

RECORD OF PROCEEDING

**SOUTHEASTERN COLORADO WATER
CONSERVANCY DISTRICT**

MINUTES

February 20, 2020

A regular meeting of the Board of Directors of the Southeastern Colorado Water Conservancy District (District) was held on Thursday, February 20, 2020 at 9:42 a.m. at the District office, 31717 United Avenue, Pueblo, Colorado.

President Long announced a quorum was present.

DIRECTORS PRESENT:

Bill Long	Curtis Mitchell	Ann Nichols
Carl McClure	Tom Goodwin	Andy Colosimo
Seth Clayton	Alan Hamel	Mark Pifher
Greg Felt	Kevin Karney	
Patrick Garcia	Pat Edelmann	

DIRECTOR(S) ABSENT AND EXCUSED:

Dallas May arrived at 9:42 AM
Howard "Bub" Miller

DISTRICT OFFICIALS PRESENT:

Executive Director James Broderick; General Counsel Lee Miller; Principal Engineer Kevin Meador; Senior Policy and Issues Manager Chris Woodka; Finance Manager Leann Noga; Administrative Support Associate Patty Rivas; and Federal Lobbyist Christine Arbogast.

VISITORS PRESENT:

Andy Klakulak and Krystal Brown, U.S. Geological Survey; Curt Thompson, AECOM; Doug Fitzgerald, Representative Scott Tipton's office; Brandon Bernard, Fountain Valley Authority; Cathy Garcia, Senator Cory Gardner's Office; Kevin Niles, Arkansas Groundwater Users' Association (AGUA); Tom Simpson, Aurora Water; Gordon Dillon, Kleinfelder; Dwight Gardner, U.S. Senator Michael Bennett's Office; Tom Browning and Matt Cirulli, Atkins; Mark Scott, Providence.

INTRODUCTION OF VISITORS:

President Long welcomed the visitors to the meeting and asked them to introduce themselves and identify the organization they represented.

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APPROVAL OF MINUTES:

President Long said the minutes of the January 16, 2020 Board meeting were posted to the Board website for review and asked if there were any corrections or additions. Hearing none, Mr. Karney moved, seconded by Mr. Hamel, to approve the minutes. Motion unanimously carried.

FINANCE COMMITTEE REPORT:

Treasurer Nichols reported the financial statements for January 2020 were posted to the Board website for review. Ms. Nichols moved, seconded by Mr. Clayton, for acceptance of the January 2020 financial statements and payment of the February 2020 bills. Motion unanimously carried.

CONSENT ITEMS:

None

PRESENTATIONS:

2020 PUBLICATIONS

Mr. Woodka reported the District has four annual publications which inform the Board and public on the financial position and progress of the District. Three of those are being presented at the February 20, 2020 Board meeting:

- The 2020 Strategic Plan: A long-term outlook on District programs, projects and strategic initiatives.
- The 2020 Business Plan: A three-year planning document that looks at current and prospective programs of the Fryingpan-Arkansas Project, District, and Water Activity Enterprise.
- The 2020 Adopted Budget: An in-depth look at the 2020 budget, which reports on progress made in 2019, and goals for 2020.

Mr. Woodka provided a PowerPoint that reviewed in detail each of the three publications mentioned above. Mr. Broderick added to the discussion by stating: The purpose of these publications are to provide all with a better understanding of where “The Numbers Come From”. And, that this is part of the District’s continuing efforts to become as transparent as possible.

All three reports have been made available to the Board members and will be posted on the District website.

2020 BUDGET REVIEW AND 2019 DRAFT ACTUAL COMPARED TO BUDGET

Mrs. Noga presented a PowerPoint reviewing the following:

2020 Budget Review

- 2020 Adopted Budget Resolutions
- Fry-Ark & Other Expenditures
- District Operating & Grant Revenue
- District Operating, Grant & Reoccurring Capital Expenditures

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- District Reoccurring Capital Operations
- Enterprise Water Fund Revenues
- Enterprise Water Fund Operations Expenditures
- District Reoccurring Capital Operations
- Water Fund Capital Project
- Hydroelectric Expenditures

Actual Compared to Budget:

- 2019 District Operations
- 2019 Enterprise Operations

A lengthy discussion was had on each topic. Specifics included: Mr. Hamel asked for an update on The R.O.Y. Project. Mr. Broderick advised an update will be provided at the March Board meeting. Mr. Long asked about the Allotment in the budget for Grants. Mr. Broderick advised, that while one hasn't been used in quite some time, it may be necessary in the future, so the allotment is there in order to avoid having to do a supplemental budget. Most of the discussion was centered on the actuals compared to budget. This proved to be an area that needed deep clarification. Ms. Noga replied to each and every inquiry in a clear and concise manner. Mr. Broderick closed with emphasis on the Publications that were provided in the previous presentation. Most, if not all the content in the publications can assist with clarification of some areas that may remain unclear.

Mrs. Noga concluded the presentation with a slide titled "Budgeting 2021 and Beyond", which led into her action item.

ACTION ITEMS:**BUDGETING 2021 AND BEYOND RECOMMENDATIONS**

Mrs. Noga reported that in 2019 the Finance Strategy and Sustainability Study and finance model was completed. The finance model will be used annually to assist in the process of forecasting the District and Enterprise revenue requirement, cost of service, and rate design. At the completion of the 2019 Finance Strategy and Sustainability Study the Board of Directors requested a review of the 2020 Budget. The Board also requested a 2019 Budget compared to Actual in order to locate the capacity in the budget. This presentation was provided prior to this action item. In an effort to align the finance model and the annual budget the staff recommends the budget methods listed in the attachment that was provided.

Budgeting Methods for Years 2021 and Beyond**Fry-Ark**

Revenue

*Tax revenue budget on county assessments

Expenditures

*Budget based on actual and estimated USBR work plan

*Winter water based on 42,000 af (mode: most often occurring)

*RRA budgeted on 5th year per audit at best estimate (2025)

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*All other items are budgeted to contract

District Operations

Revenues

*Tax revenue budget on county assessments

*Interest income based on market assumptions

*Specific Ownership Tax based on actual from prior year and additions or depletions of economic indicators

Expenditures

*Budget based on prior year actual + CPI + CIP + known single item additions or depletions with explanation

*add 5-8% percentage of the budgeted operating revenue as an expense capacity line item (not calculated in Cost of Service)

* Tabor calculation allowable capacity for grant opportunities

Enterprise Operations & Projects

Revenues

*Water revenue budget 20-year average of imports

*Return Flow revenue budget on 20-year average

*Carryover storage revenue Budget on 10-year average

*Excess capacity storage revenue budget per contract

*Interest income base on market assumptions

Expenditures

*Budget Based on Prior year actual + CPI + CIP + known single item additions or depletions with explanation

*add 5-13% percentage of the budgeted operating revenue as an expense capacity line item (not calculated in Cost of Service)

* Tabor calculation allowable capacity for grant opportunities

Hydroelectric Power Project

Revenues

*Energy generation budget on 10 year average at contract rates.

Expenditures

*Budget based on prior year actual + CPI + CIP + known single item additions or depletions with explanation

*add 5% percentage of the operating revenue as an expense capacity line item (not calculated in Cost of Service)

*CPI - US Bureau of Labor Statistic issued Consumer Price Index for Denver-Aurora-Lakewood, Colorado.

**CIP - District and/or Enterprise Capital Improvement and Capital Projects Plan

Mr. Goodwin moved, seconded by Mr. Garcia, the Board approve the recommended budgeting methods for years 2021 and beyond. Motion carried, with four No votes by Ms. Nichols, Mr. Edelmann, Mr. Colosimo, and Mr. Pifher.

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INCLUSION OF LAND ANNEXED BY COLORADO SPRINGS

Mr. Woodka reported the Resource and Engineering Planning Committee recommends the Board approve the inclusion of Banning Lewis Ranch North by Colorado Springs into the Southeastern Colorado Water Conservancy District (District) with the standard terms and conditions (shown below). Once approved by the Board of Directors, staff will send the annexation to Bureau of Reclamation (Reclamation) for assent. The District will submit the inclusion to the District Court for final decree.

The Board has approved inclusions of properties located outside of the District which were annexed by towns and cities in the District. These inclusions are subject to the standard terms and conditions, Secretarial Assent, and District Court decree including the lands within the District.

There are three methods of including lands into the District:

1. Annexation by a town or city located in the District.
2. Petition of the property owners.
3. Vote of the property owners.

All three of these methods require assent from the Secretary of Interior, for which Reclamation requires a National Environmental Policy Act (NEPA) review of the lands to be included in the District boundaries. Once the Board approves the inclusion by Resolution, then Secretary Assent by Reclamation is requested. The inclusion is submitted to the District Court for a decree including the lands within the District.

The Application of Assent has been submitted to the District and will be forwarded to Reclamation for the property.

The Resolution for Inclusion is:

RESOLUTION NO.	More Commonly Known As	Legal	Acres	County
2020-01D INCL-AX	Banning Lewis Ranch North	Sec2, 3, 10 and 11 Twn13SR65	812.96	El Paso

The Board was provided the Resolution No. 2020-01D INCL-AX with Application for Assent and Map. Curtis Mitchell reported the Resource and Engineering Planning Committee recommended at their Committee meeting held on February 6, 2020 that this be brought to the Board for approval.

Mr. Garcia moved, seconded by Mr. Pifher, the Board approve, by Resolution, the inclusion of Banning Lewis Ranch North annexed by Colorado Springs subject to the following terms and conditions:

1. Approval of these inclusions into the Southeastern Colorado Water Conservancy District will not increase the amount of Fryingspan-Arkansas Project water available to the city. Any Fryingspan-Arkansas Project water used on these included lands will need to come from the water allocated to the city through Fryingspan-Arkansas Project water allocations made pursuant to the District's Allocation Principles and Policies; and

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2. Any use of Fryingpan-Arkansas Project water on the included lands is subject to the decrees for the Fryingpan-Arkansas Project, and to all lawful rules, regulations, principles, policies, and contractual obligations of the District; and
3. The annexed lands will be subject to ad valorem taxes levied by the District as any other similarly situated lands in the District at the time of this inclusion; and
4. Prior to the District filing a petition for District Court approval of this inclusion, the Municipality, and/or owner(s) of the annexed lands shall have paid all the costs charged by the United States in connection with the contracting officer's assent to this inclusion.

Motion unanimously carried.

STATEMENT OF OPPOSITION IN APPLICATION OF THE CITY OF FOUNTAIN, CASE NOS. 19CW3081 AND 3082 (DIV. 2)

Mr. Lee Miller reported Case No. 19CW3081: Fountain seeks a change of water right, augmentation plan and exchange. For the change, Fountain applies to change the type, manner, and place of use of 2.125 cfs of its Laughlin Ditch Enlargement (Fountain Creek Priority No. 17) water right, for municipal use (including storage and reuse) in Fountain's service area, and for lease elsewhere in the Arkansas River basin. The water right was previously changed to a diversion point at the Fountain Mutual (FMIC) head gate, and Fountain plans to continue diverting there, for return through augmentation stations. The consumptive use of Fountain's 2.125 cfs has not previously been quantified; Fountain's water resource engineer proposes to establish monthly depletion and Return Flow factors. The augmentation plan would use the consumptive use water and reusable Return Flows as an additional source to augment depletions from several wells covered by Fountain's previously decreed augmentation plans. This application proposes two exchanges; one on Fountain Creek (from the Fountain Sanitation District Wastewater Treatment Plant to the depletion location for Fountain's Widefield Aquifer wells), and an exchange on the Arkansas River from the confluence of Fountain Creek to Pueblo Reservoir.

The Arkansas River exchange involves Fountain's use of Pueblo Reservoir. The resume notice contains some but not all of the District's Standard Language regarding Project facilities. The omissions include statements relating to the Pueblo Reservoir spill priority, and about the exchange not operating during the Winter Water Storage Program season. Paragraph 9.2.8 states that the exchange to Pueblo Reservoir will operate as a Subject Exchange under the May 27, 2004 Intergovernmental Agreement (IGA) among Fountain, the District, and others, which limits Subject Exchange operations to the terms of the IGA for the Arkansas River Flow Management Program, but this does not fully satisfy the District's Standard Language for such exchanges. The maximum exchange rate to Pueblo Reservoir for Consumptive Use Credits and Reusable Return Flows is 19 cfs, with this conditional exchange rate being included within the 19 cfs exchange decreed in 2001CW108. Reusable Return Flows will be quantified using the method in Fountain's previous augmentation plan (2001CW146). Regarding transit loss along Fountain Creek, the resume notice states that Fountain will meet with the U.S. Geological Survey and others to make arrangements to modify the Fountain Creek transit loss model. The resume states that the historically irrigated parcel has been dried up but does not include any terms regarding revegetation. The District typically has not pursued revegetation of lands on Fountain Creek.

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Case No. 19CW3082: Fountain seeks a change of water right, augmentation plan and exchange. For the change, Fountain applies to change the use of 92 FMIC shares, to all municipal uses, as well as use for augmentation, replacement, storage, and exchange, with the right to reuse and successively use the historical consumptive yield after replacing historical Return Flows. Fountain relies on the ditch-wide historic consumptive use determinations for FMIC shares from several previous change cases, including *Williams v. Midway Ranches Property Owners Association*, 938 P.2d 515 (Colo. 1997), for the average annual historic consumptive use of 0.7 acre-foot per share, for a total of 64.4 acre-feet from 92 shares. As in the previous FMIC change cases, the actual consumptive use for the shares varies based on water availability, so the actual consumptive use is calculated from actual in-priority diversions and the FMIC replacement credit schedule. The resume asserts there have been no material changed circumstances since the previous decrees that would warrant changing the historic consumptive use quantification. Much like 19CW3081, the augmentation plan would use the consumptive use water and reusable Return Flows as an additional source to augment depletions from several wells covered by Fountain's previously decreed augmentation plans. Also, like 19CW3081, this application proposes two exchanges; one on Fountain Creek (from the Fountain Sanitation District Wastewater Treatment Plant to the depletion location for Fountain's Widefield Aquifer wells), and an exchange on the Arkansas River from the confluence of Fountain Creek to Pueblo Reservoir.

The Arkansas River exchange involves Fountain's use of Pueblo Reservoir. The resume notice contains some but not all of the District's Standard Language regarding Project facilities. The omissions include statements relating to the Pueblo Reservoir spill priority, and about the exchange not operating during the Winter Water Storage Program season. As in 19CW3081, the resume states that the exchange to Pueblo Reservoir will operate as a Subject Exchange under the 2004 IGA among Fountain, the District, and others, which limits Subject Exchange operations to the terms of the IGA for the Arkansas River Flow Management Program, but this does not fully satisfy the District's Standard Language for such exchanges. The maximum exchange rate to Pueblo Reservoir for Consumptive Use Credits and Reusable Return Flows is 19 cfs, with this conditional exchange rate being included within the 19 cfs exchange decreed in 2001CW108. Reusable Return Flows will be quantified using the method in Fountain's previous augmentation plan (2001CW146). Regarding transit loss along Fountain Creek, the resume notice states that Fountain will meet with the U.S. Geological Survey and others to make arrangements to modify the Fountain Creek transit loss model. The resume states that no dry-up is required, consistent with other FMIC changes (which the District has accepted).

Staff and Counsel recommend that the District file opposition in both cases to ensure that appropriate Standard Language regarding Project facilities, the Winter Water Storage Program, and the Arkansas River Flow Management Program is explicitly included in this decree. The District may also want to address the potential impacts of the exchanges to Pueblo Reservoir on releases of stored Project water for the hydropower plant.

Mr. Hamel moved, seconded by Mr. May, that the District Board authorize Special Water Counsel to file Statements of Opposition to the Applications of the City of Fountain in Cases Nos. 19CW3081 and 3082. Motion carried, with Mr. Mitchell abstaining.

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STATEMENT OF OPPOSITION IN APPLICATION OF UAWCD, CASE NO. 19CW3089 (DIV. 2)
Mr. Lee Miller reported Upper Arkansas Water Conservancy District (UAWCD) seeks to change a portion of the water rights decreed to the Cottonwood Irrigating Ditch, from Cottonwood Creek near Buena Vista, for use in its existing/future augmentation plans and Rule 14 replacement plan. UAWCD proposes to apply stream depletion credits from the changed water rights for replacement as they accrue to the stream, or through storage and release from Pueblo Reservoir, Twin Lakes Reservoir, Cottonwood Lake, Rainbow Lake, and other named reservoirs.

The water rights UAWCD is changing were decreed in 1890, with 1866 and 1872 priorities, and were previously quantified and changed in Case No. 79CW172, which found that the total average annual consumptive use was 34 AF/year. UAWCD is changing 68 percent of the water rights that were quantified in Case No. 79CW132; thus, UAWCD claims historical consumptive use for its portion of the water rights is 23.12 AF/year.

The point of diversion for a different portion of the Cottonwood Irrigating Ditch water rights was previously changed in Case No. C.A. 4396 to a different location referred to as "Cottonwood Irrigating 2," within approximately 200 feet upstream of the Cottonwood Irrigating Ditch. This location is equipped to divert and return water to Cottonwood Creek, so UAWCD requests the flexibility to divert, measure, and administer the water rights changed in this case at Cottonwood Irrigating 2. UAWCD states that it may apply this water to the changed uses either by direct use or by exchange, including the exchange decreed in Case No. 04CW96; this application does not request a new appropriative right of exchange.

UAWCD requests to use any fully consumable water rights in its portfolio other than Fryingpan-Arkansas Project water, to maintain historical Return Flows from the changed water rights. (This exclusion is consistent with District policy and Standard Language.) The water rights that may be used to replace Return Flows include UAWCD's Twin Lakes shares, North Fork Reservoir, O'Haver Reservoir, water leased from the Board of Water Works of Pueblo (BWWP), and the Friend Ranch Water Rights recently acquired from Poncha Springs. The water leased from BWWP includes 202 acre-feet of fully consumable water, attributable to BWWP's Twin Lakes Shares or other water available to BWWP that is stored in Clear Creek Reservoir, Turquoise Reservoir, Twin Lakes Reservoir, or Pueblo Reservoir, from direct flow transmountain water or transmountain Return Flows by exchange. This leased water will be delivered to UAWCD at the confluence of Lake Creek and the Arkansas River, or at Pueblo Reservoir.

This application is similar in some respects to UAWCD's recent change application in Case No. 17CW3037, in which UAWCD changed various water rights previously changed by Poncha Springs (in Case No. 07CW111, in which the District stipulated), to allow the use of those rights in its augmentation/Rule 14 plans. As in this case, UAWCD's application in Case No. 17CW3037 sought to use previously quantified water rights in its augmentation plans by applying stream depletion credits from the changed rights as they accrue to the stream, or through storage and release from Pueblo Reservoir and other structures. Though the District did not object to that application, the final decree does include some modified Standard Language concerning the use of Project facilities. There are more uncertainties for the District to address in Case No. 19CW3089, partly because the previous change decree for the Cottonwood Irrigating Ditch rights (Case No. 79CW172) is a much older decree that likely did not address current

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District concerns (such as the Cottonwood Creek exchange right jointly held by SECWCD, UAWCD, and Buena Vista, decreed in Case No. 96CW17), and the quantification from that decree may raise questions of changed circumstances. Also, this case presents overlapping issues for the District with UAWCD's current blanket augmentation plan case (Case No. 18CW3076) that have yet to be addressed by stipulation in that case. However, it seems realistic to believe UAWCD and the District will be able to work toward a prompt stipulation resolving the District's concerns in Case No. 19CW3089, either in tandem with or possibly even sooner than settlement in Case No. 18CW3076.

Mr. Clayton moved, seconded by Mr. Felt, the District Board authorize Special Water Counsel to file a Statement of Opposition to the Application of the Upper Arkansas Water Conservancy District in Cases No. 19CW3089. Motion carried, with Mr. Goodwin and Mr. May abstaining.

STATEMENT OF OPPOSITION IN APPLICATION OF AURORA, CASE NO. 19CW3159 (DIV. 5)

Mr. Lee Miller reported the City of Aurora (Aurora) filed an application for an appropriative right of exchange of up to 900 acre-feet from the confluence of the Roaring Fork and the Fryingpan Rivers to Ruedi Reservoir and an additional exchange of up to 450 of the 900 acre-feet up Ivanhoe Creek to Ivanhoe Reservoir. Such an application by Aurora was contemplated by the 2018 settlement agreement between Aurora and several West Slope parties in the Busk-Ivanhoe change case (Case No. 09CW142, Water Division 2). The District consented to the Aurora-Busk Ivanhoe change decree resulting from that settlement, but its consent did not limit the District's ability to oppose or participate in Aurora's current application.

The District's decreed water rights in the Fryingpan River drainage are subject to minimum stream flow requirements measured at the Thomasville Gage, as well as required bypass flows at several Fry-Ark diversion structures, including the diversion on Ivanhoe Creek. The operation of Aurora's exchange may deplete the flow of the river at the Thomasville Gage and the water available for Project diversion and stream flow bypass at the Ivanhoe Creek diversion structure, thus causing injury to the District's water rights. In addition, appropriate terms and conditions regarding Aurora's use of Ruedi Reservoir will be necessary. The Bureau of Reclamation (Reclamation) has coordinated with the District regarding language addressing some of these issues and communicated this language to Aurora. Reclamation will not file a Statement of Opposition based on its understandings with Aurora.

Staff and Counsel recommend filing a Statement of Opposition to obtain more information about Aurora's proposed exchanges and to ensure that appropriate terms and conditions are included in the decree to prevent injury to the Fryingpan-Arkansas Project's water rights and the use of Ruedi Reservoir.

Mr. Hamel moved, seconded by Mr. May, the District Board authorize Special Water Counsel to file a Statement of Opposition to the Application of Aurora in Case No. 19CW3159. Motion unanimously carried.

MONTHLY/QUARTERLY REPORTS:**U.S. BUREAU OF RECLAMATION REPORT**

Roy Vaughan provided a written report reviewing the following:

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As of February 12, 2020

- As of February 12, 2020, there were 253,230 acre-feet stored in Pueblo Reservoir; 139,713 acre-feet of Project water; 39,088 acre-feet of Excess Capacity water; 51,025 acre-feet of Winter water
- There is currently 105,660 acre-feet of Project space in Pueblo Reservoir and 42,346 acre-feet of space in Turquoise and Twin Lakes Reservoirs
- Charts illustrating storage amounts in Turquoise, Twin Lakes, and Pueblo Reservoir
- Total M&I Project water in the System
- Project Reservoirs: Turquoise 93%, Twin Lakes 109%, Pueblo 122% as of February 12, 2020
- Total M&I Project water in the System
- Forecast ensemble for the Collection System
- Snow Water Equivalent Fremont, Independence, Ivanhoe, Nast

DIVISION ENGINEER'S REPORT

Mr. Tyner provided a written report reviewing the following:

In November 2019, the Division Engineer's Report provided information about ongoing discussions related to an important administration practice in Division 2. In January 2020, the attached memo was provided to all parties who participated in the discussion to inform them of the State and Division Engineers' position regarding Reservoir Trades and Substitutions.

Reservoir Trades and Substitutions were inherently important to successful cooperation on the Voluntary Flow Management Agreement for the Arkansas Headwaters area and allowed the Bureau of Reclamation and SECWCD to work effectively with other entities who needed to move water either upstream or downstream to facilitate their end beneficial uses so that flows could be managed in an optimal way to achieve diverse recreational and habitat benefits.

The Division Engineer's Office will continue to evaluate potential Reservoir Trades and Substitutions involving native water rights where those rights have not been reduced to consumptive use by virtue of prior Water Court decrees to determine whether appropriate terms and conditions of an operation may be required to avoid the potential for injury.

Copy of a letter was provided that read:

January 22, 2020

To: Arkansas River Basin Water Users

From: Kevin Rein, State Engineer; Bill Tyner, Division Engineer, Division 2

Subject: Reservoir Trades and Substitutions, Water Division 2

Objective of Letter

The objective of this letter is to inform Division 2 water users of the State and Division Engineers' position regarding the historical practice of Reservoir Trades and Substitutions ("Reservoir Trades"). For the purpose of this letter, Reservoir Trades is the practice of two entities identifying equal amounts of

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water placed in reservoirs on the same stream system and, through accounting only, trading the character of those amounts of water such that the water in each reservoir takes on all components of the water right in the other reservoir, leading to an ability to use the water more effectively, minimizing the need for infrastructure, and at times eliminating transit losses associated with the delivery of water.

On March 14, 2019, Bill Tyner contacted a small group of Arkansas River Basin (“Basin”) water users by e-mail to inform them that he was reviewing the practice of “Contract Exchanges,” what we now refer to as Reservoir Trades, to determine whether the practice falls within with statutory authority given the State and Division Engineers and to determine whether the practice causes injury to vested water rights. Since then, the Division of Water Resources has identified a much larger stakeholder group that includes water managers, engineers, and attorneys. Since the March 14 e-mail, Bill Tyner and I have facilitated three meetings with stakeholders to gather more information regarding the practice of Reservoir Trades. Those meetings occurred on April 3, July 2, and November 18, 2019.

Summary of Position

After reviewing the scope and magnitude of the Reservoir Trades practices historically occurring in Division 2, I have also considered statutory and case law, as well as the effects of Reservoir Trades on instream flow rights and more traditional exchange rights involving an upstream diversion and the delivery of replacement water downstream as identified in sections 37-80-120, 37-83-104, and 37-92-305, C.R.S. (“Physical Exchanges”). For the reasons set forth below, the State and Division Engineers will allow the practice of Reservoir Trades to continue, as further described below, and recognize the associated accounting for the purpose of shepherding any reservoir releases to the stream to their decreed places of use, while also encouraging continued dialogue among water users, as described below.

Background**Introduction**

Although the practice of Reservoir Trades can be complicated, the basic components include recoloring equal amounts of water in two different reservoirs, giving each the character of the other, without physically delivering any water through the natural stream or, at times, without the use of a Physical Exchange. A Reservoir Trade usually uses transbasin or otherwise fully consumable water. This practice has been common in the Basin and has been done with the approval of the Division Engineer and State Engineer, including at times when there was not sufficient exchange potential in the stream, had a party desired to move the water to an upper reservoir through the use of a Physical Exchange. This practice has been used by many water users in the Basin to efficiently deliver and maximize the beneficial use of their water rights through daily water delivery operations, plans for augmentation, and Rule 14 plans, among other things. For that reason, Bill Tyner and I, along with other DWR staff, entered into the discussion of Reservoir Trades with the intent of working cooperatively to better understand the practice, any need for authority to allow it to continue, and the potential for injury to other water rights.

Legal Authority

I have evaluated the State and Division Engineers’ authority to acknowledge Reservoir Trades. The General Assembly did provide for water users to move water through the stream system and associated

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infrastructure in certain ways. Specifically, the allowance in 37-87-102(4) affirms the right to physically release reservoir water and convey it through the natural stream, with due allowance for transit losses. Inherent in this statutory provision is the Division Engineer's administration of the released water to ensure the volume of water, with due regard for transit losses, is delivered to the intended destination. Further, through 37-83-104, the General Assembly provided for the need to take water out of priority from an upstream source and deliver a like amount to the downstream calling water right. This is the traditional exchange or Physical Exchange that is practiced regularly in Colorado.

Such a practice is also allowed under sections 37-80-120(2), (3) and (4), C.R.S.

Beyond the provisions of 37-80-120 and 37-83-104, I have not identified specific authority or responsibility given to the State and Division Engineers by the General Assembly to administer a practice that provides for the change in the character of water, as accomplished by Reservoir Trades. I note that in my evaluation of Reservoir Trades, I do not compare or equate the action to that of a Physical Exchange and I do not evaluate the practice based on standards applicable to a Physical Exchange. A Physical Exchange involves the diversion of water out of priority from an upstream source while delivering an equal amount to the affected, or potentially injured downstream water right owner. I recognize that a non-consumptive use cannot expect or demand the release of water, as described and allowed by 37-87-102(4). However, I also recognize that during a Reservoir Trade, when a water user desires to not deliver water through the natural stream under that statutory allowance and instead relies on another accounting mechanism to move the water, such a mechanism needs to occur in a manner the State and Division Engineers can acknowledge without conflicting with existing statutory and case law or specific terms and conditions of the water court decrees for the water rights involved.

Benefits, Effect on the Stream System, and Water Quality Considerations Benefits

The practice of Reservoir Trades provides benefits to the water users in the Basin. A primary benefit is allowing municipal or quasi-municipal water providers the ability to maximize the beneficial use of their water right by making that water available to them in a reservoir where their infrastructure is most suited to use the water. An additional benefit is that through that practice, a water user eliminates the losses to the system that would have come from physically delivering the water and is able to obtain the same beneficial use of the water from the lower reservoir as it would have from the upper reservoir.

A third benefit occurs by facilitating the operations of the Voluntary Flow Management Program for the Upper Arkansas River Basin. Colorado Parks and Wildlife, Southeastern Colorado Water Conservancy District, and other recreational and economic interests in the Upper Arkansas River Basin have collaboratively designed a program whereby releases from Twin Lakes Reservoir are managed to both limit the discharge for the benefit of improving fish breeding habitat in the Arkansas River as well increasing the discharge, to the benefit of recreation. This program's operation is enhanced through Reservoir Trades and the ability to move water from Twin Lakes Reservoir to Pueblo Reservoir without physically releasing or physically exchanging water.

Effects on the Stream System

The practice of Reservoir Trades does affect flows when considering what may have occurred on the stream had water been moved by another mechanism. When water is physically released to move it from

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an upper reservoir to a lower reservoir, the water may benefit instream flow water rights and exchanges on the river. Through Reservoir Trades, the water is accounted for in the lower reservoir without the physical release. This change does affect the instream flow and the exchange potential on the river. In general, this has an effect on any non-consumptive use on the river.

Additionally, a Reservoir Trade that involves native water that has been stored in priority has the potential to cause water right impacts under certain conditions where that water occupies space in the reservoir. In the situation where the subject water cannot be used prior to the start of the next reservoir fill season, the volume would be carried over to the next season and counted against that year's fill.¹ A Reservoir Trade would allow the use of that water, which would create physical space and eliminate the carryover to the following season. In this scenario, the practice could allow a greater fill under a senior priority in that following season, which would impact junior water rights.

The lack of a physical release may also affect recharge to the stream alluvium. This is a valid consideration, however, assuming that water that is moved upstream through a Reservoir Trade would have been instead accomplished by a Physical Exchange, the total amount of water delivered would be the same over the course of time, resulting in the alluvial recharge component being primarily a matter of timing.

Water Quality

The Reservoir Trades practice does have a water quality component. For the Arkansas River below Pueblo Reservoir, the water quality is lower than the upper part of the river and the degradation of water quality continues downstream. Through a Reservoir Trade, a party often takes higher-quality water from higher in the basin when their right to water was acquired lower in the basin. This is an incidental benefit and is advantageous to the water provider. At the same time, that same volume of higher quality water is no longer released to the lower part of the river where its release would incrementally improve the water quality on the lower part of the river. Since the objective of this document is only to give direction on the State and Division Engineers' administrative allowance of Reservoir Trades, the question of appropriate water quality considerations will be addressed in a separate effort.

The Question of Potential for Injury

The State and Division Engineers are bound to administer the use of water to ensure no injury. The potential for injury usually arises from an action or proposed action by a water user, for example, a change of water right with return flow obligations, an out-of-priority diversion, or a Physical Exchange. These actions when taken by water users will deplete the stream. If that depletion impacts vested water rights, the water user taking the action may need to mitigate that impact to prevent injury. However, in the case of Reservoir Trades, the question is whether a practice that eliminates the need to put water in the stream, thereby reducing stream flows that otherwise would be enjoyed by non-consumptive uses in the stream, constitutes injury.

It is the alteration of what would have occurred that gives rise to the question of injury to vested water rights. While the General Assembly has given the Division Engineer the authority to "order the total or partial discontinuance of any diversion in his (or her) division to the extent that the water being diverted is required by persons entitled to use water under water rights having senior priorities,"² the General

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Assembly has not given the Division Engineer the authority to order the release of water for the same purpose unless the water was unlawfully or improperly stored or the release is required by a water court decree or substitute water supply plan.

Position and Recommendations

I have considered statutory and case law, as well as the effects of Reservoir Trades on instream flow rights, physical exchanges, or other non-consumptive uses. I find no basis to administratively preclude the practice strictly on the consideration of legal authority or the effects created on the stream system by Reservoir Trades. The exception to this is when the Reservoir Trade occurs using native water stored in priority when there is potential that the ability to use the water through a Reservoir Trade may allow for greater storage the following season.

Allowance for Reservoir Trades; Transbasin or Fully Consumable Changed Water Rights

Therefore, in consideration of the longstanding practice of Reservoir Trades and the resulting significant benefits to water users in the Arkansas River Basin, the State and Division Engineers will allow the practice of Reservoir Trades, and the associated accounting, that includes only transbasin or fully-consumable changed water rights in the reservoirs as long as the parties operating the Reservoir Trade give prior notice to the Division Engineer. The Division Engineer has the discretion to not allow such a Reservoir Trade when the Division Engineer determines that such a Reservoir Trade would conflict with an explicit term or condition in the water court decrees for the water rights involved. The Division Engineer will post notice of Reservoir Trades on the Arkansas Basin Water Operations Dashboard.

Allowance for Reservoir Trades; Native Water Stored in Priority

Further, the State and Division Engineers will allow the practice of Reservoir Trades and the associated accounting that includes native water stored in priority according to its water right in a reservoir only if the parties operating the Reservoir Trade submit notice to the Division Engineer requesting evaluation of the Reservoir Trade involving native water stored in priority. The Division Engineer has the discretion to not allow such a Reservoir Trade when the Division Engineer determines injury will occur due specifically to the potential that the ability to use the water through a Reservoir Trade may allow for greater storage through a senior storage right the following season or that such a Reservoir Trade would conflict with an explicit term or condition in the water court decree for that water right. The Division Engineer will post notice of Reservoir Trades on the Arkansas Basin Water Operations Dashboard.

I encourage the entities that practice Reservoir Trades to be receptive to outreach and discussions with any party that operates a non-consumptive use in the potentially affected stream reaches and I encourage the parties that operate those non-consumptive uses to contact the entities operating Reservoir Trades when they become aware of their proposed operations. I believe that through that communication, all parties may be able to cooperate in defining the details of the Reservoir Trades such that they continue to provide their intended benefits without causing injury.

Sincerely,
Kevin G. Rein Bill Tyner
State Engineer, Director Division Engineer, Division 2

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U.S. GEOLOGICAL SURVEY REPORT

Krystal Brown provided a written report reviewing the following:

- Harmful Algal Blooms (HABs) what they are, and why discuss them
- Protection of Pueblo Reservoir
- What to do about the HABs
- Nutrient management

STATE LEGISLATION UPDATE

Mr. Lee Miller provided a written report stating more than a month into the legislative session there have been a number of bills introduced that have impacts on the District that we are following. A few of these bills are described below:

Two bills address perfluoroalkyl and polyfluoroalkyl substances, commonly referred to as PFAS. [HB20-1042](#) is a bill modifying the notice requirements for manufacturers of PFAS. This bill has passed the House and has started its path through the Senate. [HB20-1119](#) is a bill addressing state regulation of PFAS. This regulatory bill has been the subject of much more discussion, with a number of stakeholder meetings with the Colorado Department of Health and Environment and the bill sponsors to discuss the scope and details of the bill. A number of amendments are circulating; a hearing in the House Energy and Environment Committee is set for February 20, 2020.

Another water quality related bill is [SB20-008](#), a bill to raise penalties for criminal violations of water quality laws to the amounts allowed under federal laws. Several clarifying amendments were adopted before passage in the Senate and is now starting its path through the House.

Senator Don Coram introduced a couple of bills reportedly introduced to “start a conversation.” [SB20-024](#) was a Water Resources Review Committee sponsored bill concerning the inclusion of public input in the development of a State Water Resources Demand Management Program. Senator Coram asked that the bill be postponed indefinitely, which the Senate Agriculture and Natural Resources Committee granted without a hearing. Similarly, Senator Coram, without any other sponsors, introduced [SB20-153](#) which would create an enterprise, the Board of which would consist of the members of the Colorado Water Conservation Board (CWCB) and the Colorado Water Resources and Power Development Authority, that is exempt from the requirements of section 20 of Article X of the state constitution, TABOR, to administer a fee-based water resources financing program. The enterprise would provide financing to "water providers", defined to include drinking water suppliers, wastewater treatment suppliers, and raw water suppliers. Customers of drinking water suppliers would pay a fee to the supplier, to transmit to the enterprise to be used for the financing. The proposed fee is 25 cents per 1,000 gallons of drinking water delivered per month to each metered connection in a drinking water supplier's public water system, collected after the first 4,000 gallons of drinking water delivered per month to an individual metered connection. The board is granted the discretion to adjust the fee based on inflation and equity concerns for large nonresidential customers and customers who pay tiered rates that start higher than 4,000 gallons per

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month. Like SB2-024, the bill was postponed indefinitely by the Senate Agriculture and Natural Resources Committee at the request of Senator Coram.

Another conversation starter bill is [SB20-048](#), which requires the executive director of the Department of Natural Resources to convene a work group to explore ways to strengthen current anti-speculation law and to report to the water resources review committee by August 15, 2021, regarding any recommended changes. While concerns about the make-up of the committee were the subject of considerably testimony before the Water Resources Review Committee, this bill flew through the Senate and is currently beginning its consideration in the House.

Water efficiency bills took a couple years hiatus after Governor John Hickenlooper vetoed an irrigation efficiency bill passed by the legislature, but a new effort returns in 2020 with HB20-1172 that would exempt water rights of persons who implement efficiencies that reduce their water usage from the water abandonment statute. The bill sponsor, Representative Jeni Arndt, stated that the bill stemmed from conversations with prominent water leaders in the state expressing a need for a unique piece of legislation that communicates to people that if they enter into some sort of water efficiency, that they wouldn't be subject to abandonment. Representative Arndt told the Colorado Water Congress State Affairs Committee that she is considering amending the bill to limit its applicability to Water Divisions Nos. 1, 2, and 3, due to west slope opposition. Given the unique history regarding irrigation efficiency in the Arkansas River basin as a result of the *Kansas v. Colorado* litigation, and the State Engineer's promulgation of the Irrigation Improvement Rules, Division No. 2 would be an inappropriate place for this "special" legislation.

A bill that could have particular impact on the grant and loan for the Arkansas Valley Conduit (AVC) included in the CWCB Construction Fund bill (not yet introduced) is SB20-159, concerning measures to limit the global warming potential for certain materials used in public projects.

The bill requires the Department of Personnel to establish a maximum acceptable global warming potential for each category of eligible materials used in a public project. The bill specifies which building materials are eligible materials. While the provision of existing law amended to include these requirements exempts local governments from its scope, it is unclear whether funding provided by state agencies such as the CWCB will be subject to these requirements, which could add significant costs to the AVC if the CWCB funds are used. Discussions regarding this bill are ongoing between the water community and the sponsor, Representative Chris Hansen.

COLORADO RIVER ISSUES STATUS

Mr. Lee Miller provided a written report stating the Colorado Water Conservation Board (CWCB) Demand Management (DM) workgroups have continued to meet. Summaries of the workgroups meetings can be found at:

<http://cwcb.state.co.us/water-management/Pages/DemandManagement.aspx>.

Members of the workgroups have been asked to attend the next Interbasin Compact Committee (IBCC) meeting in Lakewood on March 4-5, 2020. Here is the information the IBCC

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and CWCB have provided on the meeting:

- DAY 1 OVERVIEW - IBCC Meeting - The March 4, 2020 IBCC meeting will cover several topics but will also spend time focusing on equity concerns around DM. This will include a group exercise around equity considerations. Tentative speakers include IBCC members, CWCB staff, and DWR staff. DM workgroup members who are in town for the March 5, 2020 meeting are encouraged to attend.
- DAY 2 OVERVIEW- DM Workgroup Workshop - The March 5, 2020 meeting provides a space where members of the DM Workgroups can meet with each-other as well as with members of the IBCC. The focus will be on the interconnects between how each workgroup is focusing on aspects of DM with a thought exercise designed to help highlight the challenges and opportunities. Time will be split between presentations, breakout exercises, and interactive conversation.

The January 24, 2020 memorandum from CWCB Director Rebecca Mitchell was provided to the Board.

INFORMATIONAL ITEMS:

The Board was provided written material on the following topics, which were posted to the Board website:

- Water Court Resume
- Update on Stipulation in Application of LAWMA, Case No. 18CW3072
- Finance Committee Meeting for Surcharge Study
- NWRA Federal Water Issues Conference
- Arkansas River Basin Water Forum

President Long asked if there were any other matters to come before the meeting. Mr. Karney asked for an update on the status of a Spill and Storage. Mr. Broderick advised, the Bureau of Reclamation has announced that if winter conditions continue as in a normal water year, a spill date will be in July 2020. As for storage, several areas need to be reviewed including costs, space and a study on flood control of the entire basin.

President Long adjourned the meeting at 11:45 a.m.

Respectfully submitted,

Patty Rivas

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Administrative Support Associate

Secretary

