

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721
Denver, Colorado 80203
Phone: (303) 866-3441
Fax: (303) 866-4474
www.cwcb.state.co.us



TO: Colorado Water Conservation Board Members

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

DATE: May 12, 2009

SUBJECT: **Agenda Item 12, May 19-20, 2009 Board Meeting**
Stream and Lake Protection – Proposed Amendment to Hat Creek Ditch
Donation and Acquisition Agreement

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Introduction

On August 2, 2007, the CWCB and the Colorado Water Trust ("Trust") entered into an Acquisition Agreement concerning the donation by the Trust to the CWCB of certain water rights for instream flow ("ISF") use on Hat Creek and East Brush Creek.

In 2007, the CWCB applied to water court to change the donated water rights to ISF use. The case is pending in water court. Because of the recent passage of HB 08-1280, Staff and the Trust have developed a First Amendment to Donation and Acquisition Agreement and a Correction Deed that amend the Agreement and Deed to include language required by HB 08-1280 for inclusion in all acquisition agreements regarding downstream use of the historic consumptive use of water rights acquired by the CWCB for ISF use. The proposed First Amendment to Donation and Acquisition Agreement and Correction Deed are attached to this memo.

Staff Recommendation

Staff recommends that the Board approve the First Amendment to Donation and Acquisition Agreement and Correction Deed with the Trust and authorize the CWCB Director to execute the Amendment and Deed on behalf of the Board.

Discussion

HB 08-1280, signed by Gov. Ritter on April 22, 2008, addresses the subsequent downstream use of historic consumptive use credits of an acquired water right that has been changed to ISF use. HB 1280 requires all agreements entered into by the CWCB for acquisitions of water to provide that, pursuant to the water court decree implementing the agreement, the lessor, lender, or donor of the water or the CWCB may bring about the beneficial use of the historical consumptive use of the leased, loaned or donated water right downstream of the ISF reach as fully consumable reusable water. The bill also amended section 37-92-305(3)(b), C.R.S. to provide that decrees

for changes of water rights that implement agreements for leases, loans or donations of water to the CWCB for ISF use under section 37-92-102(3)(b) shall provide that the lessor, lender, or donor of the water or the CWCB may bring about the beneficial use of the historical consumptive use of the leased, loaned or donated water right downstream of the ISF reach as fully consumable reusable water. These two provisions were included in HB 1280 to clarify existing law and did not establish any new authority regarding acquired water rights. The First Amendment to Donation and Acquisition Agreement and the Correction Deed will incorporate these two provisions.

Staff Recommendation

Staff recommends that the Board approve the First Amendment to Donation and Acquisition Agreement and Correction Deed with the Trust and authorize the CWCB Director to execute the Amendment and Deed on behalf of the Board.

Attachments

FIRST AMENDMENT TO
DONATION AND ACQUISITION AGREEMENT
(Hat Creek Ditch)

This First Amendment to Donation and Acquisition Agreement (this “Amendment”) is made between the COLORADO WATER CONSERVATION BOARD (the “Board”), an agency of the State of Colorado, and the COLORADO WATER TRUST (the “Trust”), a Colorado nonprofit corporation.

WHEREAS, the Board and the Trust are parties to the Donation and Acquisition Agreement dated August 2, 2007 (the “2007 Agreement”) concerning the Hat Creek Ditch water right described therein (the “Hat Creek Right”), and a Bargain and Sale Deed whereby the Trust donated the Hat Creek Right to the Board that was recorded in the real property records of Eagle County, Colorado on September 10, 2007, at Reception No. 200723997 (the “Hat Creek Deed”);

WHEREAS, the Board has filed Case No. 07CW227, Water Division No. 5, that seeks to convert the Hat Creek Right to instream flow use from the headgate of the Hat Creek Ditch down to East Brush Creek, and then down East Brush Creek to its confluence with Brush Creek (the “Instream Flow Reach”);

WHEREAS, the 2008 Colorado legislature passed, and the Governor signed into law, House Bill 08-1280 that provides that the lessor, lender or donor of a water right to the Board “may bring about beneficial use of the historical consumptive use of the leased, loaned or donated water right downstream of the instream flow reach as fully consumable water” (the “Re-Use Right”), subject to such terms and conditions as the Water Court deems necessary to prevent injury to vested water rights or decreed conditional water rights;

WHEREAS, the Board and the Trust desire to amend the 2007 Agreement and modify the Hat Creek Deed to clarify that the Trust retains the Re-Use Right associated with the Hat Creek Right, provided that the Re-Use Right is only exercised downstream of the Instream Flow Reach;

THEREFORE, in consideration of the foregoing, the parties agree as follows:

1. A new Section 10 is added to the 2007 Agreement reading as follows:
10. Re-Use Right. Pursuant to Section 37-92-102, C.R.S. (2009), and to the water court decree that will implement this Agreement, the Trust shall have and retain the right to bring about beneficial use of the historical consumptive use of Hat Creek Right as fully consumable water at any point below the confluence of East Brush Creek and Brush Creek (the “Re-Use Right”), subject to such terms and conditions as the Water Court

deems necessary to prevent injury to the Board's instream flow water rights, vested water rights or decreed conditional water rights. The Trust may sell or lease such Re-Use Right to third parties on such terms as the Trust may find acceptable, but shall consult with the staff of the Board before finalizing any such sale or lease.

2. Correction Deed. The Board and the Trust shall execute and record a Correction Deed in the form attached hereto that corrects the existing Hat Creek Deed to reflect the Trust's Re-Use Right.

Dated this ____ day of May, 2009.

COLORADO WATER CONSERVATION BOARD

By:_____

COLORADO WATER TRUST

By:_____
Michael F. Browning, President

CORRECTION DEED

This Bargain and Sale Deed, dated this ____ day of May, 2009, is by and between the COLORADO WATER TRUST, a Colorado nonprofit corporation (the "Trust"), and the COLORADO WATER CONSERVATION BOARD, an agency of the State of Colorado (the "Board").

In consideration of due and sufficient consideration, the Trust hereby sells and conveys all of its right, title and interest in the following described water right located in Eagle County, Colorado (the "Hat Creek Right") to the Board, for use to preserve and improve the natural environment to a reasonable degree in Hat Creek from the existing decreed point of diversion of the Hat Creek Ditch downstream to the confluence of Hat Creek and East Brush Creek, and then down East Brush Creek to its confluence with Brush Creek (the "Instream Flow Reach"):

The 2.0 cfs decreed to the Hat Creek Ditch, as stream priority no. 335A, in Civil Action No. 673, by the Eagle County District Court, on July 17, 1916, with an appropriation date of March 7, 1914, for irrigation purposes.

Pursuant to Section 37-92-102, C.R.S. (2009), and to the water court decree that will implement the Donation and Acquisition Agreement and First Amendment to Donation and Acquisition Agreement between the Trust and the Board, the Trust hereby retains, and the Board hereby grants and conveys the Trust, the right to bring about beneficial use of the historical consumptive use of Hat Creek Right as fully consumable water at any point below the Instream Flow Reach, subject to such terms and conditions as the Water Court deems necessary to prevent injury to the Board's decreed instream flow water rights, vested water rights or decreed conditional water rights. The Trust may lease, sell, assign or convey such re-use right to third parties.

This Correction Deed corrects and replaces in full that certain Bargain and Sale Deed between the parties recorded in the real property records of Eagle County, Colorado on September 10, 2007 at Reception No. 200723997.

IN WITNESS WHEREOF, this Deed has been executed by the Trust and by the Board as of the date first set forth above.

COLORDAO WATER TRUST

By: _____
Michael F. Browning, President

COLORADO WATER CONSERVATION BOARD

By: _____
Jennifer L. Gimbel, Director

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

The foregoing instrument was acknowledged before me this ____ day of May, 2009, by Michael F. Browning, as President of the Colorado Water Trust, a Colorado nonprofit corporation.

Witness my hand and official seal.

Notary Public

My commission expires:_____

STATE OF COLORADO)
) ss.
CIT AND COUNTY OF DENVER)

The foregoing instrument was acknowledged before me this ____ day of May, 2009, by Jennifer L. Gimbel, as Director of the Colorado Water Conservation Board, an agency of the State of Colorado.

Witness my hand and official seal.

Notary Public

My commission expires:_____