

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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



TO: Colorado Water Conservation Board Members

John W. Hickenlooper
Governor

FROM: Linda Bassi
Jeff Baessler
Stream and Lake Protection Section

Mike King
DNR Executive Director

James Eklund
CWCB Director

DATE: September 9, 2013

SUBJECT: **Consent Agenda Item 1, September 24-25, 2013 Board Meeting**
Stream and Lake Protection – Temporary Lease of Water for Instream Flow
Use – Colorado Water Trust and Western Rivers Conservancy

Background

On March 26, 2013, the Colorado Water Trust (“CWT”) issued a “Request for Water” to solicit interested water rights owners to temporarily lease or loan water to the CWCB for instream flow (“ISF”) use under section 37-83-105(2), C.R.S. (2012). Under section 37-83-105(2), a water rights owner can lease or loan water to CWCB for ISF use pursuant to a decreed ISF water right for a period not to exceed 120 days in any one calendar year, provided that the State and Division Engineers have determined that the lease/loan will not injure existing water rights.

The process for accepting such leases/loans is outlined under Rule 6k. of the Rules Concerning Colorado’s Instream Flow and Natural Level Program (“ISF Rules”). Rule 6k. authorizes the CWCB Director to accept temporary leases that the State and Division Engineers have approved and requires the Board to ratify or overturn the Director’s decision at the next regularly scheduled Board meeting.

On July 30, 2013, staff submitted a request to the State and Division Engineers for approval of a temporary lease of water from the CWT and Western Rivers Conservancy (“WRC”) for ISF use on the Cimarron River. See Map at Attachment 1. The State and Division Engineers approved the temporary lease on August 19, 2013 and CWCB Director James Eklund accepted the lease on the same day. See Lease Approval Letter and Lease at Attachments 2 and 3.

Staff Recommendation

Staff recommends that the Board ratify the acceptance of the temporary lease of water from WRC.

Description of Lease

Under the lease agreement, WRC and the CWT will lease up to 5.81 cfs of shares owned in the McKinley Ditch water right, located on the Little Cimarron River, for ISF use by the CWCB on the Cimarron River. The lease period is to be implemented initially for one year, from August 1, 2013 to August 1, 2014, and may be extended for implementation up to two more years in the next ten years, by agreement among the parties and pursuant to section 37-83-105(2). It should

be noted that the WRC shares in the McKinley Ditch will be used in a split-season lease. During the early irrigation season, from approximately early May through July 31, the WRC shares will be used for irrigation of hay meadows and pasture grass on the same land historically irrigated by those shares. Beginning August 1 and continuing through the end of the historical irrigation season in late October, water will be available for instream flow use by CWCB. This year, irrigation using the WRC shares ceased on July 31. This reflects historic irrigation use on these lands.

The ISF water right that will benefit from this lease is described below:

Case No.	Stream	Segment	Approp Date	Segment Length	Amount
4-84CW398	Cimarron River	Little Cimarron to Gunnison River	5-4-1984	3.7 miles	16 cfs

As required by section 37-83-105(2), staff provided written notice of this request for approval to the substitute water supply plan ("SWSP") notification list for the relevant water division. Water rights owners have fifteen days from the date the notice was mailed to submit comments to the State and Division Engineers on the proposal. The statute requires the State and Division Engineers to approve or deny a proposed lease/loan within twenty days of the date of mailing the SWSP notice.

The State and Division Engineers received one comment email on this proposal from Dion and Dixie Luke. See Comment email at Attachment 4. After considering the comment, the State and Division Engineers issued their approval of the temporary lease on August 19, 2013. The Colorado Water Trust is funding this lease in its entirety for this first year.

Implementation of Lease to Date

As of the date of this memo, the lease has not been implemented. However, CWT staff is working with the water commissioner and an engineer on several on-site ditch laterals that will be used to direct the leased water back to the Little Cimarron River. In addition, CWT staff is working with the water commissioner on gaging requirements and dry-up implementation.

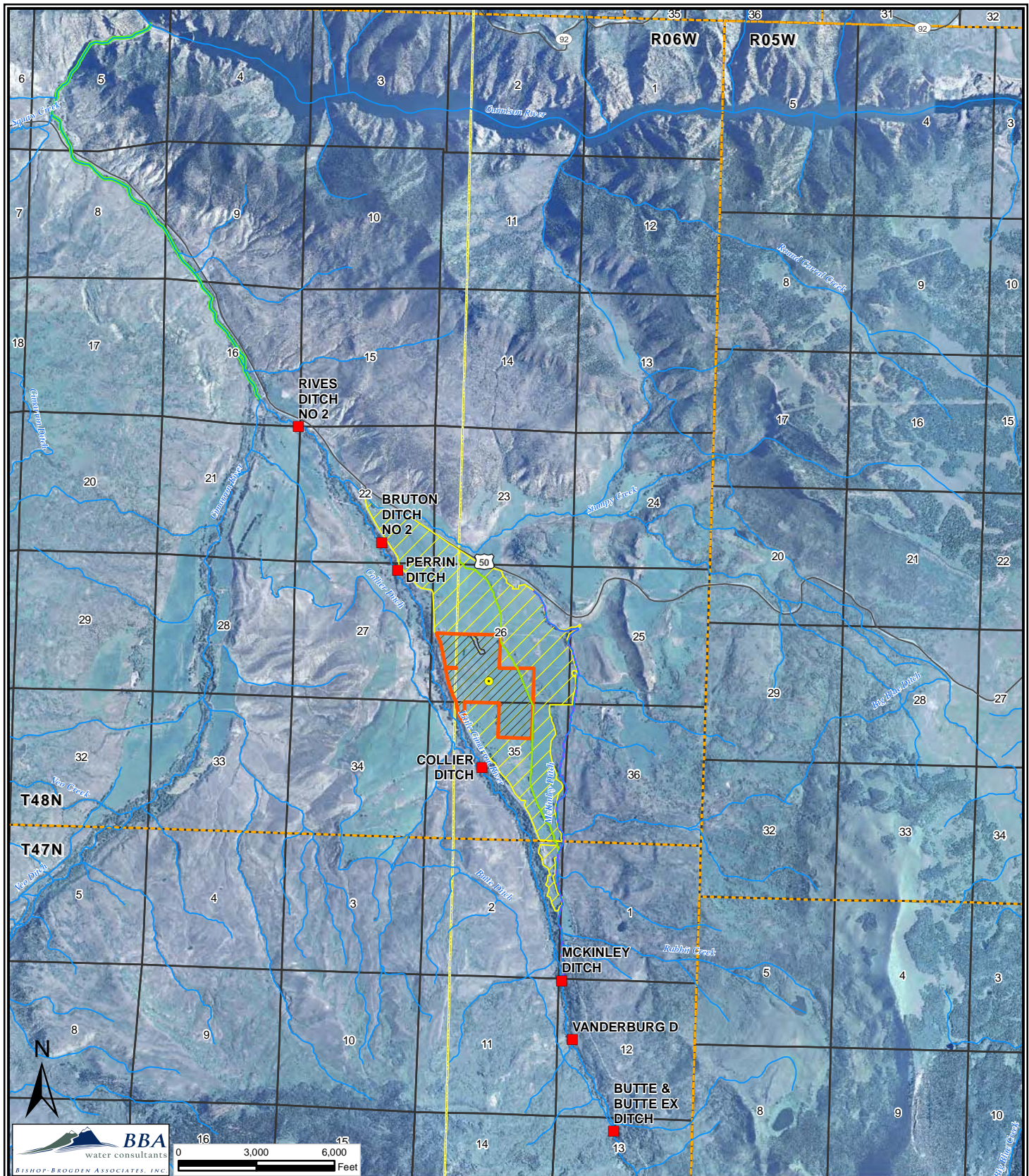
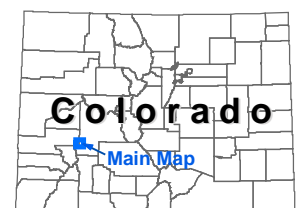


Figure 1:
McKinley Ditch Location and
Shepardson Property Irrigated Area

- Legend**
- Diversion Structures
 - Property Centroid
 - McKinley Ditch (East Lateral)
 - McKinley Ditch (West Lateral)
 - ISF Reach Benefitted
 - ▭ Shepardson Property Boundary (Approx.)
 - ▭ Parcel Irrigated Area (Approx.)
 - ▭ Ditch-Wide Irrigated Area
 - ▭ Section Boundary
 - ▭ County Boundary

Date: July 15, 2012
 Photo Date: July 16, 2009
 Job No. 0906.01

Overview Map





DEPARTMENT OF NATURAL RESOURCES

DIVISION OF WATER RESOURCES

John W. Hickenlooper
GovernorMike King
Executive DirectorDick Wolfe, P.E.
Director/State EngineerBob W. Hurford, P.E.
Division Engineer

August 19, 2013

Ms. Linda J. Bassi
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, Colorado 80203

Re: Temporary Loan of Water Rights for Colorado Water Conservation Board for Instream Flow-McKinley Ditch
Pursuant to Section 37-83-105, C.R.S.
Section 16, T 48 N, R 6 W and Section 5, T 48 N, R 6 W, N.M. P.M.
Water Division 4, Water District 62, Gunnison and Montrose Counties

Approval Period: August 19, 2013 through December 31, 2022

Contact Phone Number for Ms. Linda J. Bassi: 303-866-3441

Dear Ms. Bassi:

We have reviewed your letter dated July 30, 2013 in which you request approval of a temporary loan of water pursuant to Section 37-83-105, C.R.S., for the Colorado Water Conservation Board ("CWCB" or "Applicant") 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 July 30, 2013 to all parties who have subscribed to the Division 4 Substitute Water Supply Plan ("SWSP") Notification List. The Division of Water Resources ("DWR") received comments during the statutory 15-day comment period from Dion & Dixie Luke. The statutory \$100 filing fee (receipt no. 3661170) was submitted with this request.

Statement of Duration and Description

CWCB is seeking approval of a temporary loan for water rights leased from Western River Conservancy ("WRC") via the Colorado Water Trust ("CWT") for ISF use. The water right leased from WRC was identified as the McKinley Ditch, which diverts water from the Little Cimarron River, approximately 5 miles above its confluence with the Cimarron River. The term of the temporary water lease agreement ("Agreement") is for the period of July 31, 2013 through October 31, 2013. Pursuant to Section 37-83-105, C.R.S., an approved loan is limited to 120 days in a calendar year and shall not be exercised for more than three years in a ten-year period. Although the term of the Agreement is for 2013 only, this request is for a ten year period beginning in 2013. Implementation of the Agreement after the first year is subject to the completion and execution of a lease extension. If CWCB seeks to extend the Agreement for a second-year term or a third-year term, CWCB shall notify the Division Engineer of its intention and provide a copy of the Agreement Extension prior to using the McKinley Ditch water for ISF use.

Water Division 4 • Montrose

P. O. Box 456, Montrose, CO 81402 • 2730 Commercial Way • Phone: 970-249-6622 • Fax: 970-249-8728
<http://water.state.co.us>

CWCB currently holds ISF water rights on the Little Cimarron River decreed in Case No. 84CW398 which is more specifically described in the table below:

Case Number	Upstream Terminus	Downstream Terminus	ISF decreed amount (cfs)	Appropriation Date
84CW398	SW1/4 SE1/4, Sec. 16, T 48 N, R 6 W, N.M.P.M	NE1/4 NE1/4, Sec. 5, T 48 N, R 6 W, N.M.P.M.	16	May 4, 1984

The Cimarron River water right was decreed to preserve the natural environment to a reasonable degree. The temporary loan of water leased from WRC will be for ISF use within the same segment of the Cimarron River as identified in Case No. 84CW398 and shown on the attached Figure 1. The leased water will be used for ISF purposes downstream of the point of historical return flow. Therefore, CWCB proposes to use only the historical consumptive use amounts for ISF in the Cimarron River. For 2013, CWCB seeks to use the historical dry-year (as represented by 2002) net stream depletions of the McKinley Ditch to benefit the ISF water rights in a 3.7 miles segment of the Cimarron River from the confluence with the Little Cimarron River to the confluence with the Gunnison River. The ground water return flow from the historically irrigated parcels with the McKinley Ditch water right will be maintained under this temporary loan approval. The loan water from the McKinley Ditch to CWCB for ISF use will be limited during a portion of the historical irrigation season from August 1 through October 31. The loan water is expected to increase stream depth and wetted perimeter and to lower water temperature for the fish.

Proponent's legal right to use the loaned water right

CWCB and the CWT have entered into a Temporary Water Lease Agreement ("Agreement") with Western River Conservancy ("WRC"). Under the Agreement, WRC will make water available to CWCB for ISF use, 1.5 shares (5.8125 cfs) of its ownership in the McKinley Ditch water rights when conditions permit. A copy of the Agreement was provided to DWR with this request and is attached to this letter. WRC ownership in the McKinley Ditch was evidenced by the decree in case no. 2012CW052, that was provided to DWR with this request and a copy is attached to this letter. Based on its ownership in the McKinley Ditch, WRC has the right to the water rights in the McKinley Ditch, and, therefore the right to loan the water pursuant to the conditions set forth in Section 37-83-105 (2), C.R.S., and in Rule 6(k) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program.

The CWCB existing ISF water right decreed in Case No. 84CW398 was identified as being more junior than the existing water rights on the segment of the Cimarron River and may be out of priority during much of the irrigation season. Consistent with the terms and conditions of the Agreement, CWCB shall notify the Division Engineer when the McKinley Ditch water rights are being used for ISF purposes. WRC agrees that it may not irrigate with the loaned water rights in the McKinley Ditch while the water rights are being used by CWCB for ISF use.

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

The McKinley Ditch diverts water from the Little Cimarron River, approximately 5 miles above its confluence with the Cimarron River. The historically irrigated lands are adjacent to the Little Cimarron River, and return flows accrue to the stream approximately 2.5 miles upstream from the confluence of

the Cimarron River with the Little Cimarron River. Diversions under the ditch typically begin in early May and continue into October.

The McKinley Ditch water rights that are subject of the Agreement, along with WRC's ownership are summarized in the table below:

Water Right Name	Priority Number	Decreed Amount (cfs)	Case Number	Appropriation Date	Adjudication Date	WRC Ownership (cfs)
McKinley Ditch	56	12.17	CA 1319	09/01/1886	03/28/1904	2.282
	125	3.125	CA1745	05/10/1905	05/08/1913	0.5859
	128	3.125	CA1745	05/10/1906	05/08/1913	0.5859
	285	12.58	CA 4742	05/01/1912	04/21/1941	2.359
Total		31				5.8128

Although the decrees in case nos. CA-1319, CA-1745 and CA-4742 indicated that certain lands are to be irrigated by certain priorities all priorities under the McKinley Ditch have historically been shared equally on all lands according to a 1948 mutual operating agreement. This agreement and the shared use of all priorities were acknowledged in the decree in case no. 2012CW052, which changed the location of the place of use of the priorities without expanding the irrigated acreage under the ditch.

Bishop-Brogden Associates, Inc. ("BBA") and West Sage Water Consultants ("WSWC") have performed a historical consumptive use analysis for the McKinley Ditch water rights. The average year consumptive use analysis was quantified based on the average monthly diversion for the period 1974 through 2010. The dry year consumptive use was estimated to be equal to the diversions for 2002, the driest year on record. The Modified Blaney-Criddle Method within the State CU program with TR-21 crop coefficients adjusted for high altitude was used for both the dry-year and average year analysis. The WRC water rights in the McKinley Ditch have been historically used for flood irrigation of pasture grass. The decree in case no. 2012CW052 identifies a total of 947 acres irrigated under the McKinley Ditch. Monthly temperature and precipitation data were taken from published records (NOAA) for the Cimarron weather station (ID1609). The ditch loss from the headgate to the irrigated fields was assumed to be 10 percent and an irrigation efficiency of 55 percent was used. Water in excess of the irrigation requirement was added to the soil moisture bank, which was assumed to have a water holding capacity of 0.12 feet/feet. The Modified Blaney-Criddle analysis shows an average crop irrigation requirement of 1,430 acre-feet. Accounting for the water holding capacity of the soil and the water available to the crop, the average historical consumptive use for all lands irrigated under the ditch was determined to be approximately 1,378 acre-feet. The WRC water rights in the McKinley Ditch were historically used for flood irrigation of approximately 177.6 acres on the former Shepardson property. Therefore, the pro-rata average historical stream depletion from the water rights in the McKinley Ditch for the 177.6 acres is estimated to be approximately 258 acre-feet (Table 1). In addition, the dry-year historical stream depletion from the water rights in the McKinley Ditch for the 177.6 acres is estimated to be approximately 154 acre-feet (Table 2).

The return flows were determined in the State CU model and are equal to the water that is applied to the fields but not consumed by the crop or held in the soil moisture reservoir. The return flows were assumed to be 60 percent surface return flow and 40 percent deep percolation, based on the close proximity of the property to the river and the soil and geologic conditions on the property. Table 1 shows that the total average year surface return flow equals 305 acre-feet and Table 2 shows that the dry-year surface return flow equals 197 acre-feet. The remaining 40 percent of the total return

flow was determined to return to the Little Cimarron River as ground water return flows. The timing of the ground water return flows was lagged to the Little Cimarron River using the Glover analysis as applied in the IDS AWAS software with the following aquifer parameters: $X = 1,950$ feet, $W = 3,600$ feet, $S=0.2$, and $T = 35,000$ gpd/ft (per BBA and WSWC the aquifer parameters were determined based upon well completion reports available in the area and hydraulic conductivities for the soils in the area). Based upon AWAS modeling, it was determined that the ground water return flow affect the river over a period of approximately three years.

For 2013 operations, CWCB proposes to use the 1.5 shares of the McKinley Ditch for continued irrigation from the beginning of the irrigation season (typically late April or early May) through July 31st. Starting August 1st, irrigation using the 1.5 shares in the McKinley Ditch will cease and the water will be used for ISF use for the remaining portion of the irrigation season. The changes in the streamflow analysis for the partial year temporary lease for the average and dry years are presented on the attached Tables 3 and 4. Beginning August 1, the water that will be left in the Little Cimarron River will equal the water historically delivered at the farm headgate (row 10). The water that will continue to be diverted at the McKinley Ditch will be the ditch loss (row 11) to ensure that the other ditch users will not assume a greater ditch loss burden than occurred under the historical operations. The partial cessation of irrigation of these water rights will result in an increase in flow in the ISF reach in an amount equal to the farm headgate delivery minus surface return flow minus lagged deep percolation (row 13). The increase in flow from the deep percolation being left in the river in October will be sufficient to replace the remaining non-irrigation season return flows. The only downstream water rights during the non-irrigation season that could be impacted by the small decrease in flow (less than 0.13 cfs on average) are the CWCB's minimum ISF right and the Crystal Reservoir power generation water right. The decrease in flows is less than 1 percent on average of the CWCB'S minimum ISF. The actual monthly percentages of the minimum ISF are shown in row 14 of Table 3 and 4.

The lagged return flows are left in the river prior to the actual timing, allowing for additional water to be available to Crystal Reservoir and the CWCB's minimum ISF during the late irrigation season. The lagging of the deep percolation return flows continues for two years after the water is being used for ISF purposes. Therefore, the following irrigation season delivery to the parcel shall be reduced, if required by the Division Engineer, to ensure the remaining lagged return flows are replaced to a downstream call. Based on the analysis shown on the attached Table 5, for Year 2 the irrigated acreage on the Shepardson property in a dry year scenario would need to be reduced by 11 acres, and for the Year 3 the irrigated acreage for the same parcel would need to be reduced by 1 acre. The Division Engineer shall notify WRC if continued dry up is required to replace lagged depletions in years 2 and 3. The amount of reduction in irrigated acreage shall be calculated by prorating the above amounts based on the number of days during the operation of this SWSP that a valid call was placed downstream of the Collier Ditch headgate.

Due to low snowpack and expected low stream flow in 2013, the amount of water claimed for ISF is based upon dry year yields for the McKinley Ditch. As mentioned above the diversions used in this analysis to estimate dry year consumptive use are assumed to be equal to the diversion in 2002, which according to the Surface Water Supply Index ('SWSI')(Figure 1) experienced similar drought conditions. The SWSI developed by DWR and the U.S.D.A. Natural Resources Conservation Service ("NRCS") is used as an indicator of mountain-based water supply conditions in the major river basins of the state. It is based on snowpack, reservoir storage, and precipitation for the winter period of November through April. For the operation of this plan, a dry-year scenario shall be based on a SWSI value for the Gunnison River of November through April of the current water year that is equal to or less than the 2002 value, or otherwise determined by the Division Engineer. When the lease water is proposed to be used for ISF use, CWCB shall notify DWR if the lease is exercised based on the dry year scenario or the average year scenario.

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), that it will not injure the existing water rights of others and will not affect Gunnison's compact entitlements.

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 diversions/releases beginning August 19, 2013 through December 31, 2022.
2. If CWCB seeks to implement the Agreement for a second-year term or a third-year term, CWCB shall notify the Division Engineer of its intention and provide a copy of the Agreement Extension prior to using the McKinley Ditch water for ISF use.
3. Approval of this temporary loan of water is for the purposes stated herein, specifically for temporary lease of WRC ownership in the McKinley Ditch water rights for CWCB ISF use on the Cimarron River reach as identified in Case No. 84CW398.
4. The diversion period of the subject McKinley Ditch approved under this temporary loan of water is May 1 through October 31.
5. For the operation of this plan, a dry-year scenario shall be used if the current year November through April SWSI values for the Gunnison River are equal to or less than the 2002 value, or otherwise determined by the Division Engineer. When the lease water is proposed to be used for ISF use, CWCB shall submit to DWR for approval, whether they intend to exercise the lease based on the dry year scenario or the average year scenario.
6. 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 (Bob Hurford, P.O. Box 456, Montrose, CO 81402, telephone 970-249-6622), and the Water Commissioner (Luke Reschke, P.O. Box 456, Montrose, CO 81402, telephone 970-275-0481) **within 20 days** of the receipt of this approval.
7. All instream flow shall be measured in a manner acceptable to the Division Engineer. The Applicant shall install and maintain measuring devices as required by the Division Engineer for operation of this temporary loan.
8. The Applicant shall perform verification for all parcels of dried up land used to generate credits during the term of this plan. The Applicant shall provide an affidavit and a map to the water commissioner and division engineer that identifies and confirms the lands that are dried up during this irrigation season. If the Agreement is implemented for the second-year term or third-year term, then the Applicant shall provide a written notification to the Water Commissioner and Division Engineer identifying the lands to be dried up for that irrigation season.

The Applicant shall modify accounting to reflect that the credit from any dried up fields containing alfalfa or native grass was assessed in the following manner:

- (a) For fields deep tilled or chemically treated to successfully kill alfalfa or native grass, 100% credit will be given for consumptive use as otherwise computed under the conditions of this approval.

- (b) For fields not deep tilled or chemically treated to successfully kill alfalfa or native grass, records of monthly monitoring of depth to ground water at existing irrigation wells or existing or new monitoring wells or piezometers within ¼-mile of each alfalfa or native grass field must be maintained to the extent required by the Division Engineer. Credits will be reduced according to the following table when depth to ground water is less than the depth assumed to provide no significant contribution to native grass or alfalfa growth. Measurements taken at the start of each month will determine the necessary reduction in credit to be applied during the following month. The applicant may use another methodology upon review and approval by the Division Engineer.

Depth to Ground Water (Feet)	Percent Reduction in CU Credit ¹	
	Native Grass	Alfalfa
1	85%	100%
2	50%	90%
3	30%	75%
4	20%	50%
5	15%	35%
6	10%	20%
7	5%	15%
8	0%	10%

1. Adapted from *EVAPOTRANSPIRATION AND AGRONOMIC RESPONSES IN FORMERLY IRRIGATED MOUNTAIN MEADOWS*, South Park, Colorado, March 1, 1990; Revised September 1, 1991

9. The Applicant must submit accounting reports to the Division Engineer (Bob Hurford, P.O. Box 456, Montrose, CO 81402, telephone 970-249-6622), and the Water Commissioner (Luke Reschke, P.O. Box 456, Montrose, CO 81402, telephone 970-275-0481) 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 diversions/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.
10. 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.
11. 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 4 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) 249-6622.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bob W. Hurford", with a stylized "for" written below it.

Bob W. Hurford, P.E.
Division Engineer

Attachments: Map of the ISF Reach (Figure 1)
Temporary Water Lease Agreement
Case No. 2012CW052
Tables 1, 2, 3, 4, and 5
SWSI Figure 1

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

Luke Reschke,
P.O. Box 456
Montrose, CO 81402
Telephone 970-275-0481

Dion and Dixie Luke
30638 J Road
Hotchkiss, Co 81419

WATER LEASE OPTION AGREEMENT:
CWT REQUEST FOR WATER 2013

This Water Lease Option Agreement ("Option Lease") is entered into by and between COLORADO WATER CONSERVATION BOARD ("CWCB"), an agency of the State of Colorado; the COLORADO WATER TRUST ("CWT"), a Colorado nonprofit corporation; and WESTERN RIVERS CONSERVANCY ("WRC"), an Oregon nonprofit public benefit corporation (collectively, the "Parties").

RECITALS

- A. Section 37-92-102(3), C.R.S. (2012) authorizes CWCB to acquire by lease or other contractual agreement such water, water rights, or interests in water as CWCB determines may preserve and improve the natural environment to a reasonable degree.
- B. CWT is a Colorado nonprofit dedicated to protecting and restoring streamflows in Colorado through voluntary, market-based efforts. CWT works within CWCB's instream flow acquisition program to accomplish this mission. This Lease supports that mission.
- C. Section 37-83-105(2) authorizes water rights owners to lease or loan water to CWCB for instream flow use pursuant to a decreed instream flow water right held by CWCB and administrative approval, subject to certain conditions and procedures ("Short Term Lease Program").
- D. Under the Short Term Lease Program, a lease may have a term for up to ten years, but may only be used for instream flows for three of those ten years. For each year the water right is used in the Short Term Lease Program, it may only be used for instream flows up to 120 days in that calendar year.
- E. WRC owns 18.75% of each of the following water rights ("Water Rights"):
 - a. 12.17 cfs of Priority No. 56 in the McKinley Ditch, decreed by the District Court in and for Montrose County in Civil Action No. 1319 on March 28, 1904, with an appropriation date of September 1, 1886.
 - b. 3.125 cfs of Priority No. 125 in the McKinley Ditch, decreed by the District Court in and for Montrose County in Civil Action No. 1745 on May 8, 1913, with an appropriation date of May 10, 1905.

- c. 3.125 cfs of Priority No. 128 in the McKinley Ditch, decreed by the District Court in and for Montrose County in Civil Action No. 1745 on May 8, 1913, with an appropriation date of May 10, 1906.
 - d. 12.58 cfs of Priority No. 285 in the McKinley Ditch, decreed by the District Court in and for Montrose County in Civil Action No. 4742 on April 21, 1941, with an appropriation date of May 1, 1912.
- F. WRC wishes to lease the Water Rights to CWCB for instream flow use on the Cimarron River, pursuant to the procedures and subject to the conditions set forth herein, in Section 37-83-105(2), and in Rule 6(k) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program.
- G. WRC has entered into a lease with Ray Wilson ("Tenant") dated March 15, 2013, to provide the Tenant guaranteed use of the Water Rights through July 31, 2013 ("Tenant Lease"). After July 31, WRC desires to lease the Water Rights for instream flow purposes after giving Tenant notice required by the Tenant Lease.
- H. CWCB holds one instream flow water right on the Cimarron River, decreed in Case No. 4-84CW398 for 16 cfs year-round, in the reach of the Cimarron River extending from the confluence of the Little Cimarron River to the confluence of the Gunnison River ("Instream Flow").
- I. Subject to the terms of this Option Lease, CWCB and CWT may exercise the option to lease the Water Rights from WRC for instream flow purposes. CWCB will use the Water Rights to maintain the Instream Flow for a period not to exceed one hundred twenty days in one calendar year.
- J. The Water Rights are not decreed for instream flow use. The use of the Water Rights by CWCB for instream flow purposes will require State and Division Engineer approval and final ratification by CWCB Board of Directors, pursuant to section 37-83-105(2).
- K. The amount of water used by CWCB under this Option Lease will not exceed the amount of water decreed to the Instream Flow.

NOW THEREFORE, in consideration of the mutual agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, CWCB, CWT, and WRC agree as follows:

LEASE OF WATER RIGHTS

1. Term.

- a. The term of this Option Lease shall begin upon the execution of the Option Lease by the Parties.
- b. The term of this Option Lease shall end on October 31, 2013.

2. Exercise of Option.

- a. The option shall not be exercised prior to July 31, 2013, provided that if the option is exercised on July 31, 2013, Tenant shall have the right to continue using the Water Rights for irrigation through July 31, 2013.
- b. To exercise the option, CWT shall notify CWCB and WRC pursuant to § 17 of this Option Lease. Upon receipt of notification, WRC shall notify Tenant pursuant to the Tenant Lease within 24 hours.
- c. CWT and CWCB shall have exclusive authority to decide how, when, and if the Water Rights will be used in the Short Term Lease Program.
- d. Upon exercise of the Option Lease, CWT will have responsibility for implementation, including reducing diversions at the headgate, measuring bypass flows, and any other operational actions necessary to fulfill the intent of this Option Lease.

3. Operations, Accounting and Monitoring.

- a. CWCB shall notify the State and Division Engineers when the Water Right is being used for instream flow under the Option Lease for administrative purposes.
- b. The Parties agree to coordinate record keeping and accounting as reasonably required by the State and Division Engineers to administer use of the Water Rights for instream flow purposes.
- c. The Parties agree to coordinate to install and maintain any measuring devices or structures reasonably required by the State and Division Engineers to administer use of the water right for instream flow purposes.

4. CWCB Acceptance of Lease. CWCB's acceptance of the Option Lease of the Water Rights is contingent upon the State and Division Engineers' determination that CWCB's use of the Water Rights in the Short Term

Lease Program will not injure existing water rights of others and will not affect Colorado's compact entitlements. Approval may include terms and conditions to ensure the non-injury standard is met pursuant to section 37-83-105(2)(b)(VI). If any such conditions are not acceptable to CWCB and/or CWT then such party shall have the right to terminate this Option Lease immediately.

5. Cessation of Historic Use. WRC agrees and acknowledges that WRC may not irrigate or lease for irrigation the Water Rights after CWT exercises the Option Lease, unless given written permission by CWT for periods during which the Water Rights are not being used in the Short Term Leasing Program.
6. Protections of Lessor's Water Rights. If this Option Lease is exercised, the Water Rights are protected from diminishment of historical consumptive use and abandonment under this Option Lease by sections 37-83-105(2)(c) and 37-92-103(2)(b)(V).
7. Use of Water Leased. If this Option Lease is exercised, CWCB will use the Water Rights to maintain its Instream Flow to preserve the natural environment to a reasonable degree.
8. Inspections.
 - a. For the term of this Option Lease, WRC grants CWCB or CWT staff and any of their representatives any and all of WRC's access rights to the McKinley Ditch, including but not limited to all facilities related to the Water Rights (e.g., source, headgate, other diversion structures, ditch system, irrigated acreage) upon request at reasonable times, for the purpose of evaluating and implementing the physical operation of the Option Lease and for evaluating the stream and habitat characteristics in the reach of stream that would benefit from the Option Lease.
 - b. If the Option Lease is exercised, WRC grants CWCB or CWT staff and any of their representatives access to the land subject to the Tenant Lease upon request at reasonable times to ensure compliance with the terms of the Option Lease.
9. Indemnification. CWCB and CWT agree to indemnify and hold WRC harmless from any costs, expenses, damages, liens, charges, claims or other liability arising out of their access to and use of the land and infrastructure described in ~~this~~ the foregoing Paragraph 8.
10. No interference. CWCB and CWT agree not to interfere with Tenant's use of the property subject to the Tenant Lease, other than the curtailment of

Tenant's use of the Water Rights pursuant to the terms of this Option Lease.

STATE AND DIVISION ENGINEER APPROVAL OF LEASE

11. **Statement to State Engineer.** Prior to accepting the Option Lease, CWCB shall compile a statement explaining the Option Lease in sufficient detail for the State Engineer to determine that such Option Lease does not injure existing decreed water rights. WRC and CWT shall use best efforts to assist CWCB in compiling said statement and in obtaining State and Division Engineer approval of the Option Lease as described below.
12. **Request for Approval.** CWCB, with CWT's and WRC's cooperation, shall file a request for approval of the Option Lease with the State and Division Engineers, which request shall include the following information:
 - a. Evidence of proponent's legal right to use the Water Rights;
 - b. A statement of the duration of the Option Lease;
 - c. A description of the original points of diversion, the return flow pattern, the stream reach, and the time, place, and types of use of the Water Rights;
 - d. A description of the stream reach, and the time, place, and types of use of the Water Rights; and
 - e. A reasonable estimate of the historic consumptive use of the Water Rights.
13. **Notice to Substitute Water Supply Plan.** CWCB, with CWT's and WRC's cooperation, shall provide written notice of the request for approval of the Lease by first-class mail or electronic mail to all parties on the substitute water supply plan notification list established pursuant to section 37-92-308 (6) for the water division in which the proposed Lease is located, and shall file proof of such notice with the Division Engineer.
14. **Compliance.** CWCB, with CWT's and WRC's cooperation, shall use its best efforts to comply with all the requirements of section 37-83-105(2), to obtain approval of the Lease, and to address any comments submitted by any party concerning potential injury to that party's water rights, as part of the initial approval process.
15. **Denial and/or Termination.**

- a. If the request for approval is denied in whole or in part, or if the approval is conditioned in such manner as to prevent this Option Lease from being completely fulfilled, then this Option Lease may be terminated immediately upon written notice by CWT and/or CWCB to WRC.
- b. The Option Lease shall automatically terminate pursuant to § 1(b) of the Option Lease.
- c. WRC may not terminate this Option Lease of its own accord, absent breach by one of the other parties.

16. Miscellaneous Provisions

- a. If this Option Lease is exercised, CWCB shall take such action as is required to make use of the Water Rights for instream flow purposes, including, if necessary, placing a call with the Division Engineer for administration of the Water Rights. CWCB agrees to use the Water Rights for instream flow purposes to the maximum extent possible. CWT shall work with CWCB to provide information concerning implementation and monitoring of this Option Lease.
- b. The Parties will implement this Option Lease in accordance with any terms and conditions imposed by the State and Division Engineers. Provided, however, that except for the obligation to forego diversion of the Water Rights, the obligation to allow CWCB and CWT to allow installation and maintenance of any measuring devices or structures reasonably required by the State and Division Engineers, and any other obligation expressly imposed by this Option Lease, WRC shall not be bound by any obligation imposed as a term and condition on the approval of the use of the Water Rights for instream flow purposes without WRC's prior written consent.
- c. This Option Lease shall be a covenant that runs with the Water Rights and shall be binding upon the Parties hereto, their successors, and assigns.
- d. CWT shall pay the \$100 filing fee required by section 37-83-105(2)(b)(I).
- e. This Option Lease shall not be interpreted to abrogate or supersede that certain Agreement for Purchase and Sale of Water Rights dated January 27, 2012, between CWT and WRC, as the same has been or may be amended from time to time.

17. Notice. Any notices required or permitted hereunder shall be sent to the addresses or email addresses set forth below, as may be changed from time to time by proper notice.

If to CWT:

Colorado Water Trust
1420 Ogden Street, Suite A2
Denver, CO 80218
Attn: Amy Beatie, abeatie@coloradowatertrust.org
Attn: Zach Smith, zsmith@coloradowatertrust.org

If to CWCB:

Colorado Water Conservation Board
Stream and Lake Protection Section
1313 Sherman Street, Room 721
Denver, CO 80203
Attn: Linda Bassi, linda.bassi@state.co.us

If to WRC:

Western Rivers Conservancy
71 SW Oak St., Suite 100
Portland, OR 97204
Attn: Sue Doroff (sdoroff@westernrivers.org)
Attn: Dieter Erdmann (derdmann@westernrivers.org)
cc: Marcus Lock (mlock@lawoftherockies.com)
cc: Kendall Burgemeister
(kburgemeister@lawoftherockies.com)

18. Limited Representations By WRC.

- a. WRC represents and warrants that it has full power and authority to execute this Option Lease, lease the Water Rights, and perform its obligations hereunder.
- b. WRC represents and warrants that the Water Rights have been used in compliance with decreed terms, to the extent WRC has owned the Water Rights.

19. Costs.

- a. Each Party shall bear its own legal costs.

- b. CWT shall pay the engineering costs associated using the Water Rights in the Short Term Lease Program.
- c. CWT shall pay the costs of installing and maintaining the infrastructure and/or measuring devices required by the State and Division Engineer to administer the Water Rights for instream flow purposes.
- d. CWT shall pay any costs related to any terms and conditions imposed by the State and Division Engineers.

20. Enforcement of this Option Lease.

- a. Pursuant to section 37-92-102(3), the terms of this Option Lease shall be enforceable by each party as a water matter in the Water Court in and for Water Division Four; provided, however, that before commencing any action for enforcement of this Option Lease, the party alleging violation shall notify the other Parties in writing of the alleged violation and the Parties shall make a good faith effort to resolve their differences through informal consultation.
- b. Specific performance of this Option Lease shall be the exclusive remedy for the failure of either party to comply with any provision of this Option Lease.

21. Non-Precedential. Nothing in this Option Lease is precedential for any future transactions.

22. Counterparts/Facsimile Signatures. This Option Lease may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Facsimile signatures shall be binding as originals.

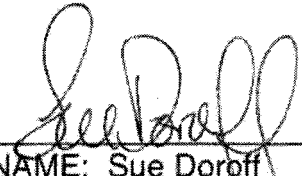
23. Governing Law. This Option Lease shall be construed under and be governed by the laws of the State of Colorado.

24. Severability. This Option Lease shall be deemed severable. The invalidity of any part of this Option Lease shall not affect the validity of the remainder of this Option Lease. In this regard, if any portion of this Option Lease is determined to be invalid, the court having jurisdiction over this Option Lease shall be entitled, with the assistance of the Parties, to substitute an alternative provision that is consistent with the intent of the Option Lease for any invalid portion.

25. Effective Date. The effective date of this Option Lease shall be the date it is executed by all parties.

IN WITNESS HEREOF, CWCB, CWT, and Lessor have executed this Option Lease.

WESTERN RIVERS CONSERVANCY

By: 
NAME: Sue Doroff
TITLE: President

Date: 7/23/13

COLORADO WATER CONSERVATION BOARD

By: _____
James Eklund
Director

Date: _____

COLORADO WATER TRUST

By: _____
Amy Beatie
Executive Director

Date: _____

25. Effective Date. The effective date of this Option Lease shall be the date it is executed by all parties.

IN WITNESS HEREOF, CWCB, CWT, and Lessor have executed this Option Lease.

WESTERN RIVERS CONSERVANCY COLORADO WATER CONSERVATION
BOARD

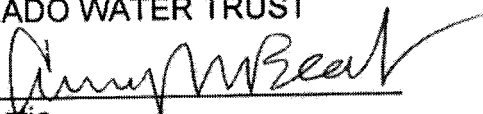
By: _____
NAME: Sue Doroff
TITLE: President

By: _____
James Eklund
Director

Date: _____

Date: _____

COLORADO WATER TRUST

By: 
Amy Beatie
Executive Director

Date: 7/24/2013

25. Effective Date. The effective date of this Option Lease shall be the date it is executed by all parties.

IN WITNESS HEREOF, CWCB, CWT, and Lessor have executed this Option Lease.

WESTERN RIVERS CONSERVANCY

COLORADO WATER CONSERVATION
BOARD

By: _____
NAME: Sue Doroff
TITLE: President

By:  _____
James Eklund
Director

Date: _____

Date: 2/20/2013

COLORADO WATER TRUST

By: _____
Amy Beatie
Executive Director

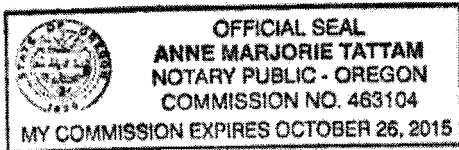
Date: _____

NOTARIZATION

STATE OF Oregon)
) ss.
COUNTY OF Multnomah)

The foregoing instrument was acknowledged before me on this 23 day of July, 2013, by Sue Droft as President of WESTERN RIVERS CONSERVANCY.

Witness my hand and official seal.



ATC

Notary Public

My commission expires:

October 26, 2015

NOTARIZATION

STATE OF COLORADO)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on this ____ day of _____, 2013, by _____ as _____ of COLORADO WATER CONSERVATION BOARD.

Witness my hand and official seal.

Notary Public

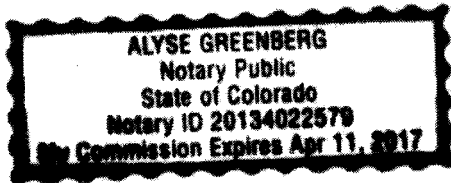
My commission expires:

NOTARIZATION

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

The foregoing instrument was acknowledged before me on this 24 day of July, 2013, by Amy Beatie as Executive Director of COLORADO WATER TRUST.

Witness my hand and official seal.



Alyse Greenberg
Notary Public

My commission expires:

4-11-17

NOTARIZATION

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on this ____ day of _____, 2013, by _____ as _____ of WESTERN RIVERS CONSERVANCY.

Witness my hand and official seal.

Notary Public

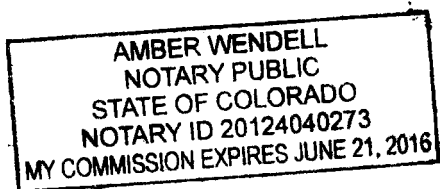
My commission expires:

NOTARIZATION

STATE OF COLORADO)
) ss.
COUNTY OF Denver)

The foregoing instrument was acknowledged before me on this 20th day of August, 2013, by Amber Wendell as Office Coordinator of COLORADO WATER CONSERVATION BOARD.

Witness my hand and official seal.



Amber Wendell

Notary Public

My commission expires:

June 21, 2016

ATTACHMENT 4

From: "D Luke" <dluke6265@skybeam.com>
To: <Megan.Sullivan@state.co.us>, <Bob.Hurford@state.co.us>, <jmcclow@ugrwcd.org>
Subject: Proposed lease on Cimmaron
Date: Wed, 14 Aug 2013 08:33:22 -0700

I am opposed to this lease because of the precedent it creates. I understand the purpose of this move but believe that it is time to learn to live with the new normal--less water everywhere. I respect the right of the water right owner to enter into such an agreement but do not believe that CWCB should pursue this.

Dion & Dixie Luke
30638 J Rd
Hotchkiss, CO 81419
Home [\(970\) 872-6265](tel:(970)872-6265) cell [\(970\) 379-6265](tel:(970)379-6265)