

# STATE OF COLORADO

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## Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

Bill Ritter, Jr.  
Governor

FROM: Linda J. Bassi  
Kaylea White  
Stream and Lake Protection Section

Harris D. Sherman  
DNR Executive Director

Jennifer L. Gimbel  
CWCB Director

DATE: March 9, 2009

Dan McAuliffe  
CWCB Deputy Director

SUBJECT: **Agenda Item No. 28, March 17-18, 2009 Board Meeting**  
**Stream and Lake Protection Section – Roaring Fork River Basin Proposed Water Acquisition**

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At its January 2009 meeting, Staff presented an offer to the Board from the Pitkin County Board of County Commissioners ("Pitkin County") of a long-term loan of a water right for instream flow ("ISF") use on Maroon Creek and the Roaring Fork River in Pitkin County. The instrument of the loan would be a revocable trust ("Trust Agreement"), wherein Pitkin County is the Settlor and CWCB is the Trustee. The first component of the proposed long-term loan includes 4.3 cfs in the Stapleton Brothers Ditch for ISF use on Maroon Creek and the Roaring Fork River. The Trust Agreement contemplates providing approximately 34 additional water rights in the Roaring Fork Basin that may be used for ISF purposes. Pursuant to ISF Rule 6m.(4), the Basalt Water Conservancy District and the Starwood Metropolitan District have requested a hearing on the proposed acquisition of the 4.3 cfs of the Stapleton Brothers Ditch water right. ISF Rule 6m. (Public Input on Acquisitions) is attached to this memo as **Exhibit 1**. The two hearing requests are attached as **Exhibit 2**. Rule 6m.(5)(a) provides that a hearing on a proposed acquisition must be held within the 120-day period allowed for Board consideration of an acquisition, unless the entity requesting the Board to consider the proposed acquisition agrees to an extension of time. A letter from Pitkin County agreeing to an extension of time will be provided to the Board at the March 17-18 Board meeting. This is the first time that the Board has received a request to hold a hearing on a proposed water acquisition.

### **Staff Recommendation**

Staff recommends that the Board: (1) grant the requests for hearing; (2) schedule the hearing to be held in conjunction with the September 2009 Board meeting; and (3) appoint Deputy Attorney General Casey Shpall as Hearing Officer.

## **Discussion**

### **1. Issues to be addressed**

Staff is recommending scheduling the hearing for September to give the parties ample time to discuss the numerous issues raised regarding this proposed acquisition, and to enable the CDOW to perform data collection related to using the acquired water to improve the natural environment to a reasonable degree. The issues raised by the parties requesting the hearing are set forth in the letters attached as Exhibit 1, and are summarized generally below.

1. Water rights administration, enforcement and accounting issues.
2. Issues related to changing the Stapleton Brothers Ditch water right to add instream flow use as a decreed use, including re-quantification of historical consumptive use, Green Mountain Reservoir Historic User Pool protection, and return flow issues.
3. Potential impacts on other water rights within the subject ISF reaches on Maroon Creek and the Roaring Fork River.
4. Issues related to utilization of Colorado's compact entitlement, particularly pre-1922 water rights.
5. The extent to which the acquired water may be used to improve the natural environments of Maroon Creek and the Roaring Fork River to a reasonable degree.

### **2. Procedural matters**

ISF Rule 6m.(5) governs hearings on proposed water acquisitions, and provides that the Hearing Officer will: (1) establish the procedures by which evidence will be offered; (2) set timelines and deadlines for all written submissions such as prehearing statements; and (3) shall determine the order of testimony for the hearing and decide other procedural matters related to the hearing. Because Staff anticipates meeting with the Division of Water Resources and with the interested parties between the March and May CWCB meetings to discuss many of the above-listed issues, Staff proposes that at the May CWCB meeting, Staff will: (1) report to the Board on the status of negotiations and issue resolution; and (2) present the Hearing Officer's schedule of deadlines related to the hearing.

## **Staff Recommendation**

Staff recommends that the Board: (1) grant the requests for hearing; (2) schedule the hearing to be held in conjunction with the September 2009 Board meeting; and (3) appoint Deputy Attorney General Casey Shpall as Hearing Officer.

Attachments

**6m. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for temporary loans or leases as provided in Rule 6k. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
  - (a) The case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved;
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and
  - (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.
- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:

- (a) A hearing on a proposed acquisition must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
- (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
- (c) At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
- (d) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
- (e) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).
- (f) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
- (g) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
- (h) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (i) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (j) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (k) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (l) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**PITKIN COUNTY ATTORNEY**

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*Code Enforcement Officer*

*Legal Assistants:*  
Lisa MacDonald  
Jane Achey

March 16, 2009

*Via e-mail Linda.Bassi@state.co.us*  
Colorado Water Conservation Board  
c/o Linda Bassi  
Stream & Lake Protection Program  
1313 Sherman Street, Room 721  
Denver, Colorado 80203

RE: January 8, 2009 Offer to Dedicate Water Pursuant to Trust Agreement

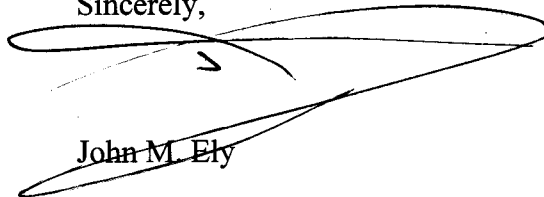
Dear Board Members:

Pitkin County has been informed through CWCB staff that it would be advisable to consider the BOCC's offer at a later date to allow time to obtain additional data on river conditions. This data gathering is not contemplated to occur until stream flows are down in the middle of the summer. As a consequence, Pitkin County is willing to waive the 120-day requirement of Rule 6(b) of the rules of the Colorado Instream Flow and Natural Lake Level Program and have our offer considered prior to September 30, 2009.

If you need any further clarification please feel free to contact me. Thank you very much.

PITKIN COUNTY ATTORNEY'S OFFICE

Sincerely,

A large, stylized handwritten signature in dark ink, appearing to be 'John M. Ely', written over the printed name.

John M. Ely

cc: Patricia DeChristopher, Esq.

**BALCOMB & GREEN, P.C.**

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OF COUNSEL:

JOHN A. THULSON

February 16, 2009

Board of Directors,  
Colorado Water Conservation Board  
Department of Natural Resources  
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Denver, CO 80203

Attention: Lisa Barr  
[Lisa.barr@state.co.us](mailto:Lisa.barr@state.co.us)

***Re: Roaring Fork River Basin Proposed Water Acquisition***

Ladies and Gentlemen:

We represent the Basalt Water Conservancy District, a public authority of the State of Colorado formed under Colorado Revised Statute § 37-45-101, et seq. The District hereby gives notice of its request for a hearing, pursuant to ISF Rule 6i.(4) regarding the Roaring Fork River Basin Proposed Water Acquisition, Agenda Item No. 15, considered by the Colorado Water Conservation Board at its meeting held January 28, 2009.

Before explaining the reason for the District's request, we would like to provide some background information about our client. The District was formed under the Water Conservancy Act of the State of Colorado by decree of the Garfield County District Court in C.A. 5593 on April 24, 1964. Its statutory purpose is to conserve, develop and stabilize supplies of water for domestic, irrigation, manufacturing, and other beneficial uses within those parts of Eagle, Garfield, and Pitkin counties included

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within its boundaries. The District is divided into seven divisions from which are appointed a total of eight directors who constitute the District's Board of Directors.

The District holds various water rights decrees as a result of adjudications in connection with the Basalt Project. The principle feature of Basalt Project is Ruedi Reservoir constructed by the United States Bureau of Reclamation on the Fryingpan River above Basalt, Colorado. The District holds contracts for storage rights in Ruedi Reservoir and Green Mountain Reservoir, as well as direct flow rights, which it uses to secure dependable water supplies for water users within the District's boundaries.

The District enters into contracts with individual users on an ongoing basis. The contracts are organized into two geographic categories, either Area A or Area B. Area A encompasses those regions that are located near the Fryingpan or Roaring Fork Rivers, or on tributary creeks, where use of the District's water rights for diversion at an alternate point or through augmentation is sufficient to satisfy the requirements of all senior downstream water rights. Area B encompasses those locations where intervening senior water rights exist between the point of diversion of the District contractee and the point at which the District water is made available for use by the contractee.

The District has historically operated a temporary augmentation plan, pursuant to the State Engineer's approval of a temporary substitute water supply plan, for qualifying Area A contractees pending the adjudication of final plans for augmentation approving those contractees' diversions. In contrast, Area B contractees must obtain an individual plan for augmentation approved by the water court in order to benefit from the District's water rights; the District does not operate a temporary augmentation plan or substitute water supply plan for Area B contractees.

The District requests that the Board hold a hearing on this matter for the following reasons:

1. The District is a statutory entity of the State of Colorado, which is charged with conserving water resources of the State of Colorado for their greatest beneficial use within the state for the public benefit. The proposed acquisition involves a water resource within the District's service Area A, and is of importance and interest to the District's constituents.

2. The proposed acquisition is, to the District's knowledge, the first acquisition that the Board has considered since the passage of H.B. 08-1280, and the

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newly promulgated ISF Rules adopted subsequent to this statutory change. It is appropriate that the Board consider the interests and concerns of the District, and any other parties, in implementing this new mechanism for the first time. The District is well positioned to participate in this regard.

3. This proposed acquisition will be made under a revocable trust arrangement that is, subject to a five-year requirement, indefinite in term. Implementation of the proposed trust arrangement will require significant outlay of public funds (by both the trustee and the beneficiary) and may itself require several years to conclude. The Board should give specific consideration to the relative benefits and costs of this particular arrangement, and the possibility that the trust may terminate shortly after the loan is implemented.

4. The Board has an existing ISF within the subject reach, Case No. 85CW646. CWCB staff advises that this acquisition will be proposed to be stacked with the existing right. The District wants an opportunity to present information to the Board regarding the appropriateness of stacking this acquisition, rather than simply using it to firm up the existing instream flow right, and to speak to the relative benefits of each.

5. The staff memorandum for Agenda Item No. 15, paragraph 11, does not adequately evaluate other existing water rights within the reach of this proposed acquisition. The District, and many of its constituents (including Pitkin County), rely on District water rights that are within this reach and may be potentially injured by this proposed acquisition. The District wants to provide information to the Board regarding these risks.

6. The materials considered by the Board at its January 28th meeting do not adequately identify the natural environment to be preserved or improved by this proposed acquisition. At a minimum, an evaluation of the adequacy of the existing 85CW646 ISF would seem appropriate. Thereafter, specific findings should be made, after consideration of relevant evidence, regarding the ability of this proposed acquisition to improve this natural environment to a reasonable degree. The District would like an opportunity to provide evidence and testimony on this subject.

7. The proposed acquisition may potentially injure utilization of Colorado water rights under its interstate compact entitlement. The Stapleton Brothers' water rights are compact-protected and originate in an area of the Roaring Fork River in which there are limited physical supplies for the public. A proposed acquisition will prevent



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consumptive use of this supply above the confluence of the Roaring Fork River and Fryingpan River. The existence and operation of Ruedi Reservoir, a compact-junior component of the Fryingpan-Arkansas Project on the Fryingpan River, provides a readily available supply of water in the Roaring Fork River below the confluence with the Fryingpan River. Presently, a year-round Ruedi contract supply can be obtained for a few hundred dollars per acre foot; the present asking price for the seasonal Stapleton Brothers' consumptive-use credits is \$12,000 per acre foot. The proposed acquisition and change, then, appears to create the likelihood of under utilization of a compact-protected senior water right and increased utilization of a compact-junior water right.

8. In consideration of the geographical conditions discussed in paragraph 7 above, the proposed acquisition creates a risk of under-utilization of waters of the State of Colorado. Because a year-round water supply is readily available from Ruedi Reservoir, the quantified Stapleton Brothers' Ditch historical consumptive use credits are likely to go unused below the confluence of the Roaring Fork River and the Fryingpan River.

9. The reach of the proposed acquisition is influenced by return flow from historically-irrigated lands. The existing 85CW646 ISF right was probably appropriated on some of the historical irrigation return flows of the Stapleton Brothers' water right. The Board should consider the extent to which the removal of the Stapleton Brothers' rights from irrigation use have impacted existing conditions in the proposed reach, and take those changed circumstances into account.

11. The use of the Stapleton Brothers' rights for instream purposes may impact the operation of Green Mountain Reservoir in a manner that is injurious to the District and other Colorado River water users in western Colorado in general.

12. In speaking with CWCB staff, and also with office of the Division Engineer, Water Division No. 5, it is the District's understanding that the two agencies have not yet determined the appropriate means for administering the Stapleton Brothers' rights for in-stream uses. The District would like an opportunity to provide input on this subject.

11. Finally, the District believes it is a more efficient use of public resources to resolve these issues before the water rights are placed into the judicial process. It is the District's understanding that the CWCB is comfortable working out these questions in the water court, but the District believes that it would improve the CWCB's application

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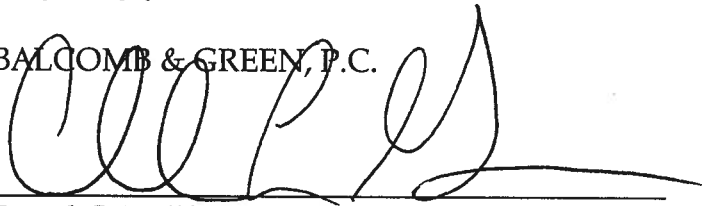
February 16, 2009  
Page 5

to the water court to have had a full opportunity to consider these questions through a hearing process in advance of filing an application.

The District wishes to thank the Board for its service on behalf of the citizens of the State of Colorado, and looks forward to having an opportunity to present information and engage in a constructive process regarding this important acquisition.

Very truly yours,

BALCOMB & GREEN, P.C.

A handwritten signature in black ink, appearing to read 'DCH', is written over a horizontal line.

David C. Hallford  
Christopher L. Geiger

CLG/eb

Xc Via Email: Linda Bassi, Esq.  
Kaylea White  
Scott Fifer  
Eric Mangeot  
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February 17, 2009

Board of Directors,  
Colorado Water Conservation Board  
Department of Natural Resources  
1313 Sherman Street, Room 721  
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Attention: Lisa Barr  
[Lisa.Barr@state.co.us](mailto:Lisa.Barr@state.co.us)

***Re: Roaring Fork River Basin Proposed Water Acquisition***

Ladies and Gentlemen:

We represent the Starwood Metropolitan District, a metropolitan district located near Aspen, Colorado formed under the Special District Act ("Starwood"). Starwood hereby gives notice of its request for a hearing, pursuant to ISF Rule 6i.(4) regarding the Roaring Fork River Basin Proposed Water Acquisition, Agenda Item No. 15, considered by the Colorado Water Conservation Board at its meeting held January 28, 2009.

Before explaining the reason for the Starwood's request, we would like to provide some background information about our client. Starwood Metropolitan District is a metropolitan district formed under the Special District Act to provide various municipal services to constituents in the Roaring Fork Valley. (See C.R.S. § 32-1-101 *et seq.*). Starwood's municipal boundaries currently encompass 125 lots near Aspen, Colorado. Its aggregate water use amounts to approximately 115 acre-feet of annual diversions. Starwood provides water service to the owners of these lots. This service includes the acquisition of sufficiently senior water rights and the legal protection of those water rights.

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Attn: Ms. Lisa Barr

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In this regard, Starwood has accumulated various water rights decrees to satisfy its municipal demands and protect its constituents against a call in a dry year scenario. Keenly relevant to this discussion is Starwood's recent acquisition of a portion of the Stapleton Brothers' water rights—the very same water right the Board is considering acquiring. Starwood's acquisition was specifically intended to protect its constituents in the event of a compact call. Starwood recently filed an application for a change of the Stapleton Brothers' water rights to effectuate this protection. However, the CWCB's acquisition of a larger portion of the same water right may adversely impact the balance of the water right, which would affect Starwood's constituents and other citizens of Colorado.

Starwood therefore requests that the Board hold a hearing on this proposed acquisition. Pursuant to ISF Rule 6i.(4), below is a brief statement, with as much specificity as possible, of the reasons for Starwood's request.

1. Starwood recently acquired a significant portion of the Stapleton Brothers water right and must prosecute its own change case. Starwood's primary concern with the CWCB's proposed acquisition and imminent adjudication of a change is that any concession the CWCB may grant through negotiations could negatively impact the entire water right, including the portion held by Starwood.
2. In speaking with CWCB staff, and also with office of the Division Engineer, Water Division No. 5, it is Starwood's understanding that the two agencies have not yet determined the appropriate means for administering the Stapleton Brothers' rights for in-stream uses. Starwood would like an opportunity to provide input on this subject.
3. The proposed acquisition is, to Starwood's knowledge, the first acquisition that the Board has considered since the passage of H.B. 08-1280, and the newly promulgated ISF Rules adopted subsequent to this statutory change. It is appropriate that the Board consider the interests and concerns of Starwood, and any other parties, in implementing this new mechanism for the first time. Starwood is well positioned to participate in this regard.
4. The proposed acquisition may potentially injure utilization of Colorado water rights under its interstate compact entitlement. The Stapleton Brothers' water rights are compact-protected and originate in an area of the Roaring Fork River in which there are limited physical supplies for the public. A proposed acquisition will prevent consumptive use of this supply above the confluence of the Roaring Fork River and Fryingpan River. The existence and operation of Ruedi Reservoir, a compact-junior component of the Fryingpan-Arkansas Project on the Fryingpan River, provides a readily available supply of water in the Roaring Fork

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River below the confluence with the Fryingpan River. Presently, a year-round Ruedi contract supply can be obtained for a few hundred dollars per acre foot; the present asking price for the seasonal Stapleton Brothers' consumptive-use credits is \$12,000 per acre foot. The proposed acquisition and change, then, appears to create the likelihood of under utilization of a compact-protected senior water right and increased utilization of a compact-junior water right.

5. In consideration of the geographical conditions discussed in paragraph 4 above, the proposed acquisition creates a risk of under-utilization of waters of the State of Colorado. Because a year-round water supply is readily available from Ruedi Reservoir, the quantified Stapleton Brothers' Ditch historical consumptive use credits are likely to go unused below the confluence of the Roaring Fork River and the Fryingpan River.
6. The reach of the proposed acquisition is influenced by return flow from historically irrigated lands. The existing 85CW646 ISF right was probably appropriated on some of the historical irrigation return flows of the Stapleton Brothers' water right. The Board should consider the extent to which the removal of the Stapleton Brothers' rights from irrigation use have impacted existing conditions in the proposed reach, and take those changed circumstances into account.
7. The use of the Stapleton Brothers' rights for instream purposes may impact the operation of Green Mountain Reservoir in a manner that is injurious to Starwood and other Colorado River water users in western Colorado in general.

Starwood wishes to thank the Board for its service on behalf of the citizens of the State of Colorado, and looks forward to having an opportunity to present information and engage in a constructive process regarding this important acquisition.

Very truly yours,

BALCOMB & GREEN, P.C.



---

Scott Balcomb  
Sara M. Dunn  
Chad J. Lee

**BALCOMB & GREEN, P.C.**  
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Colorado Water Conservation Board  
Attn: Ms. Lisa Barr

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Page 4

cc Via Email:

Linda Bassi, Esq.  
Kaylea White, Esq.  
William L. Lorah, P.E., Wright Water Engineers, Inc.  
Starwood Metropolitan District

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March 9, 2009

Via email: [jennifer.gimbel@state.co.us](mailto:jennifer.gimbel@state.co.us)

Jennifer Gimbel, Director  
Colorado Water Conservation Board  
Colorado Department of Natural Resources  
1313 Sherman St., Room 721  
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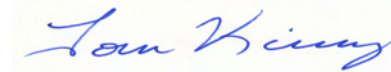
**RE: Town of Basalt support for acquisition of Stapleton Bros. Ditch water right for ISF**

Dear Jennifer:

As you are aware, I submitted my attached letter of January 21, 2009 to Linda Bassi and Kaylea White of the CWCB Stream & Lake Protection Section addressing several concerns the Town of Basalt has regarding the proposed acquisition of 4.3 cfs Stapleton Brothers' Ditch, Priority No. 269, water right by the CWCB from Pitkin County for instream flow enhancement from the ditch headgate on Maroon Creek downstream to the confluence of the Fryingpan River with the Roaring Fork River. Since then, the Town Council has met with John Ely, Pitkin County Attorney, to further discuss the proposed Stapleton Brothers' Ditch water right acquisition. As a result of this meeting, the Town of Basalt wishes to reiterate its support for the proposed Stapleton Brothers' Ditch water right acquisition for instream flow enhancement in the Roaring Fork River, including the reach of the Roaring Fork River immediately upstream from the Fryingpan River confluence in which reach the Town and Pitkin County have been cooperating to develop a whitewater park. The Town's support, however, is qualified upon the CWCB addressing and resolving the Town's concerns, including prevention of injury to the Town in the exercise of its municipal water rights and approved augmentation plan.

Very truly yours,

HILL, KINNEY & WOOD, LLC  
Attorneys for the Town of Basalt



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Tom Kinney

cc: Bill Kane, Town Manager; [billk@basalt.net](mailto:billk@basalt.net)  
Larry Thompson, Town Engineer; [lthompson@basalt.net](mailto:lthompson@basalt.net)  
Linda Bassi, Chief, Stream & Lake Protection Section, CWCB; [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us)  
John Ely, Pitkin County Attorney; [johne@co.pitkin.co.us](mailto:johne@co.pitkin.co.us)

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January 21, 2009

Via email: [linda.bassi@state.co.us](mailto:linda.bassi@state.co.us) & [kaylea.white@state.co.us](mailto:kaylea.white@state.co.us)

Linda Bassi, Chief  
Kaylea White, Senior Water Resource Specialist  
Stream & Lake Protection Section  
Colorado Water Conservation Board  
Colorado Department of Natural Resources  
1313 Sherman St., Room 721  
Denver, CO 80203

**RE: Town of Basalt comments concerning acquisition of Stapleton Bros. Ditch water right for ISF**

Dear Linda & Kaylea:

Yesterday, I received notice of a proposed acquisition of 4.3 cfs of 8.0 cfs, absolute, Stapleton Brothers' Ditch, Priority 269, water right from Pitkin County via a perpetual loan for instream flow purposes from the ditch headgate downstream to the confluence of the Fryingpan River with the Roaring Fork River. I spoke with Kaylea concerning the notice and clarifying that only the consumptive use portion of this water right will be used for instream flow purposes in the reach of the Roaring Fork River between the Maroon Creek and Fryingpan River confluences.

As stated in the CWCB's notice, the Stapleton Brothers' Ditch water right that is the subject of the proposed acquisition from Pitkin County for instream flow purposes was decreed by the Garfield County District Court on October 16, 1933 in Civil Action No. 3000. The duty of water for the Stapleton Brothers' Ditch water right established by the Court's decree in C.A. 3000 is 1 cfs per 50 acres irrigated. As also referenced in the CWCB's notice, the Water Court subsequently entered a decree in Case No. 99CW306 on January 31, 2005 changing Pitkin County's Stapleton Brothers' Ditch irrigation water right to include augmentation use and establishing a historical irrigation consumptive use ratio for this water right of 1.83 acre-feet per acre. However, this historical irrigation consumptive use ratio was reduced by the Water Court to 1.62 acre-feet per acre at the behest of the Division 5 Engineer to reflect periods when the County's Sardy Field airport property was not irrigated using the Stapleton Brothers' Ditch water right. According to the documents posted on the CWCB's website supporting the acquisition of 4.3 cfs, absolute, Stapleton Brothers' Ditch water right for instream flow purposes, this water right is associated with 119.25 acre-feet per acre of the 'remaining' historical irrigation consumptive use recognized by the Water Court in Case No. 99CW306.

The Town of Basalt has the following comments concerning the proposed acquisition of 4.3 cfs, absolute, Stapleton Brothers' Ditch water right from Pitkin County for instream flow purposes:



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1. The CWCB staff and Pitkin County associate 4.3 cfs, absolute, Stapleton Brothers' Ditch water right with 119.25 acre-feet per acre of historical irrigation consumptive use recognized by the Water Court in Case No. 99CW306. (See Exhibit A-1 of the draft Declaration of a Revocable Trust (The Pitkin County Water Rights Revocable Trust) and Linda Bassi and Kaylea White memo to CWCB dated January 20, 2009). However, pursuant to the 1 cfs per 50 acres irrigated 'duty of water' established by the District Court for the Stapleton Brothers' Ditch water right in C.A. 3000 and also according to the historical irrigation consumptive use ratio and historical irrigation season recognized by the Water Court in Case No. 99CW306, 4.3 cfs cannot be associated with 119.25 acre-feet per acre 'remaining' historical irrigation consumptive use in the reach of the Roaring Fork River from the confluence of Maroon Creek downstream to the Fryingpan River confluence. Rather, not more than 0.52 cfs is associated with this amount of remaining 'historical consumptive use for instream flow use in the reach of the Roaring Fork River from the confluence of Maroon Creek downstream to the Fryingpan River confluence during the historical irrigation season. (Linda Bassi and Kaylea White memo to CWCB dated January 20, 2009 at Section 8 on page 5.)

2. The Water Court decree entered in Case No. 99CW306 concerning Pitkin County's Stapleton Brothers' Ditch water right contained the following finding of fact at Paragraph 7.G., which finding was incorporated as a restrictive condition at Paragraph 17 of the decree:

"Any other uses of such remaining consumptive use credits by any person or entity must be approved by subsequent application to the Water Court, requesting a change of water right and approval of either an amended augmentation plan or an additional augmentation plan to replace all out-of-priority depletions associated with such new uses."

The Town of Basalt reminds the CWCB that this restrictive condition applies to its acquisition and proposed use of Pitkin County's 4.3 cfs Stapleton Brothers' Ditch water right for instream flow purposes.

3. The Town of Basalt will likely file a statement of opposition in any case filed in the Water Court for Water Division No. 5 concerning changing the use of Pitkin County's 4.3 cfs, absolute, Stapleton Brothers' Ditch water right for instream flow purposes by the CWCB in order to protect exercise of its municipal well water rights decreed for diversion at the Basalt Municipal Well No. 13 and the Basalt RE-1 School District Well, and also operation of the augmentation plan incorporating bypasses of the Town's John Ruedi Ditch water rights decreed by the Water Court in Case Nos. 90CW138 and 00CW252.

4. The Town has been working with Pitkin County to establish a whitewater park in the reach of the Roaring Fork River immediately upstream of the Fryingpan River confluence. Pitkin County anticipates adjudicating junior-priority RICD water rights for the whitewater park. Pitkin County also desires to gain an additional benefit of having senior-priority water rights, such as the 4.3 cfs Stapleton Brothers' Ditch water right, flowing through the whitewater park reach of the Roaring Fork River pursuant to the proposed acquisition of these water rights by the CWCB for instream flow purposes:

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“... Utilizing the provisions of House Bill 1280 as well as a trust document it will be possible for Pitkin County to assign certain water rights in its existing portfolio as well as any future acquired water rights through the Open Space and Trails or Healthy River funds to enhance the minimum stream flow in this particular reach of the Roaring Fork River. By enhancing the minimum stream flows in this reach of the Roaring Fork River, the last part of the river as it leaves Pitkin County, all other stream segments above this reach in the Roaring Fork and its tributaries will also be enhanced. The kayak course allows for the utilization of acquired rights in a way that will augment minimum stream flows throughout the Roaring Fork River while providing a recreational facility for valley residents.” (Excerpt from John Ely, Pitkin County Attorney, memo to Pitkin County Open Space and Trails Board dated November 20, 2008 at page 4).

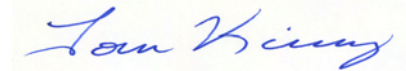
The Town of Basalt agrees with this objective so long as any use of Pitkin County's senior-priority water rights by the CWCB for instream flow purposes does not injure the Town in the exercise of its municipal water rights and operation of its augmentation plan.

5. The Town of Basalt supports the CWCB's acquisition of 4.3 cfs, absolute, Stapleton Brothers' Ditch water right pursuant to a perpetual loan from Pitkin County, but requests that the CWCB expressly condition any such approval of the acquisition such that this water right shall be used for instream flow purposes only upon entry of a final decree by the Water Court: (a) changing the use of this water right to include instream flow purposes; and, (b) incorporating restrictive conditions on the instream flow use of this water right protective of the Town of Basalt's exercise of its municipal water rights and operation of its augmentation plan.

Thank you for considering the Town of Basalt comments concerning acquisition of Pitkin County's 4.3 cfs, absolute, Stapleton Brothers' Ditch water right via perpetual loan for instream flow purposes.

Very truly yours,

HILL, KINNEY & WOOD, LLC



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Tom Kinney

cc: John Ely, Pitkin County Attorney, [john@co.pitkin.co.us](mailto:john@co.pitkin.co.us)  
Tim Beaton, Pitkin County water rights counsel, [tbeaton@mwhw.com](mailto:tbeaton@mwhw.com)

Agenda item 28

**PITKIN COUNTY ATTORNEY**

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Code Enforcement Officer

*Legal Assistants:*  
Lisa MacDonald  
Jane Achey

March 16, 2009

*Via e-mail Linda.Bassi@state.co.us*  
Colorado Water Conservation Board  
c/o Linda Bassi  
Stream & Lake Protection Program  
1313 Sherman Street, Room 721  
Denver, Colorado 80203

RE: January 8, 2009 Offer to Dedicate Water Pursuant to Trust Agreement

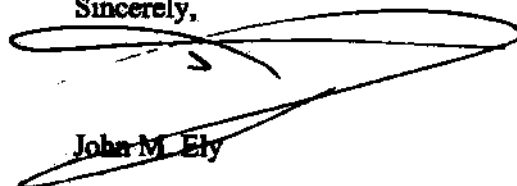
Dear Board Members:

Pitkin County has been informed through CWCB staff that it would be advisable to consider the BOCC's offer at a later date to allow time to obtain additional data on river conditions. This data gathering is not contemplated to occur until stream flows are down in the middle of the summer. As a consequence, Pitkin County is willing to waive the 120-day requirement of Rule 6(b) of the rules of the Colorado Instream Flow and Natural Lake Level Program and have our offer considered prior to September 30, 2009.

If you need any further clarification please feel free to contact me. Thank you very much.

PITKIN COUNTY ATTORNEY'S OFFICE

Sincerely,



John M. Ely

cc: Patricia DeChristopher, Esq.