

WATER RIGHTS ACQUISITION AGREEMENT

This Water Rights Acquisition Agreement (this "Agreement"), dated this ____ day of _____, 2014 is between the COLORADO WATER CONSERVATION BOARD (the "Board"), an agency of the State of Colorado, and the COLORADO WATER TRUST (the "Trust"), a Colorado nonprofit corporation (sometimes collectively referred to herein as the "Parties").

RECITALS

- A. The Board is authorized by Section 37-92-102(3), C.R.S. (2013), to acquire from any person, such water, water rights, or interests in water as the Board determines may be required for instream flows to preserve or improve the natural environment to a reasonable degree and to take whatever action may be needed to ensure such stream flows remain in the river.
- B. Under Section 37-92-102(3), C.R.S. (2013), no person or entity other than the Board "shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points . . . for any purpose whatsoever."
- C. Founded in 2001, the Trust is a Colorado nonprofit organization that uses voluntary, market-based tools to restore and protect stream flows in Colorado. The Trust routinely works within the Board's Instream Flow Program to bring water, water rights, interests in water, and other capacity to the Stream and Lake Protection Section of the Board.
- D. The McKinley Ditch was decreed for a total of 31 cfs in Case Nos. CA1319, CA1745, and CA4742, diverting water out of the Little Cimarron River, tributary to the Cimarron and Gunnison Rivers, to irrigate ground in Montrose and Gunnison Counties.
- E. In 2008, the Trust was contacted by a landowner offering to sell an 18.75% undivided interest in the water rights decreed to the McKinley Ditch, as described more fully in Exhibit A (the "Water Rights"). In 2010, the Trust partnered with Western Rivers Conservancy ("WRC") to purchase the Water Rights and the land historically irrigated by the Water Rights (the "Land"). WRC purchased the Land and the Water Rights from Montrose Bank in 2012. In January 2014, the Trust purchased the Water Rights from WRC.
- F. The Board currently holds decreed instream flow water rights on the Little Cimarron River decreed in Case No. 84CW396 and on the Cimarron River decreed in Case No. 84CW395, but these rights are relatively junior in priority.

- G. The Little Cimarron River routinely dries up downstream of the McKinley Ditch headgate as a result of diversions by the more senior McKinley Ditch. Upstream of the McKinley Ditch, the Little Cimarron River meets the biomass criteria for a Gold Medal Fishery.
- H. The Trust and the Board recognize the economic and social value of agriculture in the Gunnison basin and in the Little Cimarron River valley. In implementing the Trust's mission of restoring stream flows, the Trust also looks for innovative solutions to optimize water use and create multi-use water projects and partnerships.
- I. The Parties intend to make a "split season" use of the Water Rights that will allow for both agricultural use and instream flow use of the Water Rights in most years, which change will require approval of the District Court in and for Water Division 4 (the "Water Court").
- J. The Board intends to accept this interest in the Water Rights, and to co-file an application with the Trust in the Water Court to add as an additional decreed use instream flow use by the Board to preserve and/or improve the natural environment to a reasonable degree in the following stream reaches (the "Instream Flow Reaches"):
 - a. Little Cimarron River from the McKinley Ditch headgate downstream to its confluence with the Cimarron River; and
 - b. Cimarron River from its confluence with the Little Cimarron River downstream to its confluence with the Gunnison River.
- K. The Trust will reserve the right to lease the Water Rights to irrigators under the McKinley Ditch or other ditches below the McKinley Ditch as part of the continued split season irrigation use of the rights.
- L. The Trust intends to remarket the historical consumptive use associated with the Water Rights when the Water Rights are used for instream flow pursuant to § 37-92-102(3), C.R.S. (2013).

NOW THEREFORE, in consideration of the mutual and dependent covenants contained herein, the parties agree as follows:

1. Purchase and Sale. The Trust agrees to sell, and the Board agrees to buy, the Grant of Flow Restoration Use attached hereto as Exhibit B (the "Instream Flow Grant"). The Purchase Price of the Instream Flow Grant shall be \$ 145,640.00
2. Closing. Closing of this transaction (the "Closing") shall occur at a location mutually agreed upon by the Parties no later than thirty (30) days following the acceptance and signature of this Agreement by the Board.

3. Closing Events. At the Closing the following shall occur, each of which shall be a condition of the others:

- (a) The Trust shall execute and deliver the Instream Flow Grant to the Board.
- (b) The CWCB shall pay the Purchase Price to the Trust by wire transfer to an account designated for this purpose by the Trust.
- (c) The Instream Flow Grant shall be recorded in the real property records of both Montrose and Gunnison Counties, with the recording fees paid by the Board.

4. Change Case. No later than December 31, 2014, the Parties shall file as co-applicants an application with the Water Court to change the use of the Water Rights to add the following uses in addition to irrigation use (the "Change Case"):

- (a) Instream flow use ("Full Season Instream Flow Use") exclusively by the Board for the entire historical season of use of the Water Rights to preserve and/or improve the natural environment to a reasonable degree in the Instream Flow Reaches;
- (b) A split-season arrangement ("Split-Season Use"), where during a single irrigation season, the Water Rights are used for irrigation in the first part of the irrigation season and then for instream flow use exclusively by the Board for the remainder of the season to preserve and/or improve the natural environment to a reasonable degree in the Instream Flow Reaches.

The Instream Flow Grant sets forth the mechanisms and criteria by which the Trust and Board will jointly agree prior to each irrigation season whether to make a Split Season Use or Full Season Instream Flow Use of the Water Rights, or to make only an irrigation use of the Water Rights in any given year.

5. Conduct of Change Case. The Parties agree that the Trust shall take the lead in prosecuting the Change Case, but shall consult with the Board's staff and attorneys throughout the Change Case and obtain the approval of the Board's staff and attorneys regarding any stipulations or decree proposed in the Change Case.

6. Costs and Expenses. The Trust shall pay for all of its own costs during the prosecution of the Change Case, including any outside engineering costs incurred by the Trust during the Change Case, subject to Section 14 below. The Board shall pay its own consultants and attorneys.

7. Substitute Water Supply Plan. After the period for filing statements of opposition in the Change Case has expired, the Board and the Trust shall co-file a

request with the State Engineer for approval of a Substitute Water Supply Plan pursuant to § 37-92-308(4), C.R.S. (2013) ("SWSP"). Subject to Section 14 below, the Trust shall bear the costs of filing and prosecuting the SWSP, except for any gauging costs and the Board's own attorneys' and consultants' costs.

8. Infrastructure and Ditch Costs. All costs associated with the physical implementation of the Full Season Instream Flow Use or Split-Season Use shall be borne by the Trust, subject to Section 14 below. Such costs include the costs of headgate modifications, diversion structure modifications, and splitter box modifications, but not the cost of any required stream gages. The Trust shall also bear the costs of any normal ditch maintenance as the owner of an 18.75% interest in the McKinley Ditch.

9. Notices. All notices required under this Agreement shall be in writing (which includes email). Notices shall be sent to the following addresses, or such other addresses the Parties may specify in writing. Notice shall be considered effective when sent.

If to the Board:

Colorado Water Conservation Board
Attn: Linda Bassi
1313 Sherman St., Room 721
Denver, CO 80203
Email: linda.bassi@state.co.us

If to the Trust:

Colorado Water Trust
Attn: Amy Beatie
1420 Ogden St., Suite A2
Denver, CO 80218
Email: abeatie@coloradowatertrust.org

10. No Assignment. Neither this Agreement, nor any of the rights or obligations hereunder may be assignable by either party without the written consent of the other.

11. No Third Party Beneficiaries. This Agreement is for the benefit of the Parties only. The Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties.

12. Amendments. This Agreement may be amended only upon the execution of each Party of written amendment.

13. No Waiver. Failure of either party at any time to require performance of any provision of this Agreement shall not limit such party's right to enforce such provision, nor shall any waiver of any breach of any provision this Agreement constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.

14. Reimbursement. The Board and Trust are parties to a Master Task Order Contract between the State of Colorado, Department of Natural Resources, Colorado Water Conservation Board, and Colorado Water Trust CMS# 55958, under which the Board pays the Trust for various authorized services. Nothing in this Agreement will preclude the Trust from seeking and obtaining payment from the CWCB for services to be performed or caused to be performed by the Trust pursuant to this Agreement or the Instream Flow Grant.

15. Complete Agreement. This Agreement, including the Instream Flow Grant, contains the entire agreement and understanding of the Parties and all prior negotiations, discussions, or agreements related thereto are merged herein.

16. Severability. If any term or provision of this Agreement is invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision.

17. Additional Assurances. Each of the parties hereto shall use best efforts to, from time to time at the request of the other party, furnish the other party such further information or assurances, execute and deliver such additional documents, instruments and conveyances, including any operational agreements needed, and take such other actions and do such other things, as may be reasonably necessary to carry out the provisions of this Agreement.

18. Survival. All of the provisions of this Agreement shall survive the Closing and shall not merge therewith.

19. Enforcement. Pursuant to Section 37-92-102(3) C.R.S. (2013), the terms of this Agreement shall be enforceable by each party as a water matter in the District Court for Water Division 4; provided, however, that before commencing any action for enforcement of this Agreement, 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 information consultation.

20. Remedies. Specific performance shall be the exclusive remedy for the failure of either party to comply with any provision of this Agreement. Both Parties waive any right to seek or collect damages for any breach of this Agreement.

The Special Provisions apply to all contracts except where noted in *italics*.

1. **CONTROLLER'S APPROVAL. CRS §24-30-202(1).** This contract shall not be valid until it has been approved by the Colorado State Controller or designee.
2. **FUND AVAILABILITY. CRS §24-30-202(5.5).** Financial obligations of the State payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.
3. **GOVERNMENTAL IMMUNITY.** No term or condition of this contract shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, CRS §24-10-101 et seq., or the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2671 et seq., as applicable now or hereafter amended.
4. **INDEPENDENT CONTRACTOR.** Contractor shall perform its duties hereunder as an independent contractor and not as an employee. Neither Contractor nor any agent or employee of Contractor shall be deemed to be an agent or employee of the State. Contractor and its employees and agents are not entitled to unemployment insurance or workers compensation benefits through the State and the State shall not pay for or otherwise provide such coverage for Contractor or any of its agents or employees. Unemployment insurance benefits will be available to Contractor and its employees and agents only if such coverage is made available by Contractor or a third party. Contractor shall pay when due all applicable employment taxes and income taxes and local head taxes incurred pursuant to this contract. Contractor shall not have authorization, express or implied, to bind the State to any agreement, liability or understanding, except as expressly set forth herein. Contractor shall (a) provide and keep in force workers' compensation and unemployment compensation insurance in the amounts required by law, (b) provide proof thereof when requested by the State, and (c) be solely responsible for its acts and those of its employees and agents.
5. **COMPLIANCE WITH LAW.** Contractor shall strictly comply with all applicable federal and State laws, rules, and regulations in effect or hereafter established, including, without limitation, laws applicable to discrimination and unfair employment practices.
6. **CHOICE OF LAW.** Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this contract. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this or any other Special Provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this contract, to the extent capable of execution.
7. **BINDING ARBITRATION PROHIBITED.** The State of Colorado does not agree to binding arbitration by any extra-judicial body or person. Any provision to the contrary in this contract or incorporated herein by reference shall be null and void.
8. **SOFTWARE PIRACY PROHIBITION. Governor's Executive Order D 002 00.** State or other public funds payable under this contract shall not be used for the acquisition, operation, or maintenance of computer software in violation of federal copyright laws or applicable licensing restrictions. Contractor hereby certifies and warrants that, during the term of this contract and any extensions, Contractor has and shall maintain in place appropriate systems and controls to prevent such improper use of public funds. If the State determines that Contractor is in violation of this provision, the State may exercise any remedy available at law or in equity or under this contract, including, without limitation, immediate termination of this contract and any remedy consistent with federal copyright laws or applicable licensing restrictions.
9. **EMPLOYEE FINANCIAL INTEREST/CONFLICT OF INTEREST. CRS §§24-18-201 and 24-50-507.** The signatories aver that to their knowledge, no employee of the State has any personal or beneficial interest whatsoever in the service or property described in this contract. Contractor has no interest and shall not acquire any interest, direct or indirect, that would conflict in any manner or

degree with the performance of Contractor's services and Contractor shall not employ any person having such known interests.

10. **VENDOR OFFSET. CRS §§24-30-202 (1) and 24-30-202.4.** *[Not Applicable to intergovernmental agreements]* Subject to CRS §24-30-202.4 (3.5), the State Controller may withhold payment under the State's vendor offset intercept system for debts owed to State agencies for: **(a)** unpaid child support debts or child support arrearages; **(b)** unpaid balances of tax, accrued interest, or other charges specified in CRS §39-21-101, et seq.; **(c)** unpaid loans due to the Student Loan Division of the Department of Higher Education; **(d)** amounts required to be paid to the Unemployment Compensation Fund; and **(e)** other unpaid debts owing to the State as a result of final agency determination or judicial action.
11. **PUBLIC CONTRACTS FOR SERVICES. CRS §8-17.5-101.** *[Not Applicable to agreements relating to the offer, issuance, or sale of securities, investment advisory services or fund management services, sponsored projects, intergovernmental agreements, or information technology services or products and services]* Contractor certifies, warrants, and agrees that it does not knowingly employ or contract with an illegal alien who will perform work under this contract and will confirm the employment eligibility of all employees who are newly hired for employment in the United States to perform work under this contract, through participation in the E-Verify Program or the Department program established pursuant to CRS §8-17.5-102(5)(c), Contractor shall not knowingly employ or contract with an illegal alien to perform work under this contract or enter into a contract with a subcontractor that fails to certify to Contractor that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this contract. Contractor **(a)** shall not use E-Verify Program or Department program procedures to undertake pre-employment screening of job applicants while this contract is being performed, **(b)** shall notify the subcontractor and the contracting State agency within three days if Contractor has actual knowledge that a subcontractor is employing or contracting with an illegal alien for work under this contract, **(c)** shall terminate the subcontract if a subcontractor does not stop employing or contracting with the illegal alien within three days of receiving the notice, and **(d)** shall comply with reasonable requests made in the course of an investigation, undertaken pursuant to CRS §8-17.5-102(5), by the Colorado Department of Labor and Employment. If Contractor participates in the Department program, Contractor shall deliver to the contracting State agency, Institution of Higher Education or political subdivision a written, notarized affirmation, affirming that Contractor has examined the legal work status of such employee, and shall comply with all of the other requirements of the Department program. If Contractor fails to comply with any requirement of this provision or CRS §8-17.5-101 et seq., the contracting State agency, institution of higher education or political subdivision may terminate this contract for breach and, if so terminated, Contractor shall be liable for damages.
12. **PUBLIC CONTRACTS WITH NATURAL PERSONS. CRS §24-76.5-101.** Contractor, if a natural person eighteen (18) years of age or older, hereby swears and affirms under penalty of perjury that he or she **(a)** is a citizen or otherwise lawfully present in the United States pursuant to federal law, **(b)** shall comply with the provisions of CRS §24-76.5-101 et seq., and **(c)** has produced one form of identification required by CRS §24-76.5-103 prior to the effective date of this contract.

SPs

Effective 1/1/09

[END OF SPECIAL PROVISIONS]

Contract Routing Number

THE PARTIES HERETO HAVE EXECUTED THIS CONTRACT

* Persons signing for Contractor hereby swear and affirm that they are authorized to act on Contractor's behalf and acknowledge that the State is relying on their representations to that effect.

<p style="text-align: center;">CONTRACTOR COLORADO WATER TRUST</p> <p>By: Amy Beatie Title: Executive Director</p> <hr style="border: 0; border-top: 1px solid black; margin: 10px 0;"/> <p style="text-align: center;">*Signature</p> <p>Date: _____</p>	<p style="text-align: center;">STATE OF COLORADO John Hickenlooper, GOVERNOR</p> <p style="text-align: center;">Colorado Water Conservation Board</p> <hr style="border: 0; border-top: 1px solid black; margin: 10px 0;"/> <p style="text-align: center;">By: James Eklund, Director Signatory avers to the State Controller or delegate that a Statutory Violation has not occurred and will not occur before the Effective Date or that a waiver has been requested under Fiscal Rules</p> <p style="text-align: center;">Date: _____</p>
<p>2nd Contractor Signature if Needed By: INSERT-Name of Authorized Individual Title: INSERT-Official Title of Authorized Individual</p> <hr style="border: 0; border-top: 1px solid black; margin: 10px 0;"/> <p style="text-align: center;">*Signature</p> <p>Date: _____</p>	<p style="text-align: center;">LEGAL REVIEW John W. Suthers, Attorney General</p> <p>By: _____ Signature - Assistant Attorney General</p> <p style="text-align: center;">Date: _____</p>

ALL CONTRACTS REQUIRE APPROVAL BY THE STATE CONTROLLER

CRS §24-30-202 requires the State Controller to approve all State Contracts. This Contract is not valid until signed and dated below by the State Controller or delegate. Contractor is not authorized to begin performance until such time. If Contractor begins performing prior thereto, the State of Colorado is not obligated to pay Contractor for such performance or for any goods and/or services provided hereunder.

STATE CONTROLLER

David J. McDermott, CPA

By: _____

INSERT-Name of Agency or IHE Delegate-Please delete if contract will be routed to OSC for approval

Date: _____

Dated this _____ day of _____, 2014.

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this ____ day of _____, 2014, by Amy Beatie, as Executive Director of the Colorado Water Trust, a Colorado nonprofit corporation.

Witness my hand and official seal.

Notary Public

My commission expires: _____

STATE OF COLORADO)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me this ____ day of _____, 2014, by _____, as _____ of the Colorado Water Conservation Board, an agency of the State of Colorado.

Witness my hand and official seal.

Notary Public

My commission expires: _____

EXHIBIT A**WATER RIGHTS**

AN UNDIVIDED 18.75% INTEREST IN AND TO THE
FOLLOWING WATER RIGHTS DECREED TO THE MCKINLEY
DITCH:

<u>PRIORITY NUMBER</u>	<u>AMOUNT OF WATER</u>
56	12.17 C.F.S.
125	3.125 C.F.S.
128	3.125 C.F.S.
285	12.58 C.F.S.

as previously changed by decree in Case Nos. 05CW132 and 12CW52.