

DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO	
109 8 TH STREET, GLENWOOD SPRINGS, CO 81601	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF ARCHIE W. DUNHAM AND LINDA R. DUNHAM,	
IN SUMMIT COUNTY, COLORADO	COURT USE ONLY
	Case Number: 06CW266
	Water Division: 5
FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE AND DECREE OF THE WATER COURT	

The above-captioned application was filed on December 28, 2006, and was referred to the Water Referee for Water Division No. 5, State of Colorado, by the Water Judge of said Court in accordance with Article 92 of Chapter 37, Colorado Revised Statutes, known as the Water Right Determination and Administration Act of 1969.

The Referee, having made such investigations as are necessary to determine whether or not the statements in the application are true, and having become fully advised with respect to the subject matter of the application, does hereby make the following findings of fact, rulings and decree in this matter:

FINDINGS OF FACT

1. **Application.** This matter involves the application for water rights filed by Archie W. and Linda R. Dunham, 141 Radney Road, Houston, TX 77024, with a copy to Porzak Browning & Bushong LLP, 929 Pearl Street, Suite 300, Boulder, CO 80302. The Referee finds that the application is complete and addresses all matters required by law.
2. **Jurisdiction.** All notices required by law have been duly given and the Court has jurisdiction over the application and all parties affected thereby, whether or not they have chosen to appear.
3. **Objectors.** Statements of opposition have been filed by the following parties: Colorado Water Conservation Board; the State and Division Engineers; the

United States of America, Department of Interior, Bureau of Land Management; Gunsight Pass Ranch, William Thomas; and the Colorado River Water Conservation District. The time for filing statements of opposition has now expired.

4. Name of Structures:

Pond A-2
Pond A-3
Pond B-1

5. Description of Water Storage Rights to be Adjudicated and Augmented by Exchange (Reference the Location Maps Attached as Exhibit A & C):

(a) Pond A-2, an on-stream pond:

- (1) Location: The center of the dam will be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, T. 4. N., R. 80 W., of the 6th P.M. approximately 1710 feet from the West Line and 1985 feet from the South Line of said Section 29; also geographically described as NAD83 UTM Coordinates, Zone 13 (metric) North 4,459,764: 382,864 East.
- (2) Source: Unnamed Tributary of Antelope Creek, a tributary of Muddy Creek.
- (3) Amount: Capacity of 6 acre feet (surface area 0.79 acres), conditional. Dead storage of 6 acre feet, active capacity of 0 acre feet.
- (4) Appropriation Date: December 28, 2006.
- (5) Uses: Recreation, fire protection, aesthetic, piscatorial, stock water, and incidental wildlife.
- (6) Dam: Height not to exceed 8 feet, length not to exceed 75 feet.

(b) Pond A-3, an on-stream pond:

- (1) Location: The center of the dam will be located in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 29, T. 4. N., R. 80 W., of the 6th P.M. approximately 2661 feet from the East Line and 2485 feet from the South Line of said Section 29; also geographically described as NAD83 UTM Coordinates, Zone 13 (metric) North 4,459,913: 383,108 East.

- (2) Source: Unnamed Tributary of Antelope Creek, a tributary of Muddy Creek.
 - (3) Amount: Capacity of 3 acre feet (surface area 0.6 acres). Dead storage of 3 acre feet, active capacity of 0 acre feet.
 - (4) Appropriation Date: December 28, 2006.
 - (5) Uses: Recreation, fire protection, aesthetic, piscatorial, stock water, and incidental wildlife.
 - (6) Dam: Height not to exceed 8 feet, and length not to exceed 60 feet.
- (c) Pond B-1, an off-stream pond:
- (1) Location: The center of the dam will be located in the NW ¼ SW ¼ of Section 29, T. 4. N., R. 80 W., of the 6th P.M. approximately 1156 feet from the West Line and 2364 feet from the South Line of said Section 29; also geographically described as NAD83 UTM Coordinates, Zone 13 (metric) North 4,459,876: 382,696 East.
 - (2) Source: Antelope Creek and unnamed tributaries of Antelope Creek, which are tributary to Muddy Creek, and will be conveyed at a combined rate of up to 1 c.f.s. from the following alternate diversion points:
 - (a) Antelope Creek: NE1/4 SW1/4 of Section 29, T. 4 N., R. 80 W. of the 6th P.M., 1529 feet from the W. section line and 2,571 feet from the S. section line of said Section 29; UTM Zone 13, NAD83 Coordinates: 4459939N:382814E;
 - (b) Unnamed Tributary: NE1/4 SW ¼ of Section 29, T. 4 N., R. 80 W. of the 6th P.M., 2661 feet from the E. section line and 2486 feet from the S. section line of said Section 29; UTM Zone 13, NAD83 Coordinates: 4459913N:383108E;
 - (3) Amount: Capacity of 9 acre feet (surface area 1.32 acres), conditional. Active storage of 6.95 acre-feet, dead storage of 2.05 acre-feet.
 - (4) Appropriation Date: December 28, 2006.
 - (5) Uses: Recreation, fire protection, aesthetic, piscatorial, stock water, augmentation and incidental wildlife.
 - (6) Dam: Height not to exceed 5 feet, length not to exceed 200 feet.

6. Change of water right and description of the water right to be used as a source of augmentation water:

(a) Antelope Ditch. 0.333 cfs out of 3.0 cfs decreed to the Antelope Ditch by the District Court in and for the County of Grand, State of Colorado in Case No. CA-113, for irrigation purposes, with an appropriation date of April 8, 1886, and an adjudication date of August 11, 1906. The decreed point of diversion is the SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ of Section 8, T.3 N., R. 80 W., of the 6th P.M. The decreed use of this water right is hereby changed from irrigation purposes to augmentation purposes, and is to be used as the source of augmentation water under the subject plan for augmentation and exchange described in paragraph 7 below.

(b) Dry-Up. An eight (8) acre parcel of land which was formerly irrigated by the Antelope Ditch water right described in paragraph 6(a) above has been permanently removed from irrigation pursuant to a dry-up covenant dated January 31, 2005, recorded at Reception No. 2005-001939 in the real property records of the County of Grand, State of Colorado. This eight acre parcel is located in the SW $\frac{1}{4}$ of Section 16 and the SE $\frac{1}{4}$ of Section 17, T. 3 N., R. 80 W. of the 6th P.M., more particularly depicted on Exhibit A, attached hereto, and has been removed from irrigation. The historic consumptive use of water on said eight (8) acres of land is 5.42 acre feet per year. The historic season of use for the water right extends from April through October.

(c) The average monthly historic depletion credits and monthly stream depletion that resulted from the use of the subject water right is set forth in the attached Exhibit B and is also provided in the table below. Such historic depletion credits will only be available to Applicant to the extent the subject water right is in priority at the historic point of diversion. Accordingly, historic depletion credits from the subject water right will not be available to Applicant at times when the historical diversion amount is not physically and legally available at the headgate. Applicant may need to place a call to bring sufficient water to the headgate in order to maintain historical return flows while using the historical depletion credits.

	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total
Total Consumptive Use by Pond A-2, A-3, B-1 and Livestock	0.00	0.00	0.00	0.58	0.77	1.09	1.05	0.80	0.67	0.46	0.00	0.00	5.42
Consumptive Use Credits from Antelope Ditch	0.00	0.00	0.00	0.02	0.63	1.98	1.72	0.78	0.27	0.02	0.00	0.00	5.42
Average Historical Depletion (+) depletion (-) accretion	-0.01	-0.01	-0.01	0.45	3.83	4.98	-0.03	-1.03	-0.70	-0.89	-0.97	-0.19	5.42
Pond Storage	0.00	0.00	0.00	0.00	3.06	3.89	0.00	0.00	0.00	0.00	0.00	0.00	6.95
Pond Releases for Replacing return flows	0.01	0.01	0.01	0	0.00	0.00	0.03	1.03	0.67	0.46	0	0	6.95
Pond Releases for Replacing Evaporation and Stock	0	0	0	0.13	0	0	1.05	0.8	0.7	0.89	0.97	0.19	

7. Description of the plan for augmentation and exchange:

(a) Historic Consumptive Use Credits.

Applicant will use all or a portion of the 5.42 consumptive acre feet of the historic depletion credits described in paragraph 6 above to augment by exchange out of priority depletions caused by the ponds described in paragraph 5, above. Said historic depletion credits may be stored by exchange in the ponds described in paragraph 5 above for later augmentation release. The only consumption associated with said ponds are surface evaporation losses and stock water use. Evaporation will be calculated at a rate of 16.8 inches per year for on-stream Ponds A-2 and A-3, and 29.6 inches per year for off-stream Pond B-1, based on the total water surface area of the ponds described in paragraph 5, above. The evaporation rates have been adjusted to an approximate elevation of 8,450 feet. The total amount of evaporation is anticipated to be 5.21 acre feet per year for Ponds A-2, A-3 and B-1.

It is estimated that approximately 20 head of livestock will utilize the ponds for livestock watering at a consumptive rate of .21 acre feet per year.

(b) Exchanges.

Evaporative losses from ponds described in paragraph 5 above will be augmented by exchange.

(i) Pond A-2. The upstream terminus of the augmentation by exchange described in paragraph 7(a) above is the location of Pond A-2, described in paragraph 5(a) above. The downstream terminus is the point of diversion for Antelope Ditch, described in paragraph 6(a) above. The exchange

has a priority date of December 28, 2006. This exchange permits out-of-priority depletions equivalent to evaporation from Pond A-2. The rates of exchange, in cfs, are as follows:

Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
0.32	0.22	0.13	0.26	0.30	0.31	0.30	0.30

(ii) Pond A-3. The upstream terminus of the augmentation by exchange described in paragraph 7(a) above is the location of Pond A-3, described in paragraph 5(b) above. The downstream terminus is the point of diversion for Antelope Ditch, described in paragraph 6(a) above. The exchange has a priority date of December 28, 2006. This exchange permits out-of-priority depletions equivalent to evaporation from Pond A-3. The rates of exchange, in cfs, are as follows:

Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
0.32	0.22	0.13	0.26	0.30	0.31	0.30	0.30

(iii) Pond B-1 Antelope Creek Exchange. The upstream terminus of the augmentation by exchange described in paragraph 7(a) above is the diversion point from Antelope Creek as described above in paragraph 5(c). The downstream terminus is the point of diversion for Antelope Ditch, described in paragraph 6(a) above. The exchange has a priority date of December 28, 2006. This exchange permits augmentation of out-of-priority depletions equivalent to evaporation from Pond B-1 as well as storage of historic depletion credits. The rates of exchange, in cfs, are as follows:

Apr	May	Jun	Jul	Aug	Sep	Oct	Nov
0.32	0.22	0.13	0.26	0.30	0.31	0.30	0.30

(c) Historic Return Flows.

Beginning in May of each year, the historic depletion credits that exceed out-of-priority depletions will be stored in Pond B-1 in the amounts set forth in Exhibit B. Such water stored in Pond B-1 will be released in the monthly amounts shown in Exhibit B to offset any deficits in historic return flows.

8. Terms and Conditions.

(a) Applicant shall install measuring devices, provide accounting, and supply calculations regarding the timing of depletions as required by the Division Engineer for the operation of this plan. The Applicant shall also file an annual report with the Division Engineer by November 15th following each preceding irrigation year (November 1 through October 31) summarizing diversions and replacement made under this plan. This report shall include a statement identifying whether the reported information is self-reported or has been verified by the water commissioner. Upon request, the Applicant will provide the United States Bureau of Land Management with the copies of the annual report.

(b) The exchanges described herein shall only operate: (i) in priority, (ii) to the extent that water is physically and legally available at the original point of diversion for the Antelope Ditch, and (iii) at times when measured flows in Antelope Creek are in excess of 1.502 c.f.s., to ensure that all decreed instream flows located within the pertinent exchange stream reaches are being met. The ponds described herein will be administered in priority at all times when the exchanges are unable to operate. Applicant agrees to install low level outlets in Ponds A-2 and A-3 in order to allow for such administration.

(c) No water rights or plan for augmentation is being adjudicated for the Cabin Pond, whose center is located at the SE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 20, T. 4 N., R. 80 W. of the 6th P.M. approximately 1632 feet from the West Line and 741 feet from the South Line of said Section 20. No out of priority diversions are permitted into the Cabin Pond.

(d) Pursuant to C.R.S. § 37-92-305(8), the state engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

(e) The Water Court shall retain jurisdiction over this change of water right and plan for augmentation pursuant to C.R.S. § 37-92-304(6) (2010) for reconsideration of injury to the vested rights of others for a period of five (5) years from the date of the decree until the date when the augmentation plan described in paragraph 7 above becomes operational. For the augmentation plan to become operable, the applicant must install the staff gages described below and provide the Division Engineer with a stage capacity curve of Pond B-1. Applicant shall provide notice to the Court, Division Engineer, and the parties when the augmentation plan becomes operational, which will begin the tolling of years. Any party desiring the Water Court to reconsider the question of injury must file a verified petition with the Water Court, setting forth the facts that cause such injury and the claimed injury. The party lodging the petition shall have the burden of proof to establish the facts and injury alleged in the petition.

(f) Each of the structures described in paragraph 5 above shall be equipped with a staff gage, shall have the ability to bypass out-of-priority storage not augmented

by the subject plan for augmentation, and as-built capacity curves for each structure shall be submitted to the Office of the State Engineer.

(g) The Applicant will bypass 1/9 of the physically and legally available flow up to .333 c.f.s. at the point of diversion from Antelope Creek. If necessary, the Applicant shall place a call for this water at the headgate in order to maintain historical return flows. The bypassed return flows will be delivered to a point on the natural stream of Antelope Creek noted on Exhibit A and further described as follows: NAD83 UTM Coordinate 4452869 North : 383858 East, both in Meters.

CONCLUSIONS OF LAW

9. To the extent they constitute legal conclusions; the foregoing Findings of Fact are incorporated herein.

10. All notices required by law have been properly made, including as required under C.R.S. § 37-92-302(3). The Court has jurisdiction over the Application and over all persons or entities that had standing to appear, even though they did not do so.

11. The Application is complete, covering all applicable matters required pursuant to the Water Right Determination and Administration Act of 1969, C.R.S. §§ 37-92-101 through 602.

12. The Applicant has fulfilled all legal requirements for a decree for the requested water right.

RULING OF THE REFEREE AND DECREE OF THE WATER COURT

13. The Findings of Fact and Conclusions of Law as set forth above are incorporated herein by reference and are hereby modified as necessary to constitute part of the Ruling and Final Judgment and Decree.

14. Subject to the terms and conditions contained herein, the Referee finds that the operation of the subject plan for augmentation and exchange provides for the replacement of all out-of-priority diversions. Thus, the Referee finds that the system will be made whole and that there will be no injury to any vested water rights or decreed conditional water rights by operation of the subject plan for augmentation and exchange. Accordingly, the Referee finds that the plan for augmentation and exchange as described herein should be, and hereby is approved and that the water rights described in paragraph 6(a) above may be used as the source of augmentation water under the subject plan for augmentation and exchange.

15. The Referee further finds that all prerequisites to initiating an appropriation for conditional water rights have been met and Applicant is entitled to and is hereby awarded conditional storage rights for conditional structures that are described in paragraph 5 above.

16. The conditional water rights decreed herein are continued in full force and effect until, _____, 2018. If the Applicant desires to maintain the conditional water rights, an application for a finding of reasonable diligence shall be filed on or before that date, or a showing shall be made on or before then that the conditional water rights have become absolute water rights by reason of the completion of the appropriation.

17. Pursuant to Rule 9 of the Uniform Local Rules for All State Water Court Divisions, upon the sale or other transfer of the conditional water rights decreed herein, the transferee shall file with the Division 5 Water Court a notice of transfer which shall state:

- A. The title and case number of this Case No. 06CW266;
- B. The description of the conditional water rights transfer;
- C. The name of the transferor;
- D. The name and mailing address of the transferee; and
- E. A copy of the recorded deed.

The owner of said conditional water rights shall also notify the Clerk of the Division 5 Water Court of any change in mailing address. The Clerk shall place any notice of transfer or change of address in the case file of this Case No. 06CW266 and in the case file (if any) in which the Court first made a finding of reasonable diligence.

It is accordingly ORDERED that this ruling shall be filed with the Water Clerk subject to judicial review.

It is further ORDERED that a copy of this ruling shall be filed with the appropriate Division Engineer and State Engineer.

Dated this ____ day of _____, 20__.

BY THE REFEREE:

Holly K. Strablizky, Water Referee

No protest was filed in this matter. The foregoing ruling is confirmed and approved and is made the judgment and decree of this Court Subject to the Court's period of retained jurisdiction set forth herein. **THE APPLICATION FOR A FINDING OF REASONABLE DILIGENCE DESCRIBED ABOVE SHALL BE FILED IN THE MONTH OF _____, 2017.**

Dated this ____ day of _____, 20__.

BY THE COURT:

Hon. James B. Boyd
District Court Judge, Water Division No. 5