

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: November 6, 2013

SUBJECT: **Agenda Item 13, November 19-20, 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 have negotiated 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. After it became apparent that Summit County intended a claim for instream piscatorial use, CWCB also 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. The Board first considered this acquisition at its September 2013 meeting. Additional background information was provided in staff's September 2013 meeting memo to the Board for Agenda Item 12. This is the second meeting of the Board's two-meeting process for acquisitions.

A general map is attached as **Exhibit A**; a draft of the Water Delivery Agreement is attached as **Exhibit B**.

Staff Recommendation

Staff recommends that the Board:

1. Accept the interest in water that would be provided by Summit County under the Water Delivery Agreement;
2. Determine that the amounts set forth in the Water Delivery Agreement are appropriate to preserve the natural environment to a reasonable degree on the subject reaches of the Snake River and Blue River in the time, amounts and locations provided by the Agreement;
3. Determine that the best use of the interest in water to be acquired is in the time, amounts and locations provided by the Water Delivery Agreement and confirmed in the water court decree in Case No. 5-10CW043; and
4. Authorize the CWCB Director to finalize and sign the Water Delivery Agreement.

Background

Under previous water court decrees, Summit County currently provides water to and augments depletions from County facilities, programs, and contractees. 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. 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

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 in existing decreed ISF reaches and details governing the administration of the released water will be provided in the 10CW043 water court decree. 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 was conducted at the September 2013 Board meeting, which initiated the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. Final action on the proposal will occur at this 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. No such hearing was requested.

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, and list several factors the Board may consider in its evaluation of the acquisitions. Several of the factors relate to 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. Peru Creek has a naturally reproducing brook trout fishery. The Snake River has some naturally reproducing brook trout and also is 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

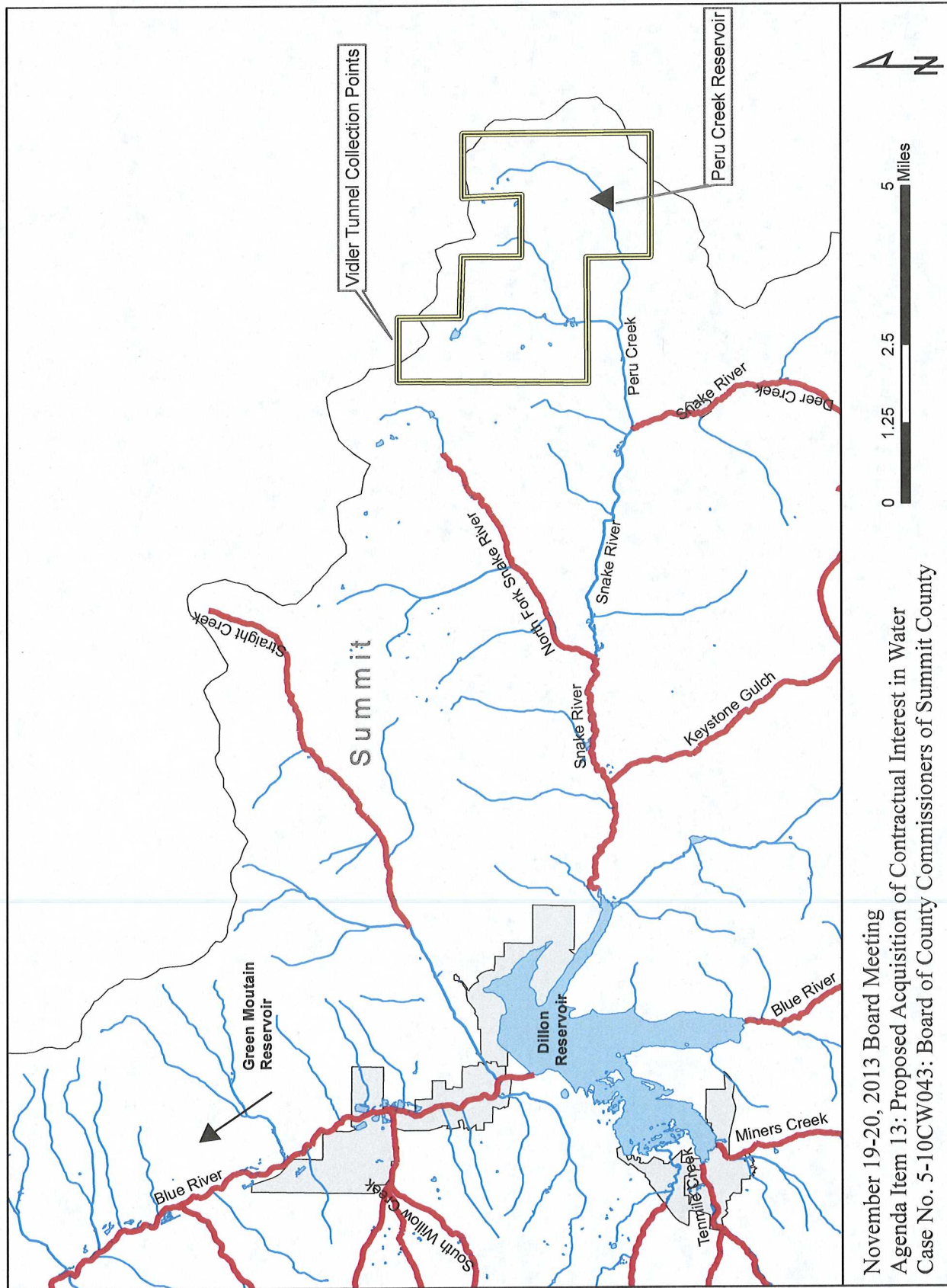
It is anticipated that this water will be diverted and used directly or by exchange by other water users downstream once it has satisfied its intended ISF beneficial use. Consequently, it does not appear that this acquisition will raise any compact issues.

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



November 19-20, 2013 Board Meeting
Agenda Item 13: Proposed Acquisition of Contractual Interest in Water
Case No. 5-10CW043: Board of County Commissioners of Summit County

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: _____