



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

DATE: November 18-19, 2020 Board Meeting

AGENDA ITEM: 23.a Proposed Acquisition of Contractual Interest in *City of Fort Collins* "Seed Water Rights" for Use in Plan for Augmentation to Augment Stream Flows on the Cache la Poudre River

The City of Fort Collins ("Fort Collins") has offered to the Colorado Water Conservation Board a donation of a contractual interest in water to be used in the plan for augmentation to augment stream flows on the Cache la Poudre River ("Poudre Flows Plan"). Because this is one of the first offers of water to be used in the Poudre Flows Plan, the water rights offered by Fort Collins are referred to as "Seed Water Rights." The water would be used to support the plan in the reach of river shown in **Exhibit FC1** as the "Fort Collins Seed Water Reach." Both the Poudre Flows Plan and the use of the Fort Collins Seed Water Rights in the plan are subject to the requirements of the new stream flow augmentation statute, section 37-92-102(4.5) C.R.S.

Staff Recommendation

The Board's consideration of this proposal at this meeting will initiate a 120-day period for Board review. **No formal action is required at this time.** Staff believes that the proposed acquisition will be a valuable component to support the Poudre Flows Plan. This initial presentation provides an opportunity for the Board and the public to identify questions or concerns for Staff, the Attorney General's Office, Colorado Water Trust ("CWT"), Fort Collins, and other Poudre Flows Partners to address at this or a subsequent meeting.

Background

Fort Collins was one of the initial participants in the "Poudre Runs Through It" group and its FLOWS Committee, and has been an important partner in the Poudre Flows Plan effort for several years, since at least 2014. Fort Collins is a key partner and signatory to the Phase II MOA (Exhibit PF5 to agenda item 23 memo). Fort Collins has offered to CWCB a contractual interest in certain water rights to be used in the Poudre Flows Plan within the Fort Collins Seed Water Reach that extends through Fort Collins to a downstream diversion point, a



stream distance of approximately 10 miles. The offer letter, draft Water Delivery Agreement, and seed water letter report are attached as **Exhibits FC2, FC3, and FC4.**

The Board's Water Acquisition Procedures

Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") sets forth the Board's procedures for acquisition of water, water rights, or interests in water for instream flow purposes. Section 37-92-102(3), C.R.S. provides 120 days for the Board to determine any terms and conditions it will accept for the Water Delivery Agreement for water, water rights, or interests in water to preserve or improve the natural environment. ISF Rule 6 requires a minimum of two Board meetings to allow for public input prior to the Board taking final action on a proposed acquisition. Therefore, the Board's initial consideration of Fort Collins's offer at this Board meeting initiates the 120-day time period for the Board to consider the proposal. Final action on the proposal could occur at the January 2021 Board meeting. ISF Rule 6m(4) provides that any person may request the Board to hold a hearing on the proposed acquisition, and that such a request must be filed within twenty days of this Board meeting.

ISF Rules 6.e and 6.f require the Board to evaluate the appropriateness of an acquisition and determine how best to utilize the acquired water rights to preserve or improve the natural environment. The ISF Rules list several factors the Board may consider in its evaluation of acquisitions, which are addressed in this memo.

Pursuant to statute, Staff has requested recommendations from Colorado Parks and Wildlife ("CPW"), the U.S. Department of Agriculture, and the U.S. Department of Interior. Pursuant to ISF Rule 6m(1), Staff has provided notice of the proposed Poudre Flows Plan and the proposed acquisition of an interest in the Seed Water Rights to all persons included on the appropriate ISF Subscription Mailing Lists and provided notice to the State Engineer's Substitute Supply Plan Notification List. Staff has requested a biological analysis from CPW pursuant to Rule 6f(2). CPW will address the Board regarding this acquisition at the Board meeting. CPW's written recommendation for this proposed acquisition is attached as **Exhibit FC5.**

Water Proposed for Acquisition

Fort Collins has offered to CWCB use of its previously changed and quantified water rights for use in the Poudre Flows Plan ("Subject Water Rights"). The Subject Water Rights are represented by shares in three ditch companies, the Arthur Irrigation Company, the Larimer County Canal No. 2 Irrigating Company, and the New Mercer Ditch Company (together with the Warren Lake Reservoir Company collectively known in the Fort Collins area as the "Southside Ditches" companies; however, Warren Lake Reservoir Company shares are not included in the offered water rights). The Subject Water Rights divert water from the Poudre River upstream of Fort Collins. Water conveyed through the Southside Ditches historically provided irrigation water for farms in the Fort Collins area south of the Poudre River. As the population increased and the lands formerly irrigated by these ditches were developed, Fort

Collins began acquiring shares in these companies. Fort Collins changed the use of the Subject Water Rights in Case No. 2005CW323 to augmentation and other uses. The water rights represented by other shares in the Southside Ditches companies were previously changed in other cases, including Case No. 1992CW129.

Existing Instream Flow Water Rights

CWCB does not currently hold any instream flow water rights in the Fort Collins Seed Water Reach of the Cache la Poudre River, or downstream of the Fort Collins Seed Water Reach on the South Platte River. CWCB's appropriated instream flow water rights upstream of the Fort Collins Reach on the Cache la Poudre River will be unaffected by this plan.

Existing Natural Environment

The Fort Collins Seed Water Reach supports both native and non-native fish species, as well as macroinvertebrate and riparian communities. The Poudre River has undergone significant changes with a number of major agricultural, municipal, and industrial diversions representing a major anthropogenic change to the watershed. The Cache la Poudre is still a snowmelt-driven system, but water developments have significantly altered the natural flow regime resulting in severely depleted flow regime with multiple points of dry up. River flows fluctuate naturally on a diurnal and seasonal pattern, and are influenced by transbasin inflows, upstream reservoir operations, river diversions, and return flows from various uses. CPW describes the natural environment with more detail in its CPW Flow Quantification Report, (Exhibit PF3 to agenda item 23 memo).

The upper reaches of the Cache la Poudre River as it emerges from Poudre Canyon are typical cold water trout habitat supporting both rainbow and brown trout populations. As the river flows eastward through Fort Collins, the fishery transitions from one that is dominated by cold-water species to a more diverse cold water/cool water/warm water fishery.

Proposed Method of Acquisition

Under this proposal, the CWCB would acquire a contractual interest in Fort Collins's direct flow water rights originating from three ditch companies in varying amounts of various priorities up to 11.87 cfs in the Arthur Irrigation Company, up to 28.11 cfs in the Larimer County Canal No. 2 Irrigating Company, and up to 14.13 cfs in the New Mercer Ditch Company. Each of the water rights have been changed and quantified in water court, are decreed for augmentation use, and are subject to volumetric limits. Fort Collins's seed water right engineering letter report describes each water right and the relevant quantification decree terms and conditions. See **Exhibit FC4**. A draft Water Delivery Agreement between Fort Collins and CWCB is attached as **Exhibit FC3**. Once the Board approves the proposed acquisition, the CWCB Director would sign the agreement and this interest in the water rights would be included in the water court application to be filed for the Poudre Flows Plan. The draft water court application is attached to the agenda item 23 memo as Exhibit PF6.

Under the Water Delivery Agreement, Fort Collins would deliver water for exclusive use by the CWCB to be used in the Poudre Flows Plan. A process would be put in place by the Poudre Flows Management Committee to notify the Division of Water Resources, CWCB, and the other Poudre Flows Partners that such deliveries are being made. The CWCB shall request administration to protect the delivered acquired water through the Fort Collins Seed Water Reach from diversion or exchange by other water users, in accordance with the terms and condition of the Poudre Flows Plan decree.

Proposed Use of the Acquired Water Rights

The CWCB would use the acquired water to preserve and improve the natural environment in the Cache la Poudre River to a reasonable degree by the delivery of water by Fort Collins at upstream locations to augment stream flows pursuant to the Poudre Flows Plan decree. In general terms, Fort Collins will leave in the Poudre River some water that it is entitled to divert under the Subject Water Rights. This water will remain in the river from the ditches' historical points of diversion where it will preserve and improve the natural environment in the Fort Collins Seed Water Reach pursuant to the Poudre Flows Plan. When the water reaches the Fossil Creek Reservoir Inlet Ditch diversion structure, Fort Collins will redivert some of this water into storage and leave some portion of this water in the river for reuse to meet return flow obligations or other stream obligations.

The CWCB would request administration of the delivered water when necessary to help maintain stream flows in the Cache la Poudre River Segments A, B, and part of C, as these segments are described in the agenda item 23 memo. CWCB would protect water provided by Fort Collins at flow rates up to the CPW flow quantification recommendations rates, as shown in the table below.

CPW Flow Quantification Seasonal Recommendations

Segment	Winter (Nov - March) Preserve (cfs)	Winter (Nov - March) Improve (cfs)	Summer (Apr - Oct) Preserve (cfs)	Summer (Apr - Oct) Improve (cfs)
A	Up to 80	80 - 150	Up to 114	114 - 260
B	Up to 80	80 - 150	Up to 114	114 - 260
C	Up to 30	30 - 54	Up to 40	40 - 54
D	Up to 10	10 - 35	Up to 10	10 - 40
E	Up to 15	15 - 30	Up to 15	15 - 30
F	Up to 15	15 - 30	Up to 15	15 - 30

Historical Use and Historical Return Flows

As required by section 37-92-102(4.5), the augmentation water rights offered by Fort Collins have already been changed and quantified in water court. The change decrees quantified historical uses and set return flow obligations. The terms and conditions of the change case decrees will continue to apply to the use of these water rights in the Poudre Flows Plan.

Potential Benefits of this Proposed Acquisition

In addition to the numerous benefits of the Poudre Flows Plan described in the agenda item 23 memo, the Board's acquisition and use of a contractual interest in the Subject Water Rights in the Poudre Flows Plan will contribute toward improving habitat connectivity in the over-appropriated Cache la Poudre River without injury to other water rights.

Location of Other Water Rights

There are many other water rights located on the Cache la Poudre River; however, they should not be affected by the protection of this previously quantified augmentation water to be delivered to and through the Fort Collins Seed Water Reach.

Potential Injury to Existing Rights

Any terms and conditions necessary to prevent injury to other water rights will be developed during the water court process for the Poudre Flows Plan, which will include consideration of these particular water rights to be used in the court-approved plan for augmentation. The CWCB, along with its co-applicants in the water court process will adhere to the specific statutory directions for the water rights to be used in the Poudre Flows Plan.

Stacking Evaluation

When water is available under the Water Delivery Agreement for use in the Poudre Flows Plan, the CWCB will be able to use the Subject Water Rights in addition to any other acquired water rights or interests in water available to the CWCB for augmentation of stream flows or other instream flow use, including any protected mitigation releases made pursuant to section 37-92-102(8), in this reach of the Cache la Poudre River up to the flow rates to meet the CPW flow recommendations to preserve and improve the natural environment, as approved by the Board.

Administrability

The Poudre Flows Partners have been, and will continue, coordinating with the State and Division Engineers regarding the administrability of the Poudre Flows Plan, for which this particular acquisition is an important component. Staff and the Poudre Flows Partners will continue conversation with the State and Division Engineers about using these specific water rights in the Poudre Flows Plan.

Maximum Utilization of the Waters of the State and Availability of the Delivered Water for Subsequent Use Downstream

This proposal will promote maximum utilization of the waters of the state because the augmentation water will not only be used in the Poudre Flows Plan to augment stream flows in the Cache la Poudre River, but also may be used for downstream beneficial purposes. Fort Collins plans to re-divert the delivered water downstream of the Fort Collins Seed Water Reach. When the water reaches the Fossil Creek Reservoir Inlet Ditch diversion, Fort Collins

will re-divert some of this water into storage and leave some portion of this water in the river for reuse to meet return flow obligations or other stream obligations.

Effect of Proposed Acquisition on Any Relevant Interstate Compact Issue

The proposed acquisition should not negatively affect any interstate compact. The water rights will be used to augment stream flows and also be used for other beneficial uses downstream of the lower terminus of the Fort Collins Seed Water Reach. Historical return flows of the water rights will continue to be maintained. Additionally, the subject water rights and uses are located in Water District 3 and the South Platte River Compact primarily affects District 64 on the lower end of the South Platte River. Based upon the foregoing, it does not appear that this acquisition will raise any compact issues.

Costs to Complete the Transaction, and Other Associated Costs

There are various costs associated with completing this proposed acquisition, but no direct expenditures to purchase or lease an interest in these Seed Water Rights because Fort Collins will donate the interest in water to the CWCB. Financial contributions by Fort Collins and the other municipal Poudre Flows Partners along with Northern Water Conservancy District, and fundraising efforts by the Colorado Water Trust are significant and are expected to be sufficient to pay for CWT project support through the water court application process, and to pay for SWE's engineering work. The CWCB's indirect costs include Staff and Attorney General's Office time dedicated to participation as a co-applicant in the water court proceeding, and participation in a management committee that will coordinate planning, recording, reporting, and guidance on day-to-day operations. The costs of physical modifications of any existing diversion structures on the stream, installation and maintenance of any additional stream gages, and any additional consultant work will be the responsibility of the Poudre Flows Partners, subject to agreement by the partners.

Exhibits

Exhibit FC1: Seed Water Map

Exhibit FC2: Offer Letter

Exhibit FC3: Draft Water Delivery Agreement

Exhibit FC4: Seed Water Letter Report

Exhibit FC5: CPW Recommendation Letter

EXHIBITS

R 70 W

R 69 W

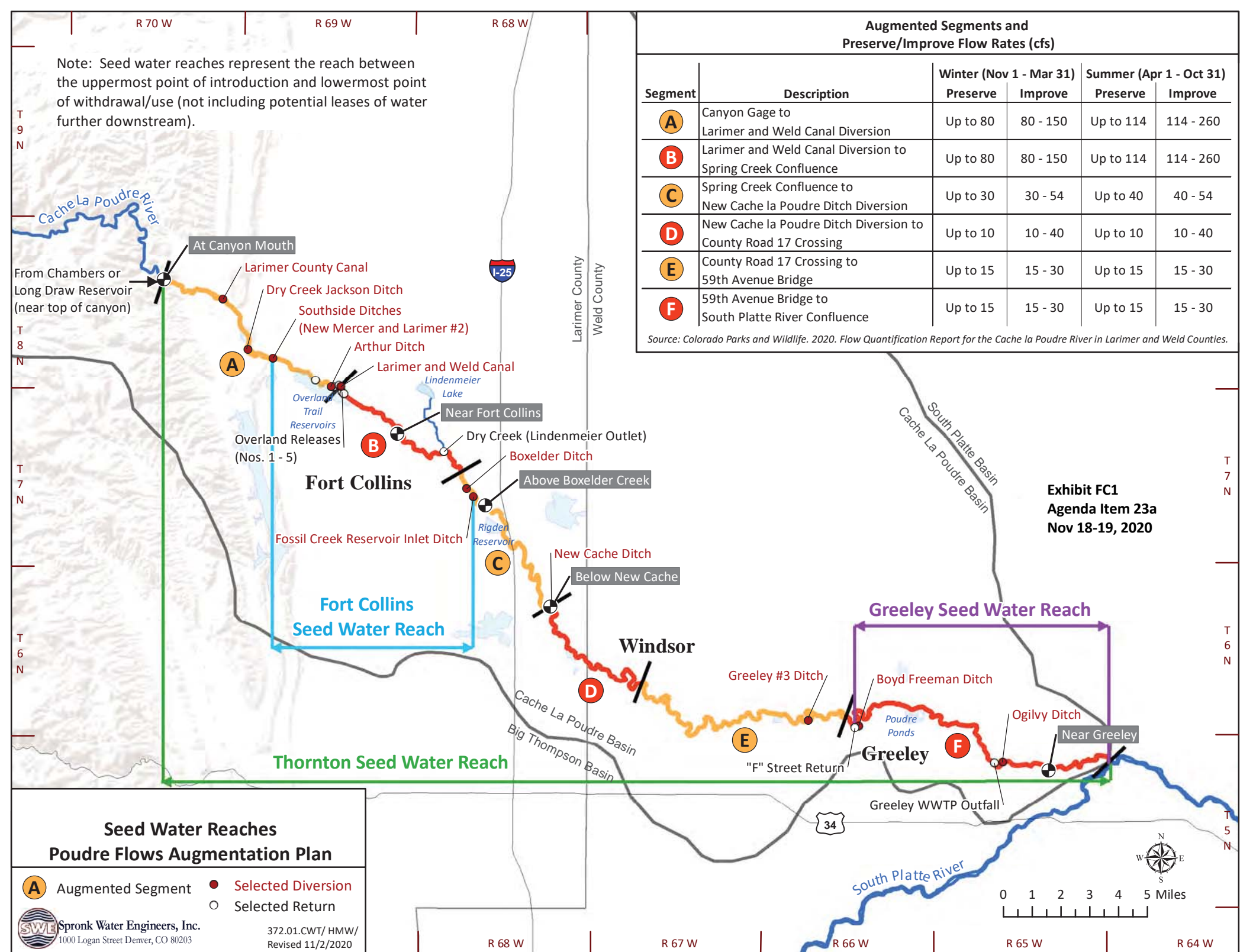
R 68 W

Note: Seed water reaches represent the reach between the uppermost point of introduction and lowermost point of withdrawal/use (not including potential leases of water further downstream).

Augmented Segments and Preserve/Improve Flow Rates (cfs)

Segment	Description	Winter (Nov 1 - Mar 31)		Summer (Apr 1 - Oct 31)	
		Preserve	Improve	Preserve	Improve
A	Canyon Gage to Larimer and Weld Canal Diversion	Up to 80	80 - 150	Up to 114	114 - 260
B	Larimer and Weld Canal Diversion to Spring Creek Confluence	Up to 80	80 - 150	Up to 114	114 - 260
C	Spring Creek Confluence to New Cache la Poudre Ditch Diversion	Up to 30	30 - 54	Up to 40	40 - 54
D	New Cache la Poudre Ditch Diversion to County Road 17 Crossing	Up to 10	10 - 40	Up to 10	10 - 40
E	County Road 17 Crossing to 59th Avenue Bridge	Up to 15	15 - 30	Up to 15	15 - 30
F	59th Avenue Bridge to South Platte River Confluence	Up to 15	15 - 30	Up to 15	15 - 30

Source: Colorado Parks and Wildlife. 2020. Flow Quantification Report for the Cache la Poudre River in Larimer and Weld Counties.



Seed Water Reaches Poudre Flows Augmentation Plan

- A** Augmented Segment ● Selected Diversion
○ Selected Return

R 68 W

R 67 W

R 66 W

R 65 W

R 64 W

**Exhibit FC1
Agenda Item 23a
Nov 18-19, 2020**



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October 23, 2020

Linda J. Bassi
Chief, Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman St., Rm. 721
Denver, CO 80203

**Re: Poudre Flows Plan – Proposed Water Delivery Agreement Between the
City of Fort Collins and the Colorado Water Conservation Board**

Linda:

The purpose of this letter is for the City of Fort Collins (“Fort Collins”) to express its willingness to enter into the attached proposed Water Delivery Agreement¹ (“Draft Agreement”) with the Colorado Water Conservation Board (“CWCB”) for the Poudre Flows Plan.

Background – Poudre Flows Plan and Fort Collins

The Cache la Poudre River (“Poudre River”) flows through the heart of Fort Collins and is central to our community and identity, including as a water supply. For numerous years, Fort Collins has actively sought ways to preserve and improve the Poudre River without adversely affecting our neighboring water users and their water rights and practices.

Fort Collins was one of the initial participants in the “Poudre Runs Through It” group and its FLOWS Committee that has since developed into the Poudre Flows group. (We understand that additional information on this group and its history will be provided to you from CWCB Staff, so we will seek to avoid restating that information here.) This diverse group has collaborated extensively since at least 2014 to develop the “Poudre Flows Plan,” a proposed plan for augmentation to augment stream flows on the Poudre River. This collaboration has included countless meetings, two detailed agreements among the Poudre Flows group members, and work towards the passage of House Bill 20-1137, which expressly authorizes these types of plans for augmentation.

Fort Collins is pleased to continue to support the Poudre Flows as its move through this CWCB process and towards Water Court. The Fort Collins City Council has entered two resolutions in support of the agreements among the Poudre Flows group,² in addition to a resolution

¹ The complete title of the Draft Agreement is: *Water Delivery Agreement Regarding Use of Certain Water Rights of the City of Fort Collins in the “Poudre Flows Plan,” a Plan for Augmentation to Augment Stream Flows on Portions of the Cache la Poudre River: (Quantified and Changed Case No. 05CW323 Southside Ditches Water Rights) (Southside Ditches Diversion Structures to the FCRID).*

² Resolution 2016-022 and Resolution 2018-087.

authorizing Fort Collins to enter into the Draft Agreement, by which Fort Collins would allow some of its water rights to be used in the Poudre Flows Plan.³

Proposed Water Delivery Agreement

The Draft Agreement would allow the CWCB to use some of Fort Collins' previously changed and quantified water rights in the Poudre Flows Plan ("Subject Water Rights"). The Subject Water Rights are represented by shares in three ditch companies that divert water from the Poudre River upstream of Fort Collins.

In general terms, Fort Collins will leave in the Poudre River some water that it is entitled to divert under the Subject Water Rights. This water will remain in the river from the ditches' historical points of diversion where it will preserve and improve the natural environment in the Poudre Flows Plan. When the water reaches the Fossil Creek Reservoir Inlet Ditch diversion, Fort Collins will redivert some of this water into storage and leave some portion of this water in the river to meet the surface return flow obligations associated with the Subject Water Rights.

Under Fort Collins' change of water right decree for the Subject Water Rights, Fort Collins provides an annual operating plan to the Division Engineer by April 15th of each year. This annual operating plan states, for the coming year, how many of the shares representing the Subject Water Rights will be used for the new, changed uses and how many will continue to be used for irrigation as occurred historically.

The Draft Agreement will thus similarly operate on an annual basis. By April 15th of each year, Fort Collins will notify the CWCB of (1) the number of shares that will be used in the Poudre Flows Plan for the coming year and (2) an estimation of the amount and timing of water that they will generate. Once noticed for use in the Poudre Flows Plan for that year, the shares will continue to be used in the Poudre Flows Plan for that year, except in emergency situations.

Fort Collins appreciates this opportunity to work with the CWCB to preserve and improve the Poudre River under the Poudre Flows Plan and the Draft Agreement. Fort Collins hopes that this Draft Agreement continues the strong working relationship we have developed with the CWCB. We appreciate the CWCB's attention to this item and willingness to work with Fort Collins and the Poudre Flows group.

Sincerely,



Eric Potyondy
Assistant City Attorney

Attachment: Draft Agreement

³ Resolution 2018-088.

WATER DELIVERY AGREEMENT
AGREEMENT REGARDING THE USE OF
CERTAIN WATER RIGHTS OF THE CITY OF FORT COLLINS
IN THE “POUDRE FLOWS PLAN,” A PLAN FOR AUGMENTATION TO AUGMENT
STREAM FLOWS ON PORTIONS OF THE CACHE LA POUDRE RIVER

(Quantified and Changed Case No. 05CW323 Southside Ditches Water Rights)
(Southside Ditches Diversion Structures to the FCRID)

This Agreement Regarding the Use of Certain Water Rights of the City of Fort Collins in the “Poudre Flows Plan,” a Plan for Augmentation to Augment Stream Flows on Portion of the Cache la Poudre River (“Agreement”) is effective on ____ of _____, 2020, and is entered into by and between the City of Fort Collins, Colorado, a Colorado municipal corporation (“Fort Collins”); and the Colorado Water Conservation Board, an agency of the State of Colorado (“CWCB”).

RECITALS

A. The CWCB, the Colorado Water Trust, and several water users on the Cache La Poudre River including Fort Collins, are seeking judicial approval, pursuant to House Bill 20-1037 (which, among other things, added Subsection 4.5 to C.R.S. §37-92-102) of a plan for augmentation to augment stream flows on the Cache la Poudre River (“Poudre River”) between the canyon mouth and its confluence with the South Platte River to preserve and/or improve the natural environment to a reasonable degree (“Poudre Flows Plan”). The Poudre Flows Plan will be administered pursuant to the decree approving the Poudre Flows Plan and will be implemented and managed pursuant to various contractual arrangements among the CWCB and others. Collectively, the relevant agreements outline a program for the CWCB to protect water, water rights, and interests of water under a decreed plan for augmentation through stream reaches of the Poudre River from the canyon mouth to its confluence with the South Platte River.

B. The CWCB is authorized by C.R.S. §37-92-102(3) to acquire from any person, such water, water rights, or interests in water as the CWCB determines may be required for instream flows to preserve and/or improve the natural environment to a reasonable degree, and to take actions to ensure such stream flows remain in the river.

C. Fort Collins owns the water rights represented by certain shares in the so-called “Southside Ditches” companies on the Poudre River (for the purposes of this Agreement, being the Arthur Irrigation Company, the Larimer County Canal No. 2 Irrigating Company, the New Mercer Ditch Company)¹ that have been judicially

¹ In the 05CW323 Decree, the water rights represented by certain shares in the Warren Lake Reservoir Company were also judicially quantified and changed. However, for the purposes of this Agreement, those water rights are excluded from the “Water Rights.”

quantified and changed to include augmentation and other uses as set forth in the decree entered in Case No. 2005CW323 on April 23, 2015 (“05CW323 Decree”) (collectively, “Water Rights”).

D. The CWCB desires to use, and Fort Collins² desires to allow the CWCB to use, water attributable to the Water Rights for augmentation use in the Poudre Flows Plan to augment stream flows in the Poudre River pursuant to House Bill 20-1037 and the terms and conditions of this Agreement.

NOW THEREFORE, in consideration of the mutual and dependent covenants contained herein, the Parties agree as follows:

1. Term. The term of this Agreement is 20 years from the effective date. This Agreement will automatically renew for one additional 20-year term unless terminated hereunder.

2. Available Shares. The CWCB’s use of water attributable to the Water Rights under this Agreement shall be limited to water attributable from the “Available Shares” that Fort Collins identifies on an annual basis as discussed herein. Fort Collins shall notify the CWCB by April 15 of each year the following:

a. The number of shares of each of the Southside Ditches companies under the 05CW323 Decree that will be used in that April 15 through April 14 year to generate water for use in the Poudre Flows Plan under this Agreement (“Available Shares”).

b. An estimation of the amount and timing of water that the Available Shares will generate for use in the Poudre Flows Plan.

The number Available Shares under each decree shall be as determined under Fort Collins’ sole discretion. The CWCB acknowledges that the amount of water available under the Available Shares at any given time will depend on various factors, including hydrological conditions and the call(s) affecting the Water Rights, such that the actual amount of water available cannot be known for certain prior to the anticipated date of use. If the Available Shares are not needed for use in the Poudre Flows Plan on any given day pursuant to the terms and conditions of the Poudre Flows Plan decree or pursuant to various contractual arrangements among the CWCB and others, Fort Collins reserves the right to use the Available Shares for other uses under the 05CW323 Decree. If Fort Collins does not identify any Available Shares, there shall be no Available Shares for that April 15 through April 14 year.

² Fort Collins’ intent is further set forth in Resolution 2018-088 of the Council of the City of Fort Collins Authorizing the City Manager to Execute an Agreement Regarding the Use of Certain Water Rights of the City of Fort Collins in the Plan for Augmentation for Instream Flow Purposes on the Cache la Poudre River.

3. No Payment. No payment is owed to Fort Collins for the CWCB’s use of water attributable to the Water Rights pursuant to the terms and conditions of this Agreement. However, nothing in this Agreement shall preclude amendments to this Agreement or subsequent agreements concerning the use of the Water Rights in the Poudre Flows Plan that may involve payments to Fort Collins.

4. Use of Available Shares by the CWCB. Fort Collins shall divert water under the Available Shares at their respective points of diversion (for the Arthur Ditch, the Larimer County Canal No. 2, and the New Mercer Ditch),³ measure, and return to the river water attributable to the Available Shares. From that point or points of introduction downstream to the point of diversion of the Fossil Creek Reservoir Inlet Ditch (“FCRID”)⁴ (the “Reach”), the CWCB shall use the Available Shares for augmentation use in the Poudre Flows Plan to increase the supply of water to the Cache la Poudre River to preserve and/or improve the natural environmental to a reasonable degree. At the point of diversion of the FCRID, the CWCB shall cease using the Available Shares, and all dominion and control over the Available Shares shall return to Fort Collins.

5. Fort Collins’ Emergency Use of Available Shares. In the rare event that there is a water supply emergency necessitating Fort Collins’ use of the Available Shares to supply customers of Fort Collins’ treated water system or other emergency purposes as determined by Fort Collins in its sole discretion, Fort Collins may use the Available Shares for such use and thereby no longer make the water available to the CWCB for use in the Poudre Flows Plan, and Fort Collins will provide notice to CWCB as soon as practicable. For the purposes of this provision, a water supply emergency means an extraordinary drought condition or other emergency condition involving the loss of water to its municipal system as a result of catastrophic events (including the failure of conveyance or treatment facilities and natural disasters); provided however, that extraordinary drought conditions or emergency conditions shall be deemed to exist only if Fort Collins has implemented or is in anticipation of implementing a water supply shortage response pursuant to Fort Collins City Code⁵ and only if Fort Collins has maximized its diversions water under all direct flow water rights other than the Available Shares that are available for municipal use during such conditions.

³ As stated in the 05CW323 Decree, the point of diversion of the Arthur Ditch is located 200 feet N and 440 feet E of the SW corner of Sec. 34, T8N, R69W, 6th P.M., Larimer County; the point of diversion of the Larimer County Canal No. 2 is located 70 feet N and 295 feet E of the SW corner of Sec. 29, T8N, R69W, 6th P.M., Larimer County; and the point of diversion of the New Mercer Ditch is located 70 feet N and 295 feet E of the SW corner of Sec. 29, T8N, R69W, 6th P.M., Larimer County.

⁴ As stated in the 05CW323 Decree, the point of diversion of the FCRID is located 85 feet W and 2600 feet N of the SE corner of Sec. 20, T7N, R68W, 6th P.M., Larimer County.

⁵ The current Fort Collins City Code provisions regarding water shortage action and emergency restrictions are set forth in the Fort Collins City Code, Chapter 26, Article III, Division 6 (Water Conservation), Sections 26-167 and 26-168.

6. Return Flows. Fort Collins shall be responsible for any return flow obligations under the 05CW323 Decree.

7. Transit Losses. Fort Collins shall bear any transit losses imposed by the Division of Water Resources as a result of CWCB's use of the Water Rights within the Reach.

8. Administration. The Parties will coordinate on the administration of the Available Water through the Reach and installation of any measuring devices deemed necessary by the Division Engineer to administer this Agreement.

9. Accounting/Reporting. The Parties agree to coordinate on accounting and reporting each year. Fort Collins shall be responsible for any accounting and reporting required under the 05CW323 Decree. The responsibility for any accounting and reporting required under the decree approving the Poudre Flows Plan shall be determined pursuant to the terms and conditions of the Poudre Flows Plan decree or pursuant to various contractual arrangements among the CWCB and others.

10. Share Assessments. Fort Collins shall remain responsible for paying the assessments on all Available Shares, and any other shares representing the Water Rights. Except as expressly provided for herein, CWCB shall acquire no ownership interest in the Water Rights and Available Shares.

11. Termination. At the end of the 20-year term of this Agreement either Party may decide to not renew this Agreement for any reason, and the Agreement will terminate upon written notice to the other Party pursuant to Paragraph 12. Fort Collins may terminate this Agreement at any time it reasonably believes its Water Rights are at risk or if the District Court for Water Division 1 or the Colorado Supreme Court denies the issuance of a decree for the Poudre Flows Plan, by providing written notice to CWCB pursuant to Paragraph 12. CWCB may terminate this Agreement if the Poudre Flows Plan application is dismissed or withdrawn from Water Court or if the plan is not otherwise implemented or operated upon written notice to Fort Collins pursuant to Paragraph 12.

12. Notice. All notices or other communications hereunder shall be sufficiently given and shall be deemed given when personally delivered, sent by U.S. Mail, or via email, addressed as follows:

To Fort Collins:

City Manager
City Hall West
300 LaPorte Avenue; P.O. Box 580
Fort Collins, Colorado 80522-0580

With copy to:

Fort Collins City Attorney

300 LaPorte Avenue; P.O. Box 580
Fort Collins, Colorado 80522-0580
epotyondy@fcgov.com

and: Fort Collins Utilities
Attn: Water Resources Manager
700 Wood Street P.O. Box 580
Fort Collins, Colorado 80522-0580
ddustin@fcgov.com

and: Natural Areas Department
Attn: Natural Areas Director
745 Hoffman Mill Road
Fort Collins, Colorado 80524
jstokes@fcgov.com;

To: CWCB Chief, Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 718
Denver, CO 80203
DNR_CWCBISF@state.co.us

With copy to: Office of the Attorney General
Water Conservation Unit
1300 Broadway, 7th Floor
Denver, CO 80220

The Parties may update the above contact information and addresses by providing notice of the new contact information and addresses pursuant to this paragraph.

13. Amendments. This Agreement may be amended only upon the execution by each Party of a written amendment to this Agreement.

14. Attorney's Fees. If a suit, action, or alternative dispute resolution is instituted in connection with any controversy arising out of this Agreement or to enforce any rights hereunder, the Parties shall bear their own costs and fees associated with such proceeding.

15. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado.

16. No Waiver of Immunities. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of 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.

17. No Third Party Beneficiaries. This Agreement does not and is not intended to confer any rights or remedies upon any person or entity other than the Parties.

18. Fiscal Contingency. Notwithstanding any other provisions of this Agreement to the contrary, the obligations of the Parties in fiscal years after the fiscal year of this Agreement shall be subject to appropriation of funds sufficient and intended therefor, with the Party having the sole discretion to determine whether the subject funds are sufficient and intended for use under this Agreement, and the failure of the Party to appropriate such funds shall be grounds for the Party to terminate this Agreement with written notice pursuant to Paragraph 12.

19. No Waiver. Failure of either Party at any time to require performance of any provision of this Agreement does not limit such Party's right to enforce such provision, nor does any waiver of any breach of any provision this Lease constitute a waiver of any succeeding breach of such provision or a waiver of such provision itself.

20. Complete Agreement. This Agreement contains the entire agreement and understanding of the Parties and all prior negotiations, discussions, or agreements related thereto are merged herein.

21. Severability. If any term or provision of this Agreement is invalid, illegal or unenforceable, such invalidity, illegality or unenforceability does not affect any other term or provision of this Agreement or invalidate or render unenforceable such term or provision.

Executed as of the date first set forth above.

[Remainder of Page Left Blank Intentionally]

CITY OF FORT COLLINS, COLORADO, a Colorado municipal corporation

By: _____
Darin A. Atteberry, City Manager

Date: _____

ATTEST:

By: _____
City Clerk's Office
Printed Name: _____
Title: _____

APPROVED AS TO LEGAL FORM:

By: _____
City Attorney's Office
Printed Name: Eric R. Potyondy
Title: Assistant City Attorney

COLORADO WATER CONSERVATION BOARD, an agency of the STATE OF COLORADO

By: _____

ATTEST:

By: _____

**Utilities**

electric · stormwater · wastewater · water
PO Box 580
Fort Collins, CO 80522

970.221-6700

970.221.6619 fax · V/TDD: 711

utilities@fcgov.com

fcgov.com/utilities

MEMORANDUM

To: Eric Potyondy, Assistant City Attorney

From: Donnie Dustin, Water Resources Manager
Susan Smolnik, Water Resources Engineer

Date: October 29, 2020

RE: Poudre Flows Plan: City of Fort Collins' Seed Water From the "Southside Ditches"
Water Rights that Were Quantified and Changed in Case No. 05CW323

This memo addresses the proposed use of some water rights of the City of Fort Collins ("Fort Collins") in the Poudre Flows Plan, which includes a proposed plan for augmentation under C.R.S. §37-92-102(4.5). Because these water rights would be included in the initial Water Court application for the plan, they have been referred to as a source of "seed water" for the plan.

At the suggestion of Colorado Water Conservation Board ("CWCB") staff, this memo is organized by the headings/questions from the CWCB's *Offered Water Right Data Sheet (updated May 2020)*.

We note that use of these water rights would also be pursuant to a water delivery agreement between Fort Collins and the CWCB¹ ("Draft CWCB Agreement"), once that agreement is executed.² The most recent draft of the Draft CWCB Agreement is attached. This memo does not focus on the issues addressed by the Draft CWCB Agreement, but instead focuses on the underlying water rights and certain operations.

1. Owner of the water right.

The City of Fort Collins, Colorado, a home-rule municipality, is the owner of the water rights represented by shares in the Arthur Irrigation Company, the Larimer County Canal No. 2 Irrigating Company, and the New Mercer Ditch Company that were judicially quantified and changed to include augmentation and other uses as set forth in the decree entered by the District Court for Water Division No. 1 in Case No. 2005CW323 on April 23, 2015 ("05CW323 Decree")

¹ The Draft CWCB Agreement is entitled: *Water Delivery Agreement: Agreement Regarding the Use of Certain Water Rights of the City of Fort Collins in the "Poudre Flows Plan," a Plan for Augmentation to Augment Stream Flows on Portions of the Cache la Poudre River (Quantified and Changed Case No. 05CW323 Southside Ditches Water Rights) (Southside Ditches Diversion Structures to the FCRID)*.

² See Resolution 2018-008 of the Council of the City of Fort Collins Authorizing the City Manager to Execute an Agreement Regarding the Use of Certain Water Rights of the City of Fort Collins in the Plan for Augmentation for Instream Flow Purposes on the Cache la Poudre River.

(collectively, “Water Rights”). The Water Rights are proposed to be used to augment stream flows on the Cache la Poudre River (“Poudre River”) in the Poudre Flows Plan.

2. General description of the offered water right.

The Arthur Irrigation Company, the Larimer County Canal No. 2 Irrigating Company, the New Mercer Ditch Company, and the Warren Lake Reservoir Company are collectively known in the Fort Collins area as the “Southside Ditches” companies. Water rights represented by the Warren Lake Reservoir Company are not included in the Water Rights proposed for use as a source of “seed water” in the Poudre Flows Plan.

Water conveyed through the Southside Ditches historically provided irrigation water for farms in the Fort Collins area south of the Poudre River. As the population increased and the lands formerly irrigated by these ditches were developed, Fort Collins began acquiring shares in these companies, primarily through the water supply development fees imposed on development for treated water service from Fort Collins Utilities.³

Fort Collins changed the use of the Water Rights on Case No. 2005CW323. The water rights represented by other shares in the Southside Ditches companies were previously changed in other cases, including Case No. 1992CW129.⁴

3. Original decree for the offered water – List the Case No., decreed amount and original decreed use for the offered water right.

The Water Rights proposed for use in the Poudre Flows Plan comprise water rights represented by shares in three ditch companies, each of which has several water rights confirmed in various decrees. All of this information is set forth in the 05CW323 Decree. The following is a summary of that information.

A. Original Decrees of the Arthur Irrigation Company

The original adjudication was entered April 11, 1882 by the District Court for Larimer County, Case No. 320. The decreed point of diversion was on the slough of the Cache la Poudre River called 11 the John Brown slough on the south side of said river three miles above the town of Fort Collins, in the SW 1/4 of Sec. 34, T 8 N, R 69 W, 6th P.M. The source was the Cache la Poudre River. The appropriation dates and amounts were:

³ This fee was historically the “Raw Water Requirement” and is now the “Water Supply Requirement.”

⁴ Note that the legal descriptions of the points of diversion for the Larimer County Canal No. 2 and the New Mercer Ditch were corrected in the decrees entered by the District Court for Water Division No. 1 in Case No. 2017CW3198 and 2017CW3199 on October 9, 2019.

Original decree	June 1, 1869	1.67 cfs
First Enlargement	April 1, 1871	31.67 cfs
Second Enlargement	July 20, 1872	33.33 cfs
Third Enlargement	September 1, 1873	63.28 cfs

The uses were for irrigation of land and domestic purposes.

A transfer adjudication was entered on June 7, 1907 by the District Court for Larimer County, Case No. 1584. The point of diversion was the headgate of the Arthur Irrigation Company located on the south bank of the Cache la Poudre River in the SW 1/4 of sec. 34, T 8 N, R 69 W, 6th P.M. in Larimer County, Colorado. The source was the Cache la Poudre River. The appropriation dates and amounts of the rights moved into the Arthur Ditch were:

Watrous, Whedbee, and Secord Ditch original construction
(original adjudication dated April 11, 1882)
June 1, 1861 0.72 cfs

Watrous, Whedbee and Secord Ditch first enlargement
(original adjudication dated April 11, 1882)
July 1, 1866 2.155 cfs

Watrous, Whedbee, and Secord Ditch second enlargement
(original adjudication dated April 11, 1882)
June 1, 1868 2.165 cfs

The use was for irrigation.

B. Original Decrees of the Larimer County Canal No. 2 Irrigating Company

The original adjudication was entered on April 11, 1882 by the District Court for Larimer County, Case No. 320. The point of diversion was on the south side of Cache la Poudre River near the center of the NE 1/4 of Sec. 32, T 8 N, R 69 W, 6th P.M. The source was the Cache la Poudre River. The appropriation date and amount were April 1, 1873, for 175 cfs.

The uses were for irrigation of lands and domestic purposes.

A supplemental adjudication was entered on September 10, 1953, by the District Court for Larimer County, Case No. 11217. The point of diversion was at a point along the Larimer County Canal No. 2 where said canal intercepts Spring Creek in the S 1/2 of Sec. 22, T 7 N, R 69 W, 6th P.M. The source was Spring Creek, a tributary of the Cache la Poudre River. The appropriation date and amount were April 1, 1873, for 175 cfs.

The use was for irrigation.

A change in point of diversion decree was entered on June 27, 1907 by the District Court for Larimer County, Case No. 2026. The point of diversion was the headgate of what had been known as the City Ditch, such headgate being located about one mile above the Town of La Porte on the south side of the Cache la Poudre River in the SW 1/4 of Sec. 28, T 8 N, R 69 W at or near the place called Point of Rocks. The source was the Cache la Poudre River. The appropriation date and amount were April 1, 1873, for 175 cfs.

The uses were for irrigation of lands and domestic purposes.

C. Original Decrees of the New Mercer Ditch Company

The original adjudication was entered on April 11, 1882, by the District Court for Larimer County Case No. 320. The decreed point of diversion was located on the south side of the Cache la Poudre River, one mile above the town of La Porte, in the SW 1/4 of Sec. 28T 8 N, R 69 W, 6th P.M., at a place called Point of Rocks. The source was the Cache la Poudre River. The appropriation dates and amounts were:

Original Construction	September 1, 1869	4.17 cfs
First Extension	October 10, 1871	8.33 cfs
First Enlargement	July 1, 1872	15.00 cfs
Second Enlargement	February 15, 1880	136.00 cfs

The uses were for irrigation of lands and domestic purposes.

A transfer adjudication was entered on August 28, 1912, by the District Court for Larimer County, Case No. 3040. The decreed point of diversion was the headgate of the two canals known as the Larimer County Canal No. 2 and the New Mercer Ditch, located about one mile above the town of La Porte on the south bank of the Cache la Poudre River, at a point commonly known as Point of Rocks which is in the SW 1/4 of Sec. 28, T 8 N, R 69 W, 6th P.M. The source was the Cache la Poudre River. The appropriation date and amount of the Josh Ames Irrigation Ditch (original adjudication entered April 11, 1882) which was moved into the New Mercer Ditch were October 1, 1867, for 10 cfs. The uses were for irrigation.

A supplemental adjudication was entered on September 10, 1953, by the District Court for Larimer County, Case No. 11217. The decreed point of diversion was at a point along the New Mercer Ditch where the same intercepts Spring Creek in the SE 1/4 of Sec.22, T 7 N, R 69 W, 6th P.M. The source was Spring Creek, a tributary of the Cache la Poudre River. The appropriation dates and amounts were July 1, 1872, for 27.5 cfs, and February 15, 1880 for 136.0 cfs.

The use was for irrigation.

An abandonment decree was entered on December 26, 1985, by the District Court, Water Division 1, Case No. 84CW663. The water right declared partially abandoned was the New Mercer Ditch Third (sic) Enlargement, 136 cfs February 15, 1880, Case No. 320. The amount decreed as abandoned was 85.53 cfs.

A supplemental adjudication was entered on September 10, 1953, by the District Court for Larimer County, Case No. 11217. The decreed point of diversion was on the North bank of Mail Creek at a point in the SE 1/4, NW 1/4 of Sec. 1, T 6 N, R 69 W, 6th P.M. The source was Mail Creek. The appropriation date and amount were May 24, 1879, for 93 cfs.

The use was for irrigation.

4. **Change of Use—List the Case No. and description of the changed uses, with specific reference to the historical consumptive use quantification, and judicial approval that includes any augmentation use. See 37-92-102(4.5)(b)(III)(A) &(B), C.R.S.(2020). (Please also provide a copy of the change decree and any exhibits.)**

In the 05CW323 Decree, the Court approved the change of use of the Water Rights, being the water rights represented by the following shares:

- Arthur Irrigation Company [154.675 of 1206.94455 total shares]
- Larimer County Canal No. 2 Irrigating Company [27.61175 of 146.28675 total shares]
- New Mercer Ditch Company [27.6083 of 141.30153 total shares]

The changed uses are from their originally decreed irrigation uses “to all municipal uses, including but not limited to domestic, irrigation (including, without limitation, agricultural irrigation), commercial, industrial, recreation, fishery, piscatorial, and wildlife, within Fort Collins service area as it now exists or may from time to time be expanded, and for augmentation, replacement and substitution, and for exchange, including contract exchanges or water trades made by mutual agreement with other water users.” 05CW323 Decree at ¶7 (emphasis added).

Water attributable to the Water Rights can also be reused and successively used. 05CW323 Decree at ¶ 20 (“Applicant is entitled to a decree awarding it the right to use, reuse, successively use and dispose of the amount of water which was historically consumed through irrigation. Because that amount was historically fully consumed, Fort Collins can consume that amount in the future without injury to other water rights.”)

The historical use of the Water Rights, including their historical consumptive use, was quantified in the 05CW323 Decree. 05CW323 Decree at ¶9. A copy of the 05CW323 Decree is attached.

5. **Current use, and any contractual obligations for the changed water right.**

Pursuant to the terms of the 05CW323 Decree, all of the Water Rights continue to be diverted at their original headgates into the respective ditch systems for irrigation use.

6. **Provide a table for each offered water right showing the monthly amount of water to be conveyed to CWCBC in acre-feet and cfs, and describe any circumstances when this water might not be available to CWCBC for ISF use.**

The decreed flow rates for the ‘05 share block by priority are as follows:

Arthur Irrigation Company

Priority Number	05CW323 Amount Avail. at Alt. Pts. [cfs]	05CW323 Cumm Amt Avail. at Alt. Pts. [cfs]
2	0.0784	0.0784
19	0.2358	0.3142
29	0.2358	0.55
32	0.1819	0.7319
38	3.4499	4.1818
52	1.9967	6.1785
66	5.695	11.8735

Total 11.87

Larimer County Canal No. 2 Irrigating Company

Priority Number	05CW323 Amount Avail. at Alt. Pts. [cfs]	05CW323 Cumm Amt Avail. at Alt. Pts. [cfs]
57	28.11	28.1102

New Mercer Ditch Company

Priority Number	05CW323 Amount Avail. at Alt. Pts. [cfs]	05CW323 Cumm Amt Avail. at Alt. Pts. [cfs]
25	1.1687	1.1687
33	0.6932	1.8619
47	1.3848	3.2467
49	2.4936	5.7403
98	8.3901	14.1304

Total 14.13

Fort Collins intends to integrate the use of the Water Rights in the Poudre Flows Plan with Fort Collins' operations, as set forth in more detail in the Draft CWCB Agreement. Under the Draft CWCB Agreement, a determination as to how many shares will be dedicated to the Poudre Flows Plan each year will be made by the Fort Collins Utilities Water Resources Manager. Considerations as to the number of shares annually dedicated for this use include need under Fort Collins' pipelines and the volume of storage capacity available in Rigden Reservoir. Fort Collins plans to never exceed the decreed 40-year monthly limits in the 05CW323 Decree when dedicating shares to the Poudre Flows Plan.

Decreed Monthly 40-Year Volumetric Limits in Acre-Feet per Share (05CW323 Decree ¶11.1.7)

	Arthur	LCC No. 2	N. Mercer
April	1.45	0	0
May	40.17	379.4	254.57
June	58.85	942.3	656.09
July	48.16	308.48	342.29
August	14.38	11.31	112.91
September	6.14	4	42.31
October	3.06	0	9

40-Year Limits in Acre-Feet Per Share Per Year (40-Year Volumetric Limits Divided by 40)

	Arthur	LCC No. 2	N. Mercer
April	0.04	0.00	0.00
May	1.00	9.49	6.36
June	1.47	23.56	16.40
July	1.20	7.71	8.56
August	0.36	0.28	2.82
September	0.15	0.10	1.06
October	0.08	0.00	0.23

40-Year Limits in Acre-Feet Per Share Per Year Multiplied by the Number of Shares in the 05CW323 Decree Minus 15% of Shares for Ditch Loss

No shares in '05 share block	154.675	27.61175	27.6083
	Arthur	LCC No. 2	N. Mercer
April	4.77	0.00	0.00
May	132.03	222.61	149.35
June	193.43	552.89	384.91
July	158.29	181.00	200.81
August	47.26	6.64	66.24
September	20.18	2.35	24.82
October	10.06	0.00	5.28

Average Daily Flow Available in CFS
(Convert above Acre-Feet to CFS and Divide by the Number of Days in the Month)

	Arthur	Larimer No. 2	New Mercer
April	0.08	0.00	0.00
May	2.15	3.62	2.43
June	3.25	9.29	6.47
July	2.57	2.94	3.27
August	0.77	0.11	1.08
September	0.34	0.04	0.42
October	0.16	0.00	0.09

Water may not be available from the Water Rights for the Poudre Flows Plan during or after a major drought, or during an emergency. Implementation of such a decision would be pursuant to the Draft CWCB Agreement.

7. Describe owner's intended use of the water other than augmentation of stream flow during and after the lease, and how the water is available for use in this augmentation plan.

The Water Rights are part of Fort Collins Utilities' water portfolio, which is primarily used to provide treated water to Fort Collins Utilities customers. Fort Collins is growing into the need to use the Water Rights. Under the 05CW323 Decree and the Draft CWCB Agreement, Fort Collins will be able to, on an annual basis, switch back and forth between the use of the Water Rights in the Poudre Flows Plan and the use of the Water Rights for other uses, such as to meet the demands from Fort Collins Utilities customers.

As described below, Fort Collins will redivert some of the water attributable to the Water Rights into storage into Fort Collins' Rigden Reservoir after it has been used to augment stream flows in the relevant stream reaches. As discussed further below, among other uses, this water will then be used to meet return flow obligations associated with the Water Rights.

8. Describe any potential change to the time, place, or amount of water available for diversion or exchange by others that may result from use of the water in this augmentation plan. See 37-92-102(4.5)(b)(VI), C.R.S. (2020).

Water attributable to the Water Rights has not yet been removed from their original ditch systems pursuant to the 05CW323 Decree. The water, once removed from these systems and used to augment stream flows under the Poudre Flows Plan, would be "new" water added to the Poudre River. There has been no past dependency on the availability of this water in the river. Using this water in the Poudre Flows Plan would not cause any change to the time, place, or amount of water available for diversion or exchange by other water.

9. **Describe relevant terms and conditions of any applicable decree to which the use of this water is subject. See 37-92-102(4.5)(b)(V), C.R.S.(2020).**

The 05CW323 Decree contains various terms and conditions to prevent injury to other water users, including:

- **Return flow obligations.** The 05CW323 Decree has both surface and subsurface return flow obligations. 05CW323 Decree at Ex. 1. The surface return flow obligations range between 16.5% -17 % of the diversions and are owed on the same day that the share water is diverted. The subsurface return flow obligations are calculated using a 10- year average of the diversions. The percentage applies ranges from 24.7% to 25.4% of the ten-year average diversion.
- **Volumetric limits.** The shares have monthly and annual, one year, ten year, and forty-year volumetric limits.
- **Ditch loss.** Replacement of ditch loss of fifteen percent (15%) is deducted from the shares and left in the respective ditches.

10. **Describe any additional terms and conditions that might be required to prevent injury to other water rights. See 37-92-102(4.5)(b)(VI), C.R.S.(2020).**

Water attributable to the Water Rights has not historically been relied upon by other water users, as described above. Fort Collins is aware of no additional terms or conditions that should be required for the use of this water in the Poudre Flows Plan.

11. **To the extent known, describe any use of, or physical modifications to, existing diversion structures that might be required. Identify the owner, name of the structure, and whether consent has been obtained, along with an estimate for construction, operation, and maintenance costs, if any. See 37-92-102(4.5)(b)(IX), C.R.S.(2020).**

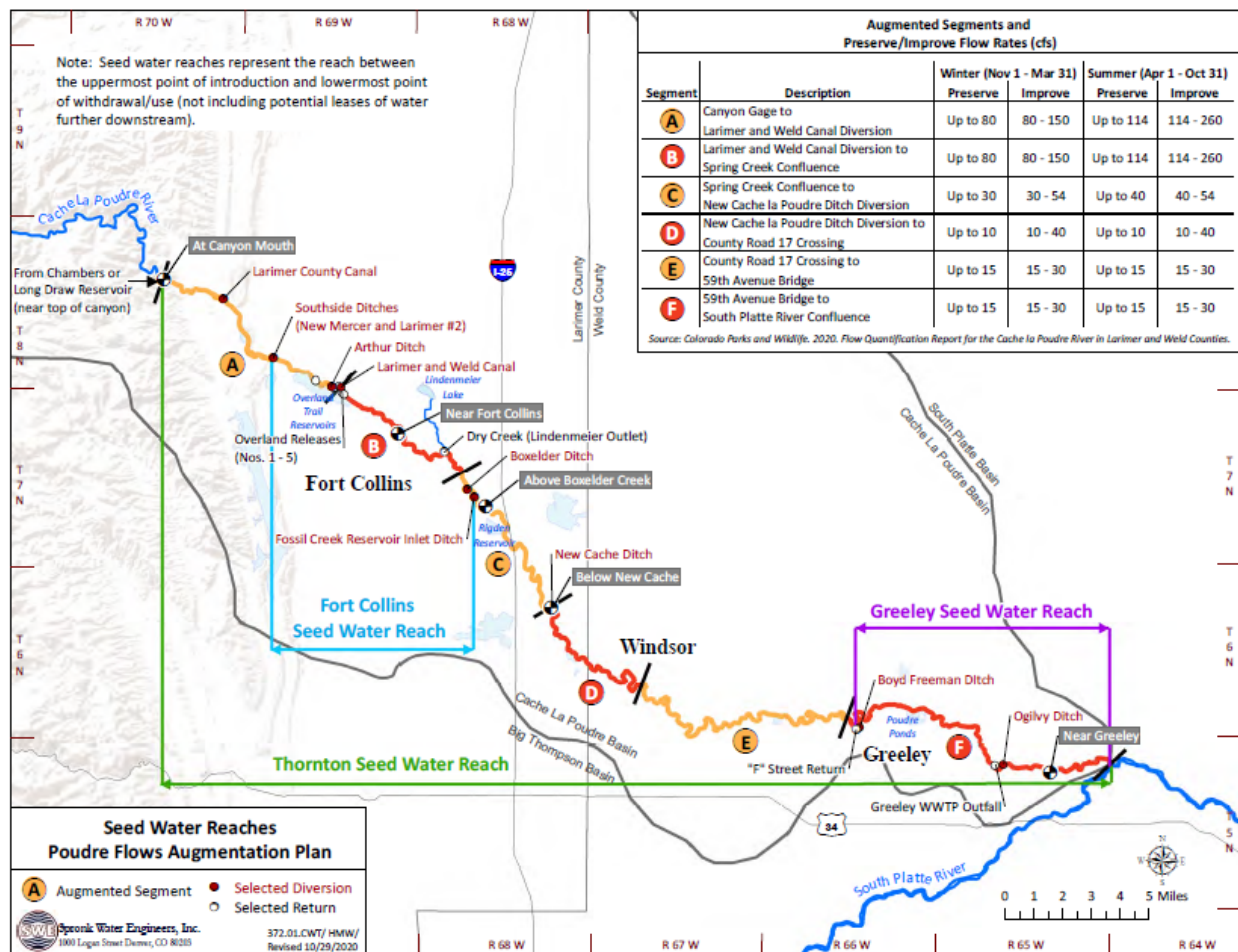
Water attributable to the Water Rights will need to go past several structures within the described reach. The Larimer and Weld Canal headgate is the only known dry-up point in this reach, though it only dries up the river periodically. At this time no arrangements have been made with the owners of these structures.

12. **Will the offered water be available for subsequent use or reuse downstream? If so, please describe.**

Water attributable to the Water Rights will be used to augment stream flows as it is delivered through part of Segment A, all of Segment B and will terminate at the Fossil Creek Reservoir Inlet Ditch ("FCRID") headgate in Segment C. The FCRID can be used to re-divert all or some of this water to Fort Collins' Rigden Reservoir. Alternatively, Fort Collins could leave this water in the Poudre River and placed to other uses. This water, once stored in Rigden Reservoir, will be placed to certain beneficial uses in the reservoir and will be used to manage return flow obligations, to meet augmentation needs and for other allowable decreed uses. Water attributable to the Water Rights that is not re-diverted and delivered to Rigden Reservoir can at times be used to directly

meet return flow and augmentation obligations. Fort Collins may also explore lease or rental arrangements for water attributable to the Water Rights. It is Fort Collins' intent to beneficially reuse and successively use all of the dedicated water after it exits segments.

13. Provide a map showing the location where the offered water is available for use (upper and lower termini).



Attachment:

- Draft CWCB Agreement
- 05CW323 Decree



COLORADO

Parks and Wildlife

Department of Natural Resources

Water Resources Section – Aquatic,
Terrestrial, and Natural Resources Branch

November 5, 2020

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

SUBJECT: Plan for Augmentation to Augment Stream Flows in the Cache la Poudre River

Linda and Kaylea:

The purpose of this letter is to provide the Colorado Water Conservation Board (CWCB) staff with Colorado Parks and Wildlife's (CPW) opinions regarding the potential acquisition of water rights to maintain, enhance, and improve river conditions on the Cache la Poudre River (Poudre River) in Division 1 as part of a plan for augmentation to augment stream flows in the Poudre River. The proposed acquisition arrangement involves the CWCB acquiring an interest in water rights through contractual agreements with the Cities of Thornton, Greeley, and Fort Collins. The Cities have provided the first set of water rights ("Seed Water") to be included in the augmentation plan to augment stream flows for the purpose of preserving and improving the natural environment to a reasonable degree in six segments of the Poudre River from the canyon mouth to the confluence with the South Platte River. The following represents CPW's opinions and recommendations on the acquisition of the Seed Water and on the concept of a plan for augmentation of stream flows on the Poudre River ("Poudre Flows Plan"). November will be the first of a two CWCB meeting process, in which the CWCB can take action on the proposed acquisition at the second January meeting. CPW's opinions and recommendations on the Seed Water from Fort Collins, Greeley, and Thornton are included in this letter.

Background

Stream flows in the Poudre River above and through the City of Fort Collins have been a concern for many decades. There have been many attempts to address this issue with little success; in the late 1980s, the City of Fort Collins approached the state to investigate the possibility of an appropriated CWCB instream flow water right. The state quickly concluded that significant and complex water availability issues precluded such an approach because there simply was not enough water through the reach to support a new appropriation.

More recently, a group of local stakeholders, water users, and state agencies gathered with the common goal of developing a new approach to improve connectivity in the Poudre River. With several dry-up locations on the river for much of the year, water was not available for a traditional appropriation of water for instream flow use. The group has endeavored to pilot a

**Exhibit FC5
Agenda Item 23a
Nov 18-19, 2020**



concept leveraging quantified augmentation supplies to meet instream flow needs. This novel concept adds replacement water to the Poudre River to satisfy non-consumptive, instream flow needs. The group, which stemmed from the FLOWS committee of the Poudre Runs Through It Group, is referred to as the Poudre Flows Group, and includes major water users in the Poudre Basin, including the Cache la Poudre Water Users Association, the City of Fort Collins, Northern Colorado Water Conservancy District, the City of Greeley, and the City of Thornton. The Colorado Water Trust has led this group of broad interests to solidify the concept of a plan for augmentation of stream flows and completed a legislative effort in early 2020 to clarify CWCB's statutory authority to file an application for such a plan for augmentation.

Natural Environment in the Poudre River

The Poudre River has been extensively studied by CPW and other entities. The natural environment includes a somewhat diverse fishery consisting of both native and non-native species. The upper reaches of the Poudre River as it emerges from Poudre Canyon are typical cold-water trout habitat supporting rainbow and brown trout. As the river flows eastward through Fort Collins, the fishery transitions to a mixed cold water/cool water/warm water fishery. Trout occur regularly downstream to approximately Prospect Avenue, but persist in the system down to approximately the highway crossing at I-25; however, they are challenged and limited by low flows, reduced habitat, and higher water temperatures.

High public use exists throughout the urban stretch of the Poudre River. Considerable public access draws visitors to swim, tube, picnic, walk, bird watch, and fish. Recent fish population surveys indicate there are 1,000 to 2,000 trout per river mile within the Fort Collins area. Impacts associated with this high recreational use include accelerated bank erosion and degradation of natural values. Regardless, the Poudre River is an important resource for the community. Fishing and the overall health of the Poudre River is an important recreational driver for the local economy.

The transition zone of the Poudre River provides important habitat for cold-water species seasonally coming down from the canyon, as well as plains species that move up from the low gradient plains zone of the Poudre River. Fish species diversity increases as the river flows through Fort Collins, where native minnow, sucker, and darter species, as well as the Plains Topminnow (Tier 1 Species of Greatest Conservation Need, CPW State Wildlife Action Plan) start to show up in fish sampling efforts. East of I-25, the fishery is dominated by species in the darter, minnow, and sucker families.

The Poudre River is important from a native species conservation standpoint although sampling efforts show a declining trend in native species diversity and abundance. This is coincident with increased demands and water diversions, causing habitat fragmentation during periodic low flow conditions and fewer high flow events connecting the river with its floodplain. The Poudre Flows Plan will introduce sufficient water to improve upon low flow conditions and take necessary steps towards habitat connectivity for fish species in decline.

Evaluation of Flows Necessary to Preserve and Improve the Natural Environment

Early in their process, the Poudre Flows Group asked CPW to assemble and analyze all existing biological and hydraulic data in order to develop instream flow recommendations to be used as flow targets for water acquisitions in this reach of the river. The quantification of flows required to both preserve and improve the natural environment to a reasonable degree is

summarized by CPW in the report titled “Flow Quantification Report for the Cache la Poudre River in Larimer and Weld Counties” dated October 2020.

In general, CPW used a combination of R2CROSS and PHABSIM data collected and published by a variety of parties over a period of ten years. The R2CROSS data was collected by CPW, Fort Collins, and CWCB staff; other data was collected and analyzed by several consulting firms working on various aspects of the Northern Integrated Supply Project (NISP) and Halligan and Seaman Reservoir expansion projects. Flow recommendations and segment delineations from the Flow Quantification Report are provided below:

Segment	Winter (November 1 - March 31)		Summer (April 1 - October 31)	
	Preserve Flow	Improve Flow	Preserve Flow	Improve Flow
A and B	Up to 80 cfs	80 - 150 cfs	Up to 114 cfs	114 - 260 cfs
C	Up to 30 cfs	30 - 54 cfs	Up to 40 cfs	40 - 54 cfs
D	Up to 10 cfs	10 - 40 cfs	Up to 10 cfs	10 - 40 cfs
E and F	Up to 15 cfs	15 -30 cfs	Up to 15 cfs	15 -30 cfs

Segment	Upper Terminus	Lower Terminus
A	Canyon Gage	Larimer/Weld Canal Diversion
B	Larimer/Weld Canal Diversion	Spring Creek Confluence
C	Spring Creek Confluence	New Cache la Poudre Diversion
D	New Cache la Poudre Diversion	County Road 17 Crossing
E	County Road 17 Crossing	59 th Avenue Bridge (Greeley)
F	59 th Avenue Bridge (Greeley)	South Platte Confluence

The Poudre River from the canyon mouth to the confluence of the South Platte River is considered an important transition zone fishery. Transition zones provide aquatic habitat conditions that support an array of species, including important native species with varying temperature and habitat preferences that can be unique to transition zones. Conditions within transition zones are not static and may shift seasonally or from year-to-year. The flow recommendations summarized in this report are based on physical habitat, but do not include habitat assessments for all native species and no direct temperature considerations were made. Future investigations to the relationship between habitat, flow, and thermal regime may be incorporated into CPW’s preferred flow targets to ensure favorable habitat and thermal conditions for native warm-water species using the transition zone.

Seed Water Rights

The envisioned Poudre Flows Plan starts with the initial Seed Water donations from the Cities; augmentation water can be subsequently added to the Plan after appropriate review and approval processes by both the CWCB and Division of Water Resources (DWR). Water rights which may be added to the plan are limited to water rights for which historical consumptive use has been quantified and changed to augmentation. The initial Seed Water from Thornton, Greeley, and Fort Collins is described in more detail below. CPW is supportive of the benefits that will be provided individually and collectively from the Cities’ contributions of water.

Fort Collins

Fort Collins has offered to the CWCB Seed Water which includes their shares in the Arthur Irrigation Company, the Larimer County Canal No. 2 Irrigating Company, and the New Mercer Ditch Company (which together with the Warren Lake Reservoir Company are collectively known as the Southside Ditches, however Warren Lake Reservoir Company shares are not included in the offered water rights). Shares were quantified and changed to include augmentation and other uses. Currently, water is being diverted and used for irrigation in their original ditch systems.

As part of the Poudre Flows Plan, each year Fort Collins will make a determination how much water will continue to be used for irrigation or municipal use, or be made available for use in the Poudre Flows Plan. Under typical operations, water will be used for instream flow augmentation in Segments A, B, and upper portions of C where the consumptive use portion of their shares will be diverted at Fossil Creek Reservoir Inlet Ditch (FCRID) for storage in Rigden Reservoir. Return flow obligations will be left in the river. Fort Collins may also deliver the consumptive use credits farther downstream to lease to other users.

Fort Collins' Seed Water Contribution may provide additional water between the Southside Ditches and FCRID in average daily rates *up to* 0.1 to 19 cfs between April and October, depending on Fort Collins' contribution in a given year. Added water will increase flows at two dry-up locations – increasing flows for both cold-water trout and native species and providing notable benefits to the heavily used urban stretch of the Poudre River surrounding Fort Collins.

Greeley

Greeley has offered to the CWCB Seed Water which includes their water right shares in Greeley Irrigation Company (GIC) that were changed from irrigation to municipal use. Greeley's shares are currently being diverted at the GIC (Greeley #3) headgate. Seed Water part of the Poudre Flows Plan will travel approximately 2 miles down the canal where it will be released back to the Poudre River through the F-street return structure. As such, the reach benefitting from Greeley's Seed Water is between the F-Street Return and the confluence with the South Platte, although Greeley may choose to bypass water at the GIC headgate in the future.

Greeley will decide on a year-to-year basis how much water to dedicate to the Poudre Flows Plan, making no less than 1 cfs available each year. Greeley's Seed Water contribution may increase river flows by an average of *up to* 1.3 to 8.9 cfs between April through October. Maximum rates of up to 16 cfs in July may be provided. Additional water will benefit native species in Segment F representing the first step to restore connectivity at a known dry-up location during irrigation season.

Thornton

Thornton has offered to the CWCB Seed Water which includes Water Supply and Storage Company Shares and Jackson Ditch Company Shares changed from irrigation use to municipal use. Thornton has proposed making all of this water available to the Poudre Flows Plan to meet downstream return flow obligations and stipulation requirements of changed water at various points within the six segments.

Benefits resulting from Thornton's Seed Water commitment will accrue over the entire Poudre Flows Plan reach extending from the canyon mouth to the South Platte River confluence.

Thornton's additions may increase river flows by an average of *up to* 1.5 cfs to 7.0 cfs year-round. Flow rates vary downstream as return flow obligations are satisfied, but this added water will provide year-round increased river flows to improve connectivity for cold-water trout and native warm-water fish species in Segments A through F.

Conclusions and Recommendations

CPW applauds the efforts of the Poudre Flows Group to innovate a creative, market-driven approach to solving the complex water shortages facing the Poudre River. In addition to having broad support from water users in the Poudre River Basin, this plan for augmentation offers a unique solution to improve connectivity in an over-appropriated river without injuring vested water rights holders.

CPW strategic goals in the Poudre River include "supporting fish passage projects for warm-water and transitional zones and continuing focused fish community monitoring as it relates to water development and habitat restoration projects" (CPW South Platte Basin Plan, 2018). Both of these strategic goals align with flow restoration benefits that will be realized through the Poudre Flows Plan. The availability of sufficient water and flow regimes are a critical factor impacting fish communities, and CPW is hopeful the added water will help improve conditions for species in decline.

CPW is of the opinion that the proposed acquisition of the Seed Water will result in benefits, namely supporting improvements to habitat fragmentation throughout the Poudre River. We appreciate the collaboration amongst water users and the state to restore the Poudre River to a healthy, working river. CPW therefore believes that CWCB should proceed with this acquisition concept while continuing to coordinate with the water users, DWR, and CPW. As the Poudre Flows Plan is implemented, logistical hurdles related to administration and physical bypass of water at diversion structures are expected. CPW looks forward to being involved in these conversations as they unfold; incorporating fish passage for both trout and native species at physical barriers would provide notable connectivity benefits. As always, CPW staff will be available at the November 2020 CWCB meeting to answer any questions that the CWCB might have relating to this agenda item. Thank you for the opportunity to assist in this matter.

Sincerely,



Katie Birch
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CC: Battige, Spohn, Wright, Conovitz, Armstrong, Harris, DeWalt, Leslie, Cannon, Surface