

DISTRICT COURT, GARFIELD (GLENWOOD SPRINGS) COUNTY, COLORADO	
Court Address: 109 8th Street, Ste. 104, Glenwood Springs, CO, 81601	DATE FILED: January 15, 2014 2:32 PM CASE NUMBER: 2010CW43
In the Interest of: SUMMIT COUNTY BOARD OF COUNTY COMMISSION	<p style="text-align: center;">△ COURT USE ONLY △</p> <p>Case Number: 2010CW43 Division: E Courtroom:</p>
Order: Decree	

The motion/proposed order attached hereto: GRANTED WITH AMENDMENTS.


The Vidler Tunnel Unit water rights originally were decreed for diversion to the Eastern slope and for use there. Therefore, the rights were fully consumptive with respect to the Colorado River basin. The proposed change will keep the water in its existing basin. For this reason, the Court concludes it is appropriate to issue the Decree without a determination or analysis of the contemplated draft.

As they relate to future court proceedings, the Court approves and adopts paragraphs 31e and 39 as the binding agreement of the parties enforceable among them as a court order as allowed by law. In approving and adopting these paragraphs, this Court is not purporting to exceed the jurisdiction of this Court (or to limit in the future the jurisdiction of this or other Courts) by such limitations as precluding a future court from making decisions about the proper scope of review or the admissibility of evidence .

Exhibits A through C filed with the proposed decree on November 22, 2013, are incorporated into this Decree.

Any request for a finding of reasonable diligence shall be filed in January 2020.

Issue Date: 1/15/2014



JAMES BERKLEY BOYD
District Court Judge

District Court, Water Division No. 5 Garfield County Courthouse 109 8 th St. Ste 104 Glenwood Springs, CO 81601 (970) 947-3861	
IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE BOARD OF COUNTY COMMISSIONERS OF SUMMIT COUNTY, COLORADO in the BLUE RIVER AND ITS TRIBUTARIES In Summit County, Colorado	<div style="text-align: center;">Δ COURT USE ONLY Δ</div> Case No.: 2010CW43 (01CW177, 95CW06, 87CW246, 83CW78, CA 2371)
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECREE OF THE WATER COURT	

THIS MATTER has come before the Water Judge on an Application for Conditional Water Storage Rights, Change of Water Rights, and Right of Exchange (the “Application”) filed by the Board of County Commissioners of Summit County (“Applicant” or “Summit County”) on February 26, 2010, and was referred by the Water Judge for the District Court in and for Water Division No. 5, State of Colorado to the Referee of the Water Court in accordance with Article 92 of Chapter 37, Colorado Revised Statutes, known as the Water Right Determination and Administration Act of 1969. This matter was re-referred to the Water Judge by Order dated March 6, 2012.

The Court, having reviewed the Application and the other pleadings in this case, and now being fully advised with respect to this matter, enters the following Findings of Fact, Conclusions of Law, and Decree:

FINDINGS OF FACT

A. INTRODUCTION

1. Application: The Applicant filed a properly verified application in this matter on February 26, 2010. Timely and adequate notice of the Application was given in the manner provided by statute. C.R.S. § 37-92-302 (2010). All notices required by law for the filing of the Application have been given, and the Court has jurisdiction over the Application.

2. Name and Address of the Applicant:

Board of County Commissioners of the County of Summit

c/o Gary Martinez
County Manager
P.O. Box 68
208 East Lincoln Avenue
Breckenridge, Colorado 80424

c/o Charles B. White, Esq.
Petros & White, LLC
1999 Broadway, Suite 3200
Denver, CO 80202
(303) 825-1980

3. Statements of Opposition: Statements of opposition were filed by the City of Colorado Springs Utilities, the City and County of Denver acting by and through its Board of Water Commissioners, the Colorado Water Conservation Board and the State and Division Engineers. The time for filing additional statements of opposition has expired.

4. Jurisdiction: All persons affected by the Application, whether appearing or not, are parties hereto and are bound by this Decree, all notices required by law having been given and the Water Court having jurisdiction over the subject matter of this proceeding. C.R.S. § 37-92-203 (2010).

5. Summary of Consultation: No summary of consultation was filed by the Division Engineer. The Division Engineer filed a statement of opposition on August 22, 2010.

6. Introduction: The Vidler Tunnel Unit water rights were originally decreed for diversion from Peru Creek, through the Vidler Tunnel, for use on the East Slope. Summit County acquired conditional Vidler Tunnel Unit water rights for diversion points G through ZZ in the amount of 8 c.f.s. from the Vidler Water Company, Inc. by Special Warranty Deed dated January 25, 2002, and in the amount of 6.6 c.f.s. from the City of Golden by Special Warranty Deed dated March 23, 2004 ("Vidler water rights"). Summit County filed an application for a finding of reasonable diligence for the Vidler water rights concurrently with this application.

In this application, Summit County seeks to change the Vidler water rights to allow use of the rights in Summit County, additional uses to those originally decreed, and storage in a proposed reservoir on Peru Creek ("Peru Creek Reservoir"). Summit County also seeks a conditional water storage right and refill right for the Peru Creek Reservoir. Summit County also seeks an appropriative right of exchange to store water in Peru Creek Reservoir that would be available for diversion at the originally decreed points of diversion K through U, which are located on tributaries of Peru Creek, downstream of the proposed location of Peru Creek Reservoir.

B. CONDITIONAL WATER STORAGE RIGHTS

7. Name of structure: Peru Creek Reservoir.

a. Legal description: The center of the crest of the dam will be located in the SE 1/4 of the NE 1/4 of Section 20, T5S, R75W, of the 6th P.M., 1,290 ft from the North Section line, and 885 ft from the East Section line.

b. Source: Peru Creek, tributary to the Snake River, a tributary of the Blue River, a tributary of the Colorado River. The Reservoir will be located on-channel and created by the construction of a dam.

c. Surface area of reservoir: Approximately 50 acres.

d. Vertical height of dam: 150 feet.

e. Length of dam: 860 feet.

f. Capacity of reservoir: Approximately 2,050 acre-feet. At this time the amount of dead storage is unknown.

g. Date of appropriation: February 23, 2010. On that date Summit County formed the requisite intent to appropriate the water right and completed substantial steps in furtherance of such intent, including but not limited to, approval of a resolution by the Board of County Commissioners of Summit County evincing Summit County's intent to appropriate the conditional water right claimed herein.

h. Amount: 2,050 acre-feet, conditional, together with a right to one or more successive refills in the cumulative total amount of 2,050 acre-feet, conditional. No more than 4,100 acre-feet may be stored under this priority in any one year.

i. Uses: Municipal, domestic, commercial, irrigation, industrial, snowmaking, augmentation, replacement, exchange, recreation, piscatorial, wildlife watering, maintenance and enhancement of water quality, remediation and restoration of riparian and wetland areas, with the right of reuse, successive use, and disposition to extinction. The place of use shall be limited to Summit County.

C. CHANGE OF WATER RIGHTS

8. Decreed name of structures for which change is sought: Vidler Tunnel Unit, diversion points G – ZZ.

9. Description of water rights:

a. Prior decrees: The Vidler Tunnel Unit water rights were originally decreed in CA 2371, by the District Court in and for the County of Summit, Water Division 5, on March 19, 1979, with a date of appropriation of July 28, 1959. Diligence has been maintained for the conditional water rights now owned by Summit County by the following decrees of the District Court for Water Division No. 5: Case No. 83CW78, dated January, 1986; Case No. 87CW246, dated January 9, 1989; Case No. 95CW06, dated July 13, 1995; and Case No. 01CW177, dated February 23, 2004.

b. Decreed points of diversion: The conditional portion of the Vidler Tunnel Unit water rights now owned by Summit County, i.e. the Vidler water rights, consists of nineteen (19) separate points of diversion (Points G – ZZ), located in the upper reaches of the Peru Creek drainage basin. The diversion point locations, sources, and amounts as originally decreed are as follows:

Headgate	Point of Diversion (Tie From Headgate to Legal Government Corners)	Source	Amount (c.f.s.)
G	S 3°20'W, 915' to M.C. 2-19781A – GP4	Gulch G	1.00
H	S 3°05'E, 769' to M.C. 2-19781A – GP4	Gulch H	0.40
J	S 51°51'E, 506' to M.C. 2-19781A – GP4	Gulch J	0.60
K	N 88°46'W, 2731' to NW Cor. S20, T5S, R75W	Gulch K	1.00
L	S 59°05'W, 1031' to SW Cor. S17, T5S, R75W	Gulch L	3.00
M	S 20°01'E, 3459' to SE Cor. S18, T5S, R75W	Ruby Gulch	10.20
N	S 23°43'E, 4138' to SE Cor. S18, T5S, R75W	Gulch N	5.20
P	N 30°10'W, 3193' to NW Cor. S7, T5S, R75W	Gulch P	4.80
Q	N 34°09'W, 1932' to NW Cor. S7, T5S, R75W	Gulch Q	7.40
R	S 46°17'E, 270' to SE Cor. S1, T5S, R76W	Gulch R	5.80
S	N 70°57'E, 766' to NE Cor. S12, T5S, R76W	Chihuahua Gulch	4.60

T	N 38°06'E, 1840' to NE Cor. S12, T5S, R76W	Gulch T	2.20
U	N 27°48'E, 5525' to NE Cor. S12, T5S, R76W	Gulch U	5.20

V	N 88°55'W, 3447' to NW Cor. S16, T5S, R75W	Gulch V	0.60
W	N 77°04'W, 3600' to NW Cor. S16, T5S, R75W	Gulch W	0.90
X	S 64°20'W, 3862' to M.C. 2-19781A – GP4	Gulch X	1.50
Y	S 82°09'W, 3373' to M.C. 2-19781A – GP4	Gulch Y	1.40
Z	N 66°36'W, 3770' to M.C. 2-19781A – GP4	Gulch Z	6.30
ZZ	N 58°19'W, 3359' to M.C. D-19781A – GP4	Gulch ZZ	2.10

The following chart provides a description of the diversion point locations on the respective water sources, in PLSS format, which are also depicted on the map attached as Exhibit A, incorporated herein by this reference.

PLSS Locations for Vidler Tunnel Collection Points

Headgate	Township	Range	Section	Distance	N/S	Distance	E/W	Q40	Q160	P.M.
G	T5S	R75W	16	1887	S	217	W	NW	SW	6th
H	T5S	R75W	16	1651	S	101	W	NW	SW	6th
J	T5S	R75W	17	1144	S	345	E	SE	SE	6th
K	T5S	R75W	20	50	N	2522	W	NW	NE	6th
L	T5S	R75W	17	760	S	776	W	SW	SW	6th
M	T5S	R75W	18	2088	N	1289	E	SE	NE	6th
N	T5S	R75W	18	1582	N	1772	E	SW	NE	6th
P	T5S	R75W	7	1990	S	1527	W	NE	SW	6th
Q	T5S	R75W	7	1704	N	1116	W	SW	NW	6th
R	T5S	R76W	1	380	S	486	E	SE	SE	6th
S	T5S	R76W	12	432	N	1272	E	NE	NE	6th
T	T5S	R76W	12	1506	N	1612	E	SW	NE	6th
U	T5S	R76W	13	280	N	2250	W	NE	NW	6th
V	T5S	R75W	9	78	S	1933	E	SW	SE	6th
W	T5S	R75W	16	813	N	1936	E	NW	NE	6th
X	T5S	R75W	16	2485	S	1982	E	NW	SE	6th
Y	T5S	R75W	16	1220	S	1953	E	SW	SE	6th
Z	T5S	R75W	21	592	N	2078	E	NW	NE	6th
ZZ	T5S	R75W	21	1217	N	2789	E	NE	NW	6th

- c. Source: Various named and unnamed tributaries of Peru Creek, tributary to the Blue River, a tributary to the Colorado River.
 - d. Appropriation date: July 28, 1959.
 - e. Amount: 14.6 c.f.s., conditional.
 - f. Decreed uses: Domestic, agricultural, industrial and municipal uses.
 - g. Amount changed: 14.6 c.f.s, which represents the maximum flow rate of diversions at any one time from the original points of diversion G-ZZ.
 - h. Historic use: The water rights to be changed are conditional water rights. Therefore, there are no records of historic use and no map of the place of historic use.
10. Changes of Vidler water rights:
- a. Additional uses: The Vidler water rights will be used for the additional purposes of commercial, irrigation, snowmaking, augmentation, replacement, exchange, recreation in Peru Creek Reservoir, piscatorial use in Peru Creek Reservoir and in stream reaches decreed for present or future CWCB instream flow water rights on Peru Creek, the Snake River, and the Blue River downstream of the Reservoir as described in paragraph 31(e), wildlife watering, maintenance and enhancement of water quality in Peru Creek and the Snake River downstream of the Reservoir and in Dillon Reservoir as described in paragraph 31(d), remediation and restoration of riparian and wetland areas, with the right of reuse, successive use, and disposition to extinction.
 - b. Change in manner of use: The Vidler water rights may be stored in the proposed Peru Creek Reservoir and will not be applied to direct-flow use.
 - c. Change of location of use: The place of use of the Vidler water rights will be changed to locations within the boundaries of Summit County. A map of Summit County is attached as Exhibit B and incorporated herein by this reference.
11. Terms and conditions on the change of water rights:
- a. Physical availability: Applicant shall account for daily physical inflow to the Peru Creek Reservoir based on measured change in storage, measured outflow, and calculated evaporation. The water available to the changed Vidler water rights will be limited to the amount of water physically and legally available at the original points of diversion for the Vidler water rights. Physical water availability at the original Vidler points of diversion shall be calculated using the daily physical inflow to the Peru Creek Reservoir and the relative watershed areas above the Reservoir and each of the original points of diversion, adjusted to account for basin elevation, provided that such

methodology is verified and modified as necessary based on field measurements, correlation to measured diversions at the existing Vidler Tunnel, or such other methodology(ies) that are reasonably acceptable to the Division Engineer, or by such other methodology as may be approved by the Court pursuant to the retained jurisdiction provisions of paragraph 38 below. These calculations shall be provided by the Applicant to the Division Engineer on a monthly basis.

b. Calls on intervening water rights: No water right appropriated prior to the date of filing the application in this case (February 26, 2010) that would not have been subject to an administrative call by the Vidler water rights at their original points of diversion described in paragraph 9(b) will be subject to a call for the changed Vidler rights at the location of the Peru Creek Reservoir.

c. No water will be stored under the priority of the changed water rights in Peru Creek Reservoir at times when the CWCB's Snake River instream flow right decreed in Case No. 86CW210 is not satisfied.

12. No injury: This change of water right will not injuriously affect the owner of or persons entitled to use water under the vested water right or decreed conditional water right. See §37-92-305, C.R.S. (2010).

D. RIGHT OF EXCHANGE

13. Name of exchange: Vidler-Peru Creek Reservoir Exchange.

14. Description of exchange: Pursuant to §§ 37-80-120 & 37-92-302(1)(a), C.R.S. (2010), Summit County claims a conditional appropriative right of exchange ("Exchange") whereby the amount of water that is physically and legally available for diversion at Vidler Tunnel Unit diversion points K through U is not diverted and is allowed to flow into Peru Creek to supply downstream appropriators, and an equivalent amount of water is diverted and stored in Peru Creek Reservoir, which will be located upstream of the points at which the water available for diversion at points K through U would flow into Peru Creek.

15. Location of structures and exchange reach:

a. Upstream terminus: The upstream terminus of the Exchange is the dam for the Peru Creek Reservoir, located in the SE 1/4 of the NE 1/4 of Section 20, T5S, R75W, of the 6th P.M., 1,290 ft from the North Section line, and 885 ft from the East Section line.

b. Downstream termini: The downstream termini of the Exchange are the locations where the water that is physically and legally available for diversion at Vidler Tunnel Unit diversion points K through U flows into Peru Creek, of which the most downstream point is the confluence of Peru Creek and Chihuahua Creek located in the NW 1/4 of the SE 1/4 of Section 24, T5S, R76W, of the 6th P.M., 2370 ft from the South Section line, and 1805 ft from the East Section line.

- c. Peru Creek Reservoir: As described in Paragraph 7.
- d. Vidler Tunnel Unit diversion points K through U: As described in Paragraph 9.B.

16. Water rights used for substitution and replacement: The Vidler Tunnel Unit rights K through U will replace an equivalent amount of water diverted and stored in the Peru Creek Reservoir. The Vidler water rights are decreed for the conditional flow rates listed in the following table with a total decreed limit of 14.6 c.f.s., and are further described in Paragraph 9.

Diversion Point	Decreed Flow (c.f.s.)
K	1.0
L	3.0
M	10.2
N	5.2
P	4.8
Q	7.4
R	5.8
S	4.6
T	2.2
U	5.2

The 14.6 cfs limit on these described points includes all diversions under points G through ZZ so that the combined total diversions or storage directly or by exchange for all of Applicant's diversion points under the Vidler Tunnel Unit do not exceed 14.6 c.f.s.

17. Appropriation: February 23, 2010. On that date Summit County formed the requisite intent to appropriate the Exchange and completed substantial steps in furtherance of such intent, including but not limited to, approval of a resolution by the Board of County Commissioners of Summit County evincing Summit County's intent to appropriate the conditional right of exchange claimed herein.

18. Amount: 14.6 c.f.s., conditional.

19. Uses: The water diverted by exchange will be used for the purposes described in the foregoing paragraphs 7(i), 9(f), and 10(a).

20. Terms and conditions. Applicant's operation of the Exchange shall be subject to the following additional terms and conditions:

- a. Live stream. The Exchange may be operated only when there is a live surface stream within the entire applicable exchange reach; provided, however, that the exchange decreed herein can call out any diversions junior to such exchange to maintain a live stream.
 - b. Amount of exchange/transmission losses. The amount of water diverted by exchange by Applicant shall be equal to the amount of water bypassed for replacement, less a reasonable deduction for stream loss, if any there be, to be determined by the State Engineer pursuant to C.R.S. § 37-83-104 (2010).
 - c. Water quality. The replacement water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation involved in the exchange has normally been put.
 - d. Notice. Notice must be given to the Division Engineer prior to operation of the exchange.
21. No injury. The change of water rights and right of exchange adjudicated herein will not result in injury to any vested water rights or decreed conditional water rights, provided that operation of the Exchange and diversion, storage, and use of the subject water rights are made in compliance with the terms and conditions described herein. *See* C.R.S. §37-92-305(3) (2010). The water to be provided for replacement is of a quality and quantity so as to meet the requirements for which the water has been used by senior downstream appropriators, and therefore meets the requirements of C.R.S. § 37-92-305(5) (2010).
22. Can and Will. The waters claimed by Applicant can be and will be diverted, or otherwise captured, possessed, and controlled and will be beneficially used and the project can and will be completed with diligence and within a reasonable time. *See* C.R.S. § 37-92-305(9)(b) (2010).

CONCLUSIONS OF LAW

23. The foregoing Findings of Fact are incorporated herein to the extent that they constitute or include conclusions of law.
24. Summit County's Application was timely and one contemplated by law. C.R.S. §§ 37-82-101, 37-87-101, 37-92-302 (2010).
25. The Water Court has jurisdiction over the subject matter of this proceeding and over all who may be affected hereby, whether they have appeared or not. C.R.S. § 37-92-203 (2010).
26. The adjudication of the water right described herein is, as a matter of law, permissible and comes within the definitions authorized by statute. *See* §§ C.R.S. 37-82-101, 37-92-103(3), 37-92-302 and 37-92-305 (2010).

27. A practice of substitution or exchange pursuant to law may constitute an appropriative right and may be adjudicated or otherwise evidenced as any other right of appropriation. C.R.S. § 37-80-120(4) (2010).

28. When the rights of others are not injured thereby, it is lawful for the owner of a reservoir to deliver stored water into a ditch entitled to water or into the public stream to supply appropriations from said stream and take in exchange therefor from the public stream higher up an equal amount of water, less a reasonable deduction for loss, if any there be, to be determined by the State Engineer. C.R.S. § 37-83-104 (2010).

29. Summit County has the power to “operate and maintain water facilities. . . for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the county, . . .” C.R.S. § 30-20-402(1)(b) (2011). *See Colo. Open Space Council v. Denver*, 543 P.2d 1258, 1260 (Colo. 1975) (“Denver is also a county as well as a city and, as such, could be said to have parallel powers to serve non-county water users under Section 30-20-402(1)(b), C.R.S.1973”).

DECREE

30. The Findings of Fact and Conclusions of Law set forth above are incorporated herein by reference.

31. a. Prior to storing water in Peru Creek Reservoir, the Applicant shall install measuring devices to measure water flows in and out of the reservoir, and a staff gage and continuous water level recorder to determine water level elevation and reservoir storage content. The Applicant shall survey the reservoir after its construction, and develop a storage/capacity rating table. The Applicant shall provide accounting of Reservoir operations, including accounting of inflows into Peru Creek Reservoir under the conditional water right, change of water rights, and exchange decreed herein, in a form reasonably approved by the Division Engineer. Transit losses associated with delivery for beneficial use will be determined by the Division Engineer at the time the deliveries are made.

b. As a condition of reuse and successive use of water under this Decree, Applicant will install such measuring devices and provide accounting reports and calculations as are reasonably required by the Division Engineer to measure and account for its effluent, return flows, and reuse and successive use of water. Except as may be approved in a subsequent Water Court decree: (i) the only water that may be reused or successively used under the water rights and change of water rights adjudicated herein shall be: (a) water released from Peru Creek Reservoir for nonconsumptive maintenance and enhancement of water quality or (b) return flows from snowmaking uses; and (ii) the permissible uses that may be made by reuse and successive use are limited to: (a) delivery to Dillon Reservoir pursuant to agreements between the Applicant or its contractees and the Denver Water Board; (b) augmentation (subject to the following paragraph 37); (c) exchange (subject to the following paragraph 32(c)), including without limitation exchange to Peru Creek Reservoir and Old Dillon Reservoir, for the beneficial uses decreed herein; and (d) direct delivery to County facilities and contractees located below

Dillon Reservoir. In order to reuse and successively use return flows from snowmaking, Applicant will demonstrate dominion and control over such return flow by using the accepted methodology for determining the timing and amount of such return flows under the Clinton-Fraser Agreement.

c. The volume of water available for initial release from Peru Creek Reservoir for consumptive uses under the water rights and changes of water rights approved in this Decree is anticipated to be approximately 306 acre-feet per year; however, the actual volume will be a function of hydrology and water rights administration. Consumptive uses of this water will be made for 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 (subject to the following paragraph 37), and exchange (subject to the following paragraph 32(c)), and/or by delivery to Dillon Reservoir to satisfy obligations of the Applicant or its contractees to the Denver Water Board.

d. Water released from Peru Creek Reservoir for nonconsumptive maintenance and enhancement of water quality will be delivered to the confluence of the Snake River and Dillon Reservoir. The beneficial use of water for these purposes will occur only within the reach of Peru Creek and the Snake River from Peru Creek Reservoir to Dillon Reservoir and in the mixing zone in Dillon Reservoir associated with the Snake River wastewater treatment plant, which is owned and operated by the Snake River Wastewater Utility, which is an enterprise fund established by the Applicant. The Applicant will provide to the Division Engineer documentation establishing the amount of water beneficially used for these purposes.

e. The place of use for water released from storage in the Peru Creek Reservoir for piscatorial purposes shall be stream reach(es) from the outlet of Peru Creek Reservoir to the inlet of Green Mountain Reservoir decreed for CWCB instream flow water right(s) (present or future decrees) within Summit County, including the instream flow water right decreed for the Snake River in Case No. 86CW210 and the instream flow water rights decreed for the Blue River in Case Nos. 87CW293, 87CW294, 87CW295, 87CW296, 87CW297, 87CW298, and 05CW264, Water Division No. 5. Water may be released from Peru Creek Reservoir for piscatorial purposes at the sole discretion of Applicant up to the rates of flow specified in, and otherwise pursuant to the Water Delivery Agreement dated November 20, 2013 between Summit County and the CWCB, attached hereto as Exhibit C, which provides that water released for piscatorial purposes shall be made available to and protected for instream flow use exclusively by the CWCB. Any beneficial use in these stream reaches for piscatorial purposes at locations other than or for rates higher than those specified in the foregoing decrees will be contingent upon (1) CWCB determination of the appropriate flow rates to preserve or improve the natural environment to a reasonable degree and execution of a water delivery agreement with the CWCB, and (2) one of the following: (a) compliance with the procedures in C.R.S. 37-83-105; (b) approval of a substitute supply plan by the State Engineer; (c) entry of a decree awarding an additional instream flow right to the CWCB for such flow rates; or (d) an amendment to this water court decree. If the decree will be amended for this purpose, after the CWCB makes a determination of appropriate flow rates to preserve or improve the natural environment to a

reasonable degree through its administrative process, Applicant shall file a water court application to amend this decree. The Court shall review only the flow rate and timing claims for the additional flows claimed under this paragraph 31(e)(2)(d).

f. Applicant will separately account for water released from the Peru Creek Reservoir for water quality and piscatorial purposes.

g. Not less than 48 hours before any release for water quality and/or piscatorial purposes, Applicant will notify the Division Engineer of:

- (1) The purpose of the release (must be one of water quality or piscatorial purposes);
- (2) The rate of flow of the release;
- (3) The location of use (identified as a stream reach between two points);
- (4) The time period of the release;
- (5) The total volume of the release; and
- (6) An explanation/calculation of how this amount of water will accomplish the claimed beneficial use in the subject location of use.

With respect to releases from the Peru Creek Reservoir for piscatorial purposes, Applicant will provide to the Director of the Colorado Water Conservation Board or his or her designee a contemporaneous copy of the notice provided to the Division Engineer in accordance with this subparagraph 31(g).

32. a. The Vidler water rights do not benefit from the Green Mountain Reservoir historic users pool.

b. Any right of exchange from Green Mountain Reservoir pursuant to the decree entered in Case No. 88CW382, to the points of diversion or place of storage of the Vidler water rights, shall have a date of appropriation no earlier than February 26, 2010.

c. This Decree does not establish a priority for upstream exchanges for which water stored in Peru Creek Reservoir pursuant to the water rights and change of water rights adjudicated in this case is the source of replacement, including without limitation exchanges for augmentation use. Such exchange(s) shall be adjudicated in a separate water court case or administered by the State and Division Engineers in the manner provided by law. Nothing in this subparagraph 32(c) is intended to affect the conditional right of exchange described in paragraphs 13 – 22 of this Decree.

33. The appropriations of the conditional water storage right as described in paragraph 7 above and the right of exchange described in paragraphs 13 – 22 above are hereby confirmed, subject to the terms and conditions stated herein.

34. The change of water rights described in paragraphs 8 – 12 herein is hereby approved,

subject to the terms and conditions stated herein.

35. The Application was filed in the Water Court in the year 2010, and the conditional water storage right and right of exchange shall be administered as having been filed in that year and shall be junior to all priorities having been filed in previous years. As between all rights filed in the same calendar year, priority shall be determined by historical dates of appropriation and not affected by the entry of the decree.

36. The State and Division Engineers shall administer the change of water rights, conditional storage right, and right of exchange as set forth herein in accordance with this Decree and priority administration under Colorado law.

37. Any use of the conditional water rights that are the subject of this Decree as a source of augmentation water may only be made in accordance with a separately adjudicated augmentation plan or an approved substitute supply plan. Any use of such conditional water rights as an augmentation source in the plan for augmentation decreed in Case No. 95CW122, Water Division No. 5, may only be pursuant to a Water Court-approved amendment to the decree in Case No. 95CW122, as required by paragraph 7 of the decree in that case. Any augmentation use by exchange of the conditional water rights that are the subject of this Decree shall be pursuant to new junior exchange priorities and shall not be exchanges contemplated by the decree in Case No. 95CW122.

38. Pursuant to C.R.S. § 37-92-304(6)(2010), the Court shall retain continuing jurisdiction over the change of water rights on the question of injury to vested water rights or decreed conditional water rights of others from the date of this Decree until five years after the date of the first complete fill of the Peru Creek Reservoir, or five years after the date any water in Peru Creek Reservoir is first used for augmentation purposes, whichever date is later. Summit County will provide notice to the Division Engineer and all objectors in this case when the final five years of such retained jurisdiction period begins. Any aggrieved party to this case may request at any time within the period of retained jurisdiction a hearing before the Court for the purpose of reconsideration of the question of injury to vested water rights or decreed conditional water rights. Any such request shall be made by petition to the Court, served on all parties herein and made in good faith, stating with particularity the factual basis upon which it is asserted that injury has occurred or will occur. The party lodging the petition shall have the burden of proof to establish the prima facie facts and injury alleged in the petition. If a prima facie case of injury to vested water rights is established, the Applicant shall bear the burden to show (a) that no injury claimed by the other party has occurred or will occur, or (b) that any modification to this Decree sought by the other party is not required, or (c) that any term or condition proposed by the Applicant in response to the petition is adequate to avoid injury.

39. There was no trial in this matter and no issues were litigated. The findings of fact, conclusions of law, judgment and decree were completed as the result of substantial discussions, negotiations and compromises by, between and among the Applicant and the Opposers pertaining to all parts of the findings, conclusions, judgment and decree. It is specifically understood and agreed by the parties hereto, and found and concluded by the court, that the

acquiescence of the parties to a stipulated decree under the specific factual and legal circumstances of this contested matter and upon the numerous and interrelated compromises reached by the parties shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, stare decisis, res judicata, estoppel, laches, or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the parties hereto in any other matter, case or dispute not involving the specific water storage rights and change of water rights adjudicated herein, nor shall testimony concerning such acquiescence of any party to a stipulated decree herein be allowed in any such other matter, case or dispute. All parties stipulate and agree that they do not intend the findings, conclusions, judgment and decree to have the effect of precedent or preclusion on any factual or legal issue in any such other matter.

40. The conditional water storage right and appropriative right of exchange decreed herein are continued in full force and effect until _____, 201_. If the Applicant desires to maintain the conditional water rights thereafter, it shall file an application for finding of reasonable diligence on or before that date, or make a showing on or before then that the conditional water rights have become absolute water rights by reason of the completion of the appropriations.

41. 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. 10CW43.
- b. The description of the conditional water right transferred;
- c. The name of the transferor;
- d. The name and mailing address of the transferee;
- e. A copy of the recorded deed.

The owner of the said conditional water right 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. 10CW43 and in the case file (if any) in which the Court first made a finding of reasonable diligence.

A Copy of this Decree shall be filed with the Division Engineer for Water Division No. 5 and with the State Engineer.

Dated: _____

BY THE COURT:

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

Attachment to Order - 2010CW43