



## COLORADO

### Colorado Water Conservation Board

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**TO:** Colorado Water Conservation Board Members

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

**DATE:** July 2, 2014

**AGENDA ITEM:** Agenda Item 21, Proposed Acquisition of Interest in Water on the Little Cimarron River

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**Background:** The Colorado Water Trust (“Trust” or “CWT”) is offering the Colorado Water Conservation Board (“CWCB” or “Board”) an opportunity to acquire an interest in senior water rights in Water Division 4 for instream flow (ISF) use. The CWT’s offer letter and summary are attached as **Exhibit A**. These water rights could be used by CWCB to restore streamflows and preserve/improve the natural environment of two Wild Trout managed streams while also maintaining traditional agricultural values in the Gunnison Basin. The Little Cimarron River originates in the Big Blue Wilderness and flows north to the Cimarron River and then into the Gunnison River immediately downstream from Morrow Point Reservoir in Gunnison and Montrose Counties. The Board holds an ISF water right on over 16 miles of the upper Little Cimarron River to preserve a high-quality fishery, but the ISF water right does not extend to the confluence with the Cimarron River due to water availability limitations. Farther downstream, the Board also holds an instream flow water right on nearly 4 miles of the Cimarron River to preserve a rainbow and brown trout fishery. See Vicinity Map attached as **Exhibit B**. This transaction is distinctive and significant because it proposes a permanent, partial irrigation/partial ISF split-season use of the water - a model that could serve future agriculture and conservation partnerships in Colorado.

**Staff recommendation:** Pursuant to Rule 6b. of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (ISF Rules), 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.** The initial presentation of this proposal provides an opportunity for the Board and the public to identify questions or concerns that Staff or the CWT will address at this or a subsequent meeting.

### 1. The Board’s Water Acquisition Procedures

ISF Rule 6. governs the Board’s procedures for acquiring water for ISF use. Section 37-92- 102(3), C.R.S. (2013) 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 its July 2014 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 September 2014 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 request must be filed within twenty days of this Board meeting. ISF Rule 6e. requires the Board to evaluate the appropriateness of the acquisition and to determine how best to utilize the acquired water to preserve or improve the



natural environment. ISF Rule 6. lists several factors the Board may consider in its evaluation of the acquisition that are addressed in this memo.

As required by statute, CWCB staff has requested recommendations from the Colorado Division of Parks and Wildlife (CPW), the U.S. Department of Agriculture and the U.S. Department of Interior. The CPW's recommendation letter is attached as **Exhibit C**. Pursuant to ISF Rule 6m.(1), CWCB staff has provided notice of the proposed acquisition to all persons on the appropriate ISF Subscription Mailing Lists and provided notice to the State Engineer's Substitute Supply Plan Notification List for Water Division 4.

## **2. Background**

In 2008, the Trust was contacted by John Shepardson, a local Gunnison basin landowner, offering to sell his 18.75% undivided interest in senior irrigation water rights decreed to the McKinley Ditch. He had subdivided his property and was marketing the land separately in 35 acre lots. In 2010, the Trust entered into a partnership with Western Rivers Conservancy (WRC) to try to purchase Mr. Shepardson's shares in the McKinley Ditch water rights and the land historically irrigated by the water rights. Subsequently, Montrose Bank foreclosed on Mr. Shepardson's property and the water rights. In 2012, WRC completed the purchase of the land and water rights from Montrose Bank. In January 2014, the Trust purchased the water rights from WRC for \$500,000.00. The Trust is now offering these shares in the McKinley Ditch water rights to CWCB for ISF use to preserve and improve approximately 9 miles of the Little Cimarron and Cimarron Rivers.

## **3. Water Right Proposed for Acquisition**

The water rights proposed for acquisition include 1.5 shares of the 8 shares decreed to the McKinley Ditch, conveyed to the Trust by Special Warranty Deed dated January 6, 2014. WRC also executed and recorded a dry-up covenant for the property. The McKinley Ditch diverts from the Little Cimarron River approximately 11.5 miles southeast of the Town of Cimarron. The Little Cimarron River is tributary to the Cimarron River, which flows north into the Gunnison River immediately downstream from Morrow Point Reservoir. The McKinley Ditch is decreed for a total of 31 cfs for irrigation use, of which the Trust owns 5.8125 cfs ("CWT McKinley Shares"). In addition to the original decrees, there have been two water court cases involving the McKinley Ditch. In Case No. 4-05CW132, the water court granted a change in point of diversion for the McKinley Ditch to correct a clerical error in the headgate location. In Case No. 4-12CW052, the water court confirmed the McKinley Ditch water rights owners' historical practice of sharing all priorities, allowing for pro-rata diversions, which had been established by a 1948 operating agreement among the owners.

The water rights offered by the Trust and proposed for acquisition by CWCB for ISF use are summarized in the following table. The Trust owns an undivided 18.75% in each of the following stream priorities:

Table 1: McKinley Ditch Water Rights Offered by the Colorado Water Trust for ISF Use

<b>Decree Number</b>	<b>Stream Priority</b>	<b>Total Decreed Amount</b>	<b>CWT Ownership (18.75%)</b>	<b>Adjudication Date</b>	<b>Appropriation Date</b>
CA1319	56	12.17 cfs	2.2819 cfs	3/28/1904	9/1/1886
CA1745	125	3.125 cfs	0.5859 cfs	5/8/1913	5/10/1905
CA1745	128	3.125 cfs	0.5859 cfs	5/8/1913	5/10/1906
CA4742	285	12.58 cfs	2.3588 cfs	4/21/1941	5/1/1912
<b>TOTAL</b>		<b>31 cfs</b>	<b>5.8125 cfs</b>		

#### 4. Reaches of Stream Proposed for Use of the Acquired Rights

The reaches of stream proposed for use of the CWT McKinley Shares consist of three segments which, in total, extend from the headgate of the McKinley Ditch downstream approximately 9 miles to the confluence with the Gunnison River. See **Exhibit B**.

**Reach 1** (Little Cimarron River): This segment includes the reach of stream historically affected by full diversions of the CWT McKinley Shares, and extends from the headgate of the McKinley Ditch downstream to the point of historical return flow at a location just upstream from the Perrin Ditch, a distance of 3.3 miles.

**Reach 2** (Little Cimarron River): This segment includes the reach of stream historically affected by the consumptive use attributable to the CWT McKinley Shares, and extends from the point of historical return flow above the Perrin Ditch to the confluence with the Cimarron River, a distance of approximately 2.1 miles.

**Reach 3** (Cimarron River): This segment also includes the reach of stream historically affected by the consumptive use attributable to the CWT McKinley Shares, and extends from the confluence of the Cimarron and Little Cimarron Rivers to the confluence with the Gunnison River, a distance of approximately 3.7 miles.

#### 5. Existing ISF Water Rights

The CWCW currently holds ISF water rights on the following segments of stream (Table 2). There are no ISF rights decreed on the Little Cimarron River downstream from the headgate of the Butte Ditch, which includes the proposed “Reach 2” for this acquisition. See **Exhibit B**.

Table 2: Existing ISF Water Rights

Case No.	Stream	Segment	Length (miles)	Amount	Approp. Date
4-84CW396	Little Cimarron River	headwaters to headgate Butte Ditch	16.4	2 cfs (1/10-12/31)	5/4/1984
4-84CW398	Cimarron River	confl Ltl Cimarron to confl Gunnison R.	3.7	16 cfs (1/10-12/31)	5/4/1984

#### 6. Natural Flow Regime

The Little Cimarron River originates at an elevation of nearly 14,000 feet in the Uncompahgre/Big Blue Wilderness near Uncompahgre Peak, and flows north approximately 23 miles to its confluence with the Cimarron River. The drainage area is approximately 75 square miles, and most of the basin lies above 7,500 feet in elevation. The mean basin elevation is 9,720 feet. With the exception of a few ranches and irrigated meadows, the basin is undeveloped. Most of the upper basin is comprised of public lands, and vehicle access is limited to a few County and Forest Service roads. There are no stream gages, no on-stream reservoirs, and no appreciable in-basin storage. Streamflow is primarily from snowmelt and local precipitation. Peak flows typically occur in May and June, and drop off quickly in July-September most years. Tributaries include Firebox Creek, Van Boxel Creek, East Fork, Rabbit Creek and Stumpy Creek.

From the headwaters, the stream flows through steep terrain for roughly 12 miles before the valley begins to open up near Johnson Park. Approximately 4 miles downstream from Johnson Park,

irrigation ditches divert significant flows during the summer months. Below the Butte Ditch, the Little Cimarron crosses irrigated meadows where the stream is typically dried up below two large headgates and re-watered by tributaries, springs and return flows just upstream from the Perrin Ditch near the confluence with Stumpy Creek. The Little Cimarron then runs parallel to Highway 50 for about one mile before joining with the Cimarron River upstream from the town of Cimarron.

## **7. Existing Natural Environment**

The Little Cimarron River is classified as a small stream (between 10-20 feet wide). Recent fishery surveys conducted by CPW indicate that the upper Little Cimarron ISF reach protects an excellent population of wild rainbow trout and brook trout. CPW currently manages the stream under CPW's Wild Trout management classification. The Cimarron River is classified as a medium stream (between 20-35 feet wide) and the ISF water right protects populations of wild rainbow trout, brown trout, bluehead suckers and speckled dace. The Cimarron River is also managed under the Wild Trout management classification.

While at the present, no electrofishing data exists for the section of the Little Cimarron between the McKinley Ditch headgate and the confluence with the Cimarron River, such data collection could be performed if necessary. Communications with CPW biologists have indicated that it is reasonable to assume that since a fishery exists both upstream and downstream of this short reach of the Little Cimarron, flow restoration would provide habitat for fish to populate this section of stream. Further, CPW has opined that when adequate flows exist in the Little Cimarron (i.e., during spring runoff), fish do utilize this habitat when it is available. Habitat connectivity is a longstanding management objective of CPW and flow restoration will aid in meeting this objective.

## **8. Proposed Method of Acquisition**

Under this proposal, the Trust is offering to sell to CWCB a Grant of Flow Restoration Use, conveying a permanent right to use the CWT McKinley Shares for ISF use for a purchase price of \$145,640.00. Under the proposed Grant, CWT would retain ownership of the water rights and CWCB would purchase a permanent contractual interest to use the CWT McKinley Shares for ISF use. The proposal contemplates a permanent split-season use of the water between irrigation and ISF uses. The proposed Acquisition Agreement and Grant of Flow Restoration Use agreement are attached as attached as **Exhibit D** and **Exhibit E**, respectively.

## **9. Proposed Use of the Acquired Water**

WRC currently owns all of the land historically irrigated by the CWT McKinley Shares, and is marketing the land for agricultural uses. The Trust, as owner of the water rights, plans to work with WRC, local entities and prospective buyers to allow the water to continue to be used for irrigation on the property consistent with applicable CWT/CWCB agreements.

CWCB and the Trust recognize the economic and social value of agriculture in Colorado, in general, and in the Gunnison basin and Little Cimarron River valley, specifically. One of the primary goals of this proposed acquisition is to preserve agricultural uses while also restoring streamflow in the Little Cimarron River. To achieve that goal, this transaction contemplates several scenarios under which the CWT McKinley Shares may be used for both ISF use and continued irrigation of the WRC Property. These scenarios include:

- A. Partial Season Irrigation/ISF Use (split-season use):** irrigation would occur only through either June or July, which would allow for both early agricultural use and later ISF use of the CWT McKinley Shares in one season. This is the preferred use of the CWT McKinley Shares.



**B. Irrigation Use for a Full Season** may occur if:

- 1) projected climatological conditions are such that there is no need to use the CWT McKinley Shares for instream flows; or
- 2) there is a land management issue that requires Full Season Irrigation, such as re-vegetation of the historically irrigated land; or
- 3) there is a pressing situation that requires Full Season Irrigation, including, but not limited to, establishing a new crop.

**C. Instream Flow Use for a Full Season** may occur if:

- 1) projected climatological conditions are such that there is a need for the use of the CWT McKinley Shares for Full Season Instream Flow Use; or
- 2) circumstances make irrigation impractical, including unavailability of a lessee for irrigation; or
- 3) there is a pressing situation that requires Full Season Instream Flow Use, including, but not limited to, unusually low projected stream flows.

The Trust is proposing to manage and coordinate all aspects of the irrigation use of the Shares, including the switch from irrigation to ISF use. The Board will have no operational responsibilities and incur no direct costs for irrigation use of the CWT McKinley Shares. The Trust also is offering to act as an agent for CWCB for the administration and monitoring of ISF use under the CWT McKinley Shares. The Trust will provide an annual report to the Board regarding the use of the CWT McKinley Shares each year as well as any actions taken by the Trust as the Board's agent. Additionally, the Trust and CWCB will file a joint application to change the CWT McKinley Shares to add ISF use by CWCB, and the Trust will take the lead in prosecuting that application. More details of the Trust's proposal are included in the proposed Acquisition Agreement and the Grant of Flow Restoration Use agreement, attached as **Exhibit D** and **E**.

During this 2014 irrigation season, the CWT McKinley Shares will not be used for irrigation because of groundwater studies that Bishop Brogden Associates (BBA) and the Trust are conducting on the WRC Property that require water to be removed from the property and the land to be dried up for this irrigation season. The purpose of the studies is to assess the effect of ground water on the overall historical consumptive use and water budget of the CWT McKinley Shares.

The Grant of Flow Restoration Use Agreement sets forth the mechanisms and criteria by which the Trust and Board will jointly decide each year whether to make a use of the acquired water rights other than Partial Season Irrigation/ISF Use. The Trust will coordinate all aspects of the irrigation use, including the switch from irrigation to ISF use.

When CWCB uses the CWT McKinley Shares for ISF use, the acquired water will be used in the following manner:

**Reach 1** (Little Cimarron River from McKinley Ditch headgate to point of historical return flow just upstream from Perrin Ditch): In this reach, the Little Cimarron River was historically affected by full diversion of the CWT McKinley Shares. CWCB would bypass the acquired water rights at the McKinley Ditch headgate, in amounts up to the full diversion (5.8125 cfs, subject to volumetric limits) less ditch loss, to restore flows to previously dewatered sections of the Little Cimarron River and to preserve the natural environment to a reasonable degree.

**Reach 2** (Little Cimarron River from point of historical return flow above Perrin Ditch to confluence with Cimarron River): In this reach, the Little Cimarron River was historically affected by the

consumptive use attributable to the CWT McKinley Shares. CWCB would use the historical consumptive use, as quantified by BBA, to preserve the natural environment to a reasonable degree.

**Reach 3** (Cimarron River from confluence of Cimarron and Little Cimarron Rivers to confluence with Gunnison River): In this reach, the Cimarron River also was historically affected by the consumptive use attributable to the CWT McKinley Shares. In addition, CWCB holds an existing ISF water right in this segment of stream for 16 cfs year-round. CWCB would use the historical consumptive use from the acquired water rights, as quantified by BBA, to preserve and improve the natural environment both by bringing the existing ISF up to its decreed amount and by increasing the amount of water used for instream flows.

At times when CWCB uses the acquired water for ISF use, the Trust reserves the right to bring about, by sale, lease or otherwise, the beneficial use of the historical consumptive use of the CWT McKinley Shares as fully consumable water downstream of the ISF reaches pursuant to section 37-92-102(3), C.R.S. (2013), subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

## **10. Historical Use and Historical Return Flows**

The McKinley Ditch is decreed for a total of 31 cfs. Diversion records obtained from the Division of Water Resources (DWR) and Colorado Decision Support System show a continuous pattern of use for the period 1974-2013. Diversions typically begin in early May, with diversions as early as April in several years. The earliest first day of use was March 31, 2004. Maximum diversions occur in July and typically end in late October. Occasionally, diversions extend into November.

BBA has prepared a report that evaluates the historical use and historical return flows for the CWT McKinley Shares for the period 1974-2013. The CWT McKinley Shares were historically used to flood irrigate approximately 194.5 acres of pasture grass on the WRC property. The average annual in-priority farm headgate deliveries to the WRC property for the study period equaled 771.5 acre-feet per year. In Case No. 4-12CW052, the court limited the acreage that can be irrigated by each shareholder under various call conditions, in addition to confirming the practice of sharing the Ditch water rights.

BBA also evaluated the historical return flows and consumptive use attributable to the McKinley Shares. Historical return flows from the McKinley Shares accrue to the Little Cimarron River approximately 3.3 miles downstream from the McKinley diversion, at a point located just upstream from the Perrin Ditch. The average annual in-priority consumptive use from the McKinley Shares was determined to be 272.9 acre-feet/year.

## **11. Location of Other Water Rights**

There are several other water rights located on the Little Cimarron River with priorities that intermingle with the McKinley Ditch priorities (See Table 3). The senior Rives No. 2 Ditch is located approximately 5 miles downstream of the McKinley Ditch, and the Collier Ditch is located approximately 1.75 miles downstream. Both the Butte and Vandenburg Ditches are located upstream from the McKinley Ditch.

Table 3 - Relative Priority of Select Little Cimarron Water Rights

<b>Relative Priority</b>	<b>Structure Name</b>	<b>Decreed Amount</b>	<b>CWT McKinley Shares</b>
1	Rives No. 2	0.61 cfs	

2	McKinley #56	12.17 cfs	2.3123 cfs
3	Collier #61, 123	8.45 cfs	
4	McKinley #125	3.125	0.5938 cfs
5	McKinley #128	3.125	0.5938 cfs
6	Vanderburg #150, 160	3.65	
7	Butte & Butte Ext #148	19.17	
8	McKinley #256	12.58	2.3902 cfs

The most senior water right on the Little Cimarron River is the Rives No. 2 Ditch, which is decreed for 0.61 cfs for irrigation use. According to the District 62 Water Commissioner, Luke Reschke, the Rives Ditch water right is small and is always satisfied by return flows from the Little Cimarron or Stumpy Creek. During the period 2002-present, there were no senior downstream water rights that completely curtailed the McKinley Ditch water rights; however, there were times when McKinley diversions were limited to just the senior #56 priority. The Collier Ditch is senior to a portion of the McKinley rights and can call out the junior priorities (#125, 128, 285). The Collier Ditch is located approximately 1.75 miles downstream from the McKinley Ditch headgate, but upstream of the location where historical return flows from the McKinley Shares accrue to the stream.

## 12. Material Injury to Existing Rights

CWCB and the Trust will file a joint application in water court to add ISF use to the CWT McKinley Shares. The water court will verify and approve the historical consumptive use and impose terms and conditions in the decree to ensure that no existing water rights will be injured from the change. Terms and conditions that may be required to prevent injury to other water rights could include limitations on irrigated acreage, diversions, and season of use, and maintenance of historical return flows.

Additionally, the CWCB holds an ISF water right on the Cimarron River for 16 cfs, year-round, which could be impacted by the loss of return flows from the acquired water right during the winter months. BBA reports the decrease in stream flow due to a reduction in lagged non-irrigation season return flow as ranging from 0.12 cfs in April of the Partial Irrigation through July scenario, to 0.22 cfs in February of the Partial Irrigation through June scenario. The maximum non-irrigation season depletion to the Cimarron River ISF right would be 0.22 cfs, which amounts to 1.37 percent of the CWCB's 16 cfs water right. CWCB staff has reviewed streamflow records from the existing USGS gage on the Cimarron River (09127000) to determine whether the proposed depletions would cause streamflow to drop below 16 cfs, the decreed rate of the ISF water right. Gage records indicate that the average mean monthly streamflow for the Cimarron River during the winter months exceeds 30 cfs, and the minimum mean monthly flow has never dropped below 16 cfs. The BBA report also identifies potential depletions to the Cimarron ISF right during the irrigation season under the Partial Irrigation (Split Season) Use scenarios. However, those depletions occur in April, May and June when streamflows tend to be highest.

## 13. Stacking Evaluation

CWCB does not currently hold ISF rights on the Little Cimarron between the Butte Ditch and the confluence with the Cimarron River; therefore, no stacking evaluation is required for this reach of stream. On the Cimarron River, the CWCB holds a year-round ISF water right for 16 cfs. In this reach of stream, the CWT McKinley Shares would be used to preserve and improve the natural environment, and may be combined, or "stacked," with the existing 16 cfs ISF water right to achieve a greater level of protection for the natural environment.

#### **14. Effect of Proposed Acquisition on Any Relevant Interstate Compact Issue**

The first three priorities for the McKinley Ditch (56, 125 and 126) were decreed as absolute water rights in the 1920s and are “pre-compact” water rights. Based on the information currently available, the proposed acquisition does not appear to directly affect any interstate compact. However, to maintain the consumptive use associated with the CWT McKinley Shares and assist the State in assuring full use of Colorado’s compact entitlements, when the CWT McKinley Shares are not used for irrigation, the Trust will pursue remarketing the historical consumptive use for additional consumptive beneficial use to downstream water users.

#### **15. Effect on Maximum Utilization of Waters of the State**

The CWT McKinley Shares have historically been used solely for irrigation. Under this proposal, the CWT McKinley Shares potentially will achieve three beneficial uses in one season - irrigation, instream flow, and a downstream consumptive beneficial use. Such uses will each contribute to the maximum utilization of the waters of the state. The CWT McKinley Shares were historically used to irrigate pasture grass, and most likely will continue to be used for partial season irrigation in most years. Consistent with the water court change decree, the CWT McKinley Shares may also be used for partial year ISF use by CWCB to preserve and improve the natural environment. Additionally, when the water is used for instream flows, CWT intends to remarket the historical consumptive use attributable to the CWT McKinley Shares for downstream beneficial consumptive use. This proposed acquisition preserves agricultural consumptive use and will maximize use of the CWT McKinley Shares for both consumptive and nonconsumptive purposes.

#### **16. Availability for Downstream Use**

During a year in which the McKinley Shares are used for instream flow, the Trust reserves the right and will make efforts to bring about beneficial use of the historical consumptive use of the McKinley Ditch water right as fully consumable water downstream of the Cimarron River ISF reach, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

#### **17. Administrability**

Using the subject water rights for ISF purposes will require the CWT McKinley Shares to be left in the stream at the McKinley Ditch headgate and administered past other downstream diversion structures. BBA has identified the need for potential modifications to two existing diversion structures, as well as additional measuring devices to enable the water commissioner to administer this change. (1) The McKinley Ditch diversion currently consists of a temporary earthen dam constructed in the Little Cimarron River channel to back water into the ditch, and in mid-to late summer, the earthen dam sweeps the stream. (2) The Collier Ditch diversion, located about 1.75 miles downstream from the McKinley Ditch, consists of a 3’ concrete dam across the Little Cimarron that diverts water into the ditch, resulting in a downstream dry-up point. The dam has the ability to bypass water, but there is no way to measure the amount of water passed at the structure. The Trust has initiated conversations with the water commissioner and shareholders in both the McKinley and Collier Ditches. CWCB staff anticipates working with the Trust, DWR and the shareholders to ensure the CWT McKinley Shares left in the river are measured to the satisfaction of the water commissioner

and shareholders. Preliminary discussions with the DWR indicate that this proposal will be administrable. DWR also indicated its agreement that this proposal will be administrable by approving a temporary lease on August 19, 2013 of the CWT McKinley Shares to CWCB for ISF use under section 37-83-105(3), C.R.S. (2013). The approval established terms and conditions under which the lease could be implemented with no injury to other water rights.

#### **18. Potential Benefits of This Proposed Acquisition**

During times when the acquired water is available for ISF use, the CWT McKinley Shares will be bypassed at the ditch headgate, and portions will remain in the stream and be protected through approximately 9 miles of river, down to the confluence with the Gunnison River. The proposed acquisition could increase stream flows in the Little Cimarron River during the irrigation season by up to 5.8125 cfs (subject to pro rata shares and volumetric limits) in Reach 1. In Reaches 2 and 3, located downstream from the point of historical return flows, stream flows could be increased by the historical consumptive use attributable to the McKinley Shares. As a result, the Little Cimarron River is expected to remain a live stream during the irrigation season, and no longer experience dry-up conditions below headgates. Habitat connectivity is a long-standing management objective of CPW and flow restoration will aid in meeting this objective.

#### **19. Cost to Complete Transaction**

There are various costs that may be associated with this transaction; however, because the Trust will retain ownership of the CWT McKinley Shares, it will take the lead in paying for costs of litigation and engineering related to a joint CWCB/CWT water court application to change the CWT McKinley Shares to add ISF use, and it will also operate the lease for irrigation use. Under full season irrigation or split-season use scenarios, the Board will have no operational responsibilities and bear no direct costs for irrigating the historically irrigated ground. CWCB will be responsible for its own litigation costs.

The Trust also will pay any costs associated with the physical implementation of the Full Season Instream Flow Use or Partial Irrigation (Split-Season) Use. Such costs may include the costs of headgate modifications, diversion structure modifications, and splitter box modifications. The Trust will also pay the costs of any normal ditch maintenance as the owner of an 18.75% interest in the McKinley Ditch. Subject to the availability of funds, CWCB will be responsible for the installation and maintenance of any gages required by the Division Engineer or the court decree for implementation of this change.

The Trust also is proposing to act as an agent for CWCB for administration, monitoring, protection and reporting for the McKinley Shares, and, similar to the City of Boulder water right donation, will provide an annual report to CWCB regarding the use of the CWT McKinley Shares each year and any actions taken by the Trust as CWCB's agent. The Trust will pay for all costs incurred when acting as CWCB's agent.

#### **20. Policy 19 Funding Request**

At the Board meeting at which staff will recommend that the Board take action on this proposal, staff will recommend that the Board approve an expenditure of \$145,640.00 from funds available to the Board under section 37-60-123.7, C.R.S. (2013) to purchase the Grant of Flow Restoration Use. Information required by the CWCB's Financial Policy 19, which the CWCB revised in March 2014, for consideration of such a request is set forth below.

## **A. Financial Aspects of the Proposal**

The CWT acquired the McKinley Shares from WRC in January 2014 at a cost of \$500,000.00. Under this proposed acquisition, CWT will convey to CWCB a Grant of Flow Restoration Use (Grant) to use the CWT McKinley Shares for ISF use in the Little Cimarron and Cimarron Rivers. CWT based the \$145,640.00 purchase price for the Grant upon a June 12, 2014 valuation analysis conducted by WestWater Research (WestWater). Because this type of transaction is unusual, there are no transactions similar to it in Colorado for comparison purposes. Consequently, WestWater's analysis relies upon a crop budget model that estimates the reduction in agricultural income that will result from this proposed transaction.

The crop budget approach is used to estimate the agricultural value of water in its current use and intended future use by determining irrigation water's contribution to net revenue from agricultural production. Water value estimates derived using this approach provide a measure of the financial compensation required by a producer to ensure that net farm income prior to a water right transaction is equivalent to net farm income following the transaction. WestWater's analysis estimated the agricultural value of the CWT McKinley Shares under the split-season (partial irrigation/part ISF) scenario, comparing current ranch operations to split-season scenario ranch operations. In determining the amount of agricultural income that would be reduced by the split-season scenario, WestWater estimated diminished grass hay yield and grazing capacity that would result from this proposal.

This Policy 19 funding request is limited to the purchase price of the Grant. In March 2013, the Board authorized staff to pay some of the costs of evaluating, transferring and monitoring water rights offered to the CWCB for ISF use by entering into a contract with an entity to perform tasks related to those evaluations and monitoring activities. In August 2013, the State approved a Master Task Order Contract between the CWCB and CWT, under which the Board agreed to pay the Trust for various future authorized services. Under the provisions of the Master Contract, CWCB has paid some limited expenses incurred for the McKinley Ditch transaction after the date the contract was executed. The source of funds to cover the remaining project costs will be provided by the Trust (through private fundraising efforts or donated or in-kind services), or through future authorizations under the Master Contract.

## **B. Potential Impacts to Agriculture of Proposed Acquisition and Balance Between Consumptive and Nonconsumptive Needs and Uses on Subject Stream**

Policy 19 requires that: (1) when considering the acquisition of irrigation water rights, the CWCB must consider the potential impact to agriculture of the acquisition; and, (2) when considering recommendations from the CWCB staff for expenditures of funds for water acquisitions to improve the natural environment to a reasonable degree, the CWCB must consider the balance between consumptive and nonconsumptive needs and uses of water on the subject stream.

This proposal encourages and enables continuation of agricultural use by this water right on the historically irrigated land. The project will allow for a split season of use for both irrigation and instream flow, and also consideration of full-year use for either irrigation or instream flow depending on a number of factors. Therefore, the impacts to agriculture are anticipated to be small.

The previous owner of the subject McKinley Ditch shares intended to sell his property in 35-acre parcels and was marketing his McKinley Ditch shares separately to potential buyers. After years on the market with no prospective buyers, Montrose Bank foreclosed on the land and water. WRC purchased the land and water from the bank, and the Trust purchased the water rights from Western Rivers. It is unclear how the McKinley Shares might have been used if not purchased by WRC and the

Trust, but it is quite possible that the historically irrigated land could have been completely dried up and the water sold to other interests in the Gunnison River basin. Under this water acquisition proposal, the McKinley Shares will remain on the land and continue to be used for irrigation early in the season. Later in the season, the McKinley Shares will be returned to the stream and used to restore streamflow in the Little Cimarron River. This permanent, partial irrigation/partial ISF split season use of the water is distinctive because it acknowledges and preserves the value of irrigated agriculture as well as the value of restoring flow to a local river. Similarly, it only slightly changes the balance between consumptive and nonconsumptive needs and uses on the Little Cimarron River, and most likely preserves that balance more evenly than the previously contemplated sales of the McKinley shares would have.

### **C. Required Information from Colorado Parks and Wildlife**

Because the acquired water will be used to improve the natural environment to a reasonable degree on the Cimarron River ISF reach, CPW has provided the following information specific to that ISF reach required by Policy 19:

- 1. Degree to which the acquired water will add useable habitat to riffles, pools and runs within the subject ISF reach and amount of additional useable area:** The anticipated addition of 1.0 to 2.0 cfs to the conditions (in a riffle) expected in the existing CWCB 16 cfs ISF reach would result in a 0.03 ft increase in average and maximum depth, a 2% increase in wetted perimeter, and a 0.05 ft/sec increase in the modeled average velocity. Additional data collection would be required to further quantify the benefits of the acquisition to other stream habitat types (pools, runs or glides).
- 2. Where applicable, the amount of protection from high temperatures and low oxygen levels in hot summer months that the acquired water will provide:** CPW is not aware of any temperature or dissolved oxygen issues in the Cimarron River ISF reach.
- 3. An analysis of the degree to which the additional water resulting from the acquisition: (1) benefits the natural environment, and (2) does not result in hydraulic conditions that are detrimental to the aspects of the natural environment intended to be benefited by the acquired water:** The degree to which the acquired water is anticipated to benefit the natural environment is addressed in C.1 above. The increment of additional flow is not of sufficient magnitude for CPW to have any concerns with respect to stream hydraulics or habitat degradation.

#### **Exhibits:**

- A - CWT Offer Letter and Summary
- B - Vicinity Map
- C - CPW recommendation letter
- D - Proposed Acquisition Agreement
- E - Proposed Grant of Flow Restoration Use Agreement



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David Robbins, Emeritus

June 17, 2014

Colorado Water Conservation Board  
1313 Sherman Street, Room 721  
Denver, Colorado 80203

Dear Members of the Board:

In 2008, the Colorado Water Trust ("the Trust") was approached by a land and water right owner on the McKinley Ditch in Gunnison and Montrose Counties. His land was for sale in 35-acre lots and he was marketing his water rights separately. Although the Trust and the seller were unable to reach a deal at that time, the Trust later partnered with another conservation group, Western Rivers Conservancy, and in 2012 completed purchase of the land and water rights from Montrose Bank, as both the property and water rights were in foreclosure. These water rights were historically diverted from the Little Cimarron River, a tributary to the Gunnison River, and used to irrigate pasture grass. Today, if this proposed project is successful, those water rights will continue to irrigate those pastures, but they will also restore streamflows on the Little Cimarron.

Right now you are engaged in a statewide effort to develop a plan and tools to meet the needs of growth, agriculture, and the environment. One of the Trust's missions is to find new, market-based solutions that meet multiple needs. We believe this transaction meets your goals and ours: it recognizes the value of irrigated agriculture and proposes a permanent partial irrigation/partial instream flow split season use of the water; a groundbreaking model that could serve future agriculture and conservation partnerships in Colorado.

The Trust is pleased to offer to the CWCB an interest in the McKinley Ditch's senior water rights on the Little Cimarron River. The Trust asks the CWCB to formally consider this offer during the Board's July 2014 meeting.

The benefit from this water right is substantial: the CWCB holds one instream flow water right upstream of the McKinley headgate and a second right downstream on the Cimarron River. The Little Cimarron is almost completely dry below the McKinley headgate, even in water plentiful years. Obtaining this right for the instream flow program will cause no injury, will help re-water a dry portion of the stream, will preserve and improve the natural environment and will help to maintain the agricultural heritage of the area.



I will attend the CWCB meeting in July and will be prepared to describe the proposed transaction in more detail. We look forward to working with the CWCB to complete this transaction.

Sincerely,

A handwritten signature in black ink, appearing to read "Amy Beatie", is displayed on a light gray background with a subtle grid pattern.

Amy Beatie  
Executive Director

Attachments

- CWT Offer Summary (*With attachments provided electronically*)
- Map
- Proposed Acquisition Agreement
- Proposed Grant of Flow Restoration Use Agreement



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**Proposed Water Right Acquisition for Instream Flow Use  
Pursuant to Section 37-92-102(3) CRS**

**OFFER SUMMARY**

**Colorado Water Trust Project No. 1004-0004  
McKinley Ditch, CWT Shares  
Little Cimarron River  
Water Division 4, Montrose and Gunnison Counties**

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**Introduction**

The Colorado Water Trust (Trust or CWT) is offering the Colorado Water Conservation Board (CWCB or Board) an opportunity to acquire an interest in senior water rights in Water Division 4 for instream flow use. These water rights could be used by CWCB to restore streamflows and preserve/improve the natural environment of two Wild Trout managed streams while also maintaining traditional agricultural values in Southwestern Colorado. The Little Cimarron River is a small stream that originates in the Big Blue Wilderness and flows north to the Cimarron River and then into the Gunnison River immediately downstream from Morrow Point Reservoir in Gunnison and Montrose Counties. The Board holds an instream flow (ISF) water right on over 16 miles of the upper Little Cimarron River to preserve a high quality fishery, but the ISF right ends at the Butte Ditch due to water availability limitations. Farther downstream, the Board also holds an instream flow water right on nearly 4 miles of the Cimarron River to preserve a rainbow and brown trout fishery. This transaction is unique because it proposes a permanent partial irrigation/partial instream flow split season use of the water, a model that could serve future agriculture and conservation partnerships in Colorado.

In 2008, the Trust was contacted by Mr. Shepardson, a local Gunnison basin landowner, offering to sell his 18.75% undivided interest in senior irrigation water rights decreed to the McKinley Ditch. He had subdivided his property and was marketing the land separately in 35 acre lots. In 2010, the Trust entered in to a partnership with Western Rivers Conservancy (WRC) to purchase Mr. Shepardson's shares in the McKinley Ditch water rights as well as the land historically irrigated by the water rights. In 2012, WRC completed the purchase of the land and water rights from Montrose Bank, as both the Shepardson property and the water rights were in foreclosure. In January 2014, the Trust acquired the water rights from WRC for \$500,000.00.

The Trust is now offering these shares in the McKinley Ditch water rights (CWT McKinley Shares) to CWCB for instream flow use to preserve and/or improve approximately 9 miles of the Cimarron and Little Cimarron Rivers.

The McKinley Ditch diverts water from the Little Cimarron River approximately 1.2 miles downstream from the Butte Ditch. The Little Cimarron River routinely dries up downstream of the McKinley Ditch headgate as a result of diversions by the ditch. Upstream of the Butte Ditch, the Little Cimarron River meets the biomass criteria for a Gold Medal Fishery and is managed by Colorado Parks and Wildlife (CPW) as a “Wild Trout” water.

Under this proposal, the Trust is offering to sell to CWCB a Grant of Flow Restoration Use providing the permanent right to use the CWT McKinley Shares for instream flow use. The purchase price for the Grant of Flow Restoration Use is \$145,640.00, and was determined through a valuation performed by WestWater Research. Under the proposed Grant, CWT would retain ownership of the water rights and CWCB would purchase a permanent contractual interest to use the CWT McKinley Shares for instream flow use.

The Trust intends to manage and coordinate all aspects of the irrigation use of the Shares, including the switch from irrigation to instream flow use. The Trust is also offering to act as an agent for CWCB for the administration and monitoring of instream flow use under the McKinley Shares. The Trust will provide an annual report to the Board regarding the use of the McKinley Shares each year as well as any actions taken by the Trust as the Board's agent. Additionally, the Trust will join with CWCB in filing the application to change the McKinley Shares to add instream flow use by CWCB. The Trust is proposing to take the lead in prosecuting the Water Court change case, but will consult with the Board's staff and attorneys throughout the proceedings and will obtain approval from the Board's staff and attorneys regarding any proposed stipulations or decrees. The full details of the Trust's proposal are included in the proposed Acquisition Agreement (Exhibit A) and the Grant of Flow Restoration Use agreement (Exhibit B).

In order to preserve agricultural uses while also restoring streamflow in the Little Cimarron River, this proposal contemplates several scenarios to use the CWT McKinley Shares. These scenarios include:

1. **Partial Season Irrigation Use** (split-season use) extending through either June or July, which allows for both early agricultural use and later instream flow use of the CWT McKinley Shares in one season. This is the preferred use of the CWT McKinley Shares.

2. **Full Season Irrigation Use** may occur if:
  - a. projected climatological conditions are such that there is no need to use the CWT McKinley Shares for instream flows; or
  - b. there is a land management issue that requires Full Season Irrigation, such as re-vegetation of the historically irrigated land; or
  - c. there is a pressing situation that requires Full Season Irrigation, including, but not limited to, establishing a new crop.
3. **Full Season Instream Flow Use** may occur if:
  - a. projected climatological conditions are such that there is a need for the use of the CWT McKinley Shares for Full Season Instream Flow Use; or
  - b. circumstances make irrigation impractical, including unavailability of a lessee for irrigation; or
  - c. there is a pressing situation that requires Full Season Instream Flow Use, including but not limited to unusually low projected stream flows.

During the 2014 irrigation season, the CWT McKinley Shares will not be used for irrigation. BBA and the Trust are conducting groundwater studies on the WRC Property which require water to be removed from the property and the land to be dried up for the 2014 irrigation season.

#### **Water Rights Proposed for Acquisition**

The water rights proposed for acquisition include 1.5 shares of the 8 shares decreed to the McKinley Ditch, conveyed to the Trust by Special Warranty Deed dated the 6<sup>th</sup> day of January, 2014 (Exhibit C). WRC also executed and recorded a Dry Up covenant for the property (Exhibit C1)

The McKinley Ditch diverts from the Little Cimarron River approximately 11.5 miles SSE of the town of Cimarron (Map 1). The Little Cimarron River is tributary to the Cimarron River, which flows north into the Gunnison River immediately downstream from Morrow Point Reservoir. The McKinley Ditch is decreed for a total of 31 cfs for irrigation use, of which the Trust owns an undivided 18.75% totaling 5.8125 cfs.

The water rights offered by the Colorado Water Trust and proposed for acquisition by CWCB for instream flow use are summarized in the following table. The decrees are attached as Exhibit D.

**Table 1: McKinley Ditch Water Rights Offered by the Colorado Water Trust for ISF Use**

DECREE NUMBER	STREAM PRIORITY	AMOUNT		ADJUD. DATE	APPROP. DATE
		Total Decreed	Colorado Water Trust Ownership (18.75%)		
CA1319	56	12.17 cfs	2.2819 cfs	3-28-1904	9-1-1886
CA1745	125	3.125 cfs	0.5859 cfs	5-8-1913	5-10-1905
CA1745	128	3.125 cfs	0.5859 cfs	5-8-1913	5-10-1906
CA4742	285	12.58 cfs	2.3588 cfs	4-21-1941	5-1-1912
<b>TOTAL</b>		<b>31 cfs</b>	<b>5.8125 cfs</b>		

Bishop Brogden Associates (BBA) has prepared a report that evaluates the historical use and historical return flows for the CWT McKinley Shares, describes water use under the four proposed operational scenarios, and includes proposed terms and conditions to prevent injury to other water rights. CWT McKinley Shares were used to flood irrigate 194.5 acres of pasture grass, and the average annual in-priority farm headgate deliveries to the property for the period 1974-2013 were 771.5 acre-feet. Historical return flows accrue to the Little Cimarron River approximately 3.3 miles downstream from the diversion structure. BBA determined the average annual in-priority consumptive use from the McKinley Shares to be 272.9 acre feet/year. The Preliminary Technical Report prepared for the Trust by BBA is attached as Exhibit E.

Attachments (Provided Electronically):

Map 1

Exhibit A – Proposed Acquisition Agreement

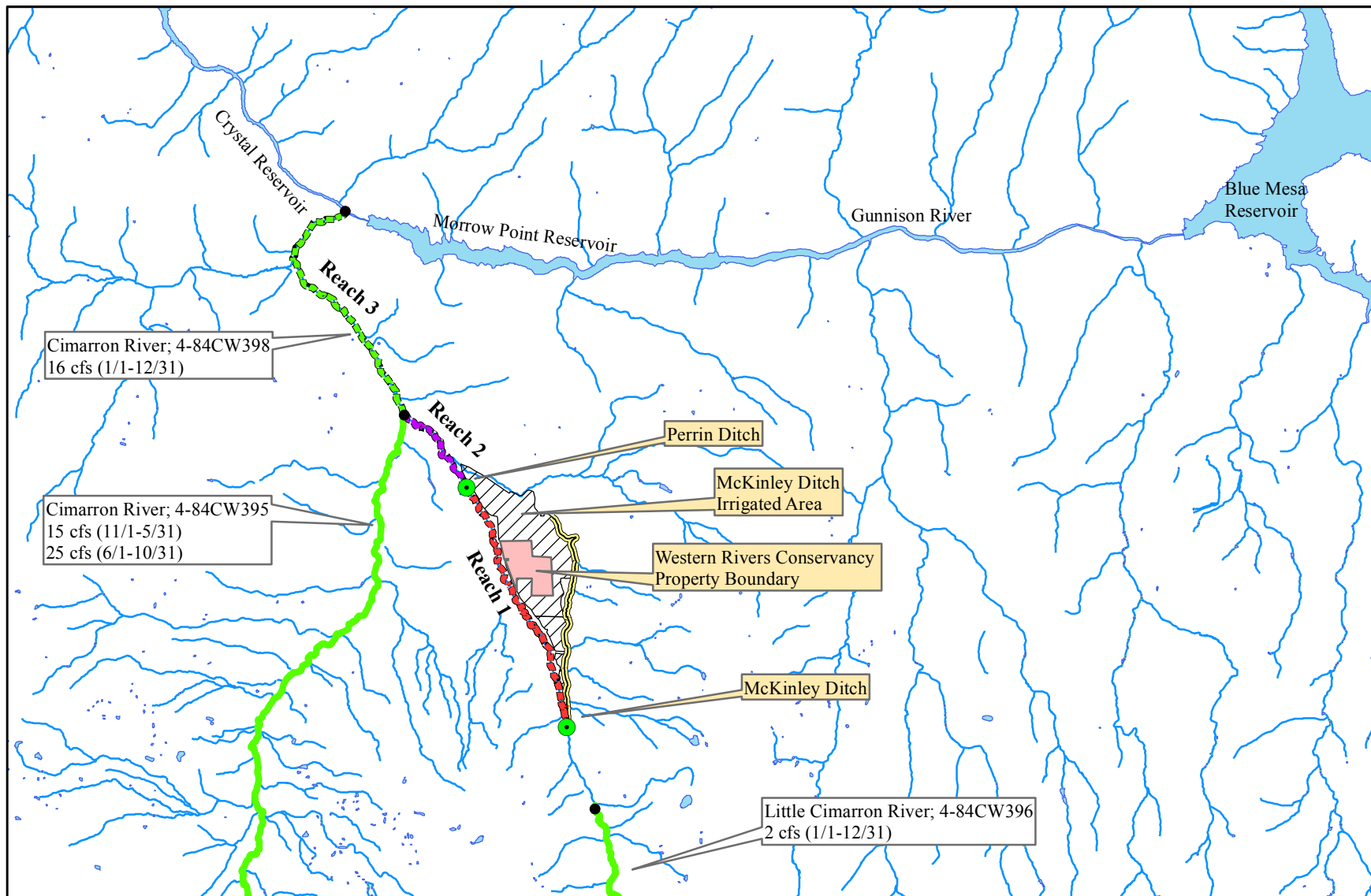
Exhibit B – Proposed Grant of Flow Restoration Use Agreement

Exhibit C – McKinley Ditch Deed

Exhibit C1 – Dry-up Covenant

Exhibit D – McKinley Ditch Decrees

Exhibit E – BBA Preliminary Technical Report



July 16-17, 2014 CWC Board Meeting  
 Agenda Item 20: Proposed Acquisition of Interest in Water  
 Water Division 4: Little Cimarron River

0 1.25 2.5 5 Miles







## COLORADO

### Parks and Wildlife

Department of Natural Resources

Water Resources Section - Wildlife and Natural Resources Branch  
6060 Broadway  
Denver, CO 80216

25 June 2014

Ms. Linda Bassi  
Section Chief, Stream and Lake Protection Section  
Colorado Water Conservation Board  
1313 Sherman, Room 723  
Denver, CO 80203

SUBJ: Proposed Acquisition of Interest in Water on the Little Cimarron River - McKinley Ditch

Dear Linda:

The following is Colorado Parks and Wildlife's (CPW) analysis and recommendations regarding the possible acquisition of an interest in the McKinley Ditch water right for instream flow purposes on the Little Cimarron River and Cimarron River in Water Division 4. CPW has been working with CWCB staff and staff of the Colorado Water Trust (CWT) on this project for the past several months in anticipation of the commencement of the formal acquisition process before the Colorado Water Conservation Board (CWCB). This formal process is going to be initiated at the July meeting of the CWCB in Rangely, Colorado. The Board Memorandum prepared by staff describes in detail the nature of the proposed acquisition and the Board's Instream Flow Program. Rule 6 and Policy 19 describe the acquisition process and the requirements of CPW's consultations regarding such acquisitions. For the purposes of the July, 2014 CWCB meeting, CPW is of the opinion that the proposed acquisition should proceed as proposed by staff because it will have immediate and significant benefits to the natural environment in both the Little Cimarron River and the Cimarron River.

#### General Information

The CWCB staff has requested CPW to evaluate the benefits and possible impacts to the natural environment of the Little Cimarron River and Cimarron River associated with the acquisition of an interest in the McKinley Ditch water right. The CWCB currently holds instream flow water rights on both of these streams, decreed in case numbers 4-84CW396 and 398, to preserve the natural environment to a reasonable degree. The Little Cimarron River decree covers 16.4 miles of stream from the headwaters to the Butte Ditch headgate with a 2 cfs year-round flow; the Butte Ditch headgate is upstream of the McKinley Ditch headgate. The Cimarron River decree covers 3.7 miles of stream from the confluence with the Little Cimarron to the Gunnison River with a year-round flow of 16 cfs. These stream segments are in Hinsdale, Montrose, and Gunnison Counties near Cimarron, CO. The proposed acquisition of the McKinley Ditch water right will provide flow to three reaches; two on the Little Cimarron River (above and below the point of historic return flows) and the entire segment of the Cimarron River described above. As stated above, the Little Cimarron River below the Butte Ditch does not have an existing instream flow water right; this is most likely due to water availability considerations that were recognized at the time of the CWCB's appropriation - these considerations were most likely brought to light in consultations with the Division Engineer for Water Division 4 prior to the time that CWCB initiated the appropriation of water for instream flow uses. Both segments that would benefit from the acquisition of the McKinley Ditch therefore fall within this reach of stream where prior water availability issues existed due to existing points of diversion.

Bob Broscheid, Director, Colorado Parks and Wildlife  
Parks and Wildlife Commission:

Bill Kane, Chair • Mark Smith, Vice-Chair • Chris Castilian, Secretary  
Gaspar Perricone • James Pribyl • John Singletary • Robert W. Bray  
Jeanne Horne • James Vigil • Dean Wingfield • Michelle Zimmerman





### **Biologic Data**

CPW and consultants for the CWT have conducted several field investigations of the natural environment in the Little Cimarron and Cimarron Rivers during recent years. CPW electrofished the Little Cimarron River in 2009 and CWT consultants (Flywater) sampled in 2013. One Flywater site was established in the Little Cimarron River above the McKinley Ditch headgate; the second Flywater site was established in the vicinity of the CPW site at the lower end of the Little Cimarron River. At the present time, no fishery information exists for the Little Cimarron River between the McKinley Ditch diversion and Stumpy Creek. This reach of the Little Cimarron coincides with the reach of stream that was previously severely dewatered by diversions (including diversions by the McKinley Ditch) and with the reach of stream that will directly benefit from the CWT proposal.

These fishery surveys show that the upper Little Cimarron River has an excellent fishery consisting of wild rainbow trout and brook trout - meeting the biomass criterion for Gold Medal designation. The lower Little Cimarron has a more diverse fishery consisting of brown and rainbow trout, speckled dace, and bluehead suckers. Both segments of the Little Cimarron are not stocked by CPW and as such are managed in the "Wild Trout" management designation category.

Both recent (2009) and historic (1975) fisheries data for the Cimarron River show that the fish population is similar in species composition and population structure to that of the lower Little Cimarron River - a diverse fishery consisting of brown and rainbow trout, speckled dace, and bluehead suckers.

CPW is of the opinion that during times of high flow such as during the peak of the hydrograph, it is reasonable to expect that fish utilize the available habitat in the unsampled reach of the Little Cimarron. As the flows in this section drop off (either naturally or due to diversion), the fish either move out of the section or are currently lost to mortality. CPW is also of the opinion that if sustained flows are restored to this section of the river as a result of the proposed acquisition, it is reasonable to expect that fish will not only utilize this habitat but will establish resident populations there. As this acquisition process moves forward, if the Board feels that it is necessary to obtain fishery information in this reach of the Little Cimarron, CPW will commit to obtaining fishery data for this reach of the river.

Another biologic consideration that relates to the effect and/or benefit of this water right acquisition is the issue of habitat connectivity. The previously dry section of the Little Cimarron River served as a significant disconnection of the aquatic habitat. The effect of this disconnect is partially illustrated in the differences in the fish population upstream and downstream of the dry reach. The acquired water will serve as a bridge to re-connect these fish populations to one another. Generally speaking, habitat connectivity as it relates to fisheries is a statewide and region-wide goal.

### **Hydraulic/Cross Section Data**

CWT consultants have provided CPW with three cross sections that they have collected to support the analyses needed to evaluate this proposed acquisition. CPW is in possession of the original cross section used to support the original instream flow recommendations on both the Little Cimarron River and the Cimarron River. All three cross sections are useful when examining the relative merits of the proposed acquisition of water from the McKinley Ditch. At this point in time, our opinion is that, given the fact that this section of the Little Cimarron River during the typical irrigation season is dry or nearly dry and that the proposed acquisition would add water to the segment during this season, the proposed acquisition will benefit the stream. It also appears from my review of the cross sections that the flows that are being proposed as a result of the acquisition (contained in the CWT engineering) will not be of sufficient magnitude to create hydraulic conditions detrimental to any specific life stages of fish or any other aspect of the natural environment.



As for the effect of the proposed acquisition on the downstream segment of the Cimarron River, CPW has reviewed the existing cross section information for this downstream segment where the additional water (the consumptive use component only) will have a small incremental benefit on the existing aquatic environment.

If, as the acquisition process moves forward, it is determined that any additional cross section or hydraulic modeling is needed to support the Board's deliberative processes or the ensuing water court case, CPW will collect and analyze such data.

### **Water Right Analysis**

The CWT proposal is comprised of three options or scenarios that have varying effects on the instream flow water rights in the vicinity of the McKinley Ditch headgate. These scenarios include (1) a partial season irrigation and instream flow use split, (2) a full season irrigation use, and (3) a full season instream flow use. Obviously, these scenarios all result in different amounts of water being delivered to the stream for instream flow use. Under all of the scenarios, the benefits to the stream flow occur during the irrigation season. As is the case with every irrigation water right change, there are small reductions in delayed return flows that are felt by the stream during the non-irrigation season. The magnitude of these changes in return flows also varies amongst the three scenarios. The following discussion is, therefore, somewhat general in its precision to which the existing instream flow water rights and natural environment will benefit from the CWT McKinley Ditch proposal.

### **Little Cimarron River**

The Little Cimarron River downstream of the McKinley Ditch diversion is divided into two reaches in the CWT proposal. The upper most reach is the section of stream that is above the point of return flow from the irrigation diversions; this section, therefore feel the effects of the entire amount of water diverted from the stream. The lower reach is that section of the Little Cimarron that only feels the effect of the reduction of consumptive use. It is CPW's understanding of the proposal that the proposed acquisition could provide up to approximately 3.5 cfs to the upper reach and up to about 2 cfs to the lower reach. As stated above, these flow benefits will accrue to a stream reach that was previously dry or nearly dry during most years.

As stated above and as stated in the CWT engineering analyses, the Little Cimarron River has long felt the effects of a cluster of irrigation diversions in the lower portion of the watershed. The additional water provided to the stream as a result of the proposed acquisition will have an immediate positive impact on the fishery and natural environment. The proposed acquisition will re-wet a previously dry stream channel and will re-connect aquatic habitats that were previously disconnected by the dry reach of stream. Further, because some lands previously irrigated by the McKinley Ditch will continue to be irrigated, the delayed winter season return flows are therefore minimized and the stream will continue to experience the positive effects from this continued irrigation practice (the provision of winter season base flows - an important beneficial aspect of irrigation to the fishery). Further, from a terrestrial wildlife perspective, because this acquisition does not result in a widespread dry-up of irrigated meadows, there are terrestrial wildlife benefits that will result from the unique provisions of this acquisition proposal.

### **Cimarron River**

According to the CWT engineering analyses, approximately 35% of the average annual headgate diversions are consumed by the irrigated crops. This 35% (or a flow ranging from about 0.7 cfs to about 2 cfs) will potentially flow through the Little Cimarron reaches and down into the Cimarron River instream flow reach. Preliminary hydrologic analyses indicate that the flow in the Cimarron River

rarely falls below the 16 cfs CWCB instream flow appropriation, so in this segment, we are potentially looking at an "improve the natural environment" situation. To evaluate this aspect of the proposal, CPW reviewed the existing cross section data that we have on file to determine if the additional water will improve the hydraulic conditions of the stream thus providing an increment of improvement to the natural environment. The addition of 1.0 to 2.0 cfs to the conditions (in a riffle) that we would expect at the existing CWCB instream flow (16 cfs) results in a 0.03 ft increase in average and maximum depth, a 2% increase in wetted perimeter, and a 0.05 ft/sec increase in the modeled average velocity. Additional data collection would be required to further quantify the benefits of the acquisition to other stream habitat types (pools, runs or glides).

In addition to the above discussion of physical habitat parameters, CWCB Policy 19 requires CPW to opine on the effect that the proposed acquisition might have on temperature, low dissolved oxygen (or other water quality parameters), alluvial/riparian benefits, and if there are any aspects of the acquisition that might be detrimental to the natural environment or the habitat. At this point in time, CPW is not aware of any temperature or dissolved oxygen issues in the subject stream reach. The riparian and upland habitat issues were discussed above in the context of continued irrigation and return flow patterns. Finally, the increment of additional flow is not of sufficient magnitude for CPW to have any concerns with respect to stream hydraulics or habitat degradation.

#### CPW Recommendation

Based on the above described review of the existing data and analysis thereof, CPW recommends that the CWCB move forward with the acquisition of an interest in the McKinley Ditch to assist in the preservation and/or improvement of the natural environment of the Little Cimarron River and Cimarron River. Acceptance and operation of the water right for the McKinley Ditch will re-wet and re-connect aquatic habitats in the Little Cimarron and provide a small incremental improvement in the water supply available to the existing Cimarron River instream flow water right and to the natural environment in that reach. CPW will continue to assist the CWCB staff and the staff of the Attorney General's Office to make this project a success. As stated above, CPW will also provide any additional data and/or analyses to the staff as they deem necessary to bring this acquisition process to closure. I will be in attendance at the July, 2014 CWCB meeting in Rangely to address any questions that the Board might have relating to this recommendation.

If you have any questions regarding the above recommendation or the data I reviewed to reach any conclusions contained in this letter, please contact me at 303-291-7260.

Sincerely,



Jay W Skinner  
Colorado Parks and Wildlife  
Instream Flow Program Coordinator

CC: Dorsey, Gerlich, Alves, Davis



## **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](mailto: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](mailto: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;"><b>CONTRACTOR</b> <b>COLORADO WATER TRUST</b></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;"><b>STATE OF COLORADO</b> <b>John Hickenlooper, GOVERNOR</b></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;"><b>LEGAL REVIEW</b> 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.

## **GRANT OF FLOW RESTORATION USE**

This GRANT OF FLOW RESTORATION USE (this "Grant") dated this \_\_\_ day of \_\_\_\_, 2014, is between the COLORADO WATER TRUST (the "Trust"), a Colorado nonprofit corporation, and the COLORADO WATER CONSERVATION BOARD (the "Board"), an agency of the State of Colorado.

1. The Water Rights. The following water rights were decreed to the McKinley Ditch that is located or irrigates land in the Counties of Montrose and Gunnison, and were conveyed to the Trust by Special Warranty Deed dated the 6<sup>th</sup> day of January, 2014. The Trust owns an undivided 18.75% in each of the following priorities ("Water Rights"):

- Priority 56, decreed in Civil Action No. 1319, District Court, Montrose County, March 28, 1904 for 12.17 cfs
- Priority 125, decreed in Civil Action No. 1745, District Court, Montrose County, May 8, 1913 for 3.125 cfs
- Priority 128, decreed in Civil Action No. 1745, District Court, Montrose County, May 8, 1913 for 3.125 cfs
- Priority 285, decreed in Civil Action No. 4742, District Court, Montrose County, April 21, 1941 for 12.58 cfs

The Water Rights were subsequently changed by decree in Case No. 05CW132 dated May 30, 2008 and by decree in Case No. 12CW52 dated February 15, 2013, District Court, Water Division 4.

2. Grant. Subject to the covenants and reservations hereinafter contained, the Trust, for due and sufficient consideration, the receipt and sufficiency of which are hereby acknowledged, does hereby grant to the Board the permanent right to use the Water Rights to preserve and/or improve the natural environmental to a reasonable degree (the "Grant") in the following stream reaches for the following purposes:

- a. Instream flow use ("Full Season Instream Flow Use") exclusively by the Board for the entire irrigation season to preserve and/or improve the natural environment to a reasonable degree in the following stream reaches (the "Instream Flow Reaches"):
  - i. Little Cimarron River from the McKinley headgate downstream to its confluence with the Cimarron River.
  - ii. Cimarron River from its confluence with the Little Cimarron River downstream to its confluence with the Gunnison River.

- 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 instream flow use exclusively by the Board for the remain of the irrigation season to preserve and/or improve the natural environment to a reasonable degree in the Instream Flow Reaches.

3. Change Case. The parties recognize the need to obtain a change of the Water Rights to allow the desired use of the Water Rights for instream flow purposes as contemplated herein. Pursuant to the Water Rights Acquisition Agreement dated \_\_\_\_\_, 2014 between the parties regarding the Water Rights, the parties will file as co-applicants an application for such a change with the District Court in and for Water Division No., 4 (the "Change Case"). This Grant shall be subject to any terms and conditions in the Change Case decree. If the Change Case is denied, in whole or in part, for any reason, or is conditioned in such a manner as to prevent the purposes of this Grant from being fulfilled, the parties shall consult with each regarding future use of the Water Rights.

4. Annual Operation. The Parties agree that Split-Season Use is the preferred use of the Water Rights in any given year. Recognizing that Split-Season Use may not be feasible or desirable by the Parties in every year, the Trust and the Board agree that under the following circumstances, full season irrigation or Full Season Instream Flow Use may occur under the following circumstances (the "Special Circumstances"):

- a. Full season irrigation may occur if the Parties agree that:
  - i. projected climatological conditions are such that there is no need to use the Water Rights to preserve and/or improve the natural environment in the Instream Flow Reaches; or
  - ii. there is a land management issue that requires full season irrigation, such as re-vegetation of the historically irrigated land; or
  - iii. there is a pressing situation that renders full season irrigation necessary, including, but not limited to, establishing a new crop.
- b. Full Season Instream Flow Use may occur if the parties agree that:
  - i. projected climatological conditions are such that there is a need for the use of the Water Rights for Full Season Instream Flow Use to preserve and/or improve the natural environment in the Instream Flow Reaches; or

- ii. circumstances make irrigation impractical, including unavailability of a lessee for irrigation; or
- iii. there is a pressing situation that renders Full Season Instream Flow Use necessary, including but not limited to unusually low projected stream flows.

The Parties agree to consult before April 1 of each year to determine whether any Special Circumstances exist and to discuss the use of the Water Rights during the upcoming irrigation season.

5. Irrigation Use. Under either the full season irrigation or Split-Season Use scenario, the Trust shall have the right to lease the Water Rights for the period in question to irrigators under the McKinley Ditch or other ditches below the McKinley Ditch for irrigation use, for such consideration and on such terms as the Trust desires. The Board shall have no responsibilities and bear no costs for such irrigation use of the Water Rights. Under the Split-Season Use scenario, the Trust shall coordinate all aspects of the irrigation use, including the switch from irrigation to instream flow use.

6. Administration. Pursuant to 2 CCR 408(2)(10), the Board hereby authorizes the Trust to be the CWCB's agent for administration and monitoring of the instream flow use of the Water Rights. If the stream flow at any monitored point falls below the decreed instream flow amount provided by the Water Rights, the Trust shall notify the staff of the Board. Upon consultation with the Trust and the Division of Water Resources, the staff of the Board shall place a call for administration of the Water Rights if appropriate. The Trust shall provide an annual report to the Board regarding the use of the Water Rights each year and the actions taken by the Trust as the Board's agent. Such report shall be due on or before December 31st of each year.

7. Injury with Mitigation. If the Board and Trust successfully obtain a decree in the Change Case, the Board commits to use the Water Rights, as changed, for instream flow purposes to preserve and/or improve the natural environment to a reasonable degree, consistent with the terms of the decree and this Grant, and to take all reasonable steps to enforce those rights for instream flow purposes and protect them from injury. If the Board receives a request to consider injury with mitigation for the portion of the Little Cimarron River and/or Cimarron River benefited by the change of the Water Rights, the Board shall promptly inform the Trust of such request, consult with the Trust regarding such request, and not take any action that, in the Trust's reasonable judgment, would impair the benefits to the Little Cimarron River and/or Cimarron River resulting from the Trust's Grant to the Board of the Water Rights and their change to add instream flow uses.

8. Stream Gages. Subject to the availability of funds, the Board shall be solely responsible for the installation and maintenance of any stream gages within



the Instream Flow Reaches that are required by law or needed to exercise the instream flow uses added to the Water Rights. The Board shall consult with the Trust regarding the type, location, and other aspects of the gaging.

9. Reserved Rights. The Grant is subject to the following rights that are expressly reserved to the Trust:

- a. the right to use the Water Rights for irrigation purposes pursuant to Section 4 above; and
- b. the right to bring about, by sale, lease or otherwise, the beneficial use of the historical consumptive use of the Water Rights as fully consumable water downstream of the Instream Flow Reaches, pursuant to 37-92-102(3), C.R.S, subject to such terms and conditions as the Water Court deems necessary to prevent injury to vested water rights or decreed conditional water rights.

10. Enforcement. The parties agree that the exclusive venue and jurisdiction of any action pertaining to the interpretation or enforcement of this Grant shall be in the District Court, Water Division No. 4, to the extent permitted by law. If jurisdiction or venue is not proper in the water court, it is agreed that the exclusive venue and jurisdiction of any action pertaining to the interpretation or enforcement of this Grant shall be in the District Court of Gunnison County, Colorado. Before commencing any action for enforcement of this Grant, 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. Specific performance shall be the exclusive remedy for failure of either party to comply with any provision of this Grant.

IN WITNESS WHEREOF, the Trust has executed this Grant on the date set forth above.

COLORADO WATER TRUST

COLORADO WATER CONSERVATION  
BOARD

By: \_\_\_\_\_

By: \_\_\_\_\_

Amy Beatie

Name: \_\_\_\_\_

Executive Director

Title: \_\_\_\_\_

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:\_\_\_\_\_