

Summary

This application (attached) seeks to make absolute and a finding of reasonable diligence for a Recreational In-Channel Diversion (RICD) on the Arkansas River located in Pueblo, CO originally decreed in Case No. 2-01CW60.

Pueblo's white water course is located on the Arkansas River just upstream of its confluence with Fountain Creek. The reach of the existing white water course is shown on the map attached and includes approximately 8 existing control structures. Structure 9, also shown on the map, has been decreed, but not yet built. The RICD is decreed for the following flows:

Time Period	Average Year (cfs)	Drier Year (cfs)
Oct. 1 - Oct. 15	250	150
Oct. 16 - Nov. 14	200	150
Nov. 15 - Mar. 15	100	100
Mar. 16 - Mar. 31	250	200
Apr. 1 - Apr. 15	350	250
Apr. 16 - Apr. 30	400	300
May 1 - May 22	450	350
May 23 - Jul. 31	500	500
Aug. 1 - Aug. 15	450	350
Aug. 16 - Sep. 7	300	300
Sep. 8 - Sep. 30	250	150

Pueblo has claimed that all of the flows (above) conditionally decreed for structures 1-8 of the RICD are absolute based on flows through the course and recreational use of the structures since the original decree was entered. Pueblo is also seeking a finding that Pueblo has exercised reasonable diligence for structure 9.

CWCB Appropriations

The CWCB does not hold instream flow (ISF) water rights that could be injured by this RICD. However, on February 21, 2012 Pueblo and the Colorado Division of Parks and Wildlife (CPW) jointly recommended a new 2013 ISF appropriation on the Arkansas River between the outlet of Pueblo Reservoir and the Arkansas River's confluence with Fountain Creek. The proposed ISF appropriation overlaps the existing RICD reach as shown on the attached map.

Basis for Statement of Opposition

The CWCB would like to ensure that the Applicant has provided proper evidence to support its claim for a finding of reasonable diligence and to make absolute the RICD water right decreed in

Case No. 2-01CW60. Improper diligence or perfection of this RICD may affect Colorado's ability to promote maximum utilization of the waters of the State.

Other Objectors

The Fort Lyon Canal Company has also filed a Statement of Opposition (SOP) in the case.

Staff Recommendation

The Staff requests that the Board ratify the attached SOP that was filed by Staff and the Attorney General's Office in this case.

Attachments:

Application and Map

SOP

DISTRICT COURT, WATER DIVISION NO. 2,
COLORADO

320 West 10th Street
Pueblo, CO 81003

**CONCERNING THE APPLICATION FOR WATER
RIGHT OF PUEBLO, A MUNICIPAL
CORPORATION**

In the Arkansas River or its Tributaries

In Pueblo County, Colorado

Attorneys for Applicant:

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**EFILED Document – District Court
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Case Number: 12CW__
(01CW160)

Div.: Ctrm.:

**APPLICATION TO MAKE RECREATIONAL IN-CHANNEL DIVERSION WATER
RIGHT ABSOLUTE IN PART AND FOR FINDING OF REASONABLE DILIGENCE
WITH RESPECT TO ANY PORTION NOT MADE ABSOLUTE**

1. Applicant: Pueblo, A Municipal Corporation

Mailing Address: Mr. Jerry Pacheco
City Manager
200 South Main Street
Pueblo, CO 81003

Email Address: jpacheco@pueblo.us

Telephone Number: (719) 553-2616

Please direct all pleadings to Applicant's counsel, Holland & Hart LLP, at the address identified above.

2. Background: In Case No. 01CW160, Applicant obtained a conditional water right decree for the recreational in-channel diversion water right ("RICD Water Right") associated with the Arkansas River Legacy Whitewater Park (the "Whitewater Park") in Pueblo, Colorado. Through this Application, Applicant seeks to make the portion of the RICD Water Right associated with Structures 1 through 8 of the Whitewater Park, absolute. In the alternative, Applicant seeks a finding of reasonable diligence with respect to any portion of the water right associated with such structures not made absolute. Applicant also seeks a finding of reasonable diligence with respect to the portion of the water right associated with Structure 9 of the Whitewater Park.

3. Description of Water Right: The RICD Water Right is described as follows:

A. Original Decree. Case No. 01CW160 (Water Div. 2), decree dated April 5, 2006.

B. Name of Structures. The nine control structures comprising the Whitewater Park are numbered consecutively from the upstream structure (Structure 1) to the furthest downstream structure (Structure 9). Construction of Structures 1 through 8 was completed in 2005. Structure 9 will be constructed in the future. These nine structures comprise a whitewater and recreational boating course.

Structure 1 of the Whitewater Park includes a permanent boat chute/fish ladder to allow kayaks, boats, and other recreational water craft, as well as native and sport fish, to pass over an existing 13-foot high diversion structure in the river known as the Southern Colorado Power Plant or Aquila Energy diversion dam (the "Power Plant Diversion"). A series of seven smaller, permanent control structures (Structures 2-8) have been constructed in the river between the Power Plant Diversion and the Union Street bridge to create self-scouring pools and to divert and control the flow of the river at specific points to create various wave forms desirable for whitewater kayaking and recreational boating. The Whitewater Park will extend downstream to Structure 9, a permanent boat chute or chutes in the Arkansas River at the location of the existing St. Charles Mesa Water District diversion structure, located just downstream from the Santa Fe Street bridge in Pueblo, near Moffat Street (the "Moffat Street Chute") to allow passage over the existing diversion structure.

The Whitewater Park structures were designed to control, concentrate, and direct the flow of the Arkansas River for use by kayaks, canoes, rafts and other types of recreational water crafts, and to establish and maintain fish habitat for piscatorial and other purposes. The structures are of the type and nature described in the letter report dated December 24, 2001 by Gary M. Lacy, submitted as Pueblo's Exhibit D in the hearing before the Colorado Water Conservation Board on July 22-23, 2002, and have been constructed generally in conformity therewith.

C. Legal Description of Structures: The Whitewater Park was constructed in the Arkansas River channel, beginning with the boat chute/fish ladder (Structure 1) over and through the Power Plant Diversion. Seven other control structures (Structures 2 through 8) are located in the river between Structure 1 and the Union Street Bridge. Structures 2 through 8 are constructed in a reach of the river that is approximately 2,000 feet in length. The Moffat Street Chute (Structure 9) will be constructed consistent with the decree in Case No. 01CW160 at the location described below. The Power Plant Diversion, the Union Street bridge, and the Moffat Street Chute (Structure 9) are generally located as follows:

Power Plant Diversion (Structure 1): A water control structure located in the Arkansas River channel in the SW1/4 of the NW1/4, Section 36, T. 20 S., R. 65 W., of the 6th P.M., at a point approximately 2,326 feet South of the North Section line and 810 feet East of the West Section line of said Section 36.

Union Street Bridge: The Union Street bridge crosses the Arkansas River in Pueblo in the SE1/4 of the SW1/4, Section 36, T. 20 S., R. 65 W., of the 6th P.M., at points approximately 968 feet North of the South Section line and 2,320 feet East of the West Section line of said Section 36.

Moffat Street Chute (Structure 9): The Moffat Street Chute is a structure in the Arkansas River channel located in the SW1/4 of the NW1/4, Section 6, T. 21. S., R. 64 W., of the 6th P.M., at a point approximately 1,684 feet South of the North Section line and 287 feet East of the West Section line of said Section 6.

The U.S. Geological Survey topographic map attached to and incorporated in this Application as Exhibit 1 identifies the general location of the Whitewater Park and the control structures as described above in the decree in Case No. 01CW160. Structures 1 through 8 were constructed consistent with such decree.

D. Source. The source of the RICD Water Right for the Whitewater Park is the Arkansas River and its tributaries.

E. Appropriation Date: May 15, 2000.

F. Amount Claimed: The following amounts, in cubic feet of water per second of time ("cfs") were decreed in Case No. 01CW160 as a conditional

RICD water right for each of the specified time periods for each of the structures that comprise the Whitewater Park:

Period	Average Year	Drier Year
Oct. 1 – Oct. 15	250	150
Oct. 16 – Nov. 14	200	150
Nov. 15 – Mar. 15	100	100
Mar. 16 – Mar. 31	250	200
Apr. 1 – Apr. 15	350	250
Apr. 16 – Apr. 30	400	300
May 1 – May 22	450	350
May 23 – Jul. 31	500	500
Aug. 1 – Aug. 15	450	350
Aug. 16 – Sep. 7	300	300
Sep. 8 – Sep. 30	250	150

The U.S. Natural Resources Conservation Service regularly releases a “Water Supply Outlook Report” for Colorado. This report includes a “most probable” forecast (50% chance of exceedance) for flows on the Arkansas River at Salida (the “Forecast”). The “Average Year” flows in the table above shall apply when the most recently released Forecast is 100% or more. The “Drier Year” flows shall apply when the most recently released Forecast is less than 100% and greater than or equal to 70%. If the Forecast ceases to be provided by the Natural Resources Conservation Service, Pueblo shall notify the Court and all parties to this case in writing of a proposed alternative measure for fair implementation of this paragraph. The other parties shall have 30 days in which to provide comments to the Court concerning Pueblo’s proposal, after which the Court shall decide upon the alternative measure to be used.

G. Uses: Boating, including but not limited to kayaking, rafting, and canoeing. The RICD Water Right is also used for incidental fishing, wildlife habitat, and piscatorial uses. However, no water right for fishing, wildlife habitat, or piscatorial uses was confirmed by the decree in Case No. 01CW160.

4. Evidence in Support of Claim to Make Absolute and for Finding of Reasonable Diligence with Respect to any Portion of the Subject Water Right Not Made Absolute: The flow rates conditionally decreed as the RICD Water Right for each of the specified time periods for Structures 1 through 8 of the Whitewater Park are claimed absolute based upon actual flows controlled through the Whitewater Park and use of the Whitewater Park for the decreed purposes of the water right since entry of the final decree in Case No. 01CW160. Applicant reserves the right to rely upon flow rates and usage that occur while this Application is pending in support of its claim to make the RICD Water Right absolute in part.

The activities described below support Applicant's claim to make the RICD Water Right absolute in part and to continue the RICD Water Right in full force and effect for another six-year diligence period with respect to any portion of such right not made absolute. This list is not intended to be exclusive and may be supplemented by additional evidence.

A. Structures 1 through 8 described above have been constructed. The Whitewater Park opened on May 7, 2005 and has been maintained and used since entry of the final decree in Case No. 01CW160.

B. Structures 1 through 8 have diverted and controlled water for the intended beneficial uses during the time periods described above in Paragraph 3. Evidence of use of the Whitewater Park includes the following:

- i. The Pueblo Paddlers Club, which provides a forum for boaters to meet and enjoy using the Whitewater Park, hosted events at the Whitewater Park from 2006 through the date of filing, including the Ice Breaker Rodeo and Demo event, weekly "Show-Up Show-Down" paddling sessions, safety clinics and river clean-ups.
- ii. The Edge Ski Paddle & Pack utilized the Whitewater Park for kayak lessons, boating competitions and benefit events each year from 2006 through the date of filing.
- iii. The Colorado River Surfing Association hosted International Surfing Day celebrations at the Whitewater Park in June 2009, 2010 and 2011, which included surf contests, trash clean-ups and other events.
- iv. The Arkansas River Festival was held in May 2006 and 2007 at the Whitewater Park.
- v. The Wild Wild West Fest was held in May 2009, 2010 and 2011, and included kayak rodeo events at the Whitewater Park.
- vi. A Paddle-A-Thon to benefit First Descents was held at the Whitewater Park in July 2007, 2008 and 2009.
- vii. The Chile & Frijoles Festival was held in late September of each year from 2006 through 2011 and included kayaking events at the Whitewater Park.
- viii. Outfitters used the Whitewater Park for commercial activities.
- ix. Instructional clinics were held at the Whitewater Park, including instruction and related activities offered through the Colorado State University-Pueblo Experiential Learning Center.

x. Individual boaters used the Whitewater Park from 2006 through the date of filing. Documentation of such use may include magazine and news publications, photographs, videos, blog posts, equipment rental information and statements by boating users of the Whitewater Park.

xi. The Whitewater Park was also used for incidental fishing, wildlife habitat, and piscatorial uses.

C. Based upon measured flows at the U.S. Geological Survey stream gauge no. 07099970, Arkansas River at Moffat Street at Pueblo, CO, flows through and controlled by Structures 1 through 8 of the Whitewater Park met or exceeded the amounts described above during each of the specified time periods described above in Paragraph 3.F.

D. Applicant expended significant funds in connection with maintaining, improving and repairing the Whitewater Park and facilities associated therewith, including expenditures in 2011 of approximately \$190,000 for bank stabilization and related maintenance activities.

E. Applicant expended significant funds for legal and consulting fees associated with the Whitewater Park and Applicant's protection of the RICD Water Right through participation as an opposer in numerous water court applications during the diligence period, in excess of \$130,000.

5. Claim to Make RICD Water Right Absolute in Part: Based upon the verified facts described in Paragraph 4.A through 4.C above, Applicant requests that the Court confirm and decree that the portion of the RICD Water Right associated with Structures 1 through 8 has been placed to beneficial use for all decreed amounts and uses consistent with C.R.S. § 37-92-305(9)(a).

6. Claim to Continue RICD Water Right as Conditional in Part: In the alternative to the claim set forth in Paragraph 5 above, based upon the verified facts described in Paragraph 4, Applicant requests that the Court find that it has exercised reasonable diligence toward controlling and placing to beneficial use any portion of the RICD Water Right associated with Structures 1 through 8 not made absolute consistent with C.R.S. § 37-92-301(4)(b). Applicant also requests that the Court find that it has exercised reasonable diligence with respect to the portion of the RICD Water Right associated with Structure 9. *Id.*

7. Terms and Conditions to Prevent Injury: The terms and conditions set forth in Paragraph 7 of the final decree in Case No. 01CW160 will continue to apply to the RICD Water Right.

8. Name and Address of Owner of Land on Which Points of Diversion and Places of Use are Located:

- A. Applicant, at the above address.
- B. The Pueblo Conservancy District, P.O. Box 234, Pueblo, CO 81002.

WHEREFORE, Applicant respectfully requests that the Court enter an order and decree:

A. Finding that the RICD Water Right has been made absolute with respect to Structures 1 through 8;

B. In the alternative finding that Applicant has exercised reasonable diligence toward controlling and placing to beneficial use any portion of the RICD Water Right associated with Structures 1 through 8 not made absolute, and that such portion of the RICD Water Right should be continued in full force and effect for all decreed amounts and uses;

C. Finding that Applicant has exercised reasonable diligence toward controlling and placing to beneficial use the portion of the RICD Water Right associated with Structure 9 and that such portion of the RICD Water Right should be continued in full force and effect for all decreed amounts and uses; and

D. Granting such other relief that the Court deems proper.

Respectfully submitted this 30th day of April 2012.



Christopher L. Thorne
Meghan N. Winokur

Thomas J. Florczak
City Attorney

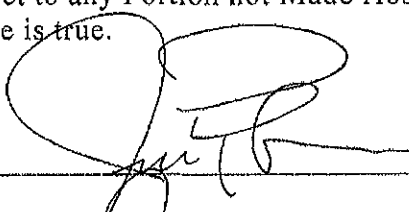
**ATTORNEYS FOR APPLICANT PUEBLO, A
MUNICIPAL CORPORATION**

THIS DOCUMENT WAS FILED WITH THE COURT THROUGH THE LEXIS NEXIS FILE & SERVE ELECTRONIC FILING PROCEDURE PURSUANT TO C.R.C.P. 121 §1-26. THE ORIGINAL SIGNED COPY OF THIS DOCUMENT IS ON FILE WITH HOLLAND & HART.

VERIFICATION

STATE OF COLORADO)
)
COUNTY OF PUEBLO) ss.

Jerry M. Pacheco, City Manager for Pueblo, A Municipal Corporation, being first duly sworn upon oath, deposes and says that he has read the foregoing Application to Make Recreational In-Channel Diversion Water Right Absolute in Part and for Finding of Reasonable Diligence with Respect to any Portion not Made Absolute, knows the contents thereof, and that the same is true.



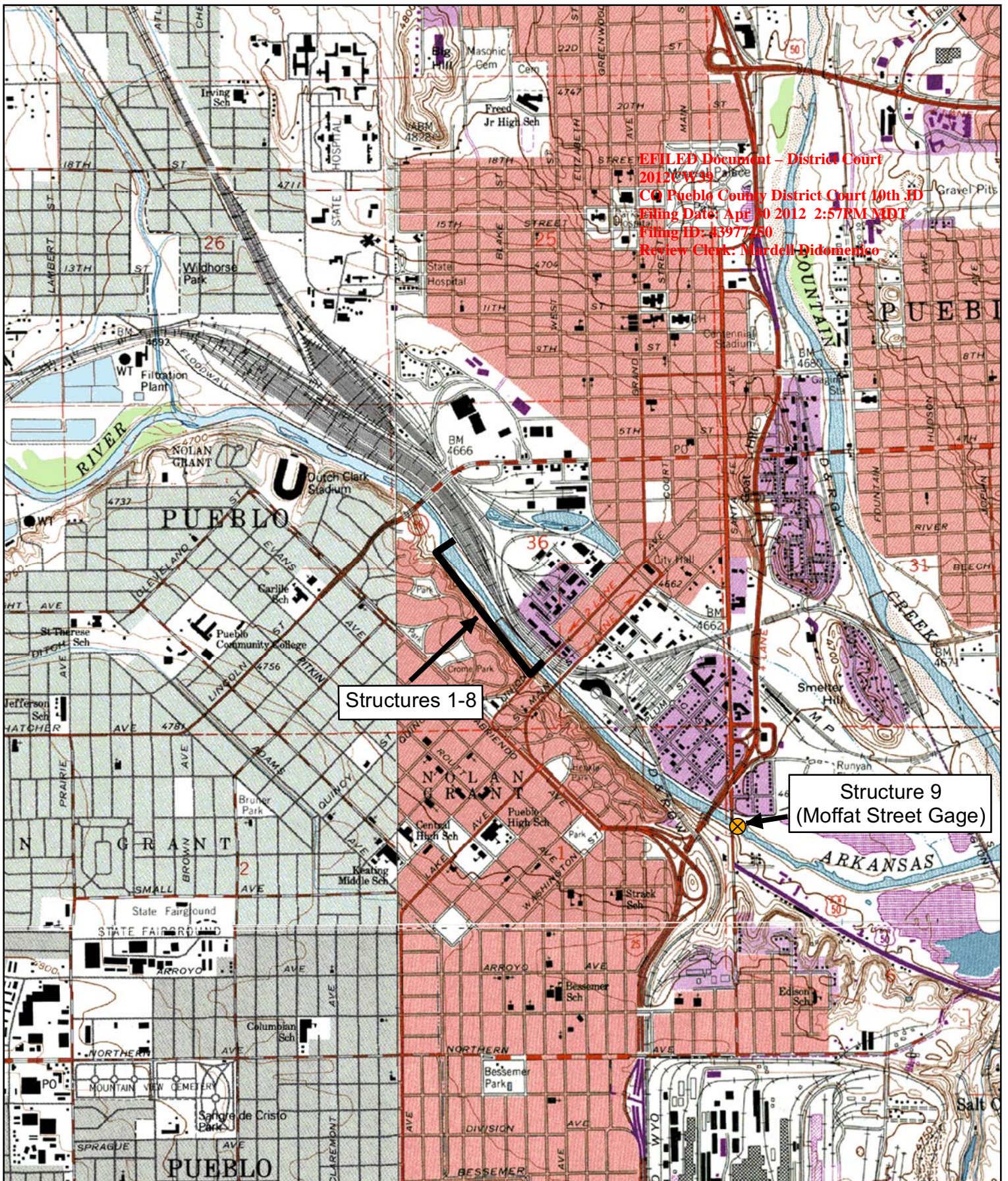
Subscribed and sworn to before me this 30 day of April, 2012.

Witness my hand and official seal.

My commission expires: 10/10/15.



Notary Public

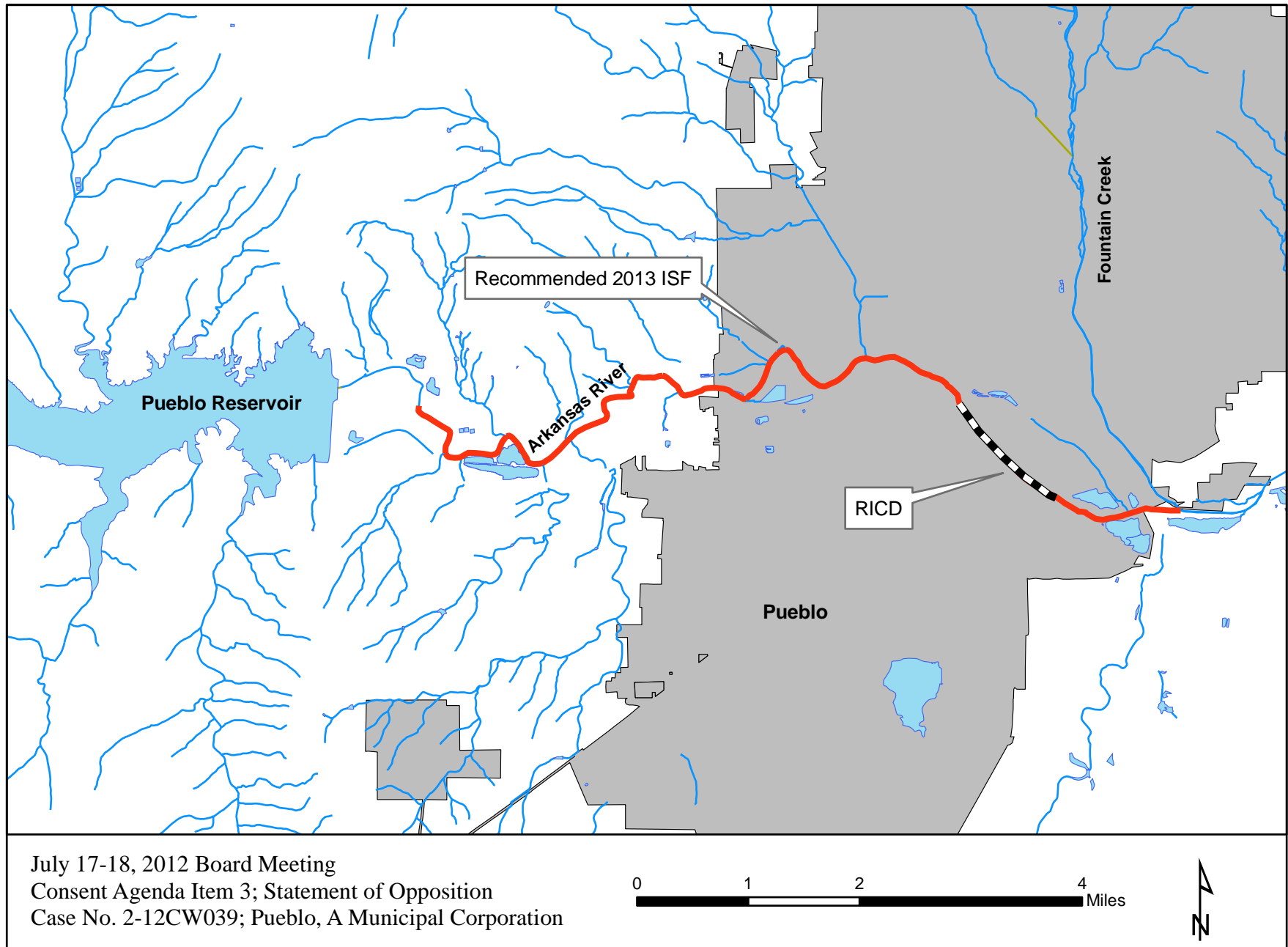


0 0.25 0.5 1 Miles

Exhibit 1
Location Map
Arkansas River Legacy
Whitewater Park



April 2012



DISTRICT COURT, WATER DIVISION 2 COLORADO 320 W 10 th Street, #207 Pueblo, CO 81003	
Concerning The Application For Water Rights Of: PUEBLO, A MUNICIPAL CORPORATION, IN THE ARKANSAS RIVER OR ITS TRIBUTARIES, IN PUEBLO COUNTY, COLORADO	▲ COURT USE ONLY ▲
On behalf of the Colorado Water Conservation Board JOHN W. SUTHERS, Attorney General SUSAN J. SCHNEIDER, #19961 * First Assistant Attorney General 1525 Sherman Street, 5 th Floor Denver, CO 80203 (303) 866-5046 susan.schneider@state.co.us *Counsel of Record	Case No.: 12CW39 Div.: 2
<p align="center">STATEMENT OF OPPOSITION OF THE COLORADO WATER CONSERVATION BOARD</p>	

1. Name of objector: Colorado Water Conservation Board (“CWCB”)

Mailing address: 1313 Sherman Street, Room 721
Denver, CO 80203
2. Name of ditch or structure: As more fully described in the application.
3. State facts why application for water rights should not be granted or why it should be granted only in part or on certain conditions:
 - a. The CWCB would like to ensure that the Applicant has provided proper evidence to support its claim for a finding of reasonable diligence and to make absolute the RICD water right decreed in Case No. 2-01CW60. Improper diligence or perfection of this RICD may affect Colorado’s ability to promote maximum utilization of the waters of the State.
 - b. The CWCB is unable to determine from the application whether additional grounds for opposition exist, and therefore reserves the right to assert other grounds for opposition as they become known.

4. This statement of opposition is continuing in nature and is intended to apply to any and all future amendments to the original application.

Dated this 29th day of May 2012.

JOHN W. SUTHERS

Attorney General

*E-filed pursuant to C.R.C.P. 121. Duly signed original on file at
the Office of the Attorney General.*

/s/Susan Schneider

SUSAN SCHNEIDER*

First Assistant Attorney General


Natural Resources and Environment Section

Attorneys for CWCB

*Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of May, 2012, I caused a true and correct copy of the foregoing **STATEMENT OF OPPOSITION OF THE COLORADO WATER CONSERVATION BOARD** to be served electronically via LexisNexis File & Serve to each of the following:

<u> Party</u>	<u>Party Type</u>	<u>Attorney</u>	<u>Firm</u>	<u>Method</u>
DIVISION ENGINEER	Division Engineer	Division 2 Water Engineer	Division 2 Engineer	E-Service
PUEBLO A MUNICIPAL CORPORATION	Applicant	Thorne, Christopher L	Holland & Hart LLP-Denver	E-Service
PUEBLO A MUNICIPAL CORPORATION	Applicant	Florczak, Thomas J	Pueblo a Municipal Corp - Law Department	E-Service
PUEBLO A MUNICIPAL CORPORATION	Applicant	Winokur, Meghan	Holland & Hart LLP-Denver	E-Service
STATE ENGINEER	State Engineer	State Water Engineer, Colorado	State Engineers Office	E-Service

*Signed original on file with the Office of the Attorney
General for the State of Colorado.
/s/Dawn M. Heher*

STATE OF COLORADO)
) ss
CITY AND COUNTY OF DENVER)

I, Timothy P. Feehan, Assistant Director, Colorado Water Conservation Board, being duly sworn hereby state that I have read the foregoing statement of opposition, and that the contents are true to the best of my knowledge.

E-filed pursuant to C.R.C.P. 121. Duly signed original on file at the Office of the Attorney General.

~~/s/ Timothy P. Feehan~~

Timothy P. Feehan

Assistant Director

Colorado Water Conservation Board

Subscribed and sworn to before me in the City and County of Denver, State of Colorado,
this 30 day of May, 2012.

E-filed pursuant to C.R.C.P. 121. Duly signed original on file at the Office of the Attorney General.

/s/

Carolyn A. Simon

NOTARY PUBLIC

My Commission expires:

4/2/2013