



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Alexander Funk, Agricultural Water Resources Specialist

DATE: March 6, 2019

AGENDA ITEM: 30. Colorado Springs Utilities Fallowing-Leasing Pilot Project Proposal

Background:

The Lower Arkansas Valley Super Ditch Company, Inc. (the "Super Ditch") and the City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities ("CS-U"), (collectively "Applicants" formally submitted a fallowing-leasing pilot proposal for selection by the Board on November 16th, 2018.

The proposal falls under the auspices of HB13-1248 and the Criteria and Guidelines for Fallowing-Leasing Pilot Projects ("Criteria and Guidelines"), approved as amended by the Board at its January 2016 meeting. HB13-1248 authorizes the Board to administer a pilot program to test the efficacy of fallowing-leasing as an alternative to permanent agricultural dry-up and is a critical component of the state's efforts in implementing Colorado's Water Plan.

The Applicants seek selection of the proposed Colorado Springs Utilities Pilot Project ("CS-U Pilot Project") by the Board. The Applicants developed the CS-U Pilot Project to demonstrate the viability of the fallowing-leasing concept on a larger scale, and to provide water to CS-U for drought recovery without the need for permanent dry-up of irrigated agriculture, which can cause significant economic hardship for rural communities. The proposal is limited to the transfer of certain shares in the Catlin Canal Company ("Catlin") for temporary use by CS-U. Limiting the proposal to Catlin shares is a change from the initial proposal received by CWCB which also included Fort Lyon Canal Company ("Fort Lyon") and Rocky Ford High Line Canal Company ("High Line"). The applicants plan to continue conversations with the respective boards and shareholders of both entities and give them additional time to discuss future ATM opportunities internally.

Discussion:

The Criteria and Guidelines establish a four-step process for pilot project selection and approval by the Board, in consultation with the State Engineer and the public. First, to be considered for selection, applicants must submit a pilot project proposal to the Board. The purpose of the proposal is to provide the Board and other interested stakeholders with notice and a general description of the proposed pilot project, the land to be fallowed, the proposed use, and other information specified in the Section II.F. of the Criteria and Guidelines. This information includes the proposed specific water rights and the lands and parcels that will be analyzed and dried up as part of the pilot project and other information providing an initial overview of the proposed pilot project's components. The submittal for selection does not



require a technical analysis regarding historic use, historic consumptive use, or return flows. The applicants must provide this more detailed information in the application phase and subsequent consultations with interested parties and the State Engineers. Altogether, the Criteria and Guidelines provide a process through which the proposal is further refined to meet the objectives of HB13-1248, including the development of written terms and conditions for the operation of the project.

Following the submission of a pilot project proposal by a sponsor, the CWCB will post the proposal on its website, and the sponsor will provide written notice. Parties may submit comments on the proposed pilot project to the CWCB within 30 days. CWCB staff received four comments on the CS-U Pilot Proposal and discussed the comments with the State Engineer's Office and the sponsors.

Overall, the comments received were generally supportive of the proposal but requested that the project application include additional information about the specific water rights and specific land and parcels that will be analyzed and dried up, and the ownership of them, in the pilot project. At the January 2019 Board meeting, the Board directed the applicants to submit a written letter responding to the comments and to include additional information as to the specific water rights and parcels to be included in the pilot proposal. The applicant's letter describing proposed modifications to the proposal to address the commenters' concerns is attached to this memo. The letter also discusses how the modified proposal builds on the previously approved Catlin Leasing-Following Pilot Project and will provide information for the CWCB and State Engineer to evaluate the efficacy of a larger-scale leasing-following pilot project. Applicants will provide a more detailed overview of the proposal during the March meeting and be available to answer any questions from the Board.

Staff recommendation:

Upon the Board's review and consideration, the Board may select the proposed pilot project to participate in the program, request that a sponsor provide more information regarding the proposed pilot project for reconsideration by the Board at its next regularly scheduled meeting (March), or deny the proposal. At this time, CWCB Staff recommends that the Board approve the CS-U Pilot Project Proposal for formal selection as an eligible pilot project within the Arkansas River Basin. Given the need to modify the proposal, staff further recommends that the Board extend the ninety (90) day application submission deadline by up to sixty (60) days.

Attachments: Applicant Letter to Board, CS-U Project Proposal Materials, Public Comment Letters





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March 4, 2019

Colorado Water Conservation Board
Rebecca Mitchell, Director
Lauren Ris, Deputy Director
Alex Funk, Agricultural Water Resources Specialist
1313 Sherman Street, Room 718
Denver, CO 80203

**Re: HB 13-1248; Super Ditch/Colorado Springs Utilities Pilot Project Proposal
Response to Comments and Modification**

Dear Ms. Mitchell. Ms. Ris, and Mr. Funk,

I. Introduction

The Lower Arkansas Valley Super Ditch Company, Inc. (the “Super Ditch”) and the City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities (“CS-U”), (collectively “Applicants”) submitted a pilot project proposal to the CWCB on November 16, 2018 (the “Proposal”). Tri-State Generation and Transmission Association (“Tri-State”), the Lower Arkansas Water Management Association (“LAWMA”), Pueblo West Metropolitan District (“Pueblo West”), and Five Rivers Cattle Feeding LLC d/b/a Colorado Beef (“Colorado Beef”) submitted comments to the Proposal in December of 2018. This letter describes the Applicants’ proposed modifications to the Proposal to address the commenters’ concerns. Most significantly, the Applicants intend to withdraw the Fort Lyon Canal Company (“Fort Lyon”) and the Rocky Ford High Line Canal Company (“High Line”) from the Proposal, and reduce the amount of water to be leased to 1,000 acre-feet in three of any ten years. The Applicants believe that this will address the majority of the commenters’ concerns, while still resulting in a significant pilot project that will test the efficacy of leasing-fallowing to meet municipal water supply needs as an alternative to buy-and-dry. Applicants request that the CWCB consider its original Proposal for selection with the changes described below.

II. Responses to Comments

A. Fort Lyon and High Line

Applicants will withdraw Fort Lyon and High Line from the Proposal, and reduce the amount of water to be leased to 1,000 acre-feet per year in three of any ten years during the term of the Super Ditch/CS-U Pilot Project. The Catlin Canal Company (“Catlin”) water rights and parcels described in the original Proposal will be used to provide the lease water for this project. For clarity, an updated table that includes certificate numbers is attached hereto as Exhibit A. Applicants intend to pursue a leasing-fallowing project to fulfill the entire 5,000 acre-feet per year as described in the original Proposal in the future, either through another pilot project application, or other administration procedure. This will allow Fort Lyon and High Line more time to determine internally how to conduct a leasing program with their shareholders.

The modified Proposal will build on the Catlin Pilot Project and provide valuable new information for the CWCB and State Engineer to evaluate the efficacy of a larger-scale leasing-fallowing project. First, the Super Ditch/CS-U Pilot Project will provide water to a large municipality with different demands and infrastructure than the municipalities participating in the Catlin Pilot Project. Second, the Super Ditch/CS-U Pilot Project will deliver water in only 3 out of 10 years, as opposed to annually. This feature will help test the operational flexibility of the leasing-fallowing project and the ability of the Super Ditch and leasing shareholders to respond to more short-term demands. Third, Applicants are analyzing an exchange concept for replacement of delayed return flows where both the consumptive use and return flow portion of the water are exchanged upstream to Pueblo Reservoir and then the delayed return flows are replaced to the Arkansas River from other fully-consumable sources available to CS-U. If approved, this feature will test whether the delivery of delayed return flow replacement water can be accomplished without the construction and operation of recharge ponds. Finally, the Super Ditch/CS-U Pilot Project is larger than the Catlin Pilot Project, providing twice as much water in one year (1,000 acre-feet) as the Catlin Pilot Project, and will help demonstrate the scalability and cost savings of a larger project.

The modified Proposal will also resolve the most significant concerns raised by the commenters. First, removing Fort Lyon and High Line will address the concern raised by commenters that the Proposal did not identify specific water rights and parcels under these ditch systems. Second, reducing the deliveries to 1,000 acre-feet per year will address Tri-State’s concern that the Proposal is a “significant water development activity” and that the CWCB must give “special consideration” to comments. Finally, limiting the Proposal to the Catlin will address LAWMA’s concern that the Proposal should be considered three pilot projects instead of one.

B. Stock Certificate Numbers

LAWMA comments that Applicants did not include the certificate numbers for the Catlin shares to be included in the Super Ditch/CS-U Pilot Project. Applicants believe that the information included in the Proposal was adequate to satisfy the Criteria and Guidelines at the proposal stage, i.e., to identify “specific water rights...and ownership of them.” However, an updated table that includes certificate numbers is attached hereto as Exhibit A.

C. Catlin Pilot Project Operations

Tri-State asserts that the Catlin Pilot Project was operated incorrectly and without advance approval by the Division Engineer on several days in 2018. These specific concerns, however, are beyond the purview of the Proposal. Additionally, CS-U is not part of the Catlin Pilot Project and has no knowledge about its operation, so it would be inappropriate for the joint applicants here to respond to this comment at the proposal selection stage. To avoid similar concerns with the Proposal in the future, Super Ditch will enter proposed exchanges under the Pilot Project into the Arkansas River DSS at the time of the request so that interested parties may review the requests.

D. Return Flows and Other Technical Analyses

Tri-State expresses concern that the Proposal does not provide sufficient information regarding return flow replacements. At this stage, the Criteria and Guidelines require the Applicants to identify only the source of water for replacing return flow obligations and how and where the replacement water will be delivered. Detailed information including “technical analyses regarding...return flows” will be submitted at the application stage, consistent with the Criteria and Guidelines. The Proposal identifies the sources of water for replacing return flow obligations and options for how and where replacement water will be delivered. Applicants will conduct thorough engineering studies during the time period between selection and submitting a full application to determine the best of these options for replacing return flows. These detailed technical analyses will be included, as required, in the full application. Similarly, Pueblo West included comments related to sub-irrigation, return flow effects, and accounting that will be addressed in the full application.

Tri-State also asserts that the proposal to trade credits with SWSPs violates section 37-60-115(8)(d)(XI) of the pilot project statute. This statute states that land and water included in a pilot project may not also be included in an SWSP or IWSA. Trading credits with an SWSP or other administratively approved program is not equivalent to including the same water rights in both projects, and thus is not prohibited by statute. Applicants will address this issue further in the future if they determine that this option should remain in the full application.

Finally, Tri-State expresses further concerns about the use of Winter Water as a potential replacement source. The Applicants do not agree with Tri-State's legal analysis supporting these concerns; but, in any event, the Applicants will not use Winter Water as a replacement source, which should obviate these concerns.

E. Overlapping Shares

Tri-State and LAWMA claim that the Proposal includes land and water that overlaps with land and water included in the Catlin Pilot Project. While some of the same farms are participating, the parcels and shares included in this project are different. Exhibit A contains an updated list of lands and water included in the Proposal.

F. Compliance with Decrees

Pueblo West asserts that the Super Ditch/CS-U Pilot Project should be operated in compliance with previous court cases. Applicants agree and are confident that following the pilot project application and comment process, extensive terms and conditions will be imposed that will protect Pueblo West's water rights, including its exchange rights, as was done with the Catlin Pilot Project.

Pueblo West also seems concerned that Applicants intend to use the 05CW96 Exchange to exchange water into Pueblo Reservoir. This, however, is incorrect. The purpose of the Super Ditch/CS-U Pilot Project is to deliver water to CS-U in Pueblo Reservoir using the 10CW4 Exchange or other legally available means. CS-U may then use its 05CW96 Exchange or other legally available means to transfer the water into its system. However, for the purposes of this project, once the water is delivered into Pueblo Reservoir, it has been delivered to the municipality and no terms and conditions related to the 05CW96 Exchange would be appropriate. Similarly, CS-U's other exchanges are beyond the scope of the Proposal and do not require additional terms and conditions as part of the Super Ditch/CS-U Pilot Project.

G. Pilot Project Evaluation

Pueblo West states that the Proposal should "be evaluated on the basis of prevention of injury to other water rights, not on a claim of benefits to society in general." The Applicants agree the pilot project must be implemented to avoid injury to other water users, and, as stated above, are confident that following the application and comment process, extensive terms and conditions will be imposed to accomplish this. As part of the Super Ditch/CS-U Pilot Project, however, the Applicants also seek to evaluate the benefits that Super Ditch offers to both individual farmers and the Arkansas River Valley

as a whole by providing alternatives to permanent buy-and-dry. The Criteria and Guidelines state that the overarching purpose of the pilot project program is “to test the efficacy of fallowing-leasing as an alternative to permanent agricultural dry-up.” § I.A. The Criteria and Guidelines also provide that the program’s purposes include demonstrating cooperation among ditch companies and municipalities, and providing data for the CWCB and State Engineer to evaluate the feasibility of fallowing-leasing. § I.D.1. Each of these will be a prominent feature of this pilot project and are appropriate for the CWCB to consider in determining whether to proceed with the Proposal.

III. Conclusion

Applicants appreciate the support expressed by Tri-State and LAWMA throughout their comment letters, and the opportunity to respond to all of the comments received. Applicants request the CWCB consider selection of the modified Proposal pursuant to C.R.S. § 37-60-115(8) and the Criteria and Guidelines at the CWCB’s March, 2019 meeting. Applicants would welcome the opportunity to make a presentation on the Super Ditch/CS-U Pilot Project at that time. Please let us know if you have any questions or would like additional information.

Sincerely,

A handwritten signature in black ink, appearing to read 'Megan Gutwein', with a long horizontal line extending to the right.

Megan Gutwein

cc: Matt Montgomery
John Schweizer
Gerry Knapp

Table 1: Participating Shares and Irrigated Acreage

Ownership	Certificate Nos.¹	Approximate Acreage	Number of Shares Associated w/ Lands
Chavez Family Farms	19, 20, 3705, 3706, 3712, 3720, 3629	3282.80	3660.863
Chavez Family Farms - Thelin	3672	153	101
Diamond A Products	6-18, 21-25, 3691	3282.80	3410.583
The Marion J. & Jack E. Roth Trust	3669	31.36	32
Groves, Russell	2, 3, 4, 5	385.63	160.04
Schelegel, Marvin	44	124	100
Schweizer, Kenneth, Arlene, John	2754, 3493, 3498, 91, 3703	413.33	389.476
Hostetler, Calvin & Deanna	3598	30	30
Hirakatas et. al.	63, 67, 68, 94-98	570.15	575
Mayhoffer, David, Lacie, Edward	3608, 3609, 3611, 3612, 3613, 3614, 3615, 3663	1,800	753.833
Elite Enterprises	55, 56	33	50.895
Herbert K. & Herbert D. Mameda	42, 43	150.1	99
Hanagan, Eric, Gary B., Margaret, Hanagan & Knaus	69-72	549.1	441.410

¹ Some certificate numbers listed here were also included in the Catlin Pilot Project. These shares will not be used in the Super Ditch/CS-U Pilot Project until the ten-year period for the first pilot project is over. Additionally, after the Catlin Pilot Project was approved, some Catlin share certificates were re-issued as augmentation share certificates and given new numbers. The full application for the Super Ditch/CS-U Pilot Project will reconcile these numbers to ensure that the same water rights are not included in both pilot projects.



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November 16, 2018

Colorado Water Conservation Board
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Lauren Ris, Deputy Director
1313 Sherman Street, Room 718
Denver, CO 80203

Re: HB 13-1248 Colorado Springs Utilities Pilot Project Proposal for CWCB Selection

Dear Ms. Mitchell and Ms. Ris,

This fallowing-leasing pilot project proposal is submitted pursuant to HB 13-1248, C.R.S. § 37-60-115(8) (2018), on behalf of the Lower Arkansas Valley Super Ditch Company, Inc. (the “Super Ditch”) and the City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities (“CS-U”), (collectively “Applicants”) for the selection of a pilot project to deliver up to 5,000 acre feet of water in a single year, which would begin operation in 2020. The CS-U Pilot Project would meet 10 percent of the 2050 goal of Colorado’s Water Plan for Alternative Transfer Methods.

Applicants seek selection of this proposal pursuant to Section II.A of the Criteria and Guidelines for Fallowing Leasing Pilot Projects, approved as amended by the Colorado Water Conservation Board on January 25, 2016 (the “Criteria and Guidelines”). The proposed Colorado Springs Utilities Pilot Project (“CS-U Pilot Project”) will use water available from certain shares in the Catlin Canal Company (“Catlin”), Fort Lyon Canal Company (“Fort Lyon”), and/or Rocky Ford High Line Canal Company (“High Line”) for temporary municipal uses by CS-U. The proposal is for a pilot project that would operate over a ten-year period, i.e., from January 1, 2020 through December 31, 2029.

HB 13-1248, as amended and extended by Senate Bill (SB) 15-198 and HB 17-1219 and codified at C.R.S. § 37-60-115(8), authorizes the CWCB to administer a pilot program to test the efficacy of fallowing-leasing as an alternative to permanent agricultural dry-up. The Super Ditch, along with the Lower Arkansas Valley Water Conservancy District (“Lower Ark”), has been successfully operating the Catlin Pilot Project under HB 13-1248 since 2015 to demonstrate rotational fallowing-water leasing to meet municipal water demands in a manner that avoids permanent

agricultural dry-up. This concept has received support from the CWCB, the IBCC, the Basin Roundtables, the Colorado Legislature, and Governor Hickenlooper. Applicants are pleased to have the opportunity to submit this proposal for a pilot project under HB 13-1248.

I. Notice Requirements (Criteria and Guidelines §§ II.A, & F)

Applicants request that the CWCB post this CS-U Pilot Project Proposal on its website upon receipt pursuant to Section II.A of the Criteria and Guidelines. Additionally, pursuant to C.R.S. § 37-60-115(8)(e)(II) and Section II.F of the Criteria and Guidelines, Applicants have provided written notice and a copy of this CS-U Pilot Project Proposal and all accompanying materials by first class mail or electronic mail to all parties that have subscribed to the substitute water supply plan notification list for Water Division 2. Proof of such notice is attached hereto.

II. Description of the Pilot Project (Criteria and Guidelines §§ II.F.1.a-f)

A. Generally

The CS-U Pilot Project will fallow parcels of land rotationally or intermittently and provide the transferable consumptive use water without permanent dry-up for municipal use, thereby encouraging farmers to continue farming and remain active members of their communities. The CS-U Pilot Project was developed by the Applicants to demonstrate the viability of the fallowing-leasing concept on a larger scale, and to provide water to CS-U for drought recovery without the need for permanent dry-up of irrigated agriculture. The CS-U Pilot Project will build on the lessons learned from the Catlin Pilot Project and demonstrate the scalability and cost savings of a larger fallowing-leasing project that includes shares in multiple ditch companies.

Super Ditch is a Colorado corporation formed in 2008 for the benefit of the farmers in the Lower Arkansas Valley below Pueblo Reservoir and above the Kansas state line. The Super Ditch in partnership with Lower Ark was created as a farmer-owned company to manage the operations of the water enterprise, including the Catlin Pilot Project and the proposed CS-U Pilot Project.

The CS-U Pilot Project seeks to use water available to shareholders of Catlin, Fort Lyon, and High Line as the source of up to 5,000 acre-feet annually of transferable consumptive use water that will be made available to CS-U for temporary use in its municipal water systems through the rotational fallowing of sufficient acreage to generate such water. CS-U will take delivery of water made available through the CS-U Pilot Project through operation of physical or contract exchanges/trades.

CS-U has contracted for at least 1,000 acre-feet of water annually in three out of the ten years of this Pilot Project. Fallowing-Leasing Project Agreement by and between the Lower Arkansas Valley Super Ditch Company and the City of Colorado Springs, Acting by and through its Enterprise, Colorado Springs Utilities (August 20, 2018) (“CS-U Contract”), attached as **Exhibit A**. CS-U has the option to request up to 5,000 acre-feet of water annually in three out of ten years. Given the nature of the contract between Super Ditch and CS-U, no land will be fallowed for more than three out of ten years in compliance with the Criteria and Guidelines, § II.C.

B. Proposed Municipal Use

CS-U's Municipal Water Use. CS-U is a municipal utility enterprise that provides, among other things, municipal and industrial water service to customers within the City of Colorado Springs, Colorado ("Colorado Springs") and its water service area, and to other municipal and quasi-municipal entities who provide water service within the vicinity of Colorado Springs. CS-U obtained a decree in Case No. 05CW96, Water Division 2, authorizing CS-U to exchange water from Pueblo Reservoir to Colorado Springs' municipal water system for use, reuse, or successive use in Colorado Springs' existing and future water service area (the "05CW96 Exchange"). Pursuant to the CS-U Pilot Project, Super Ditch will deliver water to Pueblo Reservoir under the exchange being decreed in Case No. 10CW4, Water Division 2 ("10CW4 Exchange"), a new exchange, or other legally available means, for use by Colorado Springs under the 05CW96 Exchange. CS-U has contracted for up to 5,000 acre-feet of water delivered by Super Ditch in three out of ten years. CS-U Contract at ¶ 3.2.

Delivery to CS-U. Leased water will be made available to CS-U through delivery via exchange to Pueblo Reservoir. Super Ditch will deliver water to Pueblo Reservoir under the 10CW4 Exchange or other legally available means. CS-U will then deliver the leased water to its municipal water system under the 05CW96 Exchange or other legally available means. Pursuant to the decree in 10CW4, during times of limited exchange potential, stepped exchanges to intermediate storage locations may be utilized to move water further upstream. Depletion credits may also be traded with entities with water available at upstream locations to meet such entities' downstream replacement obligations. It is currently anticipated that these trades could involve entities such as Lower Ark, CWPDA, AGUA, and/or other entities with water stored in Pueblo Reservoir to meet downstream replacement obligations owed under augmentation plans, SWSPs, Rule 10 Plans, and/or Rule 14 Plans. When feasible, depletion credits may also be exchanged back up to the Catlin or High Line headgates and delivered into recharge locations and re-timed either for later use and/or exchange to upstream locations. The CS-U Pilot Project will, when possible, use these and potentially other operational mechanisms in order to ensure maximum utilization of available depletion credits and to test and demonstrate alternative delivery mechanisms.

An exchange concept for replacing delayed return flows may also be implemented as part of the CS-U Pilot Project, subject to further analysis during the application process. During operation of this pilot project, water to replace delayed return flows may ultimately be exchanged upstream to Pueblo Reservoir along with the consumptive use water. The delayed return flow water would be considered fully consumable and transferred to CS-U. CS-U could then make all of the required delayed return flow releases to the Arkansas River from fully consumable sources it has available to it. Conducting this operation as an exchange would maintain the fully consumable character of the water being used to replace delayed return flows.

C. The Participating Ditch Companies, Farmers & Lands to be Fallowed

The potential participating farmers with historically irrigated lands available for fallow for the initial 2020 operations of the CS-U Pilot Project consist of the shareholders of Catlin, Fort Lyon, and High Line, identified in **Table 1**, attached (the "Participating Farmers"). These three canal companies have indicated that enough of their shareholders have expressed an interest in rotationally or

intermittently fallowing all or portions of their farms for three years during the ten-year term of this pilot project to meet CS-U's needs.

Catlin Canal Company. Pursuant to a resolution signed by the Catlin board, Catlin will provide up to 5,000 acre-feet of water for lease to CS-U during the ten-year term of the CS-U Pilot Project. Resolution of the Board of Directors of the Catlin Canal Company, dated November 13, 2018 ("Catlin Resolution"), attached as **Exhibit B**. Catlin will present a contract between Catlin and Super Ditch for shareholder approval at the shareholder meeting in December. Upon approval, Catlin will execute the contract with Super Ditch, and will then enter into contracts with individual shareholders. Catlin will select historically irrigated parcels to be fallowed when CS-U requests lease water during the ten-year term of the CS-U Pilot Project. Information regarding the historically irrigated lands and associated shares used in irrigating the interested shareholders' land is provided in the attached **Table 1**. Additionally, a map showing the interested shareholders' historically irrigated lands is attached as **Exhibit C**.

Fort Lyon Canal Company. Pursuant to a letter of intent signed by the Fort Lyon board, Fort Lyon will provide up to 5,000 acre-feet of water for lease to CS-U during the ten-year term of the CS-U Pilot Project. Fort Lyon Letter of Intent, dated November 14, 2018 attached as **Exhibit D**. Fort Lyon will present a contract between Fort Lyon and Super Ditch for shareholder approval at the shareholder meeting in December. Upon approval, Fort Lyon will execute the contract with Super Ditch, and will then enter into contracts with individual shareholders. Similar to Catlin, Fort Lyon will select historically irrigated parcels to be fallowed when CS-U requests lease water during the ten-year term of the CS-U Pilot Project. Information regarding the historically irrigated lands under Fort Lyon and associated shares used in irrigating these lands is provided in the attached **Table 1**. Additionally, a map showing Fort Lyon's historically irrigated lands is attached as **Exhibit E**.

Rocky Ford High Line Canal Company. Pursuant to a letter of intent signed by the High Line board, High Line will provide up to 5,000 acre-feet of water for lease to CS-U during the ten-year term of the CS-U Pilot Project. High Line Letter of Intent, dated November 16, 2018 attached as **Exhibit F**. High Line will present a contract between High Line and Super Ditch for shareholder approval at the shareholder meeting in December. Upon approval, High Line will execute the contract with Super Ditch, and will then enter into contracts with individual shareholders. Similar to the other canal companies, High Line will select historically irrigated parcels to be fallowed when CS-U requests lease water during the ten-year term of the CS-U Pilot Project. Information regarding the historically irrigated lands under High Line and associated shares used in irrigating these lands is provided in the attached **Table 1**. High Line's historically irrigated lands are shown on the overall map attached as **Exhibit G**.

D. The Water Rights to be Used

The water rights to be utilized in the CS-U Pilot Project are those owned by Catlin, Fort Lyon, and High Line and delivered to the Participating Farmers. Catlin, Fort Lyon, and High Line own the

water rights decreed for irrigation listed in the attached **Table 2**, all located in Water District 17:¹ The canal companies also have rights to Winter Storage Water pursuant to the Decree entered in Case No. 84CW179 (Water Division 2) that are included in the CS-U Pilot Project.

E. Source of Water for Return Flow Obligations and Delivery of Replacement Water

Tailwater (irrigation season) and deep percolation (lagged) return flows associated with the historically irrigated lands will be replaced in time, location, and amount through utilizing a number of operational mechanisms and a variety of sources. Tailwater return flows will be released back to the river through augmentation stations as the water is being delivered. Delayed return flows could be met via the exchange conducted with CS-U, as described in section II.B above. Delayed return flows may also be replaced with depletion credits (either transferable consumptive use derived from the fallowed acreage and/or stream depletion credits resulting from lagging groundwater return flows) through diversion at the Catlin, Fort Lyon, or High Line headgates and subsequent release to the stream through augmentation stations. Alternatively, return flows may be maintained by exchanging depletion credits into, and later releasing those credits from, upstream storage locations. Return flows may also be maintained from upstream water supplies made available through effectuating trades with entities who have downstream replacement obligations. This could include, for example, managing operations in conjunction with Rule 10 and/or Rule 14 Plans with return flow obligations owed at downstream locations that could be met with depletion credits, thereby avoiding potential transit losses resulting from delivery from upstream locations. Additionally, return flows may be maintained through the delivery of depletion credits, either directly or by exchange, to existing or future recharge facilities and retiming of the resulting stream accretions via these same mechanisms.

Two recharge ponds have been constructed on the Catlin Canal and are located on the Schweizer and Hanagan farms. These recharge ponds have been tested in the Catlin Pilot Project and are operational. Other existing or subsequently constructed recharge facilities may also be used (such as the Excelsior Ditch recharge facilities), if determined feasible. Applicants may also construct additional recharge ponds on or near other participating farms, and/or in other locations as determined appropriate to deliver water to the appropriate stream locations.

F. Stream Reaches Used to Operate the Proposed Transfer & Administrative or Hydrological Obstacles

Generally, stream reaches that will be used to operate the proposed transfers of water under the CS-U Pilot Project will include the Arkansas River upstream to Pueblo Reservoir from its confluence with: (1) Crooked Arroyo; (2) Timpas Creek; (3) Smith Hollow; (4) Horse Creek; (5) the Fort Lyon Canal Wasteway No. 2; (6) the Holbrook Reservoir outlet ditch; (7) the Holbrook Dye Reservoir; (8) the Lake Meredith reservoir outlet; (9) the Rocky Ford High Line Canal Augmentation Station 1; and (10) from the confluences of Patterson Hollow, Timpas Creek, and Crooked Arroyo with the Arkansas River to the point of historical return flow delivery to and/or the delivery of recharge on Patterson Hollow, Timpas Creek, and Crooked Arroyo.

¹ The canal companies also receive allocations of Fry-Ark Project water, but these sources are not a part of the CS-U Pilot Project.

Applicants recognize that the exchange potential on the Arkansas River does pose a hydrological challenge to operation of the CS-U Pilot Project under certain conditions. Although the Super Ditch and Lower Ark are close to obtaining an exchange decree for the Super Ditch (Case No. 10CW4, Div. 2), this proposal has been thoughtfully designed to include various mechanisms to allow for operation in times of limited exchange potential such as the use of stepped exchanges to intermediate storage locations, use of recharge facilities, and trades of water. Also, because the Catlin Canal augmentation stations (located on Timpas Creek and Crooked Arroyo) and the point of delivery of recharge to the Arkansas River from the Schweizer and Hanagan recharge ponds are located downstream of several of the locations of historical return flows, this proposal includes possible additional recharge locations, retiming of recharge, and use of upstream storage in order to ensure the ability of the pilot project to maintain return flows in time, location and amount to prevent injury to other water rights.

G. Necessary Structures & Ownership

Structures that may be necessary and/or desirable in the operation of the CS-U Pilot Project and their ownership are shown in the attached **Table 3**.

As discussed above, water made available through the CS-U Pilot Project's fallowing of the historically irrigated lands will be run through and measured at augmentation stations. The portion of the shares historically lost to ditch seepage will be diverted at the respective canal headgate and left in the ditch. Water may be delivered via Catlin Canal laterals to the Schweizer and Hanagan recharge ponds and other ponds that may be constructed as needed. Rocky Ford High Line Canal will deliver water to the augmentation station where it will be measured back to the river. Fort Lyon Canal will deliver water to the river as approved by its board and/or shareholders. Water will also be exchanged into and/or traded for water stored in Pueblo Reservoir. Additional structures may be used in operation of the CS-U Pilot Project to provide for intermediate storage locations along the Arkansas River and additional recharge facilities. CS-U will take delivery of leased water at Pueblo Reservoir and will be responsible for transporting that water to its water systems for example, via the 05CW96 Exchange.

It is not currently anticipated that any other structures or facilities are necessary for operation of the CS-U Pilot Project. However, it is possible that additional structures either currently existing or that may be constructed during the term of the CS-U Pilot Project may be used to maximize the operational flexibility and efficiency of the project.

III. Eligibility Requirements (Criteria and Guidelines § II.C)

The proposed CS-U Pilot Project meets the eligibility requirements of C.R.S. § 37-60-115(8) (a) through (c) and Section II.C of the Criteria and Guidelines. As the second fallowing-leasing pilot project to be considered for selection, the CS-U Pilot Project has been carefully designed to build on the Catlin Pilot Project and demonstrate the efficacy of a larger fallowing-leasing pilot project of fallowing irrigated land for leasing water for temporary municipal use, while incorporating operational components that will provide useful information on the viability of fallowing-leasing. See Resolution of the Board of Directors of the Lower Arkansas Valley Super Ditch Company, Inc., dated November, 13, 2018 attached as **Exhibit H** ("Super Ditch Resolution"). The CS-U Pilot Project will demonstrate

the practice of rotationally fallowing substantial agricultural lands (currently estimated at up to 700 acres annually to supply 1,000 acre-feet of water and 3,500 acres annually to supply 5,000 acre-feet of water) that have been historically irrigated to allow for the leasing of the historical consumptive use water for temporary municipal use by CS-U. *See* Super Ditch Resolution.

The CS-U Pilot Project will demonstrate cooperation among three different canal companies, a different type of water demand (CS-U drought recovery), participating farmers, and the Super Ditch. *See* Super Ditch Resolution; Catlin Resolution; Fort Lyon Letter of Intent; High Line Letter of Intent. The cooperation amongst these groups will be facilitated through Super Ditch's management of operations. *Id.* The State, the participants, and other interested parties will have the opportunity to evaluate the feasibility of delivering leased water to temporary municipal users on a large scale using lease water from multiple ditch companies and their shareholders with more flexibility to fallow irrigated land through operation of the CS-U Pilot Project. *Id.*

The CS-U Pilot Project will provide data from which the CWCB and State Engineer can further evaluate the efficacy of using a streamlined approach for determining historical consumptive use, return flows, the potential for material injury to other water rights, and conditions to prevent injury on a large scale. Unlike the Catlin Pilot Project, the CS-U Pilot Project will involve lease water from shareholders in three different canal companies and provide maximum flexibility to irrigators to determine which acres will be fallowed. Applicant's consultants will conduct an historical use analysis using the Leasing Fallowing Tool that has been developed for the CWCB. It will also utilize the assumptions, presumptive factors and methodologies set forth in Section II.G of the Criteria and Guidelines (or successor), which were conservatively developed to streamline and standardize the historical use analysis so as to prevent injury to vested water rights, conditional water rights, or contract rights to water. *Id.* Through this, along with the imposition of protective terms and conditions, the CS-U Pilot Project will demonstrate how to operate, administer and account for the practice of fallowing irrigated agricultural land under multiple ditch companies for leasing water for temporary municipal use without causing material injury to other vested water rights, decreed conditional water rights, or contract rights to water. *Id.*

The CS-U Pilot Project would not involve the fallowing of the same land for more than three years in a ten-year period because the contract between Super Ditch and CS-U only allows CS-U to lease water in three out of ten years. The CS-U Pilot Project will involve the fallowing of lands irrigated under three different ditches and demonstrate cooperation and operation among Super Ditch, the canal companies, and individual shareholders.

The CS-U Pilot Project would not involve any transfer or facilitation of transfer of water across the continental divide by direct diversion, exchange, or otherwise, nor does it involve the transfer or facilitation of transfer of water out of the Rio Grande Basin by direct diversion, exchange or otherwise. *See* Map (**Exhibit G**). The source of water is water native to the Arkansas River; all historical irrigation with this water has occurred in the Lower Arkansas River Valley in Pueblo, Otero, Prowers, and Bent Counties under the Catlin, Fort Lyon, and High Line canals; and the proposed temporary municipal use will occur within CS-U's water service areas located wholly within El Paso County. Section II.C of the Criteria and Guidelines allows the CWCB to approve a pilot project involving more

than one ditch if the proposal is for a unified pilot project. The CS-U Pilot Project is intended to be a unified pilot project to provide a significant amount of water for temporary municipal use while providing the maximum amount of flexibility to the ditch companies and irrigators. The purpose of the CS-U Pilot Project is to demonstrate the efficacy of a large-scale fallowing-leasing project, not to circumvent the limitation of the number of pilot projects that may be authorized.

It is anticipated that the CS-U Pilot Project can be implemented using existing infrastructure. However, Applicants may investigate the construction of additional recharge facilities in order to maximize the operational flexibility of the CS-U Pilot Project. Moreover, it is possible that during the 10-year term of the CS-U Pilot Project, additional facilities would be constructed that may be useful in project operations.

IV. Necessary Approvals and Agreements (Criteria and Guidelines § II.F.3)

If approved by the CWCBC for operation, the CS-U Pilot Project will require certain other approvals and agreements. Representatives of Super Ditch have met with and discussed the proposed CS-U Pilot Project with representatives for CS-U, the participating farmers, and the Catlin, Fort Lyon, and High Line boards of directors. Based on these discussions, Super Ditch believes that all of the agreements and approvals that may be necessary to operate the CS-U Pilot Project can be reasonably obtained. *See Super Ditch Resolution.* Applicant currently anticipates the following agreements would be necessary for operation of the CS-U Pilot Project, some of which are already in place:

1. Lease Agreement or other appropriate agreement between Super Ditch and CS-U. CS-U has executed a long-term water lease agreement with Super Ditch, attached as **Exhibit A**.
2. Lease Agreements or other appropriate agreements between Super Ditch and Catlin, Fort Lyon, and High Line. Super Ditch has met with the boards of each of the canal companies to discuss the terms of such agreement. Catlin has executed a resolution indicated its intent to work with its shareholders and participate in this project, attached as **Exhibit B**. Fort Lyon and High Line have each executed letters of intent to obtain approval from their respective shareholders to participate in this project, attached as **Exhibits D and F**.
3. Lease Agreements or other appropriate agreements between Catlin, Fort Lyon, and High Line and each participating farmer. Super Ditch and the canal company boards have met with potential participating farmers to discuss the terms of such agreement. Catlin has obtained letters of interest from the participating farmers attached as **Exhibit I**. Fort Lyon and High Line will present the contract with Super Ditch to their shareholders in December and will subsequently obtain firm contracts with interested shareholders.
4. Catlin Canal Company Board approval of use of Catlin Canal facilities (ditch, laterals, and augmentation station) and carriage of non-Catlin water to recharge facilities. The Catlin

- Resolution demonstrates their general support for the CS-U Pilot Project, suggesting that these approvals should reasonably be able to be obtained. **Exhibit B.** Additionally, Lower Ark has already entered into a carriage agreement with Catlin to allow for delivery of non-Catlin water to the recharge ponds, attached as **Exhibit J.** This agreement is assignable, and Lower Ark is able to assign it to Super Ditch if necessary for this project.
5. Fort Lyon Canal Company Board approval of use of Fort Lyon facilities (ditch, laterals, reservoirs, and augmentation stations) and carriage of non-Fort Lyon water to recharge facilities. The Fort Lyon Letter of Intent demonstrates their general support for the CS-U Pilot Project, suggesting that these approvals should reasonably be able to be obtained. **Exhibit D.** Fort Lyon does not currently have any recharge ponds.
 6. High Line Canal Company Board approval of use of High Line facilities (ditch, laterals, and augmentation station) and carriage of non-High Line water to recharge facilities. The High Line Letter of Intent demonstrates their general support for the CS-U Pilot Project, suggesting that these approvals should reasonably be able to be obtained. **Exhibit F.**
 7. Agreements for lease of recharge sites. Applicant currently has Recharge Site Leases in place with the owners of the land upon which the Schweizer and Hanagan recharge facilities are located, which Applicant anticipates can and will be renewed at such time that those agreements expire. *See Exhibits K and L.* Additional agreements for any future locations will be obtained, as needed.
 8. BOR annual renewal of Lower Ark's "if and when" storage contract. BOR routinely approves such contracts for Lower Ark and others.

To facilitate more efficient operations, Applicant may seek to obtain permission to utilize intermediate storage locations along the Arkansas River to facilitate operation of a stepped exchange into Pueblo Reservoir from the Colorado Canal Company, the City of Aurora, the City of Colorado Springs, and/or the Fort Lyon Canal Company. Applicant may also work with other entities to effectuate trades that could be subject of separate agreements. Applicant may also seek permission to utilize the Excelsior Recharge Ponds from the Excelsior Ditch Company and/or AGUA, or to utilize other recharge facilities that may be constructed in the future. However, these permissions and/or agreements are not necessary for operation of the CS-U Pilot Project.

V. Water Conservancy District Limitations/Requirements (Criteria and Guidelines § II.F.4)

Both the place of temporary municipal use and the historically irrigated lands are located within the boundaries of the Southeastern Colorado Water Conservancy District ("Southeastern"). It is anticipated that replacement of return flow obligations could be met through use of Lower's Ark's "if

and when” account or operation of the CWPDA Rule 14 Plan. Trades with entities who store water in Pueblo Reservoir could also be effectuated to facilitate project operations and reduce transit losses. The CWPDA Rule 14 Plan involves use of Pueblo Reservoir, which is owned and operated as part of the Fry-Ark Project by the United States Department of Interior, Bureau of Reclamation. Any use of the Fry-Ark Project facilities used in operation of the CS-U Pilot Project, for storage, exchange, release or otherwise, will occur only pursuant to the terms and conditions of any applicable contracts, any Rule 14 Plan approval or other approval, and all applicable rules and policies of Southeastern and the U.S. Bureau of Reclamation. Use of Winter Water to meet return flow obligations from the fallowing of historically irrigated lands will be consistent with the terms and conditions contained in the Winter Water Storage Program (“WWSP”) decreed in Case No. 84CW179 (Water Div. 2), Southeastern’s contract for Winter Water storage in Pueblo Reservoir and any “if and when” contracts with the Bureau of Reclamation, and other applicable terms and conditions contained in the Rule 14 Plan. Beneficial use of such water will occur within Southeastern’s district boundaries.

VI. Conclusion

Applicant appreciates the opportunity to apply for participation in the HB 13-1248 pilot program to test the efficacy of a larger, more complex fallowing-leasing project as an alternative to permanent agricultural dry-up. We believe that the proposed CS-U Pilot Project meets all of the requirements for, and fulfills the objectives of, the contemplated pilot projects. Moreover, this larger scale demonstration would alone meet 10 percent of the 2050 goal of Colorado’s Water Plan for Alternative Transfer Methods. Applicant therefore requests the CWCB consider selection of this CS-U Pilot Project Proposal pursuant to C.R.S. § 37-60-115(8) and the Criteria and Guidelines at the CWCB’s January, 2019 meeting. Applicant would welcome the opportunity to make a presentation on the CS-U Pilot Project at that time. Selection at the January meeting would allow Applicants to submit their application in time for the CWCB’s consideration at the April meeting, which would accommodate the successful implementation of the CS-U Pilot Project in 2020. Please let us know if you have any questions or would like additional information.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter D. Nichols", followed by a long horizontal line extending to the right.

Peter D. Nichols
Megan Gutwein

cc: John Schweizer; Gerry Knapp

Table 1: Participating Shares and Irrigated Acreage

Ownership	Canal Company	Approximate Acreage	Number of Shares Associated w/ Lands
Chavez Family Farms / Diamond A Products	Catlin	3282.80	3660.863
Chavez Family Farms - Thelin	Catlin	153	101
Diamond A Products	Catlin	3282.80	3410.583
Larsen, Scott & Wendy	Catlin	60	68
The Marion J. & Jack E. Roth Trust	Catlin	31.36	32
Groves, Russell	Catlin	385.63	160.04
Schelegel, Marvin	Catlin	124	100
Schweizer, Kenneth, Arlene, John	Catlin	413.33	389.476
Hostetler, Calvin & Deanna	Catlin	30	30
Hirakatas et. al.	Catlin	570.15	575
Mayhoffer, David, Lacie, Edward	Catlin	1,800	753.833
Elite Enterprises	Catlin	33	50.895
Herbert K. & Herbert D. Mameda	Catlin	150.1	99
Hanagan, Eric, Gary B., Margaret, Hanagan & Knaus	Catlin	549.1	441.410
c/o Fort Lyon Canal Company Board of Directors	Fort Lyon	86,141	93,989.4166
c/o Rocky Ford High Line Canal Company Board of Directors	High Line	22,500	2,250

Table 2: Catlin, Fort Lyon, and High Line Canal Company Water Rights

Water Right	Priority No.	Appropriation Date	Adjudication Date	Amount (c.f.s.)
Catlin Canal	2	04/10/1875	04/08/1905	22.0
Catlin Canal	5	12/03/1884	04/08/1905	226.0
Catlin Canal	7	11/14/1887	04/08/1905	97.0
Fort Lyon Canal	4	04/15/1884	04/08/1905	164.64
Fort Lyon Canal	6	03/01/1887	04/08/1905	597.16
Fort Lyon Canal	25	08/31/1893	04/08/1905	171.20
Adobe Creek Reservoir	27.5	01/25/1906	11/08/1928	8,631 840
Adobe Creek Reservoir	50	03/01/1910	11/08/1928	1,466
Adobe Creek Reservoir, First Enlargement	41	12/29/1908	11/08/1928	8,631 840
Adobe Creek Reservoir, First Enlargement	50	03/01/1910	11/08/1928	1,466
Horse Creek Reservoir	10	08/15/1900	11/08/1928	2,000
Horse Creek Reservoir	27.5	01/25/1906	11/08/1928	840
Horse Creek Reservoir	50	03/01/1910	11/08/1928	1,466
Horse Creek Reservoir, First Enlargement	27.5	01/25/1906	11/08/1928	840
Horse Creek Reservoir, First Enlargement	30.5	12/20/1907	11/08/1928	5,000
Horse Creek Reservoir, First Enlargement	50	03/01/1910	11/08/1928	1,466
Horse Creek Reservoir, Second Enlargement	37	06/12/1908	11/08/1928	5,000
Horse Creek Reservoir, Second Enlargement	50	03/01/1910	11/08/1928	1,466

Water Right	Priority No.	Appropriation Date	Adjudication Date	Amount (c.f.s.)
Thurston Reservoir	1	08/12/1889	04/08/1905	355.2
Rocky Ford High Line Canal	20	09/21/1867	03/23/1896	0.6
Rocky Ford High Line Canal	50	03/11/1886	03/23/1896	2
Rocky Ford High Line Canal	60	01/06/1890	03/23/1896	378
Rocky Ford High Line Canal	61	01/06/1890	03/23/1896	2.5
Rocky Ford High Line Canal	25	07/01/1869	04/27/1900	16
Rocky Ford High Line Canal	48	06/30/1885	04/27/1900	30
Rocky Ford High Line Canal	4	12/31/1861	09/15/1905	40
Rocky Ford High Line Canal	3	03/07/1884	04/08/1905	32.5

Table 3: Structures Necessary/Desirable for Operation of Pilot Project

Structure	Owner
Colorado Springs Utilities Water System	Colorado Springs Utilities
Hanagan Recharge Pond	Roger and Mary Jane Maddux
Schweizer Recharge Pond	Kenneth and Arlene Schweizer
Catlin Canal Company canal, laterals, headgate and the Crooked Arroyo and Timpas Creek augmentation stations	Catlin Canal Company
Fort Lyon Canal Company canal, laterals, headgate, and augmentation stations	Fort Lyon Canal Company
Rocky Ford High Line Canal Company canal, laterals, headgate, and augmentation station	Rocky Ford High Line Canal Company
Suburban Lateral (off Catlin Canal, delivers to Hanagan Recharge Pond)	Eric Hanagan, Jaren Gardner, Diamond A Inc., Bill Seamans
Pueblo Reservoir	U.S. Department of Interior, Bureau of Reclamation
Colorado Canal, Lake Meredith, Lake Henry, Lake Canal	Colorado Canal Company
Fort Lyon Storage Canal, Horse Creek Reservoir, Adobe Creek Reservoir	Fort Lyon Canal Company
Dye Reservoir, Holbrook Reservoir, Holbrook Canal	Holbrook Mutual Irrigating Company
Excelsior Ditch	Excelsior Irrigating Company
Excelsior Ditch Recharge Ponds	AGUA

December 14, 2018

Via email to Rebecca.Mitchell@state.co.us & Lauren.Ris@state.co.us

Rebecca Mitchell, Director
Lauren Ris, Deputy Director
Colorado Water Conservation Board
1313 Sherman Street, Suite 721
Denver, Colorado 80203

Re: Tri-State's Comments re CS-U Pilot Project Proposal for Selection

Dear Ms. Mitchell and Ms. Ris:

Thank you for the opportunity to provide comments regarding the November 16, 2018 proposal ("Proposal") filed by the Lower Arkansas Valley Super Ditch Company, Inc. ("Super Ditch") and the City of Colorado Springs, acting by and through its utility enterprise ("CS-U" and collectively, "Applicants") for an H.B. 13-1248 pilot project involving shares in the Catlin Canal Company, Fort Lyon Canal Company and/or Rocky Ford High Line Canal Company ("CS-U Pilot Project"). I am writing on behalf of Tri-State Generation and Transmission Association, Inc. ("Tri-State") to submit comments on the Proposal for consideration by the Colorado Water Conservation Board ("CWCB") pursuant to section II.A of the CWCB's Criteria and Guidelines for Fallowing-Leasing Pilot Projects dated November 19, 2013 and amended on January 25, 2016 ("Criteria").

According to the Applicants, the CS-U Pilot Project will rotationally or intermittently fallow parcels of land irrigated by the Catlin, Fort Lyon, or Rocky Ford High Line canals and transfer up to 5,000 acre-feet per year of consumptive use water to Colorado Springs Utilities in Pueblo Reservoir. Super Ditch intends to use a forthcoming decree in Case No. 10CW4 approving appropriative rights of exchange to transfer consumptive use water from the historical irrigation locations to Pueblo Reservoir. The proposed CS-U Pilot Project would operate from January 1, 2020 through December 31, 2029.

Tri-State owns water rights that divert from the Arkansas River in the vicinity and downstream of the proposed CS-U Pilot Project, including shares in the Fort Lyon Canal Company, Amity Mutual Irrigation Company, and Buffalo Canal Company; other well and surface diversion water rights; conditional exchange, groundwater, and storage water rights decreed in Case No. 2007CW74; and shares in the Lower Arkansas Water Management Association. Tri-State is participating in the Pilot Project process to ensure that its water rights are protected from injury and to assist the CWCB and Applicants in demonstrating the viability of non-injurious alternative methods to transfer water rights from agricultural to municipal uses. Tri-State has previously participated cooperatively with Super Ditch in the Catlin Pilot Project

application during 2014 and 2015 and assisted the Catlin Pilot Project applicants in developing the “pay-as-you-go” return flow method.

The Applicants state that Super Ditch and the Lower Arkansas Valley Water Conservancy District have been “successfully operating” the Catlin Pilot Project and seek to “build on the lessons learned from the Catlin Pilot Project.” Proposal at 1, 2. The Catlin Pilot Project has not consistently operated according to its terms and conditions. For example, the accounting posted on the Division Engineer’s website¹ during 2018 shows that exchanges of water for the Catlin Pilot Project were operated without advance approval by the Division Engineer on: May 5-6, May 10, May 12, June 10, June 23-24, July 9-10, July 13 and July 18-30, 2018. This operation was contrary to stipulated term and condition number 28 of the Joint Conference Report for the Catlin Pilot Project (Jan. 6, 2018) that was adopted by the State Engineer and CWCB.² There were also exchanges operated during 2018 on the following dates such that intervening water rights were prevented from diverting the full amount of water from the Arkansas River to which such rights would otherwise be legally and physically entitled in the absence of the Catlin Pilot Project exchange: May 1-7, May 9-10, May 12-13, June 27-28 and July 24-25, 2018. This operation was contrary to agreed term and condition number 30 in the Joint Conference Report.

The proposed CS-U Pilot Project has the potential to move up to 5,000 acre-feet of water per year and Applicants acknowledge its “large scale.” *See, e.g.,* Proposal at 7. If the Proposal had been filed in water court, it would qualify as a “significant water development activity” subject to special terms and conditions. C.R.S. §§ 37-92-103(10.7); 37-92-305(4.5)(b). Accordingly, the Criteria require that “[f]or any proposed pilot projects with transferrable consumptive use in excess of 1,000 acre-feet per year, the Board shall give special consideration to comments received, if any, and to protecting the interests of other water users and the state’s water resources before granting approval.” Criteria § II.D (emphasis added). The large scale of the CS-U Pilot Project means that it has greater potential to cause injury to other water users. It will be important to prevent upsets like the ones that occurred with the Catlin Pilot Project during 2018 when operating the CS-U Pilot Project.

Tri-State supports the CWCB’s selection of the Proposal so long as critical terms and conditions presented in these comments are included. At this early stage, many crucial details of the CS-U Pilot Project have not been developed, and Tri-State’s requested terms and conditions are focused on developing these details before the application stage of the Pilot Project. First, Tri-State requests that Applicants identify all specific farms, water rights and structures that will be included in the CS-U Pilot Project as part of the forthcoming application to the CWCB. Second, Tri-State requests that Applicants present a firm plan to replace return flows as part of

¹ <http://water.state.co.us/DWRDocs/News/Pages/ApprovedPilotProjects.aspx>.

² The State Engineer adopted agreed items from the Joint Conference Report in his Written Determination of the State Engineer, HB13-1248 Catlin Following-Leasing Pilot Project (Jan. 16, 2015). The CWCB adopted the State Engineer’s Written Determination in its written decision dated March 11, 2015.

their forthcoming application. Tri-State hopes to meet with Applicants this month to discuss the development of the return flow plan. Finally, Tri-State requests that Applicants obtain all necessary ditch company approvals before the application stage. Tri-State is providing high level comments at this selection stage and will provide detailed comments after the project is refined in an application.

Tri-State's requested terms and conditions and the reasons for seeking their inclusion are described in more detail in Part I of this letter. While Tri-State supports the CWCB's selection of the CS-U Pilot Project Proposal with proper terms and conditions, it also must reserve its legal rights in the event Tri-State determines that the terms and conditions in this letter are not imposed in the CWCB's selection. Part II of this letter summarizes legal and injury issues that Tri-State may pursue if necessary terms and conditions are not imposed on the CWCB's selection or approval of Applicants' Proposal.

I. TRI-STATE'S REQUESTED TERMS AND CONDITIONS FOR CWCB'S CATLIN PILOT PROJECT SELECTION.

Based on the information provided by Applicants, the following terms and conditions should be included as part of the CWCB's selection of the Catlin Pilot Project. The terms and conditions should be included as requirements for the pilot project application to the CWCB. The Criteria provide the Board with specific authority to include these as requirements for the application. Criteria § II.G.1.f.

A. Identification of Specific Lands, Water Rights and Structures Supported by Contracts.

The Criteria require the Proposal to identify "the specific water rights to be utilized by the pilot project and ownership of them" and "the specific lands and parcels that will be analyzed and dried up, and the ownership of them." Criteria § II.F.1.a–b. The Applicants have identified specific farms and shareholders under the Catlin Canal Farms in the Proposal. However, they list the entirety of the Fort Lyon Canal and Rocky Ford High Line ditch systems and water rights and fail to identify specific land and water rights to be included. Water rights in mutual ditch systems are owned by the individual shareholders. *Jacobucci v. Dist. Ct. In and For Jefferson County*, 541 P.2d 667, 673 (Colo. 1975). Applicants have not identified the water rights owners under the Fort Lyon or Rocky Ford High Line canals who may participate in the CS-U Pilot Project. Applicants do not have permission from the owners to include all the water rights under these Canals in the Pilot Project.

Similarly, Criteria require the Proposal to identify "any and all structures necessary for operation of the pilot project and ownership of them." Criteria § II.F.1.f. The Proposal fails to identify any specific structures under the Fort Lyon or Rocky Ford canal systems. *See* Proposal at 6. For example, the Proposal refers to augmentation stations under these canals but does not

identify their locations. In addition, the Proposal notes that additional structures may be incorporated into the project. *Id.*

Tri-State understands that the proposal was prepared on a short time frame based on the execution of a contract between Super Ditch and CS-U in August 2018. It appears that efforts are underway to identify specific farms, water rights, and structures. For example, the Proposal indicates that contracts with individual Fort Lyon and Rocky Ford High Line shareholders are expected after each company's annual shareholder meeting in December 2018. Proposal at 4.

Tri-State requests that the CWCBC require Applicants to identify specific Fort Lyon and Rocky Ford High Line lands (farms), water rights, structures and owners at the application stage and limit the lands, water rights, and included structures to those specifically identified and supported by contracts. Tri-State's fundamental concern is that there is not sufficient time or resources to evaluate a change of use of the more than 100,000 irrigated acres included in these two ditch systems within the 60 day review and comment period provided by the Criteria. In addition, a change of use of the entire acreage identified in the Proposal would produce far more than the maximum 10,000 acre-feet of transferrable consumptive use per year. *See* Criteria § II.D. Such a change of water rights would be by far the largest in the history of the Arkansas Basin and would not be a "pilot project."

In addition to the fundamental concern that the CS-U Pilot Project should not include a change of the entire Rocky Ford High Line or Fort Lyon Canal systems, there are many details of the project where specific identification of farms, water rights and structures will avoid or eliminate issues. For example:

- Maintenance of carriage water and ditch seepage will depend on the historical locations of irrigation water delivery in comparison to locations of augmentation stations and recharge projects. Other shareholders in the ditch systems will seek protection from increased ditch loss on their shares that may occur during the pilot project. Conversely, downstream water users will want to ensure that historical ditch seepage loss (which accrues to the Arkansas River and becomes part of their divertable supply) is maintained. The amount of ditch loss obligations will require identification of specific farms, augmentation stations, and recharge sites.
- Some Fort Lyon farms are located east of the Horse Creek drainage. If they are fallowed and water is returned through a local augmentation station, then the depletion reach could exceed the lower boundary at the confluence of Horse Creek and the Arkansas River described at page 5 of the Proposal. Fallowing of Fort Lyon farms located east of John Martin Reservoir could present additional compliance issues with the Arkansas River Compact.

- Identification of and permission to use structures involved in the CS-U Pilot Project will be critical to prevent injury. For example, if Applicants' plan for return flow replacement requires use of a specific augmentation station to prevent injury but Applicants lack the legal right to use the structure, then the pilot project would likely cause injury.

If Applicants do not identify the water rights, irrigated acreage and structures with specificity in their application, they will be unable to satisfy a number additional requirements under the Criteria, including providing: the source of water that will be used to meet return flow obligations (Criteria § II.G.1.e) and how and where necessary replacement water will be delivered to the appropriate stream locations (*id.* § II.G.2.a.v.3.a). At the application stage, the Criteria's detailed list of requirements amount to the need for a specific plan and intent regarding how the CS-U Pilot Project will operate. *Id.* § II.G.

In summary, the CWCB should require Applicants to identify specific lands, water rights, structures and owners at the application stage and limit the lands, water rights, and included structures to those specifically identified and supported by contracts. The Criteria permit the CWCB to extend the application deadline to more than 60 days after selection, and Tri-State would support a moderate (30 to 60 day) extension to allow the Applicants to comply with this condition. *See* Criteria at 10 (§ II.F).

B. Identification of Firm Supply for Return Flow Replacement Obligations.

Maintenance of historical return flows is a critical element of a successful pilot project. Other water rights owners, including Tri-State, depend on historical return flows to make up a portion of their supply. Therefore, maintaining the historical return flow pattern while rotationally or intermittently fallowing lands is a critical step in preventing injury to other water rights.

The CWCB Criteria require Applicants to identify, at the selection stage, "the source of water that will be used to meet return flow obligations" and "how and where any necessary replacement water will be delivered to the appropriate stream location(s)." Criteria § II.F.1.c–d. The Proposal does not meet this requirement. The Proposal states that tailwater return flows will be "released back to the river through augmentation stations as the water is being delivered." Proposal at 5. However, there is no current plan for maintaining deep percolation return flows, and the Proposal sets out multiple options:

- "Delayed return flows could be met via the exchange conducted with CS-U" Proposal at 5. However, the current Super Ditch contract with CS-U does not provide for CS-U to deliver any water to maintain historical return flows, so a new contract will be required for this operation. In addition, effluent from Colorado Springs often includes transmountain water that may not be included in a pilot project.

- “Delayed return flows may also be replaced with depletion credits . . . release[d] to the stream through augmentation stations.” Proposal at 5. It is not clear what the term “depletion credit” means, or how a depletion can also be a credit. Assuming that Applicants are referring to the fully consumable portion of farm headgate deliveries for the water rights included in the pilot project, then the application must show that these credits are available at times and locations needed to replace historical return flows. This method does not appear viable for replacement of return flows owed during the non-irrigation (winter) season.
- Delayed return flows may also be replaced with depletion credits that are exchanged to and then released from upstream storage locations. Proposal at 5. This method of return flow replacement is subject to unreliable exchange potential in the Arkansas River. As detailed in Tri-State’s comments regarding the Catlin Pilot Project, use of this method to replace return flows will require extensive terms and conditions to ensure that adequate return flow water is already in storage (or another reliable supply exists) to replace all delayed return flows before fallowing lands each year.
- Delayed return flows may also be replaced through “effectuating trades with entities who have downstream replacement obligations.” Proposal at 5. Applicants have not identified any specific trades, and it is not clear how another entity’s downstream obligation would provide water to make up Applicants’ return flow obligations. The legality of trades will depend on the specific statutes and decrees applicable to each trade. For example, Rule 14 Plans are not authorized to replace return flows on water rights changed to municipal uses, and water in a pilot project may not be traded for water in a substitute water supply plan.
- Delayed return flows may also be replaced “through the delivery of depletion credits . . . to existing or future recharge facilities.” Proposal at 5. The effectiveness of recharge to replace return flows will require detailed information regarding the siting and lagging factors for all proposed recharge sites. For example, recharge should not be sited where shallow groundwater conditions would interfere with recharge accretion to the alluvial aquifer system. Untested and unidentified recharge sites cannot be considered a firm source of supply for replacing return flows.

The Lower Arkansas Valley Water Conservancy District and Tri-State are working to schedule a technical meeting regarding plans to replace historical return flows for the CS-U Pilot Project. Tri-State appreciates the early opportunity to discuss the options above and attempt to identify a return flow plan that is viable and will prevent injury.

At the application stage, the Applicants must include a “description of the source of water to be used to replace all historical return flow obligations, with evidence that the source will provide a firm yield of water.” Criteria, § II.G.1.e (emphasis added). CWCB should condition selection of the CS-U Pilot Project on Applicants’ demonstration in their application that Applicants have refined their return flow plan and identified firm replacement supplies to replace all return flow obligations from the farms, including those obligations that accrue after the ten-year term of the CS-U Pilot Project. The large scale of the CS-U Pilot Project means that return flow obligations, and the potential for injury to other water rights, will also be substantial. By presenting a firm plan to replace return flows, as opposed to a myriad of options and contingencies, Applicants will be able to focus on executing the CS-U Pilot Project and will reduce the risk that the State Engineer would terminate the project because of injury to other water rights. The Criteria permit the CWCB to extend the application deadline to more than 60 days after selection, and Tri-State would support a moderate (30 to 60 day) extension to allow the Applicants to comply with a condition requiring a firm return flow replacement plan at the application stage.

C. Need to Obtain Ditch Company Approvals.

The Proposal discusses the need for ditch company approvals from the Catlin Canal Company, Fort Lyon Canal Company and Rocky Ford High Line Ditch Company. Proposal at 8-9. The Proposal notes the need for ditch company approval of use of company facilities and carriage of non-company water. In addition, ditch company approval may be necessary to (1) transfer shares to different delivery locations under each ditch (e.g. to a location where Applicants have an augmentation station; and (2) to transfer shares to non-agricultural uses outside of the ditch. *See Fort Lyon Canal Co. v. Catlin Canal Co.*, 762 P.2d 1375 (Colo. 1988) (holding that ditch company bylaws conditioning transfers or changes of water rights upon board approval are legally enforceable).

These ditch company approvals will be critical to successful operation of the CS-U Pilot Project, and their details may have significant effects on the design of the project. For example, the locations of delivery of substitute supply water and resulting exchange reaches under the Fort Lyon may depend on transferring shares up-ditch, and the Fort Lyon Canal Company may impose terms and conditions to protect other shareholders from changes in ditch loss resulting from the transfer.

The CWCB should require that submission of an application for the CS-U Pilot Project include final approvals from all three involved ditch companies. The details of such approvals are expected to provide critical guidance on pilot project operations that will protect other water users in each ditch. Having such approvals in place at the application stage will ensure that the pilot project is able to operate as approved, and will reduce the risk of a shutdown related to a subsequent board decision. The Criteria permit the CWCB to extend the application deadline to more than 60 days after selection, and Tri-State would support a moderate (30 to 60 day)

extension to allow the Applicants to comply with a condition requiring a firm return flow replacement plan at the application stage.

II. RESERVATION OF RIGHTS.

Tri-State respectfully requests the selection of the CS-U Pilot Project Proposal include terms and conditions described in Section I of this letter. However, if the Proposal is selected or approved without the terms and conditions that Tri-State deems necessary to prevent injury, or if the project is injurious in its operation, Tri-State reserves the right to raise all issues with the CS-U Pilot Project and pursue them before the CWCB, State Engineer, and Division 2 Water Court. These include but are not limited to the issues described in this letter and additional comments that Tri-State may provide in the future, including comments at the application stage of the CS-U Pilot Project. Nothing in this letter waives Tri-State's rights under Colorado law or establishes a precedent regarding lease-fallowing or pilot projects.

Without waiving its right to comment further during the application stage of the CS-U Pilot Project, Tri-State notes the following additional issues with the Proposal:

- H.B. 13-1248 requires that “during the term of a pilot project, land and water included in a pilot project is not also included in a substitute water supply plan . . . an interruptive water supply agreement . . . or another pilot project.” C.R.S. § 37-60-115(8)(d)(XI); *see also*, Criteria § II.L. The farms listed on Exhibit I to the Proposal appear to overlap with farms included in the Catlin Pilot Project approved by the CWCB in 2015.
- The Proposal discusses trading of “depletion credits” with SWSPs at page 3. Such trades would violate the pilot project statute. C.R.S. § 37-60-115(8)(d)(XI).
- Applicants claim the use of Winter Water Storage Program water as a potential replacement source. Proposal at 10. However, the decree in Case No. 84CW179 provides that “any future change of purpose or use is subject to proof of historic consumptive use, year round river depletions, and conditions to prevent injury under C.R.S. 37-92-305.” Decree ¶ W, at 22-23, Case No. 84CW179, Water Division No. 2 (Nov. 10, 1987) (emphasis added). This statutory reference in the decree requires a water court proceeding to change the use of any Winter Water Storage Program water. The inclusion of Winter Water Storage Program water in the CS-U Pilot Project is prohibited by the decree in Case No. 84CW179.

CONCLUSION

Thank you for the opportunity to comment regarding Applicants' Proposal for the CS-U Pilot Project. Tri-State supports the CWCB's selection of the Proposal with the terms and conditions listed in this letter. If the CWCB has any questions regarding this letter, please let me

Ms. Mitchell and Ms. Ris
December 14, 2018
Page 9 of 9

know. Please consider Tri-State a party to the CS-U Pilot Project and copy me on further communications affecting the Proposal and on the CWCB's decision regarding the Proposal. Tri-State anticipates providing further comments and input on the CS-U Pilot Project once the application has been presented to the CWCB as contemplated by the Criteria.

Very truly yours,

WHITE & JANKOWSKI, LLP



Matthew L. Merrill

Attorneys for Tri-State

cc: Client
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MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

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December 14, 2018

By email

Colorado Water Conservation Board
Lauren Ris, Deputy Director
1313 Sherman Street, Room 718
Denver, CO 80203
lauren.ris@state.co.us

Re: LAWMA's comments on Super Ditch/CS-U Pilot Project Proposal

Dear Ms. Ris:

In accordance with the Colorado Water Conservation Board's ("CWCB") Criteria and Guidelines for Fallowing-Leasing Pilot Projects ("Criteria and Guidelines"), this letter provides the Lower Arkansas Water Management Association's ("LAWMA") comments on Lower Arkansas Valley Super Ditch Company, Inc.'s ("Super Ditch") and Colorado Springs Utilities' ("CS-U") (together, "Applicants") November 16, 2018 pilot project proposal ("Proposal").

As CS-U's partner in an innovative water-sharing agreement put into place in 2018, LAWMA unreservedly supports the purpose of the Proposal. However, as summarized below, the Applicants have not yet met a number of the minimum requirements set forth in the Criteria and Guidelines. CWCB therefore should conserve resources—CWCB's, the State Engineer's, and interested parties'—by tabling consideration of the Proposal until the Applicants have provided all such required information. If CWCB decides to select the Proposal in spite of its violation of the Criteria and Guidelines, LAWMA respectfully asks that CWCB document why specific Criteria and Guidelines are not applicable to the Proposal; and that CWCB refuse to accept any pilot project application that does not meet all of the minimum requirements for both proposals and applications.

LAWMA's comments on and concerns with the Proposal are as follows:

1. Specific water rights to be used as sources of supply in the pilot project

The Applicants have not yet met the minimum requirement for a proposal to identify "the specific water rights to be utilized by the pilot project and the ownership of those water rights." Criteria and Guidelines § II.F.1.a. The Proposal does not identify any Fort Lyon Canal Company

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

Colorado Water Conservation Board

December 14, 2018

Page 2

(“FLCC”) or Rocky Ford High Line Canal Company (“Rocky Ford”) shareholders whose water rights are to be used in the pilot project. Instead, the Proposal’s Table 1 simply lists all of each company’s outstanding shares and identifies the owners of those shares as “c/o the [canal company’s] Board of Directors.” With respect to the Catlin Canal Company (“Catlin”), Table 1 indicates that 6,461.877 of Catlin’s 18,660 outstanding shares will participate in the proposed pilot project and identifies the participating shares’ owners but not their certificate numbers.¹

As the owner of 6,080 shares in the FLCC, LAWMA is particularly concerned with the Applicants’ failure to meet this minimum requirement of the Criteria and Guidelines. LAWMA is likewise concerned with the Proposal’s plain misrepresentation of the FLCC “letter of intent” attached to the Proposal as Exhibit D. The Applicants write that “[p]ursuant to [that] letter of intent signed by the Fort Lyon board, Fort Lyon will provide up to 5,000 acre-feet of water for lease to CS-U during the 10-year term of the CS-U Pilot Project,” and that “Fort Lyon will present a contract between Fort Lyon and Super Ditch for shareholder approval at the shareholder meeting in December.” Both statements are false. The letter attached to the Proposal at Exhibit D describes the FLCC Board’s support for the concept of the proposed pilot project, and confirms that the FLCC annual meeting on December 17, 2018, the Board will recommend to FLCC shareholders that the Board create a committee to study that concept. The FLCC letter does not—because the FLCC Board has no authority to—commit any amount of FLCC shareholders’ water to the pilot project, much less 5,000 acre-feet of water per year. The FLCC letter likewise does not indicate that the shareholders will be voting on a “contract between Fort Lyon and Super Ditch” at the annual meeting on December 17, and no such shareholder consideration of a contract is on the agenda for that annual meeting.

Without identification of ownership of the specific water rights to be included in a pilot project, CWCB, the State Engineer, and interested parties cannot determine whether a proposal complies with relevant statutes and the Criteria and Guidelines. As just one example, unless an applicant identifies by certificate number the mutual ditch company shares to be included in a pilot project, it is impossible for CWCB to confirm that those shares are not included in another pilot project, as required by section 37-60-115(8), C.R.S. Further, and most significantly for LAWMA, mutual ditch company shareholders must be able to confirm that participating shares have obtained all required ditch company approvals—with attendant protective terms and conditions—before the share water may be included in an application for a temporary change of use in a pilot project.

¹ By contrast, Super Ditch’s and Lower Arkansas Valley Water Conservancy District’s proposal for their existing pilot project using Catlin water (“Catlin Pilot Project”) complied with the Criteria and Guidelines by identifying the owners and share certificate numbers of the specific Catlin shares to be included in the project. Catlin Pilot Project proposal, Table 1.

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

Colorado Water Conservation Board

December 14, 2018

Page 3

Based on the Applicants' failure to meet the Criteria and Guidelines' minimum requirement for identification of the specific water rights to be included in the pilot project, including the ownership of those water rights and the associated share certificate numbers, CWCB should table consideration of the Proposal until the Applicants have delivered this information to the CWCB and the parties. CWCB also should address Applicants' mischaracterization of the FLCC letter attached to the Proposal as Exhibit D.

Should CWCB determine to select the Proposal in spite of its failure to meet this minimum requirement of the Criteria and Guidelines, LAWMA asks that CWCB, on the record, (i) explain why this requirement does not apply to the Proposal; and (ii) decide that CWCB will accept no application that does not identify the specific water rights to be included in the pilot project, including ownership of the water rights and associated share certificate numbers.

2. Specific lands to be dried up

With respect to lands under the Rocky Ford High Line Canal and the Fort Lyon Canal, the Applicants have not yet met the minimum requirement for a proposal to identify "the specific lands and parcels that will be analyzed and dried up, and the ownership of them." § II.F.1.b. While Exhibit C to the Proposal includes maps of the specific parcels of Catlin land to be dried up, Exhibits E and G include maps of all of the land historically irrigated by the Fort Lyon and Rocky Ford canals, with no identification of specific dry-up parcels.

For the reasons given in Section 1 above, CWCB should table consideration of the Proposal until the Applicants have delivered to the CWCB and the parties this required information about specific dry-up parcels under the Rocky Ford and Fort Lyon canals. Should CWCB determine to select the Proposal in spite of its failure to meet this minimum requirement of the Criteria and Guidelines, LAWMA asks that CWCB, on the record, (i) explain why this requirement does not apply to the Proposal; and (ii) decide that CWCB will accept no application that does not identify the specific Rocky Ford and Fort Lyon parcels to be rotationally fallowed under the pilot project.

3. Necessary approvals from and agreements with FLCC and/or its shareholders

With respect to inclusion of FLCC share water in the proposed pilot project, the Applicants have not yet met the minimum requirement for a proposal to include "evidence to demonstrate that all necessary approvals and agreements between ditch companies [and] ditch members . . . have been obtained or reasonably will be obtained." § II.F.3. While Super Ditch may have begun discussions with FLCC's Board and certain FLCC shareholders, Super Ditch has not yet obtained the right to use any FLCC shares in the proposed pilot project and has not obtained approval to use infrastructure owned by the FLCC or its shareholders. Further, as described in Section 1 above, the Applicants have plainly misrepresented the FLCC letter attached to the Proposal as Exhibit D,

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

Colorado Water Conservation Board

December 14, 2018

Page 4

which does not commit FLCC share water to the proposed pilot project and which does not indicate that FLCC shareholders will be voting on a proposed contract with Super Ditch at the FLCC's annual meeting on December 17.

Even if Super Ditch is able to enter into agreements with FLCC shareholders for use of their water in the proposed pilot project, obtaining the FLCC Board's approval of such temporary change of use of FLCC share water will take significant time and is by no means assured. Under the FLCC's bylaws, the FLCC Board must review all proposed changes in use of FLCC shares, and may approve such changes only if they will not cause injury to FLCC, the Fort Lyon canal, and other FLCC shareholders.² Furthermore, FLCC's Board is on the record as interpreting its bylaws to require shareholders to obtain such approval before they may even submit an application for temporary administrative changes of use of FLCC share water. Accordingly, before the Applicants may include FLCC share water in an application for the proposed pilot project, the owners of any participating FLCC shares must apply for and obtain FLCC's approval of the proposed temporary change in use necessary of those shares. Having twice sought and obtained such approval from FLCC, LAWMA is aware that FLCC will require submission of supporting engineering reports, a hearing before the FLCC Board and interested shareholders, and extensive conferral between the shareholders' attorneys and engineers and the FLCC's attorneys and engineers. That process can be quite lengthy. LAWMA's first request for FLCC approval of a proposed change in use of LAWMA's FLCC shares took approximately one year from application to approval; the second took approximately five and one-half months. The Criteria and Guidelines require that within ninety days of CWCB's selection of any pilot project proposal, the applicant must submit a full application for that pilot project. Here, Super Ditch has not yet identified FLCC shares that will be included in the project, and no FLCC shareholder has initiated an application for the FLCC's required review and approval of any proposed change in use of FLCC share water. The Proposal therefore does not meet the minimum requirement of demonstrating that Super Ditch reasonably will obtain all needed FLCC approvals for inclusion of FLCC share water in the proposed pilot project. The Proposal also does not document the likelihood that the Applicants can obtain approval of their use of necessary infrastructure (e.g., augmentation stations) on the Fort Lyon Canal.

CWCB therefore should table consideration of the Proposal until the Applicants have delivered to the CWCB and the parties the required evidence that the Applicants have obtained or reasonably can obtain the necessary approvals of and/or agreements with the FLCC and its shareholders. Should CWCB determine to select the Proposal in spite of its failure to meet this

² Article V, Section 1 of the Fort Lyon Canal Company Bylaws provides in pertinent part that "[e]ach Stockholder desiring to change the type of use, place of use, time of use, point or means of diversion, storage or other change of said Stockholder's water shall make written request therefore to the Board of Directors. If in the opinion of the Board of Directors, such change may be made without injury to the canal, the Company, and other Stockholders, such request shall be granted, with such terms and conditions as may be necessary to prevent injury."

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

Colorado Water Conservation Board

December 14, 2018

Page 5

minimum requirement of the Criteria and Guidelines, LAWMA asks that CWCB, on the record, (i) explain why this requirement does not apply to the Proposal; and (ii) decide that CWCB will accept no application that includes FLCC share water in the absence of evidence that the FLCC Board has expressly approved the temporary change of use of water rights associated with specified FLCC shares to be included in the pilot project.

4. Necessary approvals from and agreements with Rocky Ford and/or its shareholders

As with FLCC approvals and agreements, the Applicants have not yet met the minimum requirement for a proposal to include “evidence to demonstrate that all necessary approvals and agreements between ditch companies [and] ditch members . . . have been obtained or reasonably will be obtained” for Rocky Ford share water. § II.F.3. The Proposal attaches a “letter of intent” from the Rocky Ford Board of Directors, which letter makes a general statement of support for the proposed project and explains that “the Board will make reasonable efforts to obtain from its shareholders approval of participation in the CS-U Pilot Project at the next shareholder meeting in December 2018.” Like the FLCC letter, however, the Rocky Ford letter includes no commitment of Rocky Ford share water to the proposed project. In addition, while LAWMA is not a Rocky Ford shareholder and is not familiar with that company’s bylaws, we think it likely that participating Rocky Ford shareholders will need to obtain the company’s approval of a temporary change in use of any Rocky Ford share water before that water may be included in an application for a pilot project.

CWCB therefore should table consideration of the Proposal until the Applicants have delivered to the CWCB and the parties the required evidence that the Applicants have obtained or reasonably can obtain the necessary approvals of and/or agreements with the Rocky Ford and its shareholders. Should CWCB determine to select the Proposal in spite of its failure to meet this minimum requirement of the Criteria and Guidelines, LAWMA asks that CWCB, on the record, (i) explain why this requirement does not apply to the Proposal; and (ii) decide that CWCB will accept no application that includes Rocky Ford share water in the absence of evidence that the Rocky Ford Board has given any bylaw-required approval of the temporary change of use of water rights associated with specified Rocky Ford shares to be included in the pilot project.

5. Potential overlap with Catlin Pilot Project

As shown in attached **Table 1**, certain Catlin shareholders whose shares would be included in the proposed pilot project also own shares that are included in the Catlin Pilot Project. Land and water included in one pilot project cannot be included in another pilot project. C.R.S. § 37-60-115(8)(d)(XI); Criteria and Guidelines § II.L.

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

Colorado Water Conservation Board

December 14, 2018

Page 6

CWCB therefore should decide on the record not to accept any application that does not document that none of the Catlin shares or land included in the proposed pilot project are also included in the Catlin Pilot Project.

6. Potential overlap with dry-up land under decree in Case No. 12CW94

As shown in **Table 1**, certain Catlin shareholders whose shares would be included in the proposed pilot project also own Catlin shares that are included in the decree entered in Case No. 12CW94. That decree authorizes temporary or permanent dry-up of the land historically irrigated with certain Catlin shares, and paragraph 14.33 of the decree requires that “[l]and that is encumbered under a lease fallowing program, whether for continued irrigation or for dry-up, may not be claimed for dry-up purposes pursuant to this decree.”

CWCB therefore should decide on the record not to accept any application that does not (i) identify any Catlin shares and land included in the proposed pilot project that also are included in the 12CW94 decree; and (ii) include proposed accounting forms sufficient to ensure and document that any such land is not dried up under the 12CW94 decree during the term of the proposed pilot project.

7. Number of pilot projects included in the Proposal

No more than five fallowing-leasing pilot projects can be authorized in the Arkansas River basin. C.R.S. § 37-60-115(a). Under the Criteria and Guidelines, CWCB will not select a pilot project that involves “fallowing-leasing from lands on more than one ditch, if the use of more than one ditch would have the effect of circumventing the limitation on the number of pilot projects that can be authorized.” § II.C.3.d.

In this case, CWCB’s consideration of the Proposal as a single project would circumvent the limit on the number of pilot projects that can be authorized in the Arkansas basin, where the Catlin Pilot Project already is operating. The Proposal involves three major ditch systems and the transfer of up to 5,000 acre-feet of water each year—two more ditches and ten times more water than is involved in the Catlin Pilot Project. Therefore, to ensure that statutory limits on the numbers of pilot projects that can be selected remain meaningful, LAWMA asks that CWCB consider the Proposal as describing three pilot projects rather than one.

Conclusion

LAWMA strongly supports the purpose of the Proposal, but has significant concerns about CWCB’s potential selection of the pilot project as the Applicants have described it. LAWMA therefore respectfully asks that CWCB require the Applicants to comply strictly with the relevant

MOSES, WITTEMYER, HARRISON AND WOODRUFF, P.C.

Colorado Water Conservation Board

December 14, 2018

Page 7

statute, the Criteria and Guidelines, and the relevant ditch company bylaws before CWCB selects the Proposal or accepts any application for new pilot projects under the Fort Lyon Canal, Rocky Ford High Line Canal, or Catlin Canal.

Thank you for your consideration, and please let us know if you have questions or need additional information about these comments.

Sincerely,

MOSES, WITTEMYER, HARRISON AND
WOODRUFF, P.C.



Richard J. Mehren
Jennifer M. DiLalla
William D. Davidson

Copy: Alexander Funk, CWCB
Bill Tyner, Division Engineer
Peter Nichols, Berg Hill
Megan Gutwein, Berg Hill
Scott Lorenz, CS-U
Matthew Montgomery, Hill & Robbins
David Hallford, Balcomb & Green
Sara Dunn, Balcomb & Green
Don Higbee, LAWMA
Randy Hendrix, Hendrix Wai Engineering

Table 1
Super Ditch / CS-U Pilot Project Share Overlap with Other Projects and Augmentation Plans

Table 1 CS-U Pilot Project Proposal	Super Ditch / CS-U Pilot Project			Super Ditch / Catlin Pilot Project			CAA 12CW94	
Ownership	Canal Company	Approximate Acreage	Number of Shares Associated w/ Lands	Share Cert Nos.	Acreage	No. Shares	Share Cert Nos.	Exhibit A
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(8)
Chavez Family Farms / Diamond A Products	Catlin	3282.8	3660.863	3314, 3329, 3395, 3411, 3537, 3538, 3539, 3540, 3541, 3542, 3543, 3603, 3604	473	491.000	3314, 3329, 3360, 3387, 3388, 3389, 3390, 3391, 3392, 3393, 3395, 3404, 3405, 3537, 3538, 3540, 3541, 3542, 3543	3338.998
Chavez Family Farms - Thelin	Catlin	153	101.000					
Diamond A Products	Catlin	3282.8	3410.583	This entry appears to be a duplicate				
Larsen, Scott & Wendy	Catlin	60	68.000					
The Marion J. & Jack E. Roth Trust	Catlin	31.36	32.000					
Groves, Russell	Catlin	385.63	160.040				2765	160.040
Schelegel, Marvin	Catlin	124	100.000				3523	100.000
Schweizer, Kenneth, Arlene, John	Catlin	413.33	389.476	2754		194.000	3494	50.000
Hostetler, Calvin & Deanna	Catlin	30	30.000					
Hirakatas et. al.	Catlin	570.15	575.000	3550		151.000	2484, 2710, 3418, 3479, 3480, 3481, 3525	575.000
Mayhoffer, David, Lacie, Edward	Catlin	1,800	753.833					
Elite Enterprises	Catlin	33	50.895				3448, 3458	50.895
Herbert K. & Herbert D. Mamedia	Catlin	150.1	99.000				3485	99.000
Hanagan, Eric, Gary B., Margaret, Hanagan & Knaus	Catlin	549.1	441.410	3606, 3607, 3317		144.000	2755, 3317, 3363	377.600
c/o Fort Lyon Canal Company Board of Directors	Fort Lyon	86,141	93989.4166					
c/o Rocky Ford High Line Canal Company Board of Directors	High Line	22,500	2250.000					

Notes:

The Diamond A Products ownership highlighted in yellow appears to duplicate the first ownership.

Share totals for the Catlin Members exceed the "Total Shares interested in the Super Ditch" on Exhibit I.

Fort Lyon Canal shares exceed the of 89% in Case No. 10CW04 or 83,650.581 shares

Rocky Ford High Line shares exceed the 41% in Case No. 10CW04 or 922.5 shares



December 14, 2018

Ms. Lauren Ris
Email: Lauren.Ris@state.co.us
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203

RE: Pueblo West Metropolitan District Comments on HB 13-1248 Colorado Springs Utilities Pilot Project Proposal for CWCB Selection

Dear Ms. Ris:

On behalf of the Pueblo West Metropolitan District (Pueblo West), we are providing comments on the pilot program request for January 1, 2020 through December 31, 2029 submitted to the Colorado Water Conservation Board ("CWCB") by the Lower Arkansas Valley Super Ditch Company, Inc. ("Super Ditch") and the City of Colorado Springs (acting through its enterprise Colorado Springs Utilities ("CS-U")) on November 16, 2018. We have reviewed the pilot program request and following summarizes our comments.

First, we want to ensure that language agreed to in previous court cases between Pueblo West and other parties (including CS-U) is adhered to during the operation of this pilot program. The applicant should acknowledge that the exchanges to Pueblo Reservoir are junior to and will be operated as junior to, the Pueblo West Metropolitan District exchanges decreed in Case Nos. 1985CW134A (decreed (September 21, 1993), 1985CW134B (decreed June 8, 2009), and 2001CW152 (decreed January 4, 2008). The Settlement Agreements, as part of Case No. 2009CW103, between Pueblo West, the Board of County Commissioners of Pueblo County, the City of Colorado Springs, and the Board of Water Works of Pueblo, dated November 23, 2010, the Pueblo West exchanges are operated subject to the Flow Management Program referenced in Case No. 2009CW103, and may be subject to reduction or curtailment in accordance with the Flow Management Program only to the extent provided in that Settlement Agreement. During



any period in which the Flow Management Program is operated to require Pueblo West to forego diversions and other parties have agreed to not exercise the exchange to Pueblo Reservoir decreed in Case No. 2009CW103.

The proposal states, as though it were a fact, “Super Ditch ...formed in 2008 for the benefit of the farmers in the Lower Arkansas Valley...” This may have been the stated purpose. However, no evidence is presented that it benefits or will benefit farmers who do not lease water to Super Ditch. In addition, it’s our understanding that farmers who do lease water to Super Ditch only get paid for transferable HCU that actually is usable by the purchasing municipalities, and so they take the risk that their lease income may be substantially less than if they had farmed instead of fallowed. Thus, the leasing farmers might or might not benefit. This is mentioned because this pilot program request should be evaluated on the basis of prevention of injury to other water rights, not on a claim of benefits to society in general.

There are concerns about operation of this type of source as source water for an exchange due to questions as to amount and timing of its availability as related to the required analysis of transferable HCU, return flows, sub-irrigation or dry-up verification, all required to be analyzed as part of the pilot program (This was not addressed in 2010CW004 because that was purely an exchange priority case that did not attempt to qualify source water for an exchange.)

Applicants indicated that they recognize that the exchange potential, requested in Case No. 2010CW004, on the Arkansas River does pose a hydrological challenge to operation of the CS-U Pilot Project under certain conditions. In addition, they say that this proposal has been designed to include various mechanisms to allow for operation in times of limited exchange potential such as the use of stepped exchanges to intermediate storage locations, use of recharge facilities, and trades of water. They also state because the Catlin Canal augmentation stations (located on Timpas Creek and Crooked Arroyo) and the point of delivery of recharge to the Arkansas River from the Schweizer and Hanagan recharge ponds are located downstream of several of the locations of historical return flows, this proposal indicates several other possible additional recharge locations, retiming of recharge, and use of upstream storage in order to ensure the ability of the pilot project to



maintain return flows in time, location and amount to prevent injury to other water rights. This concern will lead to significant accounting and control issues that the applicant should address along with detailed engineering analysis typically required for a change-in-water-rights application.

With these issues in mind the following concerns are listed below:

1. The applicant should indicate that they understand that under the proposed pilot program that any water that is to be exchanged under the 2005CW96 decree must conform to the requirements of paragraph 29.P of that decree, including notice, approval by the Division Engineer and opportunity for other parties to object. In addition, the Division Engineer should confirm whether the 2005CW096 decree allows water to be exchanged into Pueblo Reservoir, whether from sources downstream of Fountain Creek or from return flows in Fountain Creek from use of the proposed sources.
2. The applicant should indicate how any potential sub-irrigation of the fallowed parcel from an adjacent irrigated parcel will be accounted for.
3. The applicant should indicate how any potential sub-irrigation that reduces the transferable amount of consumptive will be calculated and accounted for.
4. The applicant should address how the rotational/intermittent fallowing will affect historic return flows from the fallowed parcels and potential interference with continuation of return flows from adjacent non-fallowed parcels.
5. The applicant should indicate that they understand that the winter water storage program, that was stipulated to in Case No. 84CW179, is not to be used to exchange water from Big Johnson Reservoir to Pueblo Reservoir, as we don't believe it allows such an exchange.
6. Use of the exchanges decreed in Colorado Spring Utilities decrees 84CW202, 84CW203, or 89CW036 with an appropriation date of June 13, 1989, from the



sewered return flows from the Las Vegas WWTP plant should only be allowed if the use of the water in this project was contemplated or decreed for use in those decrees.

7. The accounting for this matter will be strenuous and should be reviewed vigorously before approval and during operation of the pilot program.
8. We understand that the applicant will be required to address historic consumptive use, return flows, and mitigation of all potential injury to water rights owned by others including Pueblo West during the approval process. We look forward to the opportunity to review those analysis once they are provided if this application is accepted. We reserve the right to provide additional comments as more information is provided pursuant to the requirements for approval of this pilot program.

Thank you for considering these comments. If you have any questions, please do not hesitate to call.

Sincerely,

Alan J. Leak, P.E.

RESPEC Consulting and Services

cc: Bob Krassa, Esq.



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December 14, 2018

VIA E-MAIL AND U.S. MAIL

Colorado Water Conservation Board
Attn.: Rebecca Mitchell, Director
Lauren Ris, Deputy Director
1313 Sherman Street, Room 718
Denver, CO 80203

Re: HB 13-1248 Colorado Springs Utilities – Super Ditch Pilot Project Proposal

Dear Ms. Mitchell and Ms. Ris:

On behalf of Five Rivers Cattle Feeding LLC d/b/a Colorado Beef (“Colorado Beef”), and pursuant to the Colorado Water Conservation Board’s Criteria and Guidelines for Fallowing Leasing Pilot Projects, this letter provides Colorado Beef’s initial comments regarding the Colorado Springs Utilities fallowing-leasing pilot project proposal (the “proposal”) that was submitted on November 16, 2018 by the Lower Arkansas Valley Super Ditch Company, Inc. (“Super Ditch”) and the City of Colorado Springs, acting by and through its enterprise Colorado Springs Utilities (“CS-U”) (collectively, “Applicants”).

Applicants have requested selection of a pilot project to deliver up to 5,000 acre-feet of water in a single year, over a plan approval period of ten years from 2020 through 2029. Applicants propose to use water available from certain shares in the Catlin Canal Company, Fort Lyon Canal Company, and/or the Rocky Ford High Line Canal Company, for temporary municipal uses by CS-U.

Colorado Beef operates a cattle feedlot in Prowers County, Colorado, with a present capacity of approximately 60,000 head of cattle. Colorado Beef’s water supply relies heavily on water delivered pursuant to Colorado Beef’s ownership of 492 shares of the Fort Lyon Canal Company, which were changed to allow use for feedlot purposes in Case No. 08CW83, Water Division 2. In addition to its Fort Lyon Canal water supply, Colorado Beef is currently a shareholder in the Lamar Canal & Irrigation Company, and a member of the Lower Arkansas Water Management Association (“LAWMA”). Additionally, Colorado Beef is one of the largest employers in Prowers County, and a significant contributor to the agricultural economy in the Lower Arkansas Valley.

Due to the general nature of the information contained in Applicants’ proposal, Colorado Beef does not have specific comments at this time and takes no position regarding the Board’s

selection process for Applicants' proposal at this time. Should the Board select the Applicants' proposal for further consideration, however, the Board should only consider approving the pilot project upon review and full vetting of a subsequent, well-developed pilot project application that includes detailed information regarding how the proposed pilot project can operate without injury to vested water rights, including without limitation proposed terms and conditions to ensure proper measurement, accounting and reporting, verification of fallowing, and maintenance of historical return flow patterns. Additionally, any use of shares in the subject ditch companies should be subject to approval under all applicable bylaws and rules and regulations of those companies, taking into account the protection of the rights of other shareholders. Colorado Beef reserves all rights to comment upon, and oppose if necessary, the Applicants' pilot project application if and when it is submitted.

Colorado Beef respectfully requests that it be included on any list of interested parties developed by Applicants or the Board and copied on any future correspondence regarding Applicants' proposal. Thank you for your consideration of these initial comments, and please do not hesitate to contact me should you have any questions whatsoever.

Sincerely,



William H. Caile
Of Counsel

WHC

cc: Mr. Juan Cocoba
Mary Presecan, P.E.

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