



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718  
Denver, CO 80203

P (303) 866-3441  
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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

**TO:** Colorado Water Conservation Board Members

**FROM:** Kaylea White, Senior Water Resource Specialist  
Pete Conovitz, Water Resource Specialist  
Stream and Lake Protection Section

**DATE:** November 17-18, 2021

**AGENDA ITEM:** #22. Proposed Renewable Temporary Loan of Lake Avery (aka Big Beaver Creek Reservoir) Water for Instream Flow Use on Big Beaver Creek and the White River (Water Division 6)

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### Staff Recommendation

No formal action is required at this time.

Pursuant to 37-83-105(2) C.R.S. (2020) and ISF Rule 6k(2), the Board will use a two-Board meeting process to review, consider public comment and approve or reject a proposal for a temporary renewable loan of water. The Board's consideration of the loan at this meeting will initiate this process and begin a twenty day period in which any person may request the Board to hold a hearing on the proposed loan. The initial presentation of this proposal provides an opportunity for the Board and the public to identify questions or concerns that Staff will address at this or a subsequent meeting. After the second CWCB meeting, the Board may direct Staff to "move forward," after which the Applicant shall file a request for approval of the loan with DWR, which will initiate a 60-day comment period for DWR's review.

### Introduction and Background

Colorado Parks and Wildlife ("CPW") has proposed a renewable temporary loan of water stored in Lake Avery, aka Big Beaver Creek Reservoir, to the CWCB for instream flow ("ISF") use in Big Beaver Creek and the White River. The intent of this loan would be to release the water to help meet existing ISF decreed rates on Big Beaver Creek and the White River to preserve the environment to a reasonable degree. CPW's offer letter is attached as **Exhibit A**.

In 2012, the CWCB approved a similar loan, under prior law, of water from CPW which was exercised in 2012, 2019 and 2020. The prior law allowed a 10-year loan to be exercised three of the ten years and was not renewable. 2020 was the third and last year the loan could be implemented for ISF use under the prior law.



CPW is proposing this new loan pursuant to the recently passed legislation codified under section 37-83-105(2), C.R.S. (2020). Under this new law, a water rights owner can loan all of a portion of a water right to the CWCB for use in a reach of stream previously decreed for ISF use either as an expedited one year loan, or as a renewable loan for up to 5 years in a 10-year period. In July 2021, CWCB accepted an expedited temporary loan under new law, from CPW for water stored in Big Beaver Creek Reservoir which was released to help meet the decreed ISF flow rates on Big Beaver Creek and the White River. Pursuant to section 37-83-105(2), and Rule 6.k(2) of the Rules Concerning Colorado’s Instream Flow and Natural Lake Level Program (“ISF Rules”), the one year loan period of the 2021 expedited loan will count as the first year of the five-year allowance (and as the first year of the 10-year period) for this proposed renewable loan. Therefore an additional four years of use will be allowed during the approval period.

The procedure for evaluating temporary loans of water is outlined under ISF Rule 6, which is followed here. Additional information on the proposal and the process and timeline concerning the acceptance of a temporary loan are provided below.

**Discussion**

ISF Rules 6e. and 6f. describe the Board’s evaluation process, including specific factors that the Board must consider in determining the appropriateness of an acquisition. Additional information that the Board may use to evaluate the proposed loan is included below:

**1. Amount and Source of Water Proposed for Loan**

The water right proposed for loan will provide up to 3,000 acre-feet of water per year owned by CPW and stored in Big Beaver Creek Reservoir, an on-channel reservoir located on Big Beaver Creek approximately 0.5 miles above the confluence with the White River.

**2. Location of Use**

The loaned water is proposed to be used on Big Beaver Creek from the Big Beaver Creek Reservoir Outlet to the confluence with the White River, and on the White River downstream to the confluence with Piceance Creek. A Location Map is attached as **Exhibit B**.

**3. Existing ISF Water Rights**

CWCB holds existing ISF water rights on both Big Beaver Creek and on the White River:

CWCB Case No.	Stream	Amount (cfs)	Approp. Date	Watershed	County
6-77W3652E	Big Beaver Ck	2.0 (1/1-12/31)	11/15/1977	Upper White	Rio Blanco
6-77W3652C	White River	200 (1/1-12/31)	11/15/1977	Upper White	Rio Blanco

The Big Beaver Creek ISF water right extends 0.5 mile from the outlet of Big Beaver Creek Reservoir to the confluence with the White River. The White River ISF water right extends 43 miles from the confluence of the North and South Forks of the White River to the confluence with Piceance Creek. The location of these ISF water rights are also shown on Exhibit B.

#### **4. Natural Flow Regime and Existing Environment**

The White River originates in the Flat Tops Wilderness Area in the White River National Forest and flows generally west to join the Green River in Utah. Big Beaver Creek is a tributary to the White River, flowing a distance of approximately 15 miles from its headwaters to the White River Confluence. Streamflow is primarily driven by snowmelt and local precipitation with peak flows typically occurring in May and June that then drop off quickly. Although the hydrology of the White River and Big Beaver Creek are affected by various river diversions, that natural hydrograph is relatively intact relative to other rivers and creeks in the Upper Colorado River system.

Both Big Beaver Creek and the White River, including the reaches decreed for ISF use, are highly productive and important native and recreational fisheries. Important recreational species include brown trout, rainbow trout and rainbow cutthroat trout hybrid. CPW has also stocked whirling disease resistant rainbow trout in an effort to establish a naturally reproducing and sustainable rainbow trout population in the White River. Existing native fish populations include mountain whitefish, mottled sculpin and Colorado River cutthroat trout. Mountain whitefish are native to Colorado only in the Yampa and White River basins.

#### **5. Proposed Method of Acquisition**

CPW is proposing entering into a “5-in-10” loan agreement with CWCB where water could be made available for ISF use for a total of five years within a ten-year period. Because the expedited loan in 2021 counted as the first year, this loan may be exercised for no more than four years in a nine year period. A draft interagency loan agreement is attached as **Exhibit C**.

#### **6. Proposed Use of the Loaned Water**

This water will be used to help meet existing ISF decreed rates on Big Beaver Creek and on the White River in order to preserve the natural environment to a reasonable degree. The released water will be beneficially used for ISF on Big Beaver Creek from the outlet of the reservoir down to the confluence with the White River. The water will enter the White River approximately one mile downstream of the ISF upper terminus and will be beneficially used for ISF on approximately 42 miles of the White River down to the confluence with Piceance Creek. At CPW’s discretion, in consultation with CWCB, CPW will release up to the maximum annual cumulative amount of 3,000 acre-feet to help increase stream flow in order to help meet the ISF decreed rates.

## **7. Historical Use and Historic Return Flows**

The water storage right decreed to Big Beaver Reservoir has been historically used for in-reservoir purposes such as fish propagation and recreation and is not attributed to any historic use or historic return flows.

## **8. Location of Other Water Rights and Injury Potential**

There are numerous water rights and diversions between the outlet of Big Beaver Reservoir and the White River confluence with Piceance Creek. No injury to existing rights is anticipated as a result of the proposed loan. DWR's approval of the 2012 temporary lease included a term and condition to prevent injury that the volume of water released for ISF use may only be refilled during periods of free river. It is anticipated that DWR would include the same term in approving the proposed loan.

## **9. Effect of Proposed Acquisition on Any Relevant Interstate Compact Issue**

The proposed loan would not negatively affect any interstate compact. The water rights will be used for instream flow purposes and will be available for use by others downstream of the instream flow reach.

## **10. Effect on Maximum Utilization of Waters of the State and Availability for Downstream Use**

The release and use of the loaned water will promote maximum utilization of waters of the State by 1) being beneficially used for ISF purposes to better preserve the natural environment to a reasonable degree throughout the decreed ISF reaches on Big Beaver Creek and the White River, and 2) being made available for downstream use including diversion for consumptive use below the White River confluence with Piceance Creek (lower terminus of the White River ISF segment).

## **11. Administration**

Staff will consult with DWR to confirm that this loan will be administrable, so long as it is operated within the terms of DWR's eventual approval.

### **Potential Benefits of the Proposed Loan**

Water released will help supplement or meet the decreed ISF rights on Big Beaver Creek and the White River when river flows are below the decreed instream flow rates. These releases will mitigate low-flow impacts to the White River fishery including high water temperatures, low dissolved oxygen, and loss of habitat, particularly in below average years. CPW's letter of recommendation in support of this loan is included as **Exhibit D**.

### **Procedure and Timeline for Temporary Loan Acquisition**

ISF Rule 6k. governs the Board's procedures for acquiring water for ISF use under a temporary loan and requires a minimum of two Board meetings to allow for public input prior to taking

final action on a proposed acquisition. The initial consideration of this proposal at this November meeting will initiate a 120-day period for the Board to consider the terms and conditions of the proposed acquisition. ISF Rule 6m.(4) provides that any person may request the Board to hold a hearing on the proposed acquisition, and that such request must be filed within twenty days of the first meeting of the two-meeting process.

CWCB staff have provided written notice of this request for consideration and approval of a temporary loan to: (a) the substitute water supply plan (“SWSP”) notification list for the Water Division 6; and (b) the ISF mailing notification lists for Water Division 6; and although not explicitly required until an application is filed with DWR pursuant to 37-83-105(2)(b)(II) and ISF Rule 6k.(2), Staff has also provided notice to (c) Scott Grosscup of the Yellow Jacket Water Conservancy District as “a registered agent of a ditch company, irrigation district, water users’ association, or other water supply or delivery entity within whose system the water rights fall.” Staff have also (d) published notice in the Rio Blanco Herald Times recognizing its duty to coordinate with applicant to “make best efforts to publish notice in an appropriate legal newspaper of general circulation” in Rio Blanco County pursuant to Rule 6.k.(2)(f).iv.

At the January, 2022 CWCB meeting (the 2<sup>nd</sup> meeting of the two-Board meeting process), if no hearing has been requested, Staff will recommend that the Board take action on this proposed loan. Specifically, the action would be to direct staff to move forward with the proposed renewable loan including authorizing staff to execute an agreement for the loan of water and to take any administrative action necessary to put the loaned water to ISF use (provided that the State Engineer determines that no injury will result from the proposed loan).

If the Board approves the proposed loan at the January meeting then the Applicant (CPW) will subsequently file its request to DWR to approve the temporary loan of water for ISF use. A draft request to DWR is attached as **Exhibit E**. At the time of this request, CWCB will coordinate with CPW to provide notice to the same parties as described above pursuant to 37-83-105(2)(b)(II) and ISF rule 6k.(2). Submitting the request to DWR initiates a 60 day review and public comment period. DWR has 10 days after the 60 day review period to approve or deny the loan request.

Attachments:

- Exhibit A - CPW offer letter
- Exhibit B - Location map
- Exhibit C - Interagency Agreement (draft)
- Exhibit D - CPW recommendation letter
- Exhibit E - DWR request (draft)



# COLORADO

## Parks and Wildlife

Department of Natural Resources

Northwest Region  
711 Independent Ave, Grand Junction, CO  
81505  
P 970.255.6100

November 3, 2021

*Via email*

Rebecca Mitchell, Director  
Colorado Water Conservation Board  
1313 Sherman Street, Room 718  
Denver, CO 80203  
[rebecca.mitchell@state.co.us](mailto:rebecca.mitchell@state.co.us)

RE: Offer of Temporary Loan of Water for Instream Flow Use

Dear Director Mitchell:

Colorado Parks and Wildlife (CPW) owns a storage water right in Big Beaver Creek Reservoir (aka Lake Avery) located on Big Beaver Creek, tributary to the White River, in Water Division 6. CPW would like to seek approval from the Colorado Division of Water Resources (DWR) of a temporary, renewable loan of water to the Colorado Water Conservation Board (CWCB) pursuant to section 37-83-105(2), C.R.S. (2020) to help maintain the CWCB's decreed instream flow water rights on Big Beaver Creek and the White River. The proposed loan will provide water to the CWCB for instream flow use to preserve the natural environment to a reasonable degree. This letter serves as CPW's formal offer of a loan of water to the CWCB pursuant to Instream Flow Rule 6(k)(2) (2021).

Releases of water from Lake Avery will be used to supplement or meet the CWCB's instream flow rights on Big Beaver Creek and the White River when river flows are below the decreed instream flow rates. The temporary loan will further the missions of both CPW and the CWCB by mitigating low-flow impacts to the White River fishery, including high water temperatures, low dissolved oxygen, and loss of habitat, particularly in dry years.

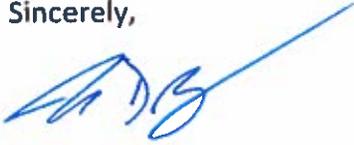
Upon receiving your response to this offer, CPW and CWCB staff will coordinate to request approval of a renewable loan from DWR and provide all required written notices. Staff are currently preparing the necessary information to submit this request to DWR. We look forward to working together to finalize and implement this loan benefitting the popular trout fishery in the White River.

Exhibit A  
November 17-18, 2021  
CWCB Board Meeting  
Item 22: Proposed Renewable Temporary Loan of Lake Avery (aka Big Beaver Creek Reservoir) Water for Instream Flow Use on Big Beaver Creek and the White River (Water Division 6)



If you have any questions or concerns regarding this offer, please do not hesitate to reach out to Katie Birch, CPW's Instream Flow Program Coordinator, at [katie.birch@state.co.us](mailto:katie.birch@state.co.us).

Sincerely,



Jacob Brey

Acting Northwest Regional Manager, Colorado Parks and Wildlife

*cc all via email:*

**Rob Viehl, Stream and Lake Protection Section, CWCB**

**Kaylea White, Stream and Lake Protection Section, CWCB**

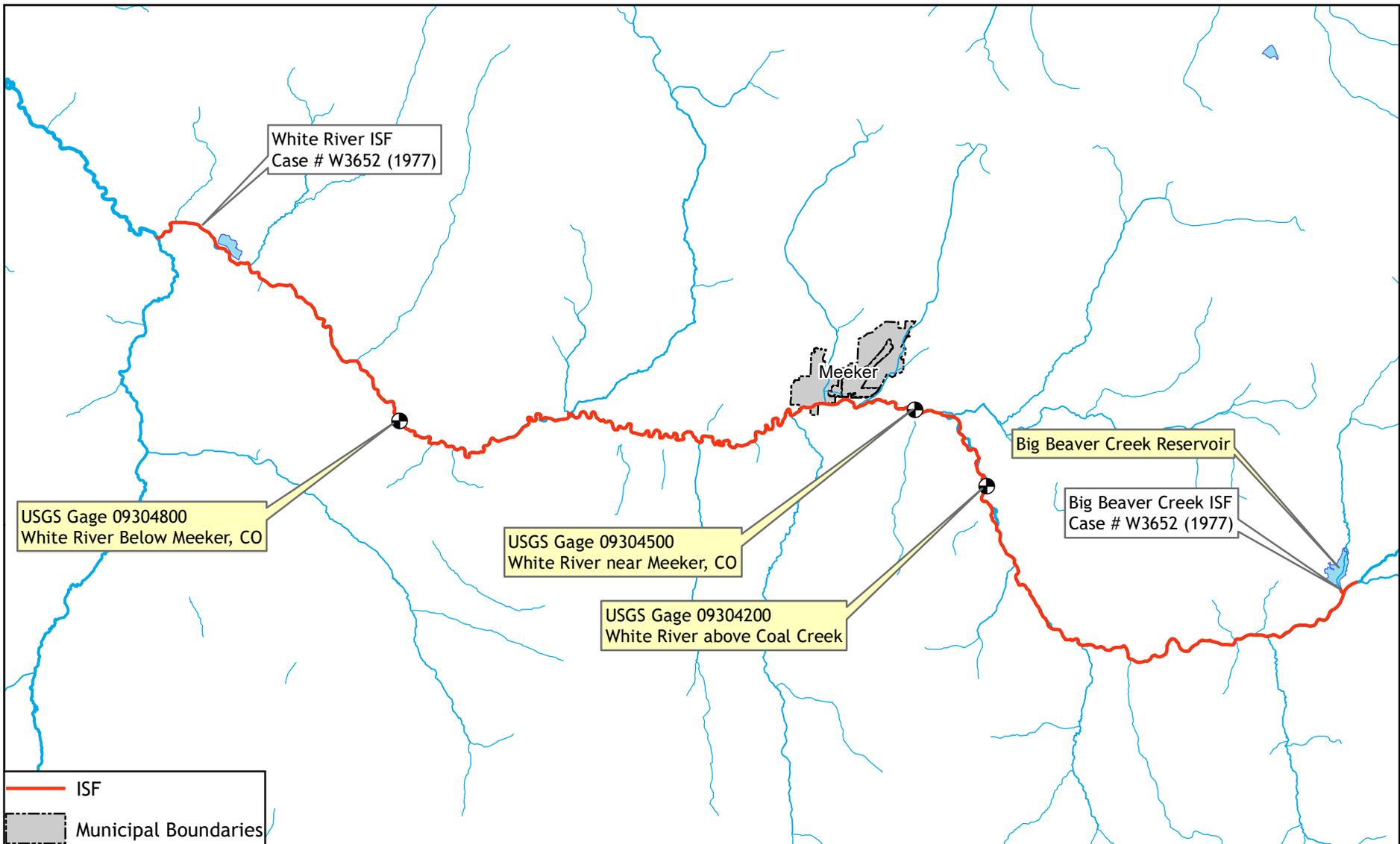
**Pete Conovitz, Stream and Lake Protection Section, CWCB**

**Katie Birch, Instream Flow Program Coordinator, CPW**

**Ed Perkins, Water Rights Coordinator, CPW**

**Lori Martin, Northwest Region Senior Aquatic Biologist, CPW**

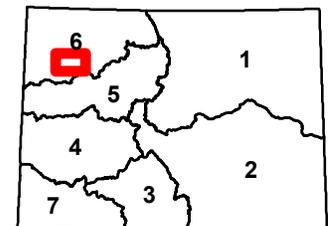
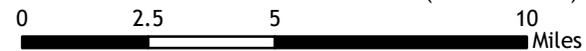
**Bill deVergie, Northwest Region Area 6 Wildlife Manager, CPW**



**COLORADO**  
**Colorado Water Conservation Board**

Department of Natural Resources

Exhibit B. November 17-18, 2021 CWCB Board Meeting Agenda Item 22. Proposed Renewable Temporary Loan of Water for ISF Use on Big Beaver Creek and the White River (Water Div 6)



## **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) CWCB 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 CWCB 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. CWCB'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 CWCB. By permitting CWCB to use a portion of the Storage Right, CPW is not abandoning, relinquishing, or forfeiting the Storage Right. CWCB 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

**CWCB:**

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 Decreases]**

DRAFT

**EXHIBIT B**

**[Big Beaver Storage Right Decree]**

DRAFT



# COLORADO

## Parks and Wildlife

Department of Natural Resources

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

Exhibit D  
November 17-18, 2021  
CWCB Board Meeting  
Item 22: Proposed Renewable Temporary Loan of Lake  
Avery (aka Big Beaver Creek Reservoir) Water for  
Instream Flow Use on Big Beaver Creek and the White  
River (Water Division 6)

November 4, 2021

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

SUBJECT: Renewable Loan of Water from Big Beaver Reservoir (Lake Avery) for the Benefit of Instream Flows in Big Beaver Creek and the White River

Rob and Kaylea:

This letter is in response to your request for recommendations and serves as a statement of strong support for the proposed renewable loan of water from Colorado Parks and Wildlife (CPW) to the Colorado Water Conservation Board (CWCB). CPW owns a storage water right in Big Beaver Creek Reservoir (also known as Lake Avery) that it has offered to loan a portion of to the CWCB to help supplement the CWCB's decreed instream flow (ISF) water rights to preserve the natural environment in Big Beaver Creek and the White River. CPW would like to enter into a renewable loan with the CWCB, pursuant to section 37-83-105(2) C.R.S. (2020). Releases of water from Lake Avery will be used to supplement the CWCB's ISF rights on Big Beaver Creek and the White River when they are not met, mitigating extreme stress to the fishery caused by warm temperatures and low streamflow.

### Background

About 30 miles east of Meeker, CPW owns a dam and State Wildlife Area (SWA) known as Lake Avery on Big Beaver Creek immediately tributary to the White River. There is a long history of CPW working to support the popular recreational trout fishery in the White River and meet the needs of the fishery in drought-afflicted years. These efforts date back to the drought of 2002 when flows in the White River east of Meeker were low enough to trigger concern from Division of Wildlife (DOW) staff at the time. At that time, there were no statutory provisions for protecting temporary transfers of water to the CWCB for ISF use. DOW's only option was to organize meetings with local irrigators, the angling community, local government, and water officials to cooperatively attempt to keep legally available water released from Lake Avery in the White River.

By 2012, the next severe drought year, a new temporary loan program had been established by the General Assembly, which allowed CPW to loan stored water in Lake Avery to supplement CWCB's instream flow rights on Big Beaver Creek and the White River. In 2012, 2019, and 2020, low streamflow conditions warranted releases of water from Lake Avery to mitigate low-flow impacts to the fishery, specifically high water temperatures, low dissolved oxygen, and loss of habitat. On multiple occasions during these implementation years, the released water from Lake Avery made up nearly the entirety of the flow in the White River at the Wakara bridge gage in the late summer. In early 2020, House Bill 20-1157 expanded the previous ISF loan statute which was limited to use 3 years in a 10-year period and was not renewable. The new statute expands



the loan program to include both expedited loans, which provide nimble action during emergency drought response, and renewable loans, which can be implemented 5 years in a 10-year period. In July 2021, CWCB accepted an expedited loan of Lake Avery water from CPW to preserve the natural environment in Big Beaver Creek and the White River. Again, this water was critical to increase White River flow conditions in a year when the fishery would otherwise be stressed due to inadequate flow and thermal conditions.

#### Natural Environment

The White River Basin originates within the Flat Tops Wilderness area and becomes the White River at the confluence of the North and South Fork just downstream of Buford, Colorado. The subject ISF reach starts at the confluence of the North and South Forks and ends at the confluence with Piceance Creek. Through this reach, the fishery is highly productive and highlighted as an outstanding resource for the angling public. Current fish sampling records indicate native populations of mountain whitefish, mottled sculpin, and Colorado River cutthroat trout, as well as sport species which include brown trout, rainbow trout, and rainbow cutthroat trout hybrid. Mountain whitefish are present in this section of the White River with biomass estimates exceeding 100 pounds/acre and density estimates exceeding 60 fish larger than 14 inch per acre, indicating a stable and relatively robust population compared to other populations in the state. Mountain whitefish are native to Colorado in only the Yampa and White River basins. In addition to notable native species presence, CPW is working towards establishing a sustainable rainbow trout population with natural recruitment in the White River.

With a number of public access points above the town of Meeker, the White River is highly used by the angling public and considered an outstanding fishery resource for the state. Public access points are numerous and recreational fishing brings many in- and out-of-state anglers to visit Meeker, contributing to the local outdoor economy. Big Beaver Creek supports the trout and native species of the White River fishery. Specifically, Big Beaver supports spawning activities of rainbow trout, which can be seen stacking up at the confluence in the spring.

#### Conclusions and Recommendations

CPW is prepared to make up to 3,000 AF per year available to the CWCB from Lake Avery at its discretion when conditions warrant. With the proposed loan, CPW must strike a balance between keeping reservoir levels up in Lake Avery and not negatively impacting recreational opportunities at Lake Avery SWA. CPW is dedicated to conserving and supporting the important fishery in the White River. As both the water right holder and recommender in this instance, we cannot over-state our strong support of the benefits this renewable loan provides.

As always, CPW staff will be available at the November 2021 virtual CWCB meeting to answer any questions that the Board might have relating to this agenda item. We appreciate the opportunity to state our support on the first application of the state's new renewable ISF loan tool. CPW continues to be appreciative of the efforts of CWCB staff to protect releases of water that conserve and help protect important fisheries around the state, especially the White River.

Sincerely,

*Katie Birch*

Katie Birch  
Instream Flow Program Specialist

cc: Eyre, Martin, DeVergie, Perkins, Harris, DeWalt, Watson, Brey



# COLORADO

## Parks and Wildlife

Department of Natural Resources

Northwest Region  
711 Independent Ave, Grand Junction, CO  
81505  
P 970.255.6100

Exhibit E  
November 17-18, 2021  
CWCB Board Meeting  
Item 22: Proposed Renewable Temporary Loan of Lake  
Avery (aka Big Beaver Creek Reservoir) Water for  
Instream Flow Use on Big Beaver Creek and the White  
River (Water Division 6)

[REDACTED], 2022

*Via email*

Kevin Rein  
State Engineer  
Colorado Division of Water Resources  
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Denver, CO 80203  
[DWRpermitsonline@state.co.us](mailto:DWRpermitsonline@state.co.us)  
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### **RE: Request for Approval of Loan of Water to the Colorado Water Conservation Board for Instream Flow Purposes**

Dear State Engineer Rein and Division Engineer Light:

The following is a request for approval of a temporary loan of water from Colorado Parks and Wildlife (CPW) to the Colorado Water Conservation Board (CWCB) for instream flow purposes pursuant to § 37-83-105, C.R.S. (2020).

#### **Overview of Proposed Loan**

CPW requests approval to temporarily loan a portion of its water storage right decreed to Big Beaver Creek Reservoir (aka “Big Beaver Reservoir” or “Lake Avery”) to the CWCB to benefit two decreed instream flow water rights—the first on Big Beaver Creek and the second on the White River. The renewable loan will provide water to the CWCB for instream flow use to preserve the natural environment to a reasonable degree. *See* § 37-83-105(1)(b)(I). CPW seeks approval of this loan under the renewable loan process in § 37-83-105(2)(a)(IV)(A).



The Big Beaver Creek and White River instream flow water rights (“Instream Flow Rights”) are more specifically described in the table below, and the decreed reaches are shown on the map attached as Exhibit A.

Case No. <sup>1</sup>	Stream	Amount (cfs)	Approp. Date	Upstream Terminus	Downstream Terminus
Case No. W-3652E, Water Division 5	Big Beaver Creek	2.0	11/15/1977	SW1/4 NE1/4, Sec. 18, T 1 S, R 91 W, 6th P.M. (from Lake Avery dam)	NW1/4 SE1/4, Sec. 18, T 1 S, R 91 W, 6th P.M. (confluence of Beaver Creek with the White River)
Case No. W-3652C, Water Division 5	White River	200	11/15/1977	NE1/4 NE1/4, Sec. 18, T 1 S, R 91 W, 6th P.M. (confluence of the North Fork and the South Fork of the White River)	NW1/4 NE1/4, Sec. 2, T 1 N, R 97 W, 6th P.M. (confluence of the White River with Piceance Creek)

The water released from Big Beaver Reservoir to the CWCB for instream flow use will be limited to the amount needed, when combined with the native flow, to meet all or part of the decreed flow rates of each Instream Flow Right within the decreed reaches. The proposed loan would operate, in CPW’s discretion and in consultation with the CWCB, during the summer and fall when river flows are below the decreed instream flow rates, and high water temperatures and low dissolved oxygen levels cause extremely stressful conditions for the fish community.

**Legal Right to Use Water**

CPW’s water storage right in Big Beaver Reservoir (the “Storage Right”) was decreed in Civil Action 1269 and is described in more detail below. The CWCB and CPW will enter into an Interagency Agreement to Loan Water for Instream Flow Use (“Loan Agreement”) in substantially similar form to the draft Loan Agreement attached hereto as Exhibit B. CPW has the right to the water stored in priority in Big Beaver Reservoir under the Storage Right and therefore has the right to loan the water to the CWCB. The pertinent pages from the final decrees for the Storage Right in C.A. 1269 and the Instream Flow Rights in Case Nos. W-3652C and W-3652E are attached hereto as Exhibit C.

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<sup>1</sup> The Instream Flow Rights were originally decreed in Water Division 5 but are administered in Water Division 6.

## **Duration of Loan**

On July 10, 2021, the State Engineer approved a one-year expedited loan (the “Expedited Loan”) of the Storage Right to the CWCB pursuant to § 37-83-105(2)(a)(III.7). The Expedited Loan expired on December 31, 2021. This proposed renewable loan will not be exercised for more than four years in a ten-year period, as the Expedited Loan period counts as the first year of the five-year allowance for this renewable loan. § 37-83-105(2)(a)(IV)(A)-(B). If this renewable loan request is approved, the ten-year period will be 2021 through 2031 based on operation of the Expedited Loan in 2021. The renewable loan will be effective upon approval by the State Engineer. Additionally, this loan will not be exercised for more than three consecutive years. Water may be used for instream flows pursuant to this loan for up to 120 days in a calendar year. § 37-83-105(2)(a).

## **Description of Big Beaver Storage Right**

Big Beaver Reservoir is an on-stream reservoir, which impounds the flow of Big Beaver Creek just upstream of its confluence with the White River. See Exhibit A. CPW owns and operates Big Beaver Reservoir.

### *Original Point of Diversion*

Big Beaver Reservoir’s point of diversion, as originally described, is located at a point whence the Northwest corner of Section 18 in Township 1 South, Range 91 West of the Sixth Principal Meridian bears North 51°36' West, a distance of 3,472 feet.

### *Return Flow Pattern*

Big Beaver Reservoir is an on-channel reservoir. As with many reservoirs, some seepage exits the toe of the dam. However, return flows are not applicable to the administration of this reservoir.

### *Time, Place, and Types of Use of the Loaned Water Right*

The Storage Right is decreed for in-reservoir fish propagation, waterfowl habitat and propagation, and recreational uses in the amount of 7,657.86 AF, which is the full capacity of the reservoir.

## **Description of Use of Loaned Water Right: New Points of Diversion, Return Flow Pattern, Stream Reach, and Time, Place, and Types of Use of the Loaned Water Right**

The point of diversion for the Big Beaver Reservoir will not change with the operation of the proposed loan. CPW will release water from Big Beaver Reservoir that was stored in priority under the Storage Right. The loaned water will be released to Big Beaver Creek and benefit that instream flow reach down to the confluence with the White River. The loaned water will then enter the White River instream flow reach at the confluence of Big Beaver Creek and the White River. The confluence of Big Beaver Creek and the White River is approximately one-half mile below the upstream terminus of the White River instream flow reach. The loaned water will then benefit the remainder of the White River instream flow reach until it arrives at the downstream terminus where it will no longer be claimed by the CWCB and used by other water users. The instream flow reaches are shown on the map attached as Exhibit A.

The loaned water will be used in both stream channels for instream flow use by the CWCB to preserve the natural environment to a reasonable degree. Specifically, the loan will benefit the Instream Flow Rights during low-flow periods occurring in summer and early autumn when the natural hydrograph has receded, irrigation diversions withdraw significant flows causing a depleted flow regime, and warm ambient temperatures raise water temperatures to levels that can adversely impact the fishery. The instream flow use of the loaned water will be limited to the decreed flow rate of each Instream Flow Right: 200 cfs for the White River and 2.0 cfs for Big Beaver Creek.

Regarding return flows, the loaned water will be used for instream flows and thus remain in the stream.

## **Historic Consumptive Use of Storage Right**

The Storage Right is not attributed any consumptive use.

## **Administration**

Any releases under this loan will occur in CPW's sole discretion and in consultation with the CWCB. Releases of water from Big Beaver Reservoir will depend upon the timing of stream flow shortages and operational constraints for the reservoir. CPW may decide not to release water for any reason during the term of this loan. For example, CPW may determine that it is necessary to conserve the pool based on temperature and flow forecasts to provide maximum benefit to the fishery.

Should CPW release water from Big Beaver Reservoir, it will only do so for up to 120 days during any one calendar year. *See* § 37-83-105(2)(a). In any of the four years that this proposed loan can be operated, the annual cumulative limit of releases of the loaned Storage Right will be 3,000 AF. These limits are described in the draft Loan Agreement to be executed by CPW and the CWCB. *See Exhibit B.* Should CPW elect to release water pursuant to this proposed loan, releases may continue in CPW's sole discretion until the first of the following occurs: the maximum volume (3,000 AF) is reached, the maximum number of days per calendar year (120) is reached, or the White River instream flow water right (200 cfs) is fully satisfied without additional loaned water releases. Despite these maximum limits, CPW may decline to release any water or may cease releases for any reason and at any time during the duration of the loan.

The loaned water will only be available to Big Beaver Creek and the White River by virtue of this loan for instream flow use by the CWCB. Therefore, CPW requests that it be administered as such and shepherded by the water commissioner past diversion structures along the decreed instream flow reaches so the entire amount, less transit losses, arrives at the downstream terminus of the White River instream flow reach. CPW acknowledges that a reasonable transit loss will be assessed. As necessary at the request of the water commissioner, CPW can conduct in-channel flow measurements to coordinate operation and administration of this loan.

The loaned water will be stored in priority before it is released to benefit the instream flow reaches. A stage-storage table for the reservoir is attached as Exhibit D. Historically, water stored in Lake Avery was not released to downstream uses. Therefore, a fill of Lake Avery to replace the volume of the loaned water released will result in a decrease of streamflow downstream of Lake Avery when compared to historical flows. To ensure this does not result in injury to a downstream water user, the volume of loaned water released will be tracked separately, and the volume of water released from Lake Avery under the loan will only be filled when free river conditions exist downstream of Lake Avery. Based on the limited gage data available for Big Beaver Creek (1955-1964), it is anticipated that most of the filling will occur in the spring following operation of the loan during the previous summer and fall, but that some of the filling may occur under free river conditions in the fall or winter. *See* average discharge chart attached as Exhibit E. Since the loan will result in a retiming of flows downstream of the reservoir, and the water will be available to downstream users for other beneficial uses, it will not adversely affect Colorado's compact entitlements.

## **Notices**

Concurrent with this transmittal, as required under § 37-83-105(2)(b)(II), written notice has been provided to all parties on the substitute water supply plan

notification list for Water Division 6 and to registered agents and water users contacts provided by the Water Commissioner (e.g. Yellow Jacket Water Conservancy District). In accordance with 2 CCR 408-2:6(k)(2)(f), CPW and the CWCB have coordinated to provide notice to all persons on the instream flow subscription mailing list for Water Division 6 and to make the best efforts to publish notice in the local newspaper in Rio Blanco County.

**Filing Fee**

On behalf of CPW, the Colorado Office of the Attorney General will pay the \$300.00 filing fee as required under § 37-83-105(2)(b)(I) via the DWR online payment system.

Should any questions arise during the operation of the proposed loan, please contact Katie Birch, 970-819-1037. Thank you for your prompt consideration of this request.

Sincerely,

*DRAFT*

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Northwest Regional Manager  
Colorado Parks and Wildlife

Encl.

*cc all via email:*

Rob Viehl, Stream and Lake Protection Section  
Kaylea White, Stream and Lake Protection Section  
Pete Conovitz, Stream and Lake Protection Section  
Katie Birch, Colorado Parks and Wildlife  
Ed Perkins, Colorado Parks and Wildlife  
Tarn Udall, Assistant Attorney General