

## **DRAFT**

### **WATER DEDICATION AND DELIVERY AGREEMENT**

The Colorado Water Conservation Board (“CWCB”), an agency of the State of Colorado, and the Northern Colorado Water Conservancy District (“Northern Water”), a quasi-municipal entity and political subdivision of the State of Colorado, in consideration of the mutual promises contained herein, agree as follows:

#### RECITALS

- A. The CWCB is an agency of the State of Colorado created to aid in the protection and development of the waters of the state for the benefit of its present and future inhabitants. In 1973, the General Assembly vested the CWCB with the exclusive authority to appropriate waters of the natural stream for minimum stream flows between specific points on a stream to preserve the natural environment to a reasonable degree.
- B. Pursuant to section 37-92-102(3), C.R.S., the General Assembly has also vested the CWCB with the ability to acquire water, water rights, or interests in water that are not on the division engineer’s abandonment list in such amount as the board determines is appropriate for stream flows to preserve or improve the natural environment to a reasonable degree.
- C. Pursuant to enacted Colorado Senate Bill 18-170 (codified at section 37-92-102(8), C.R.S.), the owner of a water storage right to be stored in New Reservoir Capacity may acquire the decreed right to make Protected Mitigation Releases<sup>1</sup> of water from that New Reservoir Capacity into a Qualifying Stream Reach to reasonably avoid, minimize, or mitigate the impacts of the New Reservoir Capacity on fish and wildlife resources within the Qualifying Stream Reach in accordance with a fish and wildlife mitigation plan approved under section 37-60-122.2, C.R.S. To make such Protected Mitigation Releases, the owner is required to: (1) dedicate the proposed Protected Mitigation Releases to the CWCB; (2) agree to make the proposed Protected Mitigation Releases available for use by the CWCB within the Qualifying Stream Reach; (3) with the CWCB as a co-applicant, file an application in water court seeking approval of the proposed Protected Mitigation Releases; and (4) obtain a final decree approving the Protected Mitigation Releases. Except as set forth in section 37-92-102(8)(e), C.R.S., the dedication to the CWCB is subject to section 37-92-102(3), C.R.S., including the requirement that the CWCB find that the proposed Protected Mitigation Releases are appropriate to preserve and improve the natural environment to a reasonable degree within the Qualifying Stream Reach.
- D. Pursuant to the decree entered in Case No. 03CW405, Water Division No. 1, Northern Water is the owner of an undivided 7/8 interest in a conditional water right decreed for storage in Grey Mountain Reservoir or Glade Reservoir and a conditional water right

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<sup>1</sup> This Water Dedication and Delivery Agreement uses terms as defined in SB18-170, codified in section 37-92-102(8), C.R.S.

decreed for storage in the Cache la Poudre Forebay or the Glade Forebay.<sup>2</sup> The most recent diligence decree for these conditional water rights was entered in Case No. 11CW242, Water Division No. 1.

- E. In Consolidated Case No. 92CW130, Water Division No. 1, Northern Water obtained a decree for conditional surface water rights, water storage rights, and appropriative rights of exchange that form the basis of an integrated project known as the South Platte Water Conservation Project (“SPWCP”). The SPWCP will divert unappropriated water from the Cache la Poudre River (“Poudre River”) and South Platte River and reposition that water by substitution and exchange to, among other structures, the to-be-constructed Glade Reservoir. The most recent diligence decree for the SPWCP was entered in Case No. 11CW241, Water Division No. 1.
- F. The water rights described in Paragraphs D and E are referred to collectively herein as the Subject Water Rights.
- G. The Northern Integrated Supply Project (“NISP”) is a regional water supply project proposed by Northern Water on behalf of numerous cities, towns, and water districts (“NISP Participants”) that will use the Subject Water Rights (and other water rights not subject to this Agreement) to provide approximately 40,000 acre-feet of reliable water supply per year to the NISP Participants.
- H. The Northern Integrated Supply Project Water Activity Enterprise (“NISP Water Activity Enterprise”) is a government-owned business within the meaning of Article X, Section 20(2)(d) of the Colorado Constitution organized pursuant to §§ 37-45.1-101 *et seq.*, C.R.S., and owned by Northern Water. The NISP Water Activity Enterprise was created to finance the planning, permitting, and construction of NISP.
- I. Northern Water was required under section 37-60-122.2, C.R.S., to submit a Fish and Wildlife Mitigation and Enhancement Plan for NISP (“NISP FWMEP”) and obtain approval of the NISP FWMEP from the Colorado Parks and Wildlife Commission and Division of Parks and Wildlife, the CWCB, and the Governor as the official state position on mitigation.
- J. The final NISP FWMEP, as approved and adopted as the official state position, includes among other things a “Conveyance Refinement,” NISP FWMEP § 5.2.2.4, that involves Mitigation Releases of water from Glade Reservoir into the Poudre River and the rediversion of that water at or downstream of the planned Poudre River Intake Diversion. The NISP FWMEP is attached hereto as **Exhibit A**. In the NISP FWMEP and the “Intergovernmental Agreement to Implement the Fish and Wildlife Mitigation and Enhancement Plan For the Northern Integrated Supply Project” between the State of Colorado and the NISP Water Activity Enterprise dated , 2018, Northern Water committed to making Mitigation Releases of between 18 and 25 cfs of water,

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<sup>2</sup> Both Glade Reservoir and the Glade Forebay qualify as “New Reservoir Capacity” as defined in section 37-92-102(8), C.R.S.

depending on time of year as further described in Paragraph 4 herein, into the Poudre River for delivery to NISP Participants. The Mitigation Releases described in the NISP FWMEP are intended to avoid and minimize negative impacts to water quality and the aquatic and riparian environments within the Qualifying Stream Reach, and to enhance the same.

- K. The Qualifying Stream Reach for the NISP FWMEP Mitigation Releases shall be that part of the Poudre River extending downstream from the Poudre River Delivery Pipeline (the point where releases from Glade Reservoir enter the Poudre River) to the Poudre River Intake Diversion, as depicted on the map attached as **Exhibit B**. The approximate coordinates of the upstream and downstream termini of the Qualifying Stream Reach are as follows:
- i. **Poudre River Delivery Pipeline (Upstream Terminus):** Within 200 feet upstream and 200 feet downstream of Lat. 40°39'47.04" N, Long. 105°12'46.29"W.
  - ii. **Poudre River Intake Diversion (Downstream Terminus):** Within 200 feet upstream and 200 feet downstream of Lat. 40°34'58.59"N, Long. 105°3'32.83W.
- L. Northern Water wishes to dedicate to the CWCB, at no cost and for instream flow use, Mitigation Releases of the Subject Water Rights through the Qualifying Stream Reach. At two regularly scheduled public meetings of the CWCB held on [REDACTED], 2018, and [REDACTED], 2018, the CWCB considered Northern Water's proposed dedication of Mitigation Releases to the CWCB in accordance with section 37-92-102(3) & (8), C.R.S., and Rules 6 and 11 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2. At its regularly scheduled Board meeting on [REDACTED], 2018, the CWCB: (1) found that in the Qualifying Stream Reach (a) winter flows of up to 55 cfs are appropriate to preserve, and flows from 55 cfs to 85 cfs are appropriate to improve, the natural environment to a reasonable degree, and (b) summer flows of up to 85 cfs are appropriate to preserve, and flows from 85 to 130 cfs appropriate to improve, the natural environment to a reasonable degree; (2) found that deliveries of the Mitigation Releases under this Agreement are appropriate to preserve and improve the natural environment to a reasonable degree within the Qualifying Stream Reach at rates up to the aforementioned flow rates found appropriate by the CWCB; and (3) authorized the CWCB Director to execute this Agreement.
- M. The CWCB and Northern Water wish to cooperate as contemplated by section 37-92-102(8), C.R.S., to protect the Mitigation Releases identified in the NISP FWMEP as Protected Mitigation Releases and to benefit stream flows in the Qualifying Stream Reach of the Poudre River in a manner consistent with the terms of the NISP FWMEP.

NOW THEREFORE, the CWCB and Northern Water agree as follows:

DELIVERY

1. Subject to the terms of this Agreement and the Water Court decree that is to be entered pursuant to section 37-92-102(8), C.R.S., adjudicating the Protected Mitigation Releases, Northern Water will release and deliver water stored in Glade Reservoir under its Subject Water Rights, in the manner and volumes and at rates of flow and times to be determined at the sole discretion of Northern Water to be necessary to satisfy the measures for Mitigation Releases identified in the NISP FWMEP, for exclusive use by the CWCB as Protected Mitigation Releases.
2. Delivery of water in accordance with this Agreement is subject to availability under the Subject Water Rights. Northern Water is under no obligation to deliver water to the CWCB pursuant to this Agreement when water yielded from the Subject Water Rights is not in storage and available at Glade Reservoir for release and delivery, or in the event that Protected Mitigation Releases are not necessary or are not being made to satisfy the measures for Mitigation Releases identified in the NISP FWMEP.
3. The making of Protected Mitigation Releases and delivery of water to the CWCB in accordance with this Agreement is subject to the circumstances described in § 5.2.2.4 of the NISP FWMEP under which the Conveyance Refinement cannot be operated or rediversion at or downstream of the Downstream Terminus of the Qualifying Stream Reach cannot be made, including when water quality within the Poudre River prevents diversions and delivery of water to the NISP Participants, when insufficient demand from the Participants exists, or when an interim delivery schedule is in effect while NISP is brought on line. As provided in the NISP FWMEP, before full buildout of NISP occurs, Northern Water commits to conveying no less than 36 percent of total NISP deliveries via the Poudre River, through the Qualifying Stream Reach, and into the Poudre River Intake Diversion.
4. When Northern Water notifies the CWCB that such releases are being made, the CWCB shall protect the delivered Protected Mitigation Releases through the Qualifying Stream Reach from diversion or exchange by other water users by, when necessary, requesting administration by the Colorado State and Division Engineers to prevent diversion of or exchange upon the water within the Qualifying Stream Reach by other water users. In the event that the CWCB does not or cannot protect the full amount of the Protected Mitigation Releases in accordance with the terms of this Agreement, nothing in this Agreement shall prevent Northern Water from exercising the Subject Water Rights in accordance with their respective decrees but without protection by the CWCB within the Qualifying Stream Reach.

CONDITIONS OF THE CWCB'S USE OF THE SUBJECT WATER RIGHTS

5. The CWCB shall use the Protected Mitigation Releases to help maintain stream flows in the Poudre River to preserve and improve the natural environment to a reasonable degree within the Qualifying Stream Reach in amounts up to the target rates the CWCB determines are necessary to preserve or improve the natural environment. Water made

available for Protected Mitigation Releases under the Subject Water Rights will be delivered by Northern Water from New Reservoir Capacity to the Poudre River for instream use by the CWCB at the Upstream Terminus of the Qualifying Stream Reach. Subject to Paragraphs 2 and 3 above, releases under this Agreement would range from 18 cfs during the winter months to 25 cfs during the summer months, with a maximum of 14,350 AF released annually. The Poudre River Intake would be located at or downstream of the Downstream Terminus and constructed to divert water released from Glade Reservoir for delivery for decreed beneficial use. The amount of storage water in Glade Reservoir or the Glade Reservoir Forebay designated for Mitigation Releases and the rates of the Mitigation Releases established by the NISP FWMEP are set forth below:

<b>Protected Mitigation Releases Through Qualifying Stream Reach</b>		
<b>Month</b>	<b>Releases (acre-feet)</b>	<b>Releases (cfs)</b>
November	1,100	18
December	1,100	18
January	1,100	18
February	1,050	18
March	1,100	18
April	1,100	18
May	1,100	18
June	1,200	20
July	1,550	25
August	1,550	25
September	1,300	22
October	1,100	18
<b>Total</b>	<b>14,350</b>	

6. Northern Water's release and delivery of water from Glade Reservoir under the Subject Water Rights for the CWCB's use for instream flows in accordance with this Agreement in no way provides the CWCB an operating or ownership interest in any of Northern Water's NISP or other facilities or water rights as they exist now or may exist in the future.
7. The CWCB's exclusive rights to water delivered to the Qualifying Stream Reach as Protected Mitigation Releases under this Agreement extends to and terminates at the Downstream Terminus of the Qualifying Stream Reach.

#### USE OF THE SUBJECT WATER RIGHTS DOWNSTREAM OF THE QUALIFYING STREAM REACH

8. In accordance with section 37-92-102(3) & (8), C.R.S., section 37-87-102(4), C.R.S., the decree that is to be entered pursuant to section 37-92-102(8), C.R.S., adjudicating the Protected Mitigation Releases, and the decrees for the Subject Water Rights, Northern Water shall redivert the Protected Mitigation Releases at or downstream of the

Downstream Terminus of the Qualifying Stream Reach, either directly at a surface point of diversion or by a decreed exchange, and bring about the decreed beneficial use of the rediverted water.

#### WATER COURT PROCEEDINGS

9. The CWCB and Northern Water agree to act as co-applicants as contemplated by section 37-92-102(8)(d)(III) & (IV), C.R.S., to file an application in water court seeking approval of the proposed Protected Mitigation Releases and to cooperate in obtaining a final water court decree approving the Protected Mitigation Releases.
  - a. Northern Water has the burden of satisfying the required elements of the water court application, including proving no injury and defending against any claim of injury to uses or exchanges of water being made pursuant to appropriation or practices in existence on the date of the filing of the application for the proposed Protected Mitigation Releases under section 37-92-102(8), if necessary. However, in accordance with section 37-92-102(8)(f)(I)(A), CWCB has the burden of demonstrating to the water court that it duly determined that the proposed Protected Mitigation Releases are appropriate for streamflows to preserve or improve the natural environment to a reasonable degree within the Qualifying Stream Reach.
  - b. Except for its own attorney and court filing fees, the CWCB is not responsible for paying costs of prosecuting the application, including the costs of hiring a consulting engineer or other witness or any attorney fees of other parties.

#### RECORDS AND ACCOUNTING

10. Northern Water shall be responsible for maintaining all records and accounting necessary for the implementation of this Agreement, using forms mutually agreeable to the parties, and all records required by the Division Engineer and water court decrees for administration of the Protected Mitigation Releases.
11. Northern Water will provide accounting related to the operation of this Agreement to the CWCB.

#### MISCELLANEOUS PROVISIONS

12. The term of this Agreement is perpetual unless terminated under the provisions of this paragraph. This Agreement may only be amended or terminated by the written agreement of the parties.
13. The CWCB is not responsible for modification of any structures that may be necessary for use of the Mitigation Releases to preserve or improve the natural environment, including, but not limited to, modification of the Watson, New Mercer, Larimer & Weld or Lake Canal Diversion Structures.

14. This Agreement shall not be assignable by any party without the written consent of the other, except that Northern Water may, as it deems necessary in its sole discretion and without seeking or securing consent from the CWCB, assign its interests in this Agreement to the NISP Water Activity Enterprise, who shall assume all of Northern Water's rights and responsibilities under this Agreement.
15. Pursuant to section 37-92-102(3), C.R.S., the terms of this Agreement shall be enforceable by each party as a water matter in the District Court for Water Division No. 1; provided, however, that before commencing any action for enforcement of this Agreement, the party alleging the violation shall notify the other party in writing of the alleged violation and the parties shall make a good faith effort to resolve their differences through informal consultation.
16. Specific performance of this Agreement shall be the exclusive remedy for failure of any party to comply with any provision of this Agreement.
17. Enforcement of this Agreement and all rights and obligations hereunder are reserved solely to the CWCB and Northern Water (and their assigns, if any, pursuant to Paragraph 12) and not to any third party. Any services or benefits which third parties may receive as a result of this Agreement are incidental to the Agreement and do not create any rights for such third parties.
18. This Agreement shall be construed in accordance with the laws of the State of Colorado and shall be interpreted broadly to effect its purposes.
19. Nothing in this Agreement shall preclude or limit Northern Water from making releases or deliveries of water yielded by the Subject Water Rights for any purposes allowed by law.
20. Any notice or request required or allowed to be given under this Agreement shall be in writing and considered effective when delivered by email or certified or registered mail addressed to the parties as follows:

If to the CWCB:

Colorado Water Conservation Board  
Stream and Lake Protection Section  
1313 Sherman Street, Room 721  
Denver, CO 80203  
DNR\_CWCB ISF@state.co.us

If to Northern Water:

Northern Colorado Water Conservancy District  
c/o NISP Project Manager  
220 Water Avenue  
Berthoud, CO 80513  
[REDACTED]@northernwater.org

IN WITNESS WHEREOF, the CWCB and Northern Water have executed this Agreement as of the last date of execution.

**COLORADO WATER CONSERVATION BOARD**

By: \_\_\_\_\_  
Rebecca Mitchell, Director

Date: \_\_\_\_\_

ATTEST:

**NORTHERN COLORADO WATER CONSERVANCY  
DISTRICT**

BY: \_\_\_\_\_

By: \_\_\_\_\_  
Brad Wind, General Manager

Date: \_\_\_\_\_