

INTERAGENCY AGREEMENT FOR A LOAN OF WATER FOR INSTREAM FLOW USE

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

RECITALS

- A. CPW is a division of the Colorado Department of Natural Resources organized and existing under and pursuant to Articles 1, 9 and 10 of Title 33, C.R.S., for the purpose of protecting, preserving, enhancing and managing Colorado’s natural, scenic, scientific, and outdoor recreation areas as well as its wildlife and environment for the use, benefit, and enjoyment of the people of Colorado and its visitors.
- B. CWCB is a division of the Colorado Department of Natural Resources organized and existing under and pursuant to Article 60 of Title 37, C.R.S., for the purpose of aiding in the protection and development of water for the benefit of the present and future inhabitants of the State of Colorado.
- C. CWCB has the exclusive authority, pursuant to § 37-92-102(3), C.R.S to appropriate and adjudicate instream flow water rights to preserve and improve the natural environment of streams and lakes in the State.
- D. The White River Instream Flow Right was adjudicated on the White River in the amount of 200 cubic feet per second (cfs) in the stream reach from the confluence of the North Fork and South Fork of the White River down to the confluence of the White River and Piceance Creek, in Case No. W-3652C (1977) in the Division 5 Water Court. The Big Beaver Creek Instream Flow Right was adjudicated on Big Beaver Creek in the amount of 2 cfs from the outlet of Big Beaver Creek Reservoir (aka Lake Avery) to the confluence with the White River in Case No. W-3652E (1977) in the Division 5 Water Court. The Decrees confirming these rights are attached hereto as **Exhibit A**. These rights are collectively referred to herein as the “Instream Flow Rights.”
- E. In recent drought years, some CWCB decreed instream flow rates were not met due to their relatively junior priority, and, as a result, Colorado’s aquatic ecosystems were negatively impacted. CWCB anticipates many decreed instream flows, including the Instream Flow Rights, may not be met again this year and in years to come. The fishery in the instream flow reaches below Big Beaver Creek Reservoir is a valuable aquatic resource, and CPW has an interest in protecting it from decline.

F. Under certain circumstances and subject to State Engineer approval, § 37-83-105(2)(a), C.R.S. (2020) allows the owner of any decreed water right to loan water to CWCB on a temporary basis to either satisfy an instream flow right up to its decreed amount in order to preserve the environment to a reasonable degree or to improve the natural environment to a reasonable degree. *See* § 37-83-105(1)(b)(I)-(II), C.R.S.

G. CPW owns a storage water right in Big Beaver Creek Reservoir, which, if approved by the State Engineer pursuant to § 37-83-105(2), may be used to help satisfy the Instream Flow Rights. CPW's storage right in Big Beaver Creek Reservoir, Priority No.726, was adjudicated in Case Action 1269 in the District Court in and for Rio Blanco County ("Storage Right"). That Decree is attached hereto as **Exhibit B**.

H. Subject to the terms and conditions of this Agreement, CPW is willing to temporarily loan a portion of the Storage Right to CWCB for instream flow use to preserve the natural environment to a reasonable degree.

I. The loan is expected to operate during the summer and fall when river flows are below the decreed flow rates for the Instream Flow Rights. When this occurs, water temperatures are generally high, and/or dissolved oxygen levels are low, causing stressful conditions for the fish community.

J. On July 10, 2021, the State Engineer approved a one-year expedited loan (the "Expedited Loan") of the Storage Right to CWCB pursuant to § 37-83-105(2)(a)(III.7), C.R.S. The operation of the Expedited Loan helped to satisfy the Instream Flow Rights. The Expedited Loan expired on December 31, 2021.

AGREEMENT

NOW THEREFORE, the Parties agree as follows:

1. Authority. This Agreement is entered into pursuant to § 37-83-105, C.R.S. for the mutual benefit of CPW and CWCB. No further payment, monetary or otherwise, is required by either Party. Section 29-1-203, C.R.S., as amended, authorizes and enables agencies and departments of the government of the State of Colorado to enter into cooperative agreements or contracts.

2. Term of Loan Agreement. This Agreement is for a term of nine years, commencing on the date the State Engineer approves the loan, and terminating nine years later.

3. Restrictions on Exercise of Loan. The loan shall not be exercised for more than four years in the nine-year term of this agreement because the operation of the Expedited Loan in 2021 counted as the first year of the five-year allowance in a ten-year period for a renewable loan. The first year of the ten-year period was 2021 when the Expedited Loan was exercised. *See*

§ 37-83-105(2)(a)(IV)(A)-(B), C.R.S. The loan shall not be exercised for more than three consecutive years or for more than 120 days in any single calendar year.

4. Future Loans. Subject to acceptance by the CWCB and approval by the State Engineer, CPW may seek renewal of the loan of the Storage Right pursuant to § 37-83-105(2)(a)(IV)(A), C.R.S. for two additional ten-year periods.

5. Agreement to Loan a Portion of the Storage Right. Subject to the terms and conditions in this Agreement, CPW may, in its sole discretion, release water that was previously diverted and stored under the Storage Right to satisfy all or part of the Instream Flow Rights. In any of the four years that this loan can be operated, the annual cumulative limit of releases of the loaned Storage Right is 3,000 AF.

(a) Limitations on Use of Loaned Water. CWCB's use of the water loaned hereunder is limited to satisfying all or part of the Instream Flow Rights. Such use is also subject to all conditions imposed pursuant to § 37-83-105(2), C.R.S., including but not limited to the duration of annual use of the loan, and any additional terms imposed by the Division or State Engineers.

(b) Process for Release of the Storage Right.

(i) CWCB may notify CPW when water is needed to satisfy all or part of the Instream Flow Rights. As part of the notification, CWCB shall specifically identify the requested rate of flow, specific instream flow reach, and requested timing of the release. Alternatively, CPW may notify CWCB when it determines that water should be released to satisfy all or part of the Instream Flow Rights and to benefit the fishery. As part of the CPW notification, CPW shall specifically identify the released rate of flow, specific instream flow reach, and timing of the release.

(ii) The releases will be made from the outlet of Big Beaver Creek Reservoir, and CPW assumes no responsibility for delivering the water to the decreed instream flow reaches. CWCB may take such action as is necessary or desirable to protect the use of the loaned water for instream flow purposes once CPW elects to release the water from Big Beaver Creek Reservoir. Either Party may request that the Division Engineer administer the delivery of the loaned water through the instream flow reach. If CPW requests such action, CPW shall promptly notify CWCB of such request.

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

(iv) CPW may decline to release water for CWCB's use in its sole discretion, including, but not limited to, if CPW determines that it does not have sufficient water available for this purpose.

(c) Accounting and Measurement.

(i) CWCBC and CPW shall coordinate record keeping and accounting as required under the recording requirements provided in 2 CCR 408-2: ISF Rule 6(g) (2021) and as otherwise may be reasonably required by the State and Division Engineers to administer the Storage Right for use in satisfying the Instream Flow Rights.

(ii) CPW and CWCBC are each solely responsible for flow measurements as may be required by the State and Division Engineers for administration of their respective water right(s).

(d) Preservation of CPW's Storage Right. CWCBC's use of CPW's water right does not transfer any legal or equitable title or interest to any part of the Storage Right to CWCBC. By permitting CWCBC to use a portion of the Storage Right, CPW is not abandoning, relinquishing, or forfeiting the Storage Right. CWCBC shall not jeopardize CPW's Storage Right by taking any action that causes or could potentially cause the water court to reopen the adjudication of the Storage Right decree.

6. Improvements to the Natural Environment. Pursuant to § 37-83-105(1)(b)(II), C.R.S., in future years when this loan is operated, the Parties reserve the right to pursue improvements to the natural environment to a reasonable degree, subject to mutual agreement of the Parties and all approvals, processes, and notices required by applicable statute and rule.

7. Notices. Each individual identified below is the principal representative of the designating Party. All notices required or permitted to be given under this Agreement shall be in writing, and shall be delivered (A) by hand with receipt required, (B) by certified or registered mail to such Party's principal representative at the address set forth below, or (C) as an email to the principal representative at the email address set forth below. Either Party may change its principal representative by notice submitted in accordance with this section without a formal amendment to this Agreement. Unless otherwise provided in this Agreement, notices shall be effective upon delivery of the written notice.

CPW:

Northwest Regional Office
Colorado Parks and Wildlife
711 Independent Avenue
Grand Junction, Colorado 81505
(970)-255-6100

CWCBC:

Kaylea White
Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 718

Denver, Colorado 80203
Kaylea.White@state.co.us
303-866-3441

8. Termination. The Parties are entering into this Agreement to serve the public interest of the State of Colorado. If this Agreement ceases to further the public interest of the State, either Party, in its discretion, may terminate this Agreement.

9. Dispute Resolution. In the event of disputes concerning performance hereunder or otherwise related to this Agreement, the Parties shall attempt to resolve them at the divisional level. If this fails, disputes shall be referred to senior departmental management staff designated by each Party. If this fails, the director of each Party shall meet and attempt resolution.

10. General Provisions.

(a) Assignment. CWCB shall not assign, transfer, or sub-lease its rights or obligations under this Agreement. Any attempt at assignment or transfer without CPW's consent shall be void.

(b) Captions. The captions and headings in the Agreement are for convenience of reference only and shall not be used to interpret, define, or limit its provisions.

(c) Counterparts. This Agreement may be executed in multiple, identical, original counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

(d) Entire Understanding. This Agreement represents the complete integration of all understandings between the Parties and all prior representations and understandings, oral or written, are merged herein. Prior or contemporaneous additions, deletions, or other changes hereto shall not have any force or effect whatsoever, unless embodied herein.

(e) Legal Counsel. Each Party to this Agreement has engaged legal counsel to negotiate, draft, and/or review this Agreement. Therefore, in the construction and interpretation of this Agreement, the Parties acknowledge and agree that it shall not be construed against any Party on the basis of authorship.

(f) Litigation Reporting. Within 10 days after being served with any pleading in a legal action filed with a court or administrative agency, related to this Agreement or which may affect CWCB or CPW's ability to comply with the terms and conditions of this Agreement, CWCB or CPW shall notify the other Party of such action and deliver copies of such pleadings to CPW's principal representative as identified herein.

(g) Modification.

(i) By the Parties. Except as specifically provided in the Agreement, modifications hereof shall not be effective unless agreed to by the Parties in writing.

(ii) By Operation of Law. This Agreement is subject to such modifications as may be required by changes in Federal or Colorado State law, or their implementing regulations. Any such required modification shall be automatically incorporated as part of the Agreement on the effective date of such changes, as if fully set forth herein.

(h) Prior Agreements. This Agreement serves to terminate and supersede any prior agreements between the Parties related to CWCB's use of the Storage Right, including the 2012 "Interagency Agreement to Loan Water For Instream Flow Use" for a ten-year loan of water and the 2021 "Interagency Agreement for an Expedited Loan of Water for Instream Flow Use" for the one-year Expedited Loan.

(i) No Waiver of Immunities. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, or any of the immunities, rights, benefits, protections, or other provisions, of the Colorado Governmental Immunity Act, C.R.S. §24-10-101, et seq., as applicable now or hereafter amended.

(j) Third Party Beneficiaries. Except for the Parties' respective successors and assigns, this Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties. Enforcement of this Agreement and all rights and obligations hereunder are reserved solely to the Parties. Any services or benefits which third parties receive as a result of this Agreement are incidental to this Agreement, and do not create any rights for such third parties.

(k) Waiver. A waiver of a breach of any provision of this Agreement shall not waive any subsequent breach of the same or different provision of this Agreement. Any Party's failure in any one or more instances to insist upon strict performance of any of the terms and conditions of this Agreement or to exercise any right herein conferred shall not be construed as a waiver or relinquishment of that right or of that Party's right to assert or rely upon the terms and conditions of this Agreement. Any express waiver of a term of this Agreement shall not be binding and effective unless made in writing and properly executed by the waiving Party.

(l) Digital Signatures. If any signatory signs this Agreement using a digital signature in accordance with the Colorado State Controller Contract, Grant and Purchase Order Policies regarding the use of digital signatures issued under the State Fiscal Rules, then any agreement or consent to use digital signatures within the electronic system through which that signatory signed shall be incorporated into this Agreement by reference.

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

CWCB

By_____

Name: Rebecca Mitchell

Title: Director, Colorado Water Conservation Board

Date:

CPW

By_____ *DRAFT* _____

Name:

Title: Northwest Regional Manager, Colorado Parks and Wildlife

Date:

DRAFT

EXHIBIT A
[Instream Flow Decrees]

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EXHIBIT B

[Big Beaver Storage Right Decree]

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