

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 
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Governor

Mike King
DNR Executive Director

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CWCB Director

DATE: August 31, 2011

SUBJECT: **Agenda Item 12, September 13-14, 2011 Board Meeting**
Stream and Lake Protection Section – Injury with Mitigation – Case No. 6-05CW023; Application of Deerwood Service Company, LLC

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 IWM proposal using a two-meeting process. This is the second meeting of the process. This proposal, submitted by Deerwood Service Company, LLC (“Applicant” or “Company”), is to mitigate impacts of domestic wells and lawn irrigation that cannot be replaced under the Applicant’s augmentation plan in a location at or upstream of the depletions. The wells, which are tributary to Whetstone Creek and Trout Creek above its confluence with Whetstone Creek, tributary to the Yampa River, are part of a planned development of three subdivisions located in Routt County southwest of Steamboat Springs, Colorado.

The proposal would allow some injury to the Trout Creek instream flow (“ISF”) water right along approximately 1 mile (5,000 feet) of the reach. The mitigation proposal is to restore two degraded riparian areas on Trout Creek in the impacted reach to enable the CWCB to continue to preserve the natural environment to a reasonable degree on Trout Creek. Staff presented this IWM proposal to the Board at its November 2010 meeting. Staff and the Applicant have addressed the one outstanding issue identified in November 2010, which is explained below under “Division Engineer Consultation.”

Staff Recommendation

Staff’s and Colorado Parks and Wildlife’s (“CPW”) review of Applicant’s proposal and discussions with Applicant’s representatives support the conclusion that the natural environment of Trout Creek can continue to be preserved to a reasonable degree under the conditions described herein as a result of the mitigation provided by Applicant. Staff recommends that the Board:

- 1) Determine that the natural environment of Trout 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 agree to appropriate terms and conditions, and

- 2) Approve the pretrial resolution of this case.

Case Background

The Applicant has requested an approval of a plan for augmentation and exchange to replace out-of-priority diversions from previously decreed conditional groundwater rights for two wells that are tributary to both Whetstone Creek and Trout Creek above its confluence with Whetstone Creek, tributary to the Yampa River in Routt County. The DP-3 Well and DP-4 Well will serve three subdivisions located on or around a working cattle ranch (Deerwood Ranches Subdivision, Creek Ranch Land Preservation Subdivision and the Wilkerson Property). The sources of augmentation water are Deerwood Pond and Whetstone Reservoir. Releases from both ponds will go into Whetstone Creek and then flow down to the confluence with Trout Creek. The proposed exchange would be from the confluence of Trout Creek and Whetstone Creek up Trout Creek to the points where pumping from the wells depletes the flow of Trout Creek. The maximum rate of the exchange would be 0.040 cfs. In September 2005, 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 Trout Creek, described below.

CWCB Case No.	Stream/Lake	Amount (cfs)	Approp. Date	Watershed	County
6-77CW1338	Trout Creek	5.0	9/23/77	Yampa River	Routt

The Trout Creek ISF water right extends through the Creek Ranch Land Preservation Subdivision. Depletions associated with the wells will impact flows within a 5,000' reach of the Trout Creek ISF reach just above the confluence with Whetstone Creek. The Applicant has agreed to mitigate the impact by restoring two sections of Trout Creek within the impacted reach, described more fully below.

Extent of proposed injury

Depletions associated with the Applicant's wells will impact flows within a 5,000' reach of the Trout Creek ISF reach just above the confluence with Whetstone Creek. Although both wells are drilled, the Applicant has relied exclusively on water withdrawn from the DP-4 Well to provide irrigation and domestic water to the residents within the three subdivisions. Therefore, this discussion focuses on depletions from the DP-4 Well, with the understanding that impacts to Trout Creek above its confluence with Whetstone Creek from operation of the DP-3 Well are +less than those from operation of the DP-4 Well. Based on conservative estimates, at full build-out for all three subdivisions, depletions from the DP-4 Well to Trout Creek above the confluence with Whetstone Creek will reach a maximum rate of 0.024 – 0.04 cfs in July of any year, with a maximum monthly depletion of 1.51 – 2.39 acre-feet during that month.¹ The potential injury from the operation of the DP-4 well will be approximately 0.48% – 0.8% of the 5 cfs ISF water right on Trout Creek.

In addition, the Applicant's engineers have examined existing stream measurements for Trout Creek provided by Chevron USA for the months of April through November in 1988 through 2003 (measurements for December through March, and parts of April and November for some years, were not available). During that period, the Applicant's engineers estimate that the ISF water right would have been shorted by the Applicant's out-of-priority depletions up to 0.024 –

¹ Currently, the Company is providing water to 31 of the planned 70 residences. The depletion numbers in the Company's proposal are based on full build-out.

0.04 cfs, or roughly 0.48% – 0.8% of the 5 cfs ISF water right for all of July, August and September, and parts of the remaining months.

Proposed Mitigation on Trout Creek

During the course of creating the subdivisions, particularly the Creek Ranch subdivision, the developer underwent an extensive restoration effort on Trout Creek where it crosses the Creek Ranch property. The Applicant has consulted with William Chace of Riverkeeper, Inc., the contractor responsible for the riparian renovation aspects of the original Trout Creek restoration project. Mr. Chace has identified two locations on Trout Creek for restoration projects that would enhance the wildlife habitat and riparian nature of Trout Creek if completed. Both of these projects are within the reach of the creek affected by depletions from operation of the Applicant's wells. Each is characterized by continued high flow erosion, including wasting banks, and instability. The continued erosion has prevented development of woody shrub cover and has increased the width of the creek, thus diminishing habitat carrying capacity in the area. Mr. Chace proposes to install toe rock in the channel substrate, grade the banks, harvest site-specific woody shrubs and transplant them to the restored bank, and conduct other activities, with the goal of deepening the channel and lowering water temperatures during summer months for fish habitat, as well as stabilizing the creek bank. These projects are similar in scope to those previously conducted on Trout Creek. A representative of the Applicant's gave a presentation to the Board in November 2010 on the proposed mitigation and the expected benefits to Trout Creek. Although the benefits from the proposed projects have not been quantified, it appears that, based on the benefits to the stream from prior similar projects, these projects will enhance the riparian area and wildlife habitat, and will enable the CWCB to continue to preserve the natural environment to a reasonable degree on Trout Creek in spite of any injury that could otherwise result by depletions to the ISF water right from operation of the Company's wells.

Alternatives

Since applying for its augmentation plan in 2005, the Applicant has explored alternatives to the proposed injury with mitigation plan. The Applicant initially explored leasing storage space in Sheriff Reservoir from the Town of Oak Creek. After corresponding with the Town, it became apparent that water storage in Sheriff Reservoir would not be available. The Applicant also explored use of a water right in Oak Creek owned by an entity related to the developer of the subdivisions, but after the Applicant was conveyed to the three homeowners associations, that water source was no longer available. To date, the Applicant has not identified any additional water sources that would be available upstream from the location of the depletions.

Colorado Parks and Wildlife Evaluation of Proposal

CPW staff has contacted the Company's representatives to discuss this proposal. The CPW staff will present its analysis and recommendation 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 should include the following:

1. Improvements. The reach of Trout Creek affected by depletions from the DP-4 Well includes portions of Trout Creek that are currently unstable, eroding, abraded, and substantially over-widened, resulting in habitat that is insufficient for fish propagation and riparian wildlife. Therefore, the Company agrees that it will complete construction of the

mitigation measures set forth in Exhibit ____ to this decree by _____, 201_. Specifically, the Company will construct a minimum of two additional habitat structures as set forth in the exhibit within the stretch of Trout Creek affected by depletions from the operation of the Company's wells. The structures will be similar in nature to those structures previously constructed on Trout Creek. The structures will be constructed for stream restoration and habitat purposes, and shall generally be designed to consolidate the banks of the creek, decrease the channel width-to-depth ratio, stabilize the banks and increase riparian vegetation and pool creation with the intent to lower temperature in the creek and enable an increased fishery carrying capacity. Until the above-described mitigation measures are in place and fully operational, the Company shall replace any out-of-priority depletions, in time, place and amount, to Trout Creek that would reduce flows in Trout Creek below the decreed instream flow rate.

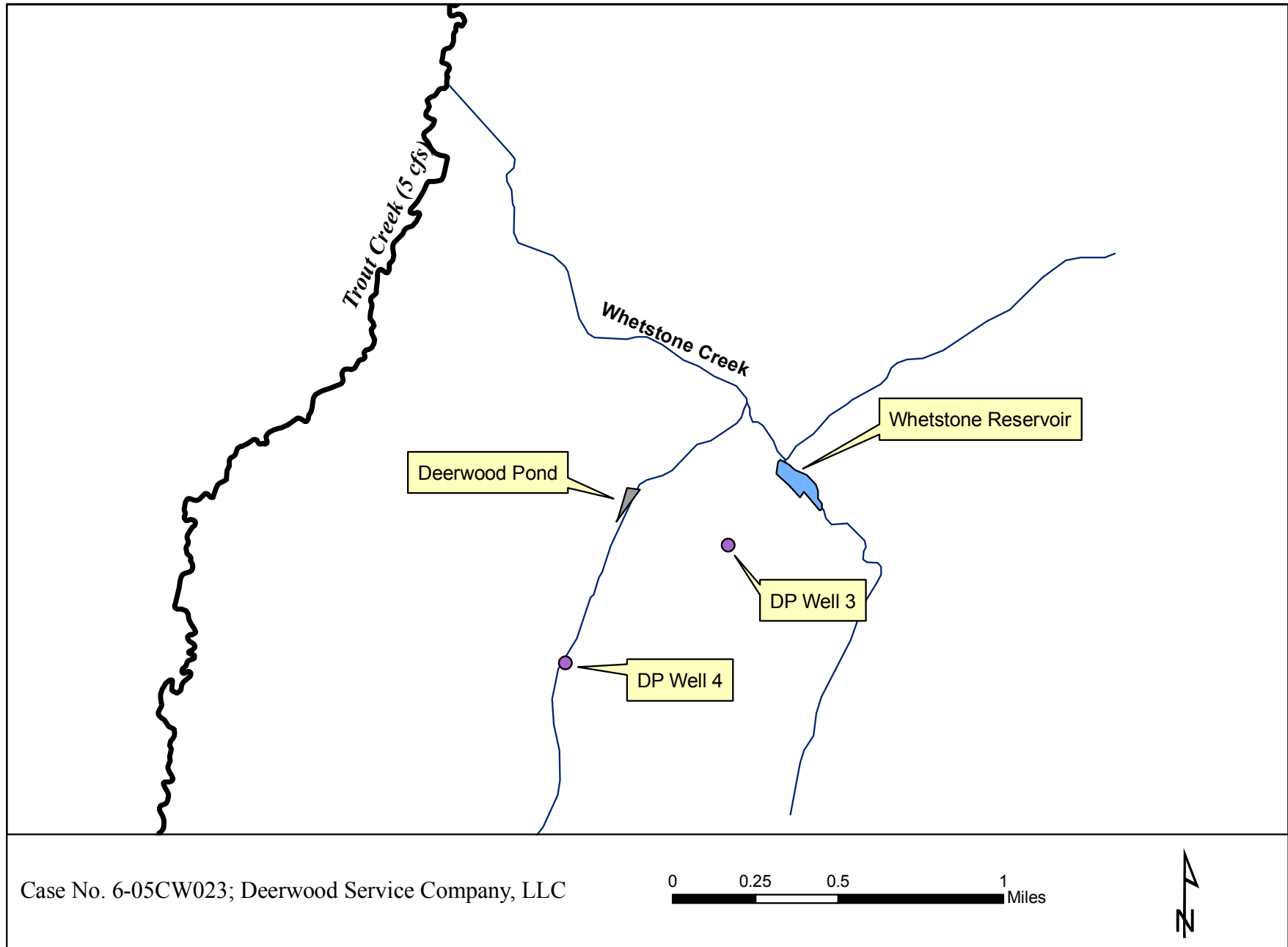
2. Maintenance. The Company will commit to permanently maintaining the structures and improvements in Trout Creek that provide the mitigation benefits, and acknowledge that any injurious depletions to Trout Creek caused by operation of the Company's wells will cease in the event the mitigation structures and improvements in Trout Creek are not maintained.
3. Additional Controls. The Company will coordinate with the Creek Ranch Owners Association to implement noxious weed control measures, and to ensure grazing practices in the pastureland protect the riparian habitat to a reasonable degree.
4. Inspection access. The Company will allow access for the CWCB and the Division of Wildlife staff to inspect the mitigation structures, and, if necessary, to perform biological stream monitoring, subject to reasonable limits and provisions for advanced notice.
5. Retained jurisdiction. The Company will include in any final decree a retained jurisdiction provision allowing the water court to enforce the provisions of the injury with mitigation stipulation as a water matter.
6. Measuring devices. The Company agrees to install, replace and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed by the Division Engineer as necessary to administer the terms of the injury with mitigation stipulation and the final decree.

Staff anticipates that the parties will work to refine the above-listed terms and conditions and incorporate them into a stipulation and the resulting water court decree, along with standard protective terms and conditions.

Division Engineer Consultation

Staff and the Attorney General's Office have consulted with the Division Engineer on this proposal. Based upon that consultation, it appears that this proposal will be administrable and will not result in a selective call or subordination on the subject reach of Trout Creek. When Staff and the Applicant presented this IWM proposal to the Board in November 2010, the Board expressed concerns about a potential selective subordination issue involving an intervening water right diverting from the potentially injured ISF reach. The Applicant has since confirmed with the water right holder that the water right will be voluntarily curtailed if the ISF water right is not met. Therefore, the curtailment would not be a result of administration, but rather by voluntary action, and the Division Engineer would not need to administer a selective subordination. See the resolution by the Board of Directors of the Creek Ranch Owners Association dated August 14, 2011, attached to this memo.

Attachments



RESOLUTION

The Board of Directors of the Creek Ranch Owners Association hereby resolves as follows:

RECITALS

WHEREAS, Pursuant to the decree entered in Case No. 99CW13, Routt County District Court, Water Division No. 6, dated October 12, 1999, Deerwood Service Company provides Creek Ranch Owners Association and its lot owners with domestic use, stock watering, and lawn irrigation water decreed to Wells No. DP3 and DP4;

WHEREAS, Creek Ranch Owners Association is a member of Deerwood Service Company, LLC;

WHEREAS, Deerwood Service Company has applied for an augmentation plan to augment out-of-priority depletions from Wells No. DP3 and DP4 in Case No. 05CW23, Routt County District Court, Water Division No. 6;

WHEREAS, the Colorado Water Conservation Board ("CWCB") filed a statement of opposition to the application in Case No. 05CW23 in order to protect its senior instream flow right decreed in the amount of 5 c.f.s. on Trout Creek from Sheriff Reservoir downstream to Trout Creek's confluence with Middle Creek, a portion of which may be injured by out-of-priority depletions from Deerwood Service Company wells;

WHEREAS, Deerwood Service Company has proposed an injury with mitigation agreement with the CWCB by which the CWCB agrees not to assert a call against out-of-priority depletions from the Deerwood Service Company Wells No. DP3 and DP4 in exchange for the completion, operation, and maintenance of riparian restoration projects performed by Deerwood Service Company on land owned by Creek Ranch Owners Association on Trout Creek;

WHEREAS, Creek Ranch Owners Association owns junior water rights, including Creek Ranch Headgate No. 1, Creek Ranch Headgate No. 2, Headquarters Lake Feeder Ditch, and Baker Lake Feeder Ditch, all diverting water rights in the reach of the CWCB's in-stream flow that may be injured by out-of-priority depletions caused by Deerwood Service Company well diversions;

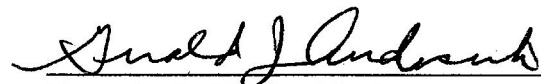
WHEREAS, in order to reach an injury with mitigation agreement and stipulation with Deerwood Service Company in Case No. 05CW23, the CWCB requires a resolution and agreement from Creek Ranch Owners Association stating that the CWCB's senior instream flow right will not be subordinated to the Creek Ranch Owners Association junior water rights set forth above; and that Creek Ranch Owners Association will not divert under its water rights listed above in a manner that will cause injury to the CWCB's instream flow right;

NOW THEREFORE, the Creek Ranch Owners Association Board of Directors resolves and agrees as follows:

1. Creek Ranch Owners Association acknowledges that its Baker Lake Feeder Ditch, Headquarters Lake Feeder Ditch, Creek Ranch Headgate No. 1, and Creek Ranch Headgate No. 2 water rights are junior to the CWCB's instream flow right decreed in Case No. W-1338-77, Routt County District Court, Water Division No. 6, and shall be operated as such by the Creek Ranch Owners Association.

2. Creek Ranch Owners Association will not divert water under its Headquarters Lake Feeder Ditch, Baker Lake Feeder Ditch, Creek Ranch Headgate No. 1 or Creek Ranch Headgate No. 2 water rights at any time when the flow in Trout Creek is less than the 5 c.f.s. instream flow decreed in Case No. W-1338-77, or at any time when diversions pursuant to the Creek Ranch Owners Association's water rights set forth above will cause flows in Trout Creek to be less than 5 c.f.s., unless such diversions are fully augmented pursuant to a decreed augmentation plan.

So resolved and agreed this 14 day of August 2011.



Gerry Audesirk, President
Creek Ranch Owners Association

Attested: _____

By: _____

8/14/11