BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

Prehearing Statement of Colowyo Coal Company, L.P.

IN THE MATTER OF STAFF'S RECOMMENDATIONS FOR AN INSTREAM FLOW APPROPRIATION ON MILK CREEK BETWEEN THE CONFLUENCE WITH WILSON CREEK AND THE CONFLUENCE WITH THE YAMPA RIVER, WATER DIVISION 6

Pursuant to Rule 5n(2) of the Rules Concerning the Colorado Instream Flow and natural Lake Level Program, Colowyo Coal Company, L.P. hereby submits the following Pre-Hearing Statement contesting the Colorado Water Conservation Board ("CWCB") Staff's recommendation for a minimum instream flow appropriation on Milk Creek between the confluence with Wilson Creek and the confluence with the Yampa River ("Proposed ISF"). This PHS is submitted on behalf of Colowyo by its attorneys, in-house counsel for Tri-State Generation and Transmission Association, Inc., Roger Williams, and outside counsel Aaron Ladd, whose information is provided in his signature block, who requests an entry of appearance in this matter and to be included on the certificate of service for all future filings.

I. Background: Colowyo Coal Company L.P. ("Colowyo") owns and operates a progressive surface coal mine with activities in the Milk Creek basin and Morgan Creek Basin, both tributary to the Yampa River. Colowyo is owned and controlled by Axial Basin Coal Company, owned and controlled by Elk Ridge Mining and Reclamation, LLC, owned and controlled by Tri-State Generation and Transmission Association, Inc. Colowyo's operations are located upstream of the CWCB's proposed instream flow water right for Milk Creek, which is the subject of In The Matter of Proposed Instream Flow Appropriation in Water Division 6: Milk Creek ("Proposed ISF"). Colowyo filed a Statement of Opposition to the Proposed ISF 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. Colowyo attaches Exhibit A, providing a narrative of Tony Tennyson, Reclamation and Environmental Manager for Colowyo Mine, and Exhibit B, Report of Austin Mallotte, Colowyo's water rights engineering consultant, which provide additional details concerning Colowyo's current and future operations and water use, as well as concerns with the Proposed ISF, as discussed in more detail below.

II. Colowyo's Request for Board Action: Pursuant to CWCB Rules 4.g., in response to its Staff's recommendation the CWCB Board ("Board") may choose to (1) file a water right application, (2) not file a water right application or (3) table action on an ISF appropriation. For the reasons set below, Colowyo requests that the Board table the proposed appropriation to address the deficiencies in the Staff's proposal identified below, and in order to recognize the unique circumstances of Colowyo's operational needs as it transitions from active mining and reclamation, to full-time reclamation, in the coming years after more than a half-century of mining. Tabling the appropriation for a period of 7 years should provide substantial improvement, refinement, and reliability in the Staff's data and recommendations, and may resolve many of Colowyo's concerns that would be caused by appropriation of the Proposed ISF in 2026.

III. <u>Standards for Appropriation</u>: Rule 5.i Standards. CWCB Rule 5.i., requires that, 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.

Statutory Standards. In addition to the Rule 5.i. Findings, and perhaps more importantly, the CWCB must also consider the statutory limitations on its authority to appropriate instream flows set out in §37-92-102(3), C.R.S. See CWCB Rule 5j.(3). Initially, the context of §37-92-102(3) must be recognized as the CWCB's stator authority for appropriating instream flows, which arises from the "the need to correlate the activities of mankind with some reasonable preservation of the natural environment…" Accordingly, inherent in the CWCB's consideration must be other activities in balance with the CWCB exercise of authority. Paramount, however, the only water that the Board is authorized to appropriate is "such waters of natural streams and lakes as the board determines may be required for <u>minimum</u> streamflows or for natural surface water levels or volumes for natural lakes to <u>preserve</u> the natural environment to a reasonable degree." (emphasis added). While the Board may acquire and change water rights for more the minimum, and to preserve and improve the natural environment to a reasonable degree, new CWCB ISF appropriation are statutorily limited to the minimum streamflows to preserve the natural environment to a reasonable degree.

While CWCB Staff and other proponents of the Proposed ISF attempt to address the CWCB Rule 5.i. factors, very little, if any, attention is given to the inherent statutory limitation of the CWCB's authority to appropriate instream flow water rights – that it be <u>minimum</u> instream flows pursuant to §37-92-102(3).

IV. **<u>Deficiencies in CWCB Staff's Recommendation</u>**: Based on CWCB Staff's recommendations and submittals by other proponents, Colowyo believes the CWCB Board lacks sufficient and reliable enough data to make the necessary determinations pursuant to the Rule 5.i. and to determine the characteristics of a *minimum* instream flow water right consistent with the Board's limited authority to appropriate minimum instream flows under §37-92-102(3).

Water Availability and Proposed Flow Rates. First, the CWCB's recommendations on water availability and in determining proposed rates of flow and timeframes are flawed and inadequate. Specifically, Staff's streamflow analysis is based on very few years of streamflow data, 2017-2024. The Staff admits the insufficiency of this data set in its recommendation for the Proposed ISF to the Board at its March meeting, stating that, "**wherever possible, long-term stream gage data (period of 20 or more years) are used to evaluate streamflow**." CWCB Staff Milk Creek Executive Summary, March 18-19, p. 10. BBA further points out in its memo that even the inadequate 7-year period presented to the Board here, also suffers from "several significant multi-day gaps, including gaps of 26 days, 71 days and 265 days" and "lack of statistical confidence intervals, and absence of model calibration details." Exhibit B, p. 8.

This flawed and anemic streamflow data set forms the basis for the CWCB's recommendation that the Board may find there is water available for the appropriation under Rule 5.i. On the inadequacy

of the data alone, the Board could find that it lacks sufficient and reliable information to make that finding.

Then, the CWCB determined its streamflow rates and periods on that flawed streamflow data. In many instances, the CWCB Staff's Proposal exposes its lack of consideration for determining the minimum streamflows (an appropriate timeframes for the same) that would preserve the natural environment to a reasonable degree under §37-92-102(3). Instead, the Staff's and other proponents' analysis consists of largely of selecting mean streamflows as the basis for the proposed flow rates, or in the case of runoff, seeking flows for maximum fish habitat; Staff and other proponents fail to provide the Board any significant analysis of what lesser flows, or what minimum flows, would preserve the environment to a reasonable degree and comply with §37-92-102(3). The following provides a few examples of Staff and proponent recommendations to the Board that fail to properly inform the Board of the minimum flows available that it has the statutory authority to appropriate (*Colowyo commentary in italics in the outline below)*:

- CWCB Staff Milk Creek Executive Summary, March 18-19:
    - Page 8. "Maximum habitat occurs from 30 cfs to 40 cfs … At flows greater than 40 cfs, additional increments of discharge provide smaller habitat benefits." *This is an admission by CWCB Staff that 40 cfs is an upper limit to an acceptable range and is by definition not the minimum streamflow that the CWCB may appropriate.*
    - Page 9. *Compare Staff's analysis of 8.0 cfs for July 1 through July 31 to its analysis of 4.5 cfs for August 1 through September 30. If 4.5 cfs provides habitat for the latter period, the recommendation lacks analysis of whether the natural environment could be preserved to a reasonable degree at flows flows below 8.0 cfs If 4.5 cfs works in a flow limited setting, why is 8 cfs the minimum in the prior period?*
- BLM Instream Flow Recommendation for Milk Creek, February 2025
    - Page 9. "Snowmelt runoff generally occurs from mid-April to **mid-June**…" *And yet the selected period for 40 cfs flow rate runs through June 30. Again this shows a disregard for identifying for the Board the minimum streamflows that are available for appropriation in this matter.*
- Letter from Katie Birch, CPW Instream Flow Program Coordinator, March 7, 2025.
    - Page 8. A flow of 40 cfs **maximizes** preferred habitat …. **Maximizes** preferred spawning… optimal depth … optimal overall habitat conditions for adult species…."
- Final Milk Creek Instream Flow Study Report, Miller, September 30, 2024
    - Page 10. The Maximum AWS for spawning habitat occurs from 30 cfs to 40 cfs for both sites. There is very little difference between the spawning habitat index value at 30 cfs and 40 cfs (Figure 5, Figure 6). A flow of 10 cfs produces approximately 65% of the maximum potential habitat at Site 1 and approximately 58% of the maximum habitat at Site 2." *Again, there is no discussion of whether 65% and 58% habitat protection at 10 cfs would be an appropriate minimum instream flow appropriation pursuant to §37-92-102(3). And if not 10 cfs, at what flow rates between 10 cfs and 30 cfs is there a minimum flow to protect the natural environment to a reasonable degree. At the very least, if there is no difference in protection between 30 cfs and 40 cfs, Staff's recommendation for 40 cfs is misleading to the Board in light of its statutory authority.*

Colowyo provides the Board Exhibit B, Report of Austin Mallotte, with additional considerations to evaluate the inadequacy of the data CWCB staff relied on in making its recommendation. As set

forth below, Colowyo recommends that the Board recognize these foundational defects, together with Staff and other proponents' and experts' failure to consider the minimum streamflows that are capable of being appropriated, and table the ISF appropriation for a period of 7 or more years. This will provide additional data collection and study of what minimum flows and timelines would adequately protect the environment to a reasonable degree.

V. Material Injury and Colowyo's Unique Circumstances: Staff's recommendation includes five lines of information for the Board to base its finding of non-injury. However, Colowyo and CWCB Staff have had several long and detailed meetings seeking to explore the complexity that would arise for Colowyo in the event the Board determines it should appropriate the Proposed ISF. Specifically, Colowyo has operated in a portion of the Milk Creek basin for more than a half century, and is at its core a progressive surface mine operation, meaning it moves over time and has new water uses arise over time. For its entire existence, Colowyo's water rights portfolio was developed as needs arise, and with the premise that any calling water right would be on the Yampa River mainstem, not locally on Milk Creek. As a result of this historical development, and as a result of significant physical supply shortage in the upper reaches of the Milk Creek basin, Colowyo may need to develop significant additional storage capacity under its existing absolute and conditional water rights to meet any future needs, if replacement were suddenly owed to a Milk Creek ISF which, especially if appropriated at the proposed higher rates that do not consider the minimum flows necessary to preserve the environment to a reasonable degree, which would increase the frequency of potential call.

Settlement of these matters is complicated by the fact that Colowyo is in a unique situation compared to other appropriators that the CWCB may be used to addressing. For example, as noted by Tony Tennyson in Exhibit A, and Austin Mallotte in Exhibit B, mined areas subject to reclamation may be subject to emergent "spoil springs," which are springs that produce poor quality water that cannot be discharged to natural springs. Under the regulations of the Colorado Department of Reclamation and Mining Safety ("DRMS"), Colowyo has to comply with water quality regulations promulgated by the Colorado Department of Public Health and Environment ("CDPHE") and must maintain adequate water supplies for its operations consistent with State water law. Because these springs are anticipated based on todays ongoing and planned mine operations, Colowyo believes they should be subject to §37-92-102(3)(b); however, to date Staff has been hesitant to recognize these existing uses that will naturally arise from Colowyo's past and planned uses.

VI. Public Policy. Colowyo is provider of coal to its parent, Tri-State, in connection with its Craig Station power plant. Tri-State is subject to various State policies that result in closure of the Craig Station and the resulting transition of Colowyo from coal production to reclamation. Exhibit A, Tony Tennyson provides information about Colwoyo's regulatory scheme and Tri-State will have Jackie Brown, Senior Water and Natural Resources Advisor, Tri-State Generation and Transmission Association Inc., present testimony at a hearing concerning the various public policy and regulatory considerations affecting Colowyo and its current and future operatoions.

VII. Procedural Defects in this ISF Procedure: CWCB Rule 5.n. states that "Proper Notice: Means the customary public notice procedure that is provided each year by the Board in the preamble to the Board's January Board meeting agenda. This customary public notice procedure may include posting of the agenda at the Board office, filing legal notices when required, mailing to Persons on the Board mailing lists and posting notices on the Board's website." As outlined in additional detail in the attached legal memo of Roger Williams, attached as **Exhibit C**, the Staff's recommendations were not noticed in the January Board meeting agenda, and nothing in that agenda suggested that additional ISF recommendations would be noticed in subsequent Board Meeting agendas. Potentially interested Parties would have no reason to check the March agenda for additional

appropriations, it is unknowable how many potential interested parties are not participating in this proceeding because Proper Notice was not provided under the CWCB Rules. This delay has specifically prejudiced Colowyo as its timeline for negotiating with CWCB Staff to address its significant and unique concerns has been inadequate and has also deprived the Board access to additional information that may otherwise have been presented.

VIII. Proposed Board Action – Table Proposed ISF. Colowyo recommends that the Board recognize the limited and reliable data, and incomplete analysis, that it has been provided by Staff, together with Staff and other proponents' and experts' failure to consider the minimum streamflows that are capable of being appropriated by the Board pursuant to §37-92-102(3). In consideration of these defects in the Staff recommendation, and the circumstances facing Colowyo with resepect to injury, Colowyo requests the CWCB table the Proposed ISF appropriation for a period of 7 or more years. This will provide additional data collection and study of what minimum flows and timelines would adequately protect the environment to a reasonable degree, and will provide Colowyo invaluable time to plan for its transition and work with CWCB staff to address injury concerns and other aspects of the Proposed ISF.

Exhibit List:

Exhibit A – Letter from Tony Tennyson
Exhibit B – Report of Austin Mallotte, BBA
Exhibit C – Legal Memo re Proper Notice

Witness List:

- Tony Tennyson, Colowyo
- Austin Mallotte, BBA
- Jackie Brown, Senior Water and Natural Resources Advisor, Tri-State Generation and Transmission Association Inc.

Respectfully submitted this 9th day of September, 2025.

DICKINSON WRIGHT, PLLC
Signature on file pursuant to C.R.C.P. 121 § 1-26(7)

By: s/ *Aaron S. Ladd*
Aaron S. Ladd (#41165)

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.
Signature on file pursuant to *C.R.C.P. 121 § 1-26(7)*

By: */s/ Roger T. Williams*
Roger T. Williams (#26302)

Attorneys for Colowyo Coal Company, L.P.

Certificate of Service

Contested CWCB ISF Appropriations on Milk Creek

I hereby certify that on September 9th, 2025, a true and correct copy of the foregoing PREHEARING STATEMENT OF COLOWYO COAL COMPANY, L.P. was sent via email to the parties below:

Jennifer L. Mele First Assistant Attorney General Water Conservation Unit Colorado Attorney General's Office 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6282 Jen.Mele@coag.gov

Hearing Officer

Party Status

Colorado Water Conservation Board	Colorado Parks and Wildlife
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Colowyo Coal Company, L.P. Roger T. Williams Tri-State Generation and Transmission Association, Inc. 1100 W 116th Avenue Westminster, CO 80234 303-254-3218 roger.williams@tristategt.org Thomas Kennedy Tri-State Generation and Transmission Association, Inc. 1100 W 116th Ave. Westminster, CO 80234 720-237-5324 thomas.kennedy@tristategt.org Aaron S. Ladd Dickinson Wright, PLLC 1125 17th St., Ste. 550 Denver, Colorado 80202 Phone Number: (303) 723-8400 E-mail: aladd@dickinson-wright.com	Bureau of Land Management Roy Smith Bureau of Land Management Denver Federal Center, Building 40 Lakewood, CO 80215 303-239-3940 r20smith@blm.gov
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Contested Hearing Participant Status

Carroll Davidson Partnership PO Box 561498, Rockledge, FL 32956-1498 321-536-1462 tootsie1@cfl.rr.com Savage Land Co. John Savage PO Box 1926 Rifle, CO 81650 970-379-6745 savagejw@slcjbs.com	Milk Creek Ranch LLC 2996 Hanson Street Fort Myers, FL 33916 239-707-4614 mm4002a@yahoo.com

/s/ Aaron Ladd

EXHIBIT A

TRI-STATE

My name is Thomas "Tony" Tennyson. I am 46 years old, I live in Moffat County, Colorado, and I am employed by Tri-State Generation and Transmission Association, Inc., where I presently serve as Reclamation and Environmental Manager.

I went to college at the University of Montana - Billings, beginning in January 1999 and graduated in May of 2002. I have worked at or with the Colowyo Mine ("Mine") in a reclamation/environmental function from January 2006 to October 2008, and again from December 2010 to present.

Coal production at the Mine began in 1976 and will cease by the end of 2025. As a surface coal mine, Colowyo is required and has been engaged in contemporaneous reclamation concurrent with coal production for the life of the mine. Reclamation includes backfilling and grading a pit or portion of a pit to an approved post-mine topography including reestablishment of post mine drainages. Once the post-mine topography is achieved, each area has topsoil replaced to a specified thickness and each unit is specifically seeded with a seed mix that is targeting a post mine land use. Once a reclamation unit is seeded, a 10-year bond liability period commences for each reclamation unit. There are three phases of bond release which each individual reclamation unit is required to meet. Phase I is a demonstration that a reclamation unit has been backfilled and graded to the approved post-mine topography. Phase I typically occurs in year one of the 10-year bond liability period. Phase II is a demonstration that topsoil has been replaced to the required depths, and vegetative cover has been established that will control erosion. Phase II also includes a demonstration that erosion levels for each reclamation parcel are less than pre-mine levels. Phase II typically occurs in year four of the 10-year bond liability period. Phase III includes a revegetation success criteria demonstration that validates that the revegetation for each reclamation unit meets or exceeds the revegetation success criteria required by the reclamation plan in the permit to mine. Phase III also includes a probable hydrologic analysis that demonstrates water quantity and quality impacts have been minimized in accordance with the probable hydrologic consequences as described in the permit to mine, and finally the targeted post mine land use has been achieved. Phase III typically occurs in year ten of the 10-year bond liability period. Colowyo is actively conducting reclamation activities and is presently managing 114 individual reclamation units in various phases within the 10-year bond liability period. As of 2025, Colowyo has topsoiled and seeded 2,873 acres and received Phase III bond release on 1,596 acres. Colowyo's reclamation is conducted in close coordination with Colorado Division of Reclamation Mining and Safety ("DRMS") pursuant to a Colowyo's permit to mine Permit No. C-1981-019.

Mined areas that are reclaimed may be subject to emergent "spoil spring(s)," which are springs that percolate through the mine backfill and express themselves in reclamation areas. Spoil springs are required to meet discharged standards as required by Colowyo's Discharge Permit CO-0045161 and DRMS regulations.

The "East Taylor Spring" emerged from a reclaimed area that was topsoiled and seeded in 2009. The spring expressed itself at the ground surface in the reclamation area approximately two to four years later. Colowyo is required to route the East Taylor Spring water through a sediment pond where it is

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EXHIBIT A

TRI-STATE

sampled at the outfall and monitored for required water quality standards. Colowyo is developing a project that will pipe that spring water to another part of the Mine's deeded property, where Colowyo is planning to construct an evaporation treatment facility. This project is expensive and has requires the Mine's interaction with CDPHE and DRMS.

I understand that the Colorado Water Conservation Board seeks to preserve the natural environment to a reasonable degree, as Colowyo prides itself on conducting all its activities with a high value on environmental stewardship and reclamation activities that meet or improve the land post mining. Attached is a list of awards received by Colowyo, including environmental stewardship.

Tri-State Generation and Transmission Association, Inc.

By: _____

Tony Tennyson
Reclamation and Environmental Manager

Attachment: List of Awards-Colowyo Company L.P.

EXHIBIT A

List of Awards-Colowyo Company L.P.

- *1983 Coal Mined Land Reclamation Award - outstanding professionalism in the field of surface coal mining and reclamation.*
- *1984 Coal Mined Land Reclamation Award - outstanding professionalism and performance in conducting mining and reclamation operations at a surface coal mine.*
- *1985 Colorado Mining Association and Colorado Mined Land Reclamation Board Coal Mined Land Reclamation Award for a Large Surface Coal Mine - operating in full compliance with the regulatory program during 1985, the continued maintenance of environment control measures on the mine site, and conscientiously following the monitoring and mitigation plans for wildlife.*
- *1986 Colorado Mining Association and Colorado Mined Land Reclamation Board Coal Mined Land Reclamation Award for a Large Surface Coal Mine - outstanding compliance record and continued exemplary reclamation performance during 1986.*
- *1987 Colorado Mining Association and Colorado Mined Land Reclamation Board Coal Mined Land Reclamation Award for a Large Surface Coal Mine - maintaining a well-run reclamation program, use of innovative approaches in reclamation problems, and continued concern for good reclamation.*
- *1988 Colorado Mining Association and Colorado Mined Land Reclamation Board Coal Mined Land Reclamation Award for a Large Surface Coal Mine - maintaining a well-run reclamation program, showing a high degree of concern for achieving good reclamation and innovative approaches to achieve good shrub reestablishment.*
- *1991 Colorado Mining Association and Colorado Mined Land Reclamation Board Coal Mined Land Reclamation Award for a Large Surface Coal Mine - operating the mine in compliance with the law and regulations, and for doing an exemplary job of reclaiming disturbed areas after mining.*
- *1992 Colorado Mining Association and Colorado Mined Land Reclamation Board Coal Mined Land Reclamation Award for a Large Surface Coal Mine - successfully permitting a new excess spoil disposal facility utilizing data knowledge and on-the-ground experience gained from the construction of a similar structure over the past 12 years.*
- *1995 Colorado Mining Association and Colorado Division of Minerals and Geology – Coal Mined Land Reclamation Large Surface Coal Mine Award - long-standing efforts to reestablish shrubs on reclaimed mined land through the testing of seeding and planting techniques; and establishing a data base to evaluate the effectiveness of planting and management methods including the simultaneous seeding of shrubs and grasses, seeding alternate strips of shrubs and grasses, transplanting shrubs occurring on the mine site, and planting nursery-bred shrub seedlings.*

EXHIBIT A

- *2001 Colorado Mining Association and Colorado Division of Reclamation and Safety Large Surface Mine Joint Award jointly to Colowyo Mine with Seneca No. 2 Mine and Trapper Mine for participation in an extensive shrub establishment study.*
- *2002 Colorado Mining Association and Colorado Division of Reclamation and Safety Large Surface Mine Innovation Award – Increased Efficiency in Mining and Reclamation Activities*
- *2003 Colorado Mining Association and Colorado Division of Reclamation and Safety Steep Slope Reclamation Award*
- *2004 Colorado Mining Association and Colorado Division of Reclamation and Safety Innovation at a Large Surface Mine Award for Highwall Mining*
- *2009 Colorado Mining Association and Colorado Division of Reclamation and Safety Excellence in Reclamation Award Backfill and Grading Honorable Mention*
- *2012 Colorado Division of Reclamation, Mining & Safety (CDRMS) and Colorado Mining Association (CMA): Excellence in Coal Reclamation – Topsoil Placement*
- *2012 CDRMS and CMA: Environmental Stewardship and Pollution Prevention*
- *2013 CDRMS and CMA: Environmental Stewardship and Pollution Prevention*
- *2014 CDRMS and CMA: Environmental Stewardship and Pollution Prevention*
- *2015 Colorado Parks and Wildlife: Partner of the Year*
- *2015 CDRMS and CMA: Excellence in Coal Reclamation – West Pit Contemporaneous Reclamation*
- *2015 CDRMS and CMA: Excellence in Safety*
- *2015 CDRMS and CMA: Environmental Stewardship and Pollution Prevention*
- *2016 National Safety Council: Perfect Safety*
- *2016 CDRMS and CMA: Excellence in Coal Reclamation – Backfilling and Grading*
- *2016 CDRMS and CMA: Environmental Stewardship and Pollution Prevention*
- *2017 CDRMS and CMA: Excellence in Coal Reclamation*
- *2017 CDRMS and CMA: Excellence in Safety*
- *2017 CDRMS and CMA: Environmental Stewardship and Pollution Prevention*
- *2018 CDRMS and CMA: Outstanding Safety Performance*
- *2022 CDRMS and CMA: Excellence in Coal Reclamation: Tall Shrub Test Plots*

MEMORANDUM

BBA Water Consultants, Inc.

EXHIBIT B

To: Roger Williams, Esq.
Aaron Ladd, Esq.
From: Austin Malotte
Subject: CWCB Proposed ISF – Milk Creek
Job: 0403.28:Exchanges
Date: September 9, 2025

Tri-State Generation and Transmission Association, Inc. (TSGT), and its remote subsidiary Colowyo Coal Company L.P., oppose the Instream Flow (ISF) appropriation proposed by the Colorado Water Conservation Board (CWCB) on Milk Creek in Water District 44 due to its potential to materially interfere with existing and future water rights and uses critical to the operation of the Colowyo Coal Mine (Colowyo). The proposed ISF rates are not supported by a transparent hydrologic basis, and their implementation could constrain water availability, complicate future water rights development, and introduce operational uncertainty. This matter is especially urgent with regards to emergent springs that may require treatment due to Colorado Department of Public Health & Environment (CDPHE) regulations, placing Colowyo in a difficult position between three state regulatory agencies—Colorado Division of Reclamation, Mining and Safety, Colorado Division of Water Resources, and CDPHE—with potentially conflicting mandates.

TSGT urges CWCB to defer action on the proposed ISF, recommended by the Bureau of Land Management (BLM) and Colorado Parks & Wildlife (CPW), until a comprehensive, peer-reviewed water availability analysis is completed. This analysis should be made publicly available and include stakeholder input from affected water users. Only through transparent and collaborative evaluation can CWCB ensure that ISF appropriations are hydrologically sustainable and legally defensible.

Potential ISF Impacts to Colowyo's Future Water Rights Operations

Emergent Springs at Colowyo

Springs are a common hydrologic feature that can arise at reclaimed mine sites where subsurface water pathways may have been altered by mining activities (where they are commonly referred to as "spoil springs" or "seeps"). These springs may emerge years after reclamation is completed, as groundwater establishes flow paths through backfill material, fractured rock, and subsided strata. The timing of spring emergence can vary widely depending on site-specific geology, hydrology, and reclamation design.

Water Quality and Treatment Requirements

Water discharged from these springs may carry elevated levels of metals, sulfates, or acidity. As a result, treatment may be necessary to meet regulatory standards for surface water discharge or to protect downstream aquatic ecosystems. The choice of treatment depends on the volume, chemistry, and variability of the spring discharge, and the physical and financial limitations of the mining company. Passive systems are generally preferred for long-term, low flow discharges due to lower operational costs and maintenance requirements.

Duration and Monitoring Needs

Treatment of emergent springs on reclaimed mining sites is typically a long-term commitment, with monitoring and treatment obligations sometimes extending decades or longer. Continuous monitoring is mandated by CDPHE where needed to track changes in flow rate and water quality, especially during seasonal shifts or after major precipitation events. In some cases, treatment systems may require retrofitting or expansion if new springs emerge or if contaminant loads change over time.

The proposed ISF could impede development or change of use of existing water rights, including conditional rights and irrigation rights that could be changed to augmentation or other uses, and disruption to exchanges that allow the use of other water rights already stored in the basin.

In order to meet the various requirements and limitations imposed by state agencies, Colowyo must continue to be able to maximize its water rights portfolio, including the flexibility to use existing augmentation and replacement supplies at different locations on and around the mine property, exchange supplies on local streams including Milk Creek and its tributaries, develop new plans for augmentation, and develop conditional water rights. For example, when an emergent spring arises, Colowyo may need to utilize existing exchanges and/or develop a new plan for augmentation to address depletions associated with treatment of that spring.

The existence of an ISF on Milk Creek would likely increase the involvement of CWCB and third parties in future Colowyo water court proceedings involving the Milk Creek watershed. Delays or restrictions on Colowyo's use or development of its water rights will increase legal and administrative costs, and could reduce operational flexibility for Colowyo and other basin users. Such restrictions could also substantially increase the scope of improvements, including pumps, pipelines and treatment facilities (including evaporation ponds, underground injection, or reverse osmosis plants) necessary for Colowyo to meet requirements imposed by other state agencies.

Colowyo Operations During Base Flow Period

The proposed ISF minimum streamflow rates during the "base flow period" (defined as August–February by the report supporting CWCB's ISF recommendation[1]) range from 4.5 cfs to 7.8 cfs. These flows may be partially supported by water sources within the Colowyo permit boundary, including springs and shallow groundwater emergence.

When Colowyo diverts these water sources to meet water quality requirements or other operational needs, flows in Milk Creek may be reduced. As such, the proposed ISF could (a) conflict with existing operational practices, (b) trigger additional administrative scrutiny or enforcement, and/or (c) complicate or prevent Colowyo's compliance with environmental and reclamation obligations.

[1] Final Milk Creek Final Instream Flow Report. William J. Miller, Freshwater Consulting, LLC. September 30, 2024. ("Miller Report") at page 8.

Comments Regarding CWCB's Instream Flow Recommendation

As described earlier in this memorandum, the recommended ISF lacks sufficient technical basis for the proposed ISF rates. The ISF recommendation includes the following minimum streamflow rates:

Proposed Milk Creek Instream Flow Minimum Streamflow Rates												
Month	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Rate (cfs)	7.8	7.8	18	40	40	40	8	4.5	4.5	5.2	5.2	5.2

The proposed ISF rates are not supported by a robust water availability analysis, which is essential to determine whether sufficient water exists to meet the proposed flow rates without injuring existing rights. Our initial comments regarding the ISF recommendation and technical bases follow.

Limited Study Period

A robust water availability analysis should include long-term streamflow data and/or hydrologic modeling that accounts for water rights, climatic conditions including precipitation trends, and quantified effects of upstream diversions and springs. The CWCB temporary gage data from 2017–2024, while helpful, is insufficient due to data gaps, lack of statistical confidence intervals, and absence of model calibration details.

CWCB temporary gage data reviewed by BBA include several significant multi-day gaps, including gaps of 26 days, 71 days and 265 days. Such significant data gaps, especially in an already limited duration dataset, may obscure streamflow conditions that could have notable impact on CWCB's evaluation of water availability for the recommended ISF.

In contrast with CWCB's discontinuous seven-year streamflow record supporting the recommended ISF, recent Water Court decreed changes of water rights in the Milk Creek basin utilized 40-year and 41-year study periods for the Hulett & Torrence Ditch and the Milk Creek Ditch No. 1, respectively.[2] Even the CWCB Staff Executive Summary acknowledges that "[w]henever possible, long-term stream gage data (period of record 20 or more years) are used to evaluate streamflow."[3]

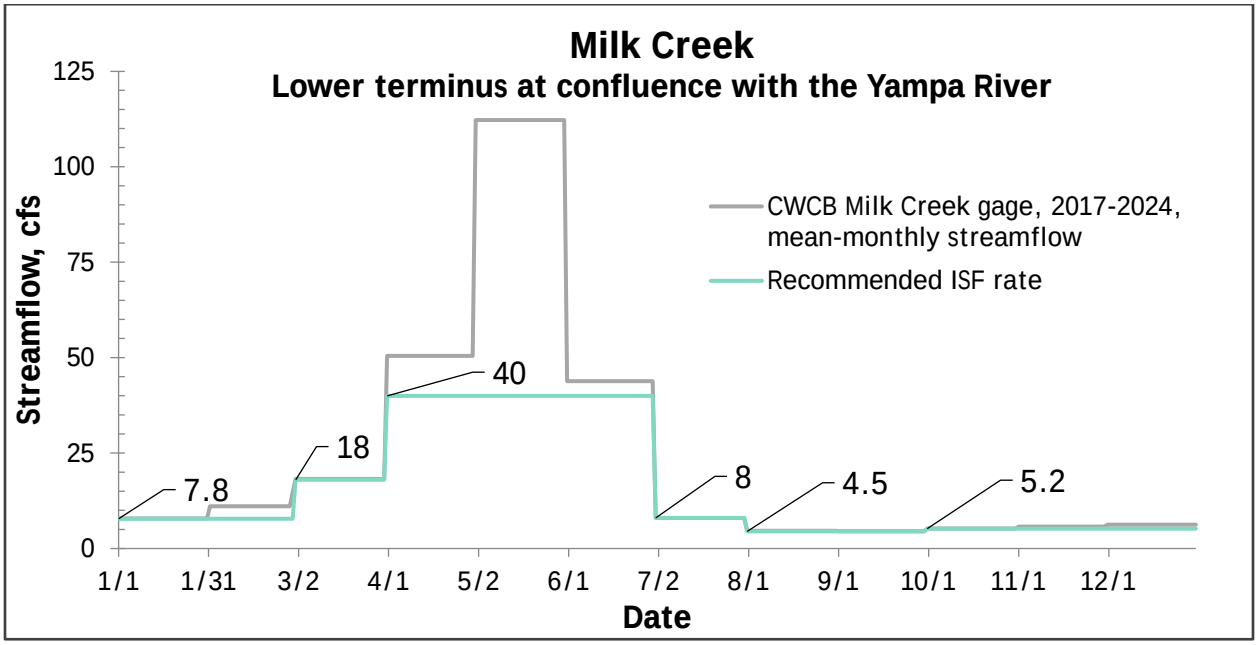
CWCB's recommendation presumes that the discontinuous seven-year streamflow record from the temporary gage is representative of future conditions on Milk Creek. However, streamflow prediction in ungaged basins—the proposed ISF reach on Milk Creek is ungaged other than the temporary gage—requires regression models calibrated with gage data from analogous basins and detailed characteristics for both the modeled and comparison basins. The Milk Creek ISF proposal does not appear to incorporate such predictive modeling to justify the proposed ISF rates.

[2] See Division 6 Water Court decree in Case No. 18CW3058.

[3] See page 10 of the Milk Creek Executive Summary, CWCB Staff Instream Flow Recommendation. March 18-19, 2025. ("CWCB Staff Executive Summary")

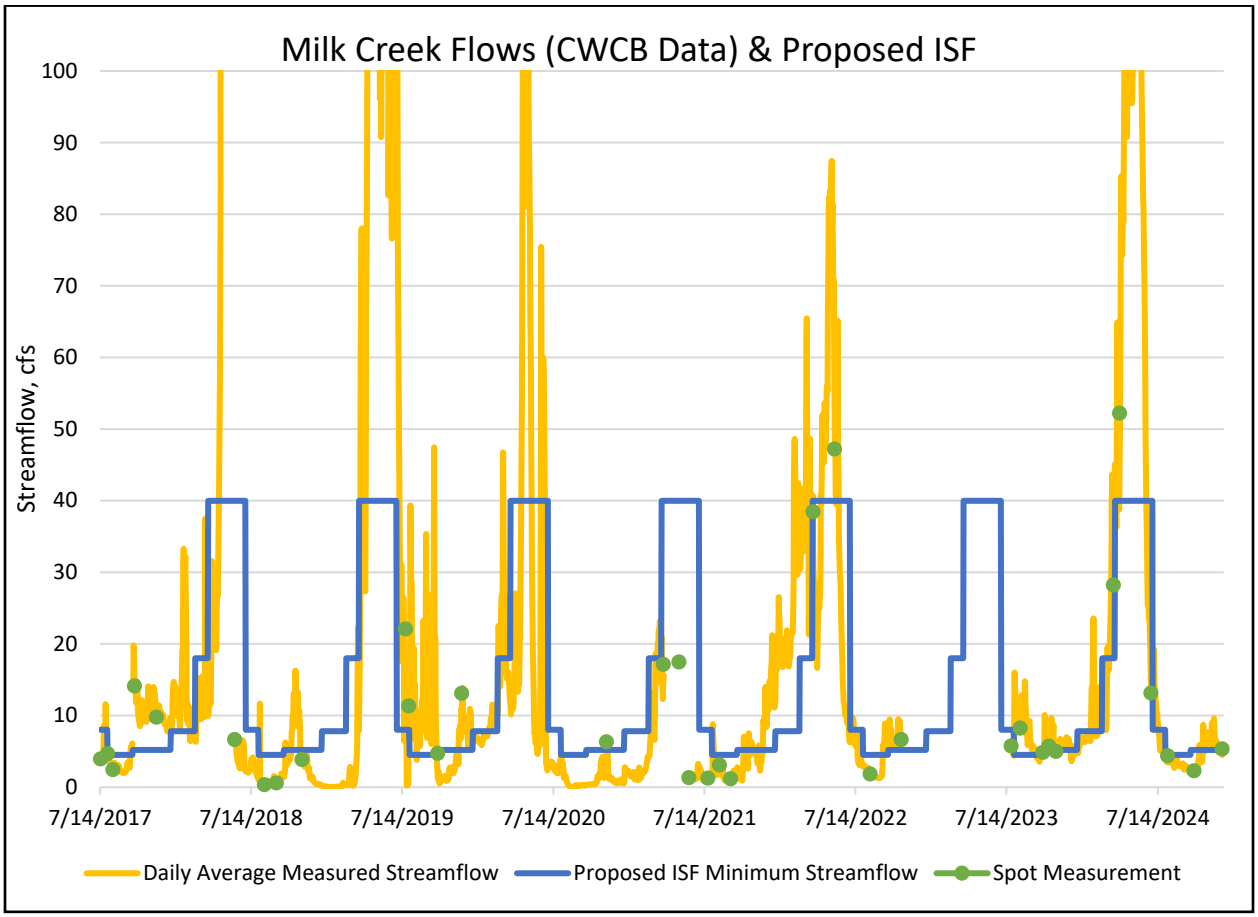
Recommended ISF Rates Based On Averages

With the exception of the 40 cfs recommended minimum streamflow during April through June, the recommended ISF rates align closely with the average streamflow measured during 2017-2024, as illustrated in the chart below (taken from CWCB's Milk Creek streamflow dataset workbook).



CWCB's rationale for relying on average streamflow as basis for most of the proposed ISF minimum streamflow rates is unclear. Review of CWCB's temporary gage data for 2017-2024 reveals that measured streamflow only exceeded the proposed ISF minimum streamflow rates on 37.3% of days with gage data (878 of 2,353 days). Conversely, the proposed ISF rates are greater than measured flows during 62.7% of study period days. This clearly illustrates that average daily streamflows are not representative of the range of streamflow conditions observed.

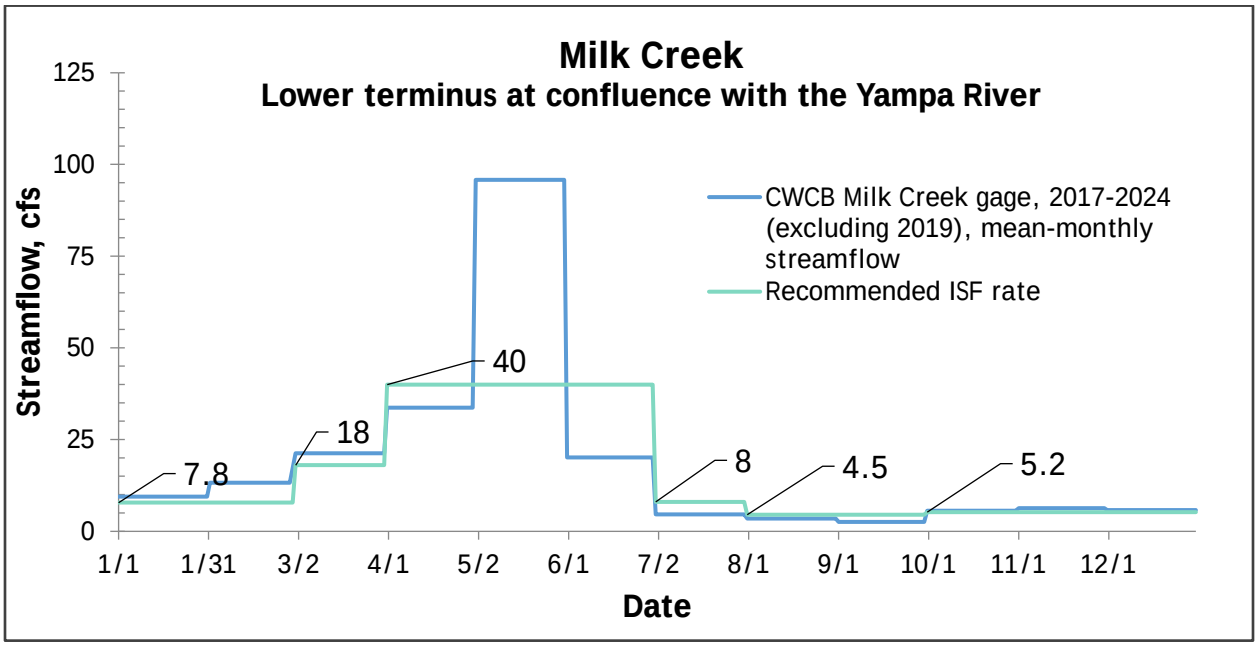
The following chart (showing only streamflows less than or equal to 100 cfs) further illustrates the issue:



In the chart above, CWCB's recommended minimum streamflow exceeds historical streamflow wherever the blue line is above the orange line. This condition occurs throughout the year, but is especially prevalent during base flow months when Colowyo's upstream replacement supplies are very limited, as discussed later in this document.

Additionally, streamflows on Milk Creek during 2019 were significantly greater than the other years of the study period: April through June discharge averaged 144 cfs in 2019 as compared with an average of 47 cfs during those same months during the remainder of the study period. As

illustrated in the chart below, exclusion of 2019 wet-year data from the average results in a notable reduction in mean streamflow rates.



Even if average streamflow was an appropriate basis for ISF minimum streamflow rates, inclusion of 2019 streamflow in calculating the average skews those values and calls into question the validity of the proposed rates.

Physical Water Availability Analysis

The physical water availability analysis data provided with CWCB's ISF recommendation included only (a) daily average flow data from CWCB's temporary gage during 2017–2024 with significant discontinuities as described above and (b) spot measurements taken during field visits.

While these data are useful, they do not provide sufficient information to support a complete physical water availability analysis because the gage record is short-term and has data gaps, there is no statistical confidence interval or hydrologic modeling summary, and the effects of upstream diversions and springs are not quantified.

Additionally, modeling assumptions and calibration details from SEFA were not provided. The Miller Report indicates SEFA software was used for "predicting hydraulic parameters" for hydraulic simulations and to "predict fish passage through a study site."[4] However, the SEFA model outputs referenced in the ISF recommendation lack transparency and reproducibility, as the underlying data and methodology have not been made publicly available.

[4] Miller Report at 4.

Ecological Effects of Flow Rates Less Than Recommended Minimums

While the ISF recommendation and supporting documentation include discussion regarding fish and macroinvertebrate habitats, CWCB does not provide information regarding the ecological effects on these habitats when streamflow rates fall below the recommended ISF rates, which occurred frequently during the seven-year study period as described above.

Additionally, BLM's ISF Recommendation discussion regarding the proposed ISF rates indicates that at least one of the proposed rates (40 cfs during April through June) "maximizes preferred habitat across both SEPA sites."[5] It is our understanding that the intent of the proposed ISF is to "protect a reasonable amount of habitat for native fishes."[6] Maximization of habitat is not the same as protecting a reasonable amount of habitat.

Similarly:

- The CWCB Staff Executive Summary says in reference to the 40 cfs proposed ISF rate, "At flows greater than 40 cfs, additional increments of discharge provide smaller habitat benefits."[7]

- Exhibit 3 to the CWCB Staff Executive Summary describes that "[a] flow rate of 40 cfs maximizes preferred habitat for adult Bluehead and Flannelmouth Suckers across both sites. This flow rate also maximizes preferred spawning habitat for these species."[8]

These examples clearly indicate that the 40 cfs proposed ISF rate is an upper limit on the range of flows that provide significant habitat benefits, in contrast with the minimum flow rate needed to reasonably protect the target habitat.

The BLM ISF Recommendation goes on to say that "40 cfs is available at least 50% of the time between April 1 and June 30, so no water availability adjustment was required during this time period."[9] The recommendation letter does not describe impacts to the Milk Creek aquatic habitat during the approximately 50% of the time when there was less than 40 cfs in the stream, although the Miller Report notes that "[a] flow of 10 cfs results in approximately 60% of maximum habitat index."[10] Did the fishery / aquatic habitat experience significant and measurable degradation during time periods with streamflow rates less than the recommended rates? Is 60% of maximum habitat index inadequate to reasonably protect the habitat? Would lower minimum streamflow rates reasonably protect the aquatic habitat in the proposed ISF reach?

[5] BLM Instream Flow Recommendation for Milk Creek, February 2025. Part 3 at 9.
[6] BLM Instream Flow Recommendation for Milk Creek, February 2025. Part 3 at 9.
[7] CWCB Staff Executive Summary at 8.
[8] See page 8 of Exhibit 3, Letter from Katie Birch, CPW Instream Flow Program Coordinator, March 7, 2025.
[9] BLM Instream Flow Recommendation for Milk Creek, February 2025. Part 3 at 9.
[10] Miller Report at page 10.

Information Regarding Colowyo's Existing Augmentation and Replacement Supplies

Colowyo owns and operates a number of water rights and plans for augmentation upstream from the recommended Milk Creek ISF. These include water rights from the Colowyo/South Taylor and Collom augmentation plans (Case Nos. W-1122-77, 16CW3056 and 17CW3044), and other senior water right supplies (Case No. 18CW3058, among others), which utilize various ditches, reservoirs, and pumping plants and pipelines. Notable augmentation and replacement supplies include:

- Milk Creek Ditch (1893) – up to 5.33 cfs and 331 AF/year (May–June)
- Taylor Ditch (1879) – up to 1.66 cfs and 93 AF/year (May–October)
- DD&E Ditch (1888) – up to 8.4 cfs and 582 AF/year (May–Aug 15)
- Wilson Reservoir – 68.4 AF original + 349.6 AF enlargement
- Milk Creek Ditch No. 1 (1883) – up to 19 cfs and 615.2 AF/year (April–August)
- Hulett & Torrence Ditch (1885) – up to 5 cfs and 109.4 AF/year (April–July)

These supplies are critical to Colowyo's mining and reclamation operations and are used to support existing augmentation plans and exchanges for dewatering systems, stormwater ponds, the East Taylor Spring (discussed below) and potential future treatment of emergent springs. While these water rights provide some flexibility, they do not fully mitigate the risks posed by the proposed ISF, for several reasons:

1. Seasonal Constraints – Many of Colowyo's rights are limited to diversion during spring and early summer months, leaving gaps in legal supplies during the ISF base flow period (August–February), when emergent springs may require diversion and treatment.

2. Volumetric Limits – Colowyo's changed water rights (senior irrigation rights whose uses were legally changed to include industrial, augmentation and/or replacement uses) are subject to annual and monthly volumetric limits that limit their availability for additional future demands like emergent springs.

3. Infrastructure Dependencies – Several rights depend on infrastructure that is not yet constructed, such as the Milk Creek Reservoir and Yampa-Milk Creek Pipeline, making them unavailable for Colowyo's immediate use.

4. Exchange Limitations – Although Colowyo has decreed exchanges from below the ISF reach to exchange-to points above the ISF reach (e.g., 18CW3057), operation of those exchanges depends on flow conditions and administrative cooperation, which could be complicated or restricted by the proposed ISF.

5. Legal and Administrative Risk – The presence of an ISF would likely increase scrutiny and delay in water court proceedings, such as future changes of use of Colowyo's senior water rights or development of Colowyo's conditional rights.

TSGT emphasizes that while Colowyo's existing water rights portfolio may be useful in addressing emergent springs that require treatment, that portfolio does not eliminate the operational, legal, and hydrologic risks introduced by the proposed ISF. The ISF could still interfere with Colowyo's ability to address emergent springs, develop conditional water rights, and operate water exchanges critical to Colowyo's long-term operations.

East Taylor Spring

Colowyo's recent experience in addressing a spring that emerged on mine property illustrates potential operational and legal complexities that further underscore the need for caution regarding the proposed ISF on Milk Creek. The recently entered decrees in Case Nos. 22CW3118 and 23CW3043 include conditional water rights, exchanges and plans for augmentation, all to address depletions associated with the East Taylor Spring (for a total of 1.12 cfs combined). Those decrees also impose a number of restrictions:

- The East Taylor Spring water right is limited to industrial use for treatment and reclamation purposes only. It does not confer a storage right, and any successive use would require a separate water right.

- The decree assumes 100% consumptive use for augmentation planning but explicitly states that future changes of use must prove actual historic consumptive use—adding uncertainty and potential litigation risk.

- The decree includes a conditional appropriative right of exchange from Elkhead Creek Reservoir to East Taylor Spring, but this exchange is only operable when the spring water right is out-of-priority, a live stream exists throughout the exchange reach, and transit losses are accounted considered. If no live stream is present, Colowyo must rely on a plan for augmentation using water from Elkhead Creek Reservoir or rights decreed in Case No. W-1122-77. These sources are subject to physical and legal availability, transit loss, and potentially administrative approval.

- The decree imposes extensive accounting and reporting requirements, including daily records of diversions and substitute supply delivery, photographic evidence of live stream conditions, and annual reports.

- Any additional augmentation sources must undergo court review and may be subject to objection by the Division Engineer, delaying implementation.

- The decree retains jurisdiction for five years to reconsider injury claims, creating ongoing legal exposure.

TSGT is concerned that the proposed ISF could interfere with its operation of the decreed exchanges and plans for augmentation for East Taylor Spring by complicating operation and administration of Colowyo's exchanges through the ISF reach.

Additionally, Colowyo's treatment plan for East Taylor Spring involves constructing evaporation ponds and pipelines, with estimated costs of $40 million over 25 years. These facilities are not yet fully operational and are subject to evolving regulatory standards.

As described above, additional springs may arise on Colowyo property in the future that require treatment to meet water quality standards. In addition to the issues identified above, the proposed ISF could increase the frequency and magnitude of out-of-priority depletions associated with such an emergent spring, potentially exceeding Colowyo's ability to augment those depletions due to legal and/or physical water supply limitations.

The proposed ISF would introduce additional administrative and hydrologic constraints that could jeopardize Colowyo's ability to comply with environmental obligations and maintain operational continuity. TSGT urges CWCB to consider these complications and defer ISF action until a robust, peer-reviewed hydrologic and legal analysis is completed.

TRI-STATE

To: Colorado Water Conservation Board

From: Roger T. Williams, Senior Attorney

Re: NOTICE; Wilson Creek/Milk Creek to Milk Creek/Yampa River ISF

Date: September 9, 2025

Under rules published by the CWCB, "[t]he January Board meeting agenda will list proposed ISF appropriations to be appropriated that year." 2 CCR 408-2-5c. "Notice of the Board's potential action to declare its intent to appropriate **shall** be given in the January Board meeting agenda and the Board will take **public comment** regarding its intent to appropriate at the January meeting." 2 CCR 408-2-5d. (emphases added)

In March 2025, the Colorado Water Conservation Board ("CWCB") noticed its Intent to Appropriate an instream flow on Milk Creek, from the Wilson Creek/Milk Creek confluence to the Milk Creek/ Yampa River confluence. CWCB rules provide "[w]hen necessary, the Board may modify or delay this schedule or any part thereof as it deems appropriate." Id. Colowyo has found no finding of necessity or propriety, justifying a deviation from the Board's mandatory regulatory schedule.

For many, the reason for attending to CWCB intentions to appropriate is that such appropriations may signal the Board's intent to appropriate in a drainage that is important to a water user's business operations. If the CWCB does not notice its intention –in January–to appropriate in a basin of concern, many water users are done monitoring CWCB activities for the year.

In this case, the CWCB actually ***did*** notice an intent to appropriate on Milk Creek in January 2025. That timely January notice, however, pertained to an instream flow reach running on Clear Creek to Milk Creek in Rio Blanco County. Seeing a CWCB intention noticed for an upstream ISF, but none on Milk Creek in Moffat County, Colowyo turned to other work.

As noted by 2 CCR 408-2-5d "The Board will hear ***comment*** on the recommended action to declare its intent to appropriate at the January Board Meeting." 2 CCR 408-2-5e-(1). The Board's March publication may have deprived many members of the local communities of the opportunity to comment, substantially impacting the scope of the recommendation.

While the Supreme Court in Farmers Water Development Company v. Colorado Water Conservation Board, 346 P.3d 52 (Colo. 2015) held that procedural due process protections do not apply to CWCB decisions to apply for instream flows, the Court did not authorize the Board to disregard its mandatory rules.