

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda J. Bassi, Chief
Kaylea White
Stream and Lake Protection Section

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

James Eklund
CWCB Director

DATE: September 13, 2013

SUBJECT: **Agenda Item 12, September 24-25, 2013 Board Meeting**
Stream and Lake Protection Section – Proposed Acquisition
of Contractual Interest in Water on the Snake River, Case No. 5-10CW43

Introduction

The Board of County Commissioners of Summit County ("Summit County") and CWCB are working toward a water delivery agreement for instream flow ("ISF") use on Peru Creek, the Snake River and the Blue River within Summit County. The water may be used on the existing Snake River and Blue River ISF reaches, or on future ISF reaches below a proposed new 2,050 acre-foot Peru Creek Reservoir. The water will be supplied as part of a new appropriation and a change of certain Vidler water rights pending in Summit County's water court Case No. 5-10CW043. CWCB filed a Statement of Opposition in the case to protect its ISF water right on the Snake River. During negotiations in this case, after it became clear that Summit County intended a claim for instream piscatorial use, CWCB sought to protect its exclusive authority to hold ISF water rights. Summit County has agreed to enter into a Water Delivery Agreement with CWCB for ISF use of water provided by Summit County under its decree. CWCB would use the released water to help bring stream flows up to its existing decreed ISF rates and thereby protect the releases from diversions by others through the ISF reach. Upon ISF determinations by the Board and obtaining a future decree, CWCB could use this water to preserve or improve the natural environment below Peru Creek Reservoir where no ISF water right is currently decreed, or to improve where an ISF water right is currently decreed only to preserve the natural environment.

A general map is attached as **Exhibit A**; a draft of the Water Delivery Agreement is attached as **Exhibit B**; and CWCB's stipulation and a proposed decree in the case are attached as **Exhibit C**.

Staff Recommendation

Pursuant to ISF Rule 6b., the Board's consideration of this proposal at this meeting will initiate the 120-day period for Board review. **No formal action is required at this time.** Staff believes that the proposed acquisition will benefit the ISF Program. The initial presentation of this

proposal provides an opportunity to the Board and the public to identify questions or concerns for staff or Summit County to address at this or a subsequent meeting.

Background

Under previous water court decrees, Summit County currently provides water to and augments depletions from County facilities, programs, and contractees. Summit County articulated some of its watershed efforts related to this case in its water court application in Case No. 10CW44 as follows:

Summit County participated in the Snake River Task Force, a collaborative effort to study the environmental impacts associated with mine tailings and drainage, as well as alternative methods of remediation and restoration. These efforts included an investigation of means to resolve the water quality issues arising from drainage and tailings from the Pennsylvania Mine. One of the intended future uses of the Vidler water rights is for the improvement of water quality affected by mine tailings and for remediation and restoration efforts. Summit County also negotiated a restrictive covenant with the owner of the Pennsylvania Mine site to facilitate restoration. Summit County expended significant sums to purchase and protect land in the Peru Creek drainage, and cooperated with the EPA, the State of Colorado, and other entities to restore the "Shoe Basin" site and remove mine tailings to protect water quality. Summit County and other West Slope entities have engaged in extensive negotiations with Denver Water seeking to resolve a number of water related issues affecting use of the headwaters of the Colorado River.

As indicated in the CWCB stipulation and proposed decree for Case No. 10CW43, Summit County proposes to build a new 2,050 acre-foot on-channel reservoir on Peru Creek, the "Peru Creek Reservoir," to help supply water to "County facilities, programs, and contractees (including without limitation the Keystone Ski Area, the Snake River Water District, and the East Dillon Water District in accordance with an agreement dated January 8, 2013) by direct delivery, augmentation..., and exchange..., and/or delivery to Dillon Reservoir to satisfy obligations of the Applicant or its contractees to the Denver Water Board." CWCB stipulation and Proposed Decree, Case No. 10CW43, page 11. Water supply for the new reservoir will be secured through a new appropriation on Peru Creek and through a change of existing Vidler water rights as specified in Case No. 10CW43.

CWCB's Role and the Water Right

CWCB filed a statement of opposition in Summit County's Case No. 10CW043 to protect its ISF water right on the Snake River decreed in Case No. 5-86CW210. During negotiations in this case, after it became clear that Summit County intended to claim an instream piscatorial use, CWCB sought to protect its exclusive authority to hold ISF water rights. Summit County has agreed to enter into a Water Delivery Agreement with CWCB for ISF use of water provided by Summit County under its decree. CWCB would use the released water to help bring stream flows up to its existing decreed ISF rates and thereby protect the releases from diversions by others through the ISF reach. Upon ISF determinations by the Board and obtaining a future decree, CWCB could use this water to preserve or improve the natural environment below Peru Creek Reservoir where no ISF water right is currently decreed, or to improve where an ISF water right is currently only decreed to preserve the natural environment.

Authorization of CWCB's use of the water and details governing the administration of the released water will be provided in the 10CW043 water court decree. A future decree would specify the flow rates for improvement flows or preservation flows in reaches currently without existing ISF decrees. Under the Water Delivery Agreement, at Summit County's sole discretion, Summit County will release water previously stored in Peru Creek Reservoir for exclusive use by the CWCB to preserve the natural environment to a reasonable degree under its decreed Snake River and Blue River ISF water rights. CWCB will protect the delivered water through the ISF reaches and request administration to prevent diversion of the water by other water users. Under future Board determinations and confirmation by water court decree, releases could be protected in stream reaches below Peru Creek Reservoir in flow rates not currently decreed for ISF use.

The Board's Water Acquisition Procedures

Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") sets forth the Board's procedures for acquiring water for ISF use. Section 37-92-102(3), C.R.S. provides 120 days for the Board to determine what terms and conditions it will accept in an acquisition agreement for water, water rights, or interests in water to preserve or improve the natural environment. ISF Rule 6 requires a minimum of two Board meetings to allow for public input prior to taking final action on a proposed acquisition. The Board's initial consideration of this proposal at this Board meeting initiates the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. Final action on the proposal could occur at the November 2013 Board meeting. ISF Rule 6m.(4) provides that any person may request the Board to hold a hearing on the proposed acquisition, and that such a request must be filed within twenty days of this Board meeting.

ISF Rules 6e. and 6f. require the Board to evaluate the appropriateness of the acquisition and determine how best to utilize the acquired water rights to preserve or improve the natural environment. The Rules list several factors the Board may consider in its evaluation of the acquisitions. Several of the factors address water rights that need to be changed from irrigation or other uses to instream flow uses. Because this acquisition involves the use of water newly appropriated or changed by Summit County for piscatorial use to help bring the flows up to the decreed ISF rate, several of the factors do not apply. This memo addresses the applicable factors.

As required by the statute, Staff has requested recommendations from Colorado Parks and Wildlife, the U.S. Department of Agriculture and the U.S. Department of Interior. Pursuant to ISF Rule 6m.(1), Staff has provided notice of the proposed acquisition to all persons included on the appropriate ISF Subscription Mailing Lists and provided notice to the State Engineer's Substitute Supply Plan Notification List. Staff has requested a biological analysis from Colorado Parks and Wildlife ("CPW") pursuant to Rule 6f.(2). Staff anticipates that CPW will address the Board regarding this acquisition at the Board meeting.

Summary of Proposed Acquisition

Under the Water Delivery Agreement, Summit County will release water stored in Peru Creek Reservoir as "piscatorial releases" at its sole discretion in accordance with the Decree. The piscatorial releases shall be made available to and protected for ISF use under Summit County's Decree in 10CW43 exclusively by the CWCB pursuant to the Water Delivery Agreement in the stream reaches decreed for ISF up to the decreed amounts of such ISF rights. Piscatorial releases

are anticipated to help preserve the natural environment to a reasonable degree on the Snake River and the Blue River in CWCB's instream flow reaches described below.

Existing Instream Flow Water Rights

CWCB will use the released water to help maintain stream flows in the Snake River and the Blue River through CWCB's decreed ISF reaches to preserve the natural environment in amounts up to the decreed rates as shown below:

CWCB Case No.	Stream/Lake	Amount (cfs) (dates)	Approp. Date	Watershed	County
86CW210	Snake River – conf with NF Snake R to inlet of Dillon Res (4.5 miles)	12 cfs (05/01-09/30) 6 cfs (10/1-04/30)	3/14/1986	Snake River	Summit
87CW293, 87CW294, 87CW295, 87CW296, 87CW297, 87CW298, & 05CW264	Blue River – outlet Dillon Res to inlet Green Mountain Res (25 miles)	Varies between 50-125 cfs (varying seasons)	10/2/1987 & 5/23/1904	Blue River	Summit

Existing Natural Environment

The Snake River and Peru Creek are typical high elevation water bodies. Peru Creek is a first order headwaters tributary stream (small, less than 10 feet wide, high gradient, cold water) and the Snake River is a second order stream with a wetted width during the non-runoff period of 20-30 feet, depending upon the location. Headwater streams in this location are typically very cold and as such support cold water species, but the cold water usually limits fish growth. Peru Creek has a naturally reproducing brook trout fishery. The Snake River has some naturally reproducing brook trout but is also stocked annually with catchable rainbow trout. It has been negatively impacted by mine drainage and would benefit from reservoir releases during low flows. The Snake River in the vicinity of Keystone is mostly open to the public and is fairly heavily utilized by anglers.

The subject Blue River instream flow segments derive flow from Dillon Reservoir releases and tributary inflow, primarily from the Eagle's Nest Wilderness on the west side of the river. Flows also are influenced by the downstream senior storage right at Green Mountain Reservoir. The Blue River supports self-sustaining brown and rainbow trout fisheries and is a designated "Gold Medal Stream" - one of only about 20 such streams in Colorado. The Blue River is heavily utilized by anglers and has a fair amount of public access.

Proposed Use and Potential Benefits of the Delivered Water

The Board could ultimately use the delivered water to preserve and improve the natural environment to a reasonable degree in Peru Creek and the Snake River from Peru Creek Reservoir to Dillon Reservoir, a distance of approximately 12.5 miles, and in the Blue River from Dillon Reservoir to Green Mountain Reservoir a distance of approximately 25 miles. The reservoir releases would be used to help maintain the Board's ISF water rights up to the existing decreed rates on the existing ISF reaches. The reservoir releases could also be used to help

maintain the Board's *future* ISF water rights up to amounts to be determined by the Board and confirmed by future decrees to improve the natural environment on existing ISF stream segments, or to preserve and improve the natural environment on new ISF segments (i.e. Peru Creek and the Snake River from the outlet of Peru Creek Reservoir to the existing ISF segment on the Snake River). CWCB would protect the releases from diversion by other water users from the Peru Creek Reservoir dam to the lower terminus of the ISF reach specified at the time of the reservoir release. Downstream of the Summit County line, the water would revert back to waters of the State of Colorado and would be available for diversion for any legal beneficial use.

Other Water Rights in Proposed Reach and Potential Injury to Existing Rights

Because the ISF use under this proposal will be achieved with fully consumable water released from storage, other water rights in the subject reaches will not be injured by the proposed ISF uses. Also, the water court decree authorizing CWCB's use consistent with the Water Delivery Agreement will contain terms and conditions to assure that no vested water rights on any of the reaches will be injured as a result of the ISF use.

Administrability

Staff has confirmed with the Division Engineer that the CWCB's proposed ISF uses of the delivered water is administrable.

Effect of Proposed Acquisition on Maximum Utilization of the Waters of the State; and Availability of the Delivered Water for Subsequent Use Downstream

Summit County's stored water in Peru Creek Reservoir will be decreed for multiple uses. The piscatorial releases will be beneficially used for ISF purposes in accordance with the Water Delivery Agreement in the identified ISF reaches. Downstream of the lower ISF terminus, the water reverts back to waters of the State of Colorado and is available for diversion for any legal beneficial use.

Effect of Proposed Acquisition on Any Relevant Interstate Compact Issue

It is anticipated that this water will be diverted and used directly or by exchange by other water users downstream once it has satisfied its intended ISF beneficial use. Consequently, it does not appear that this acquisition will raise any compact issues.

Costs to complete the transaction, or other associated costs

Summit County is not requesting the Board to pay for the delivered water or to participate as a co-applicant in the water court proceeding. Summit County has offered to perform all record keeping, accounting and reporting. Because CWCB is already a party in the water court case, little extra expense is expected as a result of this acquisition.

Attachments

- Exhibit A: General Map
- Exhibit B: Draft Water Delivery Agreement
- Exhibit C: CWCB Stipulation and Proposed Decree in 5-10CW43

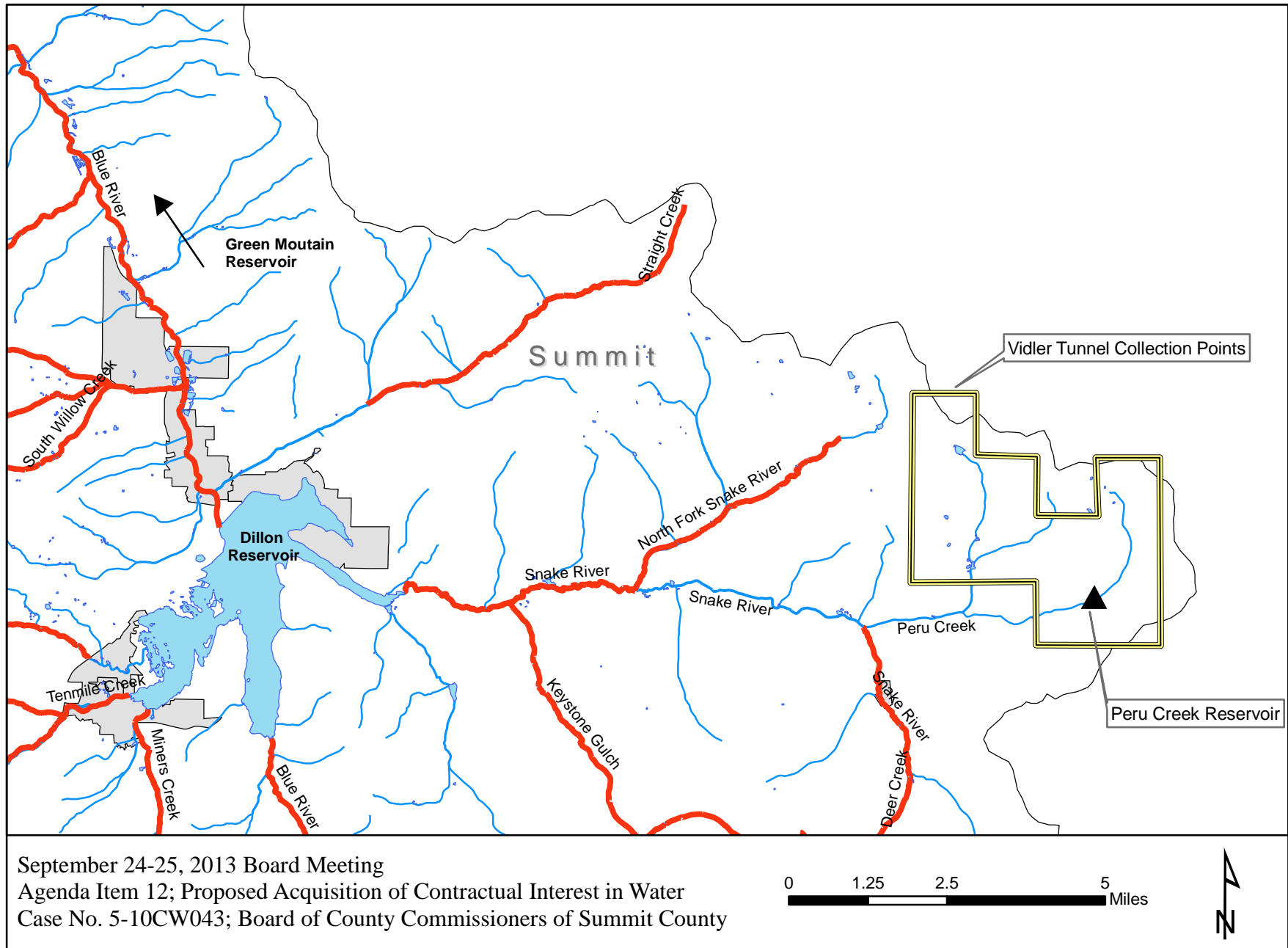


Exhibit A

EXHIBIT B

WATER DELIVERY AGREEMENT

The Colorado Water Conservation Board (“CWCB”), an agency of the State of Colorado, and the Board of County Commissioners of Summit County, Colorado, a political subdivision of the State of Colorado (“Summit County”) in consideration of the mutual promises contained in this document, agree as follows:

RECITALS

- A. Summit County has obtained a decree for conditional water rights and a change of conditional water rights in Case No. 10CW43, Water Division No. 5 (the “Decree”), providing for the storage of water in Peru Creek Reservoir as described in paragraphs 7 and 10 of the Decree.
- B. Paragraph 31(e) of the Decree provides, inter alia, that the place of use for water released from storage in Peru Creek Reservoir for piscatorial purposes shall be the stream reach(es) decreed for present or future CWCB instream flow water right(s) within Summit County.
- C. The CWCB has obtained a decree in the District Court, Water Division 5, in Case No. 86CW210 for an instream flow (“ISF”) water right to preserve the natural environment to a reasonable degree on the Snake River from its confluence with the North Fork of the Snake River to the confluence with Dillon Reservoir.
- D. Summit County and the CWCB desire to work cooperatively on water matters in the Snake River Basin. Summit County may elect in its sole discretion to release from Peru Creek Reservoir water for piscatorial purposes in accordance with the terms and conditions of the Decree, at times to be determined at the sole discretion of Summit County, at rates of flow up to those provided in paragraphs 1 and 2 of this Agreement (the “Piscatorial Releases”). The CWCB has agreed to use the Piscatorial Releases under Summit County’s Decree to preserve or improve the natural environment to a reasonable degree in the stream reach(es) decreed for present or future CWCB instream flow water right(s) within Summit County, subject to the terms and conditions outlined in this Agreement. The Piscatorial Releases do not include water stored in or released from Peru Creek Reservoir at the sole discretion of Summit County for any other purposes authorized by the Decree.
- E. Pursuant to section 37-92-102(3), C.R.S. (2011), the CWCB may acquire by contractual agreement with any person, including any governmental entity, such water, water rights or interests in water that are not on the Division Engineer’s abandonment list in such amount as the CWCB determines is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree. This Agreement provides for the CWCB’s contractual acquisition of water or an interest in

water to preserve or improve the natural environment to a reasonable degree in certain stream reaches.

- F. Pursuant to C.R.S. § 29-1-203, the CWCB and Summit County may cooperate or contract with one another with respect to the exercise of their governmental functions.

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth herein, Summit County and the CWCB agree as follows:

1. The Piscatorial Releases, in the volumes and at the rates of flow and times to be determined at the sole discretion of Summit County in accordance with the Decree, shall be made available to and protected for instream flow use under Summit County's Decree exclusively by the CWCB pursuant to this Agreement in the stream reach(es) decreed for CWCB ISF right(s) within Summit County, up to the decreed amount(s) of such ISF right(s) by maintaining flows in those stream reaches where the CWCB has instream flow rights, when the CWCB's instream flow rights on these reaches are not satisfied.
2. Summit County may also elect, in its sole discretion, to make Piscatorial Releases from Peru Creek Reservoir available to and protected for instream flow use under Summit County's Decree exclusively by the CWCB pursuant to this Agreement, at times to be determined at the sole discretion of Summit County, up to the maximum rates of flow to be determined pursuant to CWCB administrative procedures and a future agreement between Summit County and the CWCB, to improve the natural environment to a reasonable degree by increasing flows in the stream reaches above the CWCB's decreed flows
3. The CWCB shall protect Piscatorial Releases in the ISF reach(es) consistent with the policies and procedures contained in the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, subject to the availability of funds. The parties shall cooperate in the administration, measurement, and monitoring of the Piscatorial Releases and their intended beneficial uses under this Agreement. In the event that the CWCB does not or cannot protect the full amount of the Piscatorial Releases in accordance with the terms of this Agreement, nothing in this Agreement shall prevent Summit County from exercising its rights under the Decree with respect to the Piscatorial Releases.
4. Nothing in this Agreement shall require Summit County to allocate any Peru Creek Reservoir water for release for non-consumptive piscatorial use or limit the ability of Summit County, in its sole discretion, to allocate Peru Creek Reservoir water for use for any of its decreed purposes.
5. Nothing in this agreement shall require either party to install gages to measure the Piscatorial Releases. The CWCB will contact the Division 5 Engineer and seek administration to ensure the full amount of Piscatorial Releases is protected through the ISF reach(es). Summit County shall be responsible for maintaining all records necessary for the implementation of this Agreement, using forms mutually agreeable to the parties,

and all records required by the Division Engineer for administration of the CWCB Releases. Summit County shall provide annual accounting related to the operation of this Agreement to the CWCB and the Division Engineer.

6. The CWCB will give due consideration, consistent with its generally applicable financial policies, to applications by Summit County for loans and grants to assist in funding the development, construction, operation, maintenance, and repair of the Peru Creek Reservoir.

7. Any rights created by this Agreement are contractual rights. This Agreement does not create and shall not be construed to create or convey any property interest, including any covenant, easement or servitude, in the real property or water rights of any party.

8. Pursuant to section 37-92-102(3), C.R.S. (2011), the terms of this Agreement shall be enforceable by each party as a water matter in the District Court, Water Division 5. Before commencing any action for enforcement of this Agreement, however, the party alleging a breach shall notify the other party in writing of the alleged breach and the parties shall make a good-faith effort to resolve their differences through informal consultation. All rights of enforcement shall be strictly reserved to the parties, and no third party shall have any right to enforce this Agreement. Specific performance of this Agreement shall be the exclusive remedy for failure of any party to comply with any provision of this Agreement. This Agreement shall be construed in accordance with the laws of the State of Colorado and shall be interpreted broadly to effect its purpose.

9. This Agreement was completed as the result of substantial discussions, negotiations and compromises by, between and among the CWCB and Summit County pertaining to the pending water court litigation referenced in the recitals. It is specifically understood and agreed by the parties hereto that the terms of this Agreement are based on and limited to the specific factual and legal circumstances of the matters described in the recitals. The interrelated compromises reached by the parties herein shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, stare decisis, res judicata, estoppel, laches or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the parties hereto in any other matter, case or dispute, nor shall testimony concerning such acquiescence of any party to the terms of this Agreement be allowed in any other matter, case or dispute. All parties stipulate and agree that they do not intend the terms of this Agreement to have the effect of precedent or preclusion on any factual or legal issue in any other matter. The parties further stipulate and agree that they each reserve the right to propose or challenge any legal or factual position in any other matter filed in Water Division No. 5 or any other court without limitation by the terms of this Agreement.

10. Any failure or delay by a party in exercising any of its rights, powers and remedies hereunder or in accordance with laws shall not lead to a waiver of such rights, and the waiver of any single or partial exercise of a party's rights shall not preclude such

party from exercising such rights in any other way and exercising the remaining part of the party's rights.

11. Each provision contained herein shall be severable and independent from each of the other provisions such that if at any time any one or more provisions herein are found to be invalid, illegal, or unenforceable, the validity, legality, or enforceability of the remaining provisions herein shall not be affected as a result thereof.

12. The effective date of this Agreement shall be the last date shown on the signature page of this Agreement, which may be executed in counterparts.

13. The term of this Agreement is perpetual unless terminated under the provisions of this paragraph. This Agreement shall not be assignable by any party without the written consent of the other party. This Agreement may only be amended or terminated by the written agreement of the parties, and any such termination or amendment shall take effect only when properly signed by both parties to this Agreement.

14. Any notice required or permitted to be given under this Agreement will be in writing and considered effective when delivered by fax, email, hand delivery, Express Mail, Federal Express, or similar service, or on the third mail-delivery day after being deposited in the United States mail, postage prepaid, addressed to the parties as follows:

Summit County:
County Manager
Summit County, Colorado
208 East Lincoln Avenue
Breckenridge, CO 80424

CWCB:
Colorado Water Conservation Board
Stream and Lake Protection Section
1313 Sherman Street, Room 721
Denver, CO 80203

IN WITNESS WHEREOF, the parties hereto have executed this Agreement.

COLORADO WATER CONSERVATION BOARD

By: James Eklund, Director

Date: _____

SUMMIT COUNTY BOARD OF COUNTY COMMISSIONERS

By: _____ Date: _____

ATTEST: _____

Exhibit C

DISTRICT COURT, WATER DIVISION 5, COLORADO GARFIELD COUNTY COMBINED COURTS 109 8 TH STREET, SUITE 104 GLENWOOD SPRINGS, CO 81601-3303	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY IN SUMMIT COUNTY, COLORADO	Δ COURT USE ONLY Δ
ATTORNEYS FOR THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY: CHARLES B. WHITE, No. 9241 DAVID S. HAYES, No. 28661 PETROS & WHITE, LLC 1999 BROADWAY, SUITE 3200 DENVER, CO 80202 TELEPHONE: (303) 825-1980 FAX: (303) 825-1983 E-MAIL: CWHITE@PETROS-WHITE.COM ATTORNEYS FOR THE COLORADO WATER CONSERVATION BOARD: JOHN W. SUTHERS, ATTORNEY GENERAL DEREK L. TURNER, No. 44091*, ASSISTANT ATTORNEY GENERAL 1300 BROADWAY, 7TH FLOOR DENVER, CO 80203 TELEPHONE: (303) 866-5461 E-MAIL ADDRESS: DEREK.TURNER@STATE.CO.US *COUNSEL OF RECORD	Case No.: 10CW43
STIPULATION BETWEEN APPLICANTS AND THE COLORADO WATER CONSERVATION BOARD	

Applicant, the Board of County Commissioners of the County of Summit, and Objectors, the Colorado Water Conservation Board (“CWCB”), hereby stipulate and agree as follows:

1. The above-captioned Application was filed on February 26, 2010.

2. The CWCB filed a timely statement of opposition.

3. The CWCB consents to the entry of Findings of Fact, Conclusions of Law, and Decree of the Water Court so long as such Decree is no less restrictive on the Applicant than the Proposed Decree attached hereto as Exhibit A (draft of _____, 2013) and does not contain any provisions inconsistent with this stipulation.

4. Applicants acknowledge that the CWCB has adjudicated the following instream flow right to preserve the natural environment to a reasonable degree, decreed prior to the filing of the application in this proceeding, Case No. 10CW43:

Case No.	Stream	Amount (cfs) (dates)	Approp. Date
5-86CW210	Snake River	6.0 (10/1 – 4/30) 12.0 (5/1 – 9/30)	3/14/1986

5. The parties will jointly request the Court to enter the Proposed Decree attached hereto as Exhibit A promptly following the approval by the CWCB of the Water Delivery Agreement that is attached as Exhibit C to such Proposed Decree, without changes that are unacceptable to the Applicant. In the event that the Water Delivery Agreement is not approved by the CWCB prior to December 1, 2013, or is approved with changes that are unacceptable to the Applicant, this stipulation shall be of no further force and effect and the parties shall jointly request the Court to set this case for trial.

6. The CWCB shall remain on the mailing list in this case. Applicant agrees to provide the CWCB and the Engineers with a copy of any Proposed Decree submitted to the Water Court in this action. The CWCB shall have a reasonable opportunity to object to any provisions that are inconsistent with or that might impair the effectiveness of this stipulation, and shall have the opportunity to protest any ruling and or/appeal any decree that is less restrictive upon Applicant than the Proposed Decree attached hereto as Exhibit A.

7. The CWCB will remain in this case for the limited purpose of ensuring that any Ruling and Decree which is ultimately entered in this case herein is in conformity with the provisions of this stipulation.

8. All parties will bear their own attorneys' fees and costs incurred in this proceeding.

9. This stipulation is submitted to the Court with the request of the parties that it be approved by Order of the Court.

10. This Stipulation is entered into by way of compromise and settlement of this litigation and the agreement of the undersigned parties for entry of said Proposed Decree. Any agreements or terms and conditions herein are due solely to the unique circumstances of this case and the resulting Stipulation. This Stipulation shall not establish any precedent and shall not be construed as a commitment to include any specific findings of fact, conclusions of law, or specific engineering methodologies or administrative practices in future stipulations or decrees. Nothing contained in said proposed decree shall be binding upon the CWCB other than in the current proceeding. This Stipulation may be enforced both as an agreement between the parties and upon its approval as an Order of the court.

11. This stipulation shall be binding on the parties, their successors and assigns. This stipulation shall be enforceable as an agreement between the parties or as an order of the Court.

Dated this ____ day of _____, 2013.

PETROS & WHITE, LLC

JOHN W. SUTHERS
ATTORNEY GENERAL

Charles B. White, No. 9241
David S. Hayes, No. 28661

Attorneys for Applicant

DEREK L. TURNER, No. 44091
Attorneys for Objectors, Colorado Water
Conservation Board

CERTIFICATE OF SERVICE

I certify that on this ____ day of _____, 2013, a true and correct copy of the foregoing **STIPULATION BETWEEN APPLICANTS AND COLORADO WATER CONSERVATION BOARD** was served by via File & Serve Xpress by selecting all parties of record.

/s/ Kari Newmyer

District Court, Water Division No. 5 Garfield County Courthouse 109 8 th St. Ste 104 Glenwood Springs, CO 81601 (970) 947-3861	REVISION DATE: Offer of compromise and settlement Subject to C.R.E. 408
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY, COLORADO in the BLUE RIVER AND ITS TRIBUTARIES In Summit County, Colorado	Δ COURT USE ONLY Δ
	Case No.: 2010CW43 (01CW177, 95CW06, 87CW246, 83CW78, CA 2371)
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE OF THE WATER COURT	

THIS MATTER has come before the Water Judge on an Application for Conditional Water Storage Rights, Change of Water Rights, and Right of Exchange (the “Application”) filed by the Board of County Commissioners of Summit County (“Applicant” or “Summit County”) on February 26, 2010, and was referred by the Water Judge for the District Court in and for Water Division No. 5, State of Colorado to the Referee of the Water Court in accordance with Article 92 of Chapter 37, Colorado Revised Statutes, known as the Water Right Determination and Administration Act of 1969. This matter was re-referred to the Water Judge by Order dated March 6, 2012.

The Court, having reviewed the Application and the other pleadings in this case, and now being fully advised with respect to this matter, enters the following Findings of Fact, Conclusions of Law, and Decree:

FINDINGS OF FACT

A. INTRODUCTION

1. Application: The Applicant filed a properly verified application in this matter on February 26, 2010. Timely and adequate notice of the Application was given in the manner provided by statute. C.R.S. § 37-92-302 (2010). All notices required by law for the filing of the Application have been given, and the Court has jurisdiction over the Application.

2. Name and Address of the Applicant:

Board of County Commissioners of the County of Summit
c/o Gary Martinez
County Manager
P.O. Box 68
208 East Lincoln Avenue
Breckenridge, Colorado 80424

c/o Charles B. White, Esq.
Petros & White, LLC
1999 Broadway, Suite 3200
Denver, CO 80202
(303) 825-1980

3. Statements of Opposition: Statements of opposition were filed by the City of Colorado Springs Utilities, the City and County of Denver acting by and through its Board of Water Commissioners, the Colorado Water Conservation Board and the State and Division Engineers. The time for filing additional statements of opposition has expired.

4. Jurisdiction: All persons affected by the Application, whether appearing or not, are parties hereto and are bound by this Decree, all notices required by law having been given and the Water Court having jurisdiction over the subject matter of this proceeding. C.R.S. § 37-92-203 (2010).

5. Summary of Consultation: No summary of consultation was filed by the Division Engineer. The Division Engineer filed a statement of opposition on August 22, 2010.

6. Introduction: The Vidler Tunnel Unit water rights were originally decreed for diversion from Peru Creek, through the Vidler Tunnel, for use on the East Slope. Summit County acquired conditional Vidler Tunnel Unit water rights for diversion points G through ZZ in the amount of 8 c.f.s. from the Vidler Water Company, Inc. by Special Warranty Deed dated January 25, 2002, and in the amount of 6.6 c.f.s. from the City of Golden by Special Warranty Deed dated March 23, 2004 ("Vidler water rights"). Summit County filed an application for a finding of reasonable diligence for the Vidler water rights concurrently with this application.

In this application, Summit County seeks to change the Vidler water rights to allow use of the rights in Summit County, additional uses to those originally decreed, and storage in a proposed reservoir on Peru Creek ("Peru Creek Reservoir"). Summit County also seeks a conditional water storage right and refill right for the Peru Creek Reservoir. Summit County also seeks an appropriative right of exchange to store water in Peru Creek Reservoir that would be available for diversion at the originally decreed points of diversion K through U, which are

located on tributaries of Peru Creek, downstream of the proposed location of Peru Creek Reservoir.

B. CONDITIONAL WATER STORAGE RIGHTS

7. Name of structure: Peru Creek Reservoir.

a. Legal description: The center of the crest of the dam will be located in the SE 1/4 of the NE 1/4 of Section 20, T5S, R75W, of the 6th P.M., 1,290 ft from the North Section line, and 885 ft from the East Section line.

b. Source: Peru Creek, tributary to the Snake River, a tributary of the Blue River, a tributary of the Colorado River. The Reservoir will be located on-channel and created by the construction of a dam.

c. Surface area of reservoir: Approximately 50 acres.

d. Vertical height of dam: 150 feet.

e. Length of dam: 860 feet.

f. Capacity of reservoir: Approximately 2,050 acre-feet. At this time the amount of dead storage is unknown.

g. Date of appropriation: February 23, 2010. On that date Summit County formed the requisite intent to appropriate the water right and completed substantial steps in furtherance of such intent, including but not limited to, approval of a resolution by the Board of County Commissioners of Summit County evincing Summit County's intent to appropriate the conditional water right claimed herein.

h. Amount: 2,050 acre-feet, conditional, together with a right to one or more successive refills in the cumulative total amount of 2,050 acre-feet, conditional. No more than 4,100 acre-feet may be stored under this priority in any one year.

i. Uses: Municipal, domestic, commercial, irrigation, industrial, snowmaking, augmentation, replacement, exchange, recreation, piscatorial, wildlife watering, maintenance and enhancement of water quality, remediation and restoration of riparian and wetland areas, with the right of reuse, successive use, and disposition to extinction. The place of use shall be limited to Summit County.

C. CHANGE OF WATER RIGHTS

8. Decreed name of structures for which change is sought: Vidler Tunnel Unit, diversion points G – ZZ.

9. Description of water rights:

a. Prior decrees: The Vidler Tunnel Unit water rights were originally decreed in CA 2371, by the District Court in and for the County of Summit, Water Division 5, on March 19, 1979, with a date of appropriation of July 28, 1959. Diligence has been maintained for the conditional water rights now owned by Summit County by the following decrees of the District Court for Water Division No. 5: Case No. 83CW78, dated January, 1986; Case No. 87CW246, dated January 9, 1989; Case No. 95CW06, dated July 13, 1995; and Case No. 01CW177, dated February 23, 2004.

b. Decreed points of diversion: The conditional portion of the Vidler Tunnel Unit water rights now owned by Summit County, i.e. the Vidler water rights, consists of nineteen (19) separate points of diversion (Points G – ZZ), located in the upper reaches of the Peru Creek drainage basin. The diversion point locations, sources, and amounts as originally decreed are as follows:

Headgate	Point of Diversion (Tie From Headgate to Legal Government Corners)	Source	Amount (c.f.s.)
G	S 3°20'W, 915' to M.C. 2-19781A – GP4	Gulch G	1.00
H	S 3°05'E, 769' to M.C. 2-19781A – GP4	Gulch H	0.40
J	S 51°51'E, 506' to M.C. 2-19781A – GP4	Gulch J	0.60
K	N 88°46'W, 2731' to NW Cor. S20, T5S, R75W	Gulch K	1.00
L	S 59°05'W, 1031' to SW Cor. S17, T5S, R75W	Gulch L	3.00
M	S 20°01'E, 3459' to SE Cor. S18, T5S, R75W	Ruby Gulch	10.20
N	S 23°43'E, 4138' to SE Cor. S18, T5S, R75W	Gulch N	5.20
P	N 30°10'W, 3193' to NW Cor. S7, T5S, R75W	Gulch P	4.80
Q	N 34°09'W, 1932' to NW Cor. S7, T5S, R75W	Gulch Q	7.40
R	S 46°17'E, 270' to SE Cor. S1, T5S, R76W	Gulch R	5.80
S	N 70°57'E, 766' to NE Cor. S12, T5S, R76W	Chihuahua Gulch	4.60

T	N 38°06'E, 1840' to NE Cor. S12, T5S, R76W	Gulch T	2.20
U	N 27°48'E, 5525' to NE Cor. S12, T5S, R76W	Gulch U	5.20

V	N 88°55'W, 3447' to NW Cor. S16, T5S, R75W	Gulch V	0.60
W	N 77°04'W, 3600' to NW Cor. S16, T5S, R75W	Gulch W	0.90
X	S 64°20'W, 3862' to M.C. 2-19781A – GP4	Gulch X	1.50
Y	S 82°09'W, 3373' to M.C. 2-19781A – GP4	Gulch Y	1.40
Z	N 66°36'W, 3770' to M.C. 2-19781A – GP4	Gulch Z	6.30
ZZ	N 58°19'W, 3359' to M.C. D-19781A – GP4	Gulch ZZ	2.10

The following chart provides a description of the diversion point locations on the respective water sources, in PLSS format, which are also depicted on the map attached as Exhibit A, incorporated herein by this reference.

PLSS Locations for Vidler Tunnel Collection Points

Headgate	Township	Range	Section	Distance	N/S	Distance	E/W	Q40	Q160	P.M.
G	T5S	R75W	16	1887	S	217	W	NW	SW	6th
H	T5S	R75W	16	1651	S	101	W	NW	SW	6th
J	T5S	R75W	17	1144	S	345	E	SE	SE	6th
K	T5S	R75W	20	50	N	2522	W	NW	NE	6th
L	T5S	R75W	17	760	S	776	W	SW	SW	6th
M	T5S	R75W	18	2088	N	1289	E	SE	NE	6th
N	T5S	R75W	18	1582	N	1772	E	SW	NE	6th
P	T5S	R75W	7	1990	S	1527	W	NE	SW	6th
Q	T5S	R75W	7	1704	N	1116	W	SW	NW	6th
R	T5S	R76W	1	380	S	486	E	SE	SE	6th
S	T5S	R76W	12	432	N	1272	E	NE	NE	6th
T	T5S	R76W	12	1506	N	1612	E	SW	NE	6th
U	T5S	R76W	13	280	N	2250	W	NE	NW	6th
V	T5S	R75W	9	78	S	1933	E	SW	SE	6th
W	T5S	R75W	16	813	N	1936	E	NW	NE	6th
X	T5S	R75W	16	2485	S	1982	E	NW	SE	6th
Y	T5S	R75W	16	1220	S	1953	E	SW	SE	6th
Z	T5S	R75W	21	592	N	2078	E	NW	NE	6th
ZZ	T5S	R75W	21	1217	N	2789	E	NE	NW	6th

- c. Source: Various named and unnamed tributaries of Peru Creek, tributary to the Blue River, a tributary to the Colorado River.
 - d. Appropriation date: July 28, 1959.
 - e. Amount: 14.6 c.f.s., conditional.
 - f. Decreed uses: Domestic, agricultural, industrial and municipal uses.
 - g. Amount changed: 14.6 c.f.s, which represents the maximum flow rate of diversions at any one time from the original points of diversion G-ZZ.
 - h. Historic use: The water rights to be changed are conditional water rights. Therefore, there are no records of historic use and no map of the place of historic use.
10. Changes of Vidler water rights:
- a. Additional uses: The Vidler water rights will be used for the additional purposes of commercial, irrigation, snowmaking, augmentation, replacement, exchange, recreation in Peru Creek Reservoir, piscatorial use in Peru Creek Reservoir and in stream reaches decreed for present or future CWCB instream flow water rights on Peru Creek and the Snake River downstream of the Reservoir as described in paragraph 31(e), wildlife watering, maintenance and enhancement of water quality in Peru Creek and the Snake River downstream of the Reservoir and in Dillon Reservoir as described in paragraph 31(d), remediation and restoration of riparian and wetland areas, with the right of reuse, successive use, and disposition to extinction.
 - b. Change in manner of use: The Vidler water rights may be stored in the proposed Peru Creek Reservoir and will not be applied to direct-flow use.
 - c. Change of location of use: The place of use of the Vidler water rights will be changed to locations within the boundaries of Summit County. A map of Summit County is attached as Exhibit B and incorporated herein by this reference.
11. Terms and conditions on the change of water rights:
- a. Physical availability: Applicant shall account for daily physical inflow to the Peru Creek Reservoir based on measured change in storage, measured outflow, and calculated evaporation. The water available to the changed Vidler water rights will be limited to the amount of water physically and legally available at the original points of diversion for the Vidler water rights. Physical water availability at the original Vidler points of diversion shall be calculated using the daily physical inflow to the Peru Creek Reservoir and the relative watershed areas above the Reservoir and each of the original points of diversion, adjusted to account for basin elevation, provided that such

methodology is verified and modified as necessary based on field measurements, correlation to measured diversions at the existing Vidler Tunnel, or such other methodology(ies) that are reasonably acceptable to the Division Engineer, or by such other methodology as may be approved by the Court pursuant to the retained jurisdiction provisions of paragraph 38 below. These calculations shall be provided by the Applicant to the Division Engineer on a monthly basis.

b. Calls on intervening water rights: No water right appropriated prior to the date of filing the application in this case (February 26, 2010) that would not have been subject to an administrative call by the Vidler water rights at their original points of diversion described in paragraph 9(b) will be subject to a call for the changed Vidler rights at the location of the Peru Creek Reservoir.

c. No water will be stored under the priority of the changed water rights in Peru Creek Reservoir at times when the CWCB's Snake River instream flow right decreed in Case No. 86CW210 is not satisfied.

12. No injury: This change of water right will not injuriously affect the owner of or persons entitled to use water under the vested water right or decreed conditional water right. *See* §37-92-305, C.R.S. (2010).

D. RIGHT OF EXCHANGE

13. Name of exchange: Vidler-Peru Creek Reservoir Exchange.

14. Description of exchange: Pursuant to §§ 37-80-120 & 37-92-302(1)(a), C.R.S. (2010), Summit County claims a conditional appropriative right of exchange ("Exchange") whereby the amount of water that is physically and legally available for diversion at Vidler Tunnel Unit diversion points K through U is not diverted and is allowed to flow into Peru Creek to supply downstream appropriators, and an equivalent amount of water is diverted and stored in Peru Creek Reservoir, which will be located upstream of the points at which the water available for diversion at points K through U would flow into Peru Creek.

15. Location of structures and exchange reach:

a. Upstream terminus: The upstream terminus of the Exchange is the dam for the Peru Creek Reservoir, located in the SE 1/4 of the NE 1/4 of Section 20, T5S, R75W, of the 6th P.M., 1,290 ft from the North Section line, and 885 ft from the East Section line.

b. Downstream termini: The downstream termini of the Exchange are the locations where the water that is physically and legally available for diversion at Vidler Tunnel Unit diversion points K through U flows into Peru Creek, of which the most downstream point is the confluence of Peru Creek and Chihuahua Creek located in the NW 1/4 of the SE 1/4 of Section 24, T5S, R76W, of the 6th P.M., 2370 ft from the South Section line, and 1805 ft from the East Section line.

- c. Peru Creek Reservoir: As described in Paragraph 7.
- d. Vidler Tunnel Unit diversion points K through U: As described in Paragraph 9.B.

16. Water rights used for substitution and replacement: The Vidler Tunnel Unit rights K through U will replace an equivalent amount of water diverted and stored in the Peru Creek Reservoir. The Vidler water rights are decreed for the conditional flow rates listed in the following table with a total decreed limit of 14.6 c.f.s., and are further described in Paragraph 9.

Diversion Point	Decreed Flow (c.f.s.)
K	1.0
L	3.0
M	10.2
N	5.2
P	4.8
Q	7.4
R	5.8
S	4.6
T	2.2
U	5.2

The 14.6 cfs limit on these described points includes all diversions under points G through ZZ so that the combined total diversions or storage directly or by exchange for all of Applicant's diversion points under the Vidler Tunnel Unit do not exceed 14.6 c.f.s.

17. Appropriation: February 23, 2010. On that date Summit County formed the requisite intent to appropriate the Exchange and completed substantial steps in furtherance of such intent, including but not limited to, approval of a resolution by the Board of County Commissioners of Summit County evincing Summit County's intent to appropriate the conditional right of exchange claimed herein.

18. Amount: 14.6 c.f.s., conditional.

19. Uses: The water diverted by exchange will be used for the purposes described in the foregoing paragraphs 7(i), 9(f), and 10(a).

20. Terms and conditions. Applicant's operation of the Exchange shall be subject to the following additional terms and conditions:

- a. Live stream. The Exchange may be operated only when there is a live surface stream within the entire applicable exchange reach; provided, however, that the exchange decreed herein can call out any diversions junior to such exchange to maintain a live stream.
 - b. Amount of exchange/transmission losses. The amount of water diverted by exchange by Applicant shall be equal to the amount of water bypassed for replacement, less a reasonable deduction for stream loss, if any there be, to be determined by the State Engineer pursuant to C.R.S. § 37-83-104 (2010).
 - c. Water quality. The replacement water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation involved in the exchange has normally been put.
 - d. Notice. Notice must be given to the Division Engineer prior to operation of the exchange.
21. No injury. The change of water rights and right of exchange adjudicated herein will not result in injury to any vested water rights or decreed conditional water rights, provided that operation of the Exchange and diversion, storage, and use of the subject water rights are made in compliance with the terms and conditions described herein. *See* C.R.S. §37-92-305(3) (2010). The water to be provided for replacement is of a quality and quantity so as to meet the requirements for which the water has been used by senior downstream appropriators, and therefore meets the requirements of C.R.S. § 37-92-305(5) (2010).
22. Can and Will. The waters claimed by Applicant can be and will be diverted, or otherwise captured, possessed, and controlled and will be beneficially used and the project can and will be completed with diligence and within a reasonable time. *See* C.R.S. § 37-92-305(9)(b) (2010).

CONCLUSIONS OF LAW

23. The foregoing Findings of Fact are incorporated herein to the extent that they constitute or include conclusions of law.
24. Summit County's Application was timely and one contemplated by law. C.R.S. §§ 37-82-101, 37-87-101, 37-92-302 (2010).
25. The Water Court has jurisdiction over the subject matter of this proceeding and over all who may be affected hereby, whether they have appeared or not. C.R.S. § 37-92-203 (2010).
26. The adjudication of the water right described herein is, as a matter of law, permissible and comes within the definitions authorized by statute. *See* §§ C.R.S. 37-82-101, 37-92-103(3), 37-92-302 and 37-92-305 (2010).

27. A practice of substitution or exchange pursuant to law may constitute an appropriative right and may be adjudicated or otherwise evidenced as any other right of appropriation. C.R.S. § 37-80-120(4) (2010).

28. When the rights of others are not injured thereby, it is lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the State Engineer. C.R.S. § 37-83-104 (2010).

29. Summit County has the power to “operate and maintain water facilities. . . for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the county, . . .” C.R.S. § 30-20-402(1)(b) (2011). *See Colo. Open Space Council v. Denver*, 543 P.2d 1258, 1260 (Colo. 1975) (“Denver is also a county as well as a city and, as such, could be said to have parallel powers to serve non-county water users under Section 30-20-402(1)(b), C.R.S.1973”).

DECREE

30. The Findings of Fact and Conclusions of Law set forth above are incorporated herein by reference.

31. a. Prior to storing water in Peru Creek Reservoir, the Applicant shall install measuring devices to measure water flows in and out of the reservoir, and a staff gage and continuous water level recorder to determine water level elevation and reservoir storage content. The Applicant shall survey the reservoir after its construction, and develop a storage/capacity rating table. The Applicant shall provide accounting of Reservoir operations, including accounting of inflows into Peru Creek Reservoir under the conditional water right, change of water rights, and exchange decreed herein, in a form reasonably approved by the Division Engineer. Transit losses associated with delivery for beneficial use will be determined by the Division Engineer at the time the deliveries are made.

b. As a condition of reuse and successive use of water under this Decree, Applicant will install such measuring devices and provide accounting reports and calculations as are reasonably required by the Division Engineer to measure and account for its effluent, return flows, and reuse and successive use of water. Except as may be approved in a subsequent Water Court decree: (i) the only water that may be reused or successively used under the water rights and change of water rights adjudicated herein shall be: (a) water released from Peru Creek Reservoir for nonconsumptive maintenance and enhancement of water quality or (b) return flows from snowmaking uses; and (ii) the permissible uses that may be made by reuse and successive use are limited to: (a) delivery to Dillon Reservoir pursuant to agreements between the Applicant or its contractees and the Denver Water Board; (b) augmentation (subject to the following paragraph 37); (c) exchange (subject to the following paragraph 32(c)), including without limitation exchange to Peru Creek Reservoir and Old Dillon Reservoir, for the beneficial uses decreed herein; and (d) direct delivery to County facilities and contractees located below

Dillon Reservoir. In order to reuse and successively use return flows from snowmaking, Applicant will demonstrate dominion and control over such return flow by using the accepted methodology for determining the timing and amount of such return flows under the Clinton-Fraser Agreement.

c. The volume of water available for initial release from Peru Creek Reservoir for consumptive uses under the water rights and changes of water rights approved in this Decree is anticipated to be approximately 306 acre-feet per year; however, the actual volume will be a function of hydrology and water rights administration. Consumptive uses of this water will be made for County facilities, programs, and contractees (including without limitation the Keystone Ski Area, the Snake River Water District, and the East Dillon Water District in accordance with an agreement dated January 8, 2013) by direct delivery, augmentation (subject to the following paragraph 37), and exchange (subject to the following paragraph 32(c)), and/or by delivery to Dillon Reservoir to satisfy obligations of the Applicant or its contractees to the Denver Water Board.

d. Water released from Peru Creek Reservoir for nonconsumptive maintenance and enhancement of water quality will be delivered to the confluence of the Snake River and Dillon Reservoir. The beneficial use of water for these purposes will occur only within the reach of Peru Creek and the Snake River from Peru Creek Reservoir to Dillon Reservoir and in the mixing zone in Dillon Reservoir associated with the Snake River wastewater treatment plant, which is owned and operated by the Snake River Wastewater Utility, which is an enterprise fund established by the Applicant. The Applicant will provide to the Division Engineer documentation establishing the amount of water beneficially used for these purposes.

e. The place of use for water released from storage in the Peru Creek Reservoir for piscatorial purposes shall be stream reach(es) from the outlet of Peru Creek Reservoir to the inlet of Green Mountain Reservoir decreed for CWCB instream flow water right(s) (present or future decrees) within Summit County, including the instream flow water right decreed for the Snake River in Case No. 86CW210 and the instream flow water rights decreed for the Blue River in Case Nos. 87CW293, 87CW294, 87CW295, 87CW296, 87CW297, 87CW298, and 05CW264, Water Division No. 5. Water may be released from Peru Creek Reservoir for piscatorial purposes at the sole discretion of Applicant up to the rates of flow specified in, and otherwise pursuant to the Water Delivery Agreement dated ____ between Summit County and the CWCB, attached hereto as Exhibit C, which provides that water released for piscatorial purposes shall be made available to and protected for instream flow use exclusively by the CWCB. Any beneficial use in these stream reaches for piscatorial purposes at locations other than or for rates higher than those specified in the foregoing decrees will be contingent upon (1) CWCB determination of the appropriate flow rates to preserve or improve the natural environment to a reasonable degree and execution of a water delivery agreement with the CWCB, and (2) one of the following: (a) compliance with the procedures in C.R.S. 37-83-105; (b) approval of a substitute supply plan by the State Engineer; (c) entry of a decree awarding an additional instream flow right to the CWCB for such flow rates; or (d) an amendment to this water court decree. If the decree will be amended for this purpose, after the CWCB makes a determination of appropriate flow rates to preserve or improve the natural environment to a reasonable degree through its administrative

process, Applicant shall file a water court application to amend this decree. The Court shall review only the flow rate and timing claims for the additional flows claimed under this paragraph 31(e)(2)(d).

f. Applicant will separately account for water released from the Peru Creek Reservoir for water quality and piscatorial purposes.

g. Not less than 48 hours before any release for water quality and/or piscatorial purposes, Applicant will notify the Division Engineer of:

- (1) The purpose of the release (must be one of water quality or piscatorial purposes);
- (2) The rate of flow of the release;
- (3) The location of use (identified as a stream reach between two points);
- (4) The time period of the release;
- (5) The total volume of the release; and
- (6) An explanation/calculation of how this amount of water will accomplish the claimed beneficial use in the subject location of use.

With respect to releases from the Peru Creek Reservoir for piscatorial purposes, Applicant will provide to the Director of the Colorado Water Conservation Board or his or her designee a contemporaneous copy of the notice provided to the Division Engineer in accordance with this subparagraph 31(g).

32. a. The Vidler water rights do not benefit from the Green Mountain Reservoir historic users pool.

b. Any right of exchange from Green Mountain Reservoir pursuant to the decree entered in Case No. 88CW382, to the points of diversion or place of storage of the Vidler water rights, shall have a date of appropriation no earlier than February 26, 2010.

c. This Decree does not establish a priority for upstream exchanges for which water stored in Peru Creek Reservoir pursuant to the water rights and change of water rights adjudicated in this case is the source of replacement, including without limitation exchanges for augmentation use. Such exchange(s) shall be adjudicated in a separate water court case or administered by the State and Division Engineers in the manner provided by law. Nothing in this subparagraph 32(c) is intended to affect the conditional right of exchange described in paragraphs 13 – 22 of this Decree.

33. The appropriations of the conditional water storage right as described in paragraph 7 above and the right of exchange described in paragraphs 13 – 22 above are hereby confirmed, subject to the terms and conditions stated herein.

34. The change of water rights described in paragraphs 8 – 12 herein is hereby approved,

subject to the terms and conditions stated herein.

35. The Application was filed in the Water Court in the year 2010, and the conditional water storage right and right of exchange shall be administered as having been filed in that year and shall be junior to all priorities having been filed in previous years. As between all rights filed in the same calendar year, priority shall be determined by historical dates of appropriation and not affected by the entry of the decree.

36. The State and Division Engineers shall administer the change of water rights, conditional storage right, and right of exchange as set forth herein in accordance with this Decree and priority administration under Colorado law.

37. Any use of the conditional water rights that are the subject of this Decree as a source of augmentation water may only be made in accordance with a separately adjudicated augmentation plan or an approved substitute supply plan. Any use of such conditional water rights as an augmentation source in the plan for augmentation decreed in Case No. 95CW122, Water Division No. 5, may only be pursuant to a Water Court-approved amendment to the decree in Case No. 95CW122, as required by paragraph 7 of the decree in that case. Any augmentation use by exchange of the conditional water rights that are the subject of this Decree shall be pursuant to new junior exchange priorities and shall not be exchanges contemplated by the decree in Case No. 95CW122.

38. Pursuant to C.R.S. § 37-92-304(6) (2010), the Court shall retain continuing jurisdiction over the change of water rights on the question of injury to vested water rights or decreed conditional water rights of others from the date of this Decree until five years after the date of the first complete fill of the Peru Creek Reservoir, or five years after the date any water in Peru Creek Reservoir is first used for augmentation purposes, whichever date is later. Summit County will provide notice to the Division Engineer and all objectors in this case when the final five years of such retained jurisdiction period begins. Any aggrieved party to this case may request at any time within the period of retained jurisdiction a hearing before the Court for the purpose of reconsideration of the question of injury to vested water rights or decreed conditional water rights. Any such request shall be made by petition to the Court, served on all parties herein and made in good faith, stating with particularity the factual basis upon which it is asserted that injury has occurred or will occur. The party lodging the petition shall have the burden of proof to establish the prima facie facts and injury alleged in the petition. If a prima facie case of injury to vested water rights is established, the Applicant shall bear the burden to show (a) that no injury claimed by the other party has occurred or will occur, or (b) that any modification to this Decree sought by the other party is not required, or (c) that any term or condition proposed by the Applicant in response to the petition is adequate to avoid injury.

39. There was no trial in this matter and no issues were litigated. The findings of fact, conclusions of law, judgment and decree were completed as the result of substantial discussions, negotiations and compromises by, between and among the Applicant and the Opposers pertaining to all parts of the findings, conclusions, judgment and decree. It is specifically understood and agreed by the parties hereto, and found and concluded by the court, that the

acquiescence of the parties to a stipulated decree under the specific factual and legal circumstances of this contested matter and upon the numerous and interrelated compromises reached by the parties shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, stare decisis, res judicata, estoppel, laches, or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the parties hereto in any other matter, case or dispute not involving the specific water storage rights and change of water rights adjudicated herein, nor shall testimony concerning such acquiescence of any party to a stipulated decree herein be allowed in any such other matter, case or dispute. All parties stipulate and agree that they do not intend the findings, conclusions, judgment and decree to have the effect of precedent or preclusion on any factual or legal issue in any such other matter.

40. The conditional water storage right and appropriative right of exchange decreed herein are continued in full force and effect until _____, 201_. If the Applicant desires to maintain the conditional water rights thereafter, it shall file an application for finding of reasonable diligence on or before that date, or make a showing on or before then that the conditional water rights have become absolute water rights by reason of the completion of the appropriations.

41. Pursuant to Rule 9 of the Uniform Local Rules for All State Water Court Divisions, upon the sale or other transfer of the conditional water rights decreed herein, the transferee shall file with the Division 5 Water Court a notice of transfer which shall state:

- a. The title and case number of this Case No. 10CW43.
- b. The description of the conditional water right transferred;
- c. The name of the transferor;
- d. The name and mailing address of the transferee;
- e. A copy of the recorded deed.

The owner of the said conditional water right shall also notify the Clerk of the Division 5 Water Court of any change in mailing address. The Clerk shall place any notice of transfer or change of address in the case file of this Case No. 10CW43 and in the case file (if any) in which the Court first made a finding of reasonable diligence.

A Copy of this Decree shall be filed with the Division Engineer for Water Division No. 5 and with the State Engineer.

Dated: _____

BY THE COURT:

James Boyd
Water Judge
District Court, Water Division No. 5