



DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER RESOURCES

John W. Hickenlooper.
Governor

Mike King
Executive Director

Dick Wolfe, P.E.
Director/State Engineer

Erin C.H. Light, P.E.
Division Engineer

July 16, 2012

Mr. Jay W. Skinner
Colorado Parks and Wildlife
711 Independent Avenue
Grand Junction, Colorado 81505

Re: Temporary Loan of Water for Colorado Water Conservation Board for Instream Flow
Pursuant to Section 37-83-105, C.R.S.
Section 18, T 1 S, R 91 W and Section 2, T 1 N, R 97 W 6TH P.M.
Water Division 6, Water District 43, Rio Blanco County

Approval Period: July 16, 2012 through November 12, 2012
Contact Phone Number for Mr. Jay W. Skinner: 970-255-6100

Dear Mr. Skinner:

We have reviewed your letter dated June 26, 2012 in which you request approval of a temporary loan of water pursuant to Section 37-83-105, C.R.S., from the Colorado Parks and Wildlife ("CPW") to the Colorado Water Conservation Board ("CWCB") for instream flow ("ISF") use. As required by § 37-83-105(2)(b)(II), C.R.S., written notice of the request for approval of a temporary loan of water was provided on June 26, 2012 to all parties who have subscribed to the Division 6 Substitute Water Supply Plan ("SWSP") Notification List. The Division of Water Resources ("DWR") did not receive comments during the statutory 15-day comment period. The statutory \$100 filing fee (receipt no. 0918764B) was submitted with this request.

Description and Statement of Duration

CPW is proposing to temporarily loan a portion of its water right stored in Big Beaver Creek Reservoir (a.k.a Big Beaver Reservoir or Lake Avery) to CWCB for ISF use. CWCB currently holds ISF water rights decreed in Case Nos. W-3652C on the White River and W-3652E on Beaver Creek, which are more specifically described in the table below:

Case Number	Upstream Terminus	Downstream Terminus	ISF decreed amounts (cfs)	Appropriation Date
W-3652C	NE1/4 NE1/4, Sec. 18, T 1 S, R 91 W, 6 th P.M. (confluence of the North Fork and the South Fork of the White River)	NW1/4 NE1/4, Sec. 2, T 1 N, R 97 W, 6 th P.M. (confluence of the White River with Piceance Creek)	200	November 15, 1997

W-3652E	SW1/4 NE1/4, Sec. 18, T 1 S, R 91 W, 6 th P.M. (from Lake Avery dam)	NW1/4 SE1/4, Sec. 18, T 1 S, R 91 W, 6 th P.M. (confluence of Beaver Creek with the White River)	2	November 15, 1997
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The White River and Beaver Creek ISF water rights were decreed to preserve the natural environment to a reasonable degree. The temporary loan of water leased from CPW will be for ISF use within the same segments of the White River and Beaver Creek as identified in Case Nos. W-3652C and W-3652E and shown on the attached map, except that the loan water will enter the White River ISF reach approximately one half mile below its upstream terminus. The water released from Big Beaver Reservoir to CWCB for ISF use will be limited to the amount needed, when combined with the native flow, to achieve the decreed flow rates of each ISF water right. Reservoir releases are expected to increase stream depth and wetted perimeter and to lower water temperature for the fish.

The temporary loan will provide water for up to 120 days in each year, not to exceed 3 years during the 10-year period ending in 2022. This approval applies to releases beginning July 16, 2012 through November 12, 2012.

Proponent's legal right to use the loaned water right

CWCB has entered into an Agreement to Loan Water for Instream Flow Use ("Agreement") with the CPW for 3,000 acre-feet of water stored in the Big Beaver Reservoir to be released for ISF use. CPW has the right to the water stored in Big Beaver Reservoir, and therefore the right to loan it because the water was legally stored in priority. A copy of the Agreement was provided to this office with this request and is attached to this letter. Correspondence between CPW and CWCB documenting CPW's offer and CWCB's response to the offer of the temporary loan are also attached to this letter.

The CWCB's existing ISF water rights decreed in Case Nos. W-3652C and W-3652E were identified as being more junior than the existing water rights on the segments of the White River and Beaver Creek described above and may be out of priority during much or all of the 2012 irrigation season. Beginning with the day of the approval of this letter, reservoir water may be released at a rate of 20 cfs, to partially make up the CWCB's ISF right of 200 cfs on White River. Reservoir releases will also be used to bring up the flow in Beaver Creek to the decreed ISF amount of 2 cfs when needed. Consistent with the terms and condition of the Agreement, CWCB shall notify the Division Engineer of the anticipated amount and timing of the release approved by CPW and that such use is being made to satisfy the ISF water rights. CWCB's use of the CPW's water rights stored in Big Beaver Reservoir does not transfer any legal or equitable title or interest to any part of the storage right to CWCB.

Historical Use and Estimate of the Consumptive Use of the loaned water right

Big Beaver Reservoir is an on-stream reservoir on Big Beaver Creek which is tributary to the White River. Big Beaver Reservoir is owned and operated by the CPW and it was decreed by the Rio Blanco County District Court as part of Civil Action 1269, Priority 726. The reservoir's point of diversion is located at a point whence the northwest corner of Section 18, Township 1 South, Range 91 West of the 6th P.M. bears North 51°36' West a distance of 3,472 feet. Big Beaver Reservoir is decreed for fish propagation, waterfowl habitat, waterfowl propagation and

recreational uses in the amount of 7,657.86 acre-feet. The reservoir is currently storing in excess of 3,000 acre-feet.

Under the Agreement, CPW will release water from Big Beaver Reservoir that was already stored in priority. The water storage right decreed to Big Beaver Reservoir is not attributed any consumptive use. Therefore, a historical consumptive use analysis is not required in this case prior to being provided to CWCB for the un-decreed ISF use. The use of water from the reservoir for the new time, place, and type of use that are subject of this loan and the resulting decrease to the amount of water stored in the reservoir may increase the volume of future inflow to be stored necessary to fill the reservoir. Therefore, to avoid any injury, the volume released may only be refilled during periods of free river conditions. It is anticipated that the refilling will occur in May of 2013. The Division Engineer has reviewed the loan allowing the new time, place and use of this water right and determined, as required by § 37-83-105(2)(a) and (2)(b), C.R.S., that it will not injure the existing water rights of others.

The timing of releases of water from the reservoir will depend upon the timing of stream flow shortages and operational constraints for the reservoir. Once the released water reaches the downstream terminus of the decreed ISF reach at the confluence of the White River with Piceance Creek, the released water will no longer be claimed by the CWCB.

Conditions of Approval

This temporary loan of water is hereby approved pursuant to Section 37-83-105, C.R.S., subject to the conditions below:

1. This approval applies to releases beginning July 16, 2012 through November 12, 2012.
2. Approval of this temporary loan of water is for the purposes stated herein, specifically for releases of Big Beaver Reservoir water for CWCB ISF use on the White River and Beaver Creek reaches identified in Case Nos. W-3625C and W-3652E.
3. The Applicant must provide the name, address and phone number of the person who will be responsible for the operation of this temporary loan of water to the SEO, the Division Engineer (Erin Light, PO Box 773450, Steamboat Springs, CO 80477, telephone 970-879-0272), and the Water Commissioner (Bill Dunham, PO Box 418, Meeker, CO 81641, telephone 970-878-4466) within 20 days of the receipt of this approval.
4. Reservoir releases and stream flows shall be measured as required by the Division Engineer. The Applicant shall install and maintain measuring devices as required by the Division Engineer for operation of this temporary loan.
5. Reasonable transit losses associated with the release of reservoir water will be assessed as determined by the Division Engineer for Water Division 6 for delivery of said water to the downstream terminus of the subject White River ISF reach.
6. CPW shall fill Big Beaver Reservoir in 2013 by the amount of water released in 2012 pursuant to the loan described in this approval only under free river conditions.
7. The Applicant must submit accounting reports to the Division Engineer (Erin Light, PO Box 773450, Steamboat Springs, CO 80477, telephone 970-879-0272) and Water Commissioner (Bill Dunham, PO Box 418, Meeker, CO 81641, telephone 970-878-4466) on a daily basis or other interval acceptable to both of them. The Applicant

shall also provide a report to the Division Engineer and Water Commissioner by November 15th, which summarizes releases made pursuant to this temporary loan of water. Accounting forms are subject to modification and approval by the Division Engineer. Flow rates shall be reported in cfs, volumes shall be reported in acre-feet.

8. This temporary loan of water may be revoked or modified at any time should it be determined that injury to other vested water rights has occurred or will occur as a result of the operation of this temporary loan of water.
9. The decision of the Division Engineer shall have no precedential or evidentiary force, shall not create any presumptions, shift the burden of proof, or serve as a defense in a water court case or any other legal action that may be initiated concerning the loan. This decision shall not bind the Division Engineer to act in a similar manner in any other applications involving other loans and shall not imply concurrence with any findings of fact or conclusions of law contained herein, or with the engineering methodologies used by the Applicant. Any appeal of a decision made by the Division Engineer concerning a temporary loan of water pursuant to Section 37-83-105, C.R.S., shall be to the Division 6 Water Judge within fifteen days of the date of this decision.

Should you have any questions regarding this temporary loan of water, please contact me at (970) 879-0272.

Sincerely,

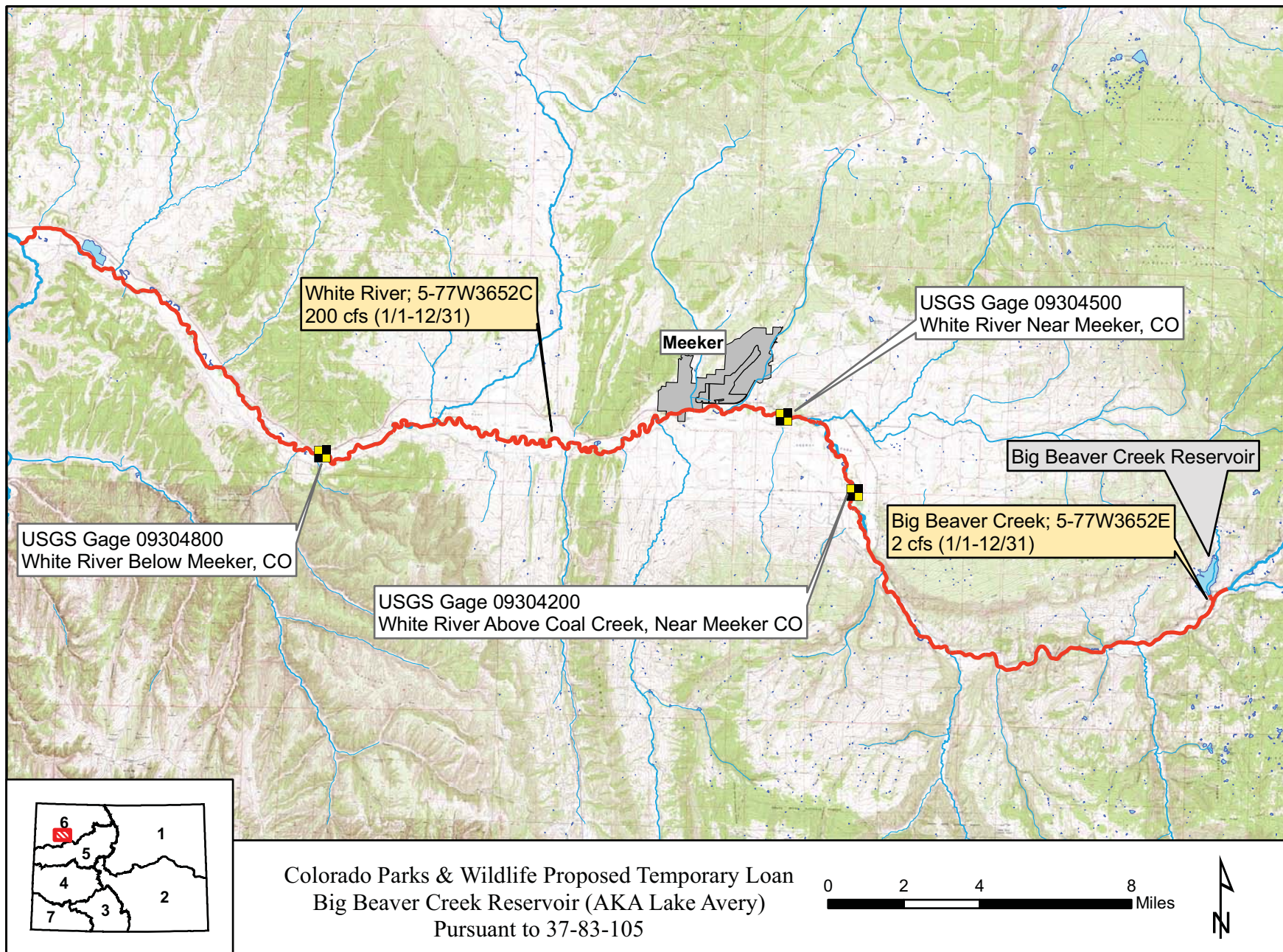


Erin C. H. Light, P.E.
Division Engineer

Attachments: Map of the ISF reaches
Agreement to Loan Water for ISF Use
CPW and CWCB letters

cc: Dick Wolfe, State Engineer
1313 Sherman Street, Room 818
Denver, Co 80203
Telephone 303-866-3581

Bill Dunham, Water Commissioner, Water District 43
P. O. Box 418
Meeker, Co 81641,
Telephone 970-878-4466



DRAFT
INTERAGENCY AGREEMENT TO LOAN WATER FOR INSTREAM FLOW USE

This Interagency Agreement to Loan Water for Instream Flow Use (“Interagency Agreement”) is entered into by and between the State of Colorado, acting by and through the Department of Natural Resources, for the use and benefit of the Division of Parks and Wildlife and the Parks and Wildlife Board (“CPW”) and the State of Colorado, acting by and through the Department of Natural Resources, for the use and benefit of the Colorado Water Conservation Board (“CWCB”) (collectively, the “Parties”).

RECITALS

- A.** CPW is a division of the Colorado Department of Natural Resources organized and existing under and pursuant to Articles 1, 9 and 10 of Title 33, C.R.S., for the purpose of protecting, preserving, enhancing and managing Colorado’s natural, scenic, scientific and outdoor recreation areas as well as its wildlife and environment for the use, benefit and enjoyment of the people of Colorado and its visitors.
- B.** CWCB is a division of the Colorado Department of Natural Resources organized and existing under and pursuant to Article 60 of Title 37, C.R.S., for the purpose of aiding in the protection and development of water for the benefit of the present and future inhabitants of the State of Colorado.
- C.** CWCB has the exclusive authority, pursuant to section 37-92-102(3), C.R.S. (2011) to appropriate and adjudicate instream flow water rights to preserve the natural environment of streams and lakes in the State.
- D.** The “White River Instream Flow Right” was adjudicated on the White River in the amount of 200 cfs from the confluence of the North Fork and South Fork of the White River down to the confluence of the White River and Piceance Creek in Case No. 5-77W3652C. The “Big Beaver Creek Instream Flow Right” was adjudicated on Big Beaver Creek in the amount of 2 cfs from the outlet of Lake Avery Reservoir (a/k/a Big Beaver Creek Reservoir) to the confluence with the White River in Case No. 5-77W3652E. The Decrees confirming these rights are attached hereto as **Exhibit A**. These rights are collectively referred to herein as “the Instream Flow Rights.”
- E.** In the drought year of 2002, many CWCB decreed instream flows were not satisfied due to their relatively junior priority and, as a result, Colorado’s aquatic ecosystems were negatively impacted. CWCB anticipates many decreed instream flows, including the two above-referenced water rights, will not be met again this year because Colorado snowpack totals for the spring of 2012 are similar to those of the drought year of 2002.
- F.** Under certain circumstances and subject to State and Division Engineer approval, section 37-83-105(2), C.R.S. (2011) allows water owned by another party to be used to satisfy an instream flow right up to its decreed amount.

G. CPW owns a storage water right in Big Beaver Creek Reservoir that is diverted and placed to beneficial use on a tributary near the upstream terminus of the White River Instream Flow Right that may, if administratively approved pursuant to section 37-83-105(2), be used to help satisfy this instream flow right. The Storage Right, Priority No. 726, was adjudicated in Case No. CA1269 in the District Court in and for Rio Blanco County (hereinafter "Storage Right"). Said Decree is attached hereto as **Exhibit B**.

H. Subject to the terms and conditions of this Interagency Agreement, CPW is willing to temporarily loan to CWCB a portion of the Storage Right for use in satisfying the Instream Flow Rights.

AGREEMENT

NOW THEREFORE, the Parties agree as follows:

1. **Authority.** This Interagency Agreement is entered into pursuant to section 37-83-105(2) for the mutual benefit of CPW and CWCB. No further payment, monetary or otherwise, is required by either Party.

2. **Term of Loan Agreement.** This single term, nonrenewable Interagency Agreement is for a term of ten years commencing on July 12, 2012 and terminating on July 12, 2022. Pursuant to section 37-83-105(2), the loan shall not be exercised for more than three years of this ten-year period, nor for a period to exceed 120 days in any calendar year.

3. **Agreement to Loan a Portion of the Storage Right.** Subject to the terms and conditions in this Interagency Agreement, CPW may, in its sole discretion, release water that was previously diverted and stored under the Storage Right to satisfy all or part of the Instream Flow Rights.

A. **Limitations on Use of Loaned Water.** CWCB's use of the water loaned hereunder is limited to satisfying all or part of the Instream Flow Rights. Such use is also subject to all conditions imposed pursuant to section 37-83-105(2), including but not limited to restrictions on the duration of annual use, and any additional terms imposed by the Division or State Engineer.

B. **Process for Requesting Release of the Storage Right.**

i. CWCB shall notify CPW when water is needed to satisfy all or part of the Instream Flow Rights. As part of the notification, CWCB shall specifically identify the requested rate of flow, specific instream flow reach and requested timing of the release.

ii. If CPW elects to release water for CWCB's use, it shall notify the CWCB of the amount and timing of such release. Such release will be made from the outlet of Big Beaver Creek Reservoir and CPW assumes no responsibility for delivering the water to the decreed instream flow reaches.

- iii. CWCB shall promptly notify the Division Engineer, with copy to CPW, of the anticipated amount and timing of the release approved by CPW and that such use is being made to satisfy the Instream Flow Rights.

C. Accounting and Measurement.

- i. CPW and CWCB shall coordinate record keeping and accounting as reasonably required by the State and Division Engineers to administer the Storage Right for use in satisfying the Instream Flow Rights.
- ii. CPW and CWCB are each solely responsible for flow measurements required by the State and Division Engineers for administration of their respective water right(s).

D. Preservation of CPW's Water Rights. CWCB's use of CPW's water rights does not transfer any legal or equitable title or interest to any part of the Storage Right to the CWCB. By permitting CWCB to use a portion of the Storage Right, CPW is not abandoning, relinquishing, or forfeiting the Storage Right. CWCB shall not jeopardize CPW's Storage Right by taking any action that causes or could potentially cause a reopening of the Storage Right.

4. **Notices and Representatives.** Each individual identified below is the principal representative of the designating Party. All notices required to be given hereunder shall be hand delivered with receipt required or sent by certified or registered mail to such Party's principal representative at the address set forth below. In addition to, but not in lieu of a hard-copy notice, notice also may be sent by e-mail to the e-mail addresses, if any, set forth below. Either Party may from time to time designate by written notice substitute addresses or persons to whom such notices shall be sent. Unless otherwise provided herein, all notices shall be effective upon receipt.

CPW:

David Graf, Regional Water Specialist
Colorado Parks and Wildlife
711 Independent Ave.
Grand Junction, CO 81505
(970) 255-6142
David.Graf@state.co.us

CWCB:

Linda Bassi, Chief
Colorado Water Conservation Board
Stream and Lake Protection Section
1313 Sherman Street, Room 721
Denver, CO 80203
(303) 866-3441
linda.bassi@state.co.us

5. **General Provisions.**

- A. **Assignment.** CWCB shall not assign, transfer or sub-lease its rights or obligations under this Interagency Agreement.
- B. **Captions.** The captions and headings in the Interagency Agreement are for convenience of reference only and shall not be used to interpret, define, or limit its provisions.
- C. **Counterparts.** This Interagency Agreement may be executed in counterparts, each of which (or combination of which), when signed by both Parties shall be deemed an original, but both together shall constitute one agreement.
- D. **Entire Understanding.** This Interagency Agreement represents the complete integration of all understandings between the Parties and all prior representations and understandings, oral or written, are merged herein. Prior or contemporaneous additions, deletions, or other changes hereto shall not have any force or effect whatsoever, unless embodied herein.
- E. **Legal Counsel.** Each Party to this Interagency Agreement has engaged legal counsel to negotiate, draft and/or review this Interagency Agreement. Therefore, in the construction and interpretation of this Interagency Agreement, the Parties acknowledge and agree that it shall not be construed against any Party on the basis of authorship.
- F. **Litigation Reporting.** Within 10 days after being served with any pleading in a legal action filed with a court or administrative agency, related to this Interagency Agreement or which may affect CWCB's ability to comply with the terms and conditions of this Interagency Agreement, CWCB shall notify CPW of such action and deliver copies of such pleadings to CPW's principal representative as identified herein.
- G. **Modification.**
 - i. By the Parties. Except as specifically provided in the Interagency Agreement, modifications hereof shall not be effective unless agreed to by the Parties in a written amendment hereto.
 - ii. By Operation of Law. This Interagency Agreement is subject to such modifications as may be required by changes in Federal or Colorado State Law, or their implementing regulations. Any such required modification shall be automatically incorporated as part of the Interagency Agreement on the effective date of such change, as if fully set forth herein.
- H. **Order of Precedence.** The provisions of the Interagency Agreement shall govern the relationship of the Parties. In the event of conflicts or inconsistencies between the Interagency Agreement and its exhibits and attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:
 - i. The provisions of the main body of this Interagency Agreement.

ii. Exhibits.

- I. **Prior Agreements.** This Interagency Agreement cancels and supersedes all prior agreements between the Parties related to CWCB's use of the Storage Right.
- J. **Third Party Enforcement.** The terms and conditions of this Interagency Agreement, and all rights of action relating thereto, are strictly reserved to the Parties, and nothing in this Interagency Agreement shall give or allow any claim or right or cause of action whatsoever by any other person not included in this Interagency Agreement. Any person and/or entity, other than the Parties, receiving services or benefits under this Interagency Agreement shall be deemed an incidental beneficiary only.
- K. **Waiver.** A waiver of a breach of any provision of this Interagency Agreement shall not waive any subsequent breach of the same or different provision of this Interagency Agreement. Any Party's failure in any one or more instances to insist upon strict performance of any of the terms and conditions of this Interagency Agreement or to exercise any right herein conferred shall not be construed as a waiver or relinquishment of that right or of that Party's right to assert or rely upon the terms and conditions of this Interagency Agreement. Any express waiver of a term of this Interagency Agreement shall not be binding and effective unless made in writing and properly executed by the waiving Party.

IN WITNESS WHEREOF, the Parties have executed this Lease Agreement effective as of the date executed by both Parties.

COLORADO DIVISION OF PARKS and WILDLIFE and the PARKS and WILDLIFE COMMISSION

By: _____
Ron Velarde, Regional Manager

Date: _____

COLORADO WATER CONSERVATION BOARD

By: _____
Jennifer Gimbel, Director

Date: _____



COLORADO PARKS & WILDLIFE

6060 Broadway • Denver, Colorado 80216
Phone (303) 297-1192 • FAX (303) 291-7109
wildlife.state.co.us • parks.state.co.us

June 26, 2012

Jennifer Gimbel, Director
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203

RE: Offer of Temporary Loan of Water for Instream Flow Use

Dear Ms. Gimbel:

Colorado Parks and Wildlife ("CPW") owns a storage water right in Big Beaver Creek Reservoir, located on Big Beaver Creek, tributary to the White River, in Water Division 6. CPW is willing to temporarily loan CWCB a portion of that water right to help maintain CWCB's decreed ISF amounts on Big Beaver Creek and the White River, pursuant to section 37-83-105(2), C.R.S. (2011).

CPW and CWCB staff members are in the process of compiling the information necessary to submit to the State and Division Engineers for approval of the temporary loan. This letter serves as CPW's formal offer to CWCB of the temporary loan of water. The temporary loan will help further the missions of both CPW and CWCB. We look forward to working together to finalize and implement this transaction.

If you have any questions or concerns regarding this matter, please give me a call at 303-291-7260. Thanks.

Sincerely,

Jay W. Skinner
Water Resources Unit Manager
Colorado Parks and Wildlife

STATE OF COLORADO

John W. Hickenlooper, Governor • Mike King, Executive Director, Department of Natural Resources
Rick D. Cables, Director, Colorado Parks and Wildlife
Parks and Wildlife Commission: David R. Brougham • Gary Butterworth, Vice-Chair • Chris Castilian
Dorothea Farris • Tim Glenn, Chair • Allan Jones • Bill Kane • Gaspar Perricone • Jim Pribyl • John Singletary
Mark Smith, Secretary • Robert Streeter • Lenna Watson • Dean Wingfield
Ex Officio Members: Mike King and John Salazar

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721
Denver, Colorado 80203
Phone: (303) 866-3441
Fax: (303) 866-4474
www.cwcb.state.co.us



June 26, 2012

Jay Skinner, Water Resources Unit Manager
Colorado Division of Parks and Wildlife
6060 Broadway
Denver, Colorado 80216

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

RE: Temporary Loan Offer on Big Beaver Creek and White River (Water Division 6)

Dear Mr. Skinner:

The CWCB staff has reviewed the June 26, 2012 offer from Colorado Parks and Wildlife of a temporary lease of water from Big Beaver Creek Reservoir for instream flow use on Big Beaver Creek and the White River in Water Division 6. Based upon that review, we believe that the proposed lease would benefit the CWCB's instream flow water rights on Big Beaver Creek and the White River. I have directed the CWCB staff to coordinate with Colorado Parks and Wildlife on preparing and submitting the necessary documentation to the State and Division Engineers to obtain approval of the lease, and on providing the statutorily required public notice of the proposed lease. Thank you for working with the CWCB to protect Colorado's streams.

Sincerely,

A handwritten signature in purple ink that reads "Jennifer L. Gimbel".

Jennifer L. Gimbel, Director