



## COLORADO

Colorado Water  
Conservation Board

Department of Natural Resources

1313 Sherman Street  
Denver, CO 80203

P (303) 866-3441  
F (303) 866-4474

John Hickenlooper, Governor

Mike King, DNR Executive Director

James Eklund, CWCB Director

**TO:** Colorado Water Conservation Board Members

**FROM:** Linda Bassi, Section Chief and  
Kaylea White, Senior Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** November 20, 2014

**AGENDA ITEM:** #22. Proposed Acquisition of Contractual Interest in Water on St. Vrain Creek in Case No. 1-12CW91 (Application of St. Vrain and Left Hand WCD and County of Boulder)

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### Background

The County of Boulder and CWCB are working toward a water delivery agreement for instream flow ("ISF") use on St. Vrain Creek. The new ISF reach would extend from approximately three miles southeast and downstream from Lyons, Colorado to the Longmont Wastewater Treatment Plan outfall in the Town of Longmont, Colorado, a distance of approximately seven miles.

St. Vrain and Left Hand Water Conservancy District and the County of Boulder ("Applicants") obtained a water court decree for a conditional water right for beneficial uses, including minimum instream flow, in Case No. 2001CW262. The CWCB was not a party in that case. Applicants are currently seeking diligence on that conditional water right in pending water court Case No. 2012CW091, to which CWCB is an opposer. CWCB opposed the case to protect its exclusive authority to hold ISF water rights. Applicants prefer to work with CWCB and donate a contractual interest in the water right into CWCB's Instream Flow Program rather than challenge CWCB's exclusive authority. Staff and Boulder County propose to enter into a water delivery agreement to: (1) resolve CWCB's opposition in the water court case and (2) to continue cooperation between CWCB and Boulder County on instream flow water matters in the St. Vrain Creek Basin.

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

### Staff Recommendation

Pursuant to ISF Rule 6b, the Board's consideration of this proposal at this meeting will initiate the 120-day period for Board review. **No formal action is required at this time.** Staff believes that the proposed acquisition will benefit the stream and the ISF Program. This initial presentation of the proposal provides an opportunity to the Board and the public to identify questions or concerns for Staff or Boulder County to address at this or a subsequent meeting.



## **CWCB's Role and the Water Right**

Applicant's Case No. 2012CW091 is set for a 2-day trial to begin on June 22, 2015. CWCB filed a Statement of Opposition in this case because Applicant's decreed use to "maintain minimum flows in St. Vrain Creek between Lake No. 4 and the outflow of the Longmont wastewater treatment plant located in the SW ¼ of the NE ¼ of Section 11, Township 2 North, Range 69 West of the 6<sup>th</sup> P.M. in the amount of 5 cfs from November 1 through March 31 and June 1 through September 30, and 100 cfs for a two or three day period in May or June" conflicts with the CWCB's exclusive authority to appropriate instream flow and natural lake level water rights. Section 37-92-102(3) C.R.S. provides: "...no other person or entity (other than the CWCB) 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." This water delivery agreement is proposed in part to resolve CWCB's opposition and to reach settlement in the water court case and to achieve continuing cooperation between CWCB and Boulder County on instream flow water matters in the St. Vrain Creek Basin.

Under the Proposed Water Delivery Agreement, Boulder County will, at times and rates determined in its sole discretion, deliver to CWCB up to 5 cfs from November 1 through March 31 and June 1 through September 30, and 100 cfs for a two or three day period in May or June to preserve and improve the environment to a reasonable degree. CWCB will protect the flows down to the outflow of Longmont wastewater treatment plant located in the SW ¼ of the NE ¼ of Section 11, Township 2 North, Range 69 West of the 6<sup>th</sup> P.M. The CWCB's use of the delivered water will be authorized by the water court decree in Case No. 2012CW091. Upon CWCB's final action on this proposal, Applicants will add appropriate terms and conditions to the proposed decree.

## **The Board's Water Acquisition Procedures**

Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") sets forth the Board's procedures for acquiring water for ISF use. Section 37-92-102(3), C.R.S. provides 120 days for the Board to determine what terms and conditions it will accept in an acquisition agreement for water, water rights, or interests in water to preserve or improve the natural environment. ISF Rule 6 requires a minimum of two Board meetings to allow for public input prior to taking final action on a proposed acquisition. The Board's initial consideration of this proposal at this Board meeting initiates the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. Final action on the proposal could occur at the January 2015 Board meeting. ISF Rule 6m (4) provides that any person may request the Board to hold a hearing on the proposed acquisition, and that such a request must be filed within twenty days of this Board meeting.

ISF Rules 6e and 6f require the Board to evaluate the appropriateness of the acquisition and determine how best to utilize the acquired water rights to preserve or improve the natural environment. The Rules list several factors the Board may consider in its evaluation of the acquisitions. Several of the factors address water rights that need to be changed from irrigation or other uses to instream flow uses. Because this acquisition does not involve a change of water right, several of the factors do not apply. This memo addresses the applicable factors.

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



## **Summary of Proposed Acquisition**

Until the 2013 flood, construction of Lake No. 4, including its inlet and outlet works, was complete. The 2013 flood breached the sealed reservoir and the Applicants are in the process of rehabilitating the reservoir to be used for its decreed purposes. Pre-flood, the Applicants had been diligently trying to fill Lake No. 4 in priority, and trying to accurately measure and account for diversion and subsequent deliveries for beneficial uses under the decree. Several beneficial uses for Lake 4 were decreed in Case No. 2001CW262, including an instream flow between the Lake 4 and the outfall of the Longmont wastewater treatment plant.

Under the Water Delivery Agreement, Boulder County will, at times and rates determined in its sole discretion, release water from Lake 4 in amounts up to 5 cfs from November 1 through March 31 and June 1 through September 30, and 100 cfs for a two or three day period in May or June to preserve and improve the environment to a reasonable degree. CWCB will protect the flows down to the outflow of the Longmont wastewater treatment plant located in the SW  $\frac{1}{4}$  of the NE  $\frac{1}{4}$  of Section 11, Township 2 North, Range 69 West of the 6<sup>th</sup> P.M. The ISF use will consist of preserving or improving the natural environment to a reasonable degree by protecting flows at the rates specified in the decree.

## **Existing Instream Flow Water Rights**

CWCB does not currently hold an ISF water right in this reach of St. Vrain Creek, or downstream of this reach on St. Vrain Creek. However, CWCB does hold ISF water rights upstream on North St. Vrain Creek and South St. Vrain Creek down to the confluence with St. Vrain Creek, which rights will not be affected by this acquisition. See attached map, Exhibit A.

## **Existing Natural Environment**

According to Colorado Parks and Wildlife biologists, this reach of St. Vrain Creek is a high quality transition zone fishery (cold to warm water) that supports a high diversity of native species. Historic samples show populations of 13 species including stonecat, common shiner, Iowa darter, and plains topminnow. Flows in this reach are mainly controlled by diversions and reservoir operations.

## **Proposed Use and Potential Benefits of the Delivered Water**

The Board could use the delivered water to preserve and improve the natural environment to a reasonable degree in St. Vrain Creek between Lake 4 and the outfall of the Longmont wastewater treatment plant, a distance of approximately seven miles. The CWCB would use reservoir releases as instream flows up to the amounts specified in the decree. CWCB would protect the releases from diversion by other water users in this reach. Downstream of the outfall, the water would revert back to the Applicants under their decree for reuse, successive uses and use to extinction pursuant to the decrees in 2001CW262 and 2012CW091.

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

Because the additional ISF protection under this proposal will be achieved with relatively junior water rights, other water rights in the subject reach will not be injured by the proposed ISF uses. Also, the water court decree implementing the Water Delivery Agreement will contain terms and conditions to assure that no vested water rights on any of the reaches will be injured as a result of the ISF use.



### **Administrability**

Staff will confirm with the Division Engineer that the CWCB's proposed uses of the delivered water will be administrable.

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

Applicant's water rights stem from junior storage rights in Lake 4. The released water will be beneficially used for ISF purposes in accordance with the Water Delivery Agreement. Downstream of the lower terminus, the water reverts back to the Applicants under their decree for reuse, successive uses and use to extinction pursuant to the decrees in 2001CW262 and 2012CW091.

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

It is anticipated that this water will be diverted and used directly or by exchange by other water uses or by Applicants under their decree for reuse, successive uses and use to extinction pursuant to the decrees in 2001CW262 and 2012CW091. Consequently, it does not appear that this acquisition will raise any compact issues.

### **Costs to complete the transaction, or other associated costs**

Boulder County is not requesting the Board to pay for the delivered water or to participate as a co-applicant in the water court proceeding. Boulder County has offered to perform all record keeping, accounting and reporting related to the release of water for ISF use by CWCB. CWCB will protect the releases through the new ISF reach and may need to assist with installation of any gages required by the Division of Water Resources to administer the decree. Because CWCB is already a party in the water court case, little extra legal expense is expected as a result of this acquisition.

### **Attachments**

Exhibit A: General Map  
Exhibit B: Water Delivery Agreement

