



COLORADO

Colorado Water
Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

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

DATE: January 26, 2015

AGENDA ITEM: 14. 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)

Background

The County of Boulder and CWCB are working toward a water delivery agreement for the CWCB to use Boulder County's water released from Lake No. 4 to maintain stream flows for fish and wildlife on St. Vrain Creek. The target reach on St. Vrain Creek extends from approximately three miles southeast and downstream from Lyons, Colorado to the Longmont Wastewater Treatment Plant 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. However, Applicants are currently seeking diligence on that conditional water right in pending water court Case No. 2012CW091, to which CWCB is a party. CWCB filed a Statement of Opposition in the new case to protect its exclusive authority to hold instream flow ("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**. Colorado Parks and Wildlife's (CPW) recommendation will be attached as **Exhibit C** (to be provided at the Board meeting).

Staff Recommendation

Staff recommends that the Board:

1. Accept the interest in water that would be provided by Boulder County under the Water Delivery Agreement;
2. Determine that the amounts set forth in the Water Delivery Agreement are appropriate to preserve and improve the natural environment to a reasonable degree on the subject reach of St. Vrain Creek in the time, amounts and locations provided by the Agreement and described in this memo;



3. Determine that the best use of the interest in water to be acquired is in the time, amounts and locations provided by the Water Delivery Agreement; and
4. Authorize the CWCB Director to finalize and sign the Water Delivery Agreement.

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 6th 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 reach settlement in the water court case, and also 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 up to 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 such deliveries 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 6th P.M. CWCB shall use and protect the Piscatorial Release to preserve the natural environment to a reasonable degree up to the released amount to bring stream flow up to 5 cfs. CWCB shall use and protect the Piscatorial Release to improve the natural environment to a reasonable degree up to the released amount that brings stream flow to a rate greater than 5 cfs. 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 occurred at the November 2014 Board meeting, which initiated the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. Final action on the proposal 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. No such request was filed and the time for filing such request has expired. Staff requests that the Board take final action on the proposal at this January 2015 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 the maintenance of minimum flows 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 releases down to 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 6th P.M. The ISF releases will preserve and improve the natural environment to a reasonable degree up to 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 will 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. CWCB shall use and protect the Piscatorial Release to preserve the natural environment to a reasonable degree up to the released amount to bring stream flow up to 5 cfs. CWCB shall use and protect the Piscatorial Release to improve the natural environment to a reasonable degree up to the released amount that brings stream flow to a rate greater than 5 cfs. CWCB uses will be made pursuant to the water court decrees and the Agreement.. CWCB will protect the releases from diversion by other water users in this reach by requesting administration by the State and Division Engineer. Downstream of the outfall, the water



right 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 stream flow protection under this proposal will be achieved with relatively junior water rights that have already been appropriated, 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 has confirmed with the Division Engineer and Water Commissioner that the CWCB's proposed uses of the delivered water are 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 maintaining stream flows 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 downstream of the target reach 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 target 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
- Exhibit C: CPW recommendation letter (to be provided at the Board meeting)



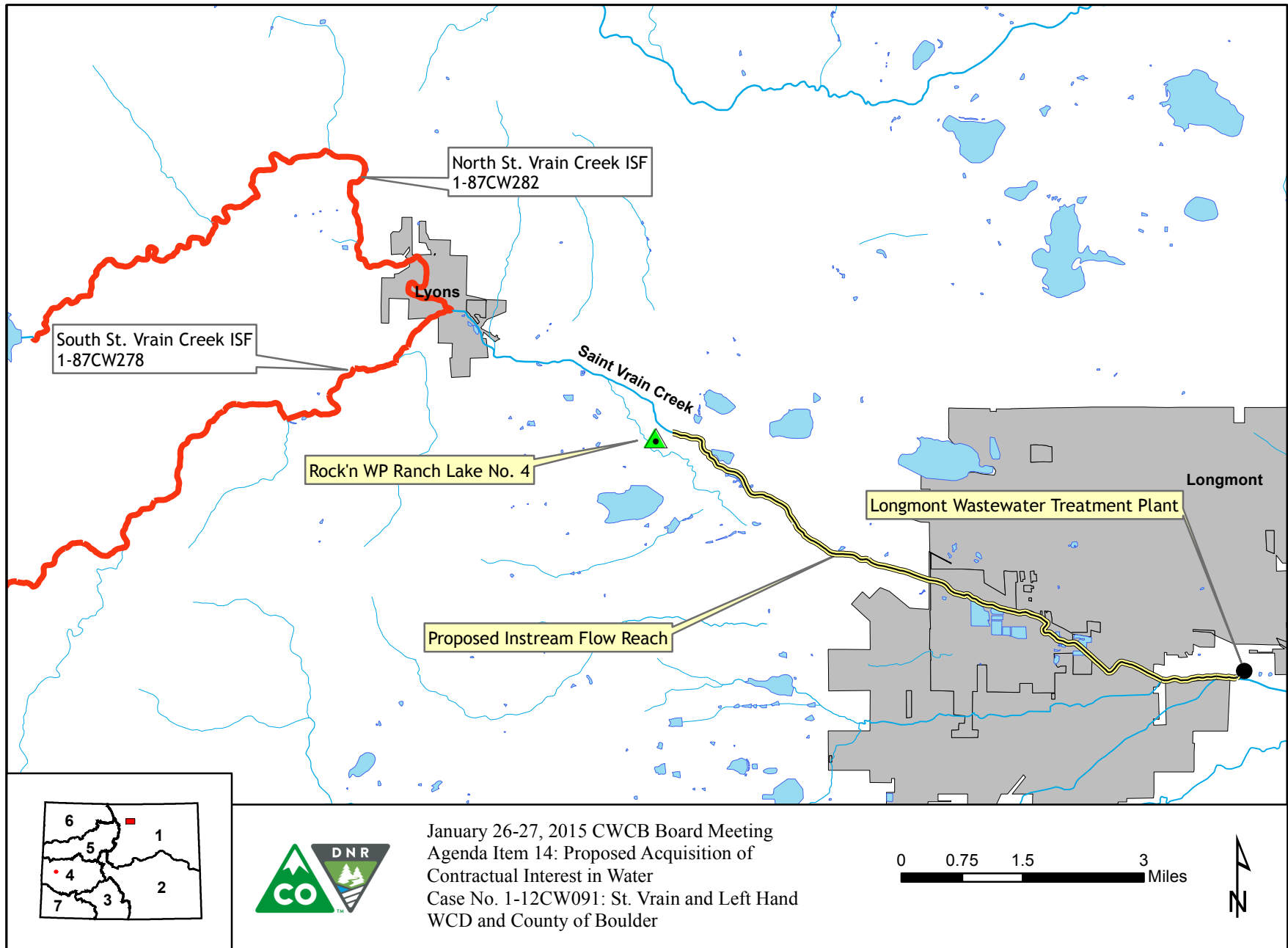


EXHIBIT A

WATER DELIVERY AGREEMENT

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

RECITALS

- A. Boulder County and the St. Vrain and Left Hand Water Conservancy District (“SVLHWCD”) each own a 50% undivided interest in Western Mobile Lake No. 4 (“Lake 4”), which has a decree for the diversion and storage of water from St. Vrain Creek obtained in Case No.2001CW262, Water Division No. 1 (the “Original Decree”).
- B. Boulder County and SVLHWCD have filed for a diligence decree for the Lake 4 water right in Case No. 2012CW091 (“Diligence Case”) to which CWCB is an opposing party.
- C. Paragraph 5(f) of the Original Decree provides, *inter alia*, that, subsequent to storage within Lake 4, the water right may be used for “... maintenance of minimum stream flows for fish, recreation and wildlife[] Paragraph 5(f) of the Original Decree additionally provides that: “Applicants may 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 6th 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 to provide flushing flows to maintain fish habitat.”
- D. The CWCB does not have an existing decree for an appropriated instream flow (“ISF”) water right to preserve the natural environment to a reasonable degree in this reach of St. Vrain Creek.
- E. Boulder County and the CWCB desire to work cooperatively on water matters in the St. Vrain Creek Basin. Boulder County may elect in its sole discretion to release from Lake 4 water to maintain minimum stream flows for fish, recreation and wildlife in accordance with the terms and conditions of the Original Decree, at times to be determined at the sole discretion of Boulder County, at rates of flow up to those provided in paragraphs 5(f) of the Original Decree (the “Piscatorial Release”). The CWCB has agreed to use the Piscatorial Release under the Original Decree as confirmed by the Diligence Case Decree to preserve and improve the natural environment to a reasonable degree in the stream reach decreed for instream flow water right(s) on St. Vrain Creek, subject to the terms and conditions outlined in this Agreement and a final decree in the Diligence Case, Case No.2012CW091. The

Piscatorial Release water shall not include water stored in or released from Lake 4 for any other purposes authorized by the Decree.

- F. SVLHWCD is not a party to this agreement because its share of the stored water is not and will not be used for Piscatorial Release.
- G. Pursuant to section 37-92-102(3), C.R.S. (2014), the CWCB may acquire by contractual agreement with any person, including any governmental entity, such water, water rights or interests in water that are not on the Division Engineer's abandonment list in such amount as the CWCB determines is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree. This Agreement provides for the CWCB's contractual acquisition of water or an interest in water to preserve and improve the natural environment to a reasonable degree in St. Vrain Creek between Lake No. 4 and 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 6th 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.
- H. Pursuant to section 29-1-203, C.R.S. (2014), the CWCB and Boulder County may cooperate or contract with one another with respect to the exercise of their governmental functions.

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

1. The Piscatorial Release, up to the amounts specified in the water court decree for the Diligence Case No. 2012CW091, shall be made available to and protected for instream flow use exclusively by the CWCB. Such CWCB use will be made in St. Vrain Creek between Lake No. 4 and the outflow of the Longmont wastewater treatment plant, up to 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. CWCB shall use and protect the Piscatorial Release to preserve the natural environment to a reasonable degree up to the released amount to bring stream flow up to 5 cfs. CWCB shall use and protect the Piscatorial Release to improve the natural environment to a reasonable degree up to the released amount that brings stream flow to a rate greater than 5 cfs. CWCB uses will be made pursuant to the water court decrees and this Agreement.
2. The CWCB shall seek to protect the Piscatorial Release in the instream flow reach consistent with the policies and procedures contained in the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, subject to the availability of funds. The parties shall cooperate in the administration, measurement, and monitoring of the Piscatorial Releases and their intended beneficial uses under this Agreement.

3. Nothing in this Agreement shall require Boulder County to allocate any Lake 4 water for release to be used for non-consumptive maintenance of minimum stream flows for fish, recreation and wildlife or limit the ability of Boulder County, in its sole discretion, to allocate Lake 4 water for use for any of its decreed purposes.
4. Nothing in this agreement shall require either party to install gages to measure the Piscatorial Release. If necessary, the CWCB will contact the Division No. 1 Engineer and seek administration to ensure the full amount of Piscatorial Release is protected through the instream flow reach. Boulder County shall be responsible for maintaining all records necessary for the implementation of this Agreement, using forms mutually agreeable to the parties, and all records required by the Division No.1 Engineer for administration of the Piscatorial Release. Boulder County shall provide annual accounting of any Piscatorial Release made at the outlet of Lake 4 to the CWCB and the Division No.1 Engineer. Boulder County shall not be responsible for providing any accounting of the Piscatorial Release beyond the Lake 4 outlet.
5. The CWCB will give due consideration, consistent with its generally applicable financial policies, to applications by Boulder County for loans and grants to assist in funding the development, construction, operation, maintenance, and repair of Lake 4.
6. Any rights created by this Agreement are contractual rights. This Agreement does not create and shall not be construed to create or convey any property interest, including any covenant, easement or servitude, in the real property or water rights of any party.
7. Pursuant to section 37-92-102(3), C.R.S. (2014), the terms of this Agreement shall be enforceable by each party as a water matter in the District Court, Water Division No. 1. Before commencing any action for enforcement of this Agreement, however, the party alleging a breach shall notify the other party in writing of the alleged breach and the parties shall make a good-faith effort to resolve their differences through informal consultation. All rights of enforcement shall be strictly reserved to the parties, and no third party shall have any right to enforce this Agreement. Specific performance of this Agreement shall be the exclusive remedy for failure of any party to comply with any provision of this Agreement. This Agreement shall be construed in accordance with the laws of the State of Colorado and shall be interpreted broadly to effect its purpose.
8. Any failure or delay by a party in exercising any of its rights, powers and remedies hereunder or in accordance with laws shall not lead to a waiver of such rights, and the waiver of any single or partial exercise of a party's rights shall not preclude such party from exercising such rights in any other way and exercising the remaining part of the party's rights.
9. Each provision contained herein shall be severable and independent from each of the other provisions such that if at any time any one or more provisions herein are found

to be invalid, illegal, or unenforceable, the validity, legality, or enforceability of the remaining provisions herein shall not be affected as a result thereof.

10. The effective date of this Agreement shall be the last date shown on the signature page of this Agreement, which may be executed in counterparts.
11. The term of this Agreement is perpetual unless terminated under the provisions of this paragraph. This Agreement shall not be assignable by any party without the written consent of the other party. This Agreement may only be amended or terminated by the written agreement of the parties, and any such termination or amendment shall take effect only when properly signed by both parties to this Agreement.
12. Any notice required or permitted to be given under this Agreement will be in writing and considered effective when delivered by fax, email, hand delivery, Express Mail, Federal Express, or similar service, or on the third mail-delivery day after being deposited in the United States mail, postage prepaid, addressed to the parties as follows:

Boulder County:
Director, Parks and Open Space Department
5201 Saint Vrain Road
Longmont, CO 80503

CWCB:
Colorado Water Conservation Board
Stream and Lake Protection Section
1313 Sherman Street, Room 718
Denver, CO 80203

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

COLORADO WATER CONSERVATION BOARD

By: James Eklund, Director

Date: _____

BOULDER COUNTY

By: Cindy Domenico, Chair
Board of Boulder County Commissioners

Date: _____

ATTEST: _____
Clerk to the Board

Exhibit C

CPW recommendation letter

(to be provided at board meeting)