

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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Stream and Lake Protection Section

DATE: September 13, 2013

SUBJECT: **Agenda Item 12, September 24-25, 2013 Board Meeting
Stream and Lake Protection Section – Proposed Acquisition
of Contractual Interest in Water on the Snake River, Case No. 5-10CW43**

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

James Eklund
CWCB Director

Introduction

The Board of County Commissioners of Summit County (“Summit County”) and CWCB are working toward a water delivery agreement for instream flow (“ISF”) use on Peru Creek, the Snake River and the Blue River within Summit County. The water may be used on the existing Snake River and Blue River ISF reaches, or on future ISF reaches below a proposed new 2,050 acre-foot Peru Creek Reservoir. The water will be supplied as part of a new appropriation and a change of certain Vidler water rights pending in Summit County’s water court Case No. 5-10CW043. CWCB filed a Statement of Opposition in the case to protect its ISF water right on the Snake River. During negotiations in this case, after it became clear that Summit County intended a claim for instream piscatorial use, CWCB sought to protect its exclusive authority to hold ISF water rights. Summit County has agreed to enter into a Water Delivery Agreement with CWCB for ISF use of water provided by Summit County under its decree. CWCB would use the released water to help bring stream flows up to its existing decreed ISF rates and thereby protect the releases from diversions by others through the ISF reach. Upon ISF determinations by the Board and obtaining a future decree, CWCB could use this water to preserve or improve the natural environment below Peru Creek Reservoir where no ISF water right is currently decreed, or to improve where an ISF water right is currently decreed only to preserve the natural environment.

A general map is attached as **Exhibit A**; a draft of the Water Delivery Agreement is attached as **Exhibit B**; and CWCB’s stipulation and a proposed decree in the case are attached as **Exhibit C**.

Staff Recommendation

Pursuant to ISF Rule 6b., the Board’s consideration of this proposal at this meeting will initiate the 120-day period for Board review. **No formal action is required at this time.** Staff believes that the proposed acquisition will benefit the ISF Program. The initial presentation of this

proposal provides an opportunity to the Board and the public to identify questions or concerns for staff or Summit County to address at this or a subsequent meeting.

Background

Under previous water court decrees, Summit County currently provides water to and augments depletions from County facilities, programs, and contractees. Summit County articulated some of its watershed efforts related to this case in its water court application in Case No. 10CW44 as follows:

Summit County participated in the Snake River Task Force, a collaborative effort to study the environmental impacts associated with mine tailings and drainage, as well as alternative methods of remediation and restoration. These efforts included an investigation of means to resolve the water quality issues arising from drainage and tailings from the Pennsylvania Mine. One of the intended future uses of the Vidler water rights is for the improvement of water quality affected by mine tailings and for remediation and restoration efforts. Summit County also negotiated a restrictive covenant with the owner of the Pennsylvania Mine site to facilitate restoration. Summit County expended significant sums to purchase and protect land in the Peru Creek drainage, and cooperated with the EPA, the State of Colorado, and other entities to restore the "Shoe Basin" site and remove mine tailings to protect water quality. Summit County and other West Slope entities have engaged in extensive negotiations with Denver Water seeking to resolve a number of water related issues affecting use of the headwaters of the Colorado River.

As indicated in the CWCB stipulation and proposed decree for Case No. 10CW43, Summit County proposes to build a new 2,050 acre-foot on-channel reservoir on Peru Creek, the "Peru Creek Reservoir," to help supply water to "County facilities, programs, and contractees (including without limitation the Keystone Ski Area, the Snake River Water District, and the East Dillon Water District in accordance with an agreement dated January 8, 2013) by direct delivery, augmentation..., and exchange..., and/or delivery to Dillon Reservoir to satisfy obligations of the Applicant or its contractees to the Denver Water Board." CWCB stipulation and Proposed Decree, Case No. 10CW43, page 11. Water supply for the new reservoir will be secured through a new appropriation on Peru Creek and through a change of existing Vidler water rights as specified in Case No. 10CW43.

CWCB's Role and the Water Right

CWCB filed a statement of opposition in Summit County's Case No. 10CW043 to protect its ISF water right on the Snake River decreed in Case No. 5-86CW210. During negotiations in this case, after it became clear that Summit County intended to claim an instream piscatorial use, CWCB sought to protect its exclusive authority to hold ISF water rights. Summit County has agreed to enter into a Water Delivery Agreement with CWCB for ISF use of water provided by Summit County under its decree. CWCB would use the released water to help bring stream flows up to its existing decreed ISF rates and thereby protect the releases from diversions by others through the ISF reach. Upon ISF determinations by the Board and obtaining a future decree, CWCB could use this water to preserve or improve the natural environment below Peru Creek Reservoir where no ISF water right is currently decreed, or to improve where an ISF water right is currently only decreed to preserve the natural environment.

Authorization of CWCB's use of the water and details governing the administration of the released water will be provided in the 10CW043 water court decree. A future decree would specify the flow rates for improvement flows or preservation flows in reaches currently without existing ISF decrees. Under the Water Delivery Agreement, at Summit County's sole discretion, Summit County will release water previously stored in Peru Creek Reservoir for exclusive use by the CWCB to preserve the natural environment to a reasonable degree under its decreed Snake River and Blue River ISF water rights. CWCB will protect the delivered water through the ISF reaches and request administration to prevent diversion of the water by other water users. Under future Board determinations and confirmation by water court decree, releases could be protected in stream reaches below Peru Creek Reservoir in flow rates not currently decreed for ISF use.

The Board's Water Acquisition Procedures

Rule 6 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program ("ISF Rules") sets forth the Board's procedures for acquiring water for ISF use. Section 37-92-102(3), C.R.S. provides 120 days for the Board to determine what terms and conditions it will accept in an acquisition agreement for water, water rights, or interests in water to preserve or improve the natural environment. ISF Rule 6 requires a minimum of two Board meetings to allow for public input prior to taking final action on a proposed acquisition. The Board's initial consideration of this proposal at this Board meeting initiates the 120-day time period for the Board to consider the terms and conditions of the proposed acquisition. Final action on the proposal could occur at the November 2013 Board meeting. ISF Rule 6m.(4) provides that any person may request the Board to hold a hearing on the proposed acquisition, and that such a request must be filed within twenty days of this Board meeting.

ISF Rules 6e. and 6f. require the Board to evaluate the appropriateness of the acquisition and determine how best to utilize the acquired water rights to preserve or improve the natural environment. The Rules list several factors the Board may consider in its evaluation of the acquisitions. Several of the factors address water rights that need to be changed from irrigation or other uses to instream flow uses. Because this acquisition involves the use of water newly appropriated or changed by Summit County for piscatorial use to help bring the flows up to the decreed ISF rate, several of the factors do not apply. This memo addresses the applicable factors.

As required by the statute, Staff has requested recommendations from Colorado Parks and Wildlife, the U.S. Department of Agriculture and the U.S. Department of Interior. Pursuant to ISF Rule 6m.(1), Staff has provided notice of the proposed acquisition to all persons included on the appropriate ISF Subscription Mailing Lists and provided notice to the State Engineer's Substitute Supply Plan Notification List. Staff has requested a biological analysis from Colorado Parks and Wildlife ("CPW") pursuant to Rule 6f.(2). Staff anticipates that CPW will address the Board regarding this acquisition at the Board meeting.

Summary of Proposed Acquisition

Under the Water Delivery Agreement, Summit County will release water stored in Peru Creek Reservoir as "piscatorial releases" at its sole discretion in accordance with the Decree. The piscatorial releases shall be made available to and protected for ISF use under Summit County's Decree in 10CW43 exclusively by the CWCB pursuant to the Water Delivery Agreement in the stream reaches decreed for ISF up to the decreed amounts of such ISF rights. Piscatorial releases

are anticipated to help preserve the natural environment to a reasonable degree on the Snake River and the Blue River in CWCB’s instream flow reaches described below.

Existing Instream Flow Water Rights

CWCB will use the released water to help maintain stream flows in the Snake River and the Blue River through CWCB’s decreed ISF reaches to preserve the natural environment in amounts up to the decreed rates as shown below:

CWCB Case No.	Stream/Lake	Amount (cfs) (dates)	Approp. Date	Watershed	County
86CW210	Snake River – conf with NF Snake R to inlet of Dillon Res (4.5 miles)	12 cfs (05/01-09/30) 6 cfs (10/1-04/30)	3/14/1986	Snake River	Summit
87CW293, 87CW294, 87CW295, 87CW296, 87CW297, 87CW298, & 05CW264	Blue River – outlet Dillon Res to inlet Green Mountain Res (25 miles)	Varies between 50-125 cfs (varying seasons)	10/2/1987 & 5/23/1904	Blue River	Summit

Existing Natural Environment

The Snake River and Peru Creek are typical high elevation water bodies. Peru Creek is a first order headwaters tributary stream (small, less than 10 feet wide, high gradient, cold water) and the Snake River is a second order stream with a wetted width during the non-runoff period of 20-30 feet, depending upon the location. Headwater streams in this location are typically very cold and as such support cold water species, but the cold water usually limits fish growth. Peru Creek has a naturally reproducing brook trout fishery. The Snake River has some naturally reproducing brook trout but is also stocked annually with catchable rainbow trout. It has been negatively impacted by mine drainage and would benefit from reservoir releases during low flows. The Snake River in the vicinity of Keystone is mostly open to the public and is fairly heavily utilized by anglers.

The subject Blue River instream flow segments derive flow from Dillon Reservoir releases and tributary inflow, primarily from the Eagle’s Nest Wilderness on the west side of the river. Flows also are influenced by the downstream senior storage right at Green Mountain Reservoir. The Blue River supports self-sustaining brown and rainbow trout fisheries and is a designated “Gold Medal Stream” - one of only about 20 such streams in Colorado. The Blue River is heavily utilized by anglers and has a fair amount of public access.

Proposed Use and Potential Benefits of the Delivered Water

The Board could ultimately use the delivered water to preserve and improve the natural environment to a reasonable degree in Peru Creek and the Snake River from Peru Creek Reservoir to Dillon Reservoir, a distance of approximately 12.5 miles, and in the Blue River from Dillon Reservoir to Green Mountain Reservoir a distance of approximately 25 miles. The reservoir releases would be used to help maintain the Board’s ISF water rights up to the existing decreed rates on the existing ISF reaches. The reservoir releases could also be used to help

maintain the Board's *future* ISF water rights up to amounts to be determined by the Board and confirmed by future decrees to improve the natural environment on existing ISF stream segments, or to preserve and improve the natural environment on new ISF segments (i.e. Peru Creek and the Snake River from the outlet of Peru Creek Reservoir to the existing ISF segment on the Snake River). CWCB would protect the releases from diversion by other water users from the Peru Creek Reservoir dam to the lower terminus of the ISF reach specified at the time of the reservoir release. Downstream of the Summit County line, the water would revert back to waters of the State of Colorado and would be available for diversion for any legal beneficial use.

Other Water Rights in Proposed Reach and Potential Injury to Existing Rights

Because the ISF use under this proposal will be achieved with fully consumable water released from storage, other water rights in the subject reaches will not be injured by the proposed ISF uses. Also, the water court decree authorizing CWCB's use consistent with the Water Delivery Agreement will contain terms and conditions to assure that no vested water rights on any of the reaches will be injured as a result of the ISF use.

Administrability

Staff has confirmed with the Division Engineer that the CWCB's proposed ISF uses of the delivered water is administrable.

Effect of Proposed Acquisition on Maximum Utilization of the Waters of the State; and Availability of the Delivered Water for Subsequent Use Downstream

Summit County's stored water in Peru Creek Reservoir will be decreed for multiple uses. The piscatorial releases will be beneficially used for ISF purposes in accordance with the Water Delivery Agreement in the identified ISF reaches. Downstream of the lower ISF terminus, the water reverts back to waters of the State of Colorado and is available for diversion for any legal beneficial use.

Effect of Proposed Acquisition on Any Relevant Interstate Compact Issue

It is anticipated that this water will be diverted and used directly or by exchange by other water users downstream once it has satisfied its intended ISF beneficial use. Consequently, it does not appear that this acquisition will raise any compact issues.

Costs to complete the transaction, or other associated costs

Summit County is not requesting the Board to pay for the delivered water or to participate as a co-applicant in the water court proceeding. Summit County has offered to perform all record keeping, accounting and reporting. Because CWCB is already a party in the water court case, little extra expense is expected as a result of this acquisition.

Attachments

- Exhibit A: General Map
- Exhibit B: Draft Water Delivery Agreement
- Exhibit C: CWCB Stipulation and Proposed Decree in 5-10CW43