

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

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

DATE: July 1, 2011

SUBJECT: **Agenda Item 10, July 12-13, 2011 Board Meeting**
Stream and Lake Protection Section – Injury with Mitigation –
Case No. 5-07CW074; Application of John and Charlene Simcox

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Introduction

This agenda item addresses a proposed pretrial resolution under ISF Rule 8i. (3) Injury Accepted with Mitigation, ("IWM"). Rule 8i.(3) requires the Board to consider an injury with mitigation proposal using a two-meeting process. This is the second meeting of the process. This proposal is to mitigate impacts of domestic wells and pond evaporation that cannot be replaced under the applicant's augmentation plan in a location at or upstream of the depletions. The wells are part of a planned development and the pond is an irrigation and augmentation pond adjacent to Crooked Creek, tributary to the Fraser River.

The proposal would allow some injury to the Crooked Creek instream flow ("ISF") water right along approximately ½ mile (2500 feet) of the reach during the non-irrigation season. The mitigation proposal is to dry up irrigation land and relinquish senior water rights to the stream during the irrigation season over a three-mile reach, which will provide sufficient mitigation to enable the CWCB to continue to preserve the natural environment to a reasonable degree on Crooked Creek.

Staff Recommendation

Staff recommends that the Board:

- 1) Determine that the natural environment of Crooked Creek could be preserved to a reasonable degree despite the proposed injury to the ISF if Applicant and any successors in interest provide the proposed mitigation, and
- 2) Approve the pretrial resolution of this case.

Procedural Background

CWCB's water court appeal seeking confirmation of its authority to accept an injury with mitigation in the Division 5 Water Court was granted in December, 2010. During the appeal process, which took more than a year, CWCB halted all work on injury with mitigation proposals, including this case. Now with the court's confirmation of CWCB's authority, Staff is moving forward with this case for the Board's action.

Case Background

Applicant has requested conditional groundwater rights for eight domestic wells that are tributary to Crooked Creek, which is tributary to the Fraser River in Grand County. Applicant also seeks a change of irrigation water rights decreed to the Crooked Creek Ditch No. 1 for augmentation and storage in Simcox Reservoir for non-irrigation season augmentation use. Total consumptive use for the wells and evaporation from the reservoir is expected to be 0.9 acre-feet per year.

In July 2007, the Board ratified the statement of opposition to this application because the change of water rights and augmentation with exchange could injure the Board's ISF water right on Crooked Creek. CWCB became a party in this case with the intent of negotiating terms and conditions to fully protect the Board's ISF water rights. Staff has been unable to secure full protection, and is therefore recommending this injury with mitigation proposal to include in a stipulation and final decree. The exercise of the proposed rights could adversely impact the Board's ISF water rights listed below.

CWCB Case No.	Stream/Lake	Amount (cfs)	Approp. Date	Watershed	County
5-90CW298	Crooked Creek	4.5/1.0	11/27/90	Fraser River	Grand
5-90CW301	Crooked Creek	6.0/1.5	11/27/90	Fraser River	Grand

(See map attached to this memo). The Crooked Creek ISF water right decreed in 90CW298 extends through Applicant's property, approximately 3 miles west of Fraser, Colorado. Depletions associated with the wells and pond evaporation will occur within this Crooked Creek ISF reach. Applicant has agreed to protect the Crooked Creek ISF rights by relinquishing senior irrigation ditch rights in Crooked Creek No. 1 Ditch to the creek by drying up an extra one acre of its 8 acres of irrigated land along the Creek, described more fully below.

Mitigation on Crooked Creek

Under the mitigation proposal, the Applicant would provide additional senior water rights in the stream during the irrigation season at times when (1) the ISF may not be met and (2) the CWCB cannot call out any senior diverters on the stream. The additional senior water rights would come from the dry-up of irrigated acreage in addition to that required for the augmentation plan. Applicant agrees to relinquish diversions for two acres of dry-up to the stream during irrigation season (0.028 of the most senior priority on Crooked Creek, and 0.025 cfs of the second priority on Crooked Creek). Applicant will re-divert a portion of their consumptive use credits into Simcox Reservoir for augmentation of non-irrigation season diversions (0.36 acre-feet per year) at its downstream location. Therefore, Applicant would dedicate $\frac{1}{4}$ of its irrigation rights for its original 8 irrigated acres to augmentation and mitigation.

The dry-up of irrigated acreage frequently results in delayed historical irrigation return flows that must be maintained. However, delayed return flows are not an issue here because the irrigated acreage is immediately adjacent to Crooked Creek and thus returned to the stream within at least 30 days. Therefore, maintenance of historical irrigation return flow is not necessary in this case.

It is anticipated that the proposed mitigation will increase the flows on Crooked Creek at times when the ISF is not met and the ISF cannot call out this and other senior diversion rights. The senior rights offered for mitigation will bring the stream flows closer to the decreed ISF amount.

Extent of proposed injury

Applicant plans to construct 8 domestic wells for indoor use only, 6 of which deplete the stream upstream of the point of replacement on Crooked Creek. Total consumptive use for the wells and evaporation from the on-site reservoir is expected to be 0.9 acre-feet per year. Under its augmentation plan, Applicant will fully replace the 0.9 acre-feet per year; however, the non-irrigation season depletions of 0.36 acre-feet per year will not be replaced at the point of depletion, but rather at a point downstream of the point of

depletion, at the Simcox Reservoir outlet. Injury to the CWCB's ISF consists of the non-irrigation season depletions.

Total injury to a ½ mile segment of the ISF reach is expected to be 0.36 acre-feet per year, distributed monthly as follows:

Jan	0.03
Feb	0.05
March	0.06
April	0.08
October	0.05
November	0.05
December	0.04
Total	0.36

Benefits of mitigation

At the May, 2011 Board meeting, Mr. Jim Pearce of Canyon Water Resources, LLC, Applicant's consulting water resources engineer, provided comments on: (1) the potential injury to Crooked Creek ISF water rights resulting from Applicant's plan for augmentation, and (2) benefits to the natural environment resulting from Applicant's proposal to relinquish senior ditch rights to the Creek.

The CWCB obtained flow data from an upstream gage that shows the flows in Crooked Creek drop below the decreed ISF amount during the irrigation season in some years. A CWCB call during this time period would not benefit the stream because diversions by senior irrigation rights causing the low flows cannot be curtailed by CWCB's 1990 ISF water right. Applicant's relinquishment of some of its senior irrigation water to the stream at the ditch headgate will increase flow conditions, thus bringing the stream flow closer to the decreed ISF amount during a time that the ISF water right cannot call out such irrigation rights.

Under this plan, another water user who is senior to the ISF could divert the water out of the stream below the point of relinquishment. The water commissioner, Neal Misbach, confirmed that the next senior diversion location on the stream is approximately three miles downstream of the Crooked Creek No. 1 Ditch headgate. Therefore, the water will remain in the stream and will benefit the environment for approximately three miles of Crooked Creek down to the next senior diversion point.

As an alternative to the plan, Applicant has offered to donate the senior irrigation water rights in question to the CWCB for instream flow use. If CWCB accepted this offer, and changed the water use to instream flow purposes, it could protect the consumptive use of the donated flows under their original senior appropriation date through the ISF reaches down to the confluence with the Fraser River (approximately five miles). However, in this case it appears that relying on administration of the relinquished water rights could provide more water than a donation because the entire diversion amount would remain in the creek beyond the historical return flow location down to the next senior diverter on the stream. Staff recommends that CWCB rely on administration of the relinquished water to the stream rather than accepting a donation of the water.

Alternatives

Applicant has explored the following alternatives to the injury with mitigation proposal described herein:

1. Applicant considered locating their augmentation sources upstream of all 8 wells; however, that is not feasible due to limitations resulting from the subject land's topography and ownership issues.
2. Applicant considered locating the water supply wells for the Lots 1, 2, 3, 4, 5, and 10 downstream of the outlet of the augmentation pond. This alternative is feasible from the standpoint of engineering design; however, economic infeasibility of drilling six wells and individually piping the supplies thousands of feet to the building site makes this alternative impractical.

3. Applicant considered the feasibility of installing a pipeline and pump station to provide replacement supplies to Crooked Creek upstream of the depletions from the 6 wells. Applicant does not own the land between the wells and the Creek, and would need to obtain an easement across the property to place the facilities. Due to the fore-mentioned complications, this alternative is not economically feasible.

Because none of these alternatives is practical, the Applicant submitted this injury with mitigation proposal.

Colorado Division of Wildlife Evaluation of Proposal

CWCB and Colorado Division of Wildlife ("CDOW") staff members have conducted a site visit and have met with Applicant's representatives to discuss this proposal. The CDOW's review of the proposal was generally positive. The CDOW staff's analysis and recommendation will be presented at the Board meeting.

Terms and Conditions

Staff, the Attorney General's Office and representatives of the Applicant have discussed proposed terms and conditions related to the injury with mitigation proposal. Some terms and conditions are yet to be negotiated, but injury with mitigation terms and conditions in the final decree will include, but not be limited to, substantially the same as the following, as specified in ISF Rule 8i. (3)(1):

- i. A provision that the proponent will not divert water or take any other action that would reduce flows in the affected stream below the decreed ISF amount until the agreed-upon mitigation measures are in place and fully operational;
- ii. A requirement that the structural components of the mitigation be maintained permanently;
- iii. A provision allowing CWCB or DOW staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e, advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);
- iv. A term providing that if the proponent ceases to provide the agreed upon mitigation (such as removing structural components or failing to maintain them to a specified level, or ceasing to implement non-structural components), that the proponent will not divert water or take any other action that would reduce flows in the affected stream below the decreed ISF amount because the Board will no longer accept the injury based upon the mitigation no longer being in effect -- in such case, if the Board places a call for the affected ISF water right, the Board will notify the Division Engineer that this provision of the decree now is in effect and that the Board is not accepting the injury;
- v. A requirement that the proponent install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed necessary by the Division Engineer to administer the terms of the stipulation and decree implementing the Injury with Mitigation pretrial resolution; and
- vi. A term providing that the water court will retain jurisdiction to enforce the terms and conditions set forth above in subsections (i) - (v), and any other terms and conditions specific to the Injury with Mitigation pretrial resolution, as a water matter.

Based upon a review of the report prepared by Jim Pearce, and upon staff's and CDOW's discussions with the Applicant's representatives, it appears that the Applicant's mitigation proposal on Crooked Creek supports the conclusion that the natural environment of Crooked Creek can continue to be preserved to a reasonable degree under the conditions described herein as a result of the mitigation provided by the Applicant. The Division Engineer has concluded that this proposal is administrable.

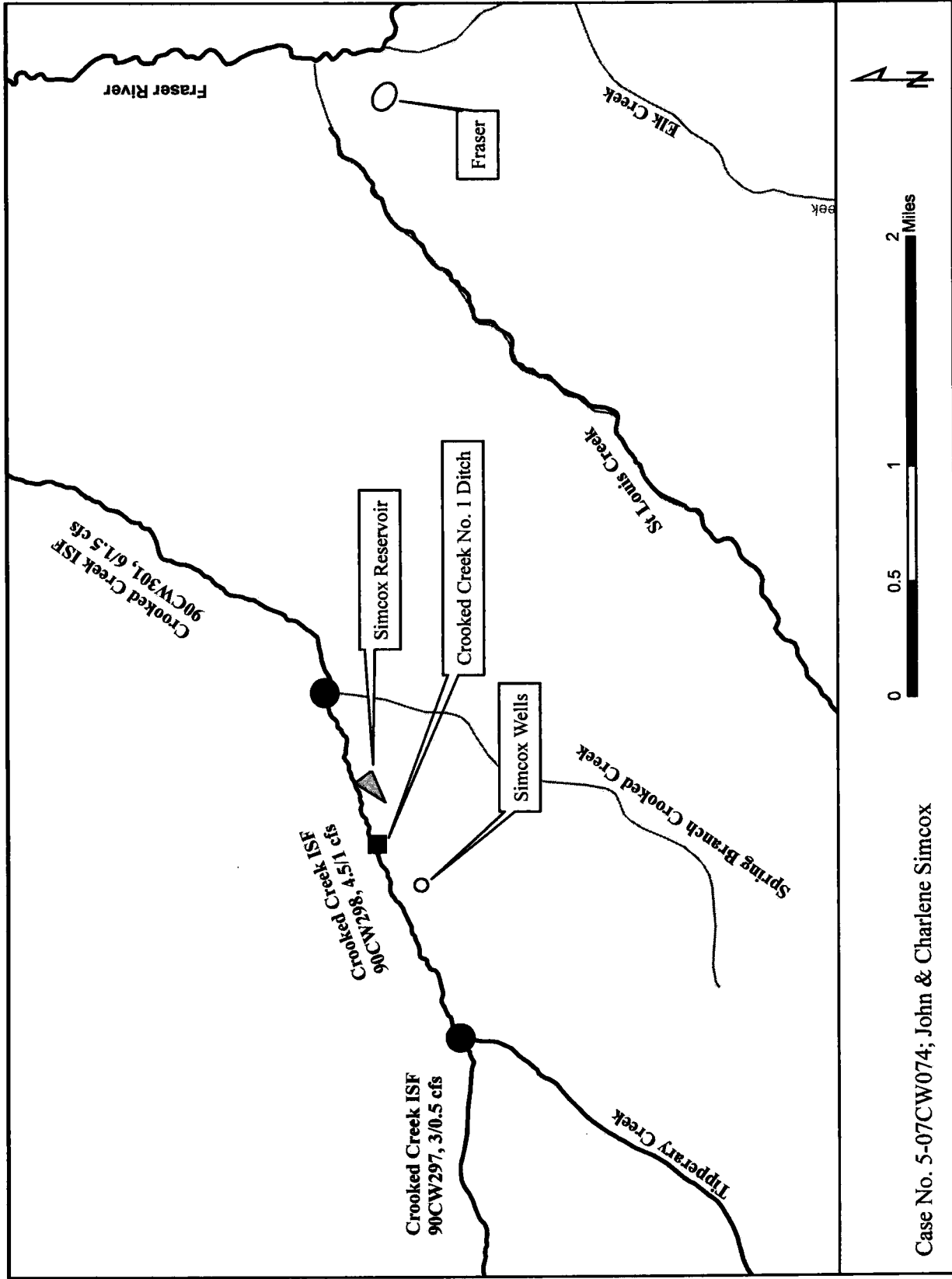
Staff Recommendation

As stated above, injury with mitigation is a two-meeting process. At the first meeting, the Board “conduct[ed] a preliminary review of the pretrial resolution during [a] regularly scheduled meeting to determine whether the natural environment could be preserved to a reasonable degree with the proposed injury or interference if applicant provided mitigation.” At this subsequent meeting, the Board may “take final action to ratify, refuse to ratify or ratify with additional conditions.”

Staff recommends that the Board:

- 1) Determine that the natural environment of Crooked Creek could be preserved to a reasonable degree despite the proposed injury to the ISF if Applicant and any successors in interest provide the proposed mitigation, and
- 2) Approve the pretrial resolution of this case.

Attachment



Case No. 5-07CW074; John & Charlene Simcox