

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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MEMORANDUM

TO: Colorado Water Conservation Board Members

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

DATE: March 3, 2011

RE: **Agenda Item 13, March 15-16, 2011 Board Meeting--
Request for Authorization to Proceed to Trial
Case No. 2-08CW106, Application of Upper Arkansas Water Conservancy
District**

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

This case is set for a eight-day trial beginning on May 31, 2011. The parties are discussing settlement options and preparing for trial on a parallel track. At this point, Staff and the Attorney General's Office believe that settlement is possible. However, we intend to discuss with the Board in executive session the litigation strategy and settlement options in the event the issues cannot be resolved before the trial date. After executive session, Staff will request authorization to proceed to trial in the event the parties are unable to settle the case.

Background

In this case, Applicant is seeking an appropriative right of exchange and approval of a plan for augmentation for the Upper Arkansas Water Conservancy District near Buena Vista in Chaffee County. Applicant is proposing to pump water from a new well near the Moltz Stabilization Pond, augment the well depletions with water owned by Upper Arkansas WCD and released to the Arkansas River (Fryingpan-Arkansas Project, Twin Lakes, etc.), deliver the water pumped from the well into the Trout Creek Ditch Company ditch, and forego diversions at the ditch headgate on Cottonwood Creek. The water not diverted at the ditch headgate will be exchanged upstream to storage in Cottonwood Reservoir on Middle Cottonwood Creek and Rainbow Lake on South Cottonwood Creek, and "will take on the nature, type and identity of the water used to augment the well."

The primary outstanding issues are whether the proposed exchange, through the complex arrangement of reassigning the identity of different water rights, will cause an expansion of use of the Trout Creek Ditch Company Ditch water rights. Additional issues include the adequacy of the augmentation plan, and inclusion of proper terms and conditions in the decree to prevent injury to the CWCB's ISF water rights.

CWCB Appropriation

The CWCB holds the following instream flow water rights that could be injured by this application:

CWCB Case No.	Stream/Lake	Amount (cfs)	Approp. Date	Watershed	County
2-79CW115	Cottonwood Creek	20	3/14/79	Arkansas River	Chaffee
2-77W4667	Middle Cottonwood Creek	10	11/15/77	Arkansas River	Chaffee
2-77W4665	South Cottonwood Creek	10	11/15/77	Arkansas River	Chaffee

This case involves an unusually complex exchange and CWCB staff is working with the Applicant to better understand their proposed operations and to refine the terms and conditions needed to protect the Board's instream flow water right. The State Engineer is also an objector and has also raised issues concerning operation and administration of the exchange and adequacy of the augmentation plan. Staff will continue to monitor resolution of those issues, but will move forward with proposed settlement terms. At this time, Staff and the AG's Office are optimistic that all issues can be resolved prior to the scheduled trial date.

Recommendation

Pursuant to ISF Rule 8j., Staff recommends that the Board authorize Staff to proceed to trial to protect the Board's instream flow water rights in the event that Staff and the Attorney General's Office are unable to reach a settlement with the Applicants.

