

## **BEFORE THE COLORADO WATER CONSERVATION BOARD**

---

### **IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION DIVISION 6: TROUT CREEK**

---

#### **ORDER RE: ISSUES DISCUSSED AT PRE-HEARING CONFERENCE**

---

THIS MATTER came before the Hearing Officer for a Pre-Hearing Conference on September 10, 2019. Staff for the Colorado Water Conservation Board ("Staff") was present and represented by counsel. The Bureau of Land Management ("BLM") was present through Mr. Roy Smith. Knott Land and Livestock Company, Inc ("Knott") was present through Mr. Tyler Knott and represented by counsel. Twentymile Coal, LLC ("Twentymile") was present through counsel.

During the Pre-Hearing Conference, the Hearing Officer and the parties discussed the following issues, and the Hearing Officer orders as follows:

#### **Date of the Hearing**

The hearing for this matter is scheduled for the CWCB's meeting scheduled for November 20-21, 2019, in the Denver Metro area. The exact location and time of the hearing has yet to be determined. The Hearing Officer will issue a notice of the exact location and time of the hearing when it is so determined. The Hearing Officer also recommends that the parties keep Tuesday, November 19, 2019 open as a possible date for the Hearing.

#### **Relevant Issues for Hearing**

The relevant issues for the Hearing are limited to the following factors as required by section 37-92-102(3)(c), C.R.S.:

1. Whether the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made;
2. Whether there is a natural environment that can be preserved to a reasonable degree with the CWCB's water right, if granted; and
3. Whether such environment can exist without material injury to water rights.

Anything not related to these three factors is not relevant and will not be allowed to

be presented at the Hearing, pursuant to Rule 5.j.(3) of CWCB's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules"). At this point, Knott and Twentymile are contesting all three of the above factors. The parties should continue discussions to determine if the issues in dispute can be further refined.

### Witnesses

Staff anticipates calling three witnesses at the Hearing: Rob Viehl, Jack Landers, and Brandy Logan. Katie Birch from Colorado Parks and Wildlife may also be called by Staff. Staff anticipates testimony to take 1.5 hours (1 hour for case in chief, 30 minutes for rebuttal).

BLM anticipates calling two witnesses: Roy Smith and Tom Fresques. BLM anticipates testimony to take 40 minutes (25 minutes for case in chief, 15 minutes for rebuttal).

Knott anticipates calling three witnesses: Tyler Knott, Shelly Hoover, P.E., and Theresa Jehn-Dellaport, P.G. Knott anticipates testimony to take 2 hours.

Twentymile anticipates calling two witnesses: Bruce Lytle, P.E. and Chris Fehn, P.E. Twentymile anticipates testimony to take 1 hour.

As noted by the Hearing Officer at the Pre-Hearing Conference, the Hearing is a "notice and comment" hearing pursuant to section 37-92-102(4)(a), C.R.S. and Rule 5.j.1 of the ISF Rules. Accordingly, witnesses will provide comments, rather than present their testimony through direct examination, and no witnesses will be cross-examined. No party will be allowed to compel testimony of any witness. See ISF Rule 5.p. Members of the public will be allowed to comment. See ISF Rule 5.j.

### Written Testimony

The parties asked to submit written testimony as part of their rebuttal statements, although the current deadline for submission of written testimony as part of pre-hearing statements has already passed. The Hearing Officer grants the request. Parties shall have the ability to raise concerns with any submitted written testimony orally at the Hearing.

### Preliminary Order of Presentation at Hearing and Requested Presentation Time

Proponents of ISF (Case in chief): Total of 1 hours 25 minutes of presentation time

Staff - 1 hour

BLM - 25 minutes

Opponents of ISF: Total of 3 hours of presentation time

Knott - 2 hours  
Twentymile - 1 hour

Proponents of ISF (rebuttal): Total of 45 minutes of presentation time

Staff - 30 minutes  
BLM - 15 minutes

The Hearing Officer expects the parties to discuss coordination, including where there might be any agreement on facts and law. The parties are also encouraged to consider shortening and streamlining their presentations. The Hearing Officer may order a second pre-hearing conference to further discuss focusing the Hearing.

**Deadline for Demonstrative Exhibits**

The deadline for the parties to submit demonstrative exhibits to the other parties to this proceeding is Wednesday, November 13, 2019.

**Staff's Unopposed Motion to Amend the Pre-Hearing Statement of Staff to Supplement Exhibits to be Introduced at Hearing**

At the Pre-Hearing Conference, Staff requested leave to file an Amended Pre-Hearing Statement to supplement their exhibits to include the BLM's field notes containing information collected along BML Transect 1 on August 2, 2017. The Hearing Officer requested Staff to file a motion regarding this issue. On September 16, 2019, Staff filed an unopposed Motion to Amend the Pre-Hearing Statement of Staff of the CWCB to Supplement Exhibits to be Introduced at Hearing. The Hearing Officer, having reviewed the motion and being otherwise adequately advised, GRANTS the motion. Staff's Amended Pre-Hearing Statement and new Exhibit 15, Field Notes containing data collected by the BLM at BLM Transect 1 on August 2, 2017, are accepted and made part of the record in this matter.

Dated this 18th day of September, 2019.

By the Hearing Officer:

*[Handwritten signature: Amy Beatie]*  
for *[Handwritten signature: Amy Beatie]*

Amy W. Beatie  
Deputy Attorney General  
Colorado Attorney General's Office  
1300 Broadway, 7th Floor  
Denver, CO 80203  
720-508-6295  
[Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

### Certificate of Service

#### Contested CWCB ISF Appropriation on Trout Creek

I hereby certify that on September 18, 2019, a true and correct copy of the foregoing ORDER RE: ISSUES DISCUSSED AT PRE-HEARING CONFERENCE was served via email to the parties referenced below:

#### Hearing Officer

Amy Beatie  
Deputy Attorney General  
Natural Resources & Environment Section  
Office of the Colorado Attorney General  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
720-508-6296  
[Amy.Beatie@coag.gov](mailto:Amy.Beatie@coag.gov)

#### Party Status

<u>Staff of the Colorado Water Conservation Board</u> Linda Bassi Rob Viehl Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3204 <a href="mailto:linda.bassi@state.co.us">linda.bassi@state.co.us</a> <a href="mailto:rob.viehl@state.co.us">rob.viehl@state.co.us</a>	<u>Counsel for Staff of the Colorado Water Conservation Board</u> Jen Mele First Assistant Attorney General Andy Nicewicz Assistant Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6259 <a href="mailto:jennifer.mele@coag.gov">jennifer.mele@coag.gov</a> <a href="mailto:andy.nicewicz@coag.gov">andy.nicewicz@coag.gov</a>
<u>Bureau of Land Management</u> Roy Smith DOI, BLM, Colorado State Office 2850 Youngfield Street Lakewood, CO 80215-7093	<u>Knott Land and Livestock Company, Inc.</u> Kent Holsinger Alyson Meyer Gould Holsinger Law, LLC 1800 Glenarm Place, Suite 500

303-239-3940 <a href="mailto:r20smith@blm.gov">r20smith@blm.gov</a>	Denver, CO 80202 <a href="mailto:kolsinger@kolsingerlaw.com">kolsinger@kolsingerlaw.com</a> <a href="mailto:agould@kolsingerlaw.com">agould@kolsingerlaw.com</a>
<u>Twentymile Coal, LLC</u> William H. Caile Mark E. Hamilton Holland & Hart, LLP 555 17 <sup>th</sup> Street, Suite 3200 P.O. Box 8749 Denver, CO 80201-8749 <a href="mailto:whcaile@hollandhart.com">whcaile@hollandhart.com</a> <a href="mailto:mehamilton@hollandhart.com">mehamilton@hollandhart.com</a>	

/s/ BD  
BARBARA L. DORI