



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

Robert Randall, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

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

DATE: September 19-20, 2018 Board Meeting

AGENDA ITEM: **19. Northern Colorado Water Conservancy District Dedication of Mitigation Releases for Instream Flow Use in the Cache la Poudre River (Water Div. 1)**

Introduction

The Northern Colorado Water Conservancy District ("Northern") has offered the Colorado Water Conservation Board a dedication of a contractual interest in water as "Protected Mitigation Releases," as defined in 37-92-102(8), C.R.S. for instream flow use in a segment of the Cache la Poudre River ("Poudre River"). This type of dedication is guided by the recently enacted Senate Bill 18-170, codified at section 37-92-102(8), C.R.S. In 2017, Northern obtained an approved mitigation and enhancement plan entitled Northern Integrated Supply Project ("NISP") Fish and Wildlife Mitigation and Enhancement Plan ("FWMEP") referred to herein as "Mitigation Plan." 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 ("IGA") was executed on July 3, 2018. The water dedicated to CWCB is part of the Mitigation Plan's reservoir release commitments. Northern's draft dedication agreement is attached as **Exhibit 1**. The CWCB will use the water to preserve and improve the natural environment to a reasonable degree in a segment of the Cache la Poudre River. See Vicinity Map attached as **Exhibit 2**.

Staff Recommendation

Staff recommends that the Board:

1. Conclude that use of the water under the proposed acquisition by dedication agreement of the Protected Mitigation Releases is appropriate to preserve and improve the natural environment of the Cache la Poudre River in the Qualifying Stream Reach to a reasonable degree;
2. Determine that the acquired Protection Mitigation Releases would be best utilized by protecting the water through the specified Qualifying Stream Reach up to the recommended winter and summer preserve and improve flow rates presented herein;
3. Accept the dedication of water from Northern;
4. Authorize the Director to execute the Dedication Agreement in a form substantially similar to the attached draft; and
5. Direct staff to work with the Attorney General's Office and Northern to file a water court application in accordance with SB 18-170.



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. (2017) 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 took place at its July 2018 meeting, which initiated the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. 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's initial consideration. No such request was filed and the time for filing such request has expired. Staff will recommend that the Board take final action on the proposal at this September 2018 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. 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 1. CPW's recommendation letter is attached as **Exhibit 3**.

Background

Pursuant to the Mitigation Plan, Northern committed to make releases and to obtain protection of those releases through a segment of the Poudre River. Northern proposes to do so pursuant to the newly enacted SB 18-170, codified at section 37-92-102(8), C.R.S. Under the new statute, CWCB is required to be a co-applicant with the water owner in water court to obtain water court approval for the use for the Protected Mitigation Releases.

In the Mitigation Plan and the IGA, Northern committed to making Mitigation Releases for delivery of 18 to 25 cfs of water, up to 14,350 acre-feet per year, to be protected through the Qualifying Stream Reach of the Poudre River as Protected Mitigation Releases for ultimate delivery to NISP Participants. The IGA and Mitigation Plan executive summary were attached to the July 2018 board memo introducing this proposal. The full document for the Mitigation Plan can be found at <http://www.northernwater.org/docs/NISP/MapsDocuments/2017FWMEPFinal.pdf>.

The Mitigation Releases described in the Mitigation Plan are intended to enhance water quality and to avoid and minimize negative impacts to the aquatic and riparian environments within the Qualifying Stream Reach. Pursuant to 37-92-102(8), C.R.S., Northern 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. 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 2**. CWCB will use and protect the water for instream flow use to preserve and improve the natural environment to a reasonable degree through this stream segment.

1. Water Proposed for Acquisition

The water rights proposed to be dedicated to the CWCB would be up to 14,350 acre-feet per year of water yielded by the Subject Water Rights available to Northern in the to-be-constructed Glade Reservoir and Glade Forebay in Larimer County. Based upon discussions with Northern, and CPW regarding the need for and use of the donated water, Staff recommends that the CWCB acquire a contractual interest in the mitigation release water up to 14,350 acre-feet. The Subject Water Rights to be used are as follows:

GLADE RESERVOIR

Source: Cache la Poudre River
Decree: 03CW0405
Appropriation Date: 5/2/1980
Adjudication Date: 12/31/1980
Decreed Amount: 220,000 Acre Feet

GLADE RESERVOIR FOREBAY

Source: Cache la Poudre River
Decree: 03CW0405
Appropriation Date: 5/2/1980
Adjudication Date: 12/31/1980
Decreed Amount: 5,400 Acre Feet

SOUTH PLATTE WATER CONSERVATION PROJECT (SPWCP) WATER RIGHTS AND APPROPRIATIVE RIGHTS OF EXCHANGE

Sources: Cache la Poudre River and South Platte River
Decrees: Case Nos. 92CW130 (Consolidated); 11CW241; 16CW3194
Appropriation Date: 12/11/1992 for all water rights and appropriative rights of exchange
Adjudication Date: 11/28/2005

2. Reach of Stream Proposed for Use of the Acquired Water Rights

The reach of stream proposed for use of Northern's Mitigation Release water is 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. The segment extends from near the mouth of the canyon through the City of Ft. Collins for approximately 11.5 river miles.

3. Existing and Future ISF Water Rights

The CWCB does not currently hold an ISF water right within this reach of the Poudre River. CPW and others have been studying and collecting field data in this segment of the Poudre River for over 10 years. CPW evaluated the studies and data by means including R2CROSS and PHABSIM modeling techniques to develop target flow rates for this section of the Poudre River.

CPW's target flow recommendations for this stream segment are as follows:

	Preserve ISF target rates	Improve ISF target rates
Winter (November 1 - March 31)	Up to 80 cfs	Between 80 and 150 cfs
Summer (April 1 - October 31)	Up to 114 cfs	Between 114 and 260 cfs

6. Natural Flow Regime

The Cache la Poudre River originates in the northern portions of Rocky Mountain National Park. The mainstem and South Fork flow north and east out of Rocky Mountain National Park onto the Roosevelt National Forest. The North Fork drains western portions on the Laramie Foothills to its confluence with the mainstem just below Poudre Park. Within the Poudre Canyon, the river is heavily forested, high gradient, and confined by canyon walls and Highway 14. Beyond the canyon mouth, the river transitions to a plains watershed, flowing through an urban zone surrounding the City of Fort Collins and rural lands further east bordered by gravel pits and irrigated agriculture. The Poudre River travels eastward approximately 126 miles from its headwaters to its confluence with the South Platte River near Greeley. The watershed's drainage area is approximately 1,880 square miles.

Streamflow in the upper Poudre River is primarily driven by snowmelt with contributions from local precipitation. The hydrology below the canyon mouth is influenced predominantly by upstream reservoir releases and some local precipitation. Peak flows are snowmelt-driven and typically occur in mid-May to June and diminish down to baseflows in mid-summer. Late season flows are supplemented by releases from upstream reservoirs and upstream trans-basin imports - Colorado-Big Thompson Project and Laramie River water. Hydrology below the mouth of the canyon is significantly depleted as a result of water management activities and dry up is common on the river. Direct flow diversions are common throughout the irrigation season, while diversions to off-channel storage reservoirs are common in the winter. The entire Poudre River system is a heavily managed system controlled by reservoir releases, trans-basin imports, and diversions and exchanges in the lower watershed. Peak flows are diminished and baseflows are impacted as a result of these water management activities. The NISP Mitigation Releases will boost flows year-round from the canyon mouth down to the Mulberry Street bridge.

7. Existing Natural Environment

The natural environment in the Poudre River is a somewhat diverse fishery consisting of both native and non-native species. The upper reaches of the Poudre River as it emerges from Poudre Canyon are typical of a cold water trout fishery, containing both rainbow and brown trout. As the river flows to the east through Fort Collins onto the plains, the slope decreases, diversions out of the channel are more significant, and water temperatures rise. Here the fishery transitions from a cold water fishery to a mixed cold water/cool water/warm water fishery. Trout persist in the watershed down to approximately Interstate 25 but are challenged by low flows, reduced habitat, and higher water temperatures. The Interstate is roughly the lower boundary of the cold water habitat. The NISP Mitigation Releases will

benefit the fishery as described above from the canyon mouth down to the Mulberry Street bridge. This reach is entirely cold water (trout) habitat.

8. Proposed Method of Acquisition

Under this proposal, the CWCB would acquire a contractual interest in up to 14,350 acre-feet of Mitigation Releases from Glade Reservoir. Northern and the CWCB are in the process of negotiating the terms of the dedication agreement. (See draft agreement at **Exhibit 1**). Following such agreement and upon the Board's approval, pursuant to 37-92-102(8)(d)(III), C.R.S., CWCB and Northern will file a water court application to "seek approval of the proposed protected mitigation releases," as required by SB 18-170.

Under the Water Delivery Agreement and Water Court decree, Northern will release and deliver water stored in Glade Reservoir as necessary to satisfy the measures for Mitigation Releases identified in the Mitigation Plan, for exclusive use by the CWCB as Protected Mitigation Releases. When Northern notifies the CWCB that such releases are being made, the CWCB shall protect the 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.

9. Proposed Use of the Acquired Water

The acquired water would be used to preserve and improve the natural environment in the Poudre River to a reasonable degree by protecting Mitigation Releases at all locations in the Qualifying Stream Reach up to 18-25 cfs as directed by the Mitigation Plan targets and CPW's recommended flows in the Poudre River. The Division Engineer may require releases from the New Reservoir Capacity to include administrative shrink to account for evaporation, transportation, and other losses so the full amount of Protected Mitigation Releases can be protected at all locations throughout the Qualifying Stream Reach. 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 of: (a) winter flows of up to 80 cfs to preserve, and flows from 80 cfs to 150 cfs to improve, the natural environment to a reasonable degree; and (b) summer flows of up to 114 cfs to preserve, and flows from 114 to 260 cfs to improve, the natural environment to a reasonable degree.

CPW has reviewed this proposal, has collaborated on this memo, and has provided the final recommendation letter attached as **Exhibit 3**. CPW staff will be available to answer questions at this board meeting in support of the project. CPW has accepted the 122.2 Mitigation Plan submitted by Northern and thus agrees that the Mitigation Releases will incrementally preserve and improve the natural environment.

CPW has relied on PHABSIM data (collected for the NISP Common Technical Platform) and R2Cross data collected by CPW when preparing final recommendations related to the proposal and the ultimate flow recommendations for this reach of the Poudre River. In general, these data show that aquatic habitat can be incrementally preserved and improved with added flows up to 150 cfs in the winter and 260 cfs in the summer.

10. Historical Use and Historical Return Flows

Because this is a release of new water stored in priority and does not involve a change of water right or historical use, the concept of historical return flows is not applicable and the Board does not need to consider this factor.

11. Location of Other Water Rights

There are many other water rights located on the Poudre River within the Qualifying Stream Reach; however, they will not be affected by this release and protection of water stored in priority.

12. Material Injury to Existing Rights

There will be no injury to existing rights. The statute guiding this acquisition requires that the owner of the water prove no injury "to vested water rights, decreed conditional water rights, ...or other water users' uses or exchanges of water being made pursuant to appropriation or practices in existence on the date of the filing" of the water court application. See 37-92-102(8)(f)(I)(B) C.R.S. Pursuant to 37-92-102(8) C.R.S., and under the Water Delivery and Dedication Agreement, water previously stored in priority under the Glade Reservoir water rights would be released as required in the Mitigation Plan and protected by CWCB up to the target flow rates for the identified stream segment. Any other necessary terms and conditions to prevent injury to other water rights will be included in the final water court decree.

13. Stacking Evaluation

When water is available under this lease for ISF use in the Poudre River, it can be used in addition to any other acquired or appropriated water rights that CWCB may also use for instream flow in this segment of the Poudre River to achieve a greater level of protection to preserve and improve the natural environment to a reasonable degree up to the CPW flow recommendations.

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

The proposed acquisition does not negatively affect any interstate compact. The reservoir release will be used for instream flow purposes, and also used for other beneficial uses at the lower terminus of the instream flow stream segment.

15. Effect on Maximum Utilization of Waters of the State

This proposed acquisition will promote maximum utilization of waters of the State by delivering the water to the NISP participants downstream, while at the same time supporting the natural environment along the delivery path of the Poudre River with additional beneficial uses for instream flow to preserve and improve the natural environment to a reasonable degree.

16. Availability for Downstream Use

The Mitigation Releases will be used downstream of the Qualifying Stream Reach by the NISP participants.

17. Administrability

CWCB Staff has discussed this project with the Division 1 Division Engineer, who has confirmed its administrability.

18. Potential Benefits of This Proposed Acquisition

The proposed acquisition will increase stream flows in the Poudre River, provide water to current dry up points in the river below headgate diversions, and provide benefits to the fish species that live in this reach.

19. Cost to Complete Transaction

Northern will dedicate the water to CWCB, so no direct costs will be incurred by CWCB. However, as part of the normal work load, CWCB staff will need to work on the acquisition documents, maintain records of the water use, and participate as a Co-Applicant in water court. The Attorney General's Office will support such application. However, physical modification to any existing diversion structures on the stream and any additional consultant costs will be incurred by Northern.

Exhibits

Exhibit 1 - Water Dedication and Delivery Agreement (Draft)

Exhibit 2 - Vicinity Map

Exhibit 3 - CPW Recommendation

Exhibit 4 - SB 18-170 (signed by Governor 4/12/2018)

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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 Releases¹ 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

¹ 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.² 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,

² 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:

Protected Mitigation Releases Through Qualifying Stream Reach		
Month	Releases (acre-feet)	Releases (cfs)
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
Total	14,350	

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: _____

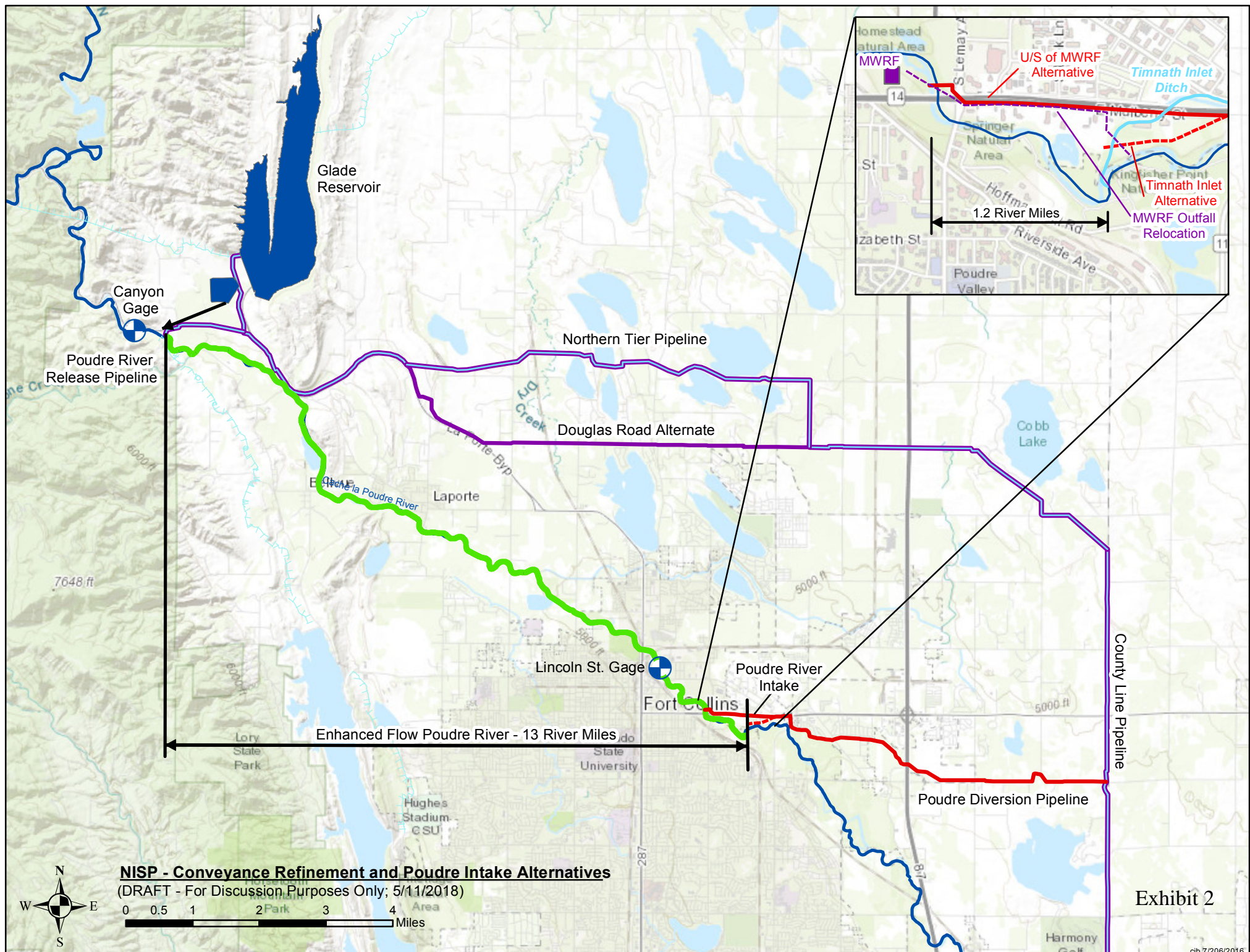
ATTEST:

**NORTHERN COLORADO WATER CONSERVANCY
DISTRICT**

BY: _____

By: _____
Brad Wind, General Manager

Date: _____





COLORADO

Parks and Wildlife

Department of Natural Resources

Water Resources Section
Capital, Parks, and Trails Branch
6060 Broadway
Denver, CO 80216

September 6, 2018

Linda Bassi
Kaylea White
Colorado Water Conservation Board
Stream and Lake Protection Section
1313 Sherman Street, 7th Floor
Denver, CO 80203

SUBJECT: Potential Contractual Interest in Water from Glade Reservoir for the Benefit of Instream Flows on the Poudre River

Linda and Kaylea:

The Colorado Water Conservation Board (CWCB) has requested Colorado Parks and Wildlife's (CPW) recommendations on the proposed acquisition of a contractual interest in stored water as part of Northern Colorado Water Conservancy District's (Northern) Northern Integrated Supply Project (NISP). The following is CPW's analysis and recommendations regarding the proposed dedication of stored water to instream flow (ISF) uses guided by recently enacted Senate Bill 18-170, codified at section 37-92-102(8), C.R.S. This is the first time that this new statute is being utilized; CPW is generally following the established procedures for water acquisitions for ISF uses. This new statute allows Northern to utilize the ISF program to provide legal protection for releases of water that are required in a state approved mitigation and/or enhancement plan. The NISP Fish and Wildlife Mitigation and Enhancement Plan (FWMEP or "Mitigation Plan") was approved by both the Colorado Parks and Wildlife Commission and the CWCB in 2017. The FWMEP included a requirement that Northern release water from storage to mitigate low flow conditions in the Cache la Poudre (CLP) River in the City of Fort Collins. Specifically, releases will be made from the to-be-constructed Glade Reservoir in amounts identified in the Mitigation Plan to provide ISF benefits to the CLP River. The new statute (described above) provides a mechanism by which the water releases are legally protected from diversion by other water users in compliance with the Mitigation Plan. The balance of this letter will address and describe CPW's analyses and final recommendations relating to the Northern - NISP proposal.

General Information

The reach benefitting from the proposed Mitigation Releases would extend from the Poudre River Delivery Pipeline to be located near the Hansen Supply Canal down approximately 11.5 miles to the proposed Poudre River Intake located near the Mulberry Wastewater Treatment Plant (the "Fort Collins reach"). Releases will be delivered from Glade Reservoir to the CLP



River via the Poudre River Delivery Pipeline and ultimately will be re-diverted from the river and delivered to NISP participants via the Poudre River Intake (Attachment - Exhibit 2). The Mitigation Releases are designed to address seasonal low flows within this reach of the CLP. It is important to point out that there are currently several points of dry-up within the subject reach of the CLP. The Mitigation Plan and IGA between the State of Colorado and the NISP Water Activity Enterprise contain the monthly schedule for deliveries ranging between 18 and 25 cfs into the Poudre River, up to 14,350 AF annually; the monthly deliveries are summarized in Table 1.

Table 1. Poudre River Mitigation Releases		
Month	Acre-feet	cfs¹
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
Total	14,350	

¹Measured at the bottom of the Fort Collins reach, at the Poudre River Intake.

CWCB does not currently hold an ISF water right within this reach of the Poudre River. At this time, a new junior ISF water right appropriation is unattainable due to some very complex and well documented water availability issues. Currently, there are other ongoing efforts by local stakeholders to restore flows in the CLP River. The approval of SB 18-170 expanded opportunities to integrate these flow augmentation concepts with the NISP mitigation plan to achieve significant and lasting ISF benefits in the Poudre River as it flows through Fort Collins. By statute, new junior ISF appropriations can only preserve the natural environment, while acquisitions of water can be used to both preserve and improve the natural environment. The proposed acquisition of a contractual interest in 14,350 AF of stored water in Glade Reservoir and released for downstream uses could, depending upon underlying hydrologic conditions, be used in the intervening reach of the CLP River to both preserve and improve the natural environment.

Field Data Collection

CPW and other interests have been analyzing and collecting field data on the Poudre River for over 10 years. CPW was approached by Larimer County Open Space Department and the City of Fort Collins Natural Areas Program in 2010 to investigate the applicability of the CWCB's ISF program to address instream flow and natural lake level protection opportunities on their lands. In 2014, CPW collected R2CROSS data at 6 sites within the Fort Collins city limits. These datasets were used to initiate discussions relating to flows necessary to preserve the natural environment through the City of Fort Collins. As stated above, the CLP through Fort Collins presents a fair number of complex water availability issues, so after some initial discussions between CPW and the City, the question of a new junior ISF water right was put on hold. The City and CPW were also both in the midst of complex discussions surrounding the environmental analyses that were underway for NISP and the Halligan/Seaman water supply projects. The state and local governmental agencies collectively agreed to wait for the outcome of these water project permitting processes and re-assess the ISF questions later. In particular, we decided to wait until the data that was generated for the environmental permitting processes was released and made available to the general public; we were collectively aware of some very detailed studies that were going to shed significant light on the CLP's ISF issues.

As part of the NISP Supplemental EIS, a Common Technical Platform (CTP) was developed to evaluate the interrelated and cumulative impacts from NISP and the Cities of Fort Collins/Greeley's Halligan/Seaman Projects. The CTP and the NISP Supplemental EIS were used as a platform for the development of the NISP Mitigation and Enhancement Plans. Aspects of the CTP will also be utilized in the future mitigation planning associated with the Halligan/Seaman Projects. The CTP documents include a comprehensive review of all available hydrologic and biologic data, water quality, and physical habitat modeling data. CPW has utilized the CTP data to enhance and refine the 2014 R2CROSS efforts (described above) and to support the work of local CLP collaborative efforts to improve flows in the entire CLP corridor from the canyon mouth down to Greeley (also described above). The CTP comprehensive report was prepared by GEI Consultants in 2013; a copy of this report can be found on the US Army Corps of Engineers website under the NISP Supplemental EIS tab.

As mentioned above, the CTP provides CPW with fisheries data and physical habitat modeling data that can be used to document the existing natural environment in the CLP, to develop ISF recommendations, and to evaluate various ISF proposals and scenarios. The scientific team who developed the CTP compiled data and information to develop reach-, species-, and life stage-specific habitat-flow relationships for the Poudre River; this was done using two-dimensional hydraulic modeling and physical habitat simulation software (PHABSIM). The resulting datasets contain habitat-flow relationships for various species of fish at different life stages. These datasets were used in conjunction with the R2CROSS results to develop segment-specific flow recommendations designed to preserve and improve the natural environment in the Poudre River.

R2CROSS is a standard setting methodology that is useful in recommending specific ISF amounts based on a set of hydraulic criteria. Standard-setting techniques tend to be a firm quantification for non-degradation of biological needs based on the retention of hydraulic characteristics in a critical low flow habitat. PHABSIM, on the other hand, is an incremental methodology that is most useful to evaluate various water management scenarios and the

associated changes in habitat conditions for certain life stages of fish. PHABSIM is a widely used technique for evaluating the incremental changes in species- or life stage-specific habitat due to changing flow scenarios; it is therefore very useful identifying impacts, potential improvements, or conducting trade-off analyses when one is looking at a change in hydrologic conditions.

In general, when a seasonal flow amount is identified (whether from R2CROSS or from PHABSIM), the lower limit can be considered to be the *amount needed to preserve the natural environment to a reasonable degree* and any flow over and above the lower limit (often times up to an upper limit or threshold) can be considered to be the range of flows where the data can be relied upon to assist in the CWCBC finding that flows in this range can be used beneficially to *improve the natural environment*.

Natural Environment Data

Over the past several decades, CPW and others have conducted field surveys of the fishery resources on this segment of the Poudre River; much of this data was summarized in the GEI CTP report. This data can be used by the CWCBC to make the conclusion that a natural environment exists and that this natural environment that can be preserved and improved to a reasonable degree with the water being made available from the acquisition. The CLP River in the Fort Collins reach is a somewhat diverse fishery consisting of both native and non-native species. As the River emerges from the Poudre Canyon, it is typical of a cold-water fishery, containing both rainbow and brown trout. As the river flows to the south and east through Fort Collins, the physical habitat changes, flow alterations become more significant, and water temperatures rise. The fishery transitions from a cold water fishery to a mixed cold water/cool water fishery. Primarily due to warmer temperatures, brown trout become more prevalent than rainbows and other species start to show up in sampling efforts - namely carp, fathead minnows, suckers, and dace.

CPW Flow Recommendations

In response to the Northern NISP Mitigation Release proposal, CWCBC asked CPW to provide our recommendations relative to flows within the Fort Collins reach that will preserve and/or improve the CLP natural environment to a reasonable degree.

To develop these flow recommendations, CPW used a composite of the three R2CROSS sites within the subject reach, Lyons Park, Shields Avenue, and Linden Avenue and two of the CTP's PHABSIM sites, Watson Lake and Martinez Park to characterize and analyze the reach of the CLP River that will benefit from the NISP Mitigation Releases (see Figure 1). CPW believes that it is appropriate to examine all of this data, both R2CROSS and PHABSIM, to come up with flow recommendations for the CLP to preserve and improve the natural environment. The R2CROSS results (developed utilizing the standard methodologies described in Nehring, 1981 and Espegren, 1996) are summarized in Table 2.

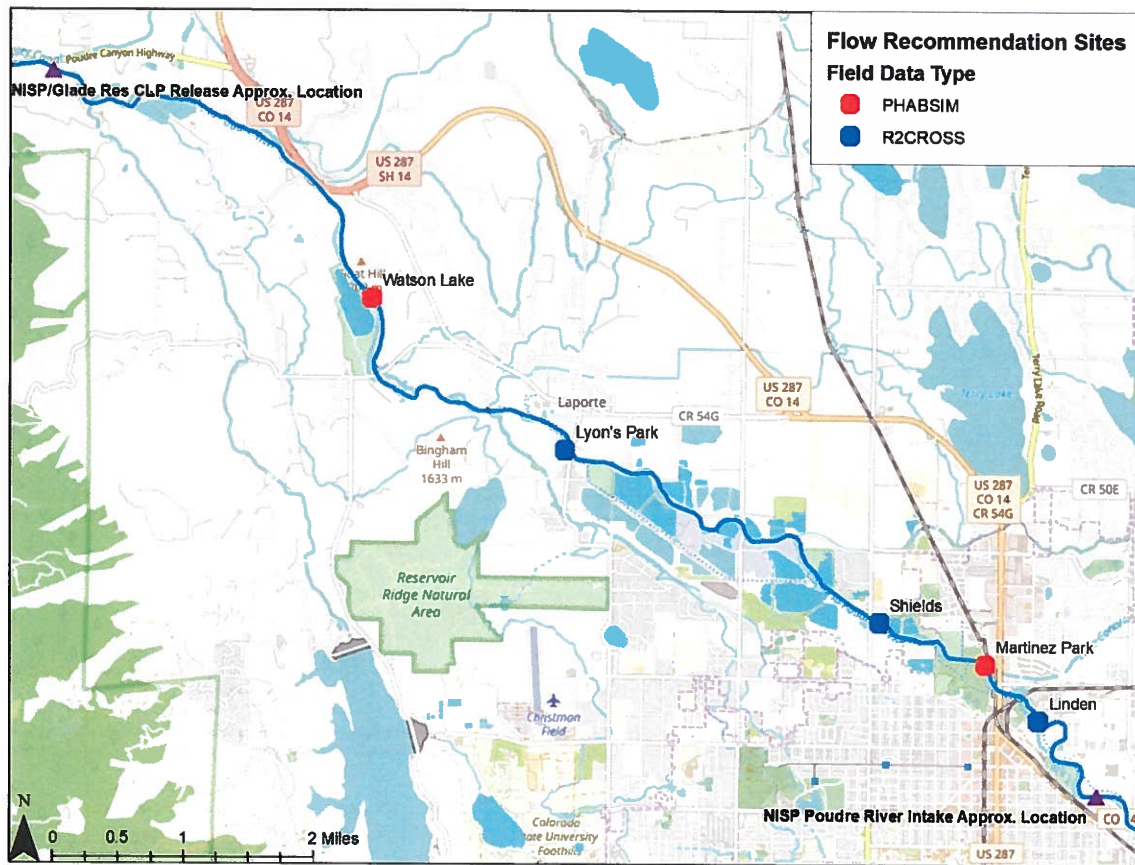


Figure 1. Map of R2CROSS and PHABSIM Sites

Table 2. Seasonal In-Range R2CROSS Flow Recommendations		
R2X Site	Winter Flow Recommendation (flow meeting 2 of the 3 hydraulic criteria)	Summer Flow Recommendation (flow meeting all 3 hydraulic criteria)
Lyons Park	98	209
Sheilds	82	170
Linden Street	Outside of Range of Accuracy	117
Average	90	165

Figure 2 and Figure 3 below are the PHABSIM weighted usable area (WUA) vs. flow relationships (WUA curves) for the two PHABSIM sites, Watson Lake and the Martinez Park:

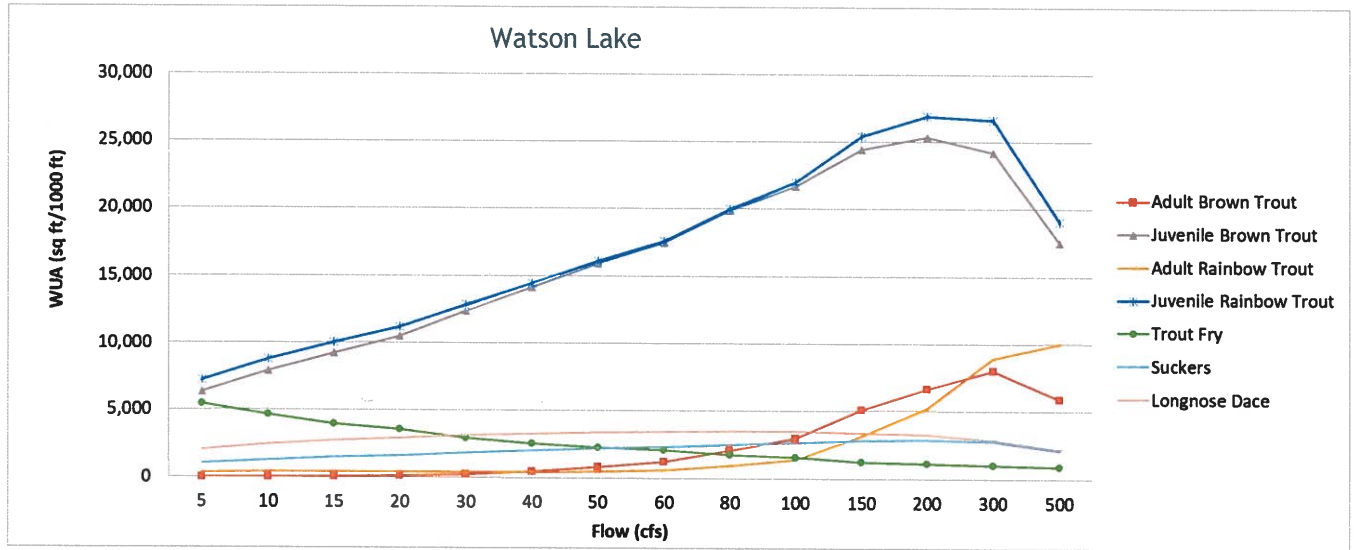


Figure 2. WUA Curves for Watson Lake Site (GEI, 2013)

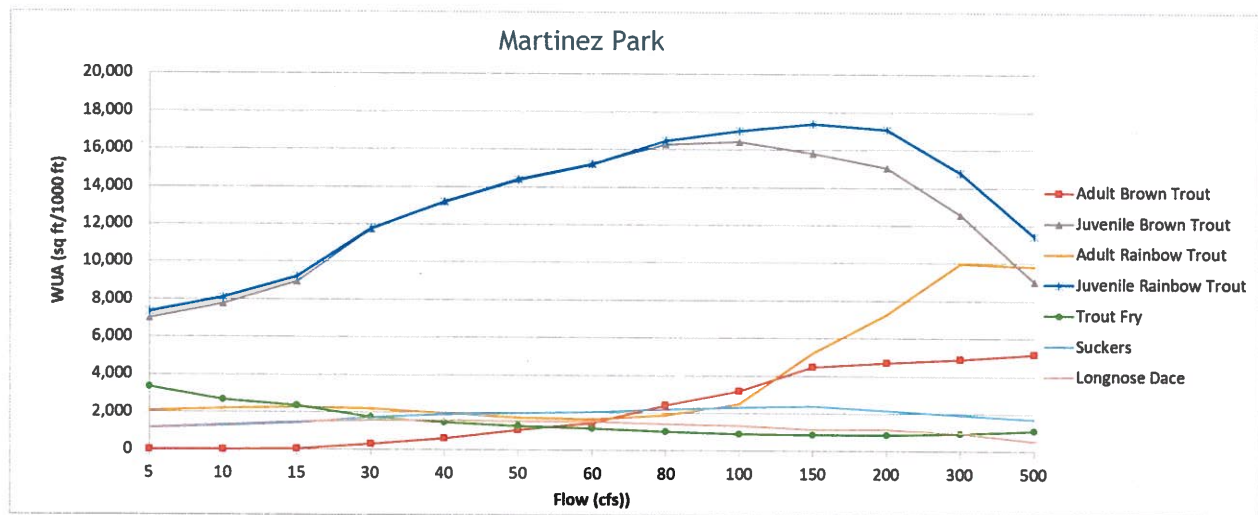


Figure 3. WUA Curves for Martinez Park Site (GEI, 2013)

The averaged R2CROSS results point toward a winter season flow recommendation of 90 cfs and a summer season flow recommendation of 165 cfs. In general, R2CROSS flow recommendations should fall in the sub-optimal range; this does not appear to be true in this case. After examining the PHABSIM results for the Fort Collins reach of the CLP River, CPW believes that the channel geometry measured at the three R2CROSS sites was significantly altered as a result of the 2013 floods and we conclude that the winter season flow appear somewhat reliable but require some refinements using the PHABSIM data. The channel alterations seem to have a greater impact on the summer season flow recommendations (due primarily to the bankfull channel indicators); we will therefore rely more heavily on the PHABSIM data for the summer season flow recommendations.

We believe that it is useful to discuss some differences and similarities that are evident in the PHABSIM results. First, note the similarities of the juvenile curves at both sites. Both rainbow and brown trout juvenile habitat curves follow the same pattern at both sites. The adult

brown trout curves also follow similar patterns from site to site, but the Martinez Park site appears to have better brown trout habitat from 150 cfs to 500 cfs. The adult rainbow curves are also quite similar from site to site. The major difference in all of these curves is the flow at which habitat is maximized (the optimum flow) and the slight differences at which habitat increases within certain ranges of flow. Due to all of these similarities from site to site and due to the fact that at any given time, both adult and juvenile life stages are present in the river, it is reasonable to combine the two PHABSIM sites and to also combine the species into two general categories - "all adult trout" and "all juvenile trout".

CPW did not consider the "Trout Fry" curve in the development of flow recommendations for the CLP. Trout fry, in general, seek out low velocity areas near the margins of any stream or river and it tends to be relatively stable irrespective of the flow; fry habitat decreases at higher flows as the overall quantity of low velocity habitat decrease. Therefore, adult and juvenile trout were the primary drivers of the flow recommendations. We also calculated the flows at which 90% and 50% of the optimum level of habitat occurs; all of this data was used to develop and/or refine the "preserve" flow recommendations.

The 90 cfs R2CROSS winter flow recommendation appears to be a little high when one looks at the optimum or near optimum (90%) flows for juvenile trout. We therefore recommend a slightly lower flow (80 cfs) for the winter season to preserve the natural environment. 80 cfs is the mid-point between the 50% flow for juveniles (22 cfs) and the 50% flow for adults (137 cfs). For the summer season "preserve" flow, we recommend 114 cfs; this flow is the mid-point of the 90% flow for juvenile trout (91 cfs) and the 50% flow for adult trout (137 cfs). CPW is of the opinion that 80 cfs in the winter season and 114 cfs in the summer season are the flow targets to preserve the natural environment to a reasonable degree in the Fort Collins reach of the CLP River. In general, trout habitat is stable or increasing in this range of flows in the CLP.

When flows increase above 80 cfs in the winter and 114 cfs in the summer, this is the hydrologic range where habitat is, in general, rapidly increasing and approaching optimum levels. This is, by definition, the range of flows where "improvement to the natural environment" is possible. In general, optimum habitat for adult trout is reached in the 300 to 500 cfs range but that needs to be balanced with the fact that juvenile trout habitat is maximized at flows in the 100 to 200 cfs range (flows above this range are actually detrimental to this critical life stage). This balancing act is largely an issue of professional judgment. CPW believes that during the winter months, improvement of the natural environment can be realized in the range of flows from 80 cfs up to 150 cfs; 150 cfs represents the mid-point of the optimum flow for juvenile trout for both species at the two PHABSIM sites. Similarly, during the summer months, CPW is of the opinion that flows from 114 cfs up to 260 cfs are flows where a significant improvement is possible. 260 cfs represents the mid-point between the average adult trout optimum (356 cfs) and the average juvenile optimum (163 cfs) for both species at both sites.

All of these flow levels are significantly higher than the Mitigation Releases in Table 1, but it is important to note that there will be times and points within the Fort Collins reach when the Mitigation Releases are not the only water in the river. The converse is also true; there will be points in both time and space where the NISP Mitigation Releases might be the only water in the river (the "Dry Up Points"). These flow recommendations will allow the CWCB to protect the NISP Mitigation Releases from diversion under all circumstances. It is CPW's understanding that the contract between CWCB and Northern will address the issue of transit losses and

measuring devices to ensure that the NISP Mitigation Releases will be present in the entire Fort Collins reach at all times.

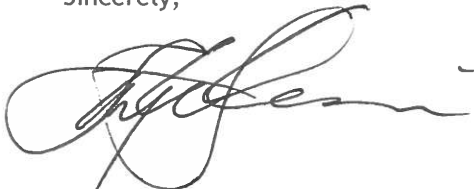
Based on the approach described above, the recommendations summarized in Table 3 are both the amount needed to preserve the natural environment and the upper limits of flows that will result in an improvement to the natural environment.

Table 3. Flow Recommendation Summary		
	Preserve ISF target rates	Improve ISF target rates
Winter Flow Recommendation (Nov 1-March 31)	Up to 80 cfs	Between 80 cfs and 150 cfs
Summer Flow Recommendation (April 1-Oct 31)	Up to 114 cfs	Between 114 cfs and 260 cfs

CPW staff and Commission invested considerable time in developing the Mitigation Plan with Northern and we are eager to put SB 18-170 to work to implement the Plan's elements. CPW is ready to assist in advancing this aspect of the NISP project and the Mitigation Plan. CPW looks forward to working with the Board's staff and Northern when the project is finalized and releases are implemented.

As always, CPW staff will be in attendance at the September 2018 CWCB meeting in Steamboat Springs to provide testimony or to answer any questions that the Board might have relating to this agenda item. Thank you for the opportunity to assist in this matter.

Sincerely,



Jay Skinner
Katie Birch
CPW Instream Flow Program Coordinators



CC: Conovitz, Spohn, Bettige, Armstrong, Nichols, Corday

NOTE: This bill has been prepared for the signatures of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws. Governor Signed 4/12/2018



SENATE BILL 18-170

BY SENATOR(S) Sonnenberg, Baumgardner, Cooke, Coram, Crowder, Gardner, Lambert, Lundberg, Marble, Neville T., Priola, Scott, Smallwood, Tate;
also REPRESENTATIVE(S) Hansen and McKean, Rankin, Rosenthal, Saine, Valdez, Winkler, Young.

CONCERNING A WATER COURT PROCESS BY WHICH AN OWNER OF A STORAGE WATER RIGHT ALLOWING WATER TO BE STORED IN NEW RESERVOIR CAPACITY MAY RELEASE WATER INTO AN IDENTIFIED STREAM REACH IN A MANNER THAT PROTECTS THE WATER RELEASES WHILE COMPLYING WITH MITIGATION MEASURES IDENTIFIED IN A FISH AND WILDLIFE MITIGATION PLAN APPROVED BY THE COLORADO WATER CONSERVATION BOARD.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 37-92-102, **add** (8) as follows:

37-92-102. Legislative declaration - basic tenets of Colorado water law. (8) Reservoir releases for fish and wildlife mitigation - definitions. (a) THE GENERAL ASSEMBLY HEREBY FINDS, DETERMINES, AND DECLARES THAT:

Exhibit 4

Capital letters or bold & italic numbers indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(I) ALLOWING THE OWNER OF A WATER STORAGE RIGHT THAT ALLOWS WATER TO BE STORED IN NEW RESERVOIR CAPACITY TO CONTRACT WITH THE BOARD TO DEDICATE TO THE BOARD WATER STORED UNDER THE WATER STORAGE RIGHT FOR RELEASE FROM THE NEW RESERVOIR CAPACITY TO REASONABLY AVOID, MINIMIZE, OR MITIGATE IMPACTS OF THE NEW RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN AN IDENTIFIED STREAM REACH MAY ENABLE THE OWNER OF THE WATER STORAGE RIGHT TO COMPLY WITH MITIGATION MEASURES IDENTIFIED IN A FISH AND WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2;

(II) ACCORDINGLY, FOR THE LIMITED PURPOSE OF PROVIDING ADDITIONAL METHODS TO COMPLY WITH A FISH AND WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2, IT IS APPROPRIATE TO CREATE A WATER COURT PROCESS TO ALLOW THE OWNER OF A WATER STORAGE RIGHT THAT ALLOWS WATER TO BE STORED IN NEW RESERVOIR CAPACITY, A PORTION OF WHICH WATER WILL THEN BE DEDICATED TO THE BOARD, TO:

(A) OBTAIN PROTECTION FOR WATER TO BE RELEASED FROM THE NEW RESERVOIR CAPACITY, UP TO THE AMOUNT OF WATER THAT IS APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH; AND

(B) MAINTAIN DOMINION AND CONTROL OVER THE RELEASED WATER THROUGH A QUALIFYING STREAM REACH;

(III) THE RELEASED WATER SUBJECT TO A PROTECTED MITIGATION RELEASE AUTHORIZED UNDER THIS SUBSECTION (8) MUST BE REDIVERTED AT OR BELOW THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH, EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED EXCHANGE AS PERMITTED IN THIS SUBSECTION (8) FOR USE BY AN OWNER FOR THE DECREED BENEFICIAL USES OF THAT WATER STORAGE RIGHT;

(IV) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (8), THE CONTRACTUAL DEDICATION TO THE BOARD MUST COMPLY WITH THE PROCEDURES AND PROTECTIONS FOR OTHER WATER RIGHTS SPECIFIED IN SUBSECTION (3) OF THIS SECTION;

(V) THE WATER COURT PROCESS AND RESULTING DECREE MUST ENSURE THAT:

(A) PROTECTED MITIGATION RELEASES DO NOT EXPAND THE WATER STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR THE PROTECTED MITIGATION RELEASES OR INJURE OTHER WATER RIGHTS;

(B) THE PROTECTED MITIGATION RELEASES WILL BE PROTECTED THROUGH THE QUALIFYING STREAM REACH UP TO THE AMOUNT OF WATER THAT IS APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH; AND

(C) DIVERSIONS OF THE PROTECTED MITIGATION RELEASES WITHIN THE QUALIFYING STREAM REACH BY EXCHANGES, SUBSTITUTION PLANS, AUGMENTATION PLANS, OR OTHER MEANS THAT CAUSE A REDUCTION IN THE PROTECTED MITIGATION RELEASES WITHIN THE QUALIFYING STREAM REACH, OTHER THAN REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER LOSSES, WILL BE PREVENTED; AND

(VI) THROUGH THE DEDICATION OF THE PROTECTED MITIGATION RELEASES TO THE BOARD UNDER THE PROCEDURES SET FORTH IN SUBSECTION (3) OF THIS SECTION, EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (8), AND THROUGH THE WATER COURT DECREE APPROVING THE PROTECTED MITIGATION RELEASES, THE PROTECTED MITIGATION RELEASES WILL SERVE A SECONDARY INSTREAM BENEFICIAL USE, SPECIFICALLY THE PRESERVATION OR IMPROVEMENT OF THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH.

(b) AS USED IN THIS SUBSECTION (8):

(I) "BOARD" MEANS THE COLORADO WATER CONSERVATION BOARD CREATED IN SECTION 37-60-102.

(II) "MITIGATION RELEASE" MEANS:

(A) THE RELEASE OF WATER FROM A WATER STORAGE RIGHT STORED IN 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; AND

(B) THE REDIVERSION OF THE RELEASED WATER AT OR BELOW THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH, EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED IN-PRIORITY EXCHANGE TO AN EXCHANGE-TO POINT IDENTIFIED IN THE DECREED IN-PRIORITY EXCHANGE THAT IS OUTSIDE OF THE QUALIFYING STREAM REACH, FOR USE BY AN OWNER FOR THE DECREED BENEFICIAL USES OF THAT WATER STORAGE RIGHT.

(III) "NEW RESERVOIR CAPACITY" MEANS ADDITIONAL WATER STORAGE CAPACITY RESULTING FROM THE CONSTRUCTION OF A NEW RESERVOIR OR A PHYSICAL ENLARGEMENT OF AN EXISTING RESERVOIR IF THE CONSTRUCTION OR PHYSICAL ENLARGEMENT IS COMPLETED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (8).

(IV) "OWNER" MEANS THE PERSON THAT OWNS THE WATER STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR A PROTECTED MITIGATION RELEASE, AND, IN THE CASE OF A WATER STORAGE RIGHT OWNED BY A WATER CONSERVANCY DISTRICT, WATER CONSERVATION DISTRICT, MUNICIPALITY, SPECIAL DISTRICT, OR MUTUAL DITCH COMPANY, INCLUDES THE RESIDENTS, ALLOTTEES, MEMBERS, CUSTOMERS, SHAREHOLDERS, OR MEMBER DITCH COMPANIES OF THAT ENTITY; AND, IN THE CASE OF A WATER STORAGE RIGHT OWNED BY AN IRRIGATION DISTRICT, INCLUDES THE LANDOWNERS WITHIN THE DISTRICT.

(V) "PROTECTED MITIGATION RELEASE" MEANS THE AMOUNT OF WATER TO BE RELEASED FOR A MITIGATION RELEASE THAT:

(A) THE BOARD DETERMINES IS APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN AN IDENTIFIED QUALIFYING STREAM REACH;

(B) IS APPROVED BY A WATER COURT DECREE PURSUANT TO THIS SUBSECTION (8); AND

(C) IS PROTECTED FROM DIVERSION, EXCHANGE, OR USE BY HOLDERS OF CONDITIONAL OR VESTED WATER RIGHTS OR OTHER PERSONS THAT CAUSE A REDUCTION IN THE PROTECTED MITIGATION RELEASE AT ANY LOCATION

WITHIN THE QUALIFYING STREAM REACH, OTHER THAN ANY REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER LOSSES.

(VI) "QUALIFYING STREAM REACH" MEANS ALL OR A PORTION OF A NATURAL STREAM OF THE STATE THAT IS IDENTIFIED IN A FISH AND WILDLIFE MITIGATION PLAN APPROVED UNDER SECTION 37-60-122.2 AND WITHIN WHICH THE BOARD DETERMINES, AND THE WATER COURT DECREE APPROVES IN ACCORDANCE WITH THIS SUBSECTION (8), THAT WATER FROM A PROTECTED MITIGATION RELEASE IS APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE. A QUALIFYING STREAM REACH MUST BE IDENTIFIED BY AN UPSTREAM POINT AT WHICH THE PROTECTED MITIGATION RELEASE ENTERS THE NATURAL STREAM AND A DOWNSTREAM TERMINATION POINT.

(VII) "SURFACE POINT OF DIVERSION" MEANS A STRUCTURE THAT DIVERTS SURFACE WATER ONLY. "SURFACE POINT OF DIVERSION" DOES NOT INCLUDE:

(A) A STRUCTURE THAT DIVERTS GROUNDWATER, WHETHER THROUGH A WELL, INFILTRATION GALLERY, OR OTHER TYPE OF GROUNDWATER DIVERSION STRUCTURE; OR

(B) DELIVERY INTO A FACILITY USED TO RECHARGE AN ALLUVIAL AQUIFER.

(c) (I) AN OWNER MAY, IN ACCORDANCE WITH AND AFTER COMPLYING WITH THE REQUIREMENTS OF THIS SUBSECTION (8), MAKE A PROTECTED MITIGATION RELEASE.

(II) HOLDERS OF CONDITIONAL OR VESTED WATER RIGHTS OR OTHER PERSONS SHALL NOT DIVERT, EXCHANGE UPON, OR USE A PROTECTED MITIGATION RELEASE WITHIN THE QUALIFYING STREAM REACH UNLESS THE DIVERSION, EXCHANGE, OR USE IS FULLY AUGMENTED SO THAT THERE IS NO REDUCTION IN THE PROTECTED MITIGATION RELEASE AT ANY LOCATION WITHIN THE QUALIFYING STREAM REACH, OTHER THAN REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER LOSSES.

(III) THE STATE ENGINEER SHALL ADMINISTER PROTECTED MITIGATION RELEASES MADE IN ACCORDANCE WITH THIS SUBSECTION (8) AND THE TERMS AND CONDITIONS OF DECREES APPROVING PROTECTED

MITIGATION RELEASES.

(IV) (A) EXCEPT FOR REDUCTIONS CAUSED BY EVAPORATION, TRANSPORTATION, AND OTHER LOSSES, AND SUBJECT TO SUBSECTIONS (8)(c)(IV)(B) AND (8)(c)(IV)(C) OF THIS SECTION, AN OWNER SHALL: REDIVERT ALL PROTECTED MITIGATION RELEASES AT OR BELOW THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH, EITHER DIRECTLY AT A SURFACE POINT OF DIVERSION OR BY A DECREED IN-PRIORITY EXCHANGE TO AN EXCHANGE-TO POINT IDENTIFIED IN THE DECREED IN-PRIORITY EXCHANGE THAT IS OUTSIDE OF THE QUALIFYING STREAM REACH; AND APPLY THE WATER TO THE DECREED BENEFICIAL USES OF THE WATER STORAGE RIGHT THAT PROVIDES THE WATER FOR THE PROTECTED MITIGATION RELEASE.

(B) EXCEPT AS PROVIDED IN SUBSECTION (8)(c)(IV)(C) OF THIS SECTION, AN OWNER MAY REDIVERT WATER ASSOCIATED WITH PROTECTED MITIGATION RELEASES IN ACCORDANCE WITH SUBSECTION (8)(c)(IV)(A) OF THIS SECTION BY EXCHANGE INTO STORAGE, WHICH EXCHANGE SHALL BE ADMINISTERED WITH A PRIORITY DATE NO EARLIER THAN THE DATE OF APPROVAL OF THE FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN PURSUANT TO SECTION 37-60-122.2, AND SUBSEQUENTLY APPLY THE WATER TO THE DECREED BENEFICIAL USES OF THE WATER STORAGE RIGHT THAT PROVIDES THE WATER FOR THE PROTECTED MITIGATION RELEASE.

(C) AN OWNER SHALL NOT REDIVERT WATER ASSOCIATED WITH PROTECTED MITIGATION RELEASES BY EXCHANGE THROUGH ALL OR A PORTION OF THE QUALIFYING STREAM REACH OR TO THE RESERVOIR OF ORIGIN.

(V) WATER PRESENT IN THE QUALIFYING STREAM REACH, OTHER THAN THE PROTECTED MITIGATION RELEASES, REMAINS AVAILABLE TO OTHER WATER USERS FOR BENEFICIAL USES AND MAY BE DIVERTED AND BENEFICIALLY USED BY OTHER WATER USERS IN ACCORDANCE WITH THE PRIORITY SYSTEM AND ANY RELEVANT DECREE.

(VI) THE PROCEDURES SET FORTH IN THIS SUBSECTION (8) APPLY ONLY TO THE ADJUDICATION OF PROPOSED PROTECTED MITIGATION RELEASES FROM NEW RESERVOIR CAPACITY AND DO NOT ALTER THE PROCEDURES OR LEGAL STANDARDS APPLICABLE TO ANY OTHER TYPE OF WATER COURT APPLICATION.

(VII) AN APPLICATION FOR APPROVAL OF A PROPOSED PROTECTED MITIGATION RELEASE FILED IN ACCORDANCE WITH THIS SUBSECTION (8) MUST NOT INCLUDE, AND SHALL NOT BE CONSOLIDATED OR JOINED WITH, ANY OTHER WATER COURT APPLICATION.

(d) AN OWNER THAT INTENDS TO MAKE PROTECTED MITIGATION RELEASES IN ACCORDANCE WITH THIS SUBSECTION (8) SHALL, BEFORE ANY SUCH RELEASES MAY BE ADMINISTERED AS PROTECTED MITIGATION RELEASES:

(I) DEDICATE THE PROPOSED PROTECTED MITIGATION RELEASES TO THE BOARD BY GRANT, DONATION, OR OTHER CONTRACTUAL AGREEMENT IN ACCORDANCE WITH SUBSECTIONS (3) AND (8)(e) OF THIS SECTION;

(II) AGREE TO MAKE THE PROPOSED PROTECTED MITIGATION RELEASES AVAILABLE TO THE BOARD WITHIN THE QUALIFYING STREAM REACH;

(III) WITH THE BOARD AS A CO-APPLICANT, FILE AN APPLICATION IN WATER COURT IN THE WATER DIVISION IN WHICH THE NEW RESERVOIR CAPACITY IS LOCATED, SEEKING APPROVAL OF THE PROPOSED PROTECTED MITIGATION RELEASES, BY THE LAST DAY OF THE TWELFTH MONTH FOLLOWING THE MONTH IN WHICH THE NEW RESERVOIR CAPACITY IS CERTIFIED FOR STORAGE BY THE STATE ENGINEER; EXCEPT THAT AN APPLICATION MUST NOT INCLUDE ANY OTHER CLAIM FOR RELIEF; AND

(IV) OBTAIN A FINAL WATER COURT DECREE APPROVING THE PROTECTED MITIGATION RELEASES.

(e) (I) EXCEPT AS OTHERWISE PROVIDED IN THIS SUBSECTION (8)(e), A DEDICATION TO THE BOARD PURSUANT TO SUBSECTION (8)(d)(I) OF THIS SECTION OF AN INTEREST IN WATER YIELDED FROM A WATER STORAGE RIGHT THAT WILL BE STORED IN NEW RESERVOIR CAPACITY IS SUBJECT TO SUBSECTION (3) OF THIS SECTION FOR THE DEDICATION OF AN INTEREST IN WATER TO THE BOARD, INCLUDING THE REQUIREMENT IN SUBSECTION (3) OF THIS SECTION THAT THE BOARD MAKE A DETERMINATION THAT THE PROPOSED PROTECTED MITIGATION RELEASES ARE APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH.

(II) THE BOARD'S CONTRACTUAL INTEREST IN WATER ACQUIRED IN ACCORDANCE WITH THIS SUBSECTION (8) MAY BE YIELDED FROM A WATER RIGHT THAT IS EITHER ABSOLUTE OR CONDITIONAL AT THE TIME OF ACQUISITION.

(III) TO OBTAIN A DECREED RIGHT TO USE PROPOSED PROTECTED MITIGATION RELEASES FOR INSTREAM FLOW PURPOSES, THE OWNER AND THE BOARD NEED NOT FILE AN APPLICATION WITH THE WATER COURT TO CHANGE THE WATER STORAGE RIGHT FROM WHICH THE PROPOSED PROTECTED MITIGATION RELEASES ARE TO BE MADE.

(IV) THE BOARD NEED NOT HOLD A DECREED APPROPRIATION FOR INSTREAM FLOWS WITHIN THE QUALIFYING STREAM REACH AS A PREREQUISITE FOR AN OWNER TO DEDICATE PROPOSED PROTECTED MITIGATION RELEASES TO THE BOARD IN ACCORDANCE WITH THIS SUBSECTION (8).

(f) (I) TO SATISFY THE REQUIREMENTS OF SUBSECTIONS (8)(d)(III) AND (8)(d)(IV) OF THIS SECTION, THE BOARD AND THE OWNER MUST FILE A WATER COURT APPLICATION AS CO-APPLICANTS PURSUANT TO SUBSECTION (8)(d)(III). THE WATER COURT SHALL ENTER A DECREE APPROVING THE PROPOSED PROTECTED MITIGATION RELEASES IF:

(A) THE BOARD DEMONSTRATES THAT IT HAS DULY DETERMINED IN ACCORDANCE WITH THIS SUBSECTION (8) AND WITH SUBSECTION (3) OF THIS SECTION THAT THE PROPOSED PROTECTED MITIGATION RELEASES ARE APPROPRIATE FOR STREAM FLOWS TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH. IF A PARTY CHALLENGES THE BOARD'S DETERMINATION IN THE WATER COURT PROCEEDING, THE BOARD SHALL ASSEMBLE AND SUBMIT TO THE COURT THE COMPLETE ADMINISTRATIVE RECORD UPON WHICH THE BOARD MADE THE DETERMINATION. THE COURT SHALL BASE ITS REVIEW OF THE BOARD'S DETERMINATION ON THE ADMINISTRATIVE RECORD, USING THE CRITERIA SET FORTH IN SECTION 24-4-106 (6) AND (7).

(B) THE OWNER PROVES THAT THE PROPOSED PROTECTED MITIGATION RELEASES: WILL NOT CAUSE AN EXPANSION OF USE BEYOND THE LIMITS OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH THE MITIGATION RELEASES ARE TO BE MADE; WILL NOT CAUSE INJURY TO VESTED WATER RIGHTS, DECREED CONDITIONAL WATER RIGHTS, SUBSEQUENTLY

ADJUDICATED WATER RIGHTS THAT ARE THE SUBJECT OF A PENDING WATER COURT APPLICATION FILED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (8), OR OTHER WATER USERS' USES OR EXCHANGES OF WATER BEING MADE PURSUANT TO APPROPRIATION OR PRACTICES IN EXISTENCE ON THE DATE OF THE FILING OF THE APPLICATION FOR APPROVAL OF THE PROPOSED PROTECTED MITIGATION RELEASES; ARE ADMINISTRABLE BY THE DIVISION ENGINEER; AND HAVE BEEN DEDICATED TO AND APPROVED BY THE BOARD IN COMPLIANCE WITH THE REQUIREMENTS AND PROCEDURES OF SUBSECTION (8)(e) OF THIS SECTION.

(II) FOR PURPOSES OF DETERMINING INJURY PURSUANT TO SUBSECTION (8)(f)(I)(B) OF THIS SECTION, THE INABILITY OF OTHER WATER USERS TO DIVERT, EXCHANGE UPON, OR USE THE PROPOSED PROTECTED MITIGATION RELEASES WITHIN THE QUALIFYING STREAM REACH SHALL NOT BE CONSIDERED INJURY.

(III) THE WATER COURT SHALL NOT REQUANTIFY THE WATER STORAGE RIGHT FROM WHICH THE PROTECTED MITIGATION RELEASES ARE PROPOSED TO BE MADE.

(IV) A DECREE APPROVING A PROTECTED MITIGATION RELEASE MUST CONTAIN THE TERMS AND CONDITIONS NECESSARY TO PREVENT INJURY TO OTHER WATER RIGHTS, PREVENT THE EXPANSION OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED MITIGATION RELEASE IS TO BE MADE, AND ENSURE THAT THE PROTECTED MITIGATION RELEASES ARE ADMINISTRABLE BY THE DIVISION ENGINEER, INCLUDING, IF NECESSARY, TO PREVENT INJURY OR EXPANSION OF USE OF THE DECREED WATER STORAGE RIGHT FROM WHICH THE PROTECTED MITIGATION RELEASE IS TO BE MADE, TERMS REJECTING OR DECREASING THE PROPOSED FLOW RATE OF THE PROTECTED MITIGATION RELEASES OR THE QUALIFYING STREAM REACH. ALL SUCH DECREES MUST ALSO SPECIFICALLY IDENTIFY THE TIMING AND RATE OF THE PROTECTED MITIGATION RELEASES, THE QUALIFYING STREAM REACH, AND THE FLOW RATE THAT IS APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH. FOR PROTECTED MITIGATION RELEASES THAT ARE TO BE EXCHANGED INTO STORAGE IN ACCORDANCE WITH SUBSECTION (8)(c)(IV)(B) OF THIS SECTION, THE DECREE MUST SPECIFY THAT THE EXCHANGE TO STORAGE BE ADMINISTERED WITH A PRIORITY DATE THAT IS NO EARLIER THAN THE DATE OF THE APPROVAL OF THE FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN PURSUANT TO SECTION 37-60-122.2.

(V) AN OWNER SHALL ERECT, MAINTAIN, AND REPAIR SUITABLE AND PROPER MEASURING DEVICES AS REQUIRED BY SECTION 37-84-113 AND BY THE DECREE APPROVING THE PROTECTED MITIGATION RELEASES AND AS ORDERED BY THE STATE OR DIVISION ENGINEER. ADDITIONALLY, THE OWNER SHALL MAINTAIN RECORDS OF THE QUANTITY AND RATE OF RELEASE OF THE PROTECTED MITIGATION RELEASES AND THE QUANTITY AND RATE OF DIVERSION OF THE PROTECTED MITIGATION RELEASES THAT ARE REDIVERTED FOR SUBSEQUENT APPLICATION TO BENEFICIAL USE.

(g) IF OPERATION OF A PROTECTED MITIGATION RELEASE UNDER THIS SUBSECTION (8) REQUIRES THE MAKING OF PHYSICAL MODIFICATIONS TO AN EXISTING WATER DIVERSION STRUCTURE WITHIN THE QUALIFYING STREAM REACH TO ALLOW THE PROTECTED MITIGATION RELEASE TO BYPASS THE EXISTING WATER DIVERSION STRUCTURE, THE OWNER OF THE WATER STORAGE RIGHT USED TO MAKE THE PROTECTED MITIGATION RELEASE SHALL BEAR ALL REASONABLE CONSTRUCTION COSTS ASSOCIATED WITH THE PHYSICAL MODIFICATIONS AND ALL REASONABLE OPERATIONAL AND MAINTENANCE COSTS INCURRED BY THE OWNER OF THE EXISTING WATER DIVERSION STRUCTURE THAT WOULD NOT HAVE BEEN INCURRED IN THE ABSENCE OF THE PHYSICAL MODIFICATIONS TO THE STRUCTURE.

(h) A DETERMINATION UNDER SECTION 37-60-122.2 THAT RELEASES OF WATER FROM NEW RESERVOIR CAPACITY WILL HELP TO REASONABLY AVOID, MINIMIZE, OR MITIGATE THE IMPACTS OF THE NEW RESERVOIR CAPACITY ON FISH AND WILDLIFE RESOURCES WITHIN THE QUALIFYING STREAM REACH IS EVIDENCE OF THE APPROPRIATENESS OF A PROTECTED MITIGATION RELEASE WITHIN THE QUALIFYING STREAM REACH.

(i) A MITIGATION RELEASE SHALL NOT BE PROTECTED OR ADMINISTERED AS A PROTECTED MITIGATION RELEASE:

(I) WHEN THE AMOUNT OF THE EXISTING FLOW IN THE QUALIFYING STREAM REACH IS SUCH THAT ADDITION OF THE PROTECTED MITIGATION RELEASE WOULD EXCEED THE STREAM FLOW RATE SET FORTH IN THE DECREE TO BE APPROPRIATE TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE WITHIN THE QUALIFYING STREAM REACH;

(II) UNLESS THE OWNER IS IN COMPLIANCE WITH:

(A) THE MEASURING REQUIREMENTS OF SECTION 37-84-113;

(B) THE TERMS AND CONDITIONS IN THE DECREE APPROVING THE PROTECTED MITIGATION RELEASE REGARDING THE OPERATION, MAINTENANCE, OR REPAIR OF PROPER MEASURING DEVICES; AND

(C) AN ORDER BY THE STATE OR DIVISION ENGINEER REGARDING THE OPERATION, MAINTENANCE, OR REPAIR OF PROPER MEASURING DEVICES;

(III) WHEN THE OWNER IS INCAPABLE OF REDIVERTING THE PROTECTED MITIGATION RELEASE AT OR BELOW THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH FOR APPLICATION TO A DECREED BENEFICIAL USE OF THE WATER STORAGE RIGHT THAT IS TO PROVIDE THE WATER FOR THE PROTECTED MITIGATION RELEASE;

(IV) WHEN THE RELEASED WATER IS WITHIN THE NATURAL STREAM AT A LOCATION OUTSIDE OF THE QUALIFYING STREAM REACH, INCLUDING WHEN THE RELEASED WATER IS BETWEEN THE DOWNSTREAM TERMINATION POINT OF THE QUALIFYING STREAM REACH AND THE POINT OF REDIVERSION; OR

(V) WHEN THE OWNER IS NOT OTHERWISE IN COMPLIANCE WITH THE TERMS OF THE DECREE APPROVING THE PROTECTED MITIGATION RELEASE.

(j) THIS SUBSECTION (8):

(I) DOES NOT IMPAIR OR IN ANY WAY AFFECT ANY WATER COURT DECREE, ADMINISTRATIVE AUTHORIZATION, OR AGREEMENT THAT ALLOWS WATER TO BE STORED, RELEASED, AND ADMINISTERED FOR ENVIRONMENTAL, PISCATORIAL, WATER QUALITY, RECREATIONAL, MUNICIPAL, OR OTHER IN-CHANNEL PURPOSES, INCLUDING THE MAINTENANCE OF DOMINION AND CONTROL OVER THE WATER RELEASES FROM A SPECIFIED RESERVOIR;

(II) IS NOT INTENDED TO BE THE EXCLUSIVE MEANS OF AUTHORIZING WATER TO BE STORED, RELEASED, AND ADMINISTERED FOR ENVIRONMENTAL, PISCATORIAL, WATER QUALITY, RECREATIONAL, MUNICIPAL, OR OTHER IN-CHANNEL PURPOSES, INCLUDING THE MAINTENANCE OF DOMINION AND CONTROL OVER THE WATER RELEASED FROM A SPECIFIC RESERVOIR; AND

(III) DOES NOT AUTHORIZE, RESTRICT, OR PRECLUDE FUTURE WATER RIGHTS, APPROPRIATIONS, ADMINISTRATIVE AUTHORIZATIONS, OR OTHER AGREEMENTS FOR THE PURPOSES LISTED IN SUBSECTION (8)(j)(I) OF THIS

SECTION.

SECTION 2. Act subject to petition - effective date - applicability. (1) This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 8, 2018, if adjournment sine die is on May 9, 2018); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2018 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

(2) This act applies to reservoir release dedication applications filed in the water court on or after the applicable effective date of this act.

Kevin J. Grantham
PRESIDENT OF
THE SENATE

Crisanta Duran
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Effie Ameen
SECRETARY OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED _____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO