

INTERAGENCY AGREEMENT TO LOAN WATER FOR INSTREAM FLOW USE

This Interagency Agreement to Loan Water for Instream Flow Use (“Interagency Agreement”) is entered into by and between the State of Colorado, acting by and through the Department of Natural Resources, for the use and benefit of the Division of Parks and Wildlife and the Parks and Wildlife Board (“CPW”) and the State of Colorado, acting by and through the Department of Natural Resources, for the use and benefit of the Colorado Water Conservation Board (“CWCB”) (collectively, the “Parties”).

RECITALS

- A. CPW is a division of the Colorado Department of Natural Resources organized and existing under and pursuant to Articles 1, 9 and 10 of Title 33, C.R.S., for the purpose of protecting, preserving, enhancing and managing Colorado’s natural, scenic, scientific and outdoor recreation areas as well as its wildlife and environment for the use, benefit and enjoyment of the people of Colorado and its visitors.
- B. CWCB is a division of the Colorado Department of Natural Resources organized and existing under and pursuant to Article 60 of Title 37, C.R.S., for the purpose of aiding in the protection and development of water for the benefit of the present and future inhabitants of the State of Colorado.
- C. CWCB has the exclusive authority, pursuant to section 37-92-102(3), C.R.S. (2011) to appropriate and adjudicate instream flow water rights to preserve the natural environment of streams and lakes in the State.
- D. The “White River Instream Flow Right” was adjudicated on the White River in the amount of 200 cfs from the confluence of the North Fork and South Fork of the White River down to the confluence of the White River and Piceance Creek in Case No. 5-77W3652C. The “Big Beaver Creek Instream Flow Right” was adjudicated on Big Beaver Creek in the amount of 2 cfs from the outlet of Lake Avery Reservoir (a/k/a Big Beaver Creek Reservoir) to the confluence with the White River in Case No. 5-77W3652E. The Decrees confirming these rights are attached hereto as **Exhibit A**. These rights are collectively referred to herein as “the Instream Flow Rights.”
- E. In the drought year of 2002, many CWCB decreed instream flows were not satisfied due to their relatively junior priority and, as a result, Colorado’s aquatic ecosystems were negatively impacted. CWCB anticipates many decreed instream flows, including the two above-referenced water rights, will not be met again this year because Colorado snowpack totals for the spring of 2012 are similar to those of the drought year of 2002.
- F. Under certain circumstances and subject to State and Division Engineer approval, section 37-83-105(2), C.R.S. (2011) allows water owned by another party to be used to satisfy an instream flow right up to its decreed amount.

G. CPW owns a storage water right in Big Beaver Creek Reservoir that is diverted and placed to beneficial use on a tributary near the upstream terminus of the White River Instream Flow Right that may, if administratively approved pursuant to section 37-83-105(2), be used to help satisfy this instream flow right. The Storage Right, Priority No. 726, was adjudicated in Case No. CA1269 in the District Court in and for Rio Blanco County (hereinafter "Storage Right"). Said Decree is attached hereto as **Exhibit B**.

H. Subject to the terms and conditions of this Interagency Agreement, CPW is willing to temporarily loan to CWCB a portion of the Storage Right for use in satisfying the Instream Flow Rights.

AGREEMENT

NOW THEREFORE, the Parties agree as follows:

1. **Authority.** This Interagency Agreement is entered into pursuant to section 37-83-105(2) for the mutual benefit of CPW and CWCB. No further payment, monetary or otherwise, is required by either Party.
2. **Term of Loan Agreement.** This single term, nonrenewable Interagency Agreement is for a term of ten years commencing on July 12, 2012 and terminating on July 12, 2022. Pursuant to section 37-83-105(2), the loan shall not be exercised for more than three years of this ten-year period, nor for a period to exceed 120 days in any calendar year.
3. **Agreement to Loan a Portion of the Storage Right.** Subject to the terms and conditions in this Interagency Agreement, CPW may, in its sole discretion, release water that was previously diverted and stored under the Storage Right to satisfy all or part of the Instream Flow Rights.
 - A. **Limitations on Use of Loaned Water.** CWCB's use of the water loaned hereunder is limited to satisfying all or part of the Instream Flow Rights. Such use is also subject to all conditions imposed pursuant to section 37-83-105(2), including but not limited to restrictions on the duration of annual use, and any additional terms imposed by the Division or State Engineer.
 - B. **Process for Requesting Release of the Storage Right.**
 - i. CWCB shall notify CPW when water is needed to satisfy all or part of the Instream Flow Rights. As part of the notification, CWCB shall specifically identify the requested rate of flow, specific instream flow reach and requested timing of the release.
 - ii. If CPW elects to release water for CWCB's use, it shall notify the CWCB of the amount and timing of such release. Such release will be made from the outlet of Big Beaver Creek Reservoir and CPW assumes no responsibility for delivering the water to the decreed instream flow reaches. CWCB shall take such action as, in its sole discretion, is necessary or desirable to protect the use of the Stored Water for instream

flow purposes, including requesting the Division Engineer to administer the delivery of the Stored Water through the instream flow reach.

- iii. CWCB shall promptly notify the Division Engineer, with copy to CPW, of the anticipated amount and timing of the release approved by CPW and that such use is being made to satisfy the Instream Flow Rights.

C. **Accounting and Measurement.**

- i. CPW and CWCB shall coordinate record keeping and accounting as reasonably required by the State and Division Engineers to administer the Storage Right for use in satisfying the Instream Flow Rights.
- ii. CPW and CWCB are each solely responsible for flow measurements required by the State and Division Engineers for administration of their respective water right(s).

- D. **Preservation of CPW's Water Rights.** CWCB's use of CPW's water rights does not transfer any legal or equitable title or interest to any part of the Storage Right to the CWCB. By permitting CWCB to use a portion of the Storage Right, CPW is not abandoning, relinquishing, or forfeiting the Storage Right. CWCB shall not jeopardize CPW's Storage Right by taking any action that causes or could potentially cause a reopening of the Storage Right.

4. **Notices and Representatives.** Each individual identified below is the principal representative of the designating Party. All notices required to be given hereunder shall be hand delivered with receipt required or sent by certified or registered mail to such Party's principal representative at the address set forth below. In addition to, but not in lieu of a hard-copy notice, notice also may be sent by e-mail to the e-mail addresses, if any, set forth below. Either Party may from time to time designate by written notice substitute addresses or persons to whom such notices shall be sent. Unless otherwise provided herein, all notices shall be effective upon receipt.

CPW:

David Graf, Regional Water Specialist
Colorado Parks and Wildlife
711 Independent Ave.
Grand Junction, CO 81505
(970) 255-6142
David.Graf@state.co.us

CWCB:

Linda Bassi, Chief
Colorado Water Conservation Board
Stream and Lake Protection Section
1313 Sherman Street, Room 721

Denver, CO 80203
(303) 866-3441
linda.bassi@state.co.us

5. **General Provisions.**

- A. **Assignment.** CWCB shall not assign, transfer or sub-lease its rights or obligations under this Interagency Agreement.
- B. **Captions.** The captions and headings in the Interagency Agreement are for convenience of reference only and shall not be used to interpret, define, or limit its provisions.
- C. **Counterparts.** This Interagency Agreement may be executed in counterparts, each of which (or combination of which), when signed by both Parties shall be deemed an original, but both together shall constitute one agreement.
- D. **Entire Understanding.** This Interagency Agreement represents the complete integration of all understandings between the Parties and all prior representations and understandings, oral or written, are merged herein. Prior or contemporaneous additions, deletions, or other changes hereto shall not have any force or effect whatsoever, unless embodied herein.
- E. **Legal Counsel.** Each Party to this Interagency Agreement has engaged legal counsel to negotiate, draft and/or review this Interagency Agreement. Therefore, in the construction and interpretation of this Interagency Agreement, the Parties acknowledge and agree that it shall not be construed against any Party on the basis of authorship.
- F. **Litigation Reporting.** Within 10 days after being served with any pleading in a legal action filed with a court or administrative agency, related to this Interagency Agreement or which may affect CWCB's ability to comply with the terms and conditions of this Interagency Agreement, CWCB shall notify CPW of such action and deliver copies of such pleadings to CPWs' principal representative as identified herein.
- G. **Modification.**
 - i. By the Parties. Except as specifically provided in the Interagency Agreement, modifications hereof shall not be effective unless agreed to by the Parties in a written amendment hereto.
 - ii. By Operation of Law. This Interagency Agreement is subject to such modifications as may be required by changes in Federal or Colorado State Law, or their implementing regulations. Any such required modification shall be automatically incorporated as part of the Interagency Agreement on the effective date of such change, as if fully set forth herein.
- H. **Order of Precedence.** The provisions of the Interagency Agreement shall govern the relationship of the Parties. In the event of conflicts or inconsistencies between the

Interagency Agreement and its exhibits and attachments, such conflicts or inconsistencies shall be resolved by reference to the documents in the following order of priority:

- i. The provisions of the main body of this Interagency Agreement.
- ii. Exhibits.

- I. **Prior Agreements.** This Interagency Agreement cancels and supersedes all prior agreements between the Parties related to CWCB's use of the Storage Right.
- J. **Third Party Enforcement.** The terms and conditions of this Interagency Agreement, and all rights of action relating thereto, are strictly reserved to the Parties, and nothing in this Interagency Agreement shall give or allow any claim or right or cause of action whatsoever by any other person not included in this Interagency Agreement. Any person and/or entity, other than the Parties, receiving services or benefits under this Interagency Agreement shall be deemed an incidental beneficiary only.
- K. **Waiver.** A waiver of a breach of any provision of this Interagency Agreement shall not waive any subsequent breach of the same or different provision of this Interagency Agreement. Any Party's failure in any one or more instances to insist upon strict performance of any of the terms and conditions of this Interagency Agreement or to exercise any right herein conferred shall not be construed as a waiver or relinquishment of that right or of that Party's right to assert or rely upon the terms and conditions of this Interagency Agreement. Any express waiver of a term of this Interagency Agreement shall not be binding and effective unless made in writing and properly executed by the waiving Party.

IN WITNESS WHEREOF, the Parties have executed this Lease Agreement effective as of the date executed by both Parties.

COLORADO DIVISION OF PARKS and WILDLIFE and the PARKS and WILDLIFE COMMISSION

By: Ron Velarde
Ron Velarde, Regional Manager

Date: July 23, 2012

COLORADO WATER CONSERVATION BOARD

By: Jennifer Gymbel
Jennifer Gymbel, Director

Date: July 18, 2012