

BOARD OF COUNTY COMMISSIONERS  
PROWERS COUNTY, COLORADO  
AGENDA ITEM

September 4, 2019, 6:00 p.m.  
Multipurpose Room of the Lamar Senior Citizens Center  
407 East Olive Street, Lamar, CO 81052

**PUBLIC HEARING**

**STAFF:** Michelle Hiigel, Darla Scranton Specht, Esq.

**RE:** AMENDED APPLICATION FOR A PERMIT TO CONDUCT A DESIGNATED ACTIVITY OF STATE INTEREST OR TO ENGAGE IN DEVELOPMENT IN A DESIGNATED AREA OF STATE INTEREST; FILED BY ARKANSAS RIVER FARMS, LLC AND LOWER ARKANSAS WATER MANAGEMENT ASSOCIATION (“AMENDED APPLICATION”).

**STAFF RECOMMENDATION:**

Staff recommends conditional approval of the Amended Application with incorporation of Staff Recommendations.

**AMENDED APPLICATION**

On May 3, 2019, an Amended Application for a Permit to Conduct a Designated Activity of State Interest or to Engage in Development in a Designated Area of State Interest (“Amended Application” or “Amended 1041 Application”) was submitted by Arkansas River Farms, LLC (“ARF”) and the Lower Arkansas Water Management Association (“LAWMA”). The Amended Application followed an initial application dated March 8, 2019. The Amended Application was accepted as complete by the Prowers County Board of County Commissioners on July 16, 2019.

Prior to Applicants’ submission of the Amended Application, the County met at various times with principals of ARF and LAWMA beginning in 2017, and ARF and LAWMA were informed of the need to obtain a 1041 Permit for the proposed development and activity. In addition, the Board of County Commissioners and/or Land Use Administrator for Prowers County, Colorado were invited to and at times attended meetings where ARF and LAWMA discussed their October 2, 2017 application for a 1041 permit with Bent County and/or Otero County.

**NOTICE AND REFERRALS**

Notice of the Amended Application and hearing was published in the Lamar Ledger on August 1, 2019, in accordance with Sections 1.304 and 2.301 of the Guidelines and Regulations for Areas and Activities of State Interest, County of Prowers, State of Colorado (“1041 Regulations”). In accordance with Section 1.304(f) of the 1041 Regulations, Notice of the Application was referred to:

Alta Vista Charter School  
8785 County Road LL  
Lamar, CO 81052

Amity Mutual Irrigation District  
P.O. Box 187  
Holly, CO 81047

Arkansas River Farms, LLC  
Attn: Aaron Patsch  
1530 16th Street, Suite 300  
Denver, CO 80202

Bent County Commissioners  
P.O. Box 350  
Las Animas, CO 81054

Buffalo Ditch  
P.O. Box 187  
Holly, CO 81047

Buffalo Drainage  
P.O. Box 187  
Holly, CO 81047

Colorado Department of Local Affairs  
1313 North Sherman Street, Suite 521  
Denver, CO 80203

CDPHE-Water Quality Control Division  
4300 Cherry Creek Drive South  
WQCD-B2  
Denver, CO 80246

Colorado Division of Water Resources  
Attn: Kevin Rein, State Engineer  
1313 Sherman Street, Suite 821  
Denver, CO 80203

Natural Resource Conservation Services  
1501 South Main Street  
Lamar, CO 81052

Colorado Parks and Wildlife  
2500 South Main Street  
Lamar, CO 81052

Colorado State Conservation Board  
200 South Santa Fe Avenue  
Pueblo, CO 81003

East Otero Conservation District  
200 South 10<sup>th</sup> Street  
Rocky Ford, CO 81067-1714

Fort Bent Ditch Company  
P.O. Box 485  
Lamar, CO 81052

Fort Lyon Canal Company  
750 Bent Avenue  
Las Animas, CO 81054

Granada Drainage  
P.O. Box 387  
Granada, CO 81041

Holly Drainage  
P.O. Box 187  
Holly, CO 81047

Karl Nyquist  
7991 Shaffer Parkway, Suite 200  
Littleton, CO 80127

Lamar Canal  
P.O. Box 287  
Lamar, CO 81052

Lower Arkansas Water Management Ass'n  
P.O. Box 1161  
Lamar, CO 81052

Lower Arkansas Valley Water Conserv. Dist.  
Attn.: Jay Winner  
801 Swink Avenue  
Rocky Ford, CO 81067

Colorado Division of Water Resources-Div. 2  
Attn: Bill Tyner, Division 2 Engineer  
310 East Abriendo Avenue, Suite B  
Pueblo, CO 81004

Otero County Commissioners  
13 West Third Street, Room 12  
La Junta, CO 81050

Prowers Conservation District  
1501 South Main Street  
Lamar, CO 81052

Southeastern Colorado Water Conservancy  
District  
31717 United Avenue  
Pueblo, CO 81001

Wiley Drainage  
P.O. Box 323  
Wiley, CO 81092

East Prowers Weed Control District  
P.O. Box 64  
Granada, CO 81041

Notice of the Amended Application and hearing was provided, upon request, to:

Monty Coen  
P.O. Box 344  
Lamar, CO 81052

Rex Davis  
5035 County Highway 196  
Lamar, CO 81052

Belinda Groner  
5035 County Road 34  
Lamar, CO 81052

Eddie Hall  
6020 County Road RR  
Lamar, CO 81052

Eric Hallenberger  
11393 County Road NN  
Lamar, CO 81052

Jillaine Hixson  
7943 County Road DD  
Lamar, CO 81052

Dallas May  
County Road 7  
Lamar, CO 81052

Riley May  
14581 County Road LL  
Lamar, CO 81052

Leroy Mauch  
8405 Antler Ridge Court  
Lamar, CO 81052

Donnie Mc Bee  
40755 County Road 9  
Lamar, CO 81052

Wesley Werth  
14591 County Road LL  
Lamar, CO 81052

Don Woller  
8600 County Road TT  
Lamar, CO 81052

Rick Wollert  
8373 County Road TT  
Lamar, CO 81052

## **APPLICANTS**

ARF is a Colorado limited liability company with two (2) member entities: Resource Land Holdings (“RLH”) and New Arkansas River Farm, LLC. RLS is a Denver-based private equity firm, focusing its investments in agricultural, timber, and mining properties around the United States. Staff has been informed that Karl Nyquist is a principal with New Arkansas River Farm, LLC.

LAWMA is a non-profit Colorado corporation organized with the overall purpose of developing water supplies to assist its members with making continued diversions from structures with junior priorities under the water rights administrative system in the Arkansas River Basin. LAWMA’s present service area (depicted on Figure 1 of the Amended Application) extends to Lincoln, Otero, Elbert, Baca, Cheyenne, Kiowa, Bent and Prowers Counties. LAWMA augments approximately 736 wells and other structures, inclusive of 531 (72%) agriculture wells, 70 (9.5%) municipal wells, and 77 (10.5%) commercial wells. The remaining 58 structures are gravel pits, ponds and wells for other purposes. There are presently approximately 684 diversion structures augmented by LAWMA, of which approximately 94% are used

for agricultural purposes. LAWMA’s replacement water supplies are derived from a number of sources, including shares in mutual ditch companies that have been changed to augmentation and replacement uses pursuant to water court decrees. There are 27,566 common shares and 940.15 preferred shares of stock presently issued by LAWMA. LAWMA’s current average allocation is 0.75 acre-feet per share, with actual annual amounts depending on hydrological conditions. Colorado Springs Public Utility has recently acquired shares in LAWMA through a negotiated sale and transfer which, in the future, may affect LAWMA’s augmentation and replacement uses.

ARF owns 1,117 of LAWMA common shares. ARF has transferred 2,500 of its previously-owned LAWMA shares to the Holly Dairy.

**DESCRIPTION OF PROPOSED DEVELOPMENT AND ACTIVITY:**

**A. 582 ACRES INTENDED TO BE DRYLAND FARMING OR PASTURE**

By their Amended Application, ARF and LAWMA (together, the “Applicants”) request a permit to engage in a development in a designated area of state interest and to conduct a designated activity of state interest. Applicants propose to dry up all acres which are the subject of their Amended Application with the specific acreage to be:

ACREAGE OF SUBJECT FARM		
FARM #	REVEG/DRYLAND FARMING	NUMBER OF FORMER IRRIGATED ACRES
62A	Dryland Farming	190
62B	Dryland Farming	(included with 62A)
118	Dryland Farming	173
141	Dryland Farming	219
Total:		582

The 582 acres were historically irrigated by shares of the Ft. Lyon Canal Company (“FLCC”) owed by ARF. Under agreement with LAWMA, ARF has traded some of its FLCC shares to LAWMA in exchange for LAWMA shares, for augmentation uses both inside and outside Prowers County. ARF’s remaining FLCC shares would be moved to other farm parcels.

ARF has designated LAWMA as the “Future Owner” of the dry-up covenants on Farms 62A, 62B, 118 and 141. Under agreement with LAWMA, ARF has traded some of its FLCC shares to LAWMA in exchange for LAWMA shares. ARF intends to transfer the FLCC shares associated with the 582 acres to LAWMA before the end of 2019 without encumbrance.

ARF makes and has made the following representations:

- A. On December 14, 2016, The Fort Lyon Canal Company approved ARF’s request to seek water court approval to add augmentation and replacement uses to the FLCC shares.
- B. For ARF to transfer the FLCC shares to LAWMA, and for LAWMA to obtain water court approval of the required change of water rights, the FLCC Shares must be severed from

Farms 62A, 62B, 118 and 141 and from the pre-1041 farm (Farm 63)<sup>1</sup>, which are farms historically irrigated by the FLCC shares.

- C. The development cost of the Holly Dairy is estimated at approximately \$25,000,000 and will likely occur over the next 12 months.
- D. For Farms 62A, 62B, 118, 141, zoning will remain agricultural and the uses will not materially change other than going from irrigated farming to dryland farming or pasture. ARF has agreed to with LAWMA to develop a network of augmentation stations, recharge ponds and related equipment on Farms 62A, 62B, 118, and 141 to return the FLCC water from the FLCC Shares that were once used on these farms back to the Arkansas River. ARF spent approximately \$400,000 in Prowers County to develop the part of the system infrastructure located in Prowers County, which infrastructure will stay in place perpetually and is operated by ARF for the benefit of LAWMA.

Within Prowers County, the Amended Application states that 582 acres of historically flood irrigated acreage will be dryland farmed, as a result of ARF's development and activity. As a consequence, ARF's proposed development will result in the permanent cessation from irrigation of approximately 582 acres in Prowers County (which acreage is understood not to include the pre-1041 acres identified as Excluded Interests parcels – Farm 63).

ARF proposed to not use any of its FLCC shares to irrigate Farms 62A, 62B, 118 and 141. It is anticipated that ARF does not intend to use any of its FLCC shares to irrigate the Excluded Interests – Farm 63 (pre-1041 dry up acres).

## **B. ARF OVERALL DEVELOPMENT PLAN**

ARF has stated in its 1041 application process with Bent County that the purpose of the proposed development and activity is to consolidate existing farming operations in Bent, Prowers and Otero Counties, enhance the water supply for such consolidated operations, and attract large agricultural businesses to the region.

ARF represented in the Bent County 1041 application process that (a) it has invested approximately \$50 million in the land and water rights acquisitions in Bent, Prowers and Otero Counties; (b) it has acquired a total of 17,414.44 shares in the FLCC, representing approximately 18% of the total shares issued by FLCC; (c) that a majority of these FLCC shares were purchased by ARF from Pure Cycle Corporation and were the subject of prior unsuccessful efforts to change the use of the shares for purposes outside of the Arkansas River Basin; (d) that it has also acquired approximately 13,674 acres of land within Otero County (260 acres), Prowers County (1,365 acres) and Bent County (12,049 acres), most of which was historically irrigated by the FLCC shares; and (e) that it did not acquire 4 parcels in Bent County (totaling approximately 843 acres) historically irrigated by ARF's FLCC shares, but did acquire dry-up covenants burdening these four parcels for which the covenants were assigned to LAWMA.

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<sup>1</sup> ARF has acquired Farm 63 with dry-up provisions not subject to Prowers County's 1041 Regulations (pre-1041 parcels). ARF has not included these pre-1041 parcels and FLCC shares in its Amended Application ("Excluded Interests").

The 17,414.44 FLCC shares acquired by ARF historically irrigated approximately 12,754 acres. Of this total, approximately 1,365 acres irrigated acres are located in Prowers County (inclusive of Excluded Interests – Farm 63). These lands were historically flood irrigated. Because FLCC makes deliveries on a rotational schedule, water was not uniformly delivered to the individual farm parcels throughout each irrigation season. ARF represented in Bent County that it was seeking to increase efficiency and provide a more uniform water supply. To do so, ARF proposed to Bent County to “stack” the remaining FLCC shares on its most productive and sustainable parcels, construct pivot irrigation systems for these parcels, and provide an additional supply of ground water from wells on these parcels augmented by the LAWMA trade shares.

ARF’s total acreage as historical use and future land use was represented to Bent County as follows:

HISTORICAL USE OF ARF ACREAGE			
County	Food Irrigated	Pasture	Total
Bent County	9,929	2,120	12,049
Otero County	252	8	260
Prowers County	1,241	124	1,364
<b>Total</b>	<b>11,422</b>	<b>2,252</b>	<b>13,674</b>

FUTURE LAND USE OF ARF ACREAGE						
Flexible, Augmented Irrigation						
County	Pivots	Flood	Dry-land	Pasture	Revegetation	Total
Bent County	4,300	1,195	2,724	2,120	1,710	12,049
Otero County	0	0	113	8	130	260
Prowers County	350	322	569	124	0	1,365
<b>Total</b>	<b>4,650</b>	<b>1,517</b>	<b>3,406</b>	<b>2,252</b>	<b>1,849</b>	<b>13,647</b>

ARF acquired 6,080 LAWMA shares on March 31, 2017, pursuant to a trade agreement with LAWMA whereby ARF conveyed 6,080 of its 17,414.44 FLCC shares to LAWMA. At that time, ARF and LAWMA contemplated an additional future conveyance of 1,429 FLCC shares to LAWMA in exchange for issuance of an equal number of LAWMA shares in the name of ARF. Shortly after the March 31, 2017 trade, ARF sold approximately 2,500 of the LAWMA shares to a third party, presumably for use outside Prowers County. ARF’s ownership of the remaining approximately 3,580 LAWMA shares will entitle ARF to a pro rata amount of the augmentation water yielded annually pursuant to LAWMA’s decreed and administratively-approved water supplies. Applicants have stated that they intend to file a water court application seeking to add the ARF Wells as augmented structures under LAWMA’s existing augmentation plan. Though ARF has stated its intention to utilize most of its remaining 3,580 LAWMA shares for the ARF Wells, the LAWMA shares owned by ARF would nevertheless remain marketable and they could in the future be transferred to third parties, upon LAWMA’s approval, to augment other diversions, including for industrial and municipal purposes, within LAWMA service area.

LAWMA has added the 6,080 FLCC shares acquired from ARF as a source of replacement water in its State-approved 2017 “Rule 14” plan. LAWMA intends to file or has filed a water court application to permanently change the ARF-derived FLCC shares from irrigation use to augmentation and replacement uses for the benefit of LAWMA’s shareholders. In order to obtain water court approval of any such

change, it will be necessary to permanently remove from irrigation the acreage historically irrigated by the changed FLCC shares, including those 2,500 shares now being utilized for benefits outside of Prowers County, and, further, to provide for the successful revegetation or dry-land farming of such acreage.

Proper to both the March 2017 LAWMA-ARF trade and the anticipated FLCC water court change application, Applicants obtained the approval of FLCC Board of Directors, as required by the FLCC bylaws, to change the use of up to 7,509 FLCC shares. The Amended Findings issued by FLCC in December 2016 (Bent County Application Exhibit U) approved the proposed change, subject to certain terms and conditions governing the dry-up and revegetation of the lands historically irrigated by the FLCC shares. Among the revegetation terms and conditions included in the FLCC findings are: a *10-year* period for ARF to complete dry-up, *limitations* on the amount of dry-up acreage that may be revegetated vs. dry land farmed in the future, *notice* and reporting to FLCC of dry-up commencement and progress, *security* equivalent to \$250/acre in the form of a 5-year letter of credit, and the *reservation* of 500 FLCC shares to aid in the establishment of revegetation.

ARF represented its objective in the Bent County 1041 Application process to be creating high-yield, water-efficient farm parcels that will attract large agricultural businesses to the region. In the Bent County 1041 process, ARF represented that it had already invested \$1.6 million in augmentation improvements to effectuate its proposed development and activity, had committed to investing up to \$9 million more in Bent County land, would create an additional approximately 17 jobs, and would add approximately \$1.2 million to regional output and labor income.

**CRITERIA REVIEW OF AMENDED APPLICATION:**

**Chapter 3, Section 3.304** of the Prowers County Guidelines and Regulations for Areas and Activities of State Interest sets forth criteria for determination of the Application with respect to efficient utilization of municipal and industrial water projects:

- (a) *To the extent applicant's service area is located within or partially within the boundaries of the County, whether the need for the proposed water project can be substantiated.*

Applicant LAWMA reports it is organized to provide replacement water supplies to its member shareholders, enabling such members to continue diversions from "junior" structures that would otherwise be curtailed under the water rights administrative scheme in the Arkansas River basin. Water diverted from such structures may include use for agricultural, municipal, industrial, and other purposes. LAWMA's service area includes Prowers County and all or portions of Lincoln, Otero, Elbert, Baca, Cheyenne, Kiowa, and Bent Counties.

- (b) *Compatibility of the proposed water project with federal, state, regional and County planning policies regarding land use and water resources.*

Applicants' state that their plan is to dry up 582 acres in addition to Farm 63 which will be subject to dry up as pre-1041 acres. Applicants propose to dry up the 582 acres to be consistent with other dryland farming in the area.

- (c) ***Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of stormwater and sanitation systems shall be accomplished in a manner that will prevent the pollution of aquifer recharge areas.***

This provision is not applicable to the Amended Application.

- (d) ***Provision has been made to ensure that the proposed water project will not contaminate surface water resources.***

Applicants assert that the proposed development and activity with the structures being placed on the Subject Farms and Farm 63 will maintain historical return flow volumes and timing to the Arkansas River, and further proposed development and activity may improve, rather than degrade, water quality in the Arkansas River.

- (e) ***The proposed water project is capable of providing water pursuant to standards of the Colorado Department of Health & Environment.***

Applicants do not supply potable water; accordingly, standards for providing treated water are not applicable.

- (f) ***The proposed diversion of water will not decrease the quality of peripheral or downstream surface and subsurface water resources within the County below that designated by the Colorado Water Quality Control Division as of the date of the adoption of these Regulations.***

See section (d) above.

- (g) ***The proposed development and the potential diversion of water will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitats, or other wildlife protection areas, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance.***

Applicants have submitted wildlife and habitat impact assessment (Exhibit P) prepared by Melvin DePra, a former Area Wildlife Manager with the Colorado Division of Wildlife, and Ecology and Environment, Inc. The assessment concludes that the proposed development and activity will not adversely impact wildlife habitat or otherwise increase direct risks to wildlife. These assessment also indicate that the proposed development and activity might result in enhanced wildlife habitat and create additional biodiversity opportunities.



- (h) ***The water treatment offset plan required by Section 3.303(16) has been approved by the Permit Authority and required fees associated therewith, if any, have been paid.***

This provision is not applicable to the Application.

- (i) ***The construction of structures, buildings, and improvements associated with the proposed development will not significantly impact existing or proposed communities.***

No buildings are included as part of the proposed development and activity on Farms 62A, 62B, 118 and 141. A recharge pond is contemplated for Farm 63 which is not the subject of the Amended Application, however, staff recommends that Farm 63 be included for review and monitoring with the 582 acres which are the subject of the Amended Application.

**Chapter 4, Section 4.304** of the Prowers County Guidelines and Regulations for Areas and Activities of State Interest sets forth criteria for determination of the Application with respect to development in areas containing or having significant impact upon natural resources of statewide importance:

- (a) ***The proposed development will not adversely affect significant wildlife habitat.***

See paragraph (g), above.

- (b) ***The proposed development adequately provides for revegetation of lands historically irrigated in a manner which will successfully prevent invasion of noxious weeds and air or waterborne soil loss.***

Applicants have submitted a dryland farming plan as part of the Amended Application (Exhibit F). Staff, in consultation with the County's retained agronomy expert, has recommended certain changes to the proposed plan, including concerning seeding and the provision for security, as more fully set forth in recommended terms and conditions section of this Report, below.

- (b) ***Revegetation plans required by Section 4.303(6)(f) have been approved by the Permit Authority and adequate security therefor has been placed with the County.***

See section (b), above, and proposed terms and conditions, below.

- (c) ***The proposed development will not significantly degrade existing natural scenic characteristics, create blight, nor cause other nuisance factors such as excessive noise, obnoxious odors, airborne dust or noxious weed invasion.***

See section (b), above, and proposed terms and conditions, below.

- (d) ***The proposed development does not conflict with an approved local master plan or other applicable regional, state or federal land use or water plan.***

Applicants' development or activity does not conflict with an approved Prowers County master plan or other regional, state or federal land use or water plans. Applicants' intent and the proposed development and activity as described in detail in the Amended Application (and Exhibit F) appear consistent with certain of the objectives set forth in the Colorado Water Plan (<https://www.colorado.gov/pacific/cowaterplan/plan>), including the objective of developing water supplies in a manner that will "keep agriculturally dependent communities whole and continue agricultural production in most years..." Water Plan, Chapter 10.2.D.

- (e) ***Adequate water supplies are available for successful implementation of revegetation plans.***

Applicants have committed 500 shares of the Fort Lyon Canal Company to be used to aide in revegetation of the overall tri-county plan encompassing Prowers, Bent and Otero Counties.

- (f) ***The proposed development does not adversely affect either surface or subsurface water rights of upstream or downstream users; provided, however, that the exercise of a senior water right in such a manner as to not cause material injury to other water rights in accordance with state statutes, decided case law and decrees of the Water Court, shall not be considered to create any adverse water rights impact upon such junior water rights.***

Applicants have obtained State/Division Engineer approval of a temporary "Rule 14" plan for use by LAWMA of the FLCC shares exchanged between ARF and LAWMA. Applicants will also file an application with the District Court, Water Division No. 2, seeking approval of a permanent change of use by LAWMA of such shares. The terms and conditions of the State Engineer in the Rule 14 approval, and of any future water court decree should likely ensure that other water rights in the Arkansas River Basin are protected from injury.

- (g) ***The benefits of the proposed development outweigh the losses of any natural resources or agricultural lands rendered unavailable or less productive as a result of the proposed development.***

Applicants report that their proposal to remove from irrigation up to 582 acres of historically irrigated farm lands in Prowers County will have real economic impacts to Prowers County, including, a decrease in assessed value of such lands and decreased property tax revenues. However, based on Applicants commitments of record inclusive of the Holly Dairy, the foregoing and other impacts related to the proposed development and activity reportedly will be outweighed by the benefits of the project due to increased employment opportunities and increased annual revenues in Prowers County.

- (h) *The proposed development will not decrease the quality of peripheral or downstream surface or subsurface water resources below that designated by the Colorado Water Quality Control Commission as of the date of adoption by these Regulations.*

Applicants assert that the proposed development and activity will still maintain historical return flow volumes and timing to the Arkansas River by means other than the flood irrigation which previously was employed on Farms 62A, 62B, 118 and 141.

- (i) *The proposed development will not violate federal or state air quality standards.*

This provision is not applicable to the Application.

- (j) *The proposed development will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitat or other wildlife protection areas, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreation areas, and unique areas of geologic, historic, or archeological importance.*

Applicants have submitted wildlife and habitat impact assessment (Exhibit P) prepared by Melvin DePra, a former Area Wildlife Manager with the Colorado Division of Wildlife, and Ecology and Environment, Inc. The assessment concludes that the proposed development and activity will not adversely impact wildlife habitat or otherwise increase direct risks to wildlife.

- (k) *The proposed development will not create an undue financial burden on existing or future residents within the source development area. The cost of securing an adequate supply of water for existing and future needs of the residents of this County shall be considered in determining whether an “undue financial burden” will result.*

See section (g), above.

**RECOMMENDATION:** Staff recommends that the Board of County Commissioners **CONDITIONALLY APPROVE** the Application, subject to the Board’s consideration of the following potential terms and conditions:

1. **Commitments of Record.** Applicants shall meet all of their commitments and representations made in the Amended Application and of record. Applicants have made representations in their Amended Application and in the Record that the impacts and losses to Prowers County associated with the removal of water from irrigation of historically irrigated lands in Prowers County will be mitigated and outweighed by the Applicants’ additional investments in Prowers County, and the resulting ability to attract large agricultural businesses to the County, including the expansion of the Holly Dairy.

Applicant shall provide the County written quarterly reports (April 1, July 1, October 1, January 1) on the progress of meeting the Applicants’ economic commitments of record, until expansion of

the Holly Dairy is completed and operational. Thereafter, the Applicants will continue to submit bi-annual (January 15 and July 15) written progress reports to the County of additional economic commitments other than the Holly Dairy, and shall continue to so submit reports until all of the Applicants' economic commitments of record have been realized and confirmed by the County.

If the proposed Holly Dairy expansion is not operational within one (1) year from the date of issuance of a 1041 Permit, or if the other economic commitments of record are not satisfied within a reasonable period, the County may, at its discretion, extend such diligence period in accordance with its regulations, or re-open the 1041 Permit and either terminate or amend the 1041 Permit as necessary to require additional economic mitigation by the Applicants.

2. **Addition of Farm 63 to 1041 Permit.** No later than 10 business days following the date of issuance of a 1041 Permit, Applicants shall file with Prowers County an application to amend the 1041 Permit by the addition of Farm 63 together with associated FLCC shares, subjecting the dry-up of Farm 63 to the 1041 Permit terms and conditions by the enforcement of covenants held by Applicants on such Farms. The Applicants shall request that these 1041 Permit dry-up terms and conditions be incorporated as minimum standards in a court decree approving a change of use of the water rights historically used on Farm 63.

4. **Dry Land Farming of Dry-Up Parcels.**

- A. Security for Compliance. Prior to issuance of the 1041 Permit, the County should attempt to enter into an agreement with FLCC wherein the County assumes the lead role in enforcement and administration of the terms and conditions applicable to revegetation and dry-land farming of all Dry-Up Parcels *within Prowers County*. ARF shall have the existing Irrevocable Standby Letter of Credit (No. 22112535), issued by Rabo AgriFinance, reissued *to name Prowers County as the Beneficiary of the Letter of Credit for Farms 62A, 62B, 63, 118 and 141*, with any drafts or reductions to be made pursuant to the 1041 Permit. The term of the Letter of Credit shall be extended to 10 years from the date this Amended Application is approved by Prowers County, or, alternately, if such a 10-year term is unavailable, ARF shall obtain and provide a new Letter of Credit, upon the same terms, no less than six months prior to the expiration of any then-current Letter of Credit. While the Letter of Credit provides security in the amount of \$1.6 million to ensure Applicants' potential liability for compliance with the terms and conditions of the 1041 Permit, it does not limit such potential liability for an amount greater than that secured by the Letter of Credit. If the forfeiture of the Letter of Credit results in inadequate revenues to cover the costs of revegetation or other adequate reclamation of the Dry-up Farms, then Prowers County may pursue collection remedies as authorized by law, including, without limitation as provided for in Section 2.402(12) of the Prowers County 1041 Regulations.

As an alternative to the security suggested in this section 4.A, staff recommends Prowers County consider requiring Applicants security in the form of certified funds in an amount equal to the number of acres historically irrigated by any LAWMA Dry-Up farm removed from irrigation multiplied by \$250 (number of acres in farm removed from irrigation X \$250 = required security amount) to secure its obligation to successfully revegetate or convert the farm to dry-land farming. The security should be a deposited by Applicants to

be held by Prowers County for Farms 62A, 62B, 63, 118 and 141. The deposit of security should be maintained with Prowers County for the greater of 10 years or until all Certificates of Completion have been obtained for all LAWMA Dry-Up parcels.

- B. Parcel Certification. The Applicants must comply with the Dry-Land Farming Certification Process terms and conditions, as set forth in Exhibit F of the Amended Application, subject to the additional requirements recommended by Staff.
  - C. Access to Dry-up Farms. Applicants shall grant to Prowers County easements for entry to inspect at any time, without notice to Applicants, Farms 62A, 62B, 63, 118 and 141 subject to dry-land farming by Prowers County or individuals contracting with Prowers County for the purpose of monitoring compliance with the Amended Application and Exhibit F to the Amended Application.
5. **Joint and Several Responsibility**. Applicants shall be jointly and severally responsible for compliance with all terms and conditions of the 1041 Permit for Farms 62A, 62B, 63, 118 and 141.
  6. **Term of Permit**. The 1041 Permit shall be valid indefinitely for the life of the development and activity, provided that Applicants are in compliance with the 1041 Permit. The 1041 Permit may be revoked or suspended for failure to comply with its terms in accordance with the Prowers County 1041 Regulations.
  7. **Transfer of Permit**. The 1041 Permit may only be transferred or assigned in whole or in part upon written approval of Prowers County. Any proposed transferee or assignee shall demonstrate that it can and will comply with all terms and conditions of the 1041 Permit. Assignment shall not release the Applicants from the requirements of the 1041 Permit, unless expressly set forth in the Assignment and approved by Prowers County.
  8. **Compliance with Regulatory Requirements**. Applicants shall comply with all state, local and federal regulatory requirements, permits, decrees and other approvals applicable to the development and activity. Applicant shall provide copies of any such approvals, permits, and decrees to Prowers County. If any such approval, permit, or decree results in a material change to the 1041 Permit, then Prowers County shall determine whether a 1041 Permit amendment or suspension is required. In the event of conflict between such other requirements, permits, decrees and other approvals and the 1041 Permit, the stricter standard shall be applicable.
  9. **Other Prowers County Regulations**. The 1041 Permit does not constitute an exemption from Prowers County's land use regulations or other applicable regulations and codes, and Applicants as part of their compliance with the 1041 Permit shall comply with all Prowers County regulations applicable to Farms 62A, 62B, 63, 118 and 141.
  10. **Permit Amendment**. Any material change in the construction, use or operation of the Applicants' development and activity, together with the Applicants' commitments of record, shall require a 1041 Permit amendment. For these purposes, a material change shall be any change in the development and activity which significantly changes the nature of impacts considered in approval

of the 1041 permit. The Applicants shall notify Prowers County of any change in the development and activity and Prowers County shall determine whether an amendment or new permit is required.

11. **Compliance Reporting.**

A. The 1041 Permit shall be subject to both interim and ongoing review and assessment by Prowers County. The cost of Prowers County staff, attorney and independent contractors in review of the Application and Amended Application and the cost of Prowers County staff, attorney and independent contractor evaluation of compliance reports, studies, or data produced by the Applicants as part of the required reviews shall be borne by Applicants. Applicants have submitted a costs deposited to Prowers County, and, at the request of Prowers County, Applicant shall deposit additional amounts required to maintain the cost deposit at a minimum balance of \$6,000 to cover costs incurred by Prowers County.

Any cost incurred by Applicants to submit Applicants' compliance reports, studies, or data produced by the Applicants as part of the required reviews shall be borne by Applicants., as well as of the County's staff time to process the reviews, shall be the sole responsibility of the Applicants.

B. Prowers County staff and/or independent contractors shall review Farms 62A, 62B, 63, 118 and 141 no less frequently than quarterly to monitor compliance of Applicants with the terms of the 1041 Permit, and shall provide a report to Prowers County annually. Reviews shall be to review the monitoring/management plans and compliance with the permit terms, conditions, and commitments of record.

C. Applicants shall submit compliance reports annually to Prowers County as set forth in the PROPOSED ADDITIONAL 1041 PERMIT DRY-LAND FARMING CERTIFICATION PROCESS (Exhibit A of these Staff Recommendations). Reviews by Prowers County staff and/or independent contractors shall occur upon receipt of compliance reports from Applicants. At any time Prowers county may required interim reviews and reports from Applicants to review and monitory the management plans and compliance with the 1041 Permit terms, conditions, and commitments of record.

12. **Noncompliance.** Noncompliance with the terms and conditions of the 1041 Permit shall suspend the 1041 Permit.

13. **Integrated Terms and Conditions.** Because any 1041 Permit issues may be based on a determination that the benefits accruing to Prowers County and its citizens from the Applicants' proposed development and activity outweigh the unavoidable impacts and losses of resources within Prowers County, if any term or condition of the 1041 Permit is deemed invalid and unenforceable, then the 1041 Permit shall be rescinded or suspended unless, Prowers County, in its discretion, approves a 1041 Permit amendment.

**Staff Report Exhibit A**  
**PROPOSED ADDITIONAL 1041 PERMIT**  
**DRY-LAND FARMING**  
**CERTIFICATION PROCESS**

The following process for implementing a reasonable dry-land farming plan (“Process”) is recommended for incorporation as terms and conditions of any 1041 Permit issued by Prowers County in addition to the certification terms set forth in Exhibit F of the Amended Application:

**I. REVEGETATION AND DRY-LAND PROCESS**

1. Upon the removal of irrigation water from each LAWMA Dry-Up parcel (parcels historically irrigated with FLCC shares, which shares will be changed for other uses), such parcel shall be subject to these requirements to be converted to dry-land farming. The conversion to dry-land farming shall be done in the manner described in Sections A and B below.
2. Applicants shall have ten (10) years from the date irrigation water is removed from a parcel of LAWMA Dry-Up to obtain a Certificate of Completion for that parcel of the LAWMA Dry-Up.
3. Prior to removal of a LAWMA Dry-Up parcel from irrigation, Applicants shall give notice to Prowers County and the Fort Lyon Canal Company (“Company” or “FLCC”) that provides: i) the identity of the parcel(s) to be removed from irrigation; ii) a statement of whether the parcel(s) will be revegetated or dry-land farmed.
4. In addition to the Dryland Pasture Seed Mix proposed by Applications in Exhibit N-7 to the Amended Application, Applicants shall incorporate warm season seed mix varieties and native varieties of grass as recommended by Prowers County’s expert.
5. For all Farms subject to the 1041 Permit, all annual and quarterly reports submitted by Applicants shall also include a list of the dates, times and descriptions of all planting activities, herbicide applications, mowing activities, tillage activities, and other farming-type activities performed on the subject Farms to date.
6. In addition to the activities described in Exhibit Q, Applicants’ requirements shall be amended to the following requirements:
  - a. The revegetation fields shall achieve a minimum 20% basal plant coverage of the field using the Point-Step Method in Class VI fields to be released, rather than 15%-20%.

- b. Included in all annual and quarterly reports submitted by Applicants, the percentage for grain crop cover shall also be reported.
  - c. For Farms subject to dryland farming, years of farming for the purpose of obtaining a Certificate of Completion shall not include farm crop years not meeting a requirement of producing 30% cover or 5 inch stubble.
7. Once Applicants obtain a Certificate of Completion for any parcel of the LAWMA Dry-Up, Prowers County shall have no further oversight of the farming or land management practices on that parcel, other than pursuant to Prowers County's zoning, building, health or other applicable regulations and codes.
  8. If Applicants have not converted any LAWMA Dry-Up to dry-land farming within ten years of the parcel being removed from irrigation, Prowers County may withdraw and employ from the security such funds as may be necessary to carry out the dry up work for such parcel, up to an amount equal to the number of acres not certified as complete times \$250. Prowers County shall provide Applicants a reasonable time to cure of no less than one irrigation season for any deficiency identified by Prowers County prior to requesting withdrawal from the security.
  9. To the extent that successful establishment and maintenance of the LAWMA Dry-Up may require water for an interim period, Applicants shall provide such water at their cost. Potential sources of such water may include but are not limited to the following: (i) ground water that is treated as sole-source pumping and is fully-augmented under LAWMA's augmentation plan or other augmentation plan approved by the Water Court for Water Division 2, or any SWSP or Arkansas River replacement plan approved by the State Engineer; (ii) water available to other Fort Lyon Canal Company shares owned by ARF; and/or (iii) water available to LAWMA. Prowers County will make the determination as to whether water is required for an interim period to establish and maintain LAWMA Dry-Up farming. In the event that the owner of any LAWMA Dry-Up desires to continue to irrigate portions of the LAWMA Dry-Up with ground water pumped by wells, Prowers County acknowledges that nothing in this Process is intended to preclude the owner from continuing to irrigate the LAWMA Dry-Up with ground water, as long as notice has been provided to Prowers County, and any such irrigation with ground water is treated as sole-source pumping and is fully augmented under LAWMA's augmentation plan or other augmentation plan approved by the Water Court for Water Division No. 2, or any substitute water supply plan or replacement plan approved by the Colorado State Engineer. If any dry-up covenant for the LAWMA Dry-Up is more restrictive on the owner of the LAWMA Dry-Up or more protective of LAWMA than this process, then the terms and conditions of the dry-up covenant shall control.
  10. In the event that the owner of any LAWMA Dry-Up desires to irrigate portions of the LAWMA Dry-Up with FLCC shares not part of this application and not previously used on the LAWMA Dry-Up Lands proposed to be irrigated ("New FLCC shares"), Prowers County acknowledges that nothing in this Process is intended to preclude the owner from doing so, as long as notice has been provided to Prowers County, and any such irrigation



with new FLCC shares has been approved by FLCC if required by the FLCC By-laws, and, if applicable, the Water Court. If any dry-up covenant for the LAWMA Dry-Up is more restrictive on the owner of the LAWMA Dry-Up or more protective of LAWMA than this process, then the terms and conditions of the dry-up covenant shall control.

## **II. CERTIFICATION OF COMPLETION**

### **A. Definitions**

1. Acceptable for Farms where Dry-land Farming will occur means:
  - a. The farm has been successfully planted to a dry-land crop or is in a fallow period following a successful dry-land crop; the crop was planted and farmed without irrigation water, such that it is dependent solely upon precipitation to meet crop water requirements; if other dry-land farming in the region is producing crops, the farm also is producing a dry-land crop with weeds adequately controlled and that controls soil erosion from wind in a manner consistent with state and local law; and minimum crop residue after harvesting a dry-land crop is as described below, and the crop residue is left on the parcel until the parcel is prepared for the next rotation of planting; provided, however, that this requirement for crop residue does not prevent a farmer from controlling weeds by mechanical tillage of the parcel or using other acceptable methods of weed control that do not disturb the residue on the surface. For grain crops, such as winter wheat or milo, this shall include a minimum crop residue of at least thirty percent (30%) determined by the step-point method. For hay or forage crops, crop stubble shall measure at least five inches (5") with row spacing no more than thirty inches (30").
  - b. Recommended best management practices for Farms designated to be Dry-land Farmed shall include the following.
    - i. The management of annual precipitation to produce commodities or forage for livestock warranting a reasonable expectation of ongoing profits.
    - ii. Weed control methods on crop land may include conservation tillage, mowing or chemicals to manage harvested crop residue to reduce evapotranspiration of soil moisture and maintain ground cover to minimize soil erosion by wind or water.
    - iii. Conservation tillage is achieved by the use of non-inversion tillage equipment such as chisels, field cultivators, sweeps, vertical tillage, no-till planters or strip till planters to maximize harvested crop residue ground cover of thirty percent (30%) or more over the entire field.

A Farm designated to be Dry-land Farmed will be deemed Acceptable even in the absence of the above-described recommended best management practices, as long as the requirements in Sub-Section 1.a above have been met for that Farm.

3. Dry-land Farming means the establishment and maintenance of dry-land farming practices with weeds adequately controlled and that controls soil erosion from wind in a manner consistent with state and local law. Dry-land farming practices include: No-Till Dry-land Farming and Minimum-tillage Dry-land Farming.
4. Farm means the parcels of land used for agricultural purposes which will be permanently removed from irrigation as described in the Process.
5. Field means a portion of the LAWMA Dry-Up within any Farm.
6. Minimum tillage Dry-land Farming means management of farming operations which seeks to minimize impacts from tilling through the use of a sweep plow, strip-till, or similar technology. Additionally, a farmer may rely on herbicides to control weeds. Both contact and residual herbicides may be used. Periodic fallowing and crop rotation may be used to stabilize the crop yields and allow the soil to rest.
7. No-till Dry-land Farming means a system of planting seeds into untilled soil by opening a narrow slot, trench or band, of sufficient width and depth to obtain proper seed coverage. As no soil tillage is utilized, a farmer must rely on herbicides to control the weeds. Both contact and residual herbicides may be used. Periodic fallowing and crop rotation may be used to stabilize the crop yields and allow the soil to rest.
8. Percentage of Completion is the total dry-up acres for a farm classified as Acceptable divided by the total number of dry-up acres for a Farm as shown in the Annual Report, multiplied by 100.

**B. Annual Report Requirements.**

1. On or about December 1 of every year ARF shall submit a report to FLCC, Prowers County and the Water Court that provides information about the LAWMA Dry-Up Farms that have been removed from irrigation. The Annual Report shall provide for each Farm the following information:
  - a. The number of the Farm and the year that irrigation water first was removed.
  - b. Whether the Farm is being Dry-land Farmed.
  - c. The total number of acres that were dried-up.
  - d. The Percentage of Completion for the Farm.

- e. The approximate annual precipitation that fell on the Farm, which may be estimated based on the average of published local weather station data.
  - f. The efforts undertaken in the preceding year to convert the Farm to Dry-land Farming, including information about tilling practices, the planting and fallowing rotation, the crops planted, and the acres fallowed; information about herbicides or pesticides applied; information about efforts to control erosion of the soil caused by wind; information about the amount of crops harvested or the number of animal units grazing the land; and information about the amount of crops planted and harvested by other Dry-land farmers in the area during the preceding year;
  - g. Whether the crop is a grain crop or a hay/forage crop. If the crop is a hay/forage crop, the expert also will determine and record the stubble height in inches and the distance, in inches, on which the hay/forage crop was planted.
  - h. Whether water was used to assist in conversion to Dry-land Farming and if so describe the water used in amount and method of application.
  - i. Whether any other factors occurred that had a negative impact on efforts to convert to Dry-land Farming.
  - j. Classification of the lands pursuant to the chart in Section III. Applicants shall notify Prowers County and FLCC prior performing an annual inspection of the Farms to determine the classification. FLCC may, at its election and cost, send its own Expert along with the Applicants' Expert to review the classification and progress toward completion of the Farms included in the Annual Report. An expert retained by Prowers County shall accompany the ARF Expert on such inspections, in addition to independent inspections made by an expert retained by Prowers County.
  - k. If an Annual Report has been filed on the Farm in past years, how the conditions on the Farm compares to past years.
  - l. If a Farm is recommended for a Certificate of Completion, the Annual Report shall also contain representative photographs of the Farm depicting how the Farm has been converted to Dry-land Farming.
  - m. Whether the Farm is eligible for issuance of a Certificate of Completion.
2. On or about July 1 of every year, Applicants shall submit a report by their Expert to Prowers County identifying the crops planted, which fields are intended to be fallow, and weed control measures (e.g., mowing, pesticides) on any dry-land farmed parcels.

**C. Certificate of Completion.** The criteria for issuing a Certificate of Completion for lands converted to Dryland Farming shall be:

1. Certificate of Completion may only be issued for an entire Farm.
2. Dry-land Farming: Any Farm where 90% of its Fields were used for one full crop rotation cycle (two years crop production, and one year fallow with appropriate stubble and weed control, for a total of three years) in accordance with the standards described in Section A.1.a above and with adequate control of weeds and wind-caused soil erosion in a manner consistent with state and local law shall be granted a Certificate of Completion.

**D. Review of Annual Report and Dispute Resolution.**

1. Applicants shall pay the reasonable expenses of an expert retained by Prowers County (Retained Expert) to review the Farms and any Annual Report that recommends that a Farm is eligible for a Certificate of Completion. In addition, Applicants shall deposit with the County, no later than March 1st of each year a nonrefundable \$6000.00 to be used by Prowers County for costs associated with Prowers County's expert's participation in field inspections of the LAWMA Dry-Up Farms, including mileage, and review of and preparation of any reports concerning the LAWMA Dry-Up Farms.
2. The County shall approve or reject the Annual Report that recommends that a Farm is eligible for a Certificate of Completion, no later than January 30.
  - a. If the County approves the Annual Report, it shall not oppose Water Court approval of a Certificate of Completion for any Farm for which the Annual Report recommends issuance of a Certificate of Completion.
  - b. If the County does not approve an Annual Report that recommends that a Farm is eligible for a Certificate of Completion, Applicants' Expert and the County's Expert, no later than February 15, shall consult and attempt to reach a consensus, which consensus may modify, or add terms to the recommendation contained in the Annual Report.
  - c. If the experts do not reach consensus on whether a Farm is eligible for a Certificate of Completion, then the recommendation may be withdrawn by Applicants, or Water Court approval of the Certificate of Completion may be requested, which may be opposed by the County.
  - d. The Water Court shall rule upon any contested request for approval of a Certificate of Completion.
    - i. Any appeal of the Water Court's Process on a request for approval of a Certificate of Completion shall follow the normal rules and procedures for appeal of a water matter.

### III. DRY-LAND FARMING CLASSIFICATION METHODOLOGY

CLASS I Full seeding and irrigation needed, either first seeding or reapplication of seeding. Desired plants scarce or absent.

CLASS II Seeding and irrigation completed. Stand undetermined. Usually this will occur at the beginning of the second growing season following seeding.

CLASS III Stand is variable. Part of the field has an adequate stand and part does not. Plants may be juvenile plants to well developed mature plants. More than 10% of field with an inadequate stand on areas exceeding one acre in size. Plant frequency of desirable plant on deficient areas is less than 10%. Such deficient areas will require reseeding.

CLASS IV-A Stand is inadequate, frequency is less than 10% but plants are fairly well distributed over field. Field may need reseeding.

CLASS IV-B Stand is inadequate; frequency is between 10% to 15%. Plants are uniformly distributed over the field. No further seeding then recommended as the stand is expected to develop.

CLASS V Stand appears adequate, but root system is undeveloped. There are 10% to 15% or more desired plants per count. Good potential for stand establishment. Generally found after the first growing season but possibly the second growing season.

CLASS VI Stand adequate. Plants well rooted. Desirable plant frequency range 15% to 20%<sup>2</sup>, no deficient areas larger than one acre in size over 90% of the field. This may occur following second growing season but more likely after the third growing season and beyond.

CLASS VII Stand adequate. Plants well rooted with vigorous top growth. Desirable Plant frequencies are 20% to 30% or more over 90% of the field. No deficient areas larger than one acre in size. Generally occurring the third growing season and beyond.

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<sup>2</sup> As modified by Section I.6.a. herein.