries with one  
10 dissenting vote. I think we have a vote of eight to  
11 one in favor of the motion, so the motion carries with  
12 a minimum of six votes required to pass a motion in  
13 front of the board.

14 With that, that concludes the hearing.  
15 Going back into the regular business meeting, I want  
16 to tell the audience as well as those that are  
17 listening on the streaming over the internet that the  
18 first order of business tomorrow will be a  
19 consideration of action associated with the proposal  
20 submitted under paragraph -- or excuse me, agenda item  
21 5-J. Once that is considered, hopefully in a timely  
22 manner in the morning, we will move immediately into  
23 the remainder of the agenda.

24 Thank you. We're recessed for this evening.

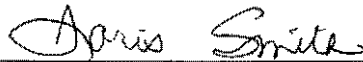
25 (End of recording.)

## C E R T I F I C A T E

I, Doris Smith, do hereby certify that I prepared the foregoing transcript from a compact disk provided to me. I certify that this transcript is complete and accurate to the best of my ability to hear and understand the proceedings.

I further certify that I am not employed by nor related to any parties herein and have no interest whatsoever in this matter.

Dated this 5th day of December, 2011.



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