

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: November 4, 2011

SUBJECT: **Consent Agenda Item 2, November 15-16, 2011 Board Meeting
Stream and Lake Protection Section – Injury with Mitigation – Case No. 4-09CW144; Application of Energy Fuels Resources Corporation**

John 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. Staff first presented this proposal to the Board in May 2011. This proposal is to mitigate impacts of water supply wells and the operation of the Pinon Ridge Mill Project, a uranium/vanadium-processing mill proposed in the East Paradox Creek Basin. Depletions to the Dolores River instream flow ("ISF") water right cannot be replaced in time, place and amount because of the predicted 100-300 year lagged depletions to the River and a 40-year expected life of the project. Therefore, the Applicant is seeking to replace all out-of-priority diversions (not just depletions) caused by the project over a condensed 40-50 year period as part of this mitigation proposal.

The proposal would allow some injury to the Dolores River ISF water right downstream of its confluence with Paradox Creek along approximately 12 miles of the reach year-round after the project is closed. The mitigation proposal is to provide to CWCB water stored in McPhee Reservoir in an amount of up to 282 acre-feet per year during the 40-year expected life of the mill. This amount of water should provide sufficient mitigation to enable the CWCB to continue to preserve the natural environment to a reasonable degree on the Dolores River.

Staff Recommendation

Staff recommends that the Board:

1. Determine that the natural environment of the Dolores River could be preserved to a reasonable degree with the proposed injury if the Applicant provides the proposed mitigation; and
2. Authorize staff and the AG's Office to enter into a stipulation incorporating this IWM proposal and other appropriate terms and conditions, provided that:

- a. The Lease Agreement between the Applicant and the Dolores Water Conservancy District is finalized; and
- b. CWCB staff has finalized the mechanism by which the CWCB will request the leased water in coordination with the CPW; and
- c. The Division Engineers have confirmed that this proposal is administrable.

Case Background

Applicant filed a water court application for surface and groundwater rights tributary to the Dolores River in Montrose County. The water will be used in the proposed Pinon Ridge Mill Facility, which will process uranium and vanadium ore mined nearby. Applicant has not filed an augmentation plan for its junior depletions because this basin has not yet been deemed “over-appropriated,” and an augmentation plan is not required by the State and Division Engineer. However, the Applicant is seeking to reach a stipulation with CWCB to mitigate injury to CWCB’s ISF water right on the Dolores River.

In March 2009, the Board ratified the statement of opposition to this application because the junior appropriation of water rights would cause un-replaced out-of-priority depletions that would likely injure the Board’s ISF water right on the Dolores River. CWCB became a party in this case with the intent of negotiating terms and conditions to fully protect the Board’s ISF water right. 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 right listed below.

CWCB Case No.	Stream/Lake	Amount (cfs)	Approp. Date	Watershed	County
7-75W1346	Dolores River	78	5/1/1975	Dolores	San Miguel, Montrose, Montezuma, Dolores

(See map attached to this memo). The Dolores River ISF water right decreed in 7-75W1346 extends from McPhee Reservoir to the confluence with the San Miguel River. Depletions associated with the wells and zero-discharge facility will occur within the lower portion of the Dolores River ISF reach from the confluence with East Paradox Creek to the ISF lower terminus at the San Miguel River. Applicant has agreed to mitigate impacts to the Dolores River ISF right by providing to CWCB water stored in McPhee Reservoir as replacement water for Applicant’s out-of-priority depletions on the Dolores River, as described more fully below.

Mitigation on the Dolores River

At the May 2011 Board meeting, Eric Bikis, Applicant’s water resources consultant gave a presentation on Applicant’s mitigation proposal. Under the mitigation proposal, the Applicant would purchase the mitigation water, including a sufficient amount to cover transit losses, which will be stored in McPhee Reservoir and made available to the CWCB. The Applicant is in the process of negotiating a lease agreement with the Dolores Water Conservancy District for this amount of stored water. The details of reservoir operations and agreements are yet to be developed; however, CWCB should have control over the release of up to 282 AF/yr for instream flow purposes. The 282 AF/yr represents 100% of the 95 AF/yr of intercepted precipitation in the zero-discharge area plus the out-of-priority portion of groundwater depletions and transit losses. Applicant’s calculations are computed as out-of-priority depletions, rather than total depletions, assuming the Dolores River ISF is not satisfied 58% of the time in the

affected segment. Under Applicant's analysis, 170% of the total project's out-of-priority depletions will be replaced during the 40-50 year life of the project. Applicant's analysis is presented in Exhibit 1.

Agreements are yet to be written, but generally, CWCB will coordinate with the Division of Wildlife to schedule releases of the 282 AF/yr with the Dolores Water Conservancy District, the operator of the reservoir. It is anticipated that the released water under the proposed mitigation will be shepherded by the Division Engineers in both Division 7 and Division 4, through the upper portion of the Dolores River ISF down to the confluence with East Paradox Creek, less transit losses, to replace out-of-priority diversions by the Applicant.

Extent of proposed injury

Applicant plans to install up to 7 wells for industrial uses with a maximum pumping rate of 175 gpm (0.39 cfs). Maximum total combined withdrawals from the wells shall not exceed 282 AF/yr. Applicant has calculated a maximum groundwater depletion rate to the Dolores River of 101.7 AF/yr using assumptions published in a USGS basin report. Applicant also plans to intercept precipitation across a 240-acre zero discharge facility. However, the entire 240 acres will not be operating at any one time. Portions of the total area will be operating at various times; in aggregate, the time-weighted zero-discharge area is 90.6 acres. Total precipitation captured by this area is 95 AF/yr.

Total depletions caused by the project could be as high as 11,470 AF. Of the total depletions, it is anticipated that only 58% of these depletions will be out-of-priority in relation to the Dolores River ISF. Total out-of-priority depletions are expected to be 6,653 AF over more than 100 years. Applicant has proposed to replace 11,280 AF over the expected life of the project, which is 40-50 years. Thus, given the assumptions for out-of-priority depletions, the Applicant will over-replace out-of-priority depletions during the project life and under-replace after the project is closed and the site is reclaimed. As shown on Figure 6 in Exhibit 1, annual lagged groundwater depletions will rapidly decline at the end of the mill operations.

Benefits of mitigation

The entire Dolores River ISF will benefit from the stored water provided by Applicant. Applicant will provide 1.7% of the total project out-of-priority depletions at the far upstream end of the ISF reach. The lower reach of the ISF is most likely to need water in the late irrigation season. Ideally, releases from McPhee Reservoir could be scheduled to cover those times when the river needs the water most, and could potentially be coordinated with Reservoir fish pool releases or with acquired water on the Dolores River to provide the most benefits.

Under this plan, reservoir released water, less 8.9% transit loss, will be shepherded down the Dolores River by the Division Engineers through Division 7 and Division 4 to the confluence with East Paradox Creek. Therefore, the water will remain in the river and will benefit the environment from McPhee Reservoir downstream for approximately 100 miles during the 40-50 year life of the project.

Colorado Division of Parks and Wildlife Evaluation of Proposal

CWCB and Colorado Division of Parks and Wildlife ("CPW") staff members have met with Applicant's representatives to discuss this proposal. At the May 2011 CWCB meeting, the CPW recommended that the Board approve the proposal.

Developments Since May 2011 CWCB Meeting

Since the May 2011 Board meeting, the Applicant has negotiated a Lease Agreement with the Dolores Water Conservancy District for the 282 AF of McPhee Reservoir water. The Lease Agreement will not become effective until the Pinon Ridge Mill property is formally included in the District, which Applicant anticipates occurring in early 2012. Staff and the Applicant also have reached agreement with the Division Engineers for Water Divisions 4 and 7 on the transit losses that the Division Engineers will assess on the released water. Staff and the Applicant are still in the process of confirming the administrability of this proposal with the Division Engineers.

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. Measuring Devices. Applicant will install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring device deemed necessary by the Division Engineer to administer terms of the stipulation and decree implementing the injury with mitigation.
2. Retained jurisdiction. Applicant 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.

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.

Based upon a review of the report prepared by Bikis Water Consultants, LLC, and upon staff's and CDOW's discussions with the Applicant's representatives, it appears that the Applicant's mitigation proposal on the Dolores River supports the conclusion that the natural environment of the Dolores River can continue to be preserved to a reasonable degree under the conditions described herein as a result of the mitigation provided by the Applicant. Staff and the Attorney General's Office are in the process of consulting with the Division Engineer on the administration of this IWM proposal. Storage and reservoir operations agreements will be drafted soon.

Staff Recommendation

Staff recommends that the Board:

1. Determine that the natural environment of the Dolores River could be preserved to a reasonable degree with the proposed injury if the Applicant provides the proposed mitigation; and
2. Authorize staff and the AG's Office to enter into a stipulation incorporating this IWM proposal provided that:
 - a. The Lease Agreement between the Applicant and the Dolores Water Conservancy District is finalized;

- b. CWCB staff has finalized the mechanism by which the CWCB will request the leased water in coordination with the CPW; and
- c. The Division Engineers have confirmed that this proposal is administrable.

Attachments

