

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

---

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS IN  
WATER DIVISION NO. 5:**

**ABRAMS CREEK  
(Headwaters to Mrs. Paye Ditch Headgate)**

**EAGLE COUNTY, COLORADO**

---

**NOTICE TO CONTEST INSTREAM FLOW APPROPRIATION**

---

Buckhorn Valley Metropolitan District No. 1, by and through its undersigned attorneys, submits the following Notice to Contest in accordance with Rule 5k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 (the "ISF Rules").

**I. Identification of Person Requesting Hearing:**

Buckhorn Valley Metropolitan District No. 1 ("District")  
Attn: John Hill, President  
P.O. Box 5128  
Gypsum, CO 81637

Please direct all notices, pleadings, and correspondence to District's counsel:

Steve Bushong  
Corina Hach  
Porzak Browning & Bushong LLP  
2120 13<sup>th</sup> Street  
Boulder, CO 80302  
sjbushong@pbblaw.com chach@pbblaw.com

**II. Identification of Proposed Instream Flow Appropriations at Issue:**

<b>CWCB ID No.</b>	<b>Stream</b>	<b>Watershed</b>	<b>Upper Terminus</b>	<b>Lower Terminus</b>	<b>Length</b>	<b>Amount</b>
16/5/A-001 (increase)	Abrams Creek	Eagle	Headwaters in the vicinity of UTM North: 4383025.55 UTM East: 339836.18	Mrs. Paye Ditch Headgate UTM North: 4387351.32 UTM East: 343811.41	3.95 miles	0.75 cfs (5/01 – 9/30) [Existing ISF: 0.5 cfs, 1/1 – 12/31]

### **III. The Contested Facts and a General Description of the Data Upon Which the Person Will Rely to the Extent Known at the Time:**

#### **1. Background.**

The District owns senior water rights in the J.P.O. No. 2 Ditch which diverts water from Abrams Creek. The J.P.O. No. 2 Ditch is decreed a total of 3.0 cfs under Civil Action 548 (1.0 cfs for irrigation, June 3, 1908 appropriation), and Civil Action 841 (2.0 cfs for irrigation and domestic, April 1, 1916 appropriation). The J.P.O. No. 2 Ditch was also decreed to fill Buckhorn Pond No. 1 in Case No. 2016CW3173 at a rate of 3.0 cfs. The portion of Abrams Creek that is subject to the instream flow (“ISF”) appropriation includes the J.P.O. No. 2 Ditch diversion point.

The District entered into an agreement with Trout Unlimited dated June 28, 2016 (“Agreement”) to improve flows in Abrams Creek for the benefit of its native cutthroat trout population. The improved flows are to be accomplished by improving the efficiency of the District’s diversion and delivery system for the J.P.O. No. 2 Ditch with a pipeline project described in the Agreement (the “Project”). Subject to the terms of the Agreement, and upon completion of the Project, the District will begin leaving in Abrams Creek 40% of the water physically available for diversion at the J.P.O. No. 2 Ditch headgate and will further limit or stop diversions if needed to leave 1.25 cfs in Abrams Creek.

The Project will help support the flows needed for the increased ISF in Abrams Creek. However, the District has concerns to address regarding the J.P.O. No. 2 Ditch and the Project before it will support the ISF, as described below.

#### **2. Findings required by C.R.S. 37-92-102(3)(c) and Rule 5(i) of the ISF Rules.**

The District questions whether there is water available for the appropriation to be made unless and until the Project is completed. The R2Cross data, including without limitation the dates and locations where the data were obtained, may not reasonably support the claimed ISF for the entire reach unless the Project is completed. Information on flows is available near the J.P.O. No. 2 Ditch and the J.P.O. No. 2 Ditch can often divert the entire flow of Abrams Creek.

The District also questions whether a natural environment within the claimed reach of Abrams Creek can exist without material injury to water rights unless and until the Project is completed. This is, in part, because of the lack of flow to satisfy the existing senior water rights if the Project is not completed. The District also seeks terms and conditions to protect its J.P.O. No. 2 Ditch to the extent the Project, as currently contemplated or as may need to be reconstructed in the future, causes any change in the decreed headgate location for the J.P.O. No. 2 Ditch. The District also questions why the ISF reach needs to extend above the J.P.O. No. 2 headgate.

**3. Compliance with C.R.S. 37-92-102(3).**

The District questions whether the proposed ISF reflects the minimum amount required to preserve the natural environment to a reasonable degree. The claimed amounts for the ISF may be overstated due to errors in the application of the R2Cross methodology, insufficient flow data, and use of flow data that is not representative of the entire reach. Claiming the same constant flow, 24 hours a day, for five continuous months may not reflect the available flow in Abrams Creek. Further, if the section of Abrams Creek subject to the proposed ISF is a gaining stream, there would be no basis to claim a fixed flow rate for an entire stream reach based on measurements taken near the bottom end of the stream.

The District questions whether the proposed ISF appropriation will deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact without protective terms and conditions.

**4. Protection of present uses under C.R.S. 37-92-102(3)(b).**

Any increased appropriation of the ISF on Abrams Creek must be subject to the present uses of water being made pursuant to a senior appropriation or practices in existence on the date of the appropriation of the ISF.

**5. Compliance with C.R.S. 37-92-102(4)(a).**

The CWCB must adopt and impose terms and conditions on any ISF appropriations on Abrams Creek, including, but not limited to:

- A. Ensuring that any ISF may only be enforced at the point on a stream reach where the CWCB has installed a measuring device at its sole cost and expense; and
- B. Terms and conditions specific to protecting the existing J.P.O. No. 2 Ditch and the Project.

**6. Reservation of right to contest other factual and legal matters.**

The District reserves the right to identify and raise other contested factual and legal issues prior to or at a hearing in this matter.

**7. General Description of Supporting Data (to the extent currently known):**

In addition to information discussed above, the District relies upon the following supporting data (to the extent currently known):

- A. All documents, facts, data, photographs, and other material in the record of the CWCB, and in the files of the Colorado Division of Wildlife and the U.S. Bureau of Land Management.

- B. Records available from the Division of Water Resources regarding existing rights, decrees, stipulations, engineering reports, call chronology, basin studies, and other relevant information.
- C. The Agreement dated June 28, 2016, between the District and Trout Unlimited.
- D. The personal knowledge of the District and District personnel and consultants regarding the flows in Abrams Creek and other matters that may be relevant hereto.
- E. All facts and data to be offered in rebuttal.
- F. The District reserves the right to present other facts, data, documents, and factual and opinion testimony at a hearing on this matter.

WHEREFORE, the District contests the proposed Abrams Creek instream flow appropriation described herein and requests that a hearing officer be appointed in accordance with Rule 5(n) of the ISF Rules.

Respectfully dated this 30<sup>th</sup> day of March, 2018.

PORZAK BROWNING & BUSHONG LLP



---

Steve Bushong (#21782)

Corina A. Hach (#47783)

*Attorneys for Buckhorn Valley Metropolitan District No. 1*