

In the Matter of Proposed Instream Flow Acquisition Division 5: Stapleton Brothers Ditch *and 36 Other Water Rights*

Concerns of Willow Creek Ditch and Herrick Ditch
Company and Roaring Fork Land and Cattle Company

Introduction

- Willow Creek Ditch and Herrick Ditch Company owns and operate the Willow Creek Ditch and Herrick Ditch structures, located upstream on Willow Creek and Maroon Creek
- Roaring Fork Land and Cattle Co. owns water rights in these ditches
- Own water rights both junior and senior to the Stapleton Brothers Ditch
- Main concern: to ensure no expansion of use and therefore injury in the change of the Stapleton Brothers Ditch to ISF use

Main Points:

- 1. Decision based on a critical review of all available information, and a reasonable evaluation of the risks**
- 2. Is this is a good test case for the first use of HB 1280?**
- 3. If the CWCB moves forward, use authority delegated under HB 1280 to condition acceptance of loan with terms sufficient to mitigate risks in water court and in the public eye**

Topics of Discussion

1. Risk of requantification of the decreed flow rate to less than 4.3 cfs
2. Consideration of delayed return flows, and injury to the existing Roaring Fork River ISF
3. Loss of Green Mountain Reservoir Historic Users Pool protection
4. Lack of public process in Pitkin County/Trust Agreement Issues

Topic One: Requantification of flow rate based on Duty of Water – will the CWCB be able to claim 4.3 cfs?

- Flow rate decreed to the Stapleton Brothers Ditch was 8 cfs to irrigate 400 acres of land (the decreed “duty of water = 1 cfs : 50 acres)
- The right to change and irrigation water right is limited by law to the decreed duty of water
- Changes of water rights are further limited to historic use
- Terms to prevent injury include relinquishment of part of the water right in order to prevent expansion of historical use C.R.S. § 37-92-305(4).

The 99CW306 decree finds that the Stapleton Brothers Ditch historically irrigated 136 acres (NOT the 400 decreed)

Quantified the consumptive use for the 136 acres

Did NOT quantify the associated flow rate needed to irrigate the 136 acres

A change for instream use central issue will be quantifying the historical direct flow diversions

Res judicata provision of 99CW306 applied only to the consumptive use calculation

What does this all mean? (John Currier, P.E.)

CWCB will acquire 54% of the SBD water right which historically irrigated 73.44 acres.

At a duty of water of 1 cfs per 50 acres, the CWCB will possibly gain 1.47 cfs ($73.44/50$), not 4.3 cfs

The benefits to the CWCB are inflated 3 fold

Topic Two: Consideration of Delayed Irrigation Return Flows and Injury to the Existing Bear Fork River ISF

When the CWCB opposes a change of an irrigation water right, it requests the applicant to account for delayed irrigation return flows.

CWCB Staff recommended delayed return flow evaluation and then reversed.

January 20, 2009 Staff Memo acknowledges the need to study and account for delayed return flows to ensure that the existing Roaring Fork River ISF is not injured:

“The ISF on the Roaring Fork River relies on the historical return flows of this water right. However, the pattern of accrual to the stream should remain unaffected by changing the water right to instream flow use because it appears that the historical return flows accrued to the Roaring Fork River within the same month it was diverted. *The timing of return flows will be checked with subsequent engineering to assure this is the case.*” 1/20/09 Staff Memo, p. 5.

WVCB staff then changed its position and failed to conduct its promised study. Prehearing Statement:

This ISF reach does not rely on maintenance of delayed historical return flows because Case No. 99CW306 decreeing the change of water right quantified the historical consumptive use and did not specify any delayed historical return flows that would be maintained. The ISF and any other water right on the Roaring Fork River below the return flow accretion point is subject to the conditions of the decree in 99CW306, and thus cannot claim any injury due to failure to maintain any delayed return flows, if there are any.” CWCB Prehearing Statement, p. 4

Argument puts the CWCB in a precarious position:

Bad precedent for the CWCB that change applicants will use against it

By not applying its own legal position to itself, sending the message that “the rules don’t apply to us”

The CWCB’s own instream flow water right on the Roaring Fork River will be potentially injured

County's own engineering shows delayed return flows are an
e (John Currier, P.E.):

tin and Wood engineering report:

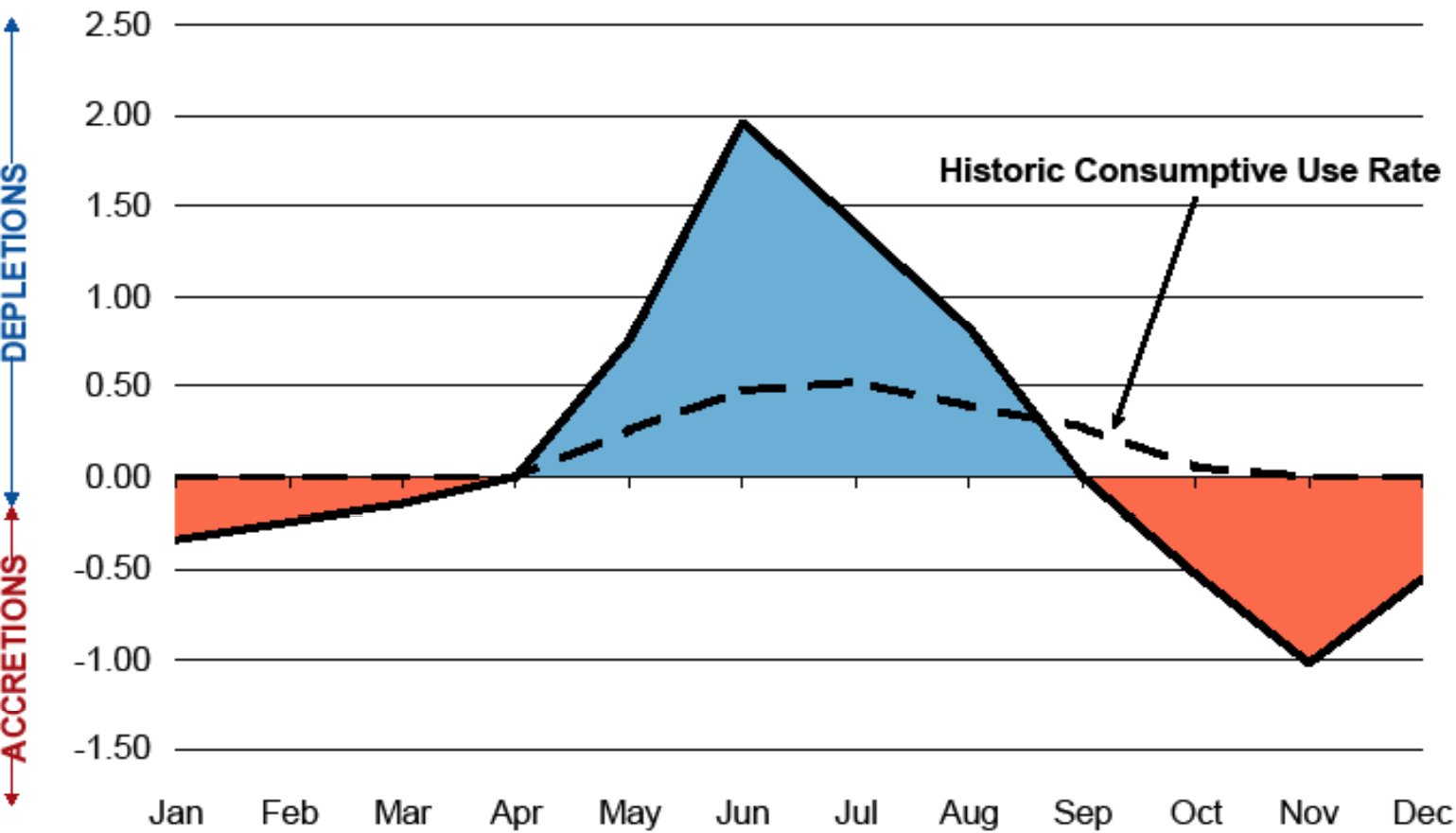
e County's use of up to 16 wells to irrigate up to 19.8 acres at the
ort is expected to result in time-delayed depletions to the
ring Fork River." Martin and Wood at p. 5 (2000).

Wells augmented in 99CW306 located in the same general area
as the Stapleton Brothers Ditch historic irrigation

If the wells have delayed depletions, groundwater return flows
from flood irrigation will also be delayed

Lagged Stream Depletion Analysis

(cfs)



Where does this leave us?

CWCB must look at impact of their action over the entire year in order to evaluate the benefit to the stream, not just their interpretation of a decree.

Negative impact to the stream in the non-irrigation season resulting from loss of return flows

CWCB should condition acceptance of the loan on a commitment to study and account for delayed return flows in the change case.

Topic Three: Loss of Green Mountain Reservoir Historic Users Pool Protection

Stapleton Brothers Ditch benefitted from releases of Green Mountain Reservoir water

The Division of Water Resources position is that a change to a non-preferred use results in loss of HUP protection

Is this worthwhile w/o HUP protection? Lose ability to enforce the water right at the very times would need to.

Downstream user: 1) Questionable whether affords HUP protection. 2) Requires a change case.

Fourth Topic: Lack of a public process in Atkin County / Trust Agreement Issues

A. Trust Agreement

Trust Agreement requires County and CWCB to proceed with
loaning 36 other water rights and changing those for instream
use

Mandatory language binds the CWCB to move forward
without ability to assess validity of converting “remainder”
rights to instream use

Opposers have experience with most of the “remainder”
rights. Some have little or no historic use.

Make the Trust Agreement elective rather than mandatory.
Study each right before committing to the change case.

B. Dry Up of Lands in Pitkin County

Most of water rights to be loaned irrigate Pitkin County open space parcels

Converting 36 “remainder” water rights to instream flow will require substantial dry up of open space lands – is this sound policy? Should the CWCB condone?

Require more input from the public in Pitkin County

CONCLUSIONS :

CWCB should ask whether this is an appropriate test case for HB 1280

CWCB has authority to condition acceptance of loaned water rights. Conditions could include requiring:

Examination of potential for requantification of the 4.3 cfs

Engineering evaluation of delayed irrigation return flows

Agreement with a downstream water use before proceeding and/or confirmation that will retain HUP beneficiary status (is it worth proceeding without that?)

Revision of the Trust Agreement so that acceptance and change of the 36 “remainder” water rights is elective rather than mandatory

Input from Pitkin County residents before drying up significant portions of their historically irrigated lands