

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN
WATER DIVISION NO. 6: TROUT CREEK**

**UNOPPOSED MOTION TO AMEND THE PREHEARING STATEMENT OF
STAFF OF THE CWCB TO SUPPLEMENT EXHIBITS TO BE INTRODUCED
AT HEARING**

The Staff of the Colorado Water Conservation Board (“CWCB Staff”), by and through undersigned counsel, hereby moves to amend its prehearing statement to supplement its exhibits to be introduced at the hearing, and as grounds therefor state the following:

1. Knott Land and Livestock Company, Inc., Twentymile Coal, LLC, the Bureau of Land Management (“BLM”), and CWCB Staff all filed prehearing statements on September 3, 2019. As required under Rule 5.n, each party’s prehearing statement included copies of all exhibits to be introduced at the hearing.
2. The prehearing statement for Knott Land and Livestock noted that the documents included with BLM’s recommendation for the instream flow appropriation on Trout Creek did not include field notes containing information collected along *BLM Transect 1* on August 2, 2017.
3. Exhibit 5 listed and included with CWCB Staff’s prehearing statement is entitled “Letter from the BLM dated December 19, 2018, recommending an ISF appropriation on Trout Creek along with supporting field data, photographs, maps, and a preliminary water availability analysis.” The field notes containing information collected by the BLM along *BLM Transect 1* on August 2, 2017, in support of the instream flow recommendation were not included as a part of CWCB Staff’s Exhibit 5.
4. CWCB Staff now moves to add these field notes as its Exhibit 15. A copy of CWCB Staff’s Amended Prehearing Statement is attached as **Exhibit A** to this Motion. The field notes, marked as Exhibit 15, are attached as **Exhibit B** to this Motion.

5. The undersigned has conferred with counsel for Knott Land and Livestock Company, Inc., and Twentymile Coal, LLC, as well as with the BLM, and based upon that conferral is authorized to state that the Parties do not oppose the Motion.

Dated this 16th day of September, 2019

PHIL WEISER
Attorney General

/s/ Jennifer Mele

Jennifer Mele, #30720*
First Assistant Attorney General
Andrew Nicewicz, #44903*
Assistant Attorney General
Natural Resources and Environment Section
Attorneys for the Staff of the Colorado Water Conservation Board
*Counsel of Record

Certificate of Service

Contested CWCB ISF Appropriation on Trout Creek

I hereby certify that I have duly served the copies of the foregoing **UNOPPOSED MOTION TO AMEND THE PREHEARING STATEMENT OF STAFF OF THE CWCB TO SUPPLEMENT CWCB STAFF'S EXHIBITS TO BE INTRODUCED AT HEARING** upon all parties herein by email, this 16th day of September 2019, addressed as follows:

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

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 linda.bassi@state.co.us rob.viehl@state.co.us	<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 jennifer.mele@coag.gov andy.nicewicz@coag.gov
<u>Bureau of Land Management</u> Roy Smith DOI, BLM, Colorado State Office 2850 Youngfield Street Lakewood, CO 80215-7093 303-239-3940 r20smith@blm.gov	<u>Knott Land and Livestock Company, Inc.</u> Kent Holsinger Alyson Meyer Gould Holsinger Law, LLC 1800 Glenarm Place, Suite 500 Denver, CO 80202 kholsinger@holsingerlaw.com agould@holsingerlaw.com

<u>Twentymile Coal, LLC</u> William H. Caile Mark E. Hamilton Holland & Hart, LLP 555 17 th Street, Suite 3200 P.O. Box 8749 Denver, CO 80201-8749 whcaile@hollandhart.com mehamilton@hollandhart.com	
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/s/Margaret L. Popick

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

First Amended Prehearing Statement of Staff of the Colorado Water Conservation Board

IN THE MATTER OF THE CWCB STAFF'S RECOMMENDATION FOR AN
INSTREAM FLOW APPROPRIATION ON TROUT CREEK, WATER DIVISION 6

Pursuant to Rule 5n.(2) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules"), the Staff of the Colorado Water Conservation Board ("Staff") hereby submits its First Amended Prehearing Statement in support of Staff's recommendation for an instream flow ("ISF") appropriation on the subject reach of Trout Creek in the amounts set forth below and in the attached memorandum (attached as **Exhibit 7**):

Waterbody	Watershed	County	Upper Terminus	Lower Terminus	Length (miles)	Flow Rate (cfs)
Trout Creek	Upper Yampa	Routt	confluence unnamed tributary at E: 323578.92 N: 4457645.23	Koll Ditch headgate at E: 329133.88 N: 4464276.41	6.64	2.0 (11/01 - 03/31) 8.0 (04/01 - 07/31) 7.0 (08/01 - 10/31)

A. FACTUAL CLAIMS

- 1) Based upon field surveys by the Bureau of Land Management ("BLM"), and other data collected or reviewed by Colorado Parks and Wildlife ("CPW") and CWCB Staff, there is a natural environment in the subject reach of Trout Creek, in Routt County.
- 2) The ISF rates recommended by Staff for the subject reach of Trout Creek:
 - a) are based upon standard scientific methodology and accurate R2Cross analyses;
 - b) consider the amount of water available for the ISF appropriation; and
 - c) will preserve the natural environment to a reasonable degree.

3) For the ISF water rights proposed by Staff:

(a) there is a natural environment in the subject reach of Trout Creek that will be preserved to a reasonable degree with the proposed water rights if granted;

(b) the natural environment will be preserved to a reasonable degree by the water available for the appropriation; and

(c) such environment can exist without material injury to water rights.

4) Staff reserves the right to supplement its factual claims at any time including in its Rebuttal Statement.

B. LEGAL CLAIMS

1) All of the procedural requirements of Rule 5 of the ISF Rules have been met in order for the CWCB to issue a final action on the proposed instream flow rights.

2) ISF Rule 5j.(3) provides that “[i]n a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by section 37-92-102(3)(c), C.R.S., and the required findings in Rule 5i.” The required findings are: (1) that there is a natural environment that can be preserved to a reasonable degree with the Board’s water right if granted; (2) that the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; and (3) that such environment can exist without material injury to water rights. Staff maintains that the facts support making these determinations.

3) The proposed ISF water rights cannot call out senior water rights within or upstream of the ISF reach, and because the ISF water rights will not consume any water, they will not injure downstream senior water rights. Therefore, the ISF water rights will not materially injure water rights. Additionally, the ISF water rights are subject to present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of these ISF appropriations, whether or not previously confirmed by court order or decree. § 37-92-102(3)(b), C.R.S.

Staff reserves the right to supplement its legal claims at any time including in its Rebuttal Statement.

C. EXHIBITS TO BE INTRODUCED AT HEARING

1) March 3, 2018, Notice to the ISF Subscription Mailing List, indicating that a reach of Trout Creek may be considered for an instream flow appropriation at the January 2019 CWCB Board meeting, attached as **Exhibit 1**.

2) March 9, 2018, Memorandum from Jeff Baessler and Rob Viehl to the CWCB, Agenda Item 15, outlining 72 ISF recommendations being noticed and processed by Staff for possible inclusion into the Instream Flow and Natural Lake Level Program in 2019, including the subject reach of Trout Creek, attached as **Exhibit 2**.

3) November 9, 2018, Notice to the ISF Subscription Mailing List, indicating that a reach of Trout Creek may be considered for an ISF appropriation at the January 2019 CWCB Board meeting, attached as **Exhibit 3**.

4) November 14-15, 2018, Memorandum from Rob Viehl to the CWCB, Agenda Item 7, indicating that a reach of Trout Creek may be considered for an ISF appropriation at the January 2019 CWCB Board meeting, attached as **Exhibit 4**.

5) Letter from the BLM dated December 19, 2018, recommending an ISF appropriation on Trout Creek along with supporting field data, photographs, maps, and a preliminary water availability analysis, attached as **Exhibit 5**.

6) Staff executive summary containing the written recommendation for the ISF appropriation on Trout Creek, attached as **Exhibit 6**.

7) January 18, 2019, Memorandum from Linda Bassi and Rob Viehl to the CWCB, Agenda Item 22, containing a tabular list of the geographical locations and associated flow rates for the segment of the proposed Trout Creek ISF and Staff's request that the Board form its intent to appropriate, attached as **Exhibit 7**.

8) February 4, 2019, Notice to the ISF Subscription Mailing List, indicating that the CWCB declared its intent to appropriate an ISF water right on a reach of Trout Creek at the January 2019 CWCB meeting, attached as **Exhibit 8**.

9) April 4, 2019, Notice to the ISF Subscription Mailing List, indicating that a notice to contest the Trout Creek ISF appropriation had been filed, attached as **Exhibit 9**.

10) Colorado Water Conservation Board *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program*, attached as **Exhibit 10**.

11) Gregory D. Espegren, *Development of Instream Flow Recommendations in Colorado Using R2Cross*, January 1996, attached as **Exhibit 11**.

12) Gregory D. Espegren, *Development of Instream Flow Recommendations in Colorado Using R2Cross for Microsoft Excel*, June 2006 attached as **Exhibit 12**.

13) First Amended Prehearing Statement of Staff of the Colorado Water Conservation Board dated September 16, 2019.

14) Any Rebuttal Statement of Staff.

15) The field notes containing data collected by the BLM at *BLM Transect 1* on August 2, 2017, in support of the instream flow recommendation, attached as **Exhibit 15**.

16) Staff may introduce demonstrative, rebuttal, or other exhibits as allowed by the Hearing Officer, the CWCB, or agreed upon by the Parties.

17) Staff may rely on any exhibits introduced or disclosed by any other party to this hearing.

D. WITNESSES

1) Linda Bassi, Section Chief of the CWCB Stream and Lake Protection Section (resume provided upon request). Ms. Bassi may testify on policies and issues related to the Instream Flow Program.

2) Kathryn Birch, Physical Scientist and Instream Flow Coordinator for the CPW (resume provided upon request). Ms. Birch will testify generally on how the CPW conducts R2Cross analyses as a basis for ISF recommendations, and specifically on the R2Cross analyses and other biological bases for the subject ISF appropriation. Ms. Birch may offer opinion and factual testimony.

3) Jack Landers, Hydrographer for the CWCB Stream and Lake Protection Section (resume provided upon request). Mr. Landers will testify on stream measurements and field investigations on Trout Creek. Mr. Landers may offer opinion and factual testimony.

4) Brandy Logan, Hydrologist for the CWCB (resume provided upon request). Ms. Logan will testify on how she conducted the water availability analysis for the subject ISF recommendation. Ms. Logan may offer opinion and factual testimony.

5) Roy Smith, Water Rights and Instream Flow Coordinator for the BLM (resume provided upon request). Mr. Smith will testify generally on how the BLM conducts R2Cross analyses as a basis for ISF recommendations, and specifically on the R2Cross analyses and other biological bases for the subject ISF appropriation. Mr. Smith may offer opinion and factual testimony.

6) Robert Viehl, Water Resource Specialist for the CWCB Stream and Lake Protection Section (resume provided upon request). Mr. Viehl will testify on how the CWCB staff formulates the basis for its recommendations. Mr. Viehl may offer opinion and factual testimony.

7) Staff may call any witness identified by any other party to this hearing.

E. WRITTEN TESTIMONY

Staff is not submitting written testimony with its First Amended Prehearing Statement, but reserves the right to submit written testimony along with its rebuttal statement.

F. Legal Memoranda

Staff is not submitting legal memoranda with this First Amended Prehearing Statement, but reserves the right to submit legal memoranda along with its rebuttal statement.

Dated this 16th day of September, 2019

PHIL WEISER
Attorney General

/s/ Jennifer Mele

JENNIFER MELE,* # 30720
First Assistant Attorney General
ANDREW B. NICEWICZ,* # 44903
Assistant Attorney General
Natural Resources and Environment Section
Attorneys for the Staff of the Colorado Water Conservation Board
*Counsel of Record

Certificate of Service

Contested CWCB ISF Appropriation on Trout Creek

I hereby certify that I have duly served the copies of the foregoing **FIRST AMENDED PREHEARING STATEMENT OF THE STAFF OF THE COLORADO WATER CONSERVATION BOARD** upon all parties herein by email, this 16th day of September 2019, addressed as follows:

Hearing Officer

Amy Beatie
Deputy Attorney General
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1300 Broadway, 7th Floor
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<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 linda.bassi@state.co.us rob.viehl@state.co.us	<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 jennifer.mele@coag.gov andy.nicewicz@coag.gov
<u>Bureau of Land Management</u> Roy Smith DOI, BLM, Colorado State Office 2850 Youngfield Street Lakewood, CO 80215-7093 303-239-3940 r20smith@blm.gov	<u>Knott Land and Livestock Company, Inc.</u> Kent Holsinger Alyson Meyer Gould Holsinger Law, LLC 1800 Glenarm Place, Suite 500 Denver, CO 80202 kholsinger@holsingerlaw.com agould@holsingerlaw.com

Twentymile Coal, LLC William H. Caile Mark E. Hamilton Holland & Hart, LLP 555 17 th Street, Suite 3200 P.O. Box 8749 Denver, CO 80201-8749 whcaile@hollandhart.com mehamilton@hollandhart.com	
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/s/ Margaret L. Popick /



COLORADO WATER
CONSERVATION BOARD

FIELD DATA FOR INSTREAM FLOW DETERMINATIONS



LOCATION INFORMATION

STREAM NAME: <u>Trout Creek</u>		CROSS-SECTION NO.: <u>1</u>	
CROSS-SECTION LOCATION: <u>0.5 mile upstream from confluence with Little Trout Creek</u>			
DATE: <u>8-2-17</u>	OBSERVERS: <u>R. Smith, E. Schertt</u>		
LEGAL DESCRIPTION: <u>SW NW</u>	SECTION: <u>23</u>	TOWNSHIP: <u>4 N S</u>	RANGE: <u>86 E W</u> PM: <u>6 H</u>
COUNTY: <u>Rowt</u>	WATERSHED: <u>Yampa R</u>	WATER DIVISION: <u>6</u>	DOW WATER CODE: <u>23533</u>
MAP(S):	USGS: <u>Zone 13</u>	4463647 N	
	USFS:	328647 E	

SUPPLEMENTAL DATA

SAG TAPE SECTION SAME AS DISCHARGE SECTION: <input checked="" type="radio"/> YES <input type="radio"/> NO		METER TYPE: <u>M-M</u>	
METER NUMBER:	DATE RATED:	CALIB/SPIN: <u>sec</u>	TAPE WEIGHT: <u>surveyed</u> lbs/foot
CHANNEL BED MATERIAL SIZE RANGE: <u>4" cobble to 18" boulders</u>		TAPE TENSION: <u>surveyed</u> lbs	NUMBER OF PHOTOGRAPHS: <u>3</u>
PHOTOGRAPHS TAKEN: <input checked="" type="radio"/> YES <input type="radio"/> NO			

CHANNEL PROFILE DATA

STATION	DISTANCE FROM TAPE (ft)	ROD READING (ft)	<div style="display: flex; align-items: center;"> <div style="writing-mode: vertical-rl; transform: rotate(180deg);">SKETCH</div> </div>	<div style="display: flex; flex-direction: column;"> <div>LEGEND:</div> <div>Stake <input checked="" type="radio"/></div> <div>Station <input checked="" type="radio"/></div> <div>Photo <input checked="" type="radio"/></div> <div>Direction of Flow </div> </div>
⊗ Tape @ Stake LB	0.0	<u>surveyed</u>		
⊗ Tape @ Stake RB	0.0	<u>surveyed</u>		
① WS @ Tape LB/RB	0.0 <u>6.7</u>	<u>5.05/5.05</u>		
② WS Upstream	<u>109.0'</u>	<u>3.55</u>		
③ WS Downstream	<u>16.8'</u>	<u>5.22</u>		
SLOPE: <u>1.67/127.8' = 0.013</u>				

AQUATIC SAMPLING SUMMARY

STREAM ELECTROFISHED: YES <input checked="" type="radio"/> NO <input type="radio"/>	DISTANCE ELECTROFISHED: <u>ft</u>	FISH CAUGHT: YES/NO	WATER CHEMISTRY SAMPLED: YES <input checked="" type="radio"/> NO <input type="radio"/>														
LENGTH - FREQUENCY DISTRIBUTION BY ONE-INCH SIZE GROUPS (1.0-1.9, 2.0-2.9, ETC.)																	
SPECIES (FILL IN)	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	>15	TOTAL
<u>Mayfly, stonefly & caddisfly abundant</u>																	
AQUATIC INSECTS IN STREAM SECTION BY COMMON OR SCIENTIFIC ORDER NAME:																	

COMMENTS

Temp water: <u>20°C</u>		Riparian: <u>alders, dogwood, and narrow-leaved cottonwood</u>	
SC: <u>213 µg/cm</u>			
pH: <u>8.35</u>			

DISCHARGE/CROSS SECTION NOTES

STREAM NAME: Trout Creek		CROSS-SECTION NO: 1		DATE: 8-2-17		SHEET ___ OF ___					
GINNING OF MEASUREMENT		EDGE OF WATER LOOKING DOWNSTREAM: (0.0 AT STAKE)		LEFT / RIGHT		Gage Reading: _____ ft		TIME: 2:00 pm			
Stake (S) Grassline (G) Waterline (W) Rock (R)	Distance From Initial Point (ft)	Width (ft)	Total Vertical Depth From Tape/Inst (ft)	Water Depth (ft)	Depth of Observation (ft)	Revolutions	Time (sec)	Velocity (ft/sec)		Area (ft ²)	Discharge (cfs)
								At Point	Mean in Vertical		
LS	1.3		3.92								
G	3.7		3.83								
	4.6		4.71								
W	6.7		5.05								
	8.0		5.25	0.20				0.45			
	9.0		5.20	0.15				0.67			
	10.0		5.45	0.40				1.22			
	10.5		5.4	0.35				1.67			
	11.0		5.5	0.45				1.65			
	11.5		5.45	0.40				2.20			
	12.0		5.45	0.40				1.98			
	12.5		5.45	0.40				1.72			
	13.0		5.5	0.45				1.95			
	13.5		5.5	0.45				1.61			
	14.0		5.53	0.50				1.24			
	14.5		5.53	0.50				1.48			
	15.0		5.45	0.40				1.40			
	15.5		5.5	0.45				1.76			
	16.0		5.50	0.45				1.61			
	16.5		5.53	0.50				2.01			
	17.0		5.45	0.40				2.34			
	17.5		5.6	0.55				2.05			
	18.0		5.65	0.60				1.63			
	18.5		5.7	0.65				1.42			
	19.0		5.75	0.70				1.84			
	20.0		5.55	0.50				0			
	21.0		5.45	0.40				0.49			
	22.0		5.3	0.25				2.07			
	23.0		5.35	0.30				1.01			
	24.0		5.05	0				0			
	25.0		5.15	0.10				0.28			
	26.0		5.15	0.10				0.02			
W	26.7		5.05								
W	29.6		4.90								
	33.9		4.62								
	35.6		4.42								
	39.3		4.68								
	41.6		4.20								
	42.6		4.04								
W+G	43.2		3.80								
TOTALS:											

End of Measurement

Time: 14:30

Gage Reading: _____ ft

CALCULATIONS PERFORMED BY:

CALCULATIONS CHECKED BY:

EXHIBIT B