RIO GRANDE WATER CONSERVATION DISTRICT
BOARD OF DIRECTORS SPECIAL MEETING
April 12, 2019 at 1:00 p.m.
RIO GRANDE WATER CONSERVATION DISTRICT CONFERENCE ROOM

Present: Greg Higel, President; Brian David, Vice-President; Dwight Martin, Secretary/Treasurer; Peggy Godfrey, Director; Mike McClure, Director; Cory Off, Director; Bill McClure, Director; Lewis Entz, Director; and Armando Valdez, Director.

Staff and Consultants: Pete Ampe, Hill & Robbins, P.C.; Cleave Simpson, General Manager; Clinton Phillips, District Engineer; Allen Davey, District Engineer; Chris Ivers, Deputy Program Manager; Amber Pacheco, Program Manager, Tim Carden, HCP Coordinator/Program Assistant; Linda Ramirez, Program Assistant; Michael Carson, Database Administrator and April Mondragon, Administrative Assistant.

Guests: Patrick O'Neil, Karla Shriver.

CALL TO ORDER
President Greg Higel called the meeting to order at 1:10 p.m. The Pledge of Allegiance was recited. There was a quorum present for the meeting.

INTRODUCTION OF STAFF & GUESTS
President Higel welcomed all those present and asked for introductions.

APPROVE AGENDA
President Higel asked for any changes or additions to the agenda. A motion was made by Dwight Martin to approve the agenda as presented. The motion was seconded by Peggy Godfrey and unanimously approved.

CONSIDER FUNDING REQUEST FROM THE MOSCA/HOOPER CONSERVATION DISTRICT
President Higel asked for consideration of funding request from the Mosca/Hooper Conservation District. Patrick O’Neil presented the details of the San Luis Valley Targeted Recharge Project funding request (copy attached). Mr. O’Neil requested $4,200.00 with a total estimated cost of the proposed project of $81,565. Mr. O’Neil stated the data would be useful for clarifying transmissivity and hydraulic conductivity values in the field and for the basin model. The Board of Directors as well as the public were given the opportunity to ask questions and provide comments.

A motion was made by Cory Off to approve the funding request from the Mosca/Hooper Conservation District. The motion was seconded by Peggy Godfrey and unanimously approved. (copy attached)

President Higel thanked Lewis Entz for his time, service and dedication to the Rio Grande Water Conservation District. Mr. Entz stated he started in 1968 and this year would mark 50 plus years in public service. Armando Valdez also thanked Mr. Entz for his public service as well as his military service.

REVIEW AND ACTION SUBDISTRICT #1 2019 ANNUAL REPLACEMENT PLAN
President Higel asked for review and action of Subdistrict No.1 2019 Annual Replacement Plan. Cleave Simpson provided the Board with an overview of the eighth (8th) Annual Replacement Plan. Mr. Simpson provided what drives the stream impacts and provided the predictions method. Mr. Simpson reported the Annual Replacement Plan highlights the source of water and explanation of water rights.

- Resolution to allow Subdistrict No. 1 to use a portion of the Closed Basin Project for the replacement of injurious depletions. (copy attached)

A motion was made by Lewis Entz to accept the resolution to allow Subdistrict No. 1 to use a portion of the Closed Basin Project for the replacement of injurious depletions. The motion was seconded by Armando Valdez. The motion was approved by all except one, Peggy Godfrey was opposed, the motion passed.

1
• Resolution for approval of the 2019 Annual Replacement Plan. (copy attached)

A motion was made by Dwight Martin to accept the resolution for approval of the Subdistrict No. 1 2019 Annual Replacement Plan. The motion was seconded by Peggy Godfrey and unanimously approved.

• Consider a new appointment for Subdistrict No. 1 Board of Managers, from the Prairie Ditch Company, to replace Mike Mitchell. The prairie ditch asked Clay Mitchell be appointed.

A motion was made by Lewis Entz to appoint Clay Mitchell to replace Mike Mitchell on the Subdistrict No. 1 Board of Managers. The motion was seconded by Cory Off and unanimously approved.

• Consider approval for Subdistrict No. 1 to liquidate/sale some assets (sprinklers). Cleave Simpson stated the assets are located on the Subdistrict owned property. The Subdistrict would hold a sealed bid process and are seeking the Board of Directors approval to liquidate.

A motion was made by Cory Off to table the consideration until the Tuesday April 16, 2019 quarterly meeting in order to obtain more information. The motion was seconded by Bill McClure and unanimously approved.

Review and Action Subdistrict No. 2 2019 Annual Replacement Plan
President Higel asked for the review and action of Subdistrict No. 2 2019 Annual Replacement Plan. Cleave Simpson stated this is the first Annual Replacement Plan for Subdistrict No. 2 and like Subdistrict No. 1 a response function is prepared to predict what the injury is. Mr. Simpson stated Subdistrict No. 2 does not have recharge decrees therefor has no off set. Pete Ampe provided further clarification on how the injury predictions are made. Amber Pacheco provided the Board with Subdistrict No. 2’s portfolio resources as well as the secured forbearance agreements. Mr. Simpson stated Subdistrict No. 2 does not have an aquifer sustainability requirement, and should be able to prove to the State they have the resources to cover the injury.

• Resolution to allow Subdistrict No. 2 to use a portion of the Closed Basin Project for the replacement of injurious depletions. (copy attached)

A motion was made by Dwight Martin to accept the resolution to allow Subdistrict No. 2 to use a portion of the Closed Basin Project for the replacement of injurious depletions. The motion was seconded by Cory Off. The motion was approved by all except one, Peggy Godfrey was opposed, the motion passed.

• Resolution for the Rio Grande Water Conservation District to act as financial guarantor for post plan depletions while the subdistrict builds up its own portfolio. (copy attached)

A motion was made by Armando Valdez accept the resolution for the Rio Grande Water Conservation District to act as financial guarantor for post plan depletions while the subdistrict builds up its own portfolio. The motion was seconded by Peggy Godfrey and unanimously approved.

• Resolution for approval of the 2019 Annual Replacement Plan. (copy attached)

A motion was made by Cory Off to accept the resolution for approval of the Subdistrict No. 2 Annual Replacement Plan. The motion was seconded by Brian David and unanimously approved.

Review and Action Subdistrict No. 3 2019 Annual Replacement Plan
President Higel asked for the review and action of Subdistrict No. 3 2019 Annual Replacement Plan. Pete Ampe stated Subdistrict No. 3 would not be asking the District to act as financial guarantor, they will operate as their own. Cleave Simpson stated the subdistrict would go through the same process as the other subdistricts to predict pumping and make replacements to
the Conejos River, the Alamosa River and the Rio Grande River. Mr. Simpson highlighted some of the subdistricts tools that will be used to remedy injurious depletions.

- Resolution to allow Subdistrict No. 3 to use a portion of the Closed Basin Project water for the replacement of injurious depletions. (copy attached)

A motion was made by Dwight Martin to accept the resolution to allow Subdistrict No. 3 to use a portion of the Closed Basin Project for the replacement of injurious depletions. The motion was seconded by Armando Valdez. The motion was approved by all except one, Peggy Godfrey was opposed, the motion passed.

- Resolution for approval of the 2019 Annual Replacement Plan. (copy attached)

A motion was made by Dwight Martin to accept the resolution for approval of the Subdistrict No. 3 Annual Replacement Plan. The motion was seconded by Peggy Godfrey and unanimously approved.

- Consider a new appointment for Subdistrict No. 3 Board of Managers, replace Jack Gilleland. Cleave Simpson stated based off of the straw poll results staff recommends Doug Bagwell be appointed the new Board of Manager for Subdistrict No. 3.

A motion was made by Cory Off to replace Jack Gilleland with Doug Bagwell as the new Subdistrict No. 3 Board of Manager. The motion was seconded by Armando and unanimously approved.

CONSIDER APPROVAL OF A CONTRACT FOR SERVICE WITH THE TRINCHERA WATER CONSERVANCY DISTRICT/SUBDISTRICT FOR 2019

President Higel asked for the consideration of approval of a contract for services with the Trinchera Water Conservancy District/Subdistrict for 2019. Cleave Simpson provided the Board with the terms of the contract and stated the contract is renewable. Pete Ampe stated the agreement does not cover legal or engineering services.

A motion was made by Bill McClure to approve the contract for service with the Trinchera Water Conservancy District/Subdistrict for 2019. The motion was seconded by Peggy Godfrey and unanimously approved.

CONSIDER APPROVAL OF A CONTRACT FOR WATER LEASE AGREEMENT FROM THE TOWN OF CREEDE

President Higel asked for the consideration of approval of a contract for water lease agreement from the Town of Creede. Cleave Simpson provided the Board with the details of the proposed agreement. Pete Ampe stated this lease agreement was not included in the Annual Replacement Plan, however it could be used to replace injurious depletions with the State Engineers approval. Mr. Ampe stated he would prepare a Substitute Water Supply Plan due to it not being decreed for augmentation for Subdistrict purposes.

A motion was made by Armando Valdez to approve the Contract for Water Lease Agreement from the Town of Creede. The motion was seconded by Cory Off and unanimously approved.

CONSIDER COMMENTS TO THE EPA/COE PROPOSED NEW RULE DEFINING THE SCOPE OF WATERS SUBJECT TO FEDERAL REGULATION UNDER THE CLEAN WATER ACT

President Higel asked for the consideration of comments to the EPA/COE proposed new rule defining the scope of waters subject to federal regulation under the Clean Water Act. Peggy Godfrey stated she read it and agreed with it 100 percent.

A motion was made by Cory Off to approve the comments to the EPA/COE. The motion was seconded by Peggy Godfrey and unanimously approved.

DISCUSS AND CONSIDER PROPOSAL FROM THE SAGUACHE CREEK WATER USERS AND MR. RAY NEWMYER

President Higel asked for the discussion and consideration of a proposal from the Saguache Creek Water Users and Mr. Ray Newmyer. Cleave Simpson reported at the January meeting he
informed the Board that he received a notice from Ed Nielsen from the Saguache Creek Water Users requesting the Board consider Ray Newmyer to act on their behalf at the PRT meetings with the District funding the effort. Discussion was held with no decisions or motions made.

EXECUTIVE SESSION
President Higel asked for a motion to go into executive session. A motion was made by Cory Off to go into executive session. The motion was seconded by Dwight Martin and unanimously passed.

ACTION ON EXECUTIVE SESSION DISCUSSION
Pete Ampe stated the Board was in Executive Session and voted to come out. Discussion was related to two (2) personal issues and two (2) water acquisition opportunities.

ADJOURN
Meeting was adjourned at 4:10 p.m.

The next scheduled quarterly meeting will be held on April 16, 2019, at 10:00 a.m.

President

Secretary and Treasurer
REQUEST FOR FUNDING FROM THE RIO GRANDE WATER CONSERVATION DISTRICT

This form is provided to allow a request for funding and a detailed explanation of a proposed project request for funding which conserves and protects the water resources of the Rio Grande Basin exclusive of Costilla County and structures associated with water courses within.

1. Name of Project: _San Luis Valley Targeted Recharge Project – Pilot Project – Supplemental Funding Request to Deploy Hydraulic Profiling Tool (HPT) for Detailed Well Logging and Hydraulic Conductivity Determination

2. Responsible party or entity: Mosca-Hooper Conservation District

3. Contact information: Patrick O’Neill – Supervisor / Robin Cope – District Manager _

4. Date of request: 19 March 2019

5. Location of Project (Legal Description)

   GPS Coordinates  Easting -105.932222   Northing 37.643371

6. Detailed Description of Proposed Project: Photos attached Yes______ No_x*_____  

   *PDF of Hydraulic Profiling Tool description attached.

The following request is made, pending budget modification approval from the Colorado Water Conservation Board related to this request.

Mosca-Hooper Conservation District (MHCD) has secured funding from Colorado Water Conservation Board (CWCB) to fund the drilling of 5 monitoring wells, as part of the Targeted Recharge Project (Electrical Resistivity Imaging) the district is deploying in April 2019. The funding level secured for the wells is $9,800 from CWCB. MHCD has identified a well driller with equipment capable of retrieving cuttings offering good resolution (approximately 6"), to detail where clay lenses, rock, gravel, and sand are located, for $10,000.

The same driller has equipment capable of drilling the monitoring wells and deploying a Hydraulic Profiling Tool (HPT), which would offer a near-continuous logging of the pressure required to inject a flow of water into the soil as the probe is advanced into the subsurface, which is reported to offer an excellent indicator of formation permeability. This data can be utilized to then calculate an estimate of hydraulic conductivity, and further transmissivity, of the materials surrounding the monitoring wells. The cost of this method of developing the monitoring wells is estimated to be $13,500.
To permit the wells dug as monitoring wells, the Division of Water Resources requires a $100 fee per well. There will be five wells developed to monitoring well standards as part of this project, totaling $500 to permit all wells accordingly.

MHCD requests Rio Grande Water Conservation District fund $4,200 towards the project ($500 permitting fees + $13,500 well drilling with HPT – $9,800 grant funds already secured from CWCB), to provide the additional data from each of the monitoring wells which the HPT approach offers and so the wells may be permitted as monitoring wells, for future use by RGWCD within its well monitoring network. Deployment of the HPT could be useful for validating further assumptions of transmissivity currently in use within the Rio Grande Decision Support System for groundwater modeling in the unconfined aquifer in the area surrounding the Targeted Recharge Project test site, and the addition of wells to the monitoring network helpful in gaining resolution relative to response rates for water level changes.

7. Amount of funding requested for proposed project from the RGWCD: $4,200

8. Total estimated cost of proposed project: $81,565

9. Cost share partners (if applicable) and amounts of funds to be contributed by each:

   - Colorado Water Conservation Board $43,100
   - Colorado Healthy Rivers Fund $20,265
   - MillerCoors $10,000
   - Soil Health Services, PBC $ 4,000

10. Need for 404 permit required (attached authority) Yes ___ No ___ X ___ Covered by Nationwide

11. Approval by District: Amount 4,200 Date 4-12-19

12. RGWCD General Manager: Approved ___ Disapproved

13. Date Project Completed:

14. Documentation Completed Date:
RESOLUTION
OF THE BOARD OF DIRECTORS OF THE
RIO GRANDE WATER CONSERVATION DISTRICT

TO ALLOW SUBDISTRICT NO. 1 TO USE A PORTION OF THE CLOSED BASIN
PROJECT FOR THE REPLACEMENT OF INJURIOUS DEPLETIONS UNDER THE
2019 ANNUAL REPLACEMENT PLAN

The Board of Directors of the Rio Grande Water Conservation District at a special
meeting held on April 12, 2019, in Alamosa, Colorado does hereby resolve that:

WHEREAS, Special Improvement District No. 1 of the Rio Grande Water Conservation
District ("Subdistrict No. 1") was created to conserve and stabilize the water supply and
groundwater storage in the unconfined aquifer of the Closed Basin for irrigation, domestic,
municipal and other beneficial uses for the water users within the boundaries of Subdistrict No. 1; and

WHEREAS, Subdistrict No. 1 is operating under an approved Plan of Water
Management which requires the development of an Annual Replacement Plan ("ARP") showing,
among other things, the predicted injurious depletions caused by Subdistrict Well pumping and
the manner in which the Subdistrict will remedy those depletions; and

WHEREAS, the production from the Closed Basin Project can and should be used as a
source of water to remedy injurious depletions caused by Subdistrict Well Pumping.

RESOLUTION

NOW, THEREFORE, be it resolved by the Board of Directors of the Rio Grande Water
Conservation District that:

1. The District anticipates that the vast majority of this Project Water will be used to
replace non-irrigation season depletions from October 31 through March 31. There may be
circumstances during the irrigation season when Subdistrict No. 1 cannot deliver water to the Rio
Grande below the Chicago Ditch due to intervening dry stream reaches or excessive losses in
deliveries. In those circumstances, the District believes Project Water is an appropriate
replacement source, but intends that its use during the irrigation season be minimized.

2. The inclusion of 500 acre-feet of water from the production of the Closed Basin
Project as a source of supply in the Subdistrict No. 1 2019 Annual Replacement Plan ("2019
ARP") and the use of said water under the 2019 ARP to remedy injurious depletions is approved.
ATTEST:

RIO GRANDE WATER
CONSERVATION DISTRICT

By: Greg Higel
President

By: Dwight Martin
Secretary/Treasurer

COUNTY OF ALAMOSA )
STATE OF COLORADO ) ss

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board of Directors of the Rio Grande Water Conservation District.

Witness my hand and seal.

My commission expires: 7/11/2021

LINDA S. RAMIREZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 1934010173
MY COMMISSION EXPIRES JULY 11, 2021

Notary Public
RESOLUTION
OF THE BOARD OF DIRECTORS OF THE
RIO GRANDE WATER CONSERVATION DISTRICT

APPROVING THE 2019 ANNUAL REPLACEMENT PLAN
OF SPECIAL IMPROVEMENT DISTRICT NO. 1
OF THE RIO GRANDE WATER CONSERVATION DISTRICT

The Board of Directors of the Rio Grande Water Conservation District at a special
meeting held on April 12, 2019, in Alamosa, Colorado does hereby resolve that:

WHEREAS, Special Improvement District No. 1 of the Rio Grande Water Conservation
District ("Subdistrict No. 1") was created to conserve and stabilize the water supply and
groundwater storage in the unconfined aquifer of the Closed Basin for irrigation, domestic,
municipal and other beneficial uses for the water users with the boundaries of Subdistrict No. 1; and

WHEREAS, Subdistrict No. 1 is operating under an approved Plan of Water
Management which requires the development of an Annual Replacement Plan showing, among
other things, the predicted injurious depletions caused by Subdistrict Well groundwater
withdrawals and the manner in which the Subdistrict will remedy those depletions.

RESOLUTION

NOW, THEREFORE, be it resolved by the Board of Directors of the Rio Grande Water
Conservation District that:

1. The Board of Directors of the Rio Grande Water Conservation District hereby
accepts and approves the 2019 Annual Replacement Plan of Special Improvement District No. 1
of the Rio Grande Water Conservation District.

ATTEST:

RIO GRANDE WATER
CONSERVATION DISTRICT

By: Greg Higiel
President

By: Dwight Martin
Secretary/Treasurer
COUNTY OF ALAMOSA  

STATE OF COLORADO  

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board of Directors of the Rio Grande Water Conservation District.

Witness my hand and seal.

My commission expires: 7/16/2031

[Signature]

LINDA S. RAMIREZ  
NOTARY PUBLIC  
STATE OF COLORADO  
NOTARY ID 1924010173  
MY COMMISSION EXPIRES JULY 19, 2023

Notary Public
RESOLUTION
OF THE BOARD OF DIRECTORS OF THE
RIO GRANDE WATER CONSERVATION DISTRICT

TO ALLOW SPECIAL IMPROVEMENT DISTRICT NO. 3 TO USE A PORTION OF
THE PRODUCTION OF THE CLOSED BASIN PROJECT FOR THE REPLACEMENT
OF INJURIOUS DEPLETIONS UNDER ITS 2019 ANNUAL REPLACEMENT PLAN

The Board of Directors of the Rio Grande Water Conservation District at a special
meeting held on April 12, 2019, in Alamosa, Colorado does hereby resolve that:

WHEREAS, Special Improvement District No. 3 of the Rio Grande Water Conservation
District ("Subdistrict No. 3") was created to conserve and stabilize the water supply and
groundwater storage for irrigation, domestic, municipal and other beneficial uses for the water
users within the boundaries of Subdistrict No. 3 and to remedy injurious depletions caused by
groundwater withdrawals from Subdistrict Wells; and

WHEREAS, Subdistrict No. 3 is operating under an approved Plan of Water
Management which requires the development of an Annual Replacement Plan ("ARP") showing,
among other things, the predicted injurious depletions caused by Subdistrict Well groundwater
withdrawals and the manner in which the Subdistrict will remedy those depletions; and

WHEREAS, the production from the Closed Basin Project can and should be used as a
source of water to remedy injurious depletions caused by groundwater withdrawals from wells
included in the Subdistrict’s 2019 ARP.

RESOLUTION

NOW, THEREFORE, be it resolved by the Board of Directors of the Rio Grande Water
Conservation District that:

1. The District anticipates that the vast majority of this Project Water will be used to
replace non-irrigation season depletions from November 1 through March 31. There may be
circumstances during the irrigation season when Subdistrict No. 3 cannot deliver water to the Rio
Grande below the Chicago Ditch due to intervening dry stream reaches or excessive losses in
deliveries. In those circumstances, the District believes Project Water is an appropriate
replacement source, but intends that its use during the irrigation season be minimized.

2. The inclusion of 1,300 acre-feet of water from the production of the Closed Basin
Project as a source of supply in the Subdistrict No. 3 2019 Annual Replacement Plan in the
amount of 300 acre-feet to the Rio Grande River and 1,000 acre-feet to the Conejos River and
the use of said water under the 2019 ARP to remedy injurious stream depletions is approved.
ATTEST:

By: Dwight Martin
Secretary/Treasurer

RIO GRANDE WATER
CONSERVATION DISTRICT

By: Greg Higel
President

COUNTY OF ALAMOSA )
) ss
STATE OF COLORADO )

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board of Directors of the Rio Grande Water Conservation District.

Witness my hand and seal.

My commission expires: 7/16/2021

LINDA S. RAMIREZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19044610173
MY COMMISSION EXPIRES JULY 16, 2021

Notary Public
RESOLUTION OF THE BOARD OF DIRECTORS
OF THE
RIO GRANDE WATER CONSERVATION DISTRICT

April 12, 2019

APPROVING 2019 ANNUAL REPLACEMENT PLAN
OF SPECIAL IMPROVEMENT DISTRICT NO. 3
OF THE RIO GRANDE WATER CONSERVATION DISTRICT

The Board of Directors of the Rio Grande Water Conservation District ("District") at a
special meeting held on April 12, 2019, in Alamosa, Colorado does hereby resolve that:

WHEREAS, Special Improvement District No. 3 of the Rio Grande Water Conservation
District ("Subdistrict No. 3") was created to conserve and stabilize the water supply and
groundwater storage for irrigation, domestic, municipal and other beneficial uses for the water
users within the boundaries of Subdistrict No. 3 and to remedy injurious depletions caused by
groundwater withdrawals from Subdistrict Wells; and

WHEREAS, Subdistrict No. 3 is operating under an approved Plan of Water
Management which requires the development of an Annual Replacement Plan showing, among
other things, the predicted injurious depletions caused by Subdistrict Well groundwater
withdrawals and the manner in which the Subdistrict will remedy those depletions; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the District on
the 12th day of April, 2019 that:

The District hereby accepts and approves the Subdistrict No. 3 2019 Annual Replacement
Plan.

ATTEST:

By:  
Dwight Martin
Secretary/Treasurer

By:  
Greg Higel
President

RIO GRANDE WATER CONSERVATION
DISTRICT
COUNTY OF ALAMOSA
STATE OF COLORADO

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board of Directors of the Rio Grande Water Conservation District

Witness my hand and seal.

My commission expires: 7/16/2021

LINDA S. RAMIREZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19934010173
MY COMMISSION EXPRES JULY 16, 2021

Notary Public
RESOLUTION
OF THE BOARD OF DIRECTORS OF THE
RIO GRANDE WATER CONSERVATION DISTRICT

TO ALLOW SPECIAL IMPROVEMENT DISTRICT NO. 2 TO USE A PORTION OF
THE PRODUCTION OF THE CLOSED BASIN PROJECT FOR THE REPLACEMENT
OF INJURIOUS DEPLETIONS UNDER ITS 2019 ANNUAL REPLACEMENT PLAN

The Board of Directors of the Rio Grande Water Conservation District at a special
meeting held on April 12, 2019, in Alamosa, Colorado does hereby resolve that:

WHEREAS, Special Improvement District No. 2 of the Rio Grande Water Conservation
District ("Subdistrict No. 2") was created to conserve and stabilize the water supply and
groundwater storage for irrigation, domestic, municipal and other beneficial uses for the water
users within the boundaries of Subdistrict No. 2 and to remedy injurious depletions caused by
groundwater withdrawals from Subdistrict Wells; and

WHEREAS, Subdistrict No. 2 is operating under an approved Plan of Water
Management which requires the development of an Annual Replacement Plan ("ARP") showing,
among other things, the predicted injurious depletions caused by Subdistrict Well groundwater
withdrawals and the manner in which the Subdistrict will remedy those depletions; and

WHEREAS, the production from the Closed Basin Project can and should be used as a
source of water to remedy injurious depletions caused by groundwater withdrawals from wells
included in the Subdistrict’s 2019 ARP.

RESOLUTION

NOW, THEREFORE, be it resolved by the Board of Directors of the Rio Grande Water
Conservation District that:

1. The District anticipates that the vast majority of this Project Water will be used to
replace non-irrigation season depletions from November 1 through March 31. There may be
circumstances during the irrigation season when Subdistrict No. 2 cannot deliver water to the Rio
Grande below the Chicago Ditch due to intervening dry stream reaches or excessive losses in
deliveries. In those circumstances, the District believes Project Water is an appropriate
replacement source, but intends that its use during the irrigation season be minimized.

2. The inclusion of 800 acre-feet of water from the production of the Closed Basin
Project as a source of supply in the Subdistrict No. 2 2019 Annual Replacement Plan and the use
of said water under the 2019 ARP to remedy injurious stream depletions is approved.
ATTEST:

By:    

Dwight Martin
Secretary/Treasurer

RIO GRANDE WATER
CONSERVATION DISTRICT

By:    

Greg Higel
President

COUNTY OF ALAMOSA    )
) ss
STATE OF COLORADO    )

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board
of Directors of the Rio Grande Water Conservation District.

Witness my hand and seal.

My commission expires: 5/11/2021

LINDA S. RAMIREZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19934010173
MY COMMISSION EXPIRES JULY 10, 2021

Notary Public
RIO GRANDE WATER CONSERVATION DISTRICT

April 12, 2018

RESOLUTION
FOR THE DISTRICT TO ACT AS FINANCIAL GUARANTOR OF THE REPLACEMENT OBLIGATIONS OF SUBDISTRICT NO. 2

The Board of Directors of the Rio Grande Water Conservation District ("District") does hereby resolve that:

WHEREAS, Special Improvement District No. 2 of the Rio Grande Water Conservation District ("Subdistrict No. 2") was created to ensure remedy of injurious stream depletions to senior water rights resulting from the withdrawal of groundwater from wells in Subdistrict No. 2 and to conserve and stabilize the water supply and amount of groundwater in storage for irrigation and other beneficial uses for the water users within the boundaries of Subdistrict No. 2; and

WHEREAS, Subdistrict No. 2 is operating under an approved Plan of Water Management which requires the development of an Annual Replacement Plan ("ARP") showing, among other things, the predicted injurious stream depletions caused by Subdistrict Well pumping and the manner in which Subdistrict No. 2 will remedy those stream depletions; and

WHEREAS, Subdistrict No. 2 continues to work diligently to obtain permanent and/or renewable supplies to remedy future stream depletions caused by present or future groundwater withdrawals by Subdistrict No. 2 wells, and

WHEREAS, at the present time it is impossible for Subdistrict No. 2 to acquire a sufficient quantity of water as a permanent supply, and sufficient reservoir storage space available for that quantity of water, to cover total post-plan injurious stream depletions after this Plan Year.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the District on the 12th day of April, 2019 that:

1. In order to address the issue identified above, the District, which is created by statute and has a mill levee which provides an annual and consistent stream of monies, will act as a financial guarantor itself if Subdistrict No. 2 were to fail or otherwise be unable to replace injurious stream depletions caused by the lagged effects of past and present groundwater withdrawals by Subdistrict No. 2 wells.

2. The District will provide funds to acquire water or compensate parties directly to insure injured parties are kept whole. This mechanism will act as a temporary measure to assure future replacement of injurious stream depletions until Subdistrict No. 2 is able to obtain permanent and/or renewable supplies to remedy future stream depletions caused by present or future groundwater withdrawals.
3. If Subdistrict No. 2 were to fail, the individual well owners of the former Subdistrict No. 2 would have to obtain plans for augmentation or take other measures to comply with rules and regulations governing existing groundwater withdrawals. Presumably, those plans would be required to replace these post-pumping stream depletions into the future. In the interim, the District would protect senior surface rights as explained in this Resolution.

ATTEST:

By: Dwight Martin
Secretary/Treasurer

RIO GRANDE WATER CONSERVATION DISTRICT

By: Greg Higel
President

COUNTY OF ALAMOSA )
) ss
STATE OF COLORADO )

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board of Directors of the Rio Grande Water Conservation District.

Witness my hand and seal.

My commission expires: 7/11/2021

LINDA S. RAMIREZ
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 19934010173
1st COMMISSION EXPRESSES JULY 18, 2021

Notary Public
RESOLUTION OF THE BOARD OF DIRECTORS
OF THE
RIO GRANDE WATER CONSERVATION DISTRICT

April 12, 2019

APPROVING 2019 ANNUAL REPLACEMENT PLAN
OF SPECIAL IMPROVEMENT DISTRICT NO. 2
OF THE RIO GRANDE WATER CONSERVATION DISTRICT

The Board of Directors of the Rio Grande Water Conservation District ("District") at a
special meeting held on April 12, 2019, in Alamosa, Colorado does hereby resolve that:

WHEREAS, Special Improvement District No. 2 of the Rio Grande Water Conservation
District ("Subdistrict No. 2") was created to conserve and stabilize the water supply and
groundwater storage for irrigation, domestic, municipal and other beneficial uses for the water
users within the boundaries of Subdistrict No. 2 and to remedy injurious depletions caused by
groundwater withdrawals from Subdistrict Wells; and

WHEREAS, Subdistrict No. 2 is operating under an approved Plan of Water
Management which requires the development of an Annual Replacement Plan showing, among
other things, the predicted injurious depletions caused by Subdistrict Well groundwater
withdrawals and the manner in which the Subdistrict will remedy those depletions; and

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of the District on
the 12th day of April, 2019 that:

The District hereby accepts and approves the Subdistrict No. 2 2019 Annual Replacement
Plan.

ATTEST:

RIO GRANDE WATER CONSERVATION
DISTRICT

By: Dwight Martin
By: Greg Higel
Secretary/Treasurer
President
COUNTY OF ALAMOSA

STATE OF COLORADO

Subscribed and sworn to me this 12th day of April, 2019, by Greg Higel, President, Board of Directors of the Rio Grande Water Conservation District

Witness my hand and seal.

My commission expires: 7/16/2021

LINDA S. RAMIREZ

STATE OF COLORADO

MY COMMISSION EXPIRES JULY 16, 2021

Notary Public

[Signature]
INTERGOVERNMENTAL AGREEMENT REGARDING ASSISTANCE IN THE DEVELOPMENT OF A PLAN OF WATER MANAGEMENT, INCLUDING A GROUNDWATER MANAGEMENT PLAN, AND ANNUAL REPLACEMENT PLANS

This INTERGOVERNMENTAL AGREEMENT REGARDING ASSISTANCE IN THE DEVELOPMENT OF A PLAN OF WATER MANAGEMENT, INCLUDING A GROUNDWATER MANAGEMENT PLAN, AND ANNUAL REPLACEMENT PLANS ("Agreement") is made and entered into as of this 12th day of April, 2019 by and between the RIO GRANDE WATER CONSERVATION DISTRICT, acting by and through its WATER ACTIVITY ENTERPRISE, established under the laws of Colorado ("RGWCD"), and the GROUNDWATER MANAGEMENT SUBDISTRICT OF THE TRINCHERA WATER CONSERVANCY DISTRICT ("Trinchera Subdistrict") a subdistrict of the Trinchera Water Conservancy District established pursuant to section 37-45-121, C.R.S. (collectively "Parties" or singularly "Party").

RECITALS

A. WHEREAS, the Trinchera Subdistrict intends to create and operate under a Plan of Water Management to comply with the rules promulgated by the State Engineer titled "Rules Governing the Withdrawal of Groundwater in Water Division No. 3 (The Rio Grande Basin) and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for All Irrigation Water Rights (Case No. 15CW3024, District Court, in and for Water Division No. 3)" as currently decreed or as they may exist in the future ("Groundwater Rules"); and

B. WHEREAS, The RGWCD has established six special improvement districts, pursuant to section 37-48-108, C.R.S., each of which has created or will create and operate under a Plan of Water Management ("POWM") and Annual Replacement Plans ("ARP") to comply with the Groundwater Rules; and

C. WHEREAS, in developing said POWMs and ARPs, the staff of the RGWCD (which also acts as staff to the RGWCD’s Subdistricts) has developed certain knowledge and skills regarding the development and drafting of Plans of Water Management; and

D. WHEREAS, the Trinchera Subdistrict would like to use the knowledge and skills developed by the RGWCD staff to assist the Trinchera Subdistrict in developing and drafting its POWM and subsequent ARPs to comply with the Groundwater Rules; and

E. WHEREAS, the Trinchera Subdistrict recognizes that having RGWCD staff assist it in developing its Plan of Water Management and ARPs offers certain efficiencies that will reduce the expenses to the Trinchera Subdistrict members; and

F. WHEREAS, the Parties contemplate that they may enter into one or more subsequent agreements concerning the RGWCD’s assistance in the Trinchera Subdistrict’s operations under ARPs, but this Agreement is limited to the developing and drafting of the Trinchera Subdistrict’s POWM and subsequent ARPs; and
WHEREAS, the RGWCD is authorized to enter into contracts pursuant to section 37-48-128, C.R.S.; and

WHEREAS the Trinchera Subdistrict is authorized to enter into contracts pursuant to section 37-45-118, C.R.S.; and

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

COVENANTS AND AGREEMENTS

1. Purpose. The purpose of this Agreement is to allow the Trinchera Subdistrict to consult with various members of the RGWCD’s staff in the development and drafting of the Trinchera Subdistrict’s POWM and subsequent ARPs and provide for compensation to the RGWCD for RGWCD’s staff time in such assistance, at staff’s rates as listed in Exhibit 1 or as those rates may change in the future.

2. Term. This Agreement will be effective from the date above until 5:00 pm on December 31, 2019. This contract will automatically be renewed from year to year unless one or both of the Parties give notice of cancellation pursuant to paragraphs 6 and 7.e. below on or before December 30 of the year.

   a. RGWCD staff will assist the Trinchera Subdistrict in developing, writing, editing and will provide advice and comments as the Trinchera Subdistrict develops its POWM and subsequent ARPs.
   b. RGWCD staff will consult with the Trinchera Subdistrict about the availability of sources of replacement water, forbearance agreements or other means of the Trinchera Subdistrict’s complying with its POWM and ARPs, but shall have no obligation to provide replacement water or other remedies for injurious depletions to the Trinchera Subdistrict. The RGWCD may assure that the RGWCD’s own subdistricts have the first opportunity to use such resources.
   c. RGWCD staff will consult with and support the Trinchera Subdistrict in its efforts to obtain administrative and/or judicial approval of its POWM and ARPs, but shall have no obligation to participate in such efforts or proceedings.
   d. Any such work performed by the RGWCD staff will performed only at the request of the Trinchera Subdistrict. Any such requests are in the sole discretion of the Trinchera Subdistrict. The Trinchera Subdistrict may set limits on total time or total charges in the aggregate or by task, and may limit RGWCD staff to specific tasks, or make more general requests for consulting services as it sees fit.
e. The RGWCD staff may decline to perform any requested task or service.

f. The RGWCD staff will not provide legal or professional engineering services to the Trinchera Subdistrict unless specifically requested by the Trinchera Subdistrict and specifically approved by the RGWCD.

g. All decisions as to the final language and contents of the Trinchera Subdistrict’s Plan of Water Management and ARPs rest solely with the Trinchera Subdistrict and its governing board.

4. **Rates.** A rate sheet is attached hereto. This rate sheet will be effective for the term of this Agreement; provided that if the RGWCD adopts new rates for 2019 for its employees, or for subsequent years in which this Agreement is in force, applicable to work that RGWCD staff does for RGWCD Subdistricts, such rates shall apply to this Agreement once they become effective.

a. The RGWCD will provide a rate sheet for the next calendar year to Trinchera on or before December 15 of each year. If the RGWCD does not provide a rate sheet, the previous year’s rate sheet will apply.

5. **Billing.** The RGWCD will provide a detailed invoices to the Trinchera Subdistrict monthly. The invoice will list the work performed, the hourly rate, the time spent on the task and the name of the RGWCD employee who performed the task. Invoices will be for one calendar month and will be provided to the Trinchera Subdistrict by the 10th day of each month. The Trinchera Subdistrict will remit payment to the RGWCD prior to the last day of each month. The RGWCD may, but is not required to, charge interest at up to 10% APR on any unpaid balances due and owing.

6. **Cancellation.** Either Party may cancel this Agreement by providing written notice of cancellation to the other Party pursuant to paragraph 7.e, below. Upon cancellation, the RGWCD will cease all work under this Agreement. Any work performed prior to receipt of cancellation will be billed by the RGWCD and paid by the Trinchera Subdistrict.

7. **Miscellaneous.**

a. **Governing Law and Jurisdiction.** This Agreement and all disputes arising hereunder shall be governed by the laws of the State of Colorado, and the Parties agree that the venue and jurisdiction over any claim arising from this Agreement shall lie in the District Court of Alamosa County.

b. **Successors and Assigns.** This Agreement shall be binding upon and inure to the benefit of the Parties and their successors, assigns, and legal representatives. Without limiting the generality of the preceding sentence, if the Trinchera Subdistrict has or forms a water activity enterprise, this Agreement shall be binding upon and inure to the benefit of such enterprise.
c. **Third Party Beneficiary.** It is specifically agreed between the Parties executing this Agreement that it is not intended by any of the provisions of any part of this Agreement to create a third-party beneficiary hereunder, or to authorize anyone not a party to this Agreement to maintain any claim under this Agreement. The duties, obligations and responsibilities of the Parties to this Agreement with respect to third parties shall remain as imposed by law.

d. ** Entire Agreement; Amendments.** This Agreement, including its exhibits, contains the entire understanding of the Parties with respect to this subject matter. This Agreement supersedes all prior agreements and understandings between the Parties with respect to its subject matter. This Agreement may be amended only by a written instrument duly executed by the Parties or their respective successors or assigns.

e. **Notice and Communications.** Any notice pursuant to the terms and conditions of this Agreement shall be in writing and delivered personally, or sent by certified mail, return receipt requested, or sent by a recognized overnight mail or courier services, with delivery receipt requested, to the following addresses (or to such other address as may from time to time be specified in writing by the Parties):

If to the RGWCD:

Cleave Simpson, General Manager  
Rio Grande Water Conservation District  
8805 Independence Way  
Alamosa, Colorado 81101  
cleave@rgwcd.org

With a copy to:

Peter J. Ampe, Esq.  
Hill & Robbins, P.C.  
1660 Lincoln Street, Suite 2720  
Denver, Colorado 80264  
Email: peterampe@hillandrobbins.com

If to Trinchera Subdistrict:

Monty Smith, President  
Ground Water Management Subdistrict of the Trinchera Water Conservancy District  
P.O. Box 41  
Blanca, Colorado 81123

with copy to:
Notices shall be effective when received by the Party to whom addressed.

f. Default/Remedies. In the event of a breach or default of this Agreement by any Party, the non-defaulting Party shall be entitled to exercise all remedies available at law or in equity, specifically including suits for specific performance and/or monetary damages, but specifically excluding claims for punitive damages.

g. Force Majeure. Wherever there is provided in this Agreement a time limitation for performance by the Parties for any obligations, the time provided for shall be extended for as long as and to the extent that the delay is due to an act of God, strikes, labor disputes, government shutdown, inability to obtain labor or materials or reasonable substitutes therefor, fire or other casualty and other causes beyond the control of the Parties.

h. Counterpart Execution. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

i. Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future laws effective during the term of this Agreement, then the legality, validity and enforceability of the remaining provisions of this Agreement will not be affected thereby; and in lieu of each such illegal, invalid or unenforceable provision, the Parties will seek to add as a part of this Agreement a provision as similar in terms to such illegal, invalid or unenforceable provision as may be possible and which will be legal, valid and enforceable.

j. Governmental Immunity. Nothing herein shall be construed as a waiver of the rights and privileges of the RGWCD or the Trinchera Subdistrict pursuant to the Colorado Governmental Immunity Act, §§ 24-10-101, et seq., C.R.S., as amended from time to time.

k. Indebtedness. No provision, covenant or agreement contained in this Agreement, nor any obligation imposed upon the RGWCD or the Trinchera Subdistrict, shall constitute or create an indebtedness or debt of the RGWCD or the Trinchera Subdistrict within the meaning of any Colorado constitutional provision or statutory limitation.
1. **Subject to Annual Budget and Appropriation.** Neither the RGWCD or the Trinchera Subdistrict intend to create a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever as a product of this Agreement. The performance of those obligations of the RGWCD and/or the Trinchera Subdistrict hereunder requiring budgeting and appropriations of funds are subject to annual budgeting and appropriations.

**ACCEPTED:**

Rio Grande Water Conservation District, Water Activity Enterprise

By: Cleave Simpson, General Manager

Date: 4-12-2019

**ACCEPTED:**

Groundwater Management Subdistrict of the Trinchera Water Conservancy District

By: Monty Smith, President

Date: 3/24/2019
WATER SUPPLY LEASE AGREEMENT

This WATER SUPPLY LEASE AGREEMENT ("Agreement") is entered into this 2nd day of April 2019, between the Rio Grande Water Conservation District, acting by and through its Water Activity Enterprise ("RGWCD"), for the use and benefit of its Special Improvement Districts, and the City of Creede, a statutory town of the State of Colorado ("Creede") (together, "the Parties" or individually as "Party").

RECITALS

A. Creede holds title to the first 0.5 cfs of the 7.0 cfs originally decreed to the Kanawha Ditch and Pipeline water right and 0.5 cfs decreed to the Cochran-Pioneer water right, both of which were decreed as sources of supply for Creede's plan for augmentation in Case No. 94CW31, District Court, Water Division No. 3 ("94CW31 Decree"), and as further decreed in Case No. 07CW60, District Court, Water Division No. 3 ("07CW60 Decree"). The 94CW31 Decree and the 07CW60 Decree are referred to collectively herein as the "Augmentation Plan".

B. As decreed, the Augmentation Plan provides Creede with surplus augmentation water available for Creede to replace increased stream depletions which may occur as Creede grows. At the present time, Creede continues to have surplus augmentation water available under the Augmentation Plan that it may lease to others on a temporary basis ("Excess Augmentation Credits").

C. Pursuant to the April 24, 2012 Perpetual Water Supply Agreement between Creede and Rio Grande Silver, Inc. ("RGS Agreement"), recorded at Reception No. 67589 of the Mineral County real property records, Creede has the obligation to make 0.25 cfs of the 0.5 cfs decreed to Creede's Cochran-Pioneer water right (the "RGS 0.25 cfs") available for RGS's use for its mining, milling, or restoration operations.

D. Although Creede retains the right to use the RGS 0.25 cfs at times when RGS is not using the RGS 0.25 cfs under the RGS Agreement, because RGS has the senior right to use the RGS 0.25 cfs, the RGS 0.25 cfs may not be available to Creede to generate Excess Augmentation Credits for lease to RGWCD under this Agreement.

E. The RGWCD's Special Improvement Districts ("SIDs") either have approved plans of water management or will have such plans in the near future. Such plans either do or will require the remedy of injurious depletions to senior surface water rights due to depletions to streamflow caused by groundwater withdrawals of wells that are within the various plans of water management and annual replacement plans. The RGWCD seeks surface water supplies to use in the annual replacement plans, as required by the plans of water management, as one available source to remedy injurious depletions. The RGWCD will assign any water under this Agreement to one or more SIDs for their use through other agreements.
The RGWCD desires to purchase and Creede desires to lease the Excess Augmentation Credits on the terms set forth below.

AGREEMENT

NOW THEREFORE, in consideration of the mutual promises and agreements herein contained, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. **Term.** The term of this Agreement is from the date of approval of a substitute water supply plan, as described in paragraph 9.1 below, through April 30, 2020 ("Lease Term").

2. **Quantity and Source of Leased Water.** Subject to the terms herein, Creede will lease to the RGWCD up to 30 acre-feet of Excess Augmentation Credits per month during the Lease Term ("Leased Water"). The Parties acknowledge that there may be less than 30 acre-feet of Excess Augmentation Credits available in any or all months during the Lease Term. The Excess Augmentation Credits may be released and delivered by Creede, in its discretion, from any of the sources available to Creede under the Augmentation Plan. However, during the Lease Term, Creede will not enter into any agreement that assigns, leases, or sells any Excess Augmentation Credits to any person or entity other than the RGWCD.

3. **Availability of Leased Water.**

   3.1 **Leased Water Supplied to the RGWCD.** On or before the 15th day of each month, Creede will provide Notice to the RGWCD of the quantity and timing of Leased Water expected to be available to the RGWCD under this Agreement in the following month. Creede will supply such accounting and other information as the RGWCD or the Division Engineer for Water Division No. 3 may require to implement this Agreement or for the RGWCD or its SIDs’ use of the water supplied under this Agreement.

   3.2 **Leased Water Limitations.** Notwithstanding any other provision in this Agreement, Creede’s obligation to provide Leased Water to the RGWCD is expressly conditioned on the legal and physical availability of Excess Augmentation Credits under Creede’s permits, decrees and water rights and shall be subordinate to Creede’s water needs. Creede expressly disclaims any warranty as to the volume of Leased Water that will be delivered to the RGWCD under this Agreement.

   3.3 **Force Majeure.** Neither Party is liable or responsible to the other, nor be deemed to have defaulted under or breached this Agreement, for any failure or delay in fulfilling or performing any term of this Agreement due solely to conditions or events of force majeure, as that term is defined in this section, provided that: (i) the non-performing Party gives the other Party

Page 2 of 9
prompt Notice describing the particulars of the force majeure; (ii) the suspension of performance is of no greater scope and of no longer duration than required by the force majeure event or condition; and, (iii) the non-performing Party proceeds with reasonable diligence to remedy its inability to perform. As used herein, “force majeure” means any delay or failure of performance under this Agreement caused by events beyond a Party’s reasonable control and without the fault of the Party including, without limitation: (a) acts of God; (b) action of the elements such as flood, fire, drought or other reduction in water supply legally and physically available to Creede, earthquake or explosion; (c) war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot, sabotage, or other civil unrest; (d) law; (e) actions, embargoes or blockades in effect on or after the date of this Agreement; (f) action by any governmental authority; (g) national or regional emergency; (h) strikes, labor stoppages, or slowdowns or other industrial disturbances; and (i) shortage of adequate power or transportation facilities. To the extent that a Party’s performance is postponed or excused by an event of force majeure, the other Party’s corresponding obligation to perform is likewise postponed or excused.

4. Location of Delivery.

4.1 Creede shall deliver the Leased Water to the RGWCD in Willow Creek at or near a point on the westerly side of Willow Creek which point is North 40 degrees 20 minutes East, 1,792.2 feet from the south quarter corner of Section 25, T42N, R1W, N.M.P.M., and being within the SE\(^{1/4}\) of Section 25, T42N, R1W, N.M.P.M., Mineral County, Colorado ("Delivery Point").

4.2 Once the Leased Water is delivered to the Delivery Point, the RGWCD shall bear all losses, including but not limited to transit losses and/or evaporative losses, associated with the conveyance of the Leased Water from the Delivery Point to the RGWCD’s or SIDs’ point(s) of use of the Leased Water.

5. Accounting.

5.1 Creede shall maintain monthly accounting of all deliveries of Leased Water to the Deliver Point for the RGWCD, and shall incorporate that accounting into its accounting under the Augmentation Plan. Upon the RGWCD’s request, Creede shall supply such accounting and other information as the RGWCD or the Division Engineer for Water Division No. 3 may require to implement this Agreement or for the RGWCD’s or SIDs’ use of the Leased Water.
5.2 The RGWCD shall maintain daily accounting of its diversion and use of the Leased Water, and shall provide that accounting to Creede on a monthly basis, within thirty days of the end of the month being accounted for.

6. **Price**. The RGWCD agrees to pay Creede the price of sixty-five dollars ($65.00) per acre-foot of Leased Water delivered by Creede to the Delivery Point for the RGWCD’s or SIDs’ use. The RGWCD’s payments to Creede pursuant to this paragraph 6 are non-refundable and are not contingent upon whether the Leased Water is actually diverted or used by the RGWCD or its SIDs, so long as Creede delivered the Leased Water to the Delivery Point.

7. **Payment**. On or before the 15th day of each month, Creede must supply to the RGWCD an accounting of the amount of Leased Water actually delivered to the Delivery Point for the RGWCD during the previous month. The RGWCD will have seven (7) days to provide notice to Creede that it disputes such accounting. If the RGWCD does not dispute the accounting, payment to Creede is due by the 15th day of the succeeding month. If the RGWCD provides notice that it disputes the accounting provided, the Parties will attempt to resolve said dispute. If the Parties cannot resolve the dispute, each Party reserves any and all remedies provided by this Agreement or that exist without this Agreement.

8. **Failure to Pay**. If the RGWCD fails to pay when due the lease payment required herein, then this Agreement may be terminated in full by Creede, and Creede will have no obligation to provide any additional Leased Water.

9. **Use of Leased Water**.

   9.1 **Approvals and a SWSP**. The use of the Leased Water under this Agreement is expressly conditioned on the RGWCD obtaining the prior written approval of State Water Officials to use the Leased Water on a temporary basis. The RGWCD is responsible for obtaining any approvals necessary for the RGWCD’s proposed delivery and use of the Leased Water. The Parties expressly acknowledge that an approved Substitute Water Supply Plan ("SWSP") pursuant to section 37-92-308, C.R.S. may be necessary for the RGWCD or its SIDs to put the Leased Water to the intended use. No such plan or approval sought by the RGWCD or its SIDs for use of the Leased Water may involve a change or review of Creede’s water rights or Augmentation Plan in Water Court.

   9.2 **Creede’s Role**. Creede will reasonably cooperate with the RGWCD and supply necessary data and other information as the RGWCD deems necessary to pursue a SWSP. The RGWCD shall provide any SWSP application or notice to Creede for review and comment prior to submittal to State Water Officials. Creede may submit comments to the State Engineer on any such application for a SWSP or a SWSP renewal and may
file a statement of opposition or objection to any such water court application or notice at Creede’s sole expense.

9.3 Termination to Protect Creede’s Water Rights. The RGWCD agrees that it will use its best efforts not to jeopardize Creede’s water rights by taking any action that causes or potentially could cause a reopening of any of Creede’s water court decrees including, without limitation the Augmentation Plan. If a third party seeks review of Creede’s water rights or decrees in Water Court in connection with the RGWCD’s or the SIDs’ use of the Leased Water in a SWSP or other approval from State Water Officials, Creede, in its sole discretion and upon prior notice to the RGWCD, may terminate this Agreement. The RGWCD acknowledges that, following the expiration or termination of this Agreement, Creede has no duties or obligation to lease water for the replacement of depletions, delayed or otherwise, arising from the operation of any such SWSP or other approval from State Water Officials.

9.4 Other Permits / Approvals. The RGWCD is responsible for obtaining all necessary authorizations, approvals, and/or permits from private or governmental agencies required for the RGWCD, including its SIDs, to use the Leased Water under this Agreement. Upon Creede’s request, the RGWCD shall provide copies of any such authorizations, approvals, and/or permits to Creede.

10. Creede’s Title. Creede represents that it is the owner of the water that is subject to this Agreement and that it has full power and authority to enter into this Agreement. Creede further represents that it is entitled to receive full payment of all sums to be paid under this Agreement, and that no part of payments hereunder are required to be made to any mortgagee, lender, or lien holder.

11. Title to Water Rights. Nothing herein grants or may be interpreted to grant any legal or equitable title in or to any of Creede’s water rights or Augmentation Plan.

12. Untreated Water. The Leased Water delivered to the RGWCD under this Agreement is derived from untreated water of whatever quality is now or in the future available as Excess Augmentation Credits. Delivery of the Leased Water under this Agreement is on an “as is” basis only. Creede makes no warranty, express or implied, concerning the quality of the Leased Water. Further, Creede expressly disclaims any implied warranties of the Leased Water’s merchantability or fitness for a particular purpose or otherwise.

13. Responsibility for Use and Indemnification. The RGWCD shall bear all responsibility for its use of the Leased Water upon Creede’s delivery of the Leased Water under this Agreement, together with all costs associated with that use. To the extent permitted by law, the RGWCD shall defend, indemnify, and hold Creede harmless from and against any and all
damages, claims, losses, obligations, other costs, and other liabilities arising from the RGWCD’s use of the Leased Water after Creede’s delivery of the Leased Water as provided for in this Agreement. In the event that the RGWCD is obligated to indemnify Creede, it may terminate this Agreement, subject to its obligations to Creede for its prior use of the Leased Water.

14. **RGWCD’s Representations.** This Agreement has been duly authorized and executed by the RGWCD, is the legal, valid, and binding obligation of the RGWCD, and is enforceable against the RGWCD according to its terms. No other consent is required for the execution, delivery or performance of this Agreement by the RGWCD. To the best of the RGWCD’s knowledge, there is no pending or threatened litigation or administrative proceeding against the RGWCD that would prevent it from leasing the Leased Water.

15. **Notice.** All notices and other communications that are required or permitted to be given to the Parties under this Agreement are sufficient in all respects if given in writing and delivered in person, by express courier, or by First Class U.S. Mail, postage prepaid. Notice delivered in person or by courier is effective upon such delivery, notice provided through U.S. Mail is effective three days after deposit in the U.S. Mail. The Parties shall give notice to the receiving party at the following addresses:

To Creede:  
Town Manager  
City of Creede  
P. O. Box 457  
Creede, CO 81130  
Email: manager@creedetownhall.com

To RGWCD:  
District Manager  
Rio Grande Water Conservation District  
8805 Independence Way  
Alamosa, CO 81101  
Email: cleave@rgwcd.org

Such addresses may be changed during the term of this Agreement by written notice given in accordance with this paragraph.

16. **Default and Remedies.** A default occurs if either Party breaches its obligations under this Agreement and fails to cure such breach within ten days of written notice from the non-breaching Party specifying the breach. Waiver or failure to give notice of a particular default shall not be construed as condoning or acquiescing to any continuing or subsequent default. In addition to other legal remedies available to it, the non-breaching Party also shall have the right to seek specific performance and damages; provided, however, that such Party first must have given the breaching party written notice of such noncompliance and an opportunity to cure pursuant to this paragraph 16. The non-breaching Party shall also be entitled to its reasonable attorneys’ fees and expenses resulting from successful legal action to obtain legal remedies for a default.
17. **No Continuing Duty to Supply Water.** Creede has no obligation to supply water to the RGWCD, or its SIDs, after this Agreement expires or otherwise is terminated.

18. **Miscellaneous Provisions.**

18.1 **Governmental Immunity.** Nothing in this Agreement waives or may be construed to waive either Party’s protection from liability or the limitations on its liability based on its sovereign immunity under the Colorado Governmental Immunity Act or otherwise.

18.2 **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties with respect to the subject matter and supersedes all prior agreements and understandings, written or oral, with respect to the subject matter. Except for those which are set forth in this Agreement, no representations, warranties, or agreements have been made by Creede or the RGWCD to one another with respect to this Agreement.

18.3 **Survival.** Each of the representations and warranties made by Creede and the RGWCD in this Agreement, or in any document or instrument delivered pursuant to this Agreement, must be true and correct in all material respects on the date hereof, and are to be deemed to be made again as and at the date of any payment date, and must then be true and correct in all material respects. All covenants in this Agreement that require performance, or that pertain to the time subsequent to the termination of this Agreement, shall survive the termination.

18.4 **Amendment - Interpretation.** This Agreement cannot be modified orally, but only by an amendment in writing signed by the Parties. The captions of this Agreement are for convenience of reference only, are not a part of this Agreement, and shall not define or limit any of the terms of this Agreement. Unless the context clearly requires otherwise, the singular includes the plural, and vice versa, and the masculine, feminine, and neuter adjectives include one another. 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 CRCP 6, then the relevant date will be extended automatically until the next business day.

18.5 **Non-Severability- Effect of Invalidity.** Each paragraph in this Agreement is interwoven with the others and is not severable unless by mutual consent of Creede and the RGWCD. 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 entire Agreement will terminate.
18.6 **Waiver.** The failure of a Party to insist in one or more cases upon the strict observation of any of the terms of this Agreement is not a waiver or relinquishment, in any future case, of any of the terms of this Agreement.

18.7 **Binding Effect and Assignability.** This Agreement and the rights and obligations created hereby are binding upon and shall inure to the benefit of the Parties hereto and their respective heirs, successors, and assigns, if any. Creede may not assign its rights or delegate its duties hereunder without the prior written consent of the RGWCD, which consent shall not be unreasonably withheld. The RGWCD may not assign its rights hereunder to any other person or entity, except the RGWCD’s SIDs, without the prior written consent of Creede, which consent shall not be unreasonably withheld.

18.8 **Governing Law and Venue.** This Agreement is governed by the laws of the State of Colorado in all respects, including matters of validity, construction, performance, and enforcement. Venue on any action arising out of this Agreement will be proper only in the District Court of Mineral County, State of Colorado.

18.9 **Third-Party Rights.** Nothing in this Agreement, express or implied, is intended to confer any rights or remedies whatsoever upon any person or entity, other than the Parties hereto, and their respective heirs, successors, and assigns.

18.10 **Recording.** The RGWCD may record this Agreement or a Memorandum of this Agreement.

18.11 **Time.** Time is of the essence in this Agreement.

18.12 **Legal Counsel.** Each Party to this Agreement has engaged legal counsel or has been advised to seek legal counsel to negotiate, draft, and/or review this Agreement. Therefore, in the construction and interpretation of this Agreement, the Parties acknowledge and agree that it cannot be construed against any Party on the basis of authorship.

18.13 **Relationship of the Parties.** Nothing within this Agreement creates any agency, joint venture, partnership or other form of joint enterprise, employment or fiduciary relationship between the Parties. Neither Party has any express or implied right or authority to assume or create any obligations on behalf of or in the name of the other Party or to bind the other Party to any contract, agreement, or undertaking with any third party.

Page 8 of 9
18.14 Recitals. The Recitals set forth above are hereby incorporated in and made a part of this Agreement by reference.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

CITY OF CREEDE

[Signature]
4/2/2019
Mayor, Jeffrey Larson
Date

ATTEST:

[Signature]
4/2/2019
City Clerk, Krisen Buchanan
Date

RIO GRANDE WATER CONSERVATION DISTRICT

[Signature]
Date
By:
Greg Higel
Title: President

President
April 15, 2019

The Honorable Andrew Wheeler, Administrator
Environmental Protection Agency
Office of the Administrator, 1101A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable Todd T. Semonite
Chief of Engineers
Department of the Army, Corps of Engineers
Department of Defense
441 G Street NW
Washington, D.C. 20314-1000

Re: Docket ID No. EPA-HQ-OW-2018-0149

Dear Administrator Wheeler and Lieutenant General Semonite,

Pursuant to the public notice published at 84 Fed. Reg. 4154 on February 14, 2019, the Rio Grande Water Conservation District ("RGWCD" or "District") respectfully submits the following comments to the proposed joint rule of the Environmental Protection Agency and the United States Army Corps of Engineers (collectively, the "Agencies") defining the scope of waters subject to federal regulation under the Clean Water Act ("CWA") in light of the U.S Supreme Court Cases in United States v. Riverside Bayview Homes ("Riverside Bayview"), Solid Waste Agency of Northern Cook County v. United States ("SWANCC"), and Rapanos v. United States ("Rapanos"), and consistent with Executive Order 13778, signed on February 28, 2017, entitled "Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the Waters of the United States’ Rule."

ANALYSIS

The RGWCD appreciates the Agencies’ efforts in this matter and believes that the proposed rule is a significant improvement to the Agencies’ 2015 Rule defining the waters of the United States. Further, the RGWCD agrees with the Agencies’ stated intent “to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation’s
waters while respecting State and tribal authority over their own land and water resources" by adhering to the "baseline concept that 'waters of the United States' are waters within the ordinary meaning of the term, such as oceans, rivers, streams, lakes, and ponds, and wetlands, and that not all waters are 'waters of the United States.'" The RGWCD particularly supports:

- The development of specific categories that define the possible waters of the United States; and

- The specific exemptions of "artificial lakes and ponds," "ditches," "ephemeral surface features," "groundwater, including groundwater drained through subsurface drainage systems" and "artificially irrigated acres" from the definition of waters of the United States.

The RGWCD, however, is concerned that, despite the Agencies’ stated intent to ground the definition of waters of the United States within Congress’ commerce power over navigation and the language and structure of the CWA, the plain language of the proposed rule does not unambiguously effectuate this intent. The RGWCD’s core concern is that, despite the significant revisions from the 2015 Rule, the plain text of the proposed rule is still potentially subject to broad interpretations that would confer expansive federal jurisdiction over land use issues that the Agencies intend to reserve to State and tribal authority—especially where the text of the proposed rule deviates from the plurality opinion in *Rapanos*. Consistent with Executive Order 13778,¹ the RGWCD encourages the Agencies to refine the definition of the waters of the United States to adhere more closely to the definition proffered by the plurality in *Rapanos*. Specifically, the RGWCD proposes that:

- The definition of jurisdictional tributaries should be limited to “relatively permeant continuously flowing bodies of water forming geographic features that are described in ordinary parlance as rivers and streams, and that have a physical connection with a traditional navigable water or territorial sea, such that they are, as a practical matter, indistinguishable from waters of the United States”;²

- The definition of jurisdictional lakes and ponds should be limited to “relatively permanent standing bodies of water forming geographic features that are described in ordinary parlance as lakes and ponds, and that have a physical connection with a traditional navigable water or territorial sea, such that they are, as a practical matter, indistinguishable from waters of the United States”;³

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¹ Executive Order 13778 directs the Agencies to “consider interpreting the term ‘navigable waters’ in a manner consistent with” Justice Scalia’s plurality opinion in *Rapanos*.

² The proposed rule defines tributaries to include tributaries that are themselves traditional navigable waters or territorial seas. The RGWCD believes that this is unnecessary and redundant because, if a body of water can be regulated as a traditional navigable water or territorial sea, there is no need to further regulate it as a tributary. The purpose of the “tributary” category is to define those bodies of water that are not traditional navigable waters or territorial seas, but which still waters of the United States subject to regulation under the CWA.

³ The proposed rule defines lakes and ponds to lakes and ponds that are themselves traditional navigable waters or territorial seas. The RGWCD believes that this is also unnecessary and redundant for similar reasons to those described above.
• “Impoundments” should be eliminated as a separate category of the waters of the United States.

1. The Rio Grande Water Conservation District’s Interest in the Jurisdictional Waters Rule

The RGWCD is a statutorily-created Special District operating in Colorado’s San Luis Valley. It was established by the Colorado General Assembly and formed in 1967 by a vote of the residents within its boundaries. The RGWCD is charged with protecting, enhancing, and developing water resources in the Rio Grande basin in Colorado. The RGWCD also works to ensure that Colorado complies with its obligations under the Rio Grande Compact, a long-standing agreement allocating the waters of the Rio Grande between Colorado, New Mexico and Texas. The District encompasses a five-county region, which includes Alamosa, Rio Grande, Conejos and portions of Saguache and Mineral Counties within the Rio Grande River basin, and includes the Closed Basin.

Through its various activities, the RGWCD actively represents the interests of a substantial portion of the 47,000 residents of the San Luis Valley. Many of these residents earn their livings through farming, ranching or related agricultural activities. An expansion of the Agencies’ jurisdiction under the CWA would have a direct and potentially devastating impact on their agricultural operations. The day-to-day operations of the District could be similarly impacted, as the District owns direct flow, storage, and groundwater recharge water rights as well as conveyance structures that may be subject to regulation as “waters of the United States” The RGWCD therefore has a vested interest in the proposed jurisdictional waters rule.

2. Because the definition of “tributary” includes a “surface water channel” that flows “when snowpack melts”, it potentially applies to every natural drainage feature in Colorado

The RGWCD is concerned that the proposed definition of “tributary” could be applied to many drainage features in Colorado that the Agencies do not necessarily intend to subject to federal jurisdiction under section 404 of the CWA. The proposed rule defines a jurisdictional “tributary” to include any “naturally occurring surface water channel that contributes perennial or intermittent flow… directly or indirectly” to a traditional navigable water or territorial sea; and “intermittent” to include any “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts).”

Colorado straddles the continental divide and is the headwaters to a number of major river systems that flow out of the state in every compass direction. As a result, potentially every naturally occurring surface water channel in the state carries snowpack melt at some point during the annual spring runoff. C.f. Rapanos (“In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface.”). Consequently, the RGWCD is concerned that under the proposed rule, any plot of land containing such a channel may potentially be regulated as a water of the United States.
Moreover, because of the nested structure of the proposed rule’s jurisdictional reach (i.e., each impoundment of a jurisdictional tributary is jurisdictional; each ditch that “constructed in” or “relocates or alters” a jurisdictional tributary is jurisdictional) the proposed definition of “tributary” could potentially extend federal jurisdiction to virtually any ditch or similar water control structure (and the underlying land) that carries water from a naturally occurring surface channel. Colorado adheres to the prior appropriation doctrine, which recognizes the right of individuals to divert water from the stream in priority and place it to beneficial use. See COLO. CONST., art. XVI, §§ 5-6. As a result, much of the water used in Colorado (whether for agriculture, municipal water systems, industrial processes, or otherwise) consists of surface water diverted from naturally occurring channels into ditches and other water control structures. If the touchstone for federal jurisdiction over these structures is simply that some of the annual flows therein are attributable to snowpack melt that coursed a naturally occurring surface water channel, this could bring numerous structures and large swaths of land in Colorado under section 404 of the CWA—notwithstanding the specific exceptions for, example, ditches in the proposed rule.

Further, because of the nested structure of the requisite hydrological connection to a traditional navigable water or territorial sea necessary to bring a tributary within the ambit of federal jurisdiction (i.e., a tributary is jurisdictional if it “contributes perennial or intermittent flow...directly or indirectly” to other jurisdictional waters) the proposed definition of “tributary” could potentially extend federal jurisdiction to virtually any ditch or similar structure (and the underlying land) that carries water to a naturally occurring surface channel. Colorado law and its compact obligations often require individuals to release water to the stream, for example, to offset the impacts of well pumping or make up the historical return flows associated with changed water rights. See C.R.S. § 37-92-101, et seq. As a result, many ditches (whether for agriculture, municipal water systems, industrial processes, or otherwise) regularly contribute water to the river. If touchstone for federal jurisdiction over ditches and other similar structures is simply that these contributions occur on a more-than-ephemeral basis (i.e., not just in response to precipitation events), this could further bring numerous structures and large swaths of land in Colorado under section 404 of the CWA—notwithstanding the specific exceptions for, example, ditches in the proposed rule.

As the Raponos plurality explained, “the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes.”

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4 In Colorado, the relatively permanent continuously flowing bodies of water forming geographic features that are described in ordinary parlance as rivers and streams are better characterized, not as naturally occurring surface water channels that carry snowpack melt, which includes potentially every natural drainage feature in the state, but as naturally occurring surface water channels that, in a typical year, not only initially carry snowpack melt during the spring runoff, but then continue to flow at least into the late-summer or early-fall because of interactions with the groundwater system or other sources of baseflow. The RGWCD, however, does not propose that the Agencies adopt this Colorado-specific definition because it is likely not be inappropriate to describe the tributaries of other non-mountainous non-arid or semi-arid riparian states that do not span the continental divide and sit at the headwaters of numerous major river systems. The point is simply that the proposed rule needs to avoid specific technical criteria, such as snowpack melt, to define tributaries because these criteria do not apply equally across the geographical breadth of the United States, and, thus, may arbitrarily engulf numerous drainage features that the Agencies do not intend to regulate. If specific technical criteria are necessary to define tributaries, the Agencies
Ditches and other similar water control structures are not typically described in ordinary parlance as rivers or streams, even if they divert and carry water away from the stream. Further, as the *Rapanos* plurality explained, in the context of construing the “jurisdictional criterion” necessary to bring a wetland within the ambit of federal jurisdiction, waters “are ‘waters of the United States’ [only] if they bear the ‘significant nexus’ of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States.”

Ditches and other water control structures are not typically, as a practical matter, indistinguishable from the waters of the United States, even if they deliver water to the stream.

To avoid these concerns, consistent with the *Rapanos* plurality opinion, the proposed rule should rely on “[c]ommon sense and common usage” to “distinguish between [for example] a wash and a seasonal river.” Accordingly, the RGWCD proposes that the proposed rule define “tributary” employing the specific language of the *Rapanos* plurality opinion to mean “a relatively permeant continuously flowing body of water forming geographic features that are described in ordinary parlance as rivers and streams, and that have a physical connection with a traditional navigable water or territorial sea, such that they are, as a practical matter, indistinguishable from waters of the United States.”

Consistent with the *Rapanos* plurality opinion, this definition would not necessarily exclude seasonal rivers which contain continuous flow during some months of the year. But it would exclude natural occurring drainage features that intermittently or ephemerally carry snowpack melt at some point during the year, but do not, within the bounds of common sense and common usage, constitute streams and rivers. Likewise, it would exclude ditches and other similar water control structures that, while they may divert water from the river, do not, within the bounds of common sense and common usage, constitute streams and rivers. Moreover, consistent with the *Rapanos* plurality opinion, this definition would require a significant hydrological connection between the tributary and a traditional water of the United States to come within the ambit of section 404 of the CWA. Consequently, it would exclude irrigation ditches and other similar structures that, while they may contribute water to a river, are not as a practical matter, indistinguishable from waters of the United States.

In the RGWCD’s view, this definition would better limit federal jurisdiction over land use decisions that are more appropriately the province of state and tribal authority consistent with what it understands to be the Agencies’ intent. This proposed definition notwithstanding, however, the RGWCD believes that, at a minimum, the definition of tributary needs to be refined to clearly indicate that the majority of ditches (particularly irrigation ditches) are intended to be excluded from regulation under section 404 the CWA, and do not come within the ambit of the federal jurisdiction merely because they carry water attributable to snowpack melt from the river, or contribute flows to the river to meet the requirements of state law or compact obligations.

The RGWCD should develop regional guidance documents that can properly describe these water bodies as they are found in the various regions across the United States.

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While the *Rapanos* plurality opinion does not expressly discuss the requisite hydrological connection necessary to bring a tributary within the ambit of section 404 of the CWA, *a fortiori*, a tributary must meet at least the same minimal jurisdictional criterion as a wetland (i.e., exhibit the same minimum hydrological connection to a traditional navigable water or territorial sea)—otherwise, the logic and structure of the CWA break down.
3. The definition of “lakes and ponds” should also employ the specific language used in the *Rapanos* plurality opinion

The RGWCD is concerned that the proposed definition of lakes and ponds could be applied to many ponds and reservoirs in Colorado that the Agencies do not necessarily intend to subject to federal jurisdiction under section 404 of the CWA. The proposed rule defines jurisdictional “lakes and ponds” to include lakes and ponds that “contribute perennial or intermittent flow” directly or indirectly to a traditional navigable water or territorial sea; and lakes and ponds that are “flooded by” a traditional navigable water or territorial sea, or other jurisdictional water.

Most lakes in Colorado are artificial, *i.e.*, reservoirs created by manmade dams. Broadly speaking, these reservoirs fall into two categories: on-channel reservoirs that dam the river, and off-channel reservoirs filled by diversion works that divert water away the river. Most on-channel reservoirs are clearly waters of the United States, as they are “inseparably bound up with” (*Riverside Bayview*) or “indistinguishable” (*Rapanos*) from the waters of the United States. Most off-channel reservoirs, on the other hand, are not inseparably bound up with or indistinguishable from the waters of the United States, and therefore, should not be regulated as waters of the United States. The proposed rule appears to acknowledge this, excepting “artificial lakes constructed in upland” from the definition of waters of the United States. Furthermore, according to the Agencies, this exception applies, not only to “water storage reservoirs,” but “farm and stock watering ponds, settling basins, and log cleaning ponds” as well.

The RGWCD supports these exceptions, and does not believe that these types of structures should be regulated under section 404 of the CWA. However, because of the nested structure of the proposed rule (discussed above), the RGWCD is concerned that these exceptions could be limited, or effectively nullified, by a broad interpretation of “tributary,” “contribute perennial or intermittent flow” or “flooded by.” Every lake and reservoir in Colorado is located in some drainage basin that is potentially impacted by the spring runoff of snowpack melt. If the touchstone for federal jurisdiction is simply that some of the water in these reservoirs is attributable to snowpack melt, whether it was delivered by ditch or naturally flowed in, this could bring numerous structures and large swaths of land in Colorado under the section 404 of the CWA—notwithstanding the specific exception for artificial lakes in the proposed rule. Likewise, reservoir storage is frequently used to release water to the stream, for example, to be redverted further down the stream, to offset the impacts of well pumping, or make up the historical return flows associated with changed water rights as required by state law or compact obligations. If the touchstone of federal jurisdiction is simply that these contributions occur on a more-than-ephemeral basis (*i.e.*, not just in response to precipitation events), again, this could bring numerous structures and large swaths of land in Colorado under the section 404 of the CWA—notwithstanding the specific exceptions for, example, artificial lakes in the proposed rule.

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There are many additional types of artificial structures that are similar to stock watering ponds and settling basins, such as recharge ponds, which can be used to make up historical return flows associated with changed water rights, offset depletions associated with well pumping, or recharge underground aquifers. Because of the importance of these types of structures to many of the irrigators represented by the RGWCD, the RGWCD seeks clarification from the Agencies that these types of structures are included in the proposed exception for artificial lakes.
Accordingly, to avoid these concerns, and for much the same reasons discussed above regarding tributaries, the RGWCD proposes that the proposed rule define “lakes and ponds” employing the specific language of the Rapanos plurality opinion to mean “a relatively permeant standing body of water forming geographic features that are described in ordinary parlance as lakes and ponds, and that have a physical connection with a traditional navigable water or territorial sea, such that they are, as a practical matter, indistinguishable from waters of the United States.”

At a minimum, however, the proposed rule should clarify that the majority of off-channel reservoirs in Colorado are not subject to regulation under section 404 of the CWA, even if they are filled or flooded with snowpack melt or used to deliver water to the river.

4. **Impoundments should be eliminated as a category of waters of the United States.**

The proposed rule includes “impoundments” as a category of waters of the United States. The proposed rule, however, does not define impoundments. The RGWCD is concerned, therefore, that this proposed category of waters of the United States is either redundant or a nebulous catchall that could be applied indiscriminately to water control features that the Agencies do not necessarily intend to subject to federal jurisdiction under section 404 of the CWA.

To take a simple example, off-channel reservoirs appear to be simultaneously exempt from federal regulation under section 404 of the CWA as “artificial lakes constructed in upland” and subject to regulation as “impoundments.” Stock watering ponds, recharge ponds, diversion dams, and many other water control structures present similar conundrums. The RGWCD is also concerned about the San Luis Valley Closed Basin Project, a federal reclamation project that it operates in conjunction with the Bureau of Reclamation, to salvage groundwater from the unconfined aquifer in the “Closed Basin” area of the San Luis Valley and deliver it to the Rio Grande River to help assist Colorado meet its compact obligations to New Mexico and Texas. This project appears to be exempt from regulation under section 404 of the CWA pursuant to the exception for “groundwater, including groundwater drained through subsurface drainage systems,” but, to the extent it relies on artificially recharged groundwater, may be potentially subject to regulation as an underground impoundment of surface water. Together, these examples highlight that the category of impoundment is at best nebulous and ill-defined.

As the Raponos plurality explained, “the phrase ‘the waters of the United States’ includes only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers and lakes.” The Rapanos plurality opinion did not mention impoundments, and this catchall category is not compatible with this description. Either an impoundment is such that in ordinary parlance it is appropriately described as a stream, ocean, river, or lake, or it should not be subject to regulation under section 404 of the CWA. Accordingly, the RGWCD proposes that the Agencies eliminate the category of impoundments from the definition of waters of the United States.
At a minimum, however, the RGWCD requests that the Agencies clarify the definition of impoundments so that the categories of waters which are made specifically exempt for the definition of waters of the United States cannot be regulated as impoundments.

CONCLUSION

The RGWCD generally supports the proposed rule and believes that it is a significant improvement to the Agencies joint 2015 Rule. However, consistent with Executive Order 13778, the RGWCD encourages the Agencies to further the refine the definition of waters of the United States to more closely match the definition proffered by the plurality opinion in Raponos.

The RGWCD appreciates the opportunity to comment on the proposed rule. If you have any questions, please do not hesitate to contact our General Manager, Cleave Simpson, at (719) 589-6301 or cleave@rgwcd.org, or the District’s legal counsel, David Robbins, Hill & Robbins, P.C., at (303) 296-8100 or davidrobbins@hillandrobbins.com.

Sincerely,

Greg Higel
President
Rio Grande Water Conservation District

cc://
Cleave Simpson, General Manager, Rio Grande Water Conservation District
Senator Cory Gardner
Senator Michael Bennet
Representative Scott Tipton