



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718
Denver, CO 80203

P (303) 866-3441
F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Chief
Stream and Lake Protection Section

DATE: July 21, 2021

AGENDA ITEM: 6. Final Action on Uncontested 2021 Instream Flow Appropriations in Water Divisions 2 and 4

Staff Recommendation: Staff requests that the Board make the following determinations and take the following actions on each of the appropriations identified in Table 1. The information necessary to support these determinations is contained in this memo, the recommendation letters and documentation submitted by the Bureau of Land Management (BLM), Colorado Parks and Wildlife (CPW) and High Country Conservation Advocates (HCCA), and in staff's oral and written presentations provided at the March 10, 2021 Board meeting.

- (1) Determine, pursuant to section 37-92-102(3), C.R.S., that for each 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 appropriations; and
 - (c) Such natural environment can exist without material injury to water rights.
- (2) Pursuant to ISF Rule 5f., establish March 10, 2021 as the appropriation date for these water rights.
- (3) Accept the provisions in the Trappers Crossing Homeowners Association Stipulation and agree to include them in any subsequent Water Court applications, filings, and decrees.
- (4) Request staff to work with the Attorney General's office to file applications for these water rights in water court by the end of the calendar year.



Table 1

Div	Stream	Watershed	County	Length (miles)	Upper Terminus (UTM)	Lower Terminus (UTM)	Flow Rate, cfs (Timing)
2	East Fork Arkansas River	Arkansas Headwaters	Lake	6.46	headwaters in the vicinity of: E: 399540.97 N:4353749.78	confl Chalk Creek at E: 394793.07 N: 4356126.94	0.25 (12/16 - 04/30) 7 (05/01 - 07/31) 2.8 (08/01 - 09/20) 0.7 (09/21 - 12/15)
4	Cow Creek	Uncompahgre	Ouray	7.4	confl Lou Creek at E: 265665.02 N: 4231002.60	confl Uncompahgre River at E: 258039.02 N: 4237591.58	7.2 (01/01 - 03/31) 20 (04/01 - 04/30) 53 (05/01 - 06/30) 20 (07/01 - 07/31) 15 (08/01 - 08/15) 7.2 (08/16 - 08/28) 5.9 (08/29 - 09/19) 7.2 (09/20 - 12/31)
4	Wildcat Creek	East-Taylor	Gunnison	2.48	outlet of Green Lake at E: 323800.20 N: 4301420.95	confl Coal Creek at E: 325687.24 N: 4304206.95	0.35 (12/01 - 03/31) 0.65 (04/01 - 04/30) 2.1 (05/01 - 08/31) 0.6 (09/01 - 11/30)

Background:

On March 10, 2021, the CWCB formed its intent to appropriate instream flow (ISF) water rights on three stream segments in Water Divisions 2 and 4 that were not contested. BLM, CPW, and HCCA recommended these streams for inclusion into the CWCB’s Instream Flow and Natural Lake Level Program. Pursuant to ISF Rule 5h., the three uncontested stream segments described in Table 1 are being recommended to the Board for Final Action.

Technical Investigations

The Board was provided detailed information regarding all field data, studies, and analyses for each stream segment at its March 10, 2021 Board meeting. A brief overview of the analyses is provided below.

Natural Environment Studies

The recommending entities conducted field surveys on these streams and found natural environments that can be preserved to a reasonable degree. To quantify the resources and to evaluate instream flow requirements, the recommenders collected biologic and hydraulic data and analyzed the data. CWCB staff reviewed all analyses and prepared recommendations for the amount of water necessary to preserve the natural environment to a reasonable degree for each of the streams.

Water Availability Studies

The CWCB staff conducted evaluations of water availability for these streams. To determine the amount of water physically available for the Board’s appropriations, staff analyzed available USGS gage records, streamflow models, and CWCB gaging and streamflow measurements records. In addition, staff analyzed existing water rights and consulted with the Division Engineer’s Office in each water division to identify any potential water availability problems. Staff used this information to develop a hydrograph showing the amount of water available for each of the recommendations. Based upon its analysis, staff has determined that water is available for appropriation on each stream to preserve the natural environment to a reasonable degree without limiting or foreclosing the exercise of existing water rights.

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: Trappers Crossing Homeowners Association Stipulation

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

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER
DIVISION NO. 4:**

**WILDCAT CREEK
(outlet of Green Lake to confluence with Coal Creek)**

GUNNISON COUNTY, COLORADO

**STIPULATION AND AGREEMENT BETWEEN THE STAFF OF THE COLORADO
WATER CONSERVATION BOARD AND TRAPPERS CROSSING HOMEOWNERS
ASSOCIATION**

Staff for the Colorado Water Conservation Board (“Staff”) and Trappers Crossing Homeowners Association (the “HOA”), by and through their respective counsel, hereby stipulate and agree as follows:

1. Staff will recommend to the CWCB Board that the following provisions be included in the CWCB’s final determination to appropriate an instream flow water right for Wildcat Creek from the outlet of Green Lake to the confluence with Coal Creek (“Instream Flow Water Right”), and in any subsequent Water Court applications, filings, and decrees related thereto:

a. The HOA and its members divert water from wells, springs, and Trapper Creek pursuant to a plan for augmentation decreed in Case No. 89CW129 as amended in Case No. 01CW66, Water Division 4 (“Augmentation Plan”). Diversions from existing or future wells and other structures augmented by direct exchange pursuant to the Augmentation Plan, including, but not limited to, diversions for fire protection, are not subject to a call from this Instream Flow Water Right, and the HOA and its members are not required to provide replacement water to this Instream Flow Water Right for such diversions.

b. Any of the HOA’s or its members’ existing or future wells permitted under section 37-92-602, C.R.S., that are exempt from priority administration are not subject to a call from this Instream Flow Water Right.

2. The above provisions may be adjusted for consistency in naming conventions, defined terms, or other stylistic or formatting conventions as appropriate for inclusion in subsequent Water Court applications, filings, and decrees.

3. In consideration of the mutual promises contained herein, the HOA agrees to not oppose or contest the appropriation of this Instream Flow Water Right before the CWCB Board or in any Water Court proceeding to adjudicate this Instream Flow Water Right. Provided, however, the

HOA reserves the right to file a statement of opposition in any such Water Court adjudication for the sole purpose of ensuring that any decree entered is consistent with the terms of this Stipulation and Agreement.

4. In the event the CWCB Board declines to adopt Staff's recommendation to include the provisions referenced above in its final action on this Instream Flow Water Right, this Stipulation is void and the HOA reserves the right to file a Notice to Contest this Instream Flow Water Right appropriation, and Staff agrees that it will support the HOA's late filing of such Notice to Contest, including, if necessary, modifying the contested appropriation deadlines.

5. Nothing in this Stipulation and Agreement affects or changes the existing instream flow water right on Coal Creek decreed in Case No. 80CW102, Water Division 5, or the terms and conditions included in the Augmentation Plan related to the protection of the same.

6. This Stipulation and Agreement shall be binding upon and inure to the benefit of the parties and their successors, agents, and assigns.

7. This Stipulation and Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

Stipulated and agreed to this 28th day of May, 2021.

OFFICE OF THE COLORADO
ATTORNEY GENERAL
*Counsel for Staff of the Colorado Water
Conservation Board*



Andrew Nicewicz
1300 Broadway, 7th Floor
Denver, CO 80203
(720) 508-6259
andy.nicewicz@coag.gov

LAW OF THE ROCKIES
*Counsel for Trappers Crossing Homeowners
Association*



Kendall Burgemeister
525 North Main Street
Gunnison, CO 81230
970-641-1903 ext. 3
kburgemeister@lawoftherockies.com