

DISTRICT COURT, WATER DIVISION 5 STATE OF COLORADO, GARFIELD COUNTY COURTHOUSE 109 8TH STREET, SUITE 104 GLENWOOD SPRINGS, CO 81601	<p style="color: red;"> <b>EFILED Document</b>  <b>CO Garfield County District Court 9th JD</b>  <b>Filing Date: Mar 01 2013 04:56PM MST</b>  <b>Filing ID: 49889415</b>  <b>Review Clerk: Kathy Hall</b> </p> <p style="text-align: center;"><b>COURT USE ONLY</b></p>
<p><b>Concerning the Application for Water Rights of:</b></p> <p>COLORADO WATER CONSERVATION BOARD,          IN THE COLORADO RIVER, A NATURAL          STREAM, IN THE COLORADO RIVER          HEADWATERS WATERSHED,           IN GRAND &amp; EAGLE COUNTIES, COLORADO.</p>	
	<p>Case No.: 2011CW161</p> <p>Div. 5</p>
<p><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF REFEREE,          JUDGMENT AND DECREE OF THE WATER COURT</b></p>	

This matter comes before the Water Referee by Application of the Colorado Water Conservation Board for an instream flow water right to preserve the natural environment to a reasonable degree. The Application was filed on November 30, 2011. The Application was thereafter referred to the Water Referee for Water Division 5, by the Water Court for Water Division 5, in accordance with C.R.S. § 37-92-101 *et seq.*

The Referee, having made such investigations as are necessary to determine whether or not the statements in the Application are true, having consulted with the Division Engineer for Water Division 5, and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, Ruling of the Referee, Judgment and Decree in this matter:

**FINDINGS OF FACT**

1. The statements in the Application are true.
2. The name and address of Applicant:  
 Colorado Water Conservation Board (“CWCB”)  
 1313 Sherman Street, Suite 721  
 Denver, CO 80203

3. Notice and Jurisdiction: All notices of this matter required by law have been fulfilled and the Court has jurisdiction over the Application and all parties affected thereby, whether or not they have chosen to appear.
  
4. Objectors: A Statement of Opposition was filed by: Grand County Board of County Commissioners, City of Aurora, City and County of Denver, Middle Park Water Conservancy District, The Homestake Partnership, Municipal Subdistrict of the Northern Colorado Water Conservancy District, Northern Colorado Water Conservancy District, Colorado River Water Conservation District, and Trout Unlimited. The Eagle County Board of County Commissioners filed a Motion to Intervene on March 30, 2012, and the Court granted the Motion on the same day and the Court accepted the Commissioners' statement of opposition on April 4, 2012. The time for filing additional Statements of Opposition has expired. The CWCB and all Objectors have reached a settlement pursuant to the following stipulations:
  - A. Stipulation between the CWCB and Board of County Commissioners for the County of Grand dated November 16, 2012.
  - B. Stipulation between the CWCB and City of Aurora dated January 17, 2013.
  - C. Stipulation between the CWCB and City and County of Denver, acting by and through its Board of Water Commissioners dated October 18, 2012.
  - D. Stipulation between the CWCB and Middle Park Water Conservancy District dated October 18, 2012.
  - E. Stipulation between the CWCB and Homestake Partnership dated December 28, 2012.
  - F. Stipulation between the CWCB and Municipal Subdistrict, Northern Colorado Water Conservancy District dated January 31, 2013.
  - G. Stipulation between the CWCB and Northern Colorado Water Conservancy District dated January 31, 2013.
  - H. Stipulation between the CWCB and Colorado River Water Conservation District dated January 23, 2013.
  - I. Stipulation between the CWCB and Trout Unlimited dated October 24, 2012.
  - J. Stipulation between the CWCB and Eagle County Board of County Commissioners dated October 24, 2012.

The CWCB has entered stipulations with each of these objectors resolving the issues in their statements of opposition in this case. The court has approved the stipulations. The stipulations approved by the court between CWCB and Grand County Board of County Commissioners, City of Aurora, The Homestake Partnership, Municipal Subdistrict of the Northern Colorado Water Conservancy District, Northern

Colorado Water Conservancy District, and Colorado River Water Conservation District each included clerical errors in the decree attached to the stipulations. This decree corrects those clerical errors and is the decree version that CWCB and each of these listed objectors intended to attach to their stipulations.

5. Summary of Consultation: The Division Engineer filed a Summary of Consultation pursuant to C.R.S. § 37-92-302(4), dated February 27, 2012 and the Applicant filed its response May 3, 2012. The Referee has given due consideration to the Summary of Consultation and the response.
6. Claim: Instream flow water right to preserve the natural environment to a reasonable degree (also referred to as an “ISF”) on the Colorado River
7. Name of natural stream: Colorado River
8. Locations: The natural stream channel of the Colorado River from the confluence with Cabin Creek extending to a point immediately upstream of confluence with the Eagle River, being a distance of approximately 25.0 miles. This segment can be located on the Blue Hill, Burns North, Burns South, McCoy and State Bridge U.S.G.S. quadrangles. The Universal Transverse Mercator (UTM) and geographical descriptions (e.g. confluences) of the upstream and downstream termini are provided as the decree locations. The Public Land Survey System (PLSS) and Lat/Long coordinates are provided as cross-reference locations only.
  - A. Upper Terminus = Confluence with Cabin Creek at:  
UTM: Northing: 4415556.15 Easting: 338088.78 (NAD 1983 Zone 13 North)  
PLSS: SE SE Section 15, Township 2 South, Range 85 West of the 6<sup>th</sup> PM 737’ West of the East Section Line, 444’ North of the South Section Line  
Lat/Long: latitude 39° 52’ 28.61”N and longitude 106° 53’ 35.85”W
  - B. Lower Terminus = Point Immediately Upstream of Confluence with the Eagle River at:  
UTM: Northing: 4390576.79 Easting: 323390.88 (NAD 1983 Zone 13 North)  
PLSS: SW NE Section 5, Township 5 South, Range 86 West of the 6<sup>th</sup> PM 2186’ West of the East Section Line, 2319’ South of the North Section Line  
Lat/Long: latitude 39° 38’ 48.33”N and longitude 107° 03’ 30.05”W
9. Metadata for Locations:
  - A. The UTM, PLSS and Lat/Long locations for the upstream and downstream termini were derived from CWCB GIS using the National Hydrography Dataset (NHD).
  - B. The PLSS locations in this decree were derived from CWCB GIS using 2005 PLSS data from the U.S. Bureau of Land Management's Geographic Coordinate Database.

10. Use of the Water: Instream flow to preserve the natural environment to a reasonable degree.
11. Date of Appropriation: Appropriation and beneficial use occurred on July 12, 2011 by the action of the CWCB under the provisions of C.R.S. §§ 37-92-102(3) and (4) and 37-92-103(3), (4) and (10).
12. Amount of water claimed (ABSOLUTE): Instream flow of 650 cubic feet per second (“cfs”) (September 16 – May 14), 900 cfs (May 15 – June 15), and 800 cfs (June 16 – September 15).

### **CONCLUSIONS OF LAW**

13. The foregoing Findings of Fact are incorporated herein to the extent they constitute conclusions of law.
14. Notice and Jurisdiction. The Water Court for Division 5 has jurisdiction over the subject matter of these proceedings and over all persons, owners of property and water rights that may be affected hereby, whether or not they have chosen to appear. The Application in this matter and the resume publication of the Application placed such persons on notice of the relief requested by the Application and granted by this decree. C.R.S. §§ 37-92-203,-302.
15. The CWCB has fulfilled all legal requirements for a decree for water rights, including C.R.S. §§ 37-92-302, -304 and -305.
16. Burden of Proof. The CWCB has complied with all requirements and has met its burden of proof to adjudicate the water rights required in the Application and is therefore entitled to a decree approving the requested water rights.

### **RULING OF REFEREE**

17. The foregoing Findings of Fact and Conclusions of Law are hereby approved and incorporated as the Judgment and Decree of the Court by this reference.
18. The application is granted and a decree (ABSOLUTE) in the amount of 650 cfs (September 16 – May 14), 900 cfs (May 15 – June 15), and 800 cfs (June 16 – September 15) is hereby entered for an instream flow water right to preserve the natural environment to a reasonable degree in the reach of the Colorado River between the upstream and downstream termini described in paragraph 8 above. The appropriation date for this water right is July 12, 2011.
19. The priority herein awarded was filed in the water court in the year of 2011 and shall be junior to all priorities filed in previous years. As between all rights filed in the same

calendar year, priorities shall be determined by historical date of appropriation and not affected by the date of entry of ruling. The Applicant shall install and maintain such measuring devices and keep such records as the Division Engineer may require for administration of this right.

20. This water right is subject to the following terms and conditions:
  - A. This ISF is a unique ISF appropriation in that it is recommended by the consensus of a diverse stakeholder group under a local management plan designed to help protect resources of “outstanding remarkable value” that have been identified by the Bureau of Land Management and the United States Forest Service. This ISF is also unique because it involves the mainstem of the Colorado River, the relative size of that river, the current level of water supply development, the level of use for recreational fishing purposes, and the river’s overall importance to the State of Colorado. The terms of this appropriation are part of a compromise and settlement and are unique circumstances that shall not establish any precedent and shall not be construed as a commitment to include any specific findings of fact, conclusions of law or administrative practices in future appropriations.
  - B. Pursuant to C.R.S. § 37-92-102(3)(b), this ISF appropriation shall be subject to the present uses or exchanges of water being made by other water users, pursuant to appropriation or practices in existence on the date of this appropriation. The CWCB will apply this provision if the proponent provides adequate documentation and verification of present uses and exchanges.
  - C. The ISF water right decreed herein is not intended to deprive the people of the State of Colorado of the beneficial use of those waters available pursuant to interstate compact. The CWCB agrees that this ISF water right will be administered by the State Engineer in accordance with rules duly promulgated by the State Engineer in accordance with applicable law related to the curtailment of Colorado River basin water uses within Colorado in order to comply with the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948, including any such rules intended to avoid, delay, or limit the severity of such a compact curtailment. If no such compact curtailment rules have been promulgated, then it is the intent of the CWCB that the CWCB will not place a call for this ISF water right during any specific period of time identified by the Upper Colorado River Commission in a finding issued pursuant to Article VIII(d)(8) of the Upper Colorado River Basin Compact of 1948 for curtailment of Colorado River basin water uses within Colorado, which the State of Colorado implements in a manner that curtails water diversions within Water Division 5.
  - D. The CWCB agrees not to file a statement of opposition to applications for water rights filed after November 30, 2011 that: (1) result in depletions that do not exceed 100 acre feet within the subject ISF reach; or (2) are for changes of water rights that do not seek to change more than 2500 acre feet, provided such changes of water

rights do not involve an exchange through the subject ISF reach. Regardless of these subsections (1) and (2), the CWCB may file a statement of opposition to applications filed after November 30, 2011 for water rights that exceed a total 1% depletive effect on the instream flow right decreed herein in accordance with the de minimis Rule 8e of the Rules Concerning the Instream Flow and Natural Lake Level Program. This term and condition only applies to applications for water rights and does not preclude the CWCB from enforcing this ISF appropriation in accordance with the priority system. The CWCB may also evaluate any water court application made after November 30, 2011 to determine whether it is appropriate for application of the Injury with Mitigation Rule 8i.(3) of the Rules Concerning the Instream Flow and Natural Lake Level Program.

- E. It is the intent of the CWCB that this ISF provide protection of the natural environment only to the extent authorized by state statute as against adjudications of water rights made after the date of this filing. The CWCB intends that the ISF water right decreed herein is not appropriate for consideration as a stream flow standard in other administrative or regulatory permitting contexts.
- F. No Precedent. The findings of fact, conclusions of law and decree in this matter were completed as a result of substantial discussions, negotiations, and compromises by, between and among the Applicant and several objectors pertaining to all parts of the findings, conclusions and decree. It is specifically understood and agreed by the parties hereto, and found and concluded by the Court, that the acquiescence of the parties to a stipulated decree under the specific factual and legal circumstances of this contested matter and upon the numerous and interrelated compromises reached by the parties shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, *stare decisis*, *res judicata*, estoppel, laches, or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the parties hereto in any other matter, case or dispute, nor shall testimony concerning such acquiescence of any party to a stipulated decree herein be allowed in any other matter, case or dispute. All parties stipulate and agree that they do not intend the findings, conclusions and decree to have the effect of precedent or preclusion on any factual or legal issue in any other matter. The parties further stipulate and agree that they each reserve the right to propose or to challenge any legal or factual position in any other matter filed in this or any other court without limitation by these Findings, Conclusions and Decree.

It is accordingly **ORDERED** that this Ruling shall be filed with the water clerk subject to judicial review.

It is further **ORDERED** that a copy of this Ruling shall be filed with the Division Engineer and the State Engineer.

Dated this 1<sup>st</sup> day of March, 2013.

BY THE REFEREE:

Handwritten signature in blue ink, appearing to read "DKS Rakizky".

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Water Referee  
Water Division No. 5  
State of Colorado

**JUDGMENT AND DECREE OF THE WATER COURT**

No protest was filed in this matter. The foregoing Ruling is confirmed and approved, and is made the Judgment and Decree of this Court.

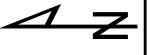
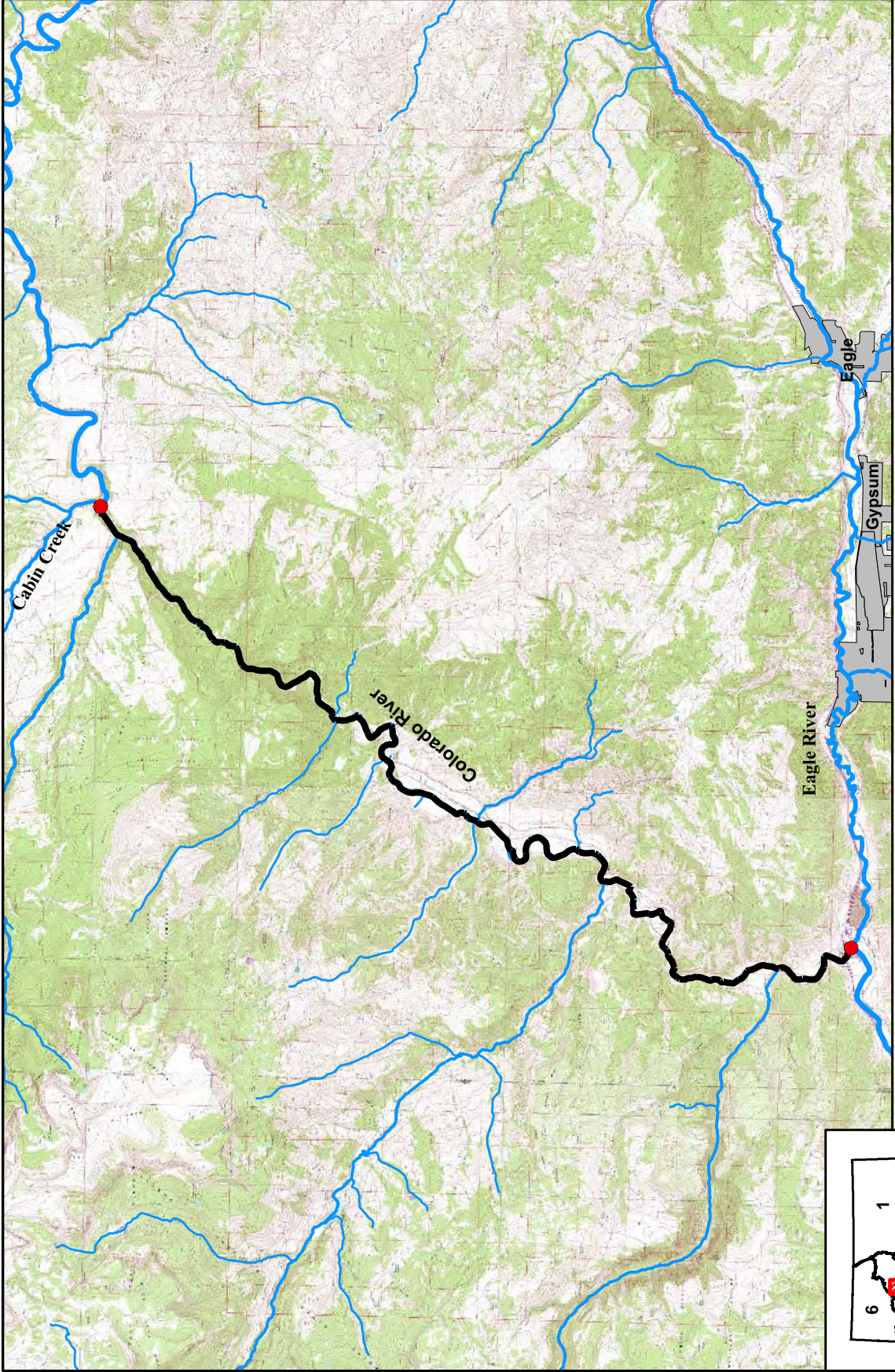
Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

BY THE COURT:

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Water Judge  
Water Division No. 5  
State of Colorado





Colorado River  
Instream Flow Reach

