

AGENDA

HEALTHY RIVERS AND STREAMS CITIZENS ADVISORY BOARD

October 27, 2009

5 – 7 p.m.

**Airport Operations Center (AOC)
1001 Owl Creek Road, Aspen, CO**

- 1. Organizational Discussion**
- 2. The Role Community Development plays in Water Quality and Quantity in Pitkin County**
Planning, Building and Environmental Health Regulations - Cindy Houben
- 3. Ken Kolm Presentation** President of Hydrologic Systems Analysis, LLC;
Senior Hydrogeologist, Hydrologic and Environmental Systems Specialist and
Paul van der Heijde President of Heath Hydrology, Senior Hydrologist
Results of the GIS-Based Evaluation-Groundwater Resources in Developed and Developable Areas, Pitkin County
- 4. CWCB Trust Agreement**
- 5. Wrap Up and Questions**
- 6. Future meetings**

ADJOURN HRSCAB MEETING

GIS-Based Evaluation Groundwater Resources in Developed and Developable Areas, Pitkin County, Colorado.

Introduction

Under a series of agreements with Pitkin County, Hydrologic Systems Analysis, LLC (HSA) of Golden, Colorado, and Heath Hydrology, Inc. (HHI) of Boulder, Colorado, created a GIS-based, step-wise, ground water resources evaluation procedure for use as decision/land use management tools by Pitkin County. The procedure, supported by GIS maps and related data bases, guides the site-specific analysis with respect to: 1) ground water resources availability in terms of sufficient quantities for the purpose of its usage, and economical exploitability (*e.g.*, at reasonable depth and with sufficient permeability); 2) long-term sustainability of the utilization of the resources for water supply (*i.e.*, presence of long term continuous recharge mechanisms, and absence of excessive water table fluctuations, for example, due to spring runoff, upland flood irrigation, and drought); and 3) the vulnerability or susceptibility of the resources to contamination. In addition, the GIS map provides information with respect to wells for which augmentation is required, and shows well applications approved (*i.e.*, permitted wells, drilled or not drilled) or denied, and wells actually drilled. Note that availability and sustainability should be judged in relation to well yield requirements, presence of other resource usages, ecological requirements, water right issues, and physical constraints, such as limitations on drawdown to prevent a pump from running dry. The GIS maps thus far prepared focused on the non-public lands areas (*i.e.*, developed and developable areas) of the Upper and Middle Roaring Fork valleys, and the watersheds of Snowmass Creek, Capitol Creek, Sopris Creek, Brush Creek, Owl Creek, lower section of Woody Creek, and the Crystal River (see Figure 1).

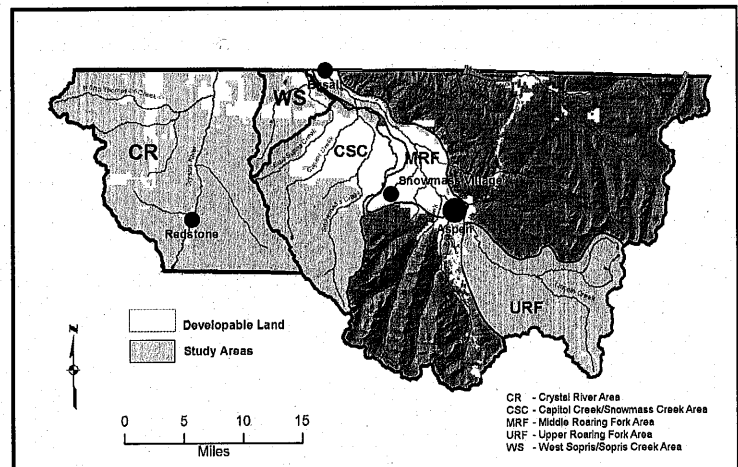


Figure 1: Areas for which GIS-based ground water resources evaluation studies have been completed.

Approach

Key elements in the three projects conducted thus far are: 1) definition of objectives: availability, sustainability, and vulnerability or susceptibility; 2) development of a ten-step ground water resources evaluation procedure; 3) hydrologic systems analysis and subsequent formulation of conceptual hydrogeologic models for representative subsystems in each of the study areas; 4) digitization and interpretation of geologic maps and converting them into hydrogeologic system layers in a GIS; 5) development of supporting GIS maps and data bases from existing data available from disparate sources and in various formats; and 6) design of illustrative example applications of the ground water resources evaluation procedure in conjunction with the developed GIS maps. The incorporated data bases include delineated hydrogeological units created by HSA/HHI, as well as data bases from Pitkin County, the Colorado Division of Water Resources/Colorado Water Conservation Board, and the Natural Resources Conservation Survey (USDA).

Based on field work and hydrologic systems analysis, a number of general conceptual models of hydrogeologic subsystems were identified within the regional scale context of each study area (see Figure 2). Each of these subsystems has a unique set of natural system parameters defining recharge and discharge, ground water levels and fluctuations, ground water flow velocities and direction, and ground water storage. In addition, important anthropogenic hydrologic system parameters include ground water recharge from irrigation and irrigation ditches, and ground water discharge from wells (see Figure 3). If water rights and allocations should change for these ditches or irrigated fields no longer irrigated, the hydrodynamics of the Quaternary glacial and alluvial aquifers would change, and water supplies from ground water may decline or vanish.

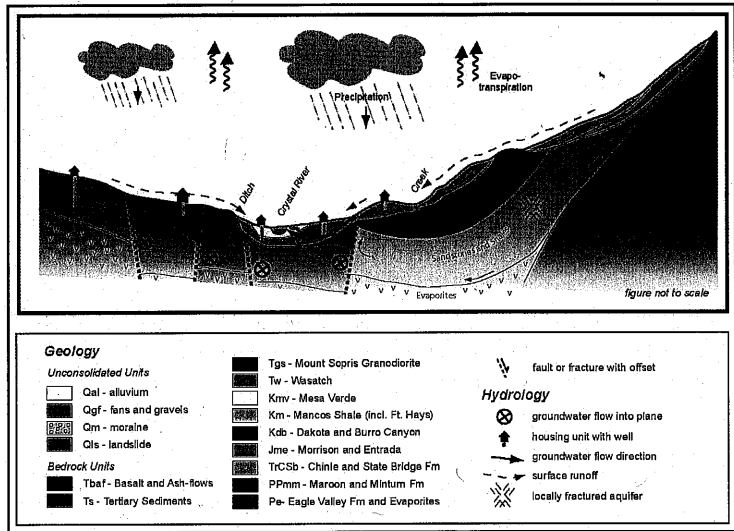


Figure 2: Example cross-section - Central Crystal River Subsystem.

The examples applications show the existing uncertainties in evaluating local ground water resources due to data limitations, and illustrate the variability of drinking water supplies, in availability, sustainability, and vulnerability, dependent on the local hydrogeology and hydrological system (see Figure 3). Most of the example sites are vulnerable to ground water pollution, albeit not at the same level. The examples demonstrate the utility and advantages of the GIS-based analysis procedure and its advantages over simple, one-layer paper maps showing, for example, some general ground water characteristics, and demonstrate the need for site-specific hydrogeologic investigation to obtain quantitative resource management answers and well design parameters.

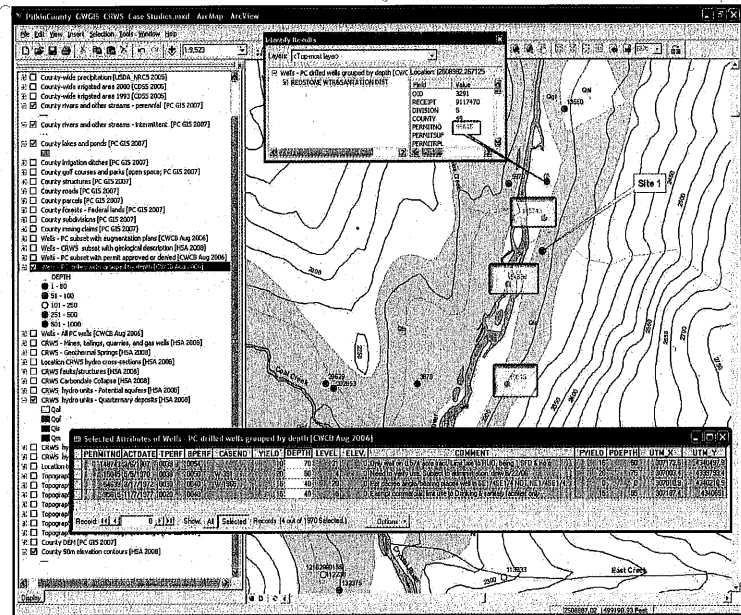


Figure 3: Example application in the Crystal River & West Sopris/Sopris Creek Study Area featuring selected hydrogeologic and well layers.

Recommendations and Utility

It is recommended that for areas in Pitkin County lacking a Hydrologic Systems Analysis (HSA) such analysis should be performed, complete with the preparation of accompanying GIS layers. This pertains in particular to Castle, Maroon, and Woody Creeks, and the Frying Pan River, as well as the Town of Aspen. The Upper Roaring Fork Drainage area has a completed HSA, but lacks the delineation and digitalization of hydrogeologic units. The GIS-based ground water resources evaluation approach developed for Pitkin County can easily be transferred to other counties with similar geographical characteristics.

MEMORANDUM

TO: Healthy Rivers and Streams Board

FROM: John Ely
Pitkin County Attorney

DATE: October 22, 2009

RE: Water Rights Revocable Trust Agreement with the
Colorado Water Conservation Board

Along with this memo please find the packet that will be presented to the Board of County Commissioners on October 28, 2009 concerning the Trust Agreement with the Colorado Water Conservation Board ("CWCB"). Included in the packet is an agenda item summary addressed to the Board, an emergency ordinance and the form of the Water Rights Revocable Trust Agreement.

The Trust Agreement is a result of modifications suggested and accepted by the CWCB staff and counsel. The terms of the agreement and the water rights associated with it are set forth and more specifically described in the attached ordinance. Final review and acceptance of the trust agreement by the CWCB is scheduled for November 16, 2009.

We feel the benefits of this trust agreement to facilitate the preservation and improvement of the natural environment by providing more senior water rights to the instream flows on the Roaring Fork River are obvious and it is hoped that this trust agreement in conjunction with the CWCB's minimum stream flow program will maximize these purposes.

AGENDA ITEM SUMMARY

REGULAR MEETING DATE: October 28, 2009

AGENDA ITEM TITLE: An Emergency Ordinance of the Board of County Commissioners of Pitkin County, Colorado Authorizing Pitkin County to Enter Into a Revocable Trust Agreement with the Colorado Water Conservation Board as Trustee for the Purpose of Augmenting Minimum Stream Flows in the Roaring Fork Basin and to Execute Such Further Instruments as Shall be Necessary to Vest the Trustee with Full Authority to Manage the Trust Estate.

STAFF RESPONSIBLE: John Ely, County Attorney

ISSUE STATEMENT: To introduce and adopt an Emergency Ordinance authorizing the execution of the Pitkin County Water Rights Revocable Trust Agreement between Pitkin County and The Colorado Water Conservation Board (CWCB), as Trustee.

BACKGROUND

I. SUMMARY

Pitkin County has acquired many real property interests over time that have been acquired through different programs within the County. Particularly, Pitkin County has aggressively acquired land in association with its airport enterprise and open space and trails program. These real property assets have been managed by existing Pitkin County staff, land stewards, weed management personnel and open space and trails personnel. The management of these real property assets, including the monitoring of a variety of conservation easements, has been efficient and proactive. However, many of Pitkin County's real property interests have brought to the County water rights that have proven more difficult to manage and protect. By their very nature, these water rights associated and appurtenant to the real property acquired by Pitkin County have always required more manpower and time to adequately maintain. Pitkin County does not have a dedicated staff to deal with these various water rights and their management has fallen on other County departments and as a consequence has left these departments overly strained.

Further, as changes in irrigation methods have developed or the absence of any active agricultural activity on some of these County properties has occurred, the need for actual diversion and application of these water rights to their appurtenant real property has become and continues to be less over time.

Since our recent drought experiences in 2001 and 2002, depicted in the attached photographs courtesy of the Roaring Fork Conservancy taken in August and September of 2002 on the Roaring Fork and Crystal Rivers respectively, the quality of the health of our rivers in the Roaring Fork valley has received heightened awareness. Continued global climate change coupled with potential increases or at least constant diversions from our streams and rivers into other basins increases the prospects for continued decline in the health of our rivers and their associated riparian habitat. As this overall river ecology is threatened, the health of our recreation and tourism economies is also jeopardized.

As a consequence of these factors, there has been a continued and growing desire by Pitkin County to position some of the County's water rights in an instream flow protection effort that would benefit the health of our rivers as well as act to protect our recreation and tourism economies.

II. LIMITATIONS IN THE COUNTY'S ABILITY TO PROTECT AND AUGMENT MINIMUM STREAM FLOWS

The County's options for minimum stream flow protection and augmentation are limited. The most viable options available to the County to augment the minimum stream flows of our local rivers are the establishment of recreational in-channel uses, such as kayak parks, the implementation of temporary agricultural loans of water rights and coordination with the Colorado Water Conservation Board (CWCB) for enhancement of its minimum stream flow protection program. These three options and others that may be technically present all have their limitations. The best approach to the issue is a coordinated effort using as many mechanisms as possible that are available to us under Colorado law. This ordinance is a result of Pitkin County's efforts to enhance minimum stream flow protection through a cooperative effort with the CWCB.

III. CWCB'S MINIMUM INSTREAM FLOW PROTECTION PROGRAM

The CWCB has been the beneficiary of donations of water rights for use in its minimum stream flow program throughout Colorado. There are two particular problems associated with a donation of Pitkin County water rights to the CWCB. First is the issue of ensuring that these rights are utilized to the fullest extent possible by the CWCB for actual augmentation of minimum stream flows. Once water rights are donated to the CWCB they come under the full management of the CWCB without any oversight or participation by the donating party. Second, a donation would require an actual conveyance of a water right from Pitkin County to the CWCB. All of Pitkin County's water rights were acquired through local tax dollars or other locally paid fees and charges. It is extremely difficult for any jurisdiction and Pitkin County is no exception, to convey assets acquired through local dollars to another organization without any consideration or continuing oversight in the disposition or use of those local assets.

Additionally, the majority of Pitkin County's water rights are associated with two programs within the County that have their own unique limitations; the airport enterprise and the open space and trails programs. All assets acquired with open space and trails restricted funds may not be converted or conveyed to another party without voter authorization and replacement of the conveyed asset with another asset of equivalent value. In the context of water rights, it is difficult to anticipate what an equivalently valued resource would be, if not simply another water right associated with a different property. This type of restriction effectively limits the ability of the County to use water rights acquired through the open space and trails fund for minimum stream flow augmentation purposes. The Pitkin County airport enterprise fund is managed consistent with TABOR. As such, those assets must be managed in the County's proprietary capacity. A donation or gift of assets acquired with the enterprise fund could potentially violate the constricts of the Taxpayer Bill of Rights.

As a result of these factors many different devices were considered by Pitkin County and the CWCB, working with assistance from the Colorado Water Trust to effect a transfer of the County's water assets to the CWCB's minimum stream flow program. No conveyance or dedication device that was discussed was ever found to be workable until last year's adoption of House Bill 1280, which specifically recognizes the ability of individuals to loan water rights to the CWCB for minimum stream flow purposes. This legislation coupled with a trust agreement which allows Pitkin County the ability to add different water rights to the agreement from time to time as well as withdraw certain water rights from time to time or even revoke the trust in its entirety, preserves for the County its underlying ownership of the water rights, avoids any legal difficulties in the administration of these water rights for minimum stream flow purposes and more importantly allows these water rights to be applied to a more productive and beneficial use for the community as a whole, mainly improved river ecology and a more stable basis for our recreation and tourism economies.

The trust agreement has been drafted and re-drafted over the last year to create a document which can be executed by Pitkin County and the CWCB. The trust agreement was presented to the CWCB Board at its January 28, 2009 meeting and received strong support. Final review and acceptance of the trust agreement by the CWCB is scheduled for November 16, 2009. The form of the document attached is a result of modifications suggested and accepted by the CWCB staff and counsel. The terms of the agreement and the water rights associated with it are set forth and more specifically described in the attached ordinance.

An additional benefit of the trust agreement is that the Pitkin County water rights will be applied to the minimum stream flow program of the CWCB in certain designated reaches of certain particular rivers in our drainage. All water rights associated with the Roaring Fork will be applied to that reach of the Roaring Fork above the confluence of the Frying Pan. Consequently, the benefit of these water rights will be felt from their current points of diversion through those tributaries to the Roaring Fork and all the way down the Roaring Fork through Pitkin County and the town of Basalt.

Pitkin County feels the benefits of this trust agreement to facilitate the preservation and improvement of the natural environment by providing more senior water rights to the instream flows on the Roaring Fork River are obvious and it is hoped that this trust agreement in conjunction with the CWCB's minimum stream flow program will maximize these purposes.

The BOCC finds that adoption of this ordinance is necessary for the immediate preservation of the public health, safety and welfare of the citizens of Pitkin.

LINK TO STRATEGIC PLAN:

- **Environmental Protection.** Pitkin County is committed to preserving and protecting the integrity of the Roaring Fork watershed and all of its natural resources.
- **Safe and Healthy Community.** An instream flow protection effort promotes an improved river ecology which enhances recreational opportunities for our citizens and a healthy tourism economy for our community.

RECOMMENDED BOCC ACTION: Motion to adopt and set for confirmatory reading and public hearing on November 18, 2009, an Emergency Ordinance Authorizing Pitkin County to Enter into a Revocable Trust Agreement with the Colorado Water Conservation Board as Trustee for the Purpose of Augmenting Minimum Stream Flows in the Roaring Fork Basin and to Execute Such Further Instruments as May be Necessary to Vest the Trustee With Full Authority to Manage the Trust Estate.

ATTACHMENTS:

Photographs of Drought of 2002 -Roaring Fork and Crystal Rivers
Emergency Ordinance
Pitkin County Water Rights Revocable Trust Agreement



**ROARING FORK RIVER
AUGUST 2002
COURTESY ROARING FORK
CONSERVANCY**

CRYSTAL RIVER

09-13-02

COURTESY ROARING FORK

CONSERVANCY



**AN EMERGENCY ORDINANCE OF
THE BOARD OF COUNTY COMMISSIONERS
OF PITKIN COUNTY, COLORADO
AUTHORIZING PITKIN COUNTY TO ENTER INTO A
REVOCABLE TRUST AGREEMENT WITH
THE COLORADO WATER CONSERVATION BOARD AS TRUSTEE
FOR THE PURPOSE OF AUGMENTING MINIMUM STREAM FLOWS
IN THE ROARING FORK BASIN AND TO EXECUTE SUCH
FURTHER INSTRUMENTS AS SHALL BE NECESSARY
TO VEST THE TRUSTEE WITH FULL AUTHORITY
TO MANAGE THE TRUST ESTATE**

ORDINANCE # ____-2009

1. Pitkin County has acquired many real property interests over time that have brought to the County water rights associated and appurtenant to the real property. These water rights require a concentration of manpower and maintenance for which Pitkin County does not have the benefit of a dedicated staff.

2. The quality of the health of our rivers in the Roaring Fork valley has received heightened awareness due to continued global climate change coupled with potential increases or at least constant diversions from our streams and rivers into other basins which increases the prospect for continued decline in the health of our rivers and their associated riparian habitat.

3. As this overall river ecology is threatened, the health of our recreation and tourism economies is also jeopardized.

4. As a consequence of these factors, there has been a continued and growing desire by Pitkin County to position some of the County's water rights in an instream flow protection effort that would benefit the health of our rivers as well as act to protect our recreation and tourism economies.

5. Some of the County's water rights were acquired through the Open Space and Trails program with restricted funds and may not be converted or sold without voter approval and some water rights were acquired through the Airport Enterprise Fund, pursuant to the Taxpayers' Bill of Rights (TABOR) and must be managed in a manner consistent with the nature of such enterprise.

6. The CWCB is a Colorado administrative agency that was created by statute in 1937 for the purpose of aiding in the protection and development of the waters of the state of Colorado. Pursuant to Colorado law it has exclusive authority to hold instream flows in the state of Colorado.

7. Pitkin County has determined that the best approach to the issue of enhancing minimum stream flow protection is through a cooperative effort with the Colorado Water Conservation Board (CWCB).

8. House Bill 08-1280 signed into law on April 21, 2008, specifically recognizes the ability of individuals to lease, loan or donate water rights to the CWCB for minimum stream

flow purposes and for the CWCB to use those water rights pursuant to amendments to C.R.S. §§ 37-92-102(3), 37-92-103(2) and 37-92-305(3).

9. This legislation coupled with a trust agreement which allows Pitkin County the ability to add different water rights to the agreement from time to time as well as withdraw certain water rights from time to time or even revoke the trust in its entirety, preserves for the County its underlying ownership of the water rights, avoids any legal difficulties in the administration of these water rights for minimum stream flow purposes and more importantly allows these water rights to be applied to a more productive and beneficial use for the community as a whole, mainly improved river ecology and a more stable basis for our recreation and tourism economies.

10. The BOCC finds that adoption of this ordinance is necessary for the immediate preservation of the public health, safety and welfare of the citizens of Pitkin County and therefore declares this ordinance and legislation to be effective immediately pursuant to Pitkin County Home Rule Charter Section 2.8.2.

11. The terms of the agreement are set forth, and the Chair (or Chair's designee) shall be authorized to sign a revocable trust agreement in substantially the form approved by the County Attorney and such further instruments as shall be necessary to vest the CWBC as Trustee with full authority to manage the trust.

NOW, THEREFORE, BE IT ORDAINED by the Board of County Commissioners of Pitkin County, Colorado that the Chair or Chair' designee is authorized to execute a revocable trust agreement with the Colorado Water Conservation Board for the purpose of augmenting minimum stream flows in the Roaring Fork basin in substantially the form approved by the County Attorney and to execute such further instruments as shall be necessary to vest the CWCB as Trustee with full authority to manage the trust estate.

INTRODUCED AND ADOPTED ON THE 28TH DAY OF OCTOBER 2009 AND SET FOR CONFIRMATORY READING AND PUBLIC HEARING ON THE 18TH DAY OF NOVEMBER 2009.

NOTICE OF PUBLIC HEARING PUBLISHED IN THE ASPEN TIMES WEEKLY ON THE 1ST DAY OF NOVEMBER 2009.

CONFIRMED AT PUBLIC HEARING ON THE 18TH DAY OF NOVEMBER 2009.

PUBLISHED AFTER CONFIRMATORY READING IN THE ASPEN TIMES WEEKLY ON THE ____ DAY OF NOVEMBER 2009.

ATTEST:

BOARD OF COUNTY COMMISSIONERS

By _____
Jeanette Jones
Deputy County Clerk

By: _____
Patti Kay-Clapper, Chair

ORDINANCE # _____-2009

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Date: _____

APPROVED AS TO FORM:

MANAGER APPROVAL

John Ely, County Attorney

Hilary Fletcher, County Manager

Declaration of a Revocable Trust
(The Pitkin County Water Rights Revocable Trust)

RECITALS

WHEREAS, this Declaration of a Revocable Trust ("Trust Agreement") is made and executed this _____ day of _____, 20____, by and between the Board of County Commissioners for the County of Pitkin ("Settlor") and the Colorado Water Conservation Board ("Trustee" or "CWCB") (collectively, the "Parties").

WHEREAS, the Trustee is a Colorado administrative agency that was created by statute in 1937 for the purpose of aiding in the protection and development of the waters of the state. It is responsible for water project planning and finance, stream and lake protection, flood hazard identification and mitigation, weather modification, river restoration, water conservation and drought planning, water information, and water supply protection. Pursuant to Colorado law, it has the exclusive authority to hold instream flows in the state of Colorado.

WHEREAS, the Trustee is authorized by Section 37-92-102(3), C.R.S. (2008), to acquire from any person, including any governmental entity, such water, water rights or interests in water as it determines may be required for instream flows to preserve or improve the natural environment to a reasonable degree and to take whatever action may be needed to ensure such instream flows remain in the river.

WHEREAS, the Trustee holds numerous instream flow water rights in the Roaring Fork and Crystal Rivers, and their tributaries ("Roaring Fork River Basin"). In dry years, these instream flow water rights have been known to suffer shortages to varying degrees, with some shorted in the extreme.

WHEREAS, Settlor owns various water rights in the Roaring Fork River Basin, which it holds to manage for the citizens of Pitkin County. Settlor may also acquire various water rights through lease or other contractual arrangements or acquisitions. Some of Settlor's water rights were acquired through Settlor's Open Space and Trails Department with restricted funds and may not be converted or sold without voter approval. Some of Settlor's water rights were acquired through Settlor's Airport Enterprise Fund pursuant to the Taxpayers' Bill of Rights ("TABOR"), under Article X, Section 20 of the Colorado Constitution, and must be managed in a manner consistent with the nature of such enterprise.

WHEREAS, Settlor desires to create a revocable trust of the water rights described in Exhibits A-1 and A-2, attached hereto and incorporated herein by reference (collectively, the "Trust Estate") for the purposes hereinafter set forth. Creation of the revocable trust is intended to assist in providing more water when needed for the Trustee's instream flow reaches in the Roaring Fork River Basin.

WHEREAS, Section 37-92-102(3), C.R.S., allows the Trustee to use water rights acquired through leases, loans and other arrangements for instream flow purposes pursuant to amendments to Sections 37-92-102(3), 37-92-103(2), and 37-92-305(3), C.R.S. House Bill 08-1280, signed by Governor Ritter on April 21, 2008, provides certain protections for water rights provided to the CWCB for use in the Instream Flow Program, pursuant to amendments to Sections 37-92-102(3), 37-92-103(2) and 37-92-305(3), C.R.S. It is specifically contemplated that each of those protections shall apply to the Trust Estate and a description of those protections shall be included in each of the water court decrees obtained pursuant to this Trust Agreement.

WHEREAS, the Settlor agrees to execute such further instruments as shall be necessary to vest the Trustee with full authority to manage the Trust Estate, and the Trustee agrees to hold the Trust Estate for the following uses and purposes set forth herein and subject to the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained, it is agreed as follows:

REVOCABLE TRUST

I. **Purpose of the Trust.** The purpose of the Trust is to preserve and improve the natural environment to a reasonable degree by providing water rights to supplement instream flows in the Roaring Fork River Basin. In accordance with the entrustment by Settlor and the provisions of this Trust Agreement, Trustee will hold, manage, and operate the Trust Estate in a manner that maximizes the purpose of the Trust.

II. **Beneficiary of the Trust.**

The Trust is a self-benefited trust, with the Board of County Commissioners of Pitkin County being the beneficiary of the Trust.

III. **Delivery of the Trust Estate.**

A. Ownership of the Trust Estate shall not be transferred from the Settlor to the Trustee as a result of the entrustment contemplated by this Trust Agreement.

B. The Settlor and Trustee shall, within six (6) months of the execution of this Trust Agreement, file an application, as co-applicants, with the District Court in and for Water Division 5 (the "Water Court") to change the use of the Stapleton Brothers Ditch water rights identified in Exhibit A-1 to add instream flows as a beneficial use (the "Stapleton Water Court case"). The Stapleton Water Court case shall be prosecuted pursuant to Sections 37-92-102(3) and 37-92-305, C.R.S., as amended by House Bill 08-1280. The protections of House Bill 08-1280 shall be specifically incorporated in any decree obtained in the Stapleton Water Court case. The Settlor shall have the right to dismiss the Stapleton Brothers Water Court case if it appears likely to the Settlor that a decree will be entered with terms and conditions that would: (i) establish an unreasonable obligation on the Settlor or (ii) substantially decrease the value of the

Stapleton Brothers Ditch water rights. The Settlor shall consult with the Trustee prior to taking any action to dismiss the Stapleton Water Court case. The Stapleton Brothers Ditch water rights identified in Exhibit A-1 shall be deemed delivered to and available for use by the Trustee upon receipt of a final decree in the Stapleton Water Court case.

C. The Settlor and Trustee's staff shall, within twelve (12) months after receipt of a final decree in the Stapleton Water Court case begin the process to obtain approval of the CWCB to add the water rights identified in Exhibit A-2 to the Trust Estate in accordance with the procedures set forth in Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, or any other applicable Rule duly promulgated by the CWCB and in effect at the time of such addition. The Trustee and Settlor shall not be obligated to proceed with such addition if CWCB approval requires terms and conditions that would: (i) establish an unreasonable obligation on the Trustee or the Settlor or (ii) substantially decrease the value of the water rights. After obtaining such approval, the Settlor and Trustee shall file a Water Court application, as co-applicants, with the Water Court to change the use of the water rights identified in Exhibit A-2 to add instream flows as a beneficial use (the "Remainder Water Court case"). The Remainder Water Court case shall be prosecuted pursuant to Sections 37-92-102(3) and 37-92-305, C.R.S., as amended by House Bill 08-1280. The protections of House Bill 08-1280 shall be specifically incorporated in any decree obtained in the Remainder Water Court case. The Trustee or the Settlor shall have the right to dismiss the Remainder Water Court case if it appears likely to the Settlor that a decree will be entered with terms and conditions that would: (i) establish an unreasonable obligation on the Trustee or the Settlor or (ii) substantially decrease the value of the remaining water rights. The Parties shall consult with each other prior to taking any action to dismiss the Remainder Water Court case. The water rights changed in the Remainder Water Court case shall be deemed delivered to and available for use by the Trustee upon receipt of a final decree in the Remainder Water Court case.

D. Each Party shall bear its own costs and expenses in the Water Court cases. The Parties shall each bear one-half of the responsibility for any services of an engineer or other consultant necessary to file and prosecute the Water Court cases.

IV. Settlor's Warranties, Rights, and Obligations.

A. The Settlor warrants that it has the legal status and legal capacity to execute, deliver, and perform all requirements of this Trust Agreement and that it has full power and authority to execute and deliver this Trust Agreement and all other documents to be entered into in relation to this Trust Agreement, and it has full power and authority to operate under the entrustment provided for herein.

B. The Settlor reserves the exclusive right at any time and from time to time by instrument in writing signed by the Settlor and delivered to the Trustee to modify or alter this Trust Agreement, in whole or in part, without the consent of the Trustee provided that the duties, powers, and liabilities of the Trustee under this Trust Agreement shall not be changed without its consent; and the Settlor reserves and shall have the right, by instrument in writing, signed by the Settlor and delivered to the

Trustee, to cancel and annul this Trust Agreement, as provided in Section XIV of this Trust Agreement.

C. After the expiration of the Initial Period defined in Section XIV.B, the Settlor may from time to time withdraw all or part of the water rights in the Trust Estate by delivering an instrument in writing duly signed by the Settlor to the Trustee substantially similar to that attached hereto as Exhibit B. Such instrument shall describe the property or portion thereof desired to be withdrawn. Upon receipt of such instrument, the Trustee shall thereupon immediately cease the use of the water rights described therein. At least thirty (30) days prior to any such withdrawal, the Settlor shall consult with the Trustee regarding the circumstances and timing of the intended withdrawal.

D. The Settlor may at any time and from time to time add water rights to the Trust Estate by providing written notice to the Trustee of such intent, describing the property or portion thereof desired to be added to the Trust Estate, in a form substantially similar to that attached hereto as Exhibit C. The Settlor may add water rights to which it holds title or in which it has a contractual or other interest. The Settlor and the Trustee's staff must obtain approval of the CWCB to add such water rights to the Trust Estate in accordance with the procedures set forth in Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, or any other applicable Rule duly promulgated by the CWCB and in effect at the time of such addition. Neither the Trustee nor the Settlor shall be obligated to proceed with such addition if CWCB approval requires terms and conditions that would: (i) establish an unreasonable obligation on the Trustee or the Settlor or (ii) substantially decrease the value of the water rights. After obtaining such approval, the Settlor and Trustee shall file a Water Court application to add instream flow uses as a beneficial use ("Supplemental Water Court case"). Any Supplemental Water Court case shall be prosecuted pursuant to Sections 37-92-102(3) and 37-92-305, C.R.S., as amended by House Bill 08-1280. The protections of House Bill 08-1280 shall be specifically incorporated in any decree obtained in the Supplemental Water Court case. The Trustee or the Settlor shall have the right to dismiss any Supplemental Water Court case if it appears likely that a decree will be entered with terms and conditions that would: (i) establish an unreasonable obligation on the Trustee or the Settlor or (ii) substantially decrease the value of the supplemental water rights. The Parties shall consult with each other prior to taking any action to dismiss any Supplemental Water Court case. The water rights changed in any Supplemental Water Court case shall be deemed delivered to and available for use by the Trustee upon receipt of a final decree in such Supplemental Water Court case.

E. The Settlor shall arbitrate, sue upon, defend against, or otherwise deal with and settle claims in favor of or against the Trust Estate as it deems best and the Settlor's decisions regarding and ultimate resolution of any such claims shall be binding and conclusive.

F. Nothing herein shall limit the Settlor's ability to protect the Trust Estate by filing statements of opposition in water court cases that may potentially injure the

Trust Estate; provided, however, that the Settlor shall consult with the Trustee regarding any such statements of opposition prior to filing.

G. The Settlor may bring about beneficial use of the historical consumptive use of the Trust Estate downstream of the instream flow reach benefited by the Trust Estate as fully consumable reusable water or in any other manner allowed by law.

V. Trustee's Warranties, Rights, and Obligations.

A. The Trustee warrants that it has the legal status and legal capacity to execute, deliver, and perform all requirements of this Trust Agreement and that it has full power and authority to execute and deliver this Trust Agreement and all the other documents to be entered into by it in relation to this Trust Agreement, and it has full power and authority to operate under the entrustment provided for herein.

B. The Trustee shall use the Trust Estate for the purposes of preserving or improving the natural environment to a reasonable degree by protecting streamflows in the state of Colorado under Section 37-92-102(3), C.R.S., as amended by House Bill 08-1280, at all times as allowed by all applicable water court decrees and Colorado law, so long as this Trust Agreement is in effect.

C. The Trustee shall be responsible for all administration, monitoring and measuring required by the Division Engineer to use the Trust Estate for instream flow purposes. To the extent that the Division Engineer requires installation of stream gages or other measuring devices in connection with such use, the Trustee shall be responsible for such installation, subject to the availability of funds for such installation. The Trustee shall be responsible for maintaining all records required by the Division Engineer for administration of the Trust Estate for instream flow purposes. The Trustee and Settlor shall coordinate on whether the Settlor may provide assistance with the operation and maintenance of any such required stream gages or other measuring devices.

D. On January 15 of each year that the Trust Agreement is in force, the Trustee shall provide an annual update to the Settlor regarding use of the Trust Estate for instream flow purposes, including but not limited to flow data from the preceding year, any enforcement activities from the previous year, and planned operations and other considerations for the forthcoming year.

E. The Trustee agrees to undertake such acts as are reasonably required to carry out the tenor, purpose, and intent of this Trust Agreement. To that end, the Trustee shall place a call to enforce the seniority of the Trust Estate in the event the instream flow water right being benefited by all or a portion of the Trust Estate is injured or is presumed to be injured by other water users. If such activities include filing statements of opposition to water court cases, the Trustee shall identify this Trust Agreement in any such statement of opposition. Nothing herein shall diminish the CWCB's right to exercise its discretion regarding enforcement of instream flow water

rights; however, the CWCB acknowledges that the intended use of the Trust Estate is to preserve or improve the natural environment to a reasonable degree.

F. The Trustee shall not assign, pledge, sell, or transfer in any manner any part of the Trust Estate, nor shall it have the power to encumber any part of the Trust Estate.

G. The Trustee shall not engage in any activity that will harm the Settlor's interest the Trust Estate.

VI. **Covenant.** This Trust Agreement shall be a covenant which runs with the Trust Estate. This Trust Agreement shall be recorded by the Settlor with the Clerk and Recorder of Pitkin County, Colorado and of Garfield County, Colorado.

VII. **Notice.** Any notice, request, demand and other correspondence made as required by or in accordance with this Trust Agreement shall be made in writing and delivered to the relevant Party at the contact information set out below. Such notice or other correspondence shall be deemed to have been delivered when it is transmitted if transmitted by facsimile, when it is delivered if delivered in person, and three (3) days after posting the same if posted by mail.

To Settlor:

John M. Ely, Esq.
Pitkin County Attorney
530 East Main Street, Suite 302
Aspen, Colorado 81611-1948
Fax: (970) 920-5198

To Trustee:

Linda J. Bassi
Chief, Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203
Fax: (303) 866-4474

VIII. **Interpretation.** This Trust Agreement shall be construed, regulated, and governed by and in accordance with the laws of the State of Colorado and shall be interpreted broadly to effect its purpose.

IX. **Integration Clause.** This Trust Agreement shall supersede all previous agreements between the Parties, and shall be binding upon the Parties and their respective heirs, executors, administrators, successors, and assigns.

X. **Dispute Resolution; Jurisdiction and Venue.** Pursuant to Section 37-92-102(3) C.R.S., the terms of this Trust Agreement shall be enforceable by each party as a water matter in the District Court for Water Division 5; provided, however, that before

commencing any action for enforcement of this Agreement, the party alleging a breach shall notify the other party in writing of the alleged breach and the parties shall make a good faith effort to resolve their differences through informal consultation.

XI. No Waiver. Any failure or delay by a Party in exercising any of its rights, powers and remedies hereunder or in accordance with laws (the "Party's Rights") shall not lead to a waiver of such rights, and the waiver of any single or partial exercise of the Party's Rights shall not preclude such Party from exercising such rights in any other way and exercising the remaining part of the Party's Rights.

XII. Severability. Each provision contained herein shall be severable and independent from each of other provisions, and if at any time any one or more provisions herein are found to be invalid, illegal, or unenforceable, the validity, legality, or enforceability of the remaining provisions herein shall not be affected as a result thereof.

XIII. Amendments. Any amendments or supplements to this Trust Agreement shall be made in writing and shall take effect only when properly signed by the Parties to this Agreement.

XIV. Term and Termination of the Trust. This Trust Agreement shall become effective upon its execution.

A. The term of this Trust Agreement is perpetual unless terminated as allowed by this Section XIV.

B. This Trust Agreement may not be terminated during the initial ten (10) years after this Trust Agreement is executed ("Initial Period").

B. After the expiration of the Initial Period, this Trust Agreement may be terminated upon at least six (6) months prior notice in writing by either Party to the other Party to terminate the Trust hereunder, after which the Trust hereunder shall terminate at the expiration of such six (6) month period or at a later date specified in the termination notice. At least thirty (30) working days prior to providing such notice, the Party initiating the termination shall consult with the other Party regarding its intent to terminate the Trust Agreement.

D. The Trust Agreement shall also be terminated upon occurrence of any event that leads to such termination in accordance with the laws of the State of Colorado.

E. Upon termination of the Trust Agreement, the Trust Estate shall belong to the Settlor and the Trustee shall act at the instruction of Settlor to take all reasonable actions immediately necessary to return the Trust Estate and management thereof to the Settlor.

XV. **Rule Against Perpetuities.** If it shall be determined that any provisions of the Trust Agreement violates any rule against perpetuities or remoteness of vesting now or hereafter in effect in a governing jurisdiction, the affected portion of the Trust Estate shall be administered as provided in this Trust Agreement until the termination of the maximum period allowed by law at which time and forthwith such part of the Trust Estate shall be removed from the Trust and returned to the quiet possession of the Settlor.

I certify that I have read the foregoing Trust Agreement and it correctly states the terms and conditions under which the Trust Estate is to be held and managed by the Trustee.

Dated as of the date set forth above.

SETTLOR, BOARD OF COUNTY COMMISSIONERS
OF PITKIN COUNTY:

By: _____
Its: _____

ATTEST:

By: _____
Its: Secretary

[Trustee]

Exhibit A-1
Description of Trust Estate - Stapleton Brothers Ditch Water Rights

Name	Decree	Source	Amount
Stapleton Brothers Ditch	99CW306	Roaring Fork River	4.3 cfs (119.25 AF/yr)

Exhibit A-2
Description of Trust Estate - Remaining Water Rights

Name	Decree	Source	Amount
Cramer Ditch, Original Construction	C.A. No. 132	Sopris Creek	0.143 cfs
Cramer Ditch, First Enlargement	C.A. No. 132	Sopris Creek	0.143 cfs
Cramer Ditch, Second Enlargement	C.A. No. 132	Sopris Creek	0.143 cfs
Cramer Ditch, Third Enlargement	C.A. No. 3082	Sopris Creek	0.143 cfs
Cramer Ditch (aka Beard Ditch)	W-867	Sopris Creek	0.143 cfs
Cramer Ditch (aka Beard Ditch) (appropriation date 8/25/1961)	W-867	Sopris Creek	0.143 cfs
Cramer Ditch, Fourth Enlargement	W-3414	Sopris Creek	0.143 cfs
Home Supply Ditch, Original Construction	C.A. No. 132	Roaring Fork River	0.5 cfs
Home Supply Ditch, First Enlargement	C.A. No. 2811	Roaring Fork River	0.5 cfs
Home Supply Ditch, Second Enlargement	C.A. No. 3082	Roaring Fork River	0.5 cfs
Home Supply Ditch (alternate point of diversion)	W-1801	Roaring Fork River	0.5 cfs
U.S. Green Ditch No. 2	C.A. No. 4033	Unnamed tributary of the Roaring Fork River	1.0 cfs ¹
U.S. Green Ditch No. 1	C.A. No. 4033	Wheel Barrow Gulch	1.0 cfs ²
J.H. Smith, Warren Creek Ditch No. 1	C.A. No. 4033	Warren Creek	1.5 cfs ³
U.S. Green Ditch No. 1	C.A. No. 4033	Wheel Barrow Gulch	2.0 cfs ⁴
Wilke Ditch	C.A. No. 2136	Crystal River	1.2 cfs
Crystal River Hot Spring Cooling Water Diversion and Pipeline	87CW202	Crystal River	0.5 cfs

1. May require cooperation with Aspen Center for Endowment Studies.
2. 1.0 acre-foot per year of historic consumptive use leased to James Hunting until 2038.
3. Owned in joint tenancy with City of Aspen.
4. Owned in joint tenancy with City of Aspen.

Name	Decree	Source	Amount
Crystal River Hot Spring and Pool (aka Granite Hot Springs Nos. 1-4)	87CW202	Geothermal groundwater and surface water tributary to the Crystal River	0.01 AF
Low Line Ditch, Original Construction	C.A. No. 1007	Crystal River	1.538088 cfs
Mautz Spring and Mautz Ditch Nos. 1 and 2	C.A. No. 4033	Mautz Spring is the source for the Mautz Ditch Nos. 1 and 2, along with snow, rain and waste water that run into said spring and ditches	2.0 cfs
John Stern Ditch No. 1	C.A. No. 5884 W-3103	Waste and seepage water	0.5 cfs
Jote Smith Ditch, Original Construction	C.A. No. 132	Brush Creek	0.72 cfs
Jote Smith Ditch, First Enlargement	C.A. No. 132	Brush Creek	0.25 cfs
Cozy Point Ditch, Original Construction	C.A. No. 132 92CW007	Brush Creek	0.19 cfs
Cozy Point Ditch, First Enlargement	C.A. No. 3723 92CW007	Brush Creek	0.24 cfs
Upper Wiese Ditch	C.A. No. 2689 92CW007	Brush Creek	0.20 cfs
Upper Wiese Ditch (appropriation date 9/1/1936)	C.A. No. 3723 92CW007	Brush Creek	0.62 cfs
Cozy Point Pond	88CW479 93CW003	Brush Creek	2.0 AF
Stapleton Ditch	C.A. No. 132	Owl Creek	2.0 cfs
Stapleton Ditch, First Enlargement	C.A. No. 132	Owl Creek	0.8 cfs
Bivert Ditch	C.A. No. 132	Owl Creek	0.5 cfs
Bivert Ditch, First Enlargement	C.A. No. 132	Owl Creek	1.0 cfs
Walthen Ditch	C.A. No. 132	Woody Creek	3.0 cfs
Walthen Ditch, First Enlargement	C.A. No. 132	Woody Creek	3.2 cfs

Exhibit B
Notice of Withdrawal

Linda J. Bassi
Chief, Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203
Fax: (303) 866-4474

Re: Pitkin County Revocable Water Rights Trust - Notice of Withdrawal

Dear Linda:

Pursuant to Section IV.C. of the Pitkin County Revocable Water Rights Trust Agreement, Pitkin County is hereby providing notice of its intent to withdraw water rights from the Trust Estate. The following water rights will be withdrawn from the Trust Estate:

<u>Name</u>	<u>Decree</u>	<u>Source</u>	<u>Amount</u>
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As required by Section IV.C. of the Trust Agreement, Pitkin County contacted the CWCB at least 30 days prior to this notice to discuss the withdrawal of the water rights specified above. Upon receipt of this letter, the CWCB shall immediately cease the use of the water rights specified above for instream flow purposes.

Sincerely,

John M. Ely
Pitkin County Attorney

Exhibit C
Notice of Addition

Linda J. Bassi
Chief, Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203
Fax: (303) 866-4474

Re: Pitkin County Revocable Water Rights Trust - Notice of Addition

Dear Linda:

Pursuant to Section IV.D. of the Pitkin County Revocable Water Rights Trust Agreement, Pitkin County is hereby providing notice of its intent to add water rights from the Trust Estate. The County wishes to add the following water rights to the Trust Estate:

<u>Name</u>	<u>Decree</u>	<u>Source</u>	<u>Amount</u>
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As required by Section IV.D. of the Trust Agreement, we must obtain CWCB approval to acquire the water rights specified above as required by Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program. Please contact me at your convenience to begin the approval process.

Sincerely,

John M. Ely
Pitkin County Attorney