

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: Tim Feehan, P.E., Chief
Finance Section

A handwritten signature in dark ink, appearing to be "TF", is written over the name "Tim Feehan".

DATE: July 1, 2011

SUBJECT: **Agenda Item 27, July 12-13, 2011 Board Meeting**
Finance Section – Revision to Existing Loans
Orphan Wells of Wiggins – Construction Interest Forgiveness

Bill Ritter, Jr.
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Introduction

At the November 2003 Board Meeting, the Board approved a loan for \$1,048,077 to Orphan Wells of Wiggins, LLC (OWW) to construct a groundwater recharge augmentation Project, consisting of one recharge well, one augmentation well, pipeline, and various recharge ponds. At the May 2006 Board Meeting, the Board approved an increase of \$202,000 to OWW's original authorization. However, due to pending water court issues at the time, OWW's contract was not amended to reflect the approved increase.

To date, the Colorado Water Conservation Board (CWCB) has disbursed \$942,494.44 to OWW towards the completion of the above-described Project. The Project, however, is currently on hold indefinitely, given OWW's inability to obtain an approved augmentation plan in water court. Given the long-term uncertainty of the Project, CWCB is viewing the Project as complete and has provided OWW with a Project Substantial Completion Letter, dated April 29, 2011, identifying the annual payment amount, due date, and interest during construction (IDC) due of \$152,611.72. OWW is in agreement with the terms of contract, as outlined in the Project Substantial Completion Letter, but is formally requesting that the IDC be calculated only from March 29, 2003 to October 1, 2008, thereby reducing its IDC obligation by \$56,872.44. Attached hereto is the formal request to reduce IDC, by Steve Bruntz, President of OWW. It is OWW's intention to hold onto the project, make annual payments, and submit a new application in water court under a revised set of parameters and conditions.

Staff Recommendation

Staff recommends that the Board approve a reduction in IDC for Orphan Wells of Wiggins, LLC from \$152,611.72 to \$95,739.28. \$95,205.56 of the IDC due will be rolled into OWW's loan,

bringing its final loan balance to \$1,048,077.00, which includes a 1% loan service fee, at an interest rate of 2.5%, amortized over 30 years. OWW will pay the remaining IDC balance of \$533.73 directly to CWCB. Additionally, OWW agrees to amend its loan contract with CWCB to include 10 shares of Riverside Private Reservoir Rights and one share of Jackson Lake Private Reservoir Rights as collateral and to provide copies of all executed easements associated with the project.

Background

In November of 2003, OWW was comprised of 31 separate agricultural operators, 45 wells and 4,500 acres of irrigated farmland. These lands received irrigation water only from junior wells, and were not within the service area of an existing agricultural ditch system.

Depletions from the 45 wells must be replaced during times when there is a call on the river by senior downstream water rights. The Groundwater Appropriators of the South Platte (GASP) used to cover these depletions, but has since dissolved, therefore requiring the 31 operators to find alternate means to cover their well depletions. In 2003, the various operators formed a Limited Liability Company (LLC), registered in the State of Colorado, under the name of Orphan Wells of Wiggins, LLC. The company developed a recharge/well augmentation plan to generate credits to offset the depletions from the 45 wells.

The plan involved the construction of one recharge well, one augmentation well, five miles of pipeline, and various recharge sites, at an estimated total cost of \$1,153,000. The plan was reviewed and approved for a construction loan by CWCB at its November 2003 Board Meeting.

The following is a brief summary of the events that have taken place since loan approval:

- During 2004, OWW completed pipeline and the installation of two wells, one at the river and the other at the end of the pipeline.
- During 2005 thru 2006, OWW attempted to address objections to its augmentation plan and to purchase and/or lease additional senior water.
- In early 2007, OWW decided to reduce its number of members from 31 to 18 and to reduce its irrigated farmland by 50%, therefore placing itself in a better position to have its augmentation plan approved in water court. OWW water court application was amended in 2007 to reflect this change.
- In March of 2007, Judge Kline ruled that OWW was not liable for past depletions of members removed from the amended application.
- March 2007 to October 2008, OWW spent an additional \$140,000 in engineering and legal fees to prepare for trial, scheduled for October of 2008.
- On October 1, 2008, Judge Kline reversed his decision and required OWW to cover past depletions of members that had dropped under the amended application. This ruling meant that OWW would be unable to meet its depletions with the water available under its proposed augmentation plan.
- In 2009, OWW sold assets paid for with CWCB loan funds, but not secured by the loan contract, to cover the \$140,000 in engineering and legal fees.

- From 2009 to present, CWCB and OWW have been working together to develop a solution to address OWW's situation and outstanding debt.

Discussion

As articulated in Mr. Bruntz's attached letter, the past eight years for OWW has been a time-consuming, expensive, and an emotional endeavor, with less than desirable results. In 2003, the CWCB assumed the risk of providing loan funds to construct an augmentation project without first having an approved water court augmentation plan. It is difficult, however, to forecast any water court outcome and in most cases funding is needed in advance to finance necessary components of the borrower's overall application process.

For the past 2 years, OWW has actively tried to sell its augmentation project in an effort to pay off its debt with CWCB. It appears that negotiations with potential buyers are complicated by OWW's contractual arrangement with CWCB and the potential for OWW not being able to meet its obligation. Buyers are waiting to see if the OWW defaults, allowing CWCB to assume ownership and sell the asset at a reduced amount. It has not been staff's position to move in the direction of default, but to work with OWW in developing a long-term solution that works in the best interest of both parties.

It is OWW's current position to adhere to the terms of its loan contract with CWCB, make its required annual payment of \$50,074.65, and to re-evaluate its position under a revised set of conditions and parameters in the future. It's OWW's opinion that its ability to obtain an approved augmentation plan will improve, based on the lag time that has occurred since its wells have been turned off.

CWCB's collateral position on the original loan consists only of recorded easements necessary to complete the work (i.e., pipeline, recharge ponds, wells, etc.). Therefore, it is staff opinion that it is in the best interest of CWCB to work with OWW, given our current collateral position and the current economic environment. In forgiving \$56,872.44 in IDC, CWCB will receive 10 shares of Riverside Private Reservoir Rights and 1 share of Jackson Private Reservoir Rights as additional collateral, valued at \$480,000 (\$42K/share Riverside and \$60K/share Jackson). This allows CWCB to substantially strengthen its collateral position, while OWW commits to pay \$95,739.28 in IDC and make its annual payment of \$50,074.65. If OWW does not meet its amended contractual obligation, CWCB is in a much better position to recoup its investment in the Project.

Staff views the request by OWW to reduce IDC as an isolated, unique case, subject to the review and approval of the Board, which does not grant any existing or future borrower this consideration.

Staff Recommendation (Board approved staff recommendation on July 20, 2010)

Staff recommends that the Board approve a reduction in IDC for Orphan Wells of Wiggin, LLC, from \$152,611.72 to \$95,739.28. \$95,205.56 of the IDC due will be rolled into OWW's loan, bringing its final loan balance to \$1,048,077.00, which includes a 1% loan service fee, at an interest rate of 2.5%, amortized over 30 years. OWW will pay the remaining IDC balance of \$533.73 directly to CWCB. Additionally, OWW agrees to amend its loan contract with CWCB to include 10 shares of Riverside Private Reservoir Rights and one share of Jackson Private Reservoir Rights as collateral, and to provide copies of all executed easements associated with the project.

cc: Steve Bruntz, President, Orphan Wells of Wiggins LLC
Susan Schneider, AGO
Peter Johnson, AGO

Attachment: Letter from Steve Bruntz with OWW

May 14, 2011

Gentlemen:

Pertaining to our meeting, this is letter of request to the Water Conservation Board. I would be willing to address the Board at the Denver meeting.

From 1955 to 1964 my father rented 3 farms south of Wiggins. He realized that the water table was going down in that area. Seeing the farms yielding less, my father wanted a farm with good water. He looked at farms in a couple of different ditch systems. He realized that in dry years the water would run out in August or September. With this in mind, he decided to look at purchasing a farm with wells north of Wiggins. He chose a farm with a long history of pumping – at least from 1938 – with no diminishing yield in water production or legal burdens on the water. He thoroughly investigated this himself.

I remember conversations between my mom and dad – about how hard it would be to pay for the farm at that price as these farms were bringing more than those with surface water, but my dad said you can't raise a crop without water.

In spite of the price, my father grabbed the American dream in the fall of 1964 and bought the NE ¼ of 34-4-60.

My family's trials and tribulations only mirror those of many other farm families. In the fall and winter of 1969, snow fall and freezing every week caused many farmers in the area not to get their sugar beets out of the field. Then, the flood of 1973—that was a good old day with much rain! In the next few years we lost yields to frost, wind, and the occasional summer hail storm

My brother and I joined the farming operation. We refinanced the home place to buy 5 more farms over these years. Then on July 15, 1985 a crushing hail storm on all 1200 acres. That year our corn yield averaged 17 bu per acre – normal yields would have been 190 bu to the acre. This caused us to lose 4 farms to financiers. This drove my brother off the farm. He is now teaching math and is an administrator for the Wiggins School District. This also drove my younger 2 brothers off the farm and into the business world. Me? I didn't know anything else and didn't have any higher education. My dad and I fought back and got back on our feet. We worked side by side until 1995 when my dad got into a battle with cancer he couldn't win. Before he died in 1998 he sold the second farm to finally pay off the original 1964 home place so my mom could have a farm free and clear for her retirement. I am still living on the original home place. My 3 children will never realize their dreams of being stewards of this land.

This is my story and I am just one story and face of the 42 other stories and faces of the original 43 well owners in the Orphan Wells of Wiggins not to mention other well owners in this area that are in the same circumstance.

My mom's retirement was going pretty well. That is, until 2003.

When GASP wells were shut down, well owners went to several meetings and were told by an engineer from Northern Colorado Water Conservation District that 2 -3 good wells a distance from the River could pump water into the river to cover depletions. This in conjunction with 2 -3 wells within 100 feet of the river could pump water up into ponds when in priority. This could take care of all the wells on Bijou Hill —essentially all the wells north of Wiggin's area. Orphan Wells of Wiggins then built a 4 ½ mile pipeline, with a large producing well at each end of the pipeline. In 2005 objectors told us the aug well at the top would not be able to be used without severe restrictions. Also we were told in 2006 our well within 100 feet of the river would now no longer be immediate and we would be required to pay back a percentage of water pumped even when in priority. In January of 2004, we were told a ten year lease of senior water would be considered a long term lease and would keep our wells running. OWW then proceeded to make deals with senior water right owners for 10 year leases to dry up their farms and let us return their senior water to the river. In 2006 objectors told us a 10 year lease would no longer be considered a long term lease, only a 50 year lease would be considered. OWW purchased 11 shares of reservoir rights. This would only cover about 40% of one of the 43 irrigation wells depletions. OWW also purchased land, permanent easements and developed more augmentation ponds, partnered with members on construction of other ponds, built two additional pipelines and another well within 100 feet of the river at a cost of approximately \$700,000. Several other members constructed ponds on their farms at their own expense

My dad always told me that if you worked hard and played by the rules that you would be successful. As you can see the OWW members have worked very hard and spent an enormous amount of money putting together an aug plan, only to find ourselves in water court several years later asking for approval of our plan and having denial waiting there for us.

As I have demonstrated, adversity thrown at us by Mother Nature are risks that all farmers accept and take in stride when they happen.

In late 2006 and early 2007 OWW decided the only way to make our project work, would be to reduce depletions. We decided to cut our number of farms covered by 50%. Members that at that time could no longer afford to go on or decided not to put more of their operation in jeopardy, sold shares to other members along with the loan liability. Then again after 4 or 5 times trying to comply with forever changing interpretation of law, we thought we had a solid plan we could make work so OWW amended our application. The judge's ruling in March of 2007, ruled we weren't liable for depletions of members that dropped out. After spending many more dollars on legal and engineering fees for the next 19 months, negotiating with objectors until 1 month before our trial on October 1, 2008, Judge Kline dropped the final hammer on us by reversing his decision making us liable for depletions for members that dropped out. If Judge Kline had just made this ruling in March 2007, we would not have spent another \$140,000 in legal and professional fees. This is just a small amount compared to what else happened

in the next 18 months. The economic recession and crash took many buyers out of the water market in 2007. Riverside private water rights sold for \$80,000. Our 10 shares of Riverside and 1 share of Jackson would have yielded us \$880,000. Recently 3 shares sold at auction for \$42,500 per share. Between our water and legal fees we could have paid \$1,020,000 on our note.

After the ruling our board had a hard time asking members who just found out their wells would never run again for an assessment to pay legal fees. We consulted with our legal counsel to see if we could sell what we called the Smith Project, a well at the river and approximately 2000 feet of pipeline to aug ponds to pay legal and engineering costs. Our counsel told us this project was not secured by our note so we sold this to cover expenses.

Many of the best and brightest farmers in the State of Colorado were affected by this decision. The fate of many of our members reads as an obituary: bankruptcies, foreclosures, off-farm jobs, retirement gone. Only members that wells in OWW were a small percentage of their operation are able to enjoy these high commodity prices.

Our members feel the same entity from engineers at Northern telling us all we need was a couple of wells at river and an aug well miles away repaying depletions with pumping of which at least $\frac{1}{2}$ would not be repaid because of free river, to previous rule of wells 100 feet from river being considered direct flow when in priority to having a delay need to be replaced, to Judge's reversal of a decision pounding us into oblivion are all the same entity that loaned us the money – the Great State of Colorado. We feel the just thing to do for the State of Colorado is to consider interest forbearance from 2007 until the present. We believe even the State mislead naïve citizens into investing a million dollars into a project destined for failure by the State. We would appreciate your consideration for some help in interest relief.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Bruntz", with a stylized, flowing script.

Steve Bruntz
President
Orphan Wells of Wiggins