

DISTRICT COURT, WATER DIVISION 2, COLORADO	
Court Address: Pueblo County Judicial Building 320 W. 10th Street Pueblo, CO 81003	
CONCERNING THE APPLICATION FOR A CONDITIONAL WATER RIGHT OF PUEBLO, A MUNICIPAL CORPORATION	
IN PUEBLO COUNTY, COLORADO	
Attorney for Applicant City of Pueblo: Name: Anne J. Castle Christopher L. Thorne Address: 555 Seventeenth Street, Suite 3200 Post Office Box 8749 Denver, Colorado 80201-8749 Phone Number: (303) 295-8000 Fax Number: (303) 295-8261 E-mail: acastle@hollandhart.com cthorne@hollandhart.com Atty.Reg.#: 11202 20003	
▲ COURT USE ONLY ▲	
<hr/> Case Number: 01CW160	
STIPULATION BETWEEN CITY OF PUEBLO AND SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT	

Applicant City of Pueblo and Opposer Southeastern Colorado Water Conservancy District, through their respective attorneys, enter into the following stipulation:

1. Applicant and Opposer agree that if Findings of Fact, Conclusions of Law, Judgment and Decree in this matter are entered in substantial conformance with, and on terms and conditions no less restrictive to the Applicant than, the proposed decree attached hereto as Exhibit 1 and incorporated herein by this reference, Opposer has no objection to the entry of such decree.

2. Applicant and Opposer acknowledge that they are two of the parties to the Intergovernmental Agreement among the Cities of Pueblo, Fountain, Colorado Springs, and Aurora, the Southeastern Colorado Water Conservancy District and the Board of Water Works of Pueblo, effective May 27, 2004, as such Agreement may be amended from time to time ("Regional IGA"). A copy of the Regional IGA is attached hereto as Exhibit 2. Pursuant to the Regional IGA, the stipulating parties have negotiated in good faith to settle this case and the other cases referenced in Exhibit 3 of the Regional IGA.

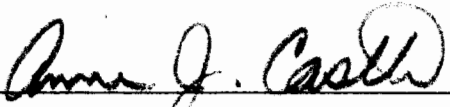
The stipulating parties further acknowledge that nothing in this Stipulation changes, modifies, or amends any element of the Regional IGA. Should the Regional IGA be amended in the future, such amendment will be filed with the Water Court in this proceeding.

3. Applicant agrees that activities related solely to the development of fishing, wildlife habitat, and piscatorial uses of the Arkansas River Corridor Legacy Project do not constitute reasonable diligence in working toward the completion of the appropriation of the water right which is the subject of this proceeding.

4. Opposer may remain a party to this proceeding to ensure that the substantive terms of the stipulation are included in any decree entered in this case, to ensure that said decree is otherwise consistent with the intent and spirit of this stipulation, and to participate in any proceedings under the Court's retained jurisdiction. Applicant will provide Opposer copies of future drafts of the ruling or any decree which are submitted to the Water Referee or to the Water Court.

5. This Stipulation shall be binding on the parties, their successors and assigns, and the parties shall each be responsible for their own attorneys fees and costs in this matter. Each party represents and affirms that the signatories to this stipulation are legally authorized to that party. This stipulation shall be enforceable by the parties as either an agreement or as an order of the Water Court.

DATED: Sept. 27, 2004

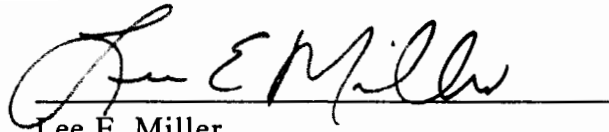


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**ATTORNEYS FOR APPLICANT
CITY OF PUEBLO**

DATED: Sept. 28, 2004

A handwritten signature in black ink, appearing to read "Lee E. Miller", written over a horizontal line.

Lee E. Miller
Stephen H. Leonhardt
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(303) 796-2626

**ATTORNEYS FOR OPPOSER
SOUTHEASTERN COLORADO WATER
CONSERVANCY DISTRICT**

EXHIBIT 1

DISTRICT COURT, WATER DIVISION 2, COLORADO Pueblo County Judicial Building 320 W. 10th Street Pueblo, CO 81003	DRAFT 9/27/2004 2:42 PM
CONCERNING THE APPLICATION FOR A CONDITIONAL WATER RIGHT OF PUEBLO, A MUNICIPAL CORPORATION IN PUEBLO COUNTY, COLORADO	▲ COURT USE ONLY ▲
Attorney or Party Without Attorney: Name: Anne J. Castle Christopher L. Thorne Address: 555 Seventeenth Street, Suite 3200 Post Office Box 8749 Denver, Colorado 80201-8749 Phone Number: (303) 295-8000 Fax Number: (303) 295-8261 E-mail: acastle@hollandhart.com cthorne@hollandhart.com Atty.Reg.#: 11202 20003	Case Number: 01CW160
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE	

This matter has come before the Court upon the application of Pueblo, a Municipal Corporation ("Pueblo" or "Applicant") for a conditional recreational in-channel diversion ("RICD") water right pursuant to C.R.S. §§ 37-92-103 (4) and (10.3). The application was filed with the Water Clerk for Water Division 2 on December 31, 2001. Pursuant to C.R.S. § 37-92-203(7) and 301(2), the application was referred to the Water Referee. By order dated _____, the application was re-referred to the Water Judge for Water Division No. 2. Having made such investigations as are necessary to determine whether the statements in the application are true, and being fully advised with respect to the subject matter of the application, the Court enters the following Findings of Fact, Conclusions of Law, and Decree:

FINDINGS OF FACT

1. Name, Address and Telephone Number of Applicant:

Pueblo, a Municipal Corporation
c/o City Manager
One City Hall Place
Pueblo, CO 81003
(719) 584-0800

2. **Notice:** Timely and adequate notice of the application was given in the manner required by law. None of the land or water rights involved in this application is located

in a designated ground water basin. The Court has jurisdiction over the subject matter of this proceeding and over all persons who have standing to appear as parties, whether they have appeared or not.

3. **Statements of Opposition:** Statements of opposition were filed in the matter by the Holbrook Mutual Irrigating Company, the Fort Lyon Canal Company, the Colorado Water Conservation Board ("CWCB"), the Arkansas Valley Ditch Association, Trout Unlimited, the State and Division Engineers, the City of Fountain, Otero County, the City of Aurora, the Upper Arkansas Water Conservancy District, the Colorado River Water Conservation District, the Rocky Ford Ditch Sellers Group, Public Service Company of Colorado, the City of Colorado Springs ("Colorado Springs"), the Twin Lakes Reservoir and Canal Company, the Colorado Canal Company, the Crowley County Board of Commissioners, and the Southeastern Colorado Water Conservancy District ("Southeastern District"). Pueblo West Metropolitan District ("Pueblo West") filed a motion to intervene on March 26, 2004 and that motion was granted by Order dated April 1, 2004. The statement of opposition conditionally filed by Pueblo West was accepted by the Court. The time for filing statements of opposition has expired.

4. **Stipulations:** Pueblo has reached stipulations with the following parties: [insert]. These stipulations, including the exhibits thereto, have been approved by the Court and are incorporated herein by this reference to the extent applicable by their terms. Pueblo and certain of the opposers are parties to an Intergovernmental Agreement among the Cities of Pueblo, Fountain, Colorado Springs, and Aurora, the Southeastern District, and the Board of Water Works of Pueblo, effective May 27, 2004 ("Regional IGA"). A copy of the Regional IGA is attached to the stipulation between Pueblo and the Southeastern District dated _____ and filed with the Water Court in this proceeding.

5. **Colorado Water Conservation Board Action:** On January 30, 2002, pursuant to C.R.S. § 37-92-102(5) and § 37-92-305(16), Pueblo submitted a copy of the application to the CWCB. On March 7, 2002, the Rocky Ford Ditch Sellers Group, the City of Aurora, the City of Fountain, and the City of Colorado Springs requested a hearing before the CWCB pursuant to C.R.S. § 37-92-102(6)(a). A hearing was held before the CWCB on July 22 and 23, 2002. After deliberations conducted on July 23 and August 5, 2002, the CWCB submitted its Findings of Fact and Final Recommendation to the Water Court on August 13, 2002.

6. **Description of Water Right:** The water right decreed herein (the "RICD Water Right") is described as follows:

A. **Name of Structures.** The Arkansas River Legacy Whitewater Park (the "Whitewater Park") in Pueblo, Colorado. The nine control structures comprising the Whitewater Park will be numbered consecutively from the upstream structure (Structure 1) to the downstream structure (Structure 9). These nine structures comprise a whitewater and recreational boating course.

Structure 1 of the Whitewater Park will include a permanent boat chute/fish ladder to allow kayaks, boats, and other recreational water craft, as well as native and sport fish, to pass over an existing 13-foot high diversion structure in the river known as the Southern Colorado Power Plant or Aquila Energy diversion dam (the "Power Plant Diversion"). A series of seven smaller, permanent control structures (Structures 2-8) will be constructed in the river between the Power Plant Diversion and the Union Street bridge to create self-scouring pools and to divert and control the flow of the river at specific points to create various wave forms desirable for whitewater kayaking and recreational boating.

These structures will be designed to control, concentrate, and direct the flow of the Arkansas River for use by kayaks, canoes, rafts and other types of recreational water crafts, and to establish and maintain fish habitat for piscatorial and other purposes. The structures will be of the type and nature described in the letter report dated December 24, 2001 by Gary M. Lacy, submitted as Pueblo's Exhibit D in the hearing before the CWCB on July 22-23, 2002, and will be constructed generally in conformity therewith. The Whitewater Park will extend downstream to Structure 9, a permanent boat chute or chutes in the Arkansas River at the location of the existing St. Charles Mesa Water District diversion structure, located just downstream from the Santa Fe Street bridge in Pueblo, near Moffat Street (the "Moffat Street Chute") to allow passage over the existing diversion structure.

B. Legal Description of Structures. The Whitewater Park will be constructed in the Arkansas River channel, beginning with the boat chute/fish ladder (Structure 1) to be constructed over and through the Power Plant Diversion. Seven other control structures (Structures 2 through 8) will be located in the river between Structure 1 and the Union Street Bridge. Structures 2 through 8 will be constructed in a reach of the river that is approximately 2,000 feet in length. The Power Plant Diversion, the Union Street bridge, and the Moffat Street Chute (Structure 9) are generally located as follows:

Power Plant Diversion (Structure 1): A water control structure located in the Arkansas River channel in the SW1/4 of the NW1/4, Section 36, T. 20 S., R. 65 W., of the 6th P.M., at a point approximately 2,326 feet South of the North Section line and 810 feet East of the West Section line of said Section 36.

Union Street Bridge: The Union Street bridge crosses the Arkansas River in Pueblo in the SE1/4 of the SW1/4, Section 36, T. 20 S., R. 65 W., of the 6th P.M., at points approximately 968 feet North of the South Section line and 2,320 feet East of the West Section line of said Section 36

Moffat Street Chute (Structure 9): The Moffat Street Chute is a structure in the Arkansas River channel located in the SW1/4 of the NW1/4, Section 6, T. 21. S., R. 64 W., of the 6th P.M., at a point approximately 1,684 feet

South of the North Section line and 287 feet East of the West Section line of said Section 6.

The location map attached to and incorporated in this Decree as Exhibit 1 identifies the general location of the Whitewater Park and the control structures. The precise location of Structures 2-8 as constructed may be slightly different from the locations depicted in Exhibit 1.

C. Source. The source of the RICD Water Right for the Whitewater Park is the Arkansas River and its tributaries.

D. Appropriation information:

i. Date of initiation of appropriation: May 15, 2000.

ii. How appropriation was initiated: By formation of the requisite intent to appropriate coupled with actions manifesting such an intent sufficient to put third parties on notice, including but not limited to the development and publication of a request for proposals concerning initial design and engineering work for the Whitewater Park. Additional such actions include, but are not limited to, Applicant's acquisition of lands or rights to use lands for the Legacy Project; authorization by the Pueblo City Council of applications for grants and funding assistance for the Legacy Project; preparation of reports, design drawings, and engineering work relating to construction of the Whitewater Park; authorization and appropriation of funds by the Pueblo City Council for the preparation and filing of the application; and the filing of this application and associated notifications.

iii. Date water applied to beneficial use: Not applicable – conditional water right.

E. Amount claimed: The following amounts, in cubic feet of water per second of time ("cfs") are herein decreed as a conditional RICD water right for each of the specified time periods for each of the structures that make up the Whitewater Park:

Period	Average Year	Drier Year
Oct. 1 – Oct. 15	250	150
Oct. 16 – Nov. 14	200	150
Nov 15 – Mar. 15	100	100
Mar. 16 – Mar. 31	250	200
Apr. 1 – Apr. 15	350	250
Apr. 16 – Apr. 30	400	300
May 1– May 22	450	350
May 23 – Jul. 31	500	500

Aug. 1 – Aug. 15	450	350
Aug. 16- Sep. 7	300	300
Sep. 8 – Sep. 30	250	150

The U.S. Natural Resources Conservation Service regularly releases a “Water Supply Outlook Report” for Colorado. This report includes a “most probable” forecast (50% chance of exceedance) for flows on the Arkansas River at Salida (the “Forecast”). The “Average Year” flows in the table above shall apply when the most recently released Forecast is 100% or more. The “Drier Year” flows shall apply when the most recently released Forecast is less than 100% and greater than or equal to 70%. If the Forecast ceases to be provided by the Natural Resources Conservation Service, Pueblo shall notify the Court and all parties to this case in writing of a proposed alternative measure for fair implementation of this paragraph. The other parties shall have 30 days in which to provide comments to the Court concerning Pueblo’s proposal, after which the Court shall decide upon the alternative measure to be used.

F. Uses: Boating, including but not limited to kayaking, rafting, and canoeing. The RICD Water Rights decreed herein will also be used for incidental fishing, wildlife habitat, and piscatorial uses. However, no water right for fishing, wildlife habitat, or piscatorial uses is being confirmed by this Decree.

G. Name and address of owner of land on which points of diversion and places of use are located:

- i. Applicant, at the above address.
- ii. Pueblo Conservancy District
111 E. 5th Street
Pueblo, CO 81003

7. **Terms and Conditions to Prevent Injury:** Applicant has agreed to the following terms and conditions to prevent injury to the vested water rights of others:

A. The RICD Water Right decreed herein shall be reduced to the amount of 100 cfs during such times as the most recently released Forecast is less than 70%.

B. The RICD Water Right decreed herein in excess of 100 cfs shall be in effect during the hours of 6:00 am to 10:00 pm and shall not be in effect or exercised during the hours of 10:00 pm to 6:00 am. The 100 cfs component of the RICD water right shall be in effect continuously when in priority.

C. The RICD Water Right will be measured at the U.S. Geological Survey stream gauge no. 07099970, Arkansas River at Moffat Street at Pueblo, CO (“Moffat St. Gauge”). The Moffat St. Gauge is an appropriate measuring point

for the RICD Water Right because Structure 9 is located at the same location as the Moffat St. Gauge and there are no significant diversions or inflows between Structure 1 and the Moffat St. Gauge. Pueblo will voluntarily participate, together with other parties whose water rights are administered based on readings taken at the Moffat St. Gauge, in the cost of operating and maintaining the accuracy of that gauge and preserving the satellite monitoring capability for the gauge, to the extent such costs are not absorbed by the USGS.

D. Pueblo, after consultation with the Flow Management Committee described in the Regional IGA, will work with the Colorado Division of Water Resources ("Division") to determine a protocol acceptable to the Division for placing a call for the RICD Water Right decreed herein, and establish a contact within the City for coordinating with the Division.

E. When Pueblo Reservoir flood control operations are in effect, or for other good and sufficient reasons in an emergency situation, and the responsible governmental agencies have determined that a flow of less than the rate for the RICD Water Right decreed herein should be released from the outlet works for Pueblo Reservoir, the RICD Water Right decreed herein will not impose a call for water that would require releases from Pueblo Reservoir in excess of that being released under flood control operations.

8. **Availability of Water:** Water is available and unappropriated for the non-consumptive uses claimed by this conditional appropriation.

9. **Reasonable Use:** Based on the exhibits and testimony presented to the Colorado Water Conservation Board at its hearing on the RICD Water Right on July 22-23, 2002, the intended recreation experiences are reasonable.

10. **No Instream Flow Water Rights in Vicinity:** No instream flow rights have been appropriated by the CWCB for any portion of the Arkansas River mainstem in the vicinity of the Whitewater Park.

CONCLUSIONS OF LAW

11. The Court has exclusive jurisdiction over the subject matter of this proceeding pursuant to C.R.S. § 37-92-203, and over all persons or entities affected hereby, whether they have appeared or not.

12. Pueblo is an entity designated by C.R.S. § 37-92-103(4) and (10.3) as entitled to appropriate RICD water rights.

13. Recreational boating through physical control structures constructed within the channel of a natural water course has been recognized as a beneficial use of water under Colorado law. C.R.S. § 37-92-103(4) and (10.3); *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).

14. The controlling of the claimed amounts of water in the natural course of the Arkansas River by means of the proposed in-channel structures described in paragraph 6 herein, constitutes a "diversion" within the meaning of C.R.S. § 37-92-103 (7).
15. Pueblo has effected an appropriation of water by demonstrating a specific plan and intent to divert the claimed amounts of water at the claimed time periods and to apply such water to beneficial use, specifically recreational in-channel boating use, in the Whitewater Park, through the acts described in paragraph 6.D above. C.R.S. § 37-92-103(3)(a). Applicant has completed the "first step" toward the conditional appropriation by showing the requisite intent to appropriate the water rights decreed herein, accompanied by an open, physical demonstration of that intent.
16. If constructed in substantial conformity with paragraph 6 above, the Whitewater Park will divert, capture, control, and place water to beneficial use between specific points defined by the nine physical control structures described in paragraph 6, herein. C.R.S. § 37-92-103(10.3).
17. The RICD Water Right decreed herein is the minimum stream flow necessary to provide a reasonable recreation experience in and on the water. C.R.S. § 37-92-103(10.3).
18. Because of the non-consumptive character of this appropriation and the over-appropriated nature of the Arkansas River downstream of the Whitewater Park, the adjudication and administration of the RICD Water Right will not impact the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements. C.R.S. § 37-92-102(6)(b)(I).
19. The reach of the Arkansas River in which the Whitewater Park will be located is an appropriate reach of stream for the intended uses. C.R.S. § 37-92-102(6)(b)(II).
20. There will be access to the Whitewater Park for recreational in-channel use. C.R.S. § 37-92-102(6)(b)(III).
21. Exercise of the RICD Water Right decreed herein will not cause material injury to any CWCB instream flow water right. C.R.S. § 37-92-102(6)(b)(IV).
22. The adjudication and administration of the RICD Water Right decreed herein will promote the maximum utilization of waters of the state under both Colorado statutes and case law. C.R.S. § 37-92-102(6)(b)(V).
23. The waters claimed by Applicant can and will be diverted, or otherwise captured, possessed, and controlled and will be beneficially used. The Whitewater Park and the appropriation of the RICD Water Right can and will be completed with diligence and within a reasonable time. C.R.S. § 37-92-305(9)(b).
24. The RICD Water Right decreed herein can be adequately measured and administered through the proposed reach by using the Moffat St. Gauge and accounting

for any intervening diversions between that gauge and the various components of the Whitewater Park.

25. Subject to the terms and conditions set forth in paragraph 7 above, Applicant is entitled to a decree confirming a conditional water right for recreational in-channel boating purposes at the proposed physical control structures in the amounts claimed during the specified time periods with an appropriation date of May 15, 2000. The RICD Water Right decreed herein will also be used for incidental fishing, wildlife habitat, and piscatorial uses. However, no water right for fishing, wildlife habitat, or piscatorial uses is confirmed by this Decree.

26. This Decree is entered into by way of compromise and settlement by Applicant and various parties that filed statements of opposition to the application. Any agreement by any such parties to the entry of this Decree shall not be construed as concurrence by those parties beyond the Decree adjudicated herein. Nothing contained in this Decree shall be binding upon any such parties in any proceeding other than the current proceeding and any subsequent proceedings involving the RICD Water Right. Because this Decree is based upon compromise, its terms may not be considered as precedent in any other similar proceeding and may not be cited against any of the compromising parties, for any purpose whatsoever other than for the purpose of enforcing the terms of this Decree, without their express written consent.

27. The Court has duly considered the August 13, 2002 Findings and Recommendations of the CWCB pursuant to C.R.S. § 37-92-305(13) and the Court adopts and incorporates the same to the extent set forth in these Findings of Fact, Conclusions of Law, and Decree.

DECREE OF THE COURT

28. The foregoing Findings of Fact and Conclusions of Law are incorporated herein by reference.

29. The Court hereby grants the application for conditional water right for recreational in-channel boating uses, at the in-channel physical control structures described herein in the claimed amounts during the claimed time periods with an appropriation date of May 15, 2000. The application is granted subject to the terms and conditions described in paragraph 7 above.

30. Applicant shall provide such accounting for the water right adjudicated herein as reasonably requested by the Division Engineer.

31. The RICD Water Right and priority granted herein are based on the appropriation date confirmed herein and on the filing of the application in this case in the Water Court in the year of 2001. The RICD Water Right and priority shall be administered as having been filed in 2001, and shall be junior to all water rights granted pursuant to applications filed in previous years. As between all water rights applied for in the same

calendar year, priorities shall be determined by historical dates of appropriation and shall not be affected by the date of application or the date of entry of ruling.

32. The conditional RICD Water Right is hereby continued in full force and effect at least until the last day of _____, 2010. To maintain this conditional water right, an application for a finding of reasonable diligence shall be filed on or before the last day of _____, 2010, or a showing made on or before such date that such conditional water right has become absolute by reason of completion of the appropriation.

Dated: _____, 2004.

BY THE COURT:

C. Dennis Maes
Water Judge
Water Division 2
State of Colorado.

EXHIBIT 2

ORIGINAL

INTERGOVERNMENTAL AGREEMENT AMONG THE CITY OF PUEBLO, THE CITY OF AURORA, THE SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, THE CITY OF FOUNTAIN, THE CITY OF COLORADO SPRINGS, AND THE BOARD OF WATER WORKS OF PUEBLO, COLORADO

This Intergovernmental Agreement ("Agreement") is entered into by and among the City of Pueblo, a municipal corporation ("Pueblo"), the City of Aurora, Colorado, acting by and through its Utility Enterprise ("Aurora"), the Southeastern Colorado Water Conservancy District ("the District"), the City of Fountain ("Fountain"), the City of Colorado Springs ("Colorado Springs"), and the Board of Water Works of Pueblo, Colorado ("the Board"). Together these entities are referred to as the "Parties."

RECITALS

- A. This Agreement is entered into pursuant to sections 29-1-201-203 C.R.S. Each of the Parties is a political subdivision of the State of Colorado within the meaning of section 29-1-202(2) C.R.S., and therefore each is a government within the meaning of section 29-1-202(1). Pueblo, the City of Aurora, Colorado Springs and Fountain are home rule cities pursuant to Article XX of the Colorado Constitution. The District is a Colorado Water Conservancy District established under section 37-45-101 et seq., C.R.S. The Board is established by the charter of the City of Pueblo, which was adopted pursuant to Article XX of the Colorado Constitution.
- B. This Agreement is based upon principles of comity and the desire for cooperation among the Parties.
- C. Pueblo Reservoir and dam ("Pueblo Dam") are features of the Fryingpan-Arkansas Project ("Project") constructed by the United States Bureau of Reclamation ("Reclamation") pursuant to Congressional authorization. Public Law 87-490.
- D. The Parties acknowledge that the development and adoption into law of certain recommendations of the September 21, 2000 "Preferred Storage Options Plan" ("PSOP") report relating to the Project are important to many municipalities and agricultural interests in the Arkansas River Basin and to Aurora.
- E. In partnership with the United States Army Corps of Engineers, Pueblo has begun construction on the Arkansas River Corridor Legacy Project ("Legacy Project"). The Legacy Project is intended to restore riparian habitat and provide enhancements to improve recreational opportunities in and along the Arkansas River through Pueblo. To help achieve the Legacy Project goals, Pueblo desires to protect and

enhance the flows and the quality of the water in the Arkansas River through Pueblo.

- F. In furtherance of the Legacy Project, Pueblo filed an application for a recreational in-channel diversion ("RICD") water right in Case No. 01CW160 (Water Division No. 2.) The District, Aurora, Colorado Springs, Fountain, and others, have opposed the requested RICD water right. If and when decreed, the RICD water right will be junior to the currently decreed water rights for the Project, to many of the currently decreed water rights of the Parties, and to certain water rights for which applications are pending.
- G. The valid, legal exercise of the existing decreed senior water rights of the Parties and certain water rights for which applications are pending may adversely impact Pueblo's ability to accomplish its goals for the Legacy Project and the requested relatively junior RICD water right.
- H. Each of the Parties has independent goals and interests, and this Agreement has been developed and is intended to further such respective goals and interests, subject to the terms and conditions of this Agreement.
- I. The Parties desire to work cooperatively to require all owners of senior water rights from the Arkansas River downstream of Pueblo Dam, the lawful exercise of which rights diminishes the flow in the Arkansas River in the Legacy Project reach, including the District, Aurora, and Fountain, to accept and comply with the Arkansas River Flow Management Program and the RICD flows provided for in this Agreement, provided that the Parties also, in the spirit of comity and cooperation, devise and operate methods and facilities as hereinafter described that mitigate adverse impacts to senior water rights and to certain water rights for which applications are pending.
- J. Other agreements among various of the Parties have previously been reached concerning issues related to those addressed herein, including the following:
 - 1. The Parties, other than Aurora and Fountain, are signatories to the document entitled "Arkansas River Water Preservation Principles," dated September 29, 2003;
 - 2. Pueblo, the Board, and Colorado Springs have entered into an Intergovernmental Agreement dated March 1, 2004 (the "March 1st IGA"), that addresses numerous issues of concern among those parties;
 - 3. Aurora and Pueblo entered a stipulation dated November 25, 2003 in Case No. 99CW169 (Water Div. 2), that includes, among other things, the commitment of each of those parties to negotiate in good faith thereafter concerning several of the primary matters addressed in this Agreement;
 - 4. Aurora and Colorado Springs entered into a stipulation dated November 6, 2003, in Case No. 99CW169 (Water Div. 2), that includes, among other things, the

agreement by Aurora not to divert with the "Changed Water Rights" the quantity of water left in the "Exchange Reach" by Colorado Springs when Colorado Springs forgoes the exercise of its exchange decrees in order to provide water to the Exchange Reach and the agreement by Aurora and other PSOP participants to negotiate in good faith with the City of Pueblo concerning the City's request for additional flow conditions on the PSOP and on Aurora's change of water rights;

5. Aurora and the Board entered into a stipulation dated November 5, 2003, in Case No. 99CW169 (Water Div. 2), that includes, among other things, the agreement by Aurora (1) not to divert with the "Changed Water Rights" the quantity of water left in the "Exchange Reach" by the Board when the Board forgoes the exercise of its exchange decrees in order to provide water to the Exchange Reach; (2) not to divert any water delivered by the Board to the Exchange Reach under an agreement with the City of Pueblo; and (3) the agreement by Aurora and other PSOP participants to negotiate in good faith with the City of Pueblo concerning the City's request for additional flow conditions on the PSOP and on Aurora's change of water rights; and

6. Aurora and the District entered into an Intergovernmental Agreement dated October 3, 2003 ("Aurora/District IGA") that addresses numerous issues of concern between those two parties, which has also led to the entry of several stipulations to settle each other's opposition in water cases; provided, however, that nothing in this Agreement is intended to supercede or modify any provision of the Aurora/District IGA.

K. Each of the Parties are the owners and beneficiaries of absolute and conditional water rights that were lawfully acquired and are entitled to be recognized and protected. In addition, each of the Parties are signatories to and beneficiaries of numerous operating agreements and stipulations, the burdens and benefits of which must be enforced and protected. Through this Agreement, the Parties intend to resolve differences concerning outstanding water rights applications, and thereafter to assure that their respective interests pursuant to these decrees and operating agreements are respected and protected;

L. The Parties recognize that the imposition of burdens and responsibilities and the vesting of benefits pursuant to this Agreement do not occur simultaneously. It is the purpose of this Agreement to assure that the Agreement permits each Party to secure its expected benefit in exchange for bearing the full extent of its corresponding burden. It is also recognized that some benefits will be irrevocably granted as part of the consideration for this Agreement. Notwithstanding the final and binding nature of this Agreement, the Parties understand and agree that the circumstances and conditions that have led to this Agreement may change and there is a recognition of this possibility and a commitment to negotiate in good faith if any Party believes that circumstances and conditions have substantially changed and that, as a result, an alteration of the prospective rights and obligations imposed by this Agreement is appropriate.

AGREEMENT

NOW, THEREFORE, and in consideration of the mutual agreements herein contained and for other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

I. Arkansas River Flow Management Program

- A. Exhibit 1 to this Agreement, the Arkansas River Flow Management Program ("Flow Management Program"), shall apply to (1) all exchanges of water rights of the Parties, regardless of when initiated or decreed, and (2) changes of water rights from points of diversion below the existing "Above Pueblo Gage" which changes are decreed on or after November 3, 1986, except for the decree in Case No. 84CW179, entered on November 10, 1987, and made final on November 10, 1990, that reduce flows in the Arkansas River in the river segment between the Above Pueblo Gage and the confluence of the Arkansas River and Fountain Creek. Such exchanges or changes of water rights owned, used or operated by the Parties are collectively referred to in the Flow Management Program and in this Agreement as the "Subject Exchanges." The Parties shall operate the Subject Exchanges in accordance with the provisions of the Flow Management Program. The Parties shall work together, cooperate and take such further actions as may be reasonably necessary to ensure that the Subject Exchanges are operated in accordance with the provisions of the Flow Management Program, including if necessary, consultation with and administration by the Colorado Division of Water Resources. The terms "reduce" and "reduction" as used in the Flow Management Program and in this Agreement with reference to the Subject Exchanges may include the complete cessation of a Subject Exchange on a temporary basis, as may be necessary to satisfy obligations created under the Flow Management Program and this Agreement.
- B. The Parties recognize the respective rights of one another to exercise their water rights in accordance with legally entered, existing decrees. The Parties fully intend to take all necessary measures to recover and beneficially use the water associated with any Foregone Diversions, as defined in Paragraph II.A., and no Party intends to abandon a water right by entering this Agreement. No Party shall claim or support claims that the reduction by any other Party of a Subject Exchange for purposes of the Flow Management Program constitutes abandonment of a water right.
- C. Nothing in this Agreement shall prevent any Party from applying for new or enlarged water rights in the future, subject to Colorado law governing priority and appropriation dates.
- D. The Parties recognize that the Colorado Legislature has sanctioned a variety of temporary water supply arrangements that may be included

within the current understandings and agreements of the Parties. These arrangements include: (1) Water bank operations pursuant to C.R.S. §37-80.1-101 et seq.; (2) dry-year lease arrangements pursuant to C.R.S. §§37-83-106 and 37-42-135; (3) interruptible water supply agreements pursuant to C.R.S. §37-92-309; (4) exchanges pursuant to C.R.S. §37-80-120; and (5) short-term trades pursuant to C.R.S. §37-83-105. The Parties recognize that these temporary water supply arrangements may be required because of drought conditions or other circumstances and that they may occur pursuant to the terms of this Agreement and any other applicable existing agreements, so long as the arrangements are operated in conformity with the requirements of the Flow Management Program and so long as they can be operated within the terms of the relevant agreements, decrees, and Colorado law.

- E. Pueblo shall not in the future request further reductions in the Subject Exchanges based on any enlargement of east slope Project reservoirs as recommended in the PSOP, or for increased dilution of point source effluent flows.

II. Restoration of Yield

- A. In order to achieve the goals described above, the Parties will cooperate to provide for the recapture and storage for later use of all water, the in-priority diversion or exchange of which is annually foregone in order to accommodate the Flow Management Program ("Foregone Diversions"). Downstream diversion and storage facilities to recapture and store Foregone Diversions must be located downstream of the Combined Flow Location as identified in Exhibit 1 hereto. Downstream storage for recapture of yield ("ROY Storage") should have, at a minimum, sufficient capacity to capture, store, and release the Foregone Diversions so as to permit the exchange of that water into Pueblo Reservoir or other upstream locations when river conditions and the Flow Management Program so allow.
- B. The ROY Storage program shall be designed to assure that all of the Parties hereto are afforded the means and opportunity to recapture Foregone Diversions and to apply those water rights to decreed beneficial uses.
- C. The contemplated ROY Storage can include, as example and without limitation, (1) the construction of lined gravel pit storage near the Arkansas River upstream from the headgate of the Colorado Canal; (2) the use, to the extent legally permissible, of any Party's individual shareholder account in the Colorado Canal Companies to store water in Lake Meredith; (3) the use, to the extent legally permissible, of a pump and pipeline to deliver water to and from any Party's individual shareholder account in Lake Meredith; and (4) other off-channel storage.

- D. The participants in ROY Storage (Colorado Springs, the Board, Aurora, Fountain, and the District) ("ROY Participants"), through the ROY Planning Subcommittee described in Paragraph II.F, will agree upon (1) the method to estimate the number of acre-feet of Foregone Diversions resulting from the Flow Management Program; (2) any additional quantity of storage desired by each ROY Participant; and (3) will thereafter agree upon a participation percentage in any ROY Storage Project.
- E. When the ROY Participants have agreed upon their respective percentage participation in any ROY Storage Project, the ROY Participants will then agree upon the cost allocation for their participation percentage in the ROY Storage project.
- F. The ROY Participants will establish a ROY Planning Subcommittee of the Flow Management Committee described in Exhibit 1 that will undertake cooperative investigations and planning activities designed to identify the most cost effective means to accomplish the ROY Storage objectives of this Agreement and will make recommendations to the ROY Participants. Each ROY Participant may have two members on the Subcommittee. Pueblo may have one member on the Subcommittee. The Subcommittee will act by consensus.
- G. Each ROY Participant is entitled to choose to participate in a ROY Storage project at a level it deems necessary but in no event will a Party's decision regarding participation or non-participation relieve that Party of its other obligations under this Agreement.
- H. Prior to the construction and operation of ROY Storage, the ROY Participants recognize that interim solutions are necessary to protect their ability to have water available above Pueblo Dam. In furtherance of that goal, the ROY Participants commit to seek the establishment of a ROY Storage account in Pueblo Reservoir and to operate the account in accordance with the following principles.
1. As soon as possible after the Effective Date of this Agreement, the District will initiate the process to secure an annual "if and when" storage account in Pueblo Reservoir by contracting with Reclamation for purposes of ROY Storage and storage of water for "softening" purposes as described in paragraph III.D.2.b of the Aurora/District IGA (the "Account"). By January 1 of each year, the ROY Participants shall notify the District of the amount of ROY Storage desired for the coming year. Each ROY Participant will pay the District for its share of the storage space leased for ROY Storage purposes, such share being based on the amount of benefit the Participant expects to receive from the Account, as determined by the ROY Planning Subcommittee.

2. The District will operate the Account and maintain the records of the water delivered into and withdrawn from the Account. The ROY Participants will pay the District for its services at a rate agreed to by the District and the ROY Participants.
3. During the remainder of 2004 and during 2005, the ROY Participants agree to collectively fund the Account to insure that at least 5,000 acre-feet of water are in storage for ROY Storage purposes at the beginning of 2006. Water used to fund the Account cannot be Project water.
4. To the extent that "if and when" storage space is available in Pueblo Reservoir, the ROY Participants agree to continue to fund the Account until December 31, 2010 at a rate sufficient to maintain a balance in the Account of at least 5,000 acre-feet of water at the start of each calendar year. The ROY Participants will use their best efforts commensurate with the critical importance of these water resources to fund their pro rata share of the estimated ROY Storage. Water used to fund the Account cannot be Project water. The exercise of any Subject Exchange to fund the Account shall be subject to the Flow Management Program.
5. During 2006 and each year thereafter, any of the ROY Participants may call for the release (including movement of water up stream) of water in the Account sufficient to recapture their Foregone Diversions caused solely by the recreational flow components of the Flow Management Program (e.g., flows in excess of 100 c.f.s.)
6. At the end of each year, the ROY Participants will review the accounting records to determine the amount of water contributed by and withdrawn by each ROY Participant in the Account during the preceding year. If any ROY Participant has withdrawn more water from the Account than it has contributed to the Account, that Participant will pay the contributing Participant(s) for the net amount of water withdrawn at the then prevailing rate for non-Project raw water leased to non-agricultural entities in the Arkansas River Basin. The affected ROY Participants can also agree to a like-kind exchange of water for repayment purposes. The payment for water to be made no later than 30 days after the determination of the exceedance. If no prevailing rate is identified, the ROY Planning Subcommittee will establish a reasonable rate for the use of water.
7. The Parties recognize that, in early years, funding may be disproportionately provided by one or more ROY Participants and that withdrawals may be made disproportionately by other ROY

Participants. The details of such disproportionate funding and withdrawals will be addressed by the ROY Planning Subcommittee.

8. The primary purpose of this subparagraph H is to provide a bridge for the ROY Participants between the time when the requirement to forego exchanges or diversions arises because Pueblo's whitewater boating course has been substantially completed and the time when ROY Storage is completed. The ROY Planning Subcommittee will agree upon and maintain accounting for Foregone Diversions as the basis for determining withdrawals from the Account.
 9. Once ROY Storage is completed or December 31, 2010, whichever occurs first, the use of the Account in Pueblo Reservoir will be discontinued for ROY purposes unless the ROY Participants acting through the ROY Planning Subcommittee agree to its continued operation. After ROY Storage is completed or December 31, 2010, whichever occurs first, no Party can be required to continue to participate in the ROY Storage in Pueblo Reservoir. After 2010, each Party shall be free to agree and contract with other Parties or other entities not party to this Agreement for continuation of the use of the Account upon mutually acceptable terms.
- I. To the extent that the ROY Participants agree upon a ROY Project and an allocation of costs for their respective participation, then each such participant will use good faith efforts to fund its respective share of the costs. Likewise, to the extent that the participants in a Regional Water Management Program, described below in Section VI, agree upon a specific program, each participant will use its good faith efforts to fund such a program commensurate with the benefits received by the participant. In no event, however, does this Agreement require a Party to appropriate funds for a particular purpose or create debt or multi-year fiscal obligations for any Party.

III. Preferred Storage Options Plan

- A. **Support for PSOP Legislation.** Following execution of this Agreement, the Parties shall request Members of Congress from Colorado to introduce and support federal legislation in a form substantially similar to that attached hereto as Exhibit 2, and dated September 19, 2003, except as identified in Paragraph III.B. No party shall request Congressional changes to the legislation unless such changes are mutually agreed to by the Parties.
- B. **Incorporation of Flow Management Program.** The District, with the mutual support of the other Parties, shall take all reasonable steps to ensure that the proposed PSOP legislation considered by the U.S.

Congress provides for consideration by the Secretary of Interior ("Secretary") of the Flow Management Program, as incorporated herein, consistent with the Secretary's consideration of the PSOP Report.

- C. **Permits, Contracts and Authorizations.** The Parties shall not knowingly or intentionally take any actions to impair or impede the ability of a Party to obtain the necessary permits, contracts and/or authorizations for the excess capacity contract components of the PSOP from Reclamation, Pueblo County, or any other governmental entity; provided, however, that nothing in this Agreement shall preclude the Parties from responding to requests for information from governmental entities, or commenting on issues of concern unrelated to the Legacy Project and the quantity of Arkansas River flows through Pueblo, and not in conflict with the spirit of this Agreement.

IV. Arkansas Valley Conduit. The Parties shall support the proposed Arkansas Valley Conduit or Pipeline utilizing outlet works on Pueblo Dam and related facilities to provide quality drinking water to communities downstream of Pueblo. Colorado Springs Utilities Board has previously passed Resolution U03-1 in support of this project. The nature and extent of future support will be determined by the respective governing bodies of each Party, consistent with existing agreements.

V. Excess Capacity Contracts

- A. Colorado Springs and Aurora have requested, and Fountain and the District anticipate requesting, long-term (10 years or longer) excess capacity storage contracts from Reclamation for the use of excess storage and conveyance capacity of east-slope Project facilities to store and convey non-Project water for municipal, water banking, and other beneficial uses ("Long-Term Excess Capacity Contracts").
- B. Subject to the terms of this Agreement, no Party shall knowingly or intentionally take any actions to impair or impede the request of any other Party for a Long-Term Excess Capacity Contract; provided, however, that nothing in this Agreement shall preclude any of the Parties from responding to requests for information from governmental entities, or commenting on issues of concern unrelated to the quantity of Arkansas River flows through Pueblo, and not in conflict with the spirit of this Agreement.

VI. Regional Water Management Program

- A. The ROY Participants through the ROY Planning Subcommittee will, within one year of the Effective Date of this Agreement, develop a Regional Water Management Program ("RWMP") that describes operating principles to accomplish the Flow Management Program while protecting all Parties' water rights. The RWMP may include other water user entities

located within the Arkansas River Basin including Conservancy Districts, on such terms as are mutually agreed to by the Parties. The ROY Planning Subcommittee will operate by consensus on the RWMP.

- B. In addition, the ROY Planning Subcommittee will make appropriate investigations to identify cooperative and mutually beneficial mechanisms and operating agreements to implement statutorily authorized water leases, interruptible supply agreements, and water trades, and similar actions pursuant to existing agreements between the Parties to achieve flexibility in operations and utilization of facilities and decreed water rights for both native and non-native Arkansas River waters, all within the confines of and subject to this Agreement and all related existing agreements. It is expected that such mechanisms and operating agreements may require additional commitments and obligations by some of the ROY Participants in order to fully effectuate the existing agreements. The mechanisms and operating agreements shall not result in the development of additional water supplies for use outside the Arkansas River Basin that would result in a net loss of native water to the Arkansas River Basin. No Party shall knowingly or intentionally take actions to impair or impede the implementation of the RWMP, so long as the RWMP activities are within the spirit and letter of this Agreement and all related existing agreements.

VII. Aurora's Agreements

- A. Aurora has currently operating and executory agreements with Colorado Springs, the Board and the District, which include rights of renewal or extension that must be respected. The most relevant of such agreements for the purposes of this Agreement, include the following:
1. The Aurora/District IGA, and the stipulations referred to in section III.C. of the Aurora/District IGA and entered into consistent with that IGA.
 2. Agreement dated November 25, 1997 between the Board and Aurora.
 3. Agreement dated March 19, 1990, between the Board and Aurora concerning the exchange and trade of water.
- B. As set forth in this Agreement, Aurora agrees to be bound by the Flow Management Program.
- C. In agreeing to be bound by the Flow Management Program, Aurora requires assurances from the other Parties that it will be afforded the means and opportunity to recover the Foregone Diversions from its water rights. Prior to the construction of ROY Storage, Colorado Springs and

the Board will cooperate with Aurora as described herein, and subject to existing agreements, to trade or exchange water with Aurora to recover yield made unavailable annually by virtue of Aurora's participation in the Flow Management Program.

- D. Aurora agrees to cooperate in good faith in the development of the ROY Storage program in the manner described in Section II above.
- E. Aurora agrees to participate in good faith in the settlement of pending water rights cases to which it is a party, which cases are listed on Exhibit 3.

VIII. District Agreements

- A. The District is the primary sponsor of the PSOP and the implementing legislation.
- B. As set forth in this Agreement, the District agrees to be bound by the Flow Management Program.
- C. The District agrees to participate in good faith in the development of the ROY Storage program in the manner described in Section II above.
- D. The District agrees to participate in good faith in the settlement of pending water rights cases to which it is a party, which cases are listed on Exhibit 3.
- E. Nothing in this Agreement is intended to expand, undermine or alter the obligations of the District and Aurora to each other under the District/Aurora IGA and any stipulations entered pursuant thereto.

IX. Fountain Agreements

- A. As set forth in this Agreement, Fountain agrees to be bound by the Flow Management Program.
- B. Fountain agrees to participate in good faith in the settlement of pending water rights cases to which it is a party, which cases are listed on Exhibit 3.
- C. In agreeing to be bound by the Flow Management Program, Fountain requires assurances from the other Parties that it will be afforded the means and opportunity to recover the Foregone Diversions from its water rights. Prior to the construction of ROY Storage, Colorado Springs and the Board will cooperate with Fountain as described herein, and subject to existing agreements, including but not limited to the letter agreement between Colorado Springs and Fountain dated May 12, 2004, to trade or

exchange water with Fountain to recover yield made unavailable annually by virtue of Fountain's participation in the Flow Management Program.

- D. Fountain agrees to cooperate in good faith in the development of the ROY Storage program in the manner described in Section II above.

X. Agreements of Pueblo, the Board, and Colorado Springs

- A. Colorado Springs and the Board agree to participate in good faith in the development of the ROY Storage program in the manner described in Section II above and to work cooperatively with the other Parties in developing the same. Pueblo agrees to cooperate with these efforts; provided, however, that Pueblo shall not be required to contribute water or financially participate in the ROY Storage program nor will it receive any rights or entitlement to any storage or yield that results.
- B. Pueblo, the Board and Colorado Springs agree to participate in good faith in the settlement of pending water rights cases to which they are parties, as shown on Exhibit 3.
- C. Subject to the terms of this Agreement, Pueblo, the Board, and Colorado Springs shall not knowingly or intentionally take any actions to impair or impede the development of ROY Storage and the subsequent use of water stored therein; provided however, that nothing herein shall preclude Pueblo from responding to requests for information from governmental entities, or commenting on issues of concern to Pueblo unrelated to the quantity of Arkansas River flow through Pueblo and downstream to the ROY Storage diversions and discharge locations, and not otherwise in conflict with the spirit of this Agreement.
- D. Pueblo agrees to keep and make available reasonable records concerning use of the recreational amenities described in Pueblo's RICD application.
- E. Nothing in this Agreement is intended to undermine or alter the obligations of Pueblo, Colorado Springs and the Board to each other under the March 1st IGA. Pueblo, Colorado Springs, and the Board agree that approval of this Agreement by all of the Parties, satisfies the requirements of Paragraph VIII.B. of the March 1st IGA.

XI. Agreement Concerning the Colorado Canal Companies

- A. The Lake Meredith Reservoir Company, The Lake Henry Reservoir Company, and the Colorado Canal Company (collectively "Colorado Canal Companies") have decreed exchanges in Cases No. 84CW62, 63, and 64, District Court, Water Division No. 2.

- B. Colorado Springs, Aurora, and Fountain agree to operate any exchanges of those shares in the Colorado Canal Companies that they control, directly or indirectly, consistent with the Flow Management Program.
- C. The Parties agree to seek the voluntary participation of minority shareholders in the Colorado Canal Companies in the Flow Management Program and to take such reasonable steps as are legally permissible to encourage that participation.

XII. Time Period

- A. The Parties hereto recognize that development of the ROY Storage program and the settlement of the pending cases identified on Exhibit 3 will require more time to complete. The Parties agree that they will negotiate in good faith during a one-year period commencing upon the Effective Date of this Agreement, to accomplish the following tasks. All dates provided below are intended by the Parties as targets which each Party will use best efforts to meet.
 - 1. Develop an acceptable downstream ROY Storage plan that will insure that all ROY Participants are afforded the means and opportunity to recover their Foregone Diversions.
 - 2. Establish the ROY Planning Subcommittee that will have as its principal focus the development and implementation of strategies to aid in the performance of this Agreement and to protect and improve the efficient management of Arkansas River basin water supplies. By July 1, 2004, the Subcommittee will agree on the initial method to determine Foregone Diversions, and identify the amount of ROY Storage each ROY Participant will need over the short term, with the understanding that the method chosen and the amount of storage will be subject to modification in the future as the Subcommittee determines as necessary. By December 31, 2004, the Subcommittee will identify potential sites for the location of ROY Storage.
 - 3. Settle among the Parties the water rights cases listed in Exhibit 3 no later than October 1, 2004, subject to any existing stipulations and agreements. An initial meeting among representatives of the Parties to discuss the water rights cases shall take place no later than 30 days after the Effective Date of this Agreement. The Parties will cooperate by providing relevant information concerning the cases to other Parties in order to facilitate such settlement.
- B. The Parties agree not to file statements of opposition to or to otherwise participate in any other Party's application for a finding of reasonable diligence or to make absolute conditional water rights decreed in the cases

listed in Exhibit 3 for a period of 24 years from the Effective Date; provided however, a Party may participate in any such case to the extent that the Application seeks or the decree grants relief beyond findings of reasonable diligence or to make absolute the conditional water rights as originally decreed.

XIII. Effective Date and Related Matters

- A. **Effective Date.** Except as hereinafter provided in this Section XIII, this Agreement shall become effective upon date of the approval by the governing body of the last Party to approve this Agreement (“Effective Date”), and shall remain in effect as written unless modified by the Parties in writing.
- B. **Interim Agreement on Recreation Flows.** The requirements of Paragraph B. of the Flow Management Program described in Exhibit 1 shall become effective upon the Effective Date, while the requirements of Paragraphs C. through I. of Exhibit 1, pertaining to reduction of the Subject Exchanges to maintain recreation flows (“Recreation Flow Provisions”), shall become effective for an interim period upon substantial completion of the physical, in-river features of the whitewater boating park component of the Legacy Project, as generally described in Pueblo’s application in Case No. 01CW160, and any amended application. Pueblo shall provide notice to the other Parties of the date when this occurs. This interim period shall continue for a term of five years from the date of Pueblo’s notice of substantial completion of the whitewater park. The continued applicability of the Recreation Flow Provisions after the initial five-year term, shall be determined as follows:
1. As to the Board and Colorado Springs, pursuant to the March 1st IGA.
 2. As to the District, if at the end of such five-year term, the PSOP legislation described in Paragraph III.A. has been enacted, the Recreation Flow Provisions shall become permanently effective. If the PSOP legislation has not been enacted, but Reclamation has entered into Long-Term Excess Capacity Contracts in the total amount of at least 32,000 acre-feet, or at least 4,000 acre-feet excluding any contract executed by Colorado Springs, whichever first occurs, by either master Long-Term Excess Capacity Contract with the District or individual Long-Term Excess Capacity Contracts to the PSOP participants, the Recreation Flow Provisions shall become permanently effective. If this interim agreement concerning recreation flows expires after five years due to the District’s cessation of active efforts to successfully obtain passage of the PSOP legislation or Reclamation’s failure to issue the

necessary Long-Term Excess Capacity Contracts, the Recreation Flow Provisions applicable during the interim period shall automatically be revived upon the renewal by the District of efforts to obtain passage of the PSOP legislation or to obtain Long-Term Excess Capacity Contracts from Reclamation as described above, and shall remain in effect so long as such efforts continue.

3. As to Aurora, the Recreation Flow Provisions shall become permanently effective upon final approval by Reclamation of Aurora's request for a Long-Term Excess Capacity Contract. If such has not occurred prior to the end of the five-year period identified above, the Recreation Flow Provisions shall remain in effect so long as Aurora's request for a Long-Term Excess Capacity Contract remains pending. Upon denial by Reclamation of Aurora's request for a Long-Term Excess Capacity Contract, Aurora shall be relieved of all obligations to comply with the Recreation Flow Provisions; provided, however, that such obligations shall be revived if Aurora reapplies for approval of a Long-Term Excess Capacity Contract, and shall remain in effect for so long as such reapplication remains pending.
4. As to Fountain, if at the end of the initial five year term, Colorado Springs is actively pursuing development of the Southern Delivery System pipeline as described in the March 1st IGA ("SDS"), the Recreation Flow Provisions shall continue in effect for an additional five years. If this interim agreement concerning recreation flows expires after either five or ten years due to Colorado Springs' cessation of active efforts to successfully complete the development of the SDS, the Recreation Flow Provisions applicable during the interim period shall automatically be revived for Fountain upon the renewal by Colorado Springs of efforts to complete the SDS from Pueblo Dam and shall remain in effect for Fountain so long as such efforts continue. Upon completion of construction of Phase I of the SDS as described in the March 1st IGA, the Recreation Flow Provisions shall become permanently effective for Fountain, regardless of any previous expiration. For purposes of this paragraph, references to Colorado Springs include any successor in interest to Colorado Springs in the SDS project.

C. Termination.

1. With the exception of the Parties' agreement to comply with the Flow Management Program, which is governed by Paragraph XIII.B., any Party may elect to terminate its participation in this Agreement by providing written notice to the remaining Parties,

upon:

- (a) The failure of the Parties to have agreed upon the ROY Storage program and each party's participation therein within one year of the Effective Date; or
 - (b) The failure of the Parties to reach settlement among themselves of the pending water rights cases listed on Exhibit 3 within one year of the Effective Date;
2. Upon any termination of the March 1st IGA, Pueblo, Colorado Springs or the Board may elect to terminate its participation in this Agreement by providing written notice to the remaining Parties. If such termination occurs prior to December 31, 2010, any other Party may opt to terminate its participation in this Agreement, with the exception of the Parties' agreement to comply with the Flow Management Program which is governed by Paragraph XIII.B, if that Party has not already received the substantial benefit that Party was intended to receive under this Agreement, whether through this Agreement or otherwise. Notwithstanding the foregoing sentence, if at any time Colorado Springs (or any successor in interest to Colorado Springs in the Southern Delivery System project) is unable to reasonably construct the Southern Delivery System pipeline from Pueblo Dam due to terms, conditions or requirements contained in any federal, state or local permit, permission or license, including Reclamation's Record of Decision or Pueblo County's 1041 permit, then Fountain may terminate its participation in this Agreement by providing written notice of such termination to the other Parties. Upon such termination of Fountain's participation, all obligations of any kind herein, other than the obligation to maintain Recreation Flows for any uncompleted portion of the period provided for in Paragraph XIII.B.4. for the interim operation of the Recreation Flow provisions, are also terminated.
 3. The obligations of a Party with respect to the non-assertion of abandonment claims based on Foregone Diversions as described in Paragraph I.B., shall survive any termination of the Party's other obligations under this Agreement.
 4. No Party shall divert any increased flows in the reach of the Arkansas River between the Above Pueblo Location and the Combined Flow Location resulting from the Foregone Diversions of any senior Subject Exchange of the other Parties. This obligation shall survive any termination of a Party's other

P.O. Box 1575/MC 510
Colorado Springs, CO 80901-1575

If to Fountain: Director of Utilities
City of Fountain
116 South Main Street
Fountain, CO 80817

and also to: Cynthia F. Covell
Alperstein & Covell P.C.
1600 Broadway, Suite 2350
Denver, CO 80202

If to the District: General Manager
Southeastern Colorado Water Conservancy
District
31717 United Avenue
Pueblo, CO 81001

and also to: Lee E. Miller
Burns, Figa & Will, P.C.
6400 S. Fiddlers Green Circle
Suite 1030
Englewood, CO 80111

If to Aurora: Director of Utilities
15151 East Alameda Parkway
Suite 3600
Aurora, CO 80012-1555

and also to: John M. Dingess
Duncan, Ostrander & Dingess, P.C.
4600 South Ulster Street
Suite 1111
Denver, CO 80237-2875

or to such other address as such party may have given to the other by notice pursuant to this Paragraph.

- B. **Assignment.** This Agreement may not be assigned by any Party without the prior written consent of each of the other Parties. Any attempted assignment in violation of this provision shall be void.
- C. **No Costs or Attorney's Fees.** In the event of any litigation or other dispute resolution process arising out of this Agreement, the Parties agree that each shall be responsible for its own costs and attorney's or other fees associated with any such action.

- D. **Entire Agreement; Amendments.** The Parties recognize and acknowledge that there are numerous other agreements between and among them addressing certain issues that are also addressed in this Agreement. This Agreement (together with the Exhibits hereto, which constitute parts of this Agreement and which are hereby incorporated by this reference) constitutes the entire agreement between all the Parties relating to the subject matter hereof. All prior or contemporaneous oral agreements and discussions among all of the Parties or their respective agents or representatives relating to the subject hereof are merged into this Agreement. This Agreement may be altered, amended, or revoked only by an instrument in writing signed by all of the Parties. Email and all other electronic (including voice) communications from any Party in connection with this Agreement are for informational purposes only. No such communication is intended by any Party to constitute either an electronic record or an electronic signature, or to constitute any agreement by any Party to conduct a transaction by electronic means. Any such intention or agreement is hereby expressly disclaimed.
- E. **Applicable Law.** This Agreement shall be governed by and construed according to the law of the State of Colorado.
- F. **Waiver.** The failure of one of the Parties to insist upon the strict performance of any provision of this Agreement or to exercise any right, power, or remedy upon a breach thereof shall not constitute a waiver of that or any other provision of this Agreement or limit that Party's, or any other Party's, right thereafter to enforce any provision or exercise any right.
- G. **Captions.** All captions contained in this Agreement are for convenience only and shall not be deemed to be part of this Agreement.
- H. **Counterparts.** This Agreement may be executed in counterparts, each of which shall constitute an original and all of which, when taken together, shall constitute one agreement.
- I. **Parties Bound by Agreement.** This Agreement is binding upon the Parties hereto and upon their respective legal representatives and successors.
- J. **Construction.** All section, paragraph, and exhibit references used in this Agreement are to this Agreement unless otherwise specified.
- K. **Authorizations.** The governing bodies of each of the Parties have authorized by resolution the execution of this Agreement.
- L. **Dispute Resolution.** If a dispute arises between the Parties relating to this Agreement, the following procedure shall be followed:

1. The Flow Management Committee shall first consider any proposed decision item or disputed matter. If not resolved by agreement of the members of the Committee, the proposed decision item or disputed matter shall be reported to the Administrative Officers. The Administrative Officers shall hold a meeting promptly, but in no event later than 20 calendar days from the referral of the dispute, attended by persons with decision-making authority regarding the dispute, to attempt in good faith to negotiate a resolution of the dispute; provided, however, that no such meeting shall be deemed to vitiate or reduce the obligations and liabilities of the Parties or be deemed a waiver by a Party hereto of any remedies to which such Party would otherwise be entitled under this Agreement unless otherwise agreed to by the Parties in writing. "Administrative Officers" collectively shall mean the Chief Executive Officer for Colorado Springs Utilities, the City Manager of Pueblo, the Executive Director of the Board, the City Manager of the City of Fountain, the Director of Utilities for the City of Aurora, the Manager of the District, or, in all cases, such other officer authorized by the Party to act in such capacity, and the designated representative of any subsequent parties.
2. If, within 20 calendar days after such meeting, the Parties have not succeeded in negotiating a resolution of the dispute, they agree to submit the dispute to non-binding mediation and to bear equally the costs of the mediation.
3. The Parties agree to participate in good faith in the mediation and related negotiations for a period of 30 calendar days. The substantive law of the State of Colorado shall apply to the proceedings, but the rules of procedure and evidence need not be adhered to. If the Parties are not successful in resolving the dispute through mediation, then the Parties shall be free to pursue any other legal or equitable remedy. The Parties agree to reasonably expedite any legal proceedings brought hereunder in order to obtain a prompt resolution.

M. No Third Party Beneficiaries. This Agreement is intended to describe the rights and responsibilities of and between the Parties and is not intended to, and shall not be deemed to confer any rights upon any persons or entities not named as parties, nor to limit in any way the powers and responsibilities of the Parties or any other entity not a party hereto.

N. Force Majeure. Subject to the terms and conditions in this paragraph, no party to this Agreement shall be liable for any delay or failure to perform under this Agreement due solely to conditions or events of Force Majeure, specifically a) acts of God, b) sudden actions of the elements such as

floods, earthquakes, hurricanes, or tornadoes, c) sabotage, d) vandalism beyond that which can be reasonably prevented, e) terrorism, f) war, and g) riots provided that: A) the non performing Party gives the other Parties prompt written notice describing the particulars of the occurrence of the Force Majeure; B) the suspension of performance is of no greater scope and of no longer duration than is required by the Force Majeure event or condition; and C) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform and provides weekly progress reports to the other Parties describing the actions taken to remedy the consequences of the Force Majeure event or condition. In the event of a change in municipal (or other local governmental entity), state or federal law or practice that prohibits or delays performance, the obligation to seek a remedy shall extend to making reasonable efforts to reform the Agreement in a manner consistent with the change that provides the Parties substantially the same benefits as this Agreement, provided, however, that no such reformation shall increase the obligations of any of the Parties. In the event any delay or failure of performance on the part of the party claiming Force Majeure continues for an uninterrupted period of more than three hundred sixty-five (365) days from its occurrence or inception as noticed pursuant to this Agreement, all of the Parties not claiming Force Majeure may, at any time following the end of such one year period, terminate this Agreement upon written notice to the Party claiming Force Majeure, without further obligation by any of the Parties; provided, however, that any such decision to terminate this Agreement shall not be effective unless agreed to by all of the Parties not claiming Force Majeure.

- O. **Non-Business Days.** If any date for any action under this Agreement falls on a Saturday, Sunday or a day that is a "holiday" as such term is defined in Rule 6 of the Colorado Rules of Civil Procedure, then the relevant date shall be extended automatically until the next business day.
- P. **Joint Draft.** The Parties, with each having the opportunity to seek the advice of legal counsel and each having an equal opportunity to contribute to its content, drafted this Agreement jointly.
- Q. **Non-Severability.** Each paragraph of this Agreement is intertwined with the others and is not severable unless by mutual consent of the Parties.
- R. **Effect of Invalidity.** If any portion of this Agreement is held invalid or unenforceable for any reason by a court of competent jurisdiction as to any Party or as to all Parties, the Parties will immediately negotiate valid alternative portion(s) that as nearly as possible give effect to any stricken portion(s).
- S. **Sole Obligation of Aurora Utility Enterprise.** The Parties agree that any and all obligations of Aurora under this Agreement are the sole

obligations of the City of Aurora, Colorado, acting by and through Utility Enterprise, and as such, shall not constitute a general obligation or other indebtedness of the City of Aurora or a multiple fiscal year direct or indirect debt or other financial obligation whatsoever of the City of Aurora within the meaning of any constitutional, statutory, or charter limitation. The Parties also agree that they shall not have any recourse against any of the properties or revenues of the City of Aurora, except that in order to satisfy any non-appealable judgment against Aurora, the Parties shall have recourse against the net revenues of the Aurora Water System that are available therefor in the City of Aurora Utility Enterprise Water Fund, or any successor enterprise fund, after payment of all expenses related to the operation and maintenance and periodic payments on bonds, loans and other financial obligations of said Aurora Water System.

- T. City of Fountain Electric, Water and Wastewater Utility Enterprise.** All financial obligations of the City Fountain hereunder shall be solely the obligations of the City of Fountain acting through the City of Fountain Electric, Water and Wastewater Utility Enterprise ("Enterprise"), and not the financial obligations or other indebtedness of the City of Fountain, Colorado, or any other political subdivision, or a multiple fiscal year direct or indirect debt or other financial obligation of the City of Fountain within the meaning of any constitutional, charter or statutory limitation. Fountain's obligation to perform any financial obligation hereunder shall be fulfilled solely from the net revenues of the Fountain utility systems. "Net revenues" shall mean the gross revenues of the utility systems, less all operation and maintenance expense related thereto as determined by the Enterprise, and periodic payments on bonds, loans and other financial obligations of said Enterprise. No other funds or property interests of the City of Fountain, nor any ad valorem property taxes will be used, directly or indirectly, to perform any financial obligation of the City of Fountain pursuant to this Agreement.
- U. Obligations of Pueblo, Colorado Springs, and the District.** Nothing herein shall constitute, nor be deemed to constitute, the creation of a debt or multi-year fiscal obligation of Pueblo, Colorado Springs, or the District, or an obligation of future appropriations by the City Council of Pueblo, the City Council of Colorado Springs or the Board of Directors of the District, contrary to Article X, § 20 of the Colorado Constitution or any other constitutional, statutory or charter debt limitation.
- V. Specific Performance.** In the event of any default by any Party hereunder, in addition to other damages or other remedies provided by law or equity, any other non-defaulting Party shall have the right to seek specific performance or injunctive relief. Paragraphs XIV.S, XIV.T, and XIV.U shall not constitute a limitation on the right of the Parties to seek such relief.

City of Pueblo, Colorado

Attest: Gina Dutcher
Gina Dutcher
City Clerk

By: Randy Thurston
Randy Thurston
President of the City Council

Date approved: May 24, 2004

Approved as to form:

Thomas E. Jagger
Thomas E. Jagger
Pueblo City Attorney

City of Colorado Springs, Colorado

Attest: Kathryn M. Young
Kathryn M. Young
City Clerk

By: Lionel Rivera
Lionel Rivera
Mayor

Date Approved: May 25, 2004

Approved as to form:

Patricia K. Kelly
Patricia K. Kelly
Colorado Springs City Attorney

**Board of Water Works of
Pueblo, Colorado**

Attest: James H. Gardner
James H. Gardner
Secretary-Treasurer

By: Kevin F. McCarthy
Kevin F. McCarthy
President

Date approved: May 18, 2004

**Southeastern Colorado Water
Conservancy District**

Attest James W. Broderick
James W. Broderick
Assistant Secretary

By: Glenn E. Everett
Glenn E. Everett
President

Approved as to form:

Lee E. Miller
Lee E. Miller
SCWCD Attorney

Approved May 20, 2004

City of Fountain

Attest Sharon Mosley
Sharon Mosley
City Clerk

By: Ken Barela
Ken Barela
Mayor

Date approved: May 25, 2004

**City of Aurora, Colorado
Acting By and Through Its
Utility Enterprise**

Attest Debra Johnson
Debra A. Johnson
City Clerk

By: Edward J. Bauer
Edward J. Bauer
Mayor

Date approved: May 27, 2004

Approved as to form:

John M. Dingess
John M. Dingess
Special Counsel

3230616_5.DOC

EXHIBIT 1

To the Intergovernmental Agreement Among
The City of Pueblo, The City of Aurora,
The Southeastern Colorado Water Conservancy District,
The City of Fountain,
The City of Colorado Springs, and
The Board of Water Works of Pueblo, Colorado

Arkansas River Flow Management Program.

- A. *Subject Water Rights.* The following provisions shall apply to "Subject Exchanges" as defined in Paragraph I.A. of the above-referenced Intergovernmental Agreement (the "Agreement"). The term "Water Suppliers" below refers collectively to all of the above-referenced parties, with the exception of the City of Pueblo ("Pueblo"). The term "Parties" below refers collectively to the Water Suppliers and Pueblo.
- B. *Year-Round Flows.* At times when the flow in the Arkansas River immediately below the fish hatchery located at Pueblo Dam is at or below 100 cubic feet per second ("c.f.s."), the Water Suppliers shall reduce the Subject Exchanges as and to the extent necessary to attain a flow of not less than 100 c.f.s. at that point. Calculation of the flow at this point, the approximate location of which is shown on the map attached hereto as Attachment 1, and referred to herein as the "Above Pueblo Location", shall be the sum of the flow at the Above Pueblo Gage plus the fish hatchery return flows.
- Additionally, at times when flows at the point identified on Attachment 1 and referred to in this Agreement as the "Combined Flow Location" are at or below 85 c.f.s., the Water Suppliers shall reduce the Subject Exchanges as and to the extent necessary to attain a flow of not less than 85 c.f.s. at the Combined Flow Location.
- C. *Recreation Flows.* During the period of March 16 through November 14 of each year, when the flow at the Above Pueblo Location is at or below the flow levels specified on the graph attached as Attachment 2, the Water Suppliers shall reduce the Subject Exchanges as and to the extent necessary to attain the flow levels specified on Attachment 2 during the times prescribed in Paragraph H. below. The "Average Year" flows shown on Attachment 2 shall apply when the Natural Resources Conservation Service's Colorado Basin Water Supply Outlook Report "most probable" forecast (50% chance of exceedance) for flows on the Arkansas River at Salida ("Forecast") is 100% or more. The "Drier Year" flows shown on Attachment 2 shall apply when the Forecast is less than 100% and equal to or more than 70%. If the federal government ever stops providing these forecasts, then the Flow Management Committee described in Paragraph F. below shall

decide upon another objective measure that will fairly insure the continuation of the provisions of the Agreement. This new objective measure shall be incorporated into a written amendment of this Agreement, executed by all the Parties.

- D. ***No Reduction Unless Flows Increase.*** Reduction of the Subject Exchanges under Paragraphs B. and C shall not be required, unless such reduction will result in an increase in flows in the Arkansas River between the Above Pueblo Location and the Combined Flow Location and the increased flow resulting from the reduction of one or more of the Subject Exchanges is not being diverted by water rights with points of diversion above the Combined Flow Location.
- E. ***Dry Year Exception.*** Reduction of the Subject Exchanges under Paragraph C above shall not be required when the most recently provided Forecast is less than 70%.
- F. ***Flow Management Committee.*** The Water Suppliers shall participate in the Flow Management Committee previously established in the March 1, 2004 Intergovernmental Agreement among Pueblo, the Board and Colorado Springs (the "March 1st IGA"). Each of the Water Suppliers shall have up to two representatives on the Flow Management Committee. The Flow Management Committee will regularly confer and coordinate concerning implementation of this Flow Management Program. Each year the Flow Management Committee will meet no later than March 16th, and, as frequently thereafter as it determines is necessary, through November 14th. After the first meeting each year, subsequent meetings may be held by telephone or other electronic means if the Flow Management Committee so agrees. Matters to be addressed by the Flow Management Committee include consideration of means to replace storage reserves during storage restoration years (Paragraph G.); weekly schedules to balance periods of reduction and non-reduction for recreation flows (Paragraph H.); and implementation of the Cooperative Flow Management Program (Paragraph I). The Flow Management Committee shall operate by consensus. If the Flow Management Committee is unable to reach consensus concerning any matter committed to the Flow Management Committee for determination by this Agreement, the matter shall be resolved in accordance with the dispute resolution provisions of Paragraph XIV.L. of the Agreement at the request of any Party.
- G. ***Storage Restoration.*** During the calendar year immediately following a year in which actual stream flows in the Arkansas River at Salida were less than 70% of average, as determined by the official streamflow gage records maintained by the State of Colorado for that location, the Flow Management Committee will determine based on relevant water storage levels; actual flow conditions; the overall objectives and intent of this Agreement; and other relevant factors, whether and to what degree reduction of the Subject Exchanges under Paragraph C shall be modified for any portion of that calendar year to allow replacement of

storage reserves to normal and acceptable operating volumes. The Parties anticipate that the alternatives to be considered may include protection solely of the flow levels required in Paragraph B; percentage reductions of the flow levels required in paragraph C; operation of the Subject Exchanges to maintain recreation flows for a specified number of days per week; or a reduced schedule of recreational flows, depending on the requirements for replacing storage reserves. These provisions for storage restoration are not intended to guarantee that the storage reservoirs of the Water Suppliers will be fully restored by the end of the subject calendar year.

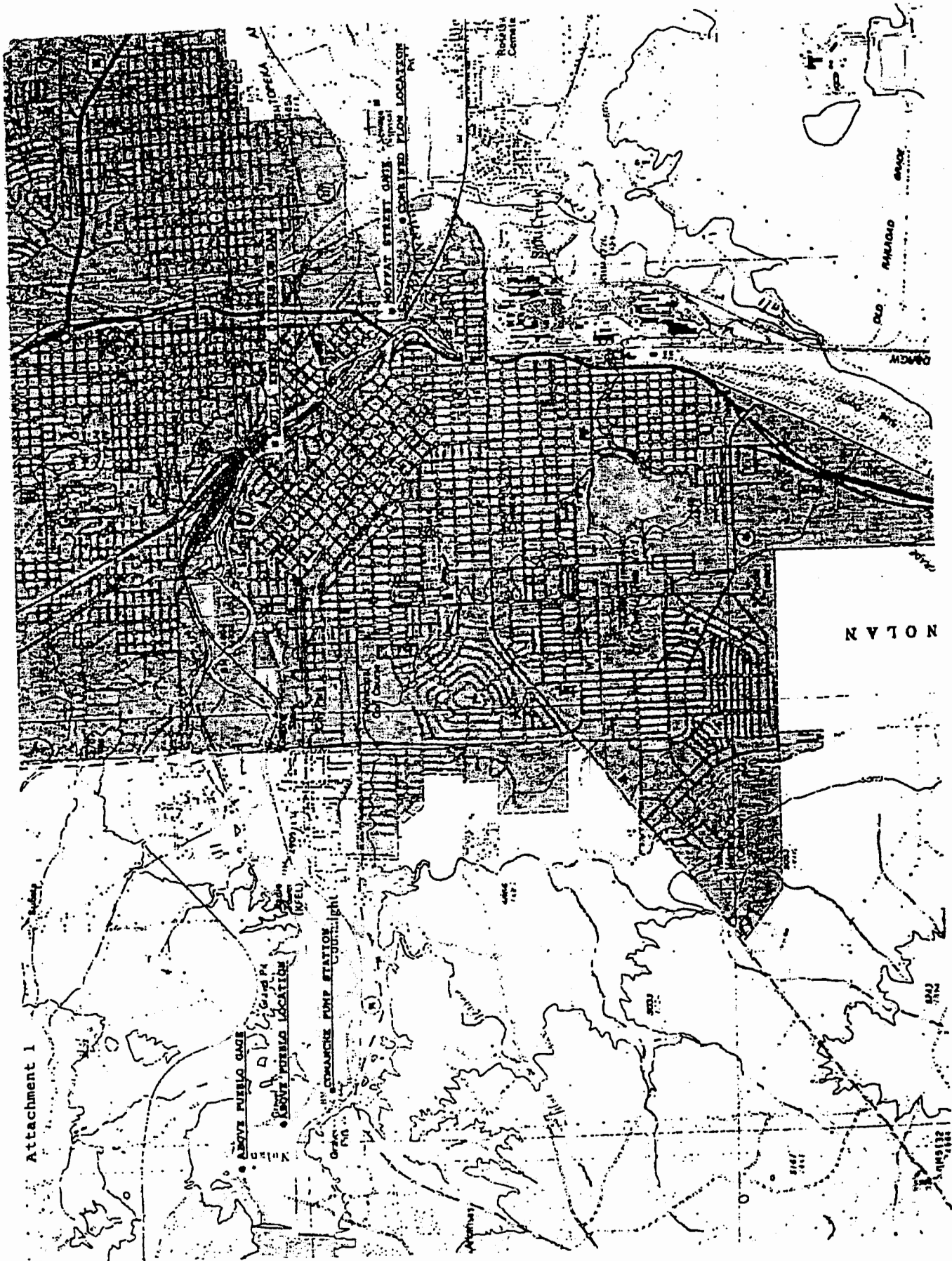
- H. ***Equitable Allocation of Operational Hours.*** The Flow Management Committee shall confer and agree upon weekly schedules of reduction under Paragraph C so as to generally achieve on a monthly basis a 50/50 balance of time between periods of reduction of the Subject Exchanges and periods of no reduction of the Subject Exchanges. In general, the Parties intend that the reduction requirements under Paragraph C shall be in effect during the day, and reduction under Paragraph C shall not be required during the night. The Parties will use their best efforts to make flow changes through the Pueblo Dam outlet structure to avoid adverse impact to fish and wildlife anticipated in the subject reach of the Arkansas River to the extent possible, while still fulfilling all the provisions of this Agreement.
- I. ***Cooperative Flow Management Program.*** The Water Suppliers shall participate in the voluntary flow management program established in Paragraph I.I. of the March 1st IGA.
- J. ***Aquila Energy Diversion Dam.*** The reduction of Subject Exchanges by the Water Suppliers under this Agreement shall not be required to be increased to meet the flows in Paragraphs B and C as a result of any decrease in flows at the Combined Flow Location resulting from increases in unaugmented depletions under the Southern Colorado Power Company water right (as described in the decree dated October 13, 1932, Case No. 19693, District Court, Tenth Judicial District).
- K. ***Combined Flow Location.*** The Combined Flow Location was selected as one of the measuring points used in this Agreement based, in part, on the fact that flows from Runyon Lake, including the return flows from diversions at the Aquila Energy Diversion Dam, enter the Arkansas River above the Combined Flow Location. If a material change in the point of return flows from Runyon Lake and the Aquila Energy Diversion Dam occurs, then the Parties will work together to designate a new Combined Flow Location and to mitigate any adverse effects to the fair implementation of this Agreement.
- L. ***Federal Government Requirements.*** The obligations of the Water Suppliers under this Agreement shall not be altered or eliminated by the imposition of any

additional or different requirements on releases from or exchanges involving Pueblo Reservoir that may be imposed by any agency of the federal government. Pueblo shall not support, sponsor, or encourage the imposition of any such requirements.

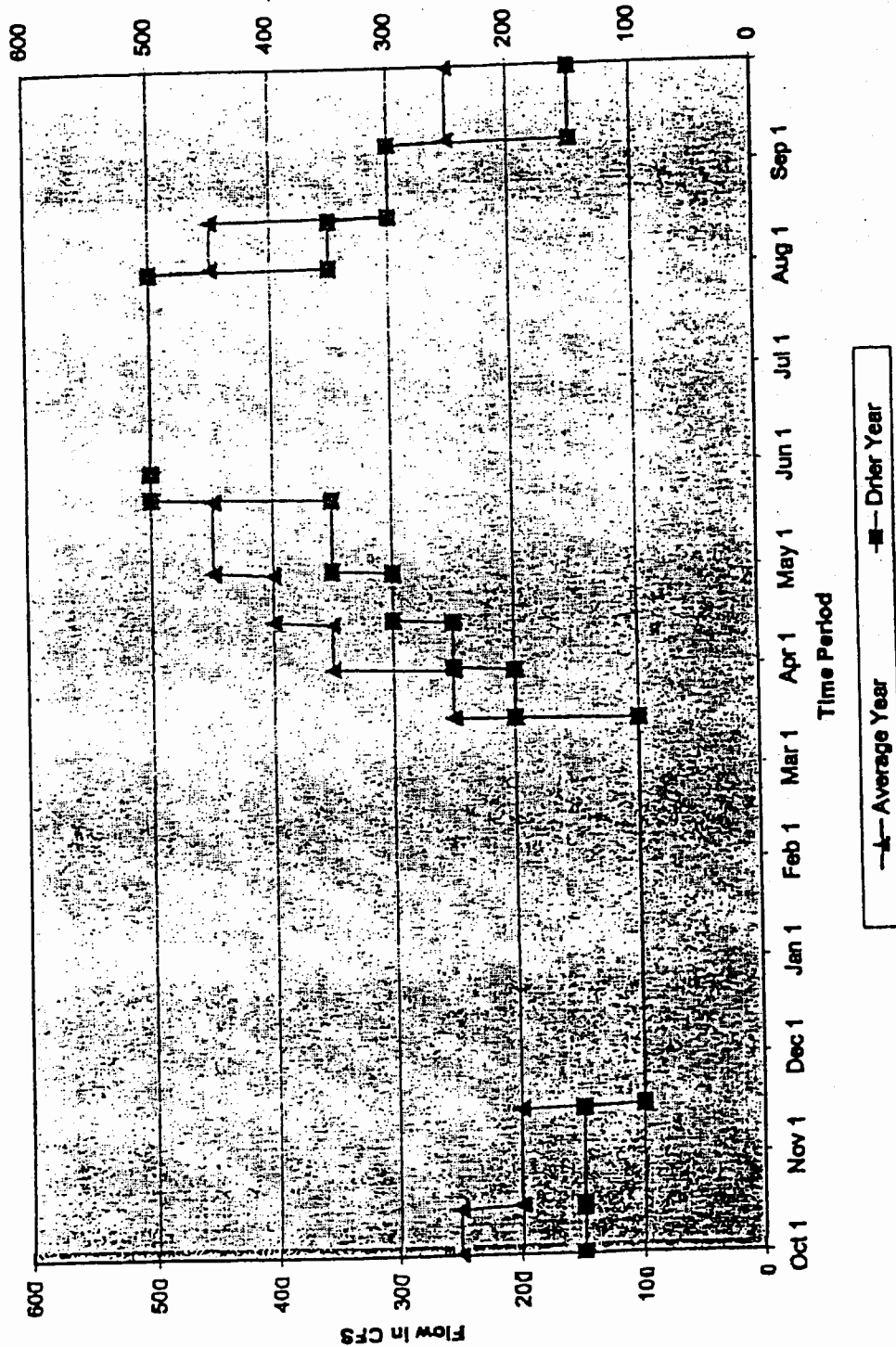
- M. *March 1st IGA.* With respect to the mutual obligations to one another of Pueblo, the Board, and Colorado Springs, to the extent that any provision of this Exhibit 1 is determined to be in conflict with the March 1st IGA, the March 1st IGA shall control.

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Attachment 1



Flow Protection Regimes



Period	Average Year	Drier Year
1-Oct	250	150
15-Oct	250	150
16-Oct	200	150
14-Nov	200	150
15-Nov	100	100
15-Mar	100	100
16-Mar	250	200
31-Mar	250	200
1-Apr	350	250
15-Apr	350	250
16-Apr	400	300
30-Apr	400	300
1-May	450	350
22-May	450	350
23-May	500	500
31-May	500	500
31-Jul	500	500
1-Aug	450	350
15-Aug	450	350
16-Aug	300	300
7-Sep	300	300
8-Sep	250	150
30-Sep	250	150

LATEST DRAFT
1/04

EXHIBIT 2

DRAFT
9/19/2003

SECWCD-AURORA IGA

ATTACHMENT

108TH CONGRESS
1ST SESSION

[H. R. _____]

To authorize the Secretary of the Interior to engage in a feasibility study relating to long term water needs for the area served by the Fryingpan-Arkansas Project, Colorado, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. Hefley introduced the following bill; which was referred to the Committee on

A BILL

To authorize the Secretary of the Interior to engage in a feasibility study relating to long term water needs for the area served by the Fryingpan-Arkansas Project, Colorado, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. PURPOSES.

The purposes of this Act are as follows:

- (1) To authorize the Secretary of the Interior (hereinafter referred to as "the Secretary") to engage in a feasibility study relating to present and future water supply and related storage requirements of the area served by the Fryingpan-Arkansas Project, Colorado.

(2) To amend the Act of August 16, 1962, as amended, (76 Stat. 389 et seq.) to authorize the Secretary to enter into contracts for the use of excess storage and conveyance capacity of the Fryingpan-Arkansas Project, Colorado, for nonproject water for municipal, water banking, and other beneficial purposes.

SEC. 2. FEASIBILITY STUDY.

(a) **AUTHORIZED** - Pursuant to Federal reclamation law (the Act of June 7, 1902, and all Acts amendatory thereof or supplementary thereto), the Secretary, through the Bureau of Reclamation, is authorized to conduct a feasibility study to determine the most feasible method of meeting the present and future water supply and related storage requirements within the area served by the Fryingpan-Arkansas project, including the potential enlargement of Fryingpan-Arkansas facilities. In conducting such study, the Secretary shall take into consideration the Preferred Storage Options Plan Report published September 21, 2000, by the Southeastern Colorado Water and Storage Needs Assessment Enterprise and Final PSOP Implementation Committee Report dated April 19, 2001 (hereinafter referred to as the "PSOP Reports") and the need to ensure compliance with the Arkansas River Compact as executed by the states of Colorado and Kansas on December 14, 1948.

(b) **FUNDING**. - Before funds are expended for the study authorized by this section, the Southeastern Colorado Water Activity Enterprise shall first agree to participate in the feasibility study and to fund, at a minimum, 50 percent of the costs of such

study. The Southeastern Colorado Water Activity Enterprise's share of the costs may be provided partly or wholly in the form of services directly related to the conduct of the study, as determined by the Secretary. Costs incurred prior to the enactment of this Act to develop the PSOP Reports may be credited toward such Enterprise's share of the costs of the feasibility study, as determined by the Secretary.

(c) **STUDY TO BE SUBMITTED.** - The Secretary shall submit the feasibility study authorized by this section to the President and the President Pro Tempore of the Senate and the Speaker of the House of Representatives.

(d) **FURTHER AUTHORIZATION REQUIRED FOR CERTAIN EXPENDITURES.** - No funds shall be expended for the construction of enlargements, or any other alternative identified in the feasibility study authorized by this section, without further authorization by Congress.

(e) **AUTHORIZATION OF APPROPRIATIONS.** - There is authorized to be appropriated \$4,000,000 to conduct the feasibility study authorized by this section.

**SEC. 3. SECRETARY AUTHORIZED TO ENTER INTO
CONTRACTS FOR THE USE OF EXCESS STORAGE
AND CONVEYANCE CAPACITY OF THE
FRYINGPAN-ARKANSAS PROJECT, COLORADO.**

The Act of August 16, 1962, as amended, (76 Stat. 389 et seq., as amended), is amended further by adding at the end the following new sections:

§SEC. 8. (a)(1) Except as provided in Section 9, and subject to the provisions of this Act, including, but not limited to section 5, and all other applicable Federal statutes, the Secretary is authorized to enter into contracts with any agency or entity, private or public, including those operating or participating in a water bank established pursuant to Colorado law, for the use of excess capacity in the Fryingpan-Arkansas project for the purpose of diverting, storing, impounding, pumping, or conveying nonproject water for irrigation, domestic, municipal and industrial, or any other beneficial purpose.

(2) In entering into such contracts, the Secretary shall take into consideration the Preferred Storage Options Plan Report published September 21, 2000, by the Southeastern Colorado Water and Storage Needs Assessment Enterprise and Final PSOP Implementation Committee Report dated April 19, 2001 (hereinafter referred to as the "PSOP Reports") and the need to ensure compliance with the Arkansas River Compact as executed by the States of Colorado and Kansas on December 14, 1948.

"(b) The Secretary is authorized to enter into contracts pursuant to this section provided that-

"(1) such contracts shall not impair or otherwise interfere with:

"(A) the Fryingpan-Arkansas Project's authorized purposes;

"(B) the ability of the Fryingpan-Arkansas Project contractors to meet such contractual

obligations to the Secretary as exist at the time of the execution of a contract pursuant to the authority of this section;

“(C) such contractual obligations as the Secretary has to Fryingpan-Arkansas Project contractors at the time of the execution of a contract under the authority of this title;

“(D) the storage allocations and limitations pursuant to Contract No. 5-07-70-W0086, as amended, renewed or superceded, between the Southeastern Colorado Water Conservancy District and the United States, and the allocation principles adopted by the Southeastern Colorado Water Conservancy District on November 29, 1979, and confirmed by the district court of Pueblo County in Civil Action No. 40487 by decree dated December 18, 1979, including any subsequent modifications made by the district that are confirmed by the District Court;

“(E) the yield of the Fryingpan-Arkansas Project from its West Slope and East Slope water rights; or

“(F) the ability of individuals or entities located within the natural basin of the Arkansas River within Colorado to enter into contracts for the use of excess water storage and conveyance capacity

pursuant to section 8 of this Act or any other authority under Reclamation law.

"(2) To the extent such contracts are with an individual or entity that does not have an allocation of Project carry over storage space pursuant to the allocation principles adopted by the Southeastern Colorado Water Conservancy District on November 29, 1979, and confirmed by the District Court of Pueblo County in Civil Action No. 40487 by decree dated December 18, 1979, including any subsequent modifications made by the District that are confirmed by the District Court ('non-qualified' entities); the contracts shall not impair or otherwise interfere with the ability of qualified entities located within the natural basin of the Arkansas River within Colorado to enter into contracts for the use of excess water storage and conveyance capacity pursuant to this section 8. Except as provided in section 9, before entering into such a contract with an individual or entity that will use water stored or conveyed under such contract outside of the natural basin of the Arkansas River within Colorado, the Secretary shall provide the Southeastern Colorado Water Conservancy District a first right of refusal, exercisable within 90 days, to enter into contracts for the use of excess water storage and conveyance capacity made available to the individual or entity that will use water

stored or conveyed under such contract outside of the natural basin of the Arkansas River within Colorado.

"(3) Nothing in sections 8 through 12 of this Act shall--

"(A) increase diversions of Project water from the natural basin of the Colorado River;

"(B) increase diversions of nonproject water from the natural basin of the Colorado River within Colorado into another river basin for delivery or storage, except as provided in section 12 of this Act;

"(C) affect in any way contracts, or the renewal of contracts, entered into pursuant to authority other than section 8 of this Act, including, but not limited to, Contract Nos. 00XX6C0049 and 009D6C0048 between the Board of Water Works of Pueblo, Colorado and the United States, or the renewal of Contract Nos. 00XX6C0049 and 009D60048; Contract No. 6-07-70-W0090 (formerly Agreement No. 14-06-700-6019) between the Cities of Aurora and Colorado Springs and the United States; Contract No. 7-07-7010056 between Twin Lakes Reservoir and Canal Company and the United States; Contract No. 9-07-70-W0099 between the United States and High Line Canal Company; and Contract No. 2-07-70-W0104 between Board of Water Works of Pueblo and the United States; or

“(D) affect the interpretation or implementation of existing law or legislation for any other Congressionally authorized water project.

“(c) Subject to the provisions of subsection (b), the Secretary may enter into contracts authorized by this section upon such terms and conditions as the Secretary may determine to be just and equitable. The term of any such contract shall be for such period, not to exceed 40 years, as the Secretary deems appropriate. Upon expiration, such contracts may be renewed upon such terms and conditions as may be mutually agreeable to the Secretary and the contractor for the use of excess capacity.

“(d) The Secretary shall establish such charges, subject to subsection (e), for the use of excess capacity as the Secretary deems appropriate. Such charges shall consist of the following components.

“(1) One component shall reflect either

(A) construction costs based on either the original cost, the estimated current costs, or other appropriate measure of costs, including interest as provided in paragraph (3) of this subsection, of constructing the Fryingpan-Arkansas project facilities involved; or

(B) another appropriate rate, such as a market rate.

“ (2) A second, separate component shall reflect an appropriate charge for operating, maintaining, and replacing these same facilities.

“ (3) Except in the case of a market based rate, when excess capacity in Fryingpan-Arkansas Project facilities will be used to divert, store, impound, pump, or convey nonproject water for municipal and industrial purposes, an interest component using the rate determined by the Secretary in accordance with the Water Supply Act of 1958 (43 U.S.C. §390b).

“ (e) All charges established pursuant to this section shall be just and equitable as to the rates paid by the project contractors that receive project water from the Fryingpan-Arkansas Project facilities. The project contractor rate shall be the baseline from which adjustments can be made based on the particular circumstances involved in the contract.

“ (f) Prior to the execution of any contracts under this section, the Secretary shall execute an agreement with the Southeastern Colorado Water Activity Enterprise to provide guidelines for the terms to be contained in the contracts executed pursuant to this section. Such guidelines shall appropriately address impacts associated with water operations under the contracts, surcharges established by the Enterprise, reimbursement of costs incurred, and water quality monitoring, as identified by the Southeastern Colorado Water Activity Enterprise and the Secretary.

“(g) Any contract executed under this section shall contain a provision pursuant to which the contracting entity agrees to cooperate in a voluntary flow management program designed to maintain a target minimum flow of 100 cfs just below Pueblo Dam.

“SEC. 9. (a) The Secretary of the Interior may enter into new and renewal contracts with the City of Aurora, Colorado, or an enterprise of the City, for a term not to exceed the term referenced in Section 8(c), for use of storage or carrying capacity excess of the requirements of the Fryingpan-Arkansas Project, Colorado, for the purpose of impounding, storage, and carriage of non-project water for domestic, municipal, industrial and other beneficial purposes.

Such contracts shall be--

“(1) limited to the storage and carriage of waters appropriated from the Arkansas River held by the City of Aurora, Colorado, or an enterprise of the City that -

(A) are decreed water rights and owned by the City of Aurora, Colorado, or an enterprise of the City as of December 7, 2001, or;

(B) are water rights described in a Colorado Water Court water rights application pending as of December 7, 2001, or an amendment or re-filing thereof, as long as such amendment or re-filing does not increase the draft of water from the Arkansas

Basin that would have been available to City of Aurora, Colorado, or an enterprise of the City under the original application, or

(C) result from water lease agreements existing as of December 7, 2001, including any renewal or replacement contract for no more than the existing amount of water, or

(D) result from interruptible supply agreements or water bank transactions authorized under Colorado law, and operating no more than five calendar years during any period of ten consecutive calendar years, or

(E) is traded to, or exchanged with, the City of Aurora, Colorado, or an enterprise of the City for one of the foregoing items (A) through (C) as long as such trade or exchange does not increase the draft of water from the Arkansas River Basin that would have been available to the City of Aurora, Colorado, or an enterprise of the City under subparagraphs (A) through (C);

“(2) are for water obtained by the City of Aurora, Colorado, or an enterprise of the City from the Colorado River consistent with section 12;

“(3) contain a provision pursuant to which the City of Aurora agrees to cooperate in a voluntary flow management program designed to maintain a target minimum

flow of 100 cfs just below Pueblo dam;

“(4) include a provision whereby the City of Aurora, Colorado, or an enterprise of the City, agrees to participate in a long-term water quality monitoring and management program as outlined in the Implementation Committee Report dated April 19, 2001; and

“(5) ensure compliance with the Arkansas River Compact as executed by the states of Colorado and Kansas on December 14, 1948.

“(b) Prior to the execution of any renewal contract with the City of Aurora, the Secretary of the Interior shall execute an Agreement with the Southeastern Colorado Water Activity Enterprise, which agreement shall provide guidelines for the terms to be contained in a renewal contract executed pursuant to this section. Such guidelines shall appropriately address those impacts associated with water operations under the contracts, such as storage and convenience charges, surcharges established by the Enterprise, reimbursement of costs incurred, and water quality monitoring, as identified by the Southeastern Colorado Enterprise and the Secretary.

“(c) Any contract executed under the authority of subsection (a) or (b) shall be in compliance with the provisions of section 8(b)(1).

“(d) The Secretary shall establish such charges under this section 9 in a manner consistent with the provisions of section 8(d) and (e).

"SEC 10. (a) Except as provided under subsection (b), all revenue generated pursuant to contracts executed under sections 8 and 9 shall be credited as follows:

"(1) That portion of the charges established pursuant to section 8(d) and 9(d) which is attributable to the component which reflects interest shall be credited as a general credit to the Reclamation Fund.

"(2) That portion of the charges established pursuant to section 8(d)(2) and the comparable provision of 9(d) shall be credited against the appropriate project operation, maintenance, and replacement costs.

"(3) All remaining revenues in excess of those in paragraphs (1) and (2) of this subsection shall be credited as follows:

(A) If reimbursable federal construction costs are outstanding for the Fryingpan-Arkansas project at the time revenues are received, then all remaining revenues shall be covered into the Reclamation Fund and credited to the Fryingpan-Arkansas project. All remaining revenues shall be credited against such reimbursable costs in a manner the Secretary deems to be just and equitable as to the reimbursable purposes which are involved. The revenues so credited shall not be applied so as to reduce the amount of the current annual payments due the Secretary from the project contractors or any other parties responsible for

paying outstanding reimbursable project construction costs unless and until the party's current annual payment due exceeds the remaining reimbursable construction costs payable by the party.

“(B) If no reimbursable Federal Fryingpan-Arkansas project construction costs are outstanding at the time revenues are received, then all remaining revenues shall be credited to a separate fund, established in the Treasury of the United States, to be known as the Fryingpan-Arkansas Project Fund, which shall remain available, without appropriation, for new federally funded construction on the project, including, but not limited to, additions, rehabilitations and betterments, safety of dams modifications, and major capital replacements, applied against the Federal reimbursable costs, if any, of such new construction in such manner as the Secretary deems just and equitable as to the Federal reimbursable project purposes involved. No expenditures may be made from the Fryingpan-Arkansas Project Fund without the express written consent of the Secretary and the Enterprise.

“(b) DIRECT PAYMENTS. - Payments generated pursuant to contract terms established under section 8(f) and the comparable provisions of 9(b) shall be made directly by the contractors to the Southeastern Colorado Water Activity Enterprise.

"SEC. 11. (a) Nonproject water diverted, stored, impounded, pumped, or conveyed under a contract entered into pursuant to section 8 or 9 shall be exempt from any acreage limitation provisions of the Act of June 17, 1902 (32 Stat. 388), and Acts amendatory thereof and supplementary thereto including, but not limited to, the Warren Act of 1911, the Reclamation Reform Act of 1982 (96 Stat. 1263; 43 U.S.C. 390aa-390zz-1) and from any farm unit size limitations established pursuant to section 4(c)(5) of the Act of August 11, 1939 (Chapter 717; 16 U.S.C. 590z- 2(c)(5)).

(b) Notwithstanding subsection (a),- if such nonproject water is commingled with project water in Reclamation project facilities, and the resulting commingled supply is used to irrigate lands in a project contractor's service area, then such commingled water shall bear the same acreage limitations or farm unit size limitations as the project water unless --

"(1) contract provisions are in effect which provide that project or nonproject water, or both, will be accounted for on a quantitative basis, that project water will not be delivered to ineligible land, and that appropriate charges, as determined by the Secretary, will be paid for the project water, and

"(2) the charges for the use of the excess capacity include an appropriate interest component, as determined by the Secretary.

"SEC. 12. (a) Excess water storage capacity of the Fryingpan-Arkansas project to divert, store, impound, pump, or convey nonproject water made available under contracts executed pursuant to the provisions of sections 8 and 9 shall not be utilized so as to increase diversion of nonproject water from the natural basin of the Colorado River within Colorado into another river basin for delivery or storage unless --

"(1) the diversion is the subject of a decree entered prior to the effective date of this section for which no new infrastructure or legal approvals are necessary to divert the water out of the natural basin; or

"(2) the diversion is the subject of an agreement in existence on the date of the enactment of this section, contemplating additional diversions diverted through or stored in the facilities authorized by this Act, between the beneficiary of such transbasin diversion and the water conservation district, as defined under Colorado law, from within whose boundaries the waters are proposed for diversion; or

"(3) the diversion is the subject of an intergovernmental agreement or other contractual arrangement executed after the date of the enactment of this section, between the beneficiary of such transbasin diversion and the water conservation district, as defined under Colorado law, from within whose boundaries the waters are proposed for diversion; or

"(4) the beneficiary of such transbasin diversion provides compensatory storage or alternate water supply in an amount equal to the quantity diverted out of the basin for the benefit of the water conservation district, as defined under Colorado law, from within whose boundaries the waters are proposed for diversion.

"(b) Prior to executing any agreement, or arrangement or agreement for provision of compensatory storage or alternative water supply, that allows for increased diversions of nonproject water as described in subsection (a), the parties to such agreements or arrangements shall submit the agreement or arrangement to the Secretary, who, within 30 days, shall submit such agreement or arrangement to the President Pro Tempore of the Senate and the Speaker of the House of Representatives for a period of not less than 60 days.

"(c) This section shall not be considered as precedent for any other congressionally authorized project.

EXHIBIT 3

**To the Intergovernmental Agreement among
The Southeastern Colorado Water Conservancy District
The City of Aurora, The City of Fountain, The City of Pueblo
The City of Colorado Springs, and
The Board of Water Works of Pueblo, Colorado**

**Water Rights Cases Pending in Water Division No. 2 to be Settled
Non-Opposition to Diligence Proceedings**

1) Southeastern Colorado Water Conservancy District

- a) Case No. 00CW138, Pueblo Reservoir Enlargement, including future diligence proceedings.
- b) Case No. 00CW139, Turquoise Reservoir Enlargement, including future diligence proceedings.
- c) Case No. 01CW151, Fryingpan-Arkansas Project return flow exchange, including future diligence proceedings.
- d) Case No. W-28, Fryingpan-Arkansas Project conditional water rights.

2) City of Aurora

- a) Case No. 87CW63 (00CW28), Exchange of Rocky Ford Ditch water upstream from Pueblo Reservoir, including any future diligence proceedings.
- b) Case No. 98CW137(b), Spurlin Shaw-Hayden Ranches change of water rights to Box Creek Reservoir.
- c) Case No. 99CW169(B), Rocky Ford Ditch Change of Water Rights.
- d) Case No. 99CW170, Upstream Exchange of Rocky Ford Ditch Water (A & B), including future diligence proceedings.
- e) Case No. 01CW145, Box Creek Reservoir.

- 3) City of Fountain
 - a) Case No. 01CW108, Fry-Ark Project and Non-Project Water Exchange, including future diligence proceedings.
 - b) Case No. 01CW146, Supplemental Plan for Augmentation.
- 4) City of Pueblo
 - a) Case No. 01CW160, RICD Water Right, including future diligence proceedings.
- 5) City of Colorado Springs
 - a) Any diligence proceeding related to the conditional water rights originally decreed in:
 - i) Case No. 84CW202 (A & B).
 - ii) Case No. 84CW203 (A & B).
 - iii) Case No. 86CW118 (A & B).
 - iv) Case No. 89CW36.
 - v) Case No. 90CW056
- 6) The Board of Water Works of Pueblo, Colorado
 - a) Any diligence proceeding related to the conditional water rights originally decreed in:
 - i) Case No. 84CW177 (A & B).
 - ii) Case No. 84CW178 (A & B).
 - iii) Case No. 86CW111 (A & B).
 - iv) Case No. 93CW86.
 - v) Case No. W-76
 - b) Settlement of Case No. 95CW216(C), Application of Board of Water Works of Pueblo.

CERTIFICATE OF SERVICE

I certify that on November 7 , 2004, I served a copy of the foregoing **STIPULATION BETWEEN CITY OF PUEBLO AND SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT** to the following by

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