



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Chief
Brandy Logan, Hydrologist
Stream and Lake Protection Section

DATE: January 27, 2026

AGENDA ITEM: 21 c. Final Action on Contested Appropriation: Milk Creek,
Water Division 6

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 Colorado Parks and Wildlife (CPW) 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 Milk Creek ISF appropriation as March 19, 2025.
- (3) Authorize Director Ris to sign the Milk Creek ISF Settlement Agreement between Colowyo Coal Company, L.P. and CWCB. (Attachment A).
- (4) Request staff to work with the Attorney General's office to file an application for this water right in water court by the end of the calendar year. A stipulation will be entered into with Colowyo that incorporates the terms and conditions of the Milk Creek ISF Settlement Agreement as an attachment to the decree.

Introduction

On March 19, 2025, the CWCB formed its intent to appropriate an ISF water right on Milk Creek in Water Division 6 (Table 1). During the notice and comment period, a notice to contest was filed by Colowyo Coal Company, L.P. (Colowyo) before the June 2, 2025 deadline.



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 July 1, 2025. Western Resource Advocates filed for Party status and Carol Davidson Partnership and Milk Creek Ranch LLC filed for Hearing Participant status in the Milk Creek appropriation. At the July Board meeting, First Assistant Attorney General Jennifer Mele was designated as the Hearing Officer and set the hearing date to be held in conjunction with the November 19-20, 2025, CWCB meeting.

CWCB staff and staff counsel held numerous meetings with Colowyo regarding concerns about the ISF appropriation on Milk Creek. As a result of continued progress in these discussions, the scheduled November 2025 hearing was vacated and rescheduled for January 26-27, 2026. A second unopposed motion to vacate the January hearing and to convert the second prehearing conference to a status conference was granted on December 30, 2025. Discussions and drafting of a potential agreement continued with CWCB and Colowyo reaching tentative agreement on the Milk Creek ISF Settlement Agreement (“Settlement Agreement”) which was provided to all parties ahead of the status conference on January 14, 2026. All Parties and Contested Hearing Participants have accepted the language in the proposed Settlement Agreement.

Milk Creek ISF Settlement Agreement

Colowyo’s primary concern with the appropriation of the Milk Creek ISF water right is that it may interfere with water rights they will need to get later to treat springs that may emerge during or after their mine reclamation process. These springs may require treatment to meet discharge standards to comply with existing permits from the Colorado Department of Public Health and Environment and Division of Mine Safety regulations. Colowyo may be obligated to divert, treat, and discharge, or to prevent discharge of, water emanating from the emergent spring(s). Colowyo anticipates that the springs are likely to emerge within or adjacent to its mining operations within the Milk Creek basin, within a few years to decades, but the exact timing, location, and amount of water needed for treatment is unknown. Future administration of the Milk Creek ISF appropriation could necessitate the need for local replacements sources to treat the springs. This could create a situation where Colowyo needs to develop its Milk Creek Reservoir¹ water right to make local replacements, which could adversely impact streamflow available to the Milk Creek ISF. Both Parties agree it is in their respective interest to avoid construction of the Milk Creek Reservoir.

¹ The Milk Creek Reservoir is a conditional water right for 70,000 acre-feet (W0986-76) that was appropriated on September 25, 1975. It is decreed for industrial, mining, power, irrigation, land reclamation, domestic, piscatorial and recreational uses and purposes related to electric energy, mining, processing, and transportation of coal and by-products of coal. The decreed location of the conditional reservoir is about 1.1 miles south (upstream) from the recommended ISF reach on Milk Creek.

Colowyo and CWCB staff have drafted an agreement to work in partnership to allow for the treatment of emergent springs and allow for the appropriation of an ISF water right on Milk Creek. The agreement contains four main parts which are discussed below:

1) The CWCB agrees to subordinate the Milk Creek ISF to any depletions related to treatment of any emergent spring(s) arising within or adjacent to Colowyo operations within 20 years, as of the date of the agreement, including spring depletions and any exchanges or exchange project rights adjudicated in connection to treatment of said emergent spring(s) depletions. The Milk Creek ISF shall remain subordinated to the administration of any such emergent spring(s) and related exchanges or exchange project rights for so long as the emergent spring(s) cause depletions upstream of the Milk Creek ISF. However, if an administered CWCB call will not result in the curtailment of treatment of any adjudicated emergent springs arising during the 20-year period and related exchange rights, CWCB may call under the adjudicated Milk Creek ISF date.

2) The CWCB will file in water court an application for ISF rights on Milk Creek. CWCB and Colowyo will enter into a stipulation, which incorporates the terms and conditions of the settlement agreement, as an attachment to the decree, to ensure compliance with Colorado law.

3) Colowyo owns the Milk Creek Ditch No. 1 water rights, which were changed and quantified in Case No. 18CW3058. Colowyo agrees to lease those water rights to the CWCB for a 20-year period as of the date of the Settlement Agreement to be used for instream flow purposes within the instream flow reach identified for the Milk Creek ISF. The lease price for use of the water shall be free-of-charge. If CWCB approval for an acquisition of the proposed lease of Milk Creek Ditch No. 1 is obtained, then Colowyo and CWCB shall file a change of water rights application with the Water Court in Water Division 6, as co-applicants, to seek a decreed right to use the Milk Creek Ditch No.1 water rights for ISF purposes. Such instream flow uses shall be in addition to the present irrigation and industrial uses presently decreed for the Milk Creek Ditch No. 1 water right.

4) The preferential right after conclusion of the lease and upon notice from Colowyo to CWCB that Colowyo is selling the Milk Creek Ditch No. 1 water rights, to bargain for purchase of the Milk Creek Ditch No. 1 water right at fair market value.

Potential Acquisition

The Settlement Agreement includes a potential acquisition of an interest in the Milk Creek Ditch No 1 for ISF use for a 20-year period with the preferential right to purchase the water right if Colowyo decides to sell it. The original Milk Creek Ditch No. 1 water right is one of the most senior water rights on Milk Creek and it also has several supplemental decrees, see Table 2 .

Table 2. Summary of Milk Creek No 1 Ditch water rights.

Appropriation Date	Adjudication Date	Diversion Rate, cfs	Decree
3/10/1883	9/22/1894	2.66	09/22/1894
12/31/1897	9/1/1960	2.7	CA1278
10/1/1951	9/1/1960	13.64	CA1278

These water rights were quantified in water court case 18CW3058 resulting in a historical maximum annual consumptive use of 615.2 acre-feet per year with a historic use season of April 1 through August 31. The annual diversions are limited to a cumulative amount of 8,226.1 acre-feet in any consecutive 10-year period

The most likely acquisition mechanism is a long-term lease which would require CWCB Board approval via a Rule 6 process in the ISF Rules. If the Milk Creek ISF appropriation is approved with the Settlement Agreement, CWCB staff anticipates bringing this acquisition to the Board for consideration later this year. A long-term acquisition would require a water court change case to add ISF use as a beneficial use to the existing decree. Because the historic use has already been quantified, this is potentially a relatively straight forward water court case. However, other acquisition mechanisms could be considered if the water court case takes longer to resolve than originally anticipated.

Technical Investigations

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

Natural Environment Studies

BLM and CPW documented the natural environment for their recommendation and found a natural environment that can be preserved. To evaluate flow requirements, the BLM and CPW collected hydraulic data and performed Instream Flow Incremental Methodology (IFIM) modeling on Milk 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 Milk Creek.

Water Availability Studies

To determine the amount of water available for Milk Creek, staff installed a temporary gage on Milk 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 44 Water Commissioners to understand water use practices.

CWCB staff suggested modifications to the IFIM biological flow recommendation due to water availability limitations. Staff met with the BLM and CPW to review the water availability analyses and discuss whether a modified recommendation would preserve the natural environment to a reasonable degree. After reviewing staff's hydrology and the IFIM results, and evaluating the flow needs of the natural environment, the BLM and CPW concluded that the proposed recommendation would preserve the natural environment to a reasonable degree on Milk 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.

Attachment:

A) Milk Creek ISF Settlement Agreement

Table 1. Instream Flow Recommendation

Water Div	Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus	Flow Rate (cfs)
6	Milk Creek	Lower Yampa	Moffat	4.11	confluence Wilson Creek	confluence Yampa River	7.8 (01/01 - 02/29) 18.0 (03/01 - 03/31) 40.0 (04/01 - 06/30) 8.0 (07/01 - 07/31) 4.5 (08/01 - 09/30) 5.2 (10/01 - 12/31)

Milk Creek ISF Settlement Agreement

THIS SETTLEMENT AGREEMENT is entered into as of the last date of signature below (“Effective Date”), by and between the Colorado Water Conservation Board (“CWCB”) and Colowyo Coal Company, L.P. (“Colowyo”) CWCB and Colowyo may also be referred to individually as “**Party**” or together as “**Parties.**”

RECITALS

A. The General Assembly created the Colorado Instream Flow and Natural Lake Level Program and charged the CWCB with implementing and administering that program. Section 37-92-102(3), C.R.S., vests the CWCB with the exclusive authority to appropriate minimum instream flow water rights.

B. The United States Bureau of Land Management and Colorado Parks and Wildlife co-recommended an instream flow (“ISF”) appropriation on Milk Creek, in Water Division 6, to protect known year-round habitat for native Flannemouth Sucker, Bluehead Sucker, and Roundtail Chub, which are often referred to as the “Three Species” because of their importance along the Upper and Lower Colorado River Basin. The Three Species are classified as Tier 1 Species of Greatest Conservation Need (SGCN) according to Colorado Parks and Wildlife’s State Wildlife Action Plan and classified as “sensitive” species by the BLM due to significant declines across their native range. Milk Creek is particularly important due to the known spawning and rearing habitat for these fish.

C. At its regularly scheduled Board Meeting on March 19, 2025, Staff for the CWCB recommended the Milk Creek ISF appropriation to its Board in the amounts shown in the table below (“**Proposed Milk Creek ISF**” or after appropriation, “**Milk Creek ISF**”):

Water Division	Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus	Flow (CFS)
6	Milk Creek	Lower Yampa	Moffat	4.11	Confluence Wilson Creek	Confluence Yampa River	7.8 (01/01 - 02/29) 18 (03/01 - 03/31) 40 (04/01 - 06/30) 8 (07/01 - 07/31) 4.5 (08/01 - 09/30) 5.2 (10/01 - 12/31)

D. During the notice and comment period, Colowyo submitted a timely Notice to Contest the Proposed Milk Creek ISF to the CWCB on June 2, 2025.

E. All notices under section 37-92-102, C.R.S., and the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (“ISF Rules”) required for the CWCB to appropriate the Proposed Milk Creek ISF have been given.

F. Colowyo owns and operates a progressive surface coal mine¹ with activities in the Wilson Creek and Good Spring Creek basins, both tributary to Milk Creek, as shown on the Map attached as **Exhibit A**. Colowyo is owned and controlled by Axial Basin Coal Company, which is owned and controlled by Elk Ridge Mining and Reclamation, LLC, which is owned and controlled by Tri-State Generation and Transmission Association, Inc. (“**Tri-State**”). Colowyo’s mining operations are located upstream of the CWCB’s Proposed Milk Creek ISF.

G. Colowyo filed a Notice to Contest the Proposed Milk Creek ISF with the CWCB Board to protect its existing water rights operations and to ensure it can operate the water rights necessary for its evolving mining, reclamation, and other industrial activities, including compliance with all permit requirements for those activities.

H. Colowyo anticipates springs are likely to emerge within or adjacent to its mining operations within the Milk Creek basin during or following reclamation (“**Emergent Spring(s)**”). The timing for any Emergent Spring(s) to arise is unknown but may range from a few years to decades.

I. Once an Emergent Spring arises on Colowyo property, or in connection with Colowyo operations, Colowyo must comply with CDPHE CDPS Permit No. C00045161, as may be revised, supplemented, or replaced; DRMS Permit No. C1981019, as may also be revised, supplemented, or replaced; and with state and federal regulations. Colowyo anticipates it will be obligated to divert, treat, and discharge, or to prevent discharge of, water emanating from the Emergent Spring(s) (together, “Treatment” or “Treat”). Colowyo’s Treatment methods for each or any Emergent Spring may change or evolve over the lifetime of the Emergent Spring, whether to meet Colowyo’s operational preferences or to meet discharge standards or permit conditions. Any Treatment process could be up to 100% consumptive. The duration of Colowyo’s obligation to replace depletions associated with Treatment of the Emergent Spring(s) is indefinite and will last as long as the quality of water discharging from the Emergent Spring(s) cannot meet CDPHE’s discharge standards without Treatment.

J. If the CWCB adjudicates the Proposed Milk Creek ISF water right and the decreed Milk Creek ISF water right is senior to Colowyo’s Emergent Spring(s), then Colowyo would be required to replace out-of-priority Emergent Spring depletions that occur upstream from, or within, the Milk Creek ISF reach. The need for local replacement obligations necessitated by the appropriation of the Milk Creek ISF may trigger the need for Colowyo to construct its Milk Creek Reservoir conditional water right on Milk Creek in order to make replacements, which could impact streamflow available to the Milk Creek ISF. Both Parties agree it is in their respective interest to avoid construction of the Milk Creek Reservoir.

¹ A “progressive surface coal mine” (aka continuous surface mining) denotes a method of mineral extraction that uses specialized equipment to cut through the ground in a methodical, row-by-row and layer-by-layer manner, moving across the land over time.

K. To address Colowyo's concerns, to avoid the need for development of Milk Creek Reservoir as triggered by the appropriation of the Milk Creek ISF, and to allow the CWCB to obtain a water rights decree for the Milk Creek ISF, the Parties desire to enter into this Settlement Agreement, which includes four main components: (1) appropriation of the Milk Creek ISF; (2) general subordination of the Milk Creek ISF to a date junior to any Emergent Spring(s) that arise within 20 years as of the date of this Settlement Agreement; (3) in consideration for this general subordination, the long-term lease from Colowyo to CWCB of the Milk Creek Ditch No. 1 water rights, changed in Case No 18CW3058, for ISF purposes; and (4) the preferential right after conclusion of the lease and upon notice from Colowyo to CWCB that Colowyo is selling the Milk Creek Ditch No. 1 water rights, to bargain for purchase of the Milk Creek Ditch No. 1 water right at fair market value.

AGREEMENT

NOW, THEREFORE, in consideration of the recitals above, the mutual agreements contained herein, and other good and valuable consideration, the sufficiency of which are hereby acknowledged, the Parties agree to the following:

1. **Incorporation of Recitals.** The Parties agree the Recitals in this Settlement Agreement are material and hereby incorporate the Recitals as if set forth fully herein.
2. **Milk Creek ISF Rates and Timeframes.** The Parties agree, and Colowyo hereby stipulates to, the CWCB filing an application with the Water Court in Water Division 6 to adjudicate the Milk Creek ISF at the rates and timeframes proposed for the Milk Creek ISF in the table above, subject to the terms and conditions contained in this Settlement Agreement.
3. **Subordination to Emergent Springs.**
 - a. The CWCB agrees to subordinate the Milk Creek ISF to any depletions related to Treatment of any Emergent Spring(s) arising within or adjacent to Colowyo operations within 20 years as of the date of this Settlement Agreement, including spring depletions and any exchanges or exchange project rights adjudicated to enable Treatment of said Emergent Spring(s) depletions. Subordination of the Milk Creek ISF water right shall be a general subordination to a date that is one day junior to the junior-most priority date of any Emergent Spring(s) that arise within the 20-year period and any exchanges or exchange project rights adjudicated to enable Treatment of said Emergent Spring(s) depletions. Under this general subordination, the Milk Creek ISF will be junior to all water rights which are senior to the date being subordinated to. The subordination shall apply to any Emergent Spring(s) that arises within this 20-year period and any exchanges or exchange project rights adjudicated to enable Treatment of said Emergent Spring(s) depletions. Colowyo shall provide prompt notice to the CWCB in writing of all springs that emerge, as their emergence becomes known, during this 20-year period.

b. Colowyo agrees to adjudicate any Emergent Spring(s) and their associated exchange(s) and exchange project right(s), after their emergence becomes known and quantified, at the earliest practicable water year to minimize the effect of general subordination on the CWCB; provided however, the parties recognize that a period of monitoring and study following the discovery of such Emergent Spring will be necessary to obtain reasonable estimates of flow rate variability over the course of a *reasonable study period*, and that enlargement claims or amendments, may be necessary to account for maximum diversion and exchange rates. Enlargement claims necessary for Treatment of the Emergent Spring(s) whose emergence became known and was noticed to the CWCB during the 20-year period; or additional enlargement claims related to Treatment of water diverted from East Taylor Spring (WDID 4402110, which is an Emergent Spring existing at the time of this Agreement, adjudicated and enlarged under Case Nos. 22CW3118 and 23CW3043 respectively); and any exchanges or exchange project rights adjudicated to enable said enlargement claims, will also be subject to the general subordination set forth in this Settlement Agreement.

c. Unless otherwise agreed to in writing by the Parties, the Parties agree that if Colowyo seeks a junior exchange or exchange project right that would serve the same function as a more senior exchange (e.g., to add an additional source of water to an existing and adequate exchange, exchange project, or augmentation plan for the convenience of Colowyo), the result of which would require the Milk Creek ISF to subordinate to a more junior priority date, and the junior exchange, or exchange project, right(s) sought are unnecessary to allow for the continued Treatment of the Emergent Spring(s), then any such unnecessary, later-filed, junior exchange or exchange project right shall not be entitled to the general subordination set forth in this Settlement Agreement. However, a junior exchange or exchange project right may be necessary to supplement a senior exchange that proves to be insufficient or ineffective (based on operational experience or as a result of circumstances outside the control of Colowyo) to adequately replace out-of-priority depletions in time, location, and amount to other vested water rights, without triggering the need for construction of Milk Creek Reservoir. The Milk Creek ISF will be generally subordinated to a date that is one day junior to such necessary, later-filed, junior exchange or exchange project right.

d. The operation of this general subordination will occur by CWCB electing to place a call that is junior to the most junior Emergent Spring and its related exchanges or exchange project rights adjudicated to enable Treatment of said Emergent Spring. For example, if the most junior Emergent Springs or related exchange or exchange project right has an adjudication date of January 1, 2030, CWCB can place a call under a priority date of January 2, 2030. If an administered CWCB call will not result in the curtailment of Treatment of any adjudicated Emergent Springs and related exchange or exchange project right arising during the 20-year period, CWCB may call under the adjudicated Milk Creek ISF date.

e. During the reasonable study period described above, Colowyo shall perform such monitoring, measurement, testing, planning, coordination with regulatory

agencies, and other actions and analyses as are reasonably necessary to develop its water court claims to appropriate water right(s) for said Emergent Spring(s) and any related exchange(s), exchange project right(s), and augmentation plan claims necessary for the in-priority and out-of-priority operation of said Emergent Spring(s). Colowyo agrees to use good faith efforts to develop its claims and file a water court application(s) as soon as practicable, balancing the need to develop strategy, evidence, and support for its claims, while limiting undue delay and the need to file enlargement claims for Emergent Spring(s) depletions after they have been adjudicated. To enhance transparency of Colowyo's activities and timelines during the reasonable study period, and to provide a forum for CWCB to state any objection(s) to the reasonableness of Colowyo's timeline for filing its claim(s) in Water Court, the Parties agree that, following the discovery of an Emergent Spring(s) by Colowyo during the 20-year period, and notice of the same by Colowyo to CWCB, the Parties will meet annually on or before August 31 ("Study Period Meeting") to discuss: (i) Colowyo's past and planned activities during the study period to develop its claims; (ii) whether Colowyo intends to file a water court application for the subject Emergent Spring(s) in the same calendar year; (iii) whether Colowyo reasonably requires additional time in its reasonable study period to develop its strategy and support for its claims and its reasonable justification for the same; (iv) whether CWCB believes any requested additional time is unreasonable; and (v) whether any Party knows or understands that any third-party intends to appropriate water rights in the Milk Creek basin.

f. If the Parties disagree with respect to the reasonable study period and proposed timeline(s) for Colowyo filing its Water Court Application, the parties agree to use the dispute resolution provisions provided in paragraph 10 herein. If Colowyo requests that its reasonable study period extend beyond the 5th calendar year following discovery of an Emergent Spring(s), and the CWCB does not agree that extending study period beyond the 5th calendar year is reasonable under the circumstances, then the CWCB shall, within 14 days following the Study Period Meeting, provide written notice to Colowyo requesting mediation. The Parties agree to participate in such mediation, which shall occur on or before October 31 of that calendar year, or such other date as agreed to by the Parties, to determine whether the Parties can agree whether Colowyo should file a Water Court Application for the subject Emergent Spring(s) in that calendar year or if there is a reasonable basis to extend the study period. If, following mediation, the parties cannot agree to the reasonableness of the study period and timing for Colowyo to file a Water Court Application for the subject Emergent Spring(s), the Parties shall have such remedies available to them for enforcement of this Agreement, as set forth in paragraph 11.

g. The Milk Creek ISF shall remain subordinated to the administration of any such Emergent Spring(s) and related exchanges or exchange project rights for so long as the Treatment of the Emergent Spring(s) cause depletions upstream of the Milk Creek ISF..

h. The Parties agree that the intended and practical effect of the general subordination set forth herein shall mean that Colowyo will have no legal

obligation to make physical or legal replacements of depletions resulting from the Emergent Spring(s), nor demonstrate the ability to make such replacements, to the Milk Creek ISF, and so long as the terms and conditions of this Settlement Agreement are complied with and in light of the specific circumstances the parties are trying to address, no injury to the Milk Creek ISF will occur if any replacements for out-of-priority diversions by Colowyo for Treatment of the Emergent Spring(s) to other calling water rights can be made to the mainstem of the Yampa River, including by exchange or exchange project right.

i. CWCB agrees to provide notice to Colowyo in writing of any changes or proposed changes to the manner CWCB chooses to exercise use of the Milk Creek ISF, if such change will impact administration of the Milk Creek ISF, so that the Parties may discuss and ensure any such request for administration is consistent with this Settlement Agreement. Such change(s) include, without limitation, placing a call for or a determination for futile call as against Colowyo's Emergent Spring(s).

j. Colowyo shall provide notice to CWCB in writing promptly upon discovering any Emergent Spring within the 20-year period described above. The Parties agree that, after discovering any Emergent Spring, Colowyo will require a period to study flows and water quality of any Emergent Spring, to develop a plan for diversion and treatment, and to file a water court application for the Emergent Spring and any related exchange or exchange project right and augmentation plan.

k. The Parties agree that, so long as this provision does not interfere with enforcement or enforceability of the general subordination described herein, CWCB retains the right to place a call under its original decreed priority date for the Milk Creek ISF under any circumstances that would not result in curtailment of, or the need to make local replacements above or within the Milk Creek ISF reach to replace deletions caused by Treatment of Colowyo's Emergent Spring(s).

l. If, in the future Colowyo no longer has depletions resulting from Treatment of the Emergent Spring(s) subject to the general subordination set forth in this Settlement Agreement, the Parties agree that, to the extent allowed by law at the time, general subordination is no longer needed for Treatment of the Emergent Spring(s) and the Milk Creek ISF may be administered under its original decreed priority. Colowyo shall provide prompt notice to the CWCB in writing that its obligations to replace depletions caused by Treatment of the Emergent Spring(s) are complete and that the general subordination provisions of this Settlement Agreement are no longer necessary.

4. **Water Court Appropriation of Milk Creek ISF.** CWCB will file a Water Court Application seeking adjudication of the Milk Creek ISF, seeking a decree consistent with this Settlement Agreement. Colowyo retains the right to file a statement of opposition in Water Court solely to ensure the terms and conditions of any decree entered by the Water Court are consistent with this Settlement Agreement. The Parties shall enter into a stipulation, which incorporates the terms and conditions of this

Settlement Agreement, as an attachment to the decree, to ensure compliance with Colorado law. The CWCB agrees to include a finding in its Water Court decree that appropriating the Milk Creek ISF, as subject to the terms of the stipulation with Colowyo, is appropriate under the facts and circumstances of this case, and administration of the same, will preserve the natural environment to a reasonable degree. If the CWCB is unsuccessful in obtaining a Water Court decree confirming the Milk Creek ISF consistent with this Settlement Agreement, for any reason, then this Settlement Agreement shall continue to apply to any reapplication of the Milk Creek ISF water right to the CWCB Board and Water Court brought within 20 years of this Settlement Agreement to remedy any defects.

5. Lease of Milk Creek Ditch No. 1. Colowyo owns the Milk Creek Ditch No. 1 water rights, which water rights were changed and quantified in Case No. 18CW3058. Colowyo agrees to lease those water rights to the CWCB for a 20-year period as of the date of this Settlement Agreement to be used for ISF purposes within the ISF reach identified for the Milk Creek ISF. The lease price for use of the water shall be free-of-charge; however, each party shall bear its own fees and costs associated with the implementation and administration of the lease, except as expressly set forth below.

a. CWCB Staff agrees to seek approval from the CWCB Board for a long-term ISF lease pursuant to ISF Rule 6. Nothing in this Settlement Agreement requires the CWCB Board to approve the lease of the Milk Creek Ditch No. 1 water rights; provided however, if the CWCB Board does not approve the long-term lease, the remainder of this Settlement Agreement shall remain in full force and effect. If CWCB decides to employ a different statutory or regulatory mechanism to use the Milk Creek Ditch No. 1 water rights pursuant to this lease, then the parties agree to meet and confer about the CWCB's preferred manner of use.

b. To acquire and implement this lease interest in the Milk Creek Ditch No. 1 water rights, the CWCB must follow the administrative processes described under ISF Rule 6. Prior to the CWCB staff seeking any approval from the CWCB Board for the use of the Milk Creek Ditch No. 1, the CWCB shall confer with Colowyo regarding the CWCB's proposed action, procedure, and timeline for authorization by the CWCB for use of the Milk Creek Ditch No. 1 pursuant to this lease. Colowyo shall have the full right to participate in any such procedures necessary for the CWCB to use the Milk Creek Ditch No. 1 pursuant to this lease, including but not limited to any pre-hearing procedures and any hearing, to support the proposed lease of Milk Creek Ditch No. 1 and to preserve and protect its water right consistent with this Agreement.

c. If Board approval for an acquisition of the proposed lease of Milk Creek Ditch No. 1 is obtained, then Colowyo and CWCB shall file a change of water rights application with the Water Court in Water Division 6, as co-applicants, to seek a decreed right to use the Milk Creek Ditch No.1 water rights for ISF purposes. Such ISF uses shall be in addition to the present irrigation and industrial uses presently decreed for the Milk Creek Ditch No. 1 water right.

d. Colowyo shall retain the right to use any fully consumable water associated with the Milk Creek Ditch No. 1 water rights downstream of the confluence of Milk Creek and Yampa River subject to the details of any future Lease Agreement between the Parties for the CWCB's use the Milk Creek Ditch No.1 water rights for ISF purposes.

e. Colowyo shall be responsible for design and construction of any measurement or augmentation station that is required by the Water Court decree to be developed in order to use the Milk Creek Ditch No. 1 water rights for ISF uses during the period of the Lease.

f. CWCB shall be responsible for maintenance of any historical return flows, including non-irrigation season return flows, arising from its use of the Milk Creek Ditch No. 1 water right.

g. The decision of whether to file the water court application for CWCB's use of the Milk Creek Ditch No. 1 water rights prior to filing the water court application to appropriate the Milk Creek ISF shall be in the CWCB's sole discretion. However, the Parties agree if the CWCB's sequencing of applications prevents the CWCB from deriving certain use or value from the lease of the Milk Creek Ditch No. 1, that outcome will not invalidate this Settlement Agreement, or any part thereof.

6. CWCB Purchase Milk Creek Ditch No. 1. If, within 10 years after the expiration of the 20-year period described in section 5, above, Colowyo determines it desires to sell all or a portion of the Milk Creek Ditch No. 1 water rights, Colowyo agrees to provide notice to the CWCB in writing of its intent to sell the same, and engage in good-faith discussions with the CWCB concerning the CWCB's potential purchase of the Milk Creek Ditch No. 1 water rights for fair market value, to be used for ISF purposes permanently.

7. Emergent Springs Arising After 20 Years. If an Emergent Spring arises after the 20-year period, which Colowyo believes is possible but unlikely, Colowyo and CWCB agree to enter into good faith negotiations to address any such Emergent Spring(s) in a manner acceptable to both Parties. Without limiting either Party's negotiation position or committing either party to any outcome or result in the event this scenario arises, the Parties presently see mutual value in avoiding the need for Colowyo to construct the Milk Creek Reservoir as an upstream augmentation supply for Colowyo to augment depletions from any such Emergent Spring(s), at considerable expense to Colowyo and to the detriment of the Milk Creek ISF flows that the CWCB seeks to protect. Without limiting the Parties options to negotiate and resolve such future negotiations, potential solutions identified at the time of this Settlement Agreement may include: (1) CWCB accepting depletions from any such Emergent Spring(s) without upstream augmentation of depletions as injury with mitigation; (2) the CWCB subordinating the Milk Creek ISF to the new Emergent Spring(s), possibly in exchange for a conveyance by Colowyo to CWCB, at no charge, of a portion of the Milk

Creek Ditch No. 1 water right(s), or a similar water right if Colowyo no longer owns the Milk Creek No. 1 water right, necessary to offset the 5-year average annual depletions to the Milk Creek ISF expected to result from the spring; and/or (3) any other resolution acceptable to the Parties at the time.

8. **Notices to CWCB.** Colowyo agrees to provide notice to the CWCB in writing if, during the 20-year period discussed above, Colowyo determines that it is reasonably necessary to construct Milk Creek Reservoir, so that the Parties may discuss the same.

9. **Savings clause and amendment.** If any terms of this Settlement Agreement are challenged and deemed unlawful for any reason, the Parties agree any provisions not invalidated shall remain in full force and effect; the Parties further agree to meet and remedy any defects to achieve the intended result and exchange of value set out in this Settlement Agreement to the greatest degree possible, while remedying any defect, to ensure that subject Emergent Spring(s) and related water rights do not have an obligation to replace upstream of the CWCB's Milk Creek ISF water right and CWCB will receive the benefits as described within this Settlement Agreement.

10. **Dispute Resolution and Enforcement.** Before a Party commences any action for enforcement of this Settlement Agreement, that Party shall notify the other Party in writing of the existence, nature, and extent of the dispute, and the Parties shall make a good-faith effort to resolve their dispute within 56 days, or such longer period on mutual agreement of the parties, or such shorter period as may be mandated by court proceedings (e.g., 21 day protest period following entry of a Referee's Ruling). The Parties may elect to pursue mediation if any dispute cannot be resolved within the periods set forth in the preceding sentence.

11. **Remedies.** The Parties shall have all rights and remedies provided under law for a breach or threatened breach of this Settlement Agreement, including but not limited to, the right to seek specific performance of this Settlement Agreement.

12. **Venue.** This Settlement Agreement is made and performed in Colorado. The laws of the State of Colorado shall be applied in the interpretation, execution, and enforcement of this Settlement Agreement. The Parties agree that the trial of any action arising out of any dispute hereunder shall be in the District Court in and for the County of Moffat, Colorado, or to the extent the matter involves water matters, in the Water Court for Water Division 6, State of Colorado.

13. **Notices.** All notices required to be given by the Parties shall be in writing and shall be sent by certified mail, postage prepaid, with a copy by email, to the following addressees:

To CWCB:

Colorado Water Conservation Board (the "CWCB")

Attn: Chief of the Stream and Lake Protection Section
1313 Sherman Street, Room 718
Denver, Colorado 80203
(303) 866-3441
Email: DNR_CWCBISF@state.co.us

Copy to Attorneys:

Colorado Department of Law
Natural Resources and Environment Section
Attn: Christopher Davis, Attorney General,
Ralph L. Carr Colorado Judicial Center
1300 Broadway Avenue, 10th Floor
Denver, CO 80203
Email: christopher.davis@coag.gov

To Colowyo:

Colowyo Coal Company, L.P. by its parent, Tri-State Generation and
Transmission Association, Inc.
Attn.: Thomas Kennedy, P.E., Water Rights Portfolio Manager
1100 W. 116th Avenue
Westminster, Colorado 80234
E-mail: thomas.kennedy@tristategt.org

Copy to Attorneys:

Deputy General Counsel
Tri-State Generation and Transmission Association, Inc.
1100 W 116th Street
Westminster, CO 80234

Aaron Ladd, Esq., and Rachel Bolt, Esq.
Dickinson Wright, PLLC
1125 17th St., Suite 550
Denver, CO 80202
Email: aladd@dickinson-wright.com; rbolt@dickinson-wright.com

A party may update or modify its contact information to be used pursuant to this Agreement by providing written notice to the other Party requesting use of the updated contact information

14. **Third-Party Obligations.** The Parties agree that this Settlement Agreement shall be binding on the Parties hereto, their successors, heirs, assigns, legal representatives, and any legal entity that Tri-State may own, control, manage, or direct.

15. **Modification.** This Agreement constitutes the entire agreement between the Parties pertaining to the subject matter described in it and supersedes any and all prior contemporaneous agreements, representations, and understandings. No supplement, modification, or amendment of this Agreement will be binding unless executed in writing by all Parties.

16. **Signature Authority.** The individuals signing below certify and attest that, after following the necessary procedures, each has the necessary approval(s) and authority to sign on behalf of, and bind, their respective Party to this Settlement Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Settlement Agreement as of the last date of signature below.

COLORADO WATER CONSERVATION BOARD

By: _____
Lauren Ris, Director

Date: _____

Colowyo Coal Company L.P.

General Partner: Axial Basin Coal Company, a Delaware close corporation

By: Elk Ridge Mining and Reclamation, LLC, its sole stockholder, a Colorado limited liability company

By: Tri-State Generation and Transmission Association, Inc., its parent

By: _____

Name: Christopher E. Pink

Title: Senior Vice President of Operations