

**BEFORE THE COLORADO WATER CONSERVATION BOARD**

**STATE OF COLORADO**

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**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS IN  
WATER DIVISION 6: TROUT CREEK**

**ROUTT COUNTY, COLORADO**

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**PREHEARING STATEMENT OF TWENTYMILE COAL, LLC**

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Pursuant to Rule 5n. (2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“ISF Rules”), Twentymile Coal, LLC (“Twentymile”), by and through its counsel Holland & Hart LLP, hereby submits its Prehearing Statement regarding the recommendations made by the Staff of the Colorado Water Conservation Board (“Board”) in support of an increased instream flow (“ISF”) appropriation on Trout Creek in Routt County, Colorado (“Trout Creek Increased ISF”).

**A. FACTUAL AND LEGAL CLAIMS**

Twentymile owns water rights and other interests in land and water that may be impacted by the claimed Trout Creek Increased ISF. While Twentymile generally supports the efforts of the Board to preserve the natural environment in Colorado through appropriate instream flow appropriations, Twentymile is participating in these proceedings at this time in order to protect its interests and ensure that the data presented (including any evidence presented by Twentymile and/or other parties) ultimately supports a finding that the factual and legal criteria for the Board’s instream flow appropriation have been met, including the following:

1. Whether there is a natural environment within the claimed reach of Trout Creek that can be preserved to a reasonable degree with the Board’s water right if granted.
2. Whether such natural environment within the claimed reach of Trout Creek will be preserved to a reasonable degree by the water available for the appropriation to be made.
3. Whether such natural environment within the claimed reach of Trout Creek can exist without material injury to water rights.

Without limiting the foregoing, Twentymile notes that the Board already holds an existing ISF right on Trout Creek, which was decreed in April of 1982 in Case No. W-1338-77, and that to date, this existing ISF on Trout Creek has never placed a call or been administered. The data provided in support of this new, increased claim appears thin at best at the present time. Twentymile therefore questions whether the claimed Trout Creek Increased ISF is both: (a)

supported by the available data as a legal and factual matter; and (b) necessary to protect the natural environment. If the Board is presently unable to meet its burdens with respect to any element of its claim in this matter, Twentymile takes the position that consideration of the claimed Trout Creek Increased ISF should be set aside until such time as a more thorough and compelling case is presented.

The technical bases for Twentymile's above-stated position are set forth in a letter report prepared by Lytle Water Solutions, dated September 3, 2019 and attached hereto as Exhibit 1. Twentymile reserves the right to adopt or support the factual and legal claims and testimony presented by other parties to this proceeding, and to identify additional contested factual and legal matters in its rebuttal statement or at any hearing in this matter.

**B. EXHIBITS**

1. Prehearing Statement dated September 3, 2019.
2. Letter report prepared by Lytle Water Solutions dated September 3, 2019 ("LWS Report").
3. Exhibits to LWS Report.
4. Any exhibits offered by any other party, demonstrative exhibits, and any exhibits offered for rebuttal or impeachment purposes.

**C. WITNESSES**

The following individuals may provide testimony or statements on behalf of Twentymile that summarizes or supports the information provided in this prehearing statement:

1. Chris Fehn, P.E., P.G., Lytle Water Solutions, Highlands Ranch, Colorado.
2. Bruce Lytle, P.E., Lytle Water Solutions, Highlands Ranch, Colorado.
3. Any witness identified by any other party, and any witnesses presented for purposes of rebuttal or impeachment.

**D. ANY ALTERNATIVE PROPOSALS**

As noted above, based on the available information it does not appear that the Trout Creek Increased ISF is either necessary and/or adequately supported by currently-available data. As such, Twentymile takes the position that consideration of the claimed increased ISF be set aside until such later date when better information is available. Twentymile also reserves the right to submit additional alternative proposals with its rebuttal statement in this matter.

**E. WRITTEN TESTIMONY**

Twentymile is not submitting written testimony with its prehearing statement but may submit written testimony with its rebuttal statement, if any.

**F. LEGAL MEMORANDA**

Twentymile is not submitting any legal memoranda at this time, but reserves the right submit legal memoranda with its rebuttal statement.

Respectfully submitted this 3rd day of September 2019.

HOLLAND & HART LLP



William H. Caile, Reg. No. 32227

Mark E. Hamilton, Reg. No. 24585

*Attorneys for Twentymile Coal, LLC*

## CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing document on all parties to this proceeding by email, dated this 3rd day of September 2019, addressed as follows:

Hearing Officer:

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/s/ William H. Caile



## LYTLE WATER SOLUTIONS, LLC

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September 3, 2019

Holland & Hart LLP  
555 17th Street, Suite 3200  
Denver, CO 80202

Attn: Mr. William Caile, Esq.

Subject: Engineering Comments for Prehearing Statement on Proposed Instream Flow Right  
Requested by Colorado Water Conservation Board – Trout Creek, Routt County.

Project No. 1377-16

Dear Mr. Caile:

The Colorado Water Conservation Board (CWCB) is applying for an increased instream flow (ISF) right on 6.64 miles of Trout Creek, in Routt County, Colorado. Twentymile Coal, LLC (Twentymile) has requested that Lytle Water Solutions, LLC (LWS) review this request for an ISF right and provide comment. Twentymile holds a number of water rights in the area of the requested ISF right reach, as shown in **Figure 1**. LWS has reviewed the executive summary as developed by the CWCB, as well as additional information regarding general CWCB policy and flow measurements in the area.

Based on the information reviewed, it is LWS' opinion that this request for an increase in the ISF flow right for this particular section of Trout Creek should not be granted based on a lack of evidence related to flow conditions throughout the proposed ISF reach. The CWCB conducted an analysis of flows at the lower terminus of the reach, based on flow data collected by the Edna Mine from 1989 to 2009, two flow measurements taken by the BLM, and two measurements taken by the CWCB. Based on an initial review of these data, LWS is concerned with the flow conditions at the CWCB measurement locations which are identified as turbulent, and slightly turbulent, respectively. Turbulent flow conditions greatly reduce the accuracy of flow measurements, and these measurements may not be reliable enough for the purposes of establishing the river flows in this request for an instream flow right. Additionally, it appears that all of the flow measurements were taken in the same isolated stream reach. All of the provided stream measurements were made in the last half mile of the 6.64 miles reach of the proposed instream flow right reach, as shown in **Figure 2**. In other words, there are only limited flow data covering less than 10 percent

of the ISF right reach. It is LWS' opinion that it is not appropriate to assume that the same flow conditions exist throughout the reach of the requested ISF right. Since all measurements are at the lower terminus of the ISF reach and no other flow data are presented, there is no evidence presented by the CWCB regarding gains or losses through the requested ISF right reach. Without such evidence regarding gains and losses, there is no way to evaluate either the applicability of the requested flow rate or the need for the ISF right upstream of the lower half mile of the reach. If this flow application is granted, the CWCB should be required to install flow measurement gages at multiple locations throughout the ISF right reach. However, because of the lack of flow data collection throughout the reach as part of this application, the gages will not necessarily support the actual flow regime found in the isolated section of the proposed reach where the entirety of the data were collected to support this request for an ISF.

Additionally, the CWCB already has an ISF flow right in a more expansive reach of Trout Creek, which was granted in April of 1982 in Case No. W-1338-77. That decree required, in the use of water section, that the CWCB "shall install and maintain such water measurement devices, recording devices, content gauges and inlet and outlet measurement and recording devices..." to operate that ISF right. To date, it is our understanding that the CWCB has not installed those structures to be able to exercise their ISF that is over 37 years old. By not complying with the terms of their decree, the CWCB has shown they have not seen a need to exercise their original ISF right, and yet that are now requesting an increase to their right in a section of the original ISF reach without the necessary demonstration of available flows throughout the reach. It is still not known how the right obtained 37 years ago would impact the use of water in the area by other water rights holders since the original right has never been quantified related to actual flows, much less an increased right.


Finally, this ISF right is being requested to provide water for the benefit of fish species in the area based on the average depth of the water in areas, yet these measurements are, again, only from the lowest half mile of the requested reach. LWS cannot evaluate the efficacy of these claims throughout the reach as there were no data collected in other areas of the requested reach. This lack of cross-sections in the upper 92 percent of the requested reach is further compounded by the fact that there are no gain/loss data for any portion of the requested reach. The CWCB does not have evidence for the geometry of the streambed in 92 percent of the requested reach, and does not have any understanding regarding how flows are correlated throughout the reach. This lack of evidence makes it very difficult for the CWCB to claim, to a high degree of certainty, that their data show a need for additional flows to protect fish species throughout the reach.

It is for these stated reasons that it is LWS' opinion that the CWCB has not met their burden to support the claim for an appropriation to increase the existing ISF right. Given the opportunity, LWS will gladly review any additional information the CWCB can provide to fill any of the data gaps explained above.

Sincerely,

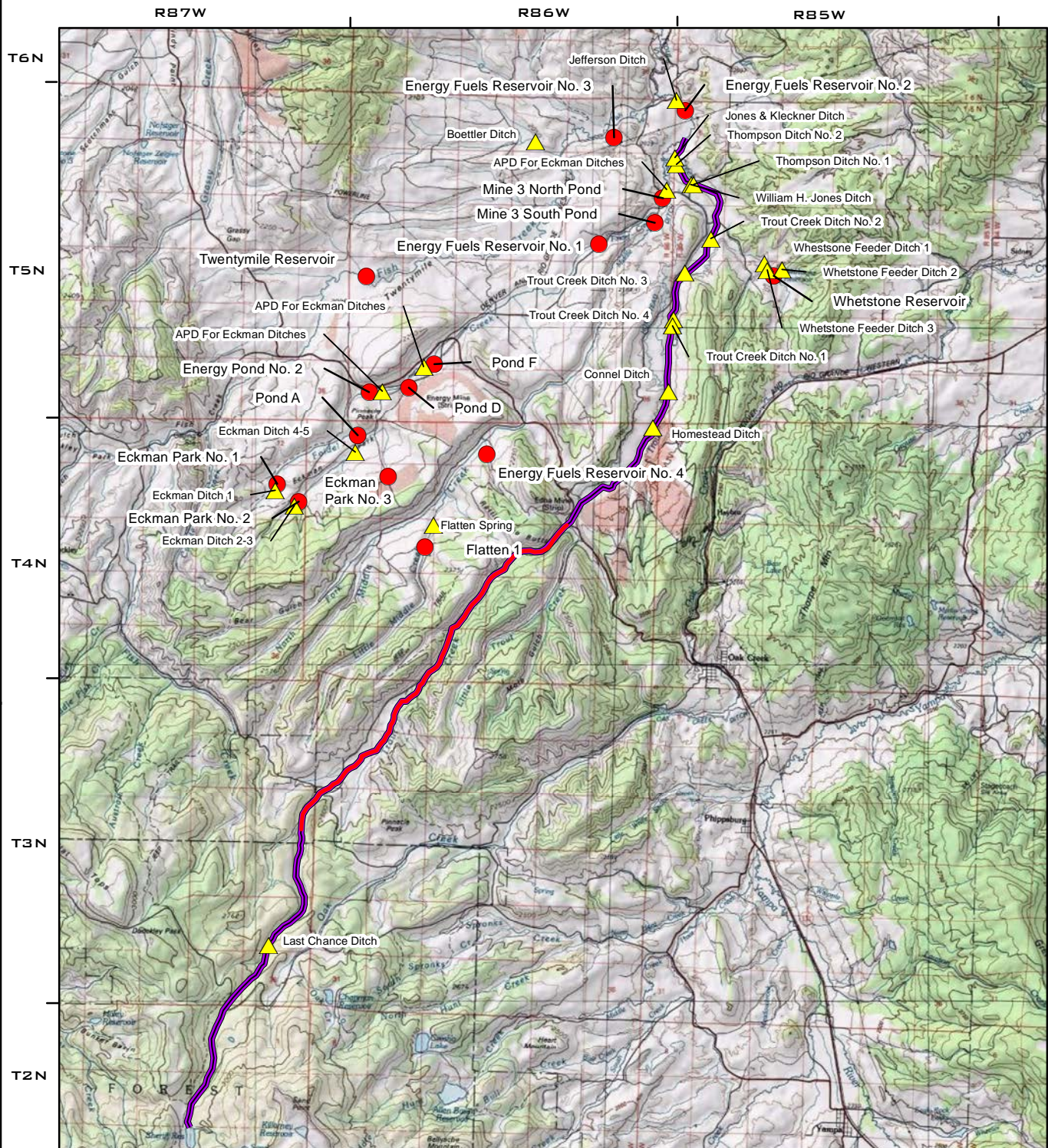


Bruce A. Lytle, P.E.  
President



Chris M.D. Fehn, P.E., P.G.  
Project Engineer





**LEGEND**

- ▲ Peabody Flow Rights
- Peabody Storage Rights
- Requested 2019 CWCB Instream Flow Right
- 1977 CWCB Instream Flow Right

0 1.25 2.5 5 Miles



**PEABODY ENERGY**

**WATER RIGHTS  
LOCATION MAP**

File Name: WaterRightsTroutCreek.mxd	Date: 9/3/2019
Project No.: 1377-16	Drawn By: CMDF
	Fig. No.: 1

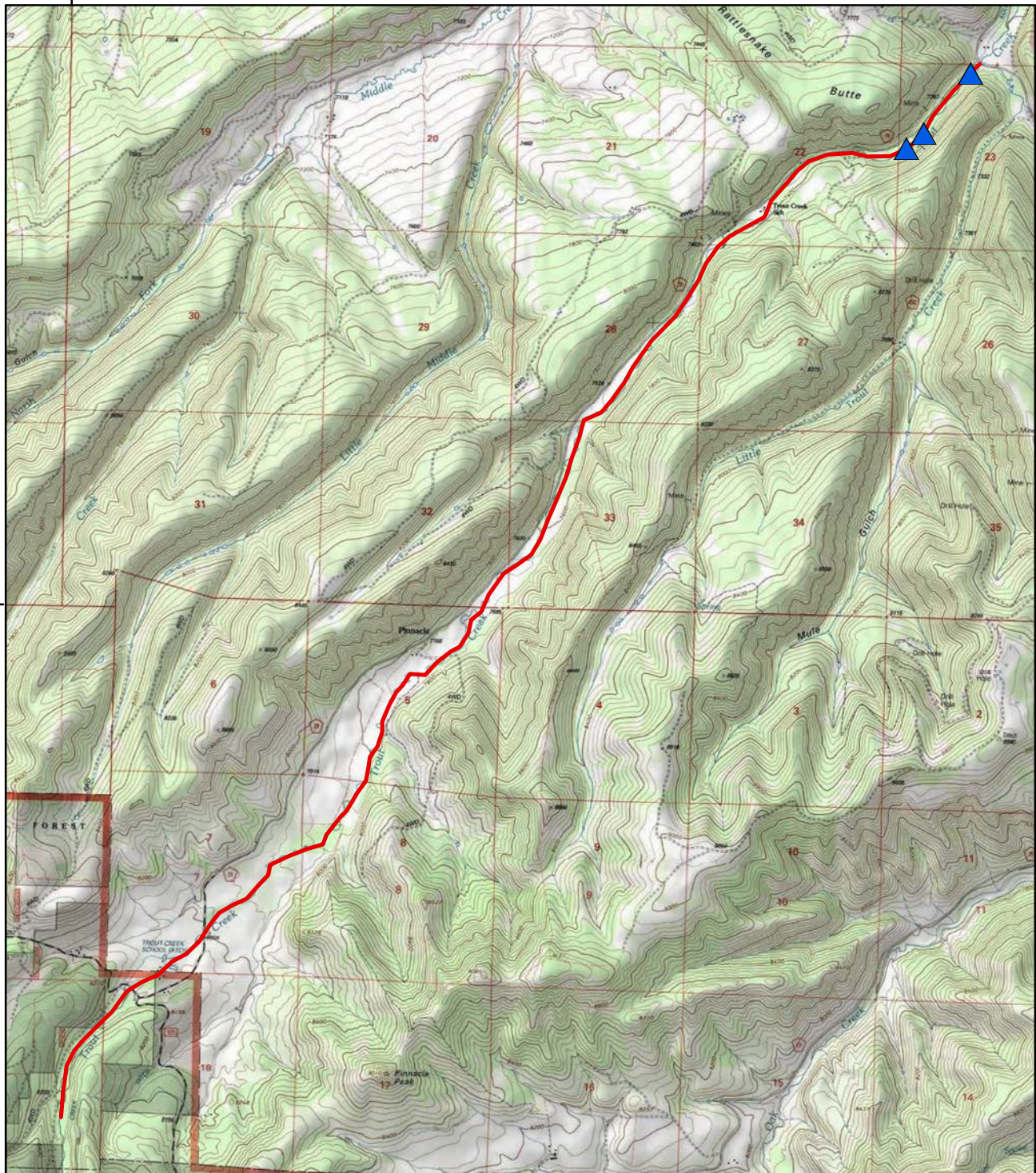


RB7W



RB6W

T4N

T3N



**LEGEND**

-  Flow Measurement Locations
-  Requested 2019 CWCB Instream Flow Right

0 0.5 1 2 Miles



**PEABODY ENERGY**

**FLOW MEASUREMENT LOCATIONS  
USED TO SUPPORT 2019 CWCB  
IN-STREAM FLOW RIGHT REQUEST**

File Name: CWCB_FlowLocations.mxd	Date: 9/3/2019
Project No.: 1377-16	Drawn By: CMDP
	Fig. No.: 2