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DISTRICT COURT, WATER DIVISION NO. 6, STATE OF COLORADO		FILED Document CO Routt County District Court 14th ID Filing Date: Mar 13 2006 9:02AM MST Filing ID: 10775574 Review Clerk: Sharon L. Martin
522 Lincoln, 3rd Floor/P.O. Box 177317 Steamboat Springs, CO 80477		<input type="checkbox"/> COURT USE ONLY <input type="checkbox"/>
CONCERNING THE APPLICATION OF THE CITY OF STEAMBOAT SPRINGS		
IN ROUTT COUNTY, COLORADO		
		Case Number: 03CW86
		Water Division: 6
AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF THE COURT		

This matter comes before the Court on the application for water rights of the City of Steamboat Springs, Colorado filed on December 22, 2003. The application was referred to the Water Referee and re-referred to this Court by Order dated March 10, 2004. This matter proceeded to trial from October 17 through October 25, 2005. Following the trial, on October 28, 2005, the court received argument and entered oral rulings and directed counsel for Applicant to prepare Findings of Fact, Conclusions of Law and a Decree. After submission, the court entered such an order on December 12, 2005, *nunc pro tunc* to October 28, 2005. Thereafter, all parties entered into a stipulation and requested that this court modify its prior written order in lieu of an appeal. That motion was filed on January 30, 2006 and no opposition has been filed by any party. This court will now grant that motion and enters the following Amended Findings of Fact, Conclusions of Law and Decree of the Court.

The Court, having considered the matters raised by the application, including the recommendations of the Colorado Water Conservation Board ("CWCB"), and having made such investigations as are necessary to become fully advised with respect to the subject matter of the application, hereby makes the following findings of fact, conclusions of law, and ruling and decree in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. **Applicant.** The applicant is the City of Steamboat Springs, Colorado ("City") with the following address: c/o Director of Parks and Recreation Services, P.O. Box 775088, Steamboat Springs, CO 80477-5088. The Court finds that the applicant is an entity entitled to obtain a water right for a recreational in-channel diversion ("RICD") pursuant to C.R.S. 37-92-103(4).

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2. Objectors. Timely statements of opposition to the application were filed by the CWCB, State and Division Engineers, Routt County Board of Commissioners, Town of Oak Creek, Town of Yampa, Upper Yampa Water Conservancy District, Morrison Creek Metropolitan Water and Sanitation District, R & S Ranch, VGS Enterprises, Wharton Development Group, Michael and Susan Holloran, Steamboat II Metro District, Catamount Development, Lake Catamount No. 1 Metro District, Pinnacle Peak Ranch, Soda Creek Ditch Co., Lafarge West, Inc., Trout Unlimited, Dan Craig, Routt County Farm Bureau, and Dean and Jim Rossi. The time for filing additional statements of opposition has expired.

3. Application Summary. The application seeks an absolute water right for a RICD (the "Boating Park RICD") consisting of two structures commonly known as Charlie's Hole and D-Hole. These two RICD structures comprise the City of Steamboat Springs Boating Park (the "Boating Park"). These structures were designed to control and concentrate the flow of the Yampa River in order to serve the beneficial uses described herein, including the formation of whitewater and wave features for recreational use by kayaks, rafts, canoes, boats, and inner tubes. The Court finds that the application is complete and covers all matters required by law.

4. 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 appeared.

5. Stipulations with Objectors. Stipulations have been entered into between the City and the Upper Yampa Water Conservancy District, Routt County, Town of Oak Creek, Town of Yampa, the Morrison Creek Metropolitan Water and Sanitation District, VGS Enterprises, R & S Ranch, Wharton Development Group, Routt County Farm Bureau, Dean and Jim Rossi, Soda Creek Ditch Company, Lafarge West, Inc., the State Engineer and the Division Engineer for Water Division No. 6, the Colorado Water Conservation Board, and Michael and Susanne Holloran. The Objectors entering into said stipulations have consented to the entry of this Decree. Such stipulations have been filed with the Court, and are hereby approved by the Court, and are hereby made a part of and incorporated into this Decree. In addition, the City entered into stipulations with Pinnacle Peak Ranch, LLC, and Catamount Development, Inc, and Lake Catamount No. 1 Metropolitan District.

a. Pinnacle Peak Ranch LLC. This Decree and the Boating Park RICD adjudicated herein are subject to the Stipulation between the City of Steamboat Springs and Pinnacle Peak Ranch, LLC dated June 14, 2005. Said Stipulation is incorporated into and made a part of this Decree by this reference. The Court retains jurisdiction to enforce the terms and conditions of said Stipulation upon motion filed by any party.

b. Catamount Development, Inc., Lake Catamount No. 1 Metropolitan District. This Decree and the Boating Park RICD adjudicated herein are subject to the Stipulation between the City of Steamboat Springs and Catamount Development, Inc, and Lake Catamount No. 1 Metropolitan District dated June 15, 2005. Said Stipulation is incorporated into and made a part of this Decree by this reference. The Court retains

jurisdiction to enforce the terms and conditions of said Stipulation upon motion filed by any party.

c. Steamboat II Metropolitan District. This Decree and the Boating Park RICD adjudicated herein are subject to the Stipulation between the City of Steamboat Springs and Steamboat II Metropolitan District entered in October 2005. Said Stipulation is incorporated into and made a part of this Decree by this reference. The Court retains jurisdiction to enforce the terms and conditions of said Stipulation upon motion filed by any party.

6. City of Steamboat Springs Boating Park.

a. Name of Structures. The Boating Park consists of two RICD structures known as Charlie's Hole and D- Hole.

b. Legal Description of Structures. The Boating Park is located within the channel of the Yampa River in the SW1/4 SW1/4 of Section 8, T. 6 N., R. 84 W. of the 6th P.M., Routt County, Colorado. The location of the two RICD structures comprising the Boating Park is as follows:

i. Structure 1 (aka Charlie's Hole). Located in the SW1/4 SW1/4 of Section 8, T. 6 N., R. 84 W., 6th P.M., the northeast end point of which is 649.5 feet from the south line and 669.4 feet from the west line of the SW1/4 of Section 8; and the southwest end point of which is 594.8 feet from the south line and 571.3 feet from the west line of the SW1/4 of Section 8.

ii. Structure 2 (aka D-Hole). Located in the SW1/4 SW1/4 of Section 8, T. 6 N., R. 84 W., 6th P.M., the northeast end point of which is 1066.2 feet from the south line and 217.7 feet from the west line of the SW1/4 of Section 8; and the southwest end point of which is 974.6 feet from the south line and 135.2 feet from the west line of the SW1/4 of Section 8.

The Boating Park RICD extends approximately 630 feet within the channel of the Yampa River between Charlie's Hole and D-Hole. A map depicting the location of the two structures comprising the Boating Park RICD and the distance between these structures is attached as Exhibit A.

c. Source. The source for the Boating Park right is the Yampa River and all tributaries thereto, upstream of the Boating Park.

d. Appropriation Date. December 16, 2003. The appropriation was initiated by the construction of the Boating Park RICD structures and the formation of the requisite intent to appropriate as evidenced by the passage of Resolution No. 2003-74 by the Steamboat Springs City Council.

e. Intent to Appropriate. The Court finds that the City possessed the requisite intent to appropriate water for the amounts and at the time periods shown in paragraph 6.f. below.

f. Decreed Amounts. The Court finds that the City is entitled to an absolute water right at each of the two RICD structures comprising the Boating Park in the quantities set forth below, as follows:

Time Period	April 15-30	May 1-15	May 16-31	June 1-15	June 16-30	July 1-15	Jul 16-31	August 1-15
Flows (cfs)	400	650	1000	1400	650	250	100	95

The above amounts claimed are limited to the hours of 8:00 a.m. to 8:00 p.m. The Boating Park RICD right is not entitled to divert, capture, or control water at the two diversion structures in the Boating Park between 8:00 p.m. and the following 8:00 a.m., except and provided that the City is entitled as a part of such absolute water right to the above amounts during the hours of 8:00 a.m. until midnight on up to 10 days between April 15 and July 15 for nighttime competitive events if each such right is first designated in writing by the City at least 5 days in advance thereof to the Division Engineer for Water Division No. 6, and provided further that if the ending time for such a nighttime competitive event is earlier than midnight, then the diversion under such water right shall end at the ending time of such event. The foregoing shall not prevent a call being placed outside of the hourly limits in order to produce the decreed amounts during the hourly limits given the transit times of water as reasonably determined by the Division Engineer. Any call after July 15 shall not be honored unless it increases the flow at the Boating Park RICD structures to at least 85 cfs.

g. Diversion and Control. The design capacity of the two RICD structures is greater than 1400 cfs, which allows flows of that amount to be fully captured by the high flow channel constructed into each structure without overtopping. Flow rates up to and greater than 1400 cfs are efficiently controlled, concentrated and diverted, without waste, to create waves and jets of water, self-scouring pools, hydraulic holes, large changes in current direction, and whitewater features that are used by kayakers and other boaters and inner tubers for the City's intended recreational purposes. A low flow channel constructed into each structure controls and concentrates water at low flow to allow passage of boats, inner tubes and other recreational water craft through each structure at lower flows.

In view of the foregoing, the Court finds that the RICD structures at Charlie's Hole and D-Hole control, concentrate and direct the flow of water through the structures in a manner that constitutes a diversion under C.R.S. § 37-92-103(7)(2004), at all flow rates up to the maximum amounts claimed in paragraph 6.f. above. See also *Colorado Water Conservancy Bd v. Upper Gunnison River Water Conservancy Dist*, 109 P.3d 585, 591-92, 598 (Colo. 2005)(hereafter

"Gunnison"). Accordingly, the Court finds that the Boating Park structures are capable of efficiently diverting and controlling the water flows without waste for the claimed amounts.

h. Beneficial Use. The Boating Park RICD is decreed for only the following recreational uses in and on the Yampa River: boating, kayaking, inner tubing, rafting, and canoeing. Recreation is a beneficial use of water in Colorado. C.R.S. § 37-92-103(4).

i. The Boating Park RICD Does Not Involve Waste. The Court finds that the two Boating Park structures were designed for an optimal flow of at least 1400 cfs. It is at those higher flows where the Boating Park turns into a competitive facility for events, river festivals, and use by the general public. Since the requested water rights (up to 1400 cfs) have or will be put to beneficial use, there is no waste.

j. Minimum Flows for Reasonable Recreation Experiences. Pursuant to C.R.S. § 37-92-103(10.3) and the *Gunnison* decision, a RICD is limited to the minimum flow for a reasonable recreation experience in and on the water.

The "reasonable recreation experience" required for a RICD as noted at section 37-92-103(10.3) necessarily depends upon the intended recreational use. *See Gunnison* at 594. The City's purpose in constructing the Boating Park was to create a recreational amenity that would draw boaters and spectators to the region. Specifically, the Boating Park was built to generate greater tourist revenue outside the ski season by meeting the recreational boating and tubing demands of the City's citizens and visitors, and creating a venue for special events. The Court finds that the City has claimed flow rates in amounts and at time intervals to meet these reasonable objectives.

The flow rates claimed were developed by the City as part of a multi-year, intensive planning process for its Yampa River corridor. The City identified and established suitable recreation activities with corresponding stretches of river in order to develop quality recreational opportunities for many different recreational users. Given its location, the Boating Park focuses use of the Yampa River in a manner consistent with the City's overall river management objectives, as explained in its river use ordinances and its comprehensive Yampa River Management Plan adopted in 2003. The flow rates claimed and decreed herein were developed by the City and its Citizens Advisory Committee out of that intensive planning process, and were carefully tailored to be the minimum necessary to meet the City's objective for the Boating Park section of its Yampa River corridor.

The Yampa River basin is not over-appropriated, and a variety of water development strategies, including new junior diversions and exchanges from downstream, can be used to support development of the Yampa River basin above the Boating Park through projected build-out. The *Gunnison* decision suggests such considerations might be relevant in determining whether a claimed flow rate is for a "reasonable recreation experience." *Gunnison* at 602.

For the foregoing reasons, the Court finds that the recreational experiences sought by the City are objectively reasonable on the Yampa River and that the claimed flows are the minimum necessary to accomplish the beneficial uses described in paragraph 6.h above during each time interval for which water is claimed.

k. Statutory RICD Provisions. Pursuant to § 37-92-102(6)(a), the CWCB held a timely public hearing regarding the City's application and considered the five statutory factors found in C.R.S. § 37-92-102(6)(b)(I)-(V). The CWCB made a final recommendation to the Court on those factors. The Court finds that the City is entitled to an absolute water right for the Boating Park RICD under the five factors set out below:

i. Compact Impairment. In its Findings and Recommendations in this matter, the CWCB concluded:

Adjudication and administration of the RICD will not impair Colorado's ability to fully develop and put to consumptive beneficial use its compact entitlements because the amount of the claimed RICD can either be used downstream of the RICD or contribute in part to the delivery obligation of Article 13 of the Upper Colorado River Compact.

The City also presented the testimony of Mr. Gary Thompson, water resources engineer, and his letter report dated January 20, 2004, and the testimony from Dr. Jeris Danielson, the former Colorado State Engineer, and his letter report dated April 18, 2005, that the adjudication and administration of the Boating Park RICD will not impair Colorado's ability to fully develop and place to consumptive beneficial use its compact entitlement. The Court concurs with the CWCB's findings and recommendations on this issue and the testimony and reports of Mr. Thompson and Dr. Danielson. Accordingly, the Court determines that the adjudication and administration of the Boating Park RICD will not impair Colorado's ability to fully develop and put to consumptive beneficial use the State's compact entitlements. C.R.S. § 37-92-102 (6)(b)(I).

ii. Stream Reach Appropriateness. The Court finds that the Boating Park RICD is located in an appropriate reach of the Yampa River for the intended uses. C.R.S. § 37-92-102 (6)(b)(II).

Most relevant to this issue is the fact that the reach selected for the Boating Park RICD was dictated by the recreation needs the City sought to meet, the area geography, and the City's overall river management objectives. In this regard, the Court takes note of the City's Yampa River Management Plan which was over three years in the making, and the testimony of Mr. Neumann which explains the Management Plan. That Management Plan dictates the appropriate stream reach for the Boating Park RICD to disperse various competing recreation activities on the Yampa River and meet the City's objectives for the Yampa River.

iii. Access for Recreational Use. The Court finds that there is sufficient access for the decreed beneficial uses as described in paragraph 6.h above. C.R.S. § 37-92-102 (6)(b)(III). This point was conceded in the CWCB's Findings and Recommendations and the Court concurs.

iv. Instream Flow Rights Injury. The Court finds that the Boating Park RICD will not cause material injury to any instream flow water rights. C.R.S. § 37-92-102 (6)(b)(IV). There are no instream flow rights in the subject reach and the Boating Park RICD will be entirely non-consumptive. This point was conceded in the CWCB Findings and Recommendations and the Court concurs.

v. Maximum Utilization. In finding that the Boating Park RICD does not impact Colorado's compact entitlements, the CWCB determined that the amount of the claimed Boating Park RICD can either be used downstream of the Boating Park RICD or contribute to Colorado delivery obligations under the Upper Colorado River Compact. The testimony of Mr. Gary Thompson and his letter report dated January 20, 2004, demonstrate that the Boating Park RICD adds a new nonconsumptive use onto water that is commanded downstream by senior absolute and conditional water rights that substantially exceed the claimed amounts of the Boating Park RICD. Mr. Thompson's testimony and letter reports dated January 20, 2004, May 14, 2004, and April 15, 2005, also demonstrate that there are substantial existing conditional water rights and unused storage rights that are senior to and upstream of the Boating Park RICD. These reports further indicate that the claimed RICD flows leave substantial unappropriated water for future upstream development and exchange potential. All of the foregoing water rights and future water supplies are more than sufficient to sustain the Upper Yampa basin through any reasonable anticipated projected build out. Thus, the Court finds that the Boating Park RICD in accordance with this Decree does not have any material impact on the development of future water supplies for existing and future upstream development. The testimony and letter report of Dr. Danielson further corroborated these facts.

Given the un rebutted testimony and evidence outlined above, the Court finds that the Boating Park RICD as herein decreed with the limitations and terms as herein set forth is consistent with and, in fact, promotes the "maximum utilization" principle in Colorado. It is a new, clean use of water on top of, and that works in tandem with, existing and future downstream diversions, generating revenue without polluting or consuming a single drop.

Accordingly, the Court finds that the adjudication and administration of the Boating Park RICD pursuant to and as set forth in this decree will promote maximum utilization of the waters of the State by making a new, valuable beneficial use, without causing any reduction in flow or injury to downstream water rights, and without causing injury to upstream senior or junior water rights. C.R.S. § 37-92-102 (6)(b)(V).

1. The Supreme Court's Gunnison Decision. This Court is mindful of the Colorado Supreme Court's recent decision in *Gunnison*, and finds that the Boating Park RICD right as

decreed herein is consistent with that decision and with Senate Bill 01-216 as construed in that decision.

7. Terms and Conditions. In order to accomplish the terms of the stipulations among the parties as referred to in paragraph 5 above, and in order to facilitate administration by the Division Engineer, Water Division No. 6, the following terms and conditions shall apply:

a. Measurement and Administration. The City shall install, operate and maintain at its expense all necessary gages and measuring devices as reasonably required by the Division Engineer to administer this decree, and shall report at reasonable times to the Division Engineer the readings from such gages and measuring devices. Without limiting this requirement, before the City may make a call on the Yampa River for the Boating Park RICD, and before the Boating Park RICD may be administered by the Division Engineer, the City shall install, operate and maintain at its cost a stream gage, or measuring device, which will continually record flows and automatically calculate an average daily flow reading on Butcher Knife Creek near its confluence with the Yampa River and on Soda Creek near its confluence with the Yampa River; or as an alternative, the City shall install, operate and maintain at its cost a stream gage, or measuring device, which will continually record flows and automatically calculate an average daily flow reading, on the Yampa River at or near the 13th Street Bridge between Charlie's Hole and D Hole as described herein. Also, on each day the City desires to make a call, the City may either (1) record the average daily flow reading(s) at the gage(s), and deliver a written report of the average daily flow reading(s) to the Division Engineer's Office, or communicate such reports in a manner approved by the Division Engineer; or (2) install data collection platform(s) with satellite transmitting capability that can transmit the average daily flow reading(s).

b. No Opposition/Future Cases. The City agrees that the Decree entered in this case for the Boating Park RICD may not be used as a basis to oppose, and the Boating Park RICD need not be protected from injury in connection with, any future application for water rights, change of water rights, diligence, to make absolute, or approval of a plan for augmentation or exchange filed by any person or entity, the sources for which are located within the following drainage basins or areas (all of which are herein collectively called the "No Opposition Basins"):

- (i) the Yampa River and its tributaries from a point immediately upstream of the confluence with Morrison Creek to the headwaters of the Yampa River;
- (ii) Morrison Creek and its tributaries from a point immediately upstream of the mouth of Morrison Creek to the headwaters of Morrison Creek; and
- (iii) Oak Creek and its tributaries from a point immediately upstream of the mouth of Oak Creek to the headwaters of Oak Creek, and including water imported into Oak Creek from Trout Creek and the return flows therefrom.

Except as modified by agreement with the City, the restriction of this paragraph 7.b. does not impair the City's ability to file a statement of opposition to any future changes of

water rights or augmentation or exchange plan applications, the sources of which are located within the No Opposition Basins, solely to prevent injury to the City's water rights other than the Boating Park RICD.

c. Settlement Agreement. This Decree shall be subject to the terms of the Settlement Agreement dated as of May 10, 2005, (as corrected by Correction of Settlement Agreement also dated as of May 10, 2005, recorded under Reception No. 628451 of the Routt County Records) between the City and the Upper Yampa Water Conservancy District, the Board of County Commissioners of Routt County, Colorado, the Town of Oak Creek and the Town of Yampa, and the Morrison Creek Metropolitan Water and Sanitation District as recorded under Reception No. 628191 of the Routt County records (the "Settlement Agreement"), and the Stipulation attached thereto which are incorporated herein by reference.

d. Limitation and Transfer. The Boating Park RICD water right shall not be transferable by the City, directly or indirectly, to any other person or entity without the prior written consent of the parties to the Settlement Agreement. Therefore, the Boating Park RICD may not be exercised, nor valid calls thereunder be made, directly or indirectly, by any person or entity other than the City.

e. Structure Removal. In the event the Boating Park RICD structures are substantially removed, and the City does not commence the permitting process to replace such structure(s) within three years of the date of removal and thereafter diligently completes the replacement of the structure(s) to the same or greater extent once all permits have been secured, then there shall be a rebuttable presumption that the RICD structure(s) and associated water right has been abandoned.

f. As-built Drawings. Prior to placing a call for the water rights decreed herein, the City must file with the Office of the Division Engineer for Water Division No. 6 as-built drawings accurately depicting the Charlie's Hole and the D-Hole RICD structures. These drawings must be signed and sealed by a professional engineer registered in Colorado. The purpose of these drawings is to ensure that the structures may be accurately replicated in the event of any future damage.

RULING AND DECREE

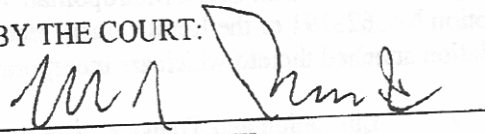
1. The foregoing Findings of Fact and Conclusions of Law are fully incorporated into this Ruling and Decree by this reference.
2. The absolute water right for the two structures constituting the Boating Park as described in paragraph 6 above are hereby decreed in the amounts as set forth in paragraph 6.f. above, subject to and limited by all of the terms and conditions set forth herein.

3. The State Engineer is directed to administer this Ruling and Decree consistent with all of the foregoing Findings of Fact and Conclusions of Law including without limitation the provisions of paragraph 7.a.

It is ORDERED that a copy of this Ruling and Decree shall be filed with the Division Engineer for Water Division No. 6 and with the State Engineer.

Dated this 13TH day of March, 2006, *n.p.t.* October 28, 2005.

BY THE COURT:



Michael A. O'Hara, III,
Water Judge, Water Division No. 6