



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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Jared Polis, Governor

Dan Gibbs, DNR Executive
Director

Lauren Ris, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Chief
Marielle Sidell, Hydrologist
Stream and Lake Protection Section

DATE: November 19, 2025

AGENDA ITEM: 5a. Final Action on 2025 New Appropriation on East Muddy Creek,
Water Division 4

Staff Recommendation

Staff requests that the Board make the following determinations and take the following actions on the instream flow (ISF) water right listed in Table 1. The information necessary to support this determination is contained in this memo, the recommendation letter and documentation submitted by the Bureau of Land Management (BLM) and in staff's memo and oral presentation provided at the March 19, 2025, Board meeting.

- (1) Determine, pursuant to section 37-92-102(3), C.R.S., that for the ISF appropriation identified in Table 1:
 - (a) There is a natural environment that can be preserved to a reasonable degree with the recommended water rights, if granted;
 - (b) The natural environment will be preserved to a reasonable degree by the water available for the recommended appropriation; and
 - (c) Such natural environment can exist without material injury to water rights.
- (2) Pursuant to ISF Rule 5f., establish the appropriation date for the East Muddy Creek ISF appropriation as the date of the filing of the water court application which will occur no sooner than December 1, 2025 and no later than December 31, 2025.
- (3) Include in the East Muddy Creek appropriation and in future water court application, filings, and decree the terms and conditions agreed upon between the CWCB, Ragged Mountain Water Users Association, and the North Fork Water Conservancy District. (Attachment A).
- (4) Request staff to work with the Attorney General's office to file application for this water rights in water court by the end of the calendar year.

Introduction

On March 19, 2025, the CWCB formed its intent to appropriate an ISF water right on East Muddy Creek in Water Division 4 (Table 1). During the notice and comment period, a notice



to contest was filed on East Muddy Creek by Jim Auster and Merrilee Bliss before the June 2, 2025 deadline. Mr. Auster previously presented concerns and stated his intent to contest at the May 21, 2025 CWCB Board meeting during the East Muddy Creek public comment period.

As required by ISF Rule 5k. (4) notice of the contested ISF appropriation was sent out to the ISF Subscription Mailing List on June 6, 2025. The deadline to request Party status and Contested Hearing Participant status was on July 1, 2025. No additional entities filed for Party status in the East Muddy Creek appropriation. At the July Board meeting, the Board designated First Assistant Attorney General Jennifer Mele as the Hearing Officer and set the hearing date to be held in conjunction with the November 19-20, 2025, regular Board meeting.

CWCB staff, staff counsel and the BLM held several meetings with Mr. Auster regarding concerns about the ISF appropriation on East Muddy Creek. On September 26, 2025, Jim Auster and Merrilee Bliss, on behalf of Hummingbird Ranch emailed CWCB counsel, requesting to withdraw their opposition. On October 3, 2025, an unopposed motion to vacate the hearing was granted (Attachment B). Considering the vacated hearing and pursuant to ISF Rule 5h., the appropriation of East Muddy Creek as described in Table 1 is being recommended to the Board for Final Action.

Technical Investigations

Staff provided the Board detailed information regarding all field data, studies, and analyses for East Muddy Creek at its March 19, 2025, Board meeting. A brief overview of the analyses is provided below.

Natural Environment Studies

The BLM documented the natural environment on their recommendation and found a natural environment that can be preserved. To evaluate flow requirements, the BLM collected hydraulic data and performed R2Cross modeling on East Muddy Creek. Staff reviewed the proposed ISF segment to ensure that the dataset was complete, and proper methods and procedures were followed. Staff also conducted site visits to East Muddy Creek. CWCB staff worked with the BLM to develop the final recommendation for the flow rates of water necessary to preserve the natural environment to a reasonable degree.

Water Availability Studies

To determine the amount of water available for East Muddy Creek, staff installed a temporary gage in the area and used an existing gage on Muddy Creek to develop a hydrograph showing mean monthly streamflow. In addition, staff analyzed water rights to identify any potential water availability limitations. Further, staff discussed water administration in depth with District 40 Water Commissioners to fully understand water use practices.

CWCB staff suggested modifications to the R2Cross biological flow recommendation due to water availability limitations. Staff met with the BLM to review the water availability analyses and discuss whether the modified recommendation would preserve the natural environment to a reasonable degree. After reviewing staff's hydrology and the original R2Cross results, and evaluating the flow needs of the natural environment, the BLM concluded that the proposed modified recommendations would preserve the natural environment to a reasonable degree on East Muddy Creek (Table 1).

Relevant Instream Flow Rules

5f. Date of Appropriation. The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

5h. Final Board Action on an ISF Recommendation. The Board may take final action on any uncontested Staff Recommendation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rule 5j-5q.

5i. Required Findings. Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

- (1) Natural Environment. That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.
- (2) Water Availability. That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.
- (3) Material Injury. That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of section 24-4-106(6) and (7), C.R.S.

Attachments:

- A) East Muddy Creek ISF Terms and Conditions
- B) Order Granting Staff for Colorado Water Conservation Board's Unopposed Motion to Vacate Hearing on November 19-20, 2025

Table 1. Instream Flow Recommendation

Water Div	Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus	Flow Rate (cfs)
4	East Muddy Creek	North Fork Gunnison	Gunnison	6.32	confluence Lee Creek	confluence Muddy Creek	11.2 (11/01 - 02/29) 20.0 (03/01 - 03/31) 23.0 (04/01 - 06/30) 14.5 (07/01 - 10/31)

Terms and Conditions to be included in final CWCB action on East Muddy Creek ISF and included in future water court filings:

1. Any conditional water rights that were decreed prior to the filing of a water court application for the East Muddy Creek ISF water right will be administered as senior to the East Muddy Creek ISF water right if such conditional water rights are decreed absolute.
2. Should any changes to the natural streambed channel of East Muddy Creek occur due to naturally occurring circumstances outside the control of water rights owners located within the ISF reach, such that it becomes necessary for water rights owner(s) to relocate the decreed point of diversion and related infrastructure to another point of diversion on East Muddy Creek to receive the proper inflow of water to which the water rights holder(s) may be entitled from East Muddy Creek, and such relocation is otherwise consistent with section 37-86-111, C.R.S., then the CWCB shall not rely on the instream flow appropriation decreed herein to prohibit or condition any such relocation of the decreed point of diversion and related diversion infrastructure or to require a change of water right associated with any such relocation of the point of diversion and related diversion infrastructure.
3. Paonia Reservoir is experiencing sedimentation and water users may in the future decide to use temporary detention ponds to decrease the amount of sedimentation that flows into the reservoir. The CWCB recognizes that the Colorado Division of Water Resources' General Administration Guidelines for Reservoirs (October 2011, amended February 2016) is a basic guide for reservoir administration.
4. Pursuant to section 37-92-102(3)(b), C.R.S., the East Muddy Creek ISF water right shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of this appropriation whether or not previously confirmed by court order or decree.
5. All currently decreed absolute water rights will be administered as senior to the East Muddy Creek ISF water right.
6. Acknowledge the existence of the 2,000 AF exchange decree w/correction (05CW0236) and its senior position.
7. The CWCB recognizes the Bureau of Reclamation Policy Manual, PEC P05, Page 7, Item G., states the following: Irrigation Use. The use of contract water to irrigate land primarily for the production of commercial agricultural crops or livestock, and domestic and other uses that are incidental thereto.
8. The CWCB will not use the East Muddy Creek ISF water right as a basis to oppose any future storage applications with an appropriation date junior to December 1, 2025.

9. Before filing a statement of opposition or motion to intervene in Water Court to oppose any future application to change the water rights, or a portion thereof, identified in Case No. 05CW0236, the CWCB will discuss their concerns with the application with the applicants and potential alternative ways to resolve the CWCB's concerns without filing a statement of opposition or motion to intervene in Water Court.

CWCB staff agrees to:

The CWCB will not file a water court application on this ISF appropriation before December 1, 2025 and will assign an appropriation date to correspond to the date of the application.

CWCB Staff agree to modify the ISF flow recommendations as follows:

East Muddy Creek: from 23 cfs (4/1-7/31) and 14.5 cfs (8/1-10/31) to 23 cfs (4/1-6/30) and 14.5 cfs (7/1-10/31)

**BEFORE THE COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

**IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN INSTREAM
FLOW APPROPRIATION ON EAST MUDDY CREEK BETWEEN THE
CONFLUENCE WITH LEE CREEK AND THE CONFLUENCE WITH
MUDDY CREEK, WATER DIVISION 4**

**ORDER GRANTING STAFF FOR COLORADO WATER CONSERVATION
BOARD'S UNOPPOSED MOTION TO VACATE HEARING ON NOVEMBER
19-20, 2025**

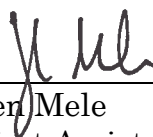
THIS MATTER comes before the Hearing Officer on Staff for Colorado Water Conservation Board's Unopposed Motion to vacate the hearing in this matter currently scheduled in conjunction with the Board's November 19-20, 2025 regularly scheduled meeting. The Hearing Officer, having reviewed the motion and being otherwise adequately advised, GRANTS the motion.

Because Hummingbird Ranch was the only party contesting the Board's instream flow appropriation, and because Hummingbird Ranch now withdraws its opposition, a hearing is no longer necessary in this matter.

The hearing in this matter set for November 19-20, 2025, is hereby VACATED. This matter is returned to staff of the Colorado Water Conservation Board for further administrative action.

DATED: October 3, 2025

BY THE HEARING OFFICER:



Jen Mele
First Assistant Attorney General
Colorado Attorney General's Office
1300 Broadway, 10th Floor
Denver, CO 80203
(720) 508-6282
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CERTIFICATE OF SERVICE

I hereby certify that I have emailed copies of the foregoing **ORDER GRANTING STAFF FOR COLORADO WATER CONSERVATION BOARD'S UNOPPOSED MOTION TO VACATE HEARING ON NOVEMBER 19-20, 2025** upon all parties herein, on October 3, 2025, addressed as follows:

Hearing Officer

Jennifer Mele
First Assistant Attorney General
Water Conservation Unit
Colorado Attorney General's Office
1300 Broadway, 10th Floor
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Party Status

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<u>Hummingbird Ranch:</u> Jim Auster and Merrilee Bliss Hummingbird Ranch 26140 Hwy 133 Somerset CO 81434 (970) 618-7692 jimauster@hotmail.com	

A duly signed original is on file with the Office of the Attorney General for the State of Colorado.

