

**Consent Agenda Item 1.b**

Board Meeting

Case No. 22CW3017 (Water Division 5); MC McLain Flats LLC

**Summary of Water Court Application**

Application for Change of Water Rights and Approval of Plan for Augmentation, Including Exchange.

**Staff Recommendation**

Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in April 2022 to protect CWCB’s instream flow water rights.

**CWCB Instream Flow Water Rights**

The CWCB holds water rights, including the following instream flow water rights, in Water Division 5 in the Roaring Fork River Watershed that could be injured by this application:

Case Number	Stream	Upper Terminus	Lower Terminus	CFS Rate (Dates)	Approp. Date
W-2948 (1976)	Roaring Fork River	confluence of Difficult Creek	confluence of Maroon Creek	32 (1/1 - 12/31)	01/14/1976
85CW0639	Roaring Fork River	confluence of Fryingpan River	confluence of Crystal River	75 (10/1 - 3/31) 145 (4/1 - 9/30)	11/08/1985
85CW0646	Roaring Fork River	confluence of Maroon Creek	confluence of Fryingpan River	30 (10/1 - 3/31) 55 (4/1 - 9/30)	11/08/1985

**Potential for Injury**

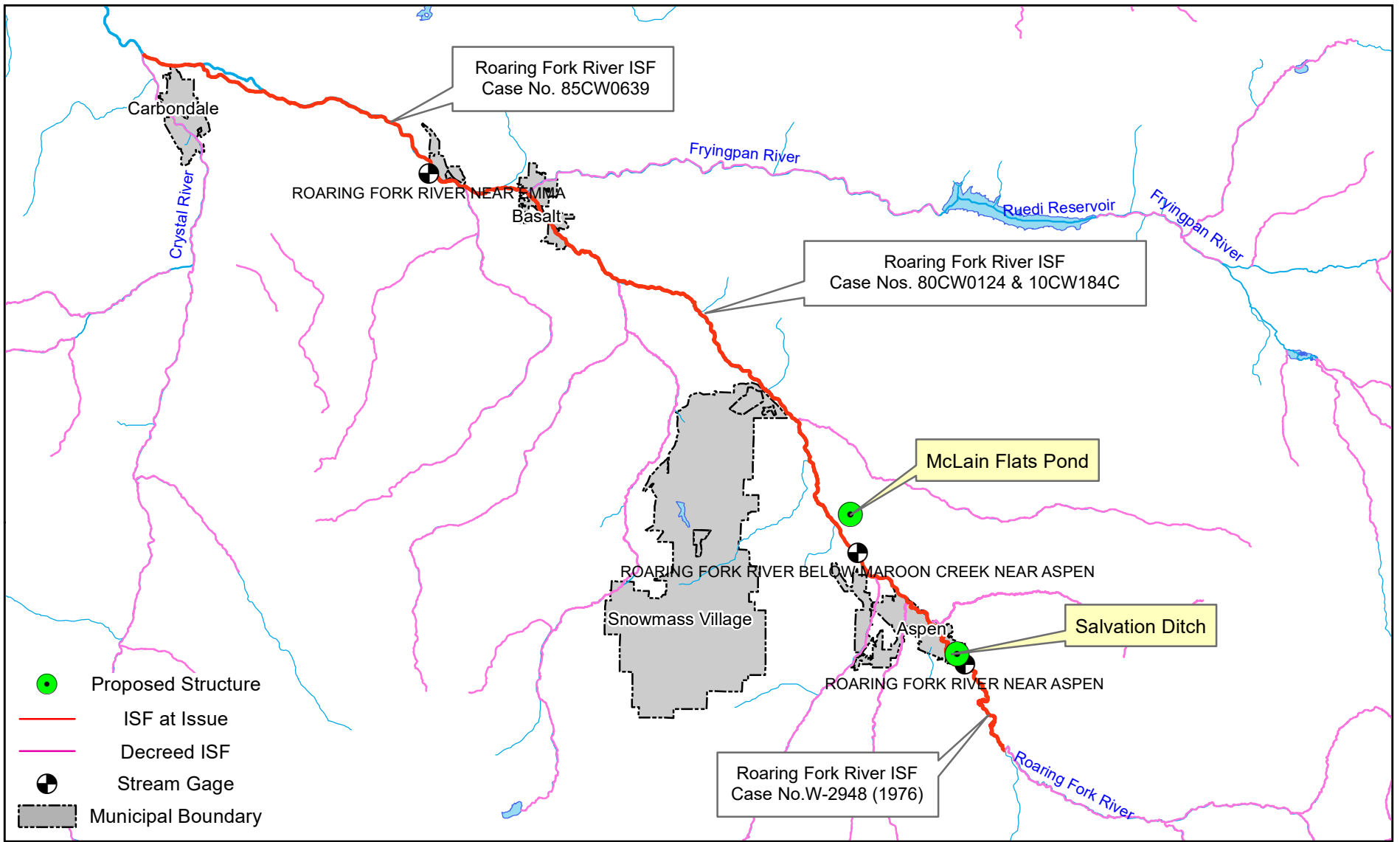
- The proposed plan for augmentation and exchange may not replace depletions in the proper time, place, and amount, which could injure the CWCB’s instream flow water rights.
- The proposed change of water rights could cause an expansion of use and could alter the time, place, and amount of historical return flows, which could injure the CWCB’s instream flow water rights.
- Terms and conditions should be included in any decree entered in this case to ensure that the decreed water rights, change of water rights, and plan for augmentation will not injure the CWCB’s instream flow water rights and flows protected under Case No. 10CW184 (CWCB’s Stapleton Brothers Ditch water rights).
- The apparent flow-through operation (to “continuously fill and refill the MC McLain Flats Pond”) could injure the CWCB’s instream flow water right because it is fully depletive to a segment of the intervening instream flow.






**Other Objectors**

Statements of Opposition were also filed by the City of Aspen; and, the Salvation Ditch Company.

**Attorney Representing CWCB**

William D. Davidson, Assistant Attorney General, is assigned to this case and can be contacted at will.davidson@coag.gov, or 720-508-6280.

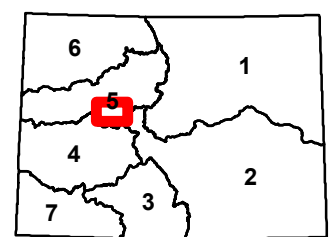
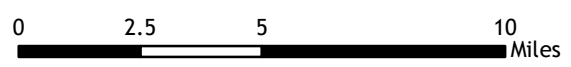


-  Proposed Structure
-  ISF at Issue
-  Decreed ISF
-  Stream Gage
-  Municipal Boundary



**COLORADO**  
**Colorado Water Conservation Board**  
 Department of Natural Resources

May 17-18, 2022 CWCB Board Meeting  
 Consent Agenda Item 1.b Statement of Opposition  
 Case No. 22CW3017 (Water Div 5)  
 MC McLain Flats LLC



## DIVISION 5 WATER COURT- FEBRUARY 2022 RESUME

7. **22CW3017 PITKIN COUNTY. ROARING FORK RIVER. MC McLain Flats LLC**, c/o Patrick, Miller, & Noto, P.C., Scott C. Miller, Esq. and John M. Sittler, Esq., 229 Midland Ave., Basalt, CO 81621, (970) 920 – 1030. APPLICATION CHANGE OF WATER RIGHT AND APPROVAL OF PLAN FOR AUGMENTATION INCLUDING EXCHANGE. First Claim: For Change of Water Rights. Decreed water right for which change is sought: Name of structure: Salvation Ditch. Date of original decree: December 15, 1906, Civil Action 1221, Garfield County District Court. Legal description of structure as described in the most recent decree: The decreed point of diversion for the Salvation Ditch is located on the north bank of the Roaring Fork River at a point from whence the east quarter corner of Section 7, Township 10 South, Range 84 West of the 6<sup>th</sup> P.M. bears North 2° 48' West 5633.4 feet. Source: Roaring Fork River. Appropriation date: August 2, 1902. Total amount decreed: 58 c.f.s., absolute. Use: Irrigation. Amount of water that applicant intends to change: 0.033 c.f.s. Detailed description of proposed change: Complete statement of change: Applicant owns 299 Salvation Ditch Company shares, which have been historically used to irrigate approximately 16.53 acres on Applicant's property depicted on the maps on file with the Court as Exhibit A and Exhibit B. Diversion records for the Salvation Ditch are on file with the Court as Exhibit E. Based upon the 12,100 shares currently outstanding, Applicant is entitled to divert and has used approximately 2.5 percent of the Salvation Ditch's historical diversions to irrigate 16.53 acres on Applicant's property. As a result of building footprints, pond system footprints, and driveways constructed on Applicant's property, Applicant has dried up or will dry up approximately 1.92 historically irrigated acres on Applicant's property. The dry-up is depicted on the map on file with the Court as Exhibit B. Applicant's consulting engineer has determined that 0.033 c.f.s. of water was historically used to irrigate the 1.92 acres of land being permanently dried up. Applicant's engineer determined the crop demand based on the duty of water decreed in the original Salvation Ditch decree in Civil Action 1221, Garfield County District Court. The dry-up results in a consumptive use credit of 1.48 acre-feet of water per year. A summary of the HCU analysis is on file with the Court as Exhibit C. Applicant intends to store the consumptive use credits in the MC McLain Flats Pond in order to augment evaporative depletions, pursuant to the plan for augmentation requested in the Third Claim below. Applicant will employ accounting procedures and install measuring devices as required by the Division Engineer to ensure that this change of water right will not result in an expansion of historical use of the amount of water changed. Second Claim: For Approval of Plan for Augmentation. Name of structures to be augmented: MC McLain Flats Pond. Description of structures to be augmented: MC McLain Flats Pond, located in the NE ¼ of the SE ¼ of Section 27, Township 9 South, Range 85 West of the 6<sup>th</sup> P.M., at a point approximately 942 feet from the East section line and 2,315 feet from the South section line (Pitkin County). UTM (NAD 83, Z 13): Easting – 339216, Northing – 4345019. Source: Applicant will deliver water to the MC McLain Flats Pond via its lateral off the Salvation Ditch. The Salvation Ditch diverts from the Roaring Fork River, tributary to the Colorado River. Name of ditch used to fill and capacity in c.f.s.: Salvation Ditch. Applicant owns 299 shares in the Salvation Ditch Company, equivalent to approximately 1.45 c.f.s. Legal description. The decreed point of diversion for the Salvation Ditch is on the north bank of the Roaring Fork River whence the East quarter corner of Section 7 in Township 10 South Range 84 West of the 6<sup>th</sup> Principal Meridian bears North 2 degrees 48 minutes West 5.633.4 feet. Date of appropriation: March 19, 2021. Amount: 1.847 acre-feet, conditional, with the right to fill and re-fill in priority or as augmented. Uses: Recreation, piscatorial, aesthetic, fire protection. No other water rights are diverted from the MC McLain Flats Pond. Water rights to be used for augmentation: Salvation Ditch consumptive use credits and Basalt Water Conservancy District Allotment Contract for 1.0 acre-foot, as described in paragraph 6.B of the Application. Complete statement of plan for augmentation, covering all applicable matters under C.R.S. § 37-92-103(9), -302(1)(2), and -308(8): Background: Applicant owns property in the McLain Flats area which is irrigated with Salvation Ditch water. The location of Applicant's property is shown on Exhibit A, on file with the Court. Applicant is building a new single-family residence with various outbuildings on its property. The MC McLain Flats Pond will be a recreational and aesthetic pond/water feature near the main house. Applicant will continuously fill and refill the MC McLain Flats Pond from its Salvation Ditch shares. When the MC McLain Flats Pond is out of priority, Applicant will continue to fill or refill the pond with consumptive use credits from its Salvation Ditch shares, as changed under the First Claim, above. When Applicant's consumptive use credits are not sufficient to replace pond evaporation, Applicant may elect to refill and top off the MC McLain Flats Pond utilizing its BWCD contract augmentation and exchange water. When and if Applicant's consumptive use credits and BWCD exchange water are not available in priority, Applicant will curtail diversions into the Pond, unless other fill sources are available in priority or as augmented. Applicant will continue to divert all changed Salvation Ditch water rights in this case at Applicant's property. Water requirements: Applicant's consulting engineer calculated the evaporation for the MC McLain Flats Pond based on DWR General Guidelines for Substitute Water Supply Plans for Sand and Gravel Pits (SEO Gravel Pit Guidelines) and NOAA Technical Report NWS 33, with consideration for no evaporation during historically ice-covered months. Those calculations are shown in Exhibit D, Columns 1-5, on file with the Court. Average annual pond evaporation for 0.455 acres of pond surface area is 37.80 inches, or 1.43 acre-feet. Evaporation is 100 percent consumptive. Applicant's engineer assumed a conservative call period to account for climate

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change, dust on snow events, shifting runoff timing and increased transmountain diversions. Under that call period, total out-of-priority depletions are 1.10 acre-feet per year, as shown in Exhibit D, Columns 6-8, on file with the Court. Applicant will have excess consumptive use credits in May-September; but there may not be enough consumptive use credits to cover all pond evaporation in April, October, and November during dry years, as shown on Exhibit D, Columns 9 and 10, on file with the Court. Call operation: Applicant will fill the MC McLain Flats Pond under its own junior priorities in free river conditions each spring. When a call comes on that would otherwise prevent Applicant from refilling and topping off the MC McLain Flats Pond, Applicant will continue to fill the pond with the Salvation Ditch consumptive use credits applied for in this case. If consumptive use credits are not sufficient to fully augmented out-of-priority depletions, Applicant may continue to fill the MC McLain Flats Pond from the Salvation Ditch under its BWCD contract, assuming exchange potential is available, and any valid administered downstream call can be satisfied by such exchange. Exhibit D, Column 11, on file with the Court, shows that Applicant's BWCD contract may need to augment 0.15 acre-feet of evaporation in April, 0.08 acre-feet in October, and 0.03 acre-feet in November. Applicant may also continue to use the MC McLain Flats Pond as an irrigation control structure for Applicant's senior Salvation Ditch rights, with outflows exceeding Salvation Ditch inflows every 72 hours. Return flows: Applicant will replace delayed return flows associated with dry-up of the 1.92 acres on Applicant's property under the Salvation Ditch by delivering the historic deep percolation component of the changed Salvation Ditch water into a recharge pit for exfiltration into the groundwater table and return to the Roaring Fork River. Applicant's engineer calculated the annual delayed return flow deep percolation obligation at 0.80 acre-feet, as shown on Exhibit C, Table 4, Column 4, on file with the Court. The maximum daily delivery obligation to the recharge pit is 1,730 gallons per day in August, as shown on Exhibit C, Table 4, Column 5, on file with the Court. The return flows will be diverted to the recharge pit from May to October. Applicant will similarly ensure maintenance of historic surface water return flows through releases from the MC McLain Flats Pond, or by-passes, back the drainage ditch that historically carried water off Applicant's property back towards the Roaring Fork River. Applicant's engineer calculated the annual surface water return flow obligation at 1.20 acre-feet, as shown on Exhibit C, Table 4, Column 2, on file with the Court. The maximum daily delivery obligation is 2,590 gallons. Surface water return flow releases will occur from May to October when the Salvation Ditch is in-priority. Applicant owns the land on which the augmented water rights will be located and where the water will be put to beneficial use. Remarks: Applicant will limit its total diversion from the Salvation Ditch to within the amounts Applicant historically diverted and the Salvation Ditch Company shares they own to ensure there is no expansion of use. Applicant does not seek a right to divert more water than Applicant could otherwise divert through the Salvation Ditch and from the Salvation Ditch under Applicant's Salvation Ditch Company shares. Applicant will reduce the irrigation use of their senior Salvation Ditch direct flow water rights by the amount of water they divert under the MC McLain Flats Pond water right. Third Claim: For Appropriative Right of Exchange. Name of structure: MC McLain Flats Exchange. Type: Appropriative Exchange. Description of water rights: Location of downstream termini: The points of replacement on the Roaring Fork and/or Colorado Rivers of the BWCD's rights described as follows: For exchange of Green Mountain Reservoir water: The confluence of the Roaring Fork and Colorado Rivers, located in the SE ¼ NW ¼ of Section 9, Township 6 South, Range 89 West of the 6<sup>th</sup> P.M., at a point approximately 2,200 feet from the North section line and 2,350 feet from the West section line (Garfield County). UTM Zone 13 NAD 83 coordinates: Northing 4380346, Easting 299776. For exchange of Ruedi Reservoir and/or Troy and Edith Ditch water: The confluence of the Roaring Fork and Fryingpan Rivers, located in the SW ¼ SE ¼ of Section 7, Township 8 S., Range 86 W. of the 6<sup>th</sup> P.M., at a point 647 feet from the South section line and 1,475 feet from the East section line (Eagle and Pitkin Counties). UTM Zone 13 NAD 83 coordinates: Northing 4359437, Easting 324739. For exchange of Robinson Ditch water: The point of diversion as decreed is located on the North bank of the Roaring Fork River one-half mile below the mouth of Sopris Creek in Section 11, T. 8 S., R. 87 West, 6<sup>th</sup> P.M. (Eagle County) UTM Zone 13 NAD 83 coordinates: Northing: 4359863, Easting 321622. Location of upstream terminus: The point of diversion for the Salvation Ditch, as described in paragraph 2.C of the Application. Source: The water rights owned or controlled by the BWCD and for which Applicant is in the process of applying for an allotment contract for the use of, as described in paragraph 6.B of the Application. Date of appropriation: February 28, 2022. How appropriation was initiated: Field inspection, formulation of intent to apply water to beneficial use, development of plans for the MC McLain Flats Pond, and filing of this application. Date water applied to beneficial use: N/A. Amount: 0.0025 c.f.s., conditional, up to 0.26 acre-foot per year. Use: Exchange to implement the plan for augmentation applied for in this case.

**YOU ARE HEREBY NOTIFIED THAT YOU HAVE until the last day of APRIL 2022 to file with the Water Clerk a verified Statement of Opposition setting forth facts as to why this application should not be granted or why it should be granted in part or on certain conditions. A copy of such statement of opposition must also be served upon the applicant or the applicant's attorney and an affidavit or certificate of such service shall be filed with the Water Clerk, as prescribed by Rule 5, CRCP. (Filing Fee: \$192.00) KATHY POWERS, Water Clerk, Water Division 5; 109 8th Street, Suite 104 Glenwood Springs, CO 81601.**