



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda Bassi, Section Chief
Kaylea White, Senior Water Resource Specialist
Stream and Lake Protection Section

DATE: January 25-26, 2016 Board Meeting

AGENDA ITEM: Consent Agenda # 2a. Deferral of Consideration of Request to Inundate;
Case No. 4-12CW143: Application of Ronald E. Tipping, Marie E. Tipping,
William R. Patterson and Rodney C. Power

Staff requests Board ratification of the Director's decision in this case to defer the Board's consideration of a potential inundation included in the water court application filed by Ronald E. Tipping, Marie E. Tipping, William R. Patterson and Rodney C. Power, ("Applicants"), pursuant to ISF Rule 7 - Inundation of ISF Rights ("Inundation"). Applicants have requested that CWCB defer its consideration of a request to inundate CWCB's instream flow water rights on North East Creek, tributary to East Creek, tributary to the Gunnison River. At this time, the Applicants desire to move ahead with the water court decree without final resolution on the inundation issue. The decree would grant a conditional water right for a new reservoir, Tippings Solitude Lake, approximately 12 miles southwest of Grand Junction, Colorado. The Applicants have agreed to include terms and conditions in the decree requiring them to file and obtain the Board's approval of a request to inundate prior to constructing, filling, diverting or storing water for the new conditional water right. This memo addresses the deferral stipulation with a general description of the project. A map is attached as Exhibit A, and the stipulation language regarding deferral of inundation request is attached as Exhibit B.

Staff Recommendation

Staff recommends that the Board:

- Ratify the Director's decision to defer consideration of a request to inundate, provided that:
 - The Applicants agree to terms and conditions in the stipulation and proposed water court decree requiring the Applicants to request the Board's approval of an inundation request before constructing, filling, diverting or storing water for the Tipping Solitude Lake water right.

Case Background

The Applicants submitted a water court application for a conditional water storage right in Case No. 4-12CW143. In that case, the Applicants are seeking a 65 acre-feet storage right for Tipping Solitude Lake with a November 1, 2012 appropriation date. Tipping Solitude Lake will



be a new on-channel reservoir on North East Creek, tributary to East Creek, tributary to the Gunnison River. The proposed dam and lake are generally depicted on the attached map as Exhibit A.

If decreed, this conditional water storage right will be junior to the instream flow water right ("ISF") on North East Creek and may inundate part of the ISF water right. Proposed uses of the stored water are irrigation, stockwatering, fire protection, piscatorial, recreation, and wildlife watering purposes.

In March 2013, the Board ratified the statement of opposition to this application partially because the inundation could injure the Board's ISF water right set forth below. CWCB became a party in this case with the intent of negotiating terms and conditions to protect the Board's ISF water rights ultimately by developing a plan with Applicants to mitigate for any ISF interference that would result from the inundation.

The Board holds the following ISF water right that could be injured by this inundation:

CWCB Case No.	Stream	Amount (cfs)	Timing	Approp. Date	Watershed	County
04CW159	North East Creek	5.0	4/1-6/15	1/28/04	North East Creek	Mesa
		1.0	6/16-8/31			
		0.7	9/1-1/31			
		1.0	2/1-3/31			

The ISF water right on North East Creek decreed in Case No. 04CW159 that would be partially inundated by Tipping Solitude Lake extends from the confluence with the first unnamed tributary downstream of King Reservoir to the confluence with East Creek, approximately 11.5 miles long. Staff has addressed other potential issues in this case through negotiations to ensure that the other aspects of the ISF water right on North East Creek will be 100% protected with terms and conditions in the stipulated decree.

Discussion

ISF Rule 7g. allows the Board several options regarding a request to inundate an ISF water right: to approve, approve with conditions, defer, or deny the request to inundate. Rule 7j. allows the Board to defer, as follows:

When it appears that other governmental agencies may impose terms and conditions upon the issuance of a permit to construct a facility which will cause an inundation, the Board may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions.

The **Applicants** request that the Board defer its consideration and have agreed to include terms and conditions in the decree to request the Board's consideration of a request to inundate after applying for the required state and federal permits and approvals and prior to diverting the enlargement water right. CWCB and Colorado Parks and Wildlife ("CPW") staff agree that the appropriate course of action is to defer the request at this time.

Attachments

Exhibit A: Map

Exhibit B: Stipulation language regarding deferral of inundation request

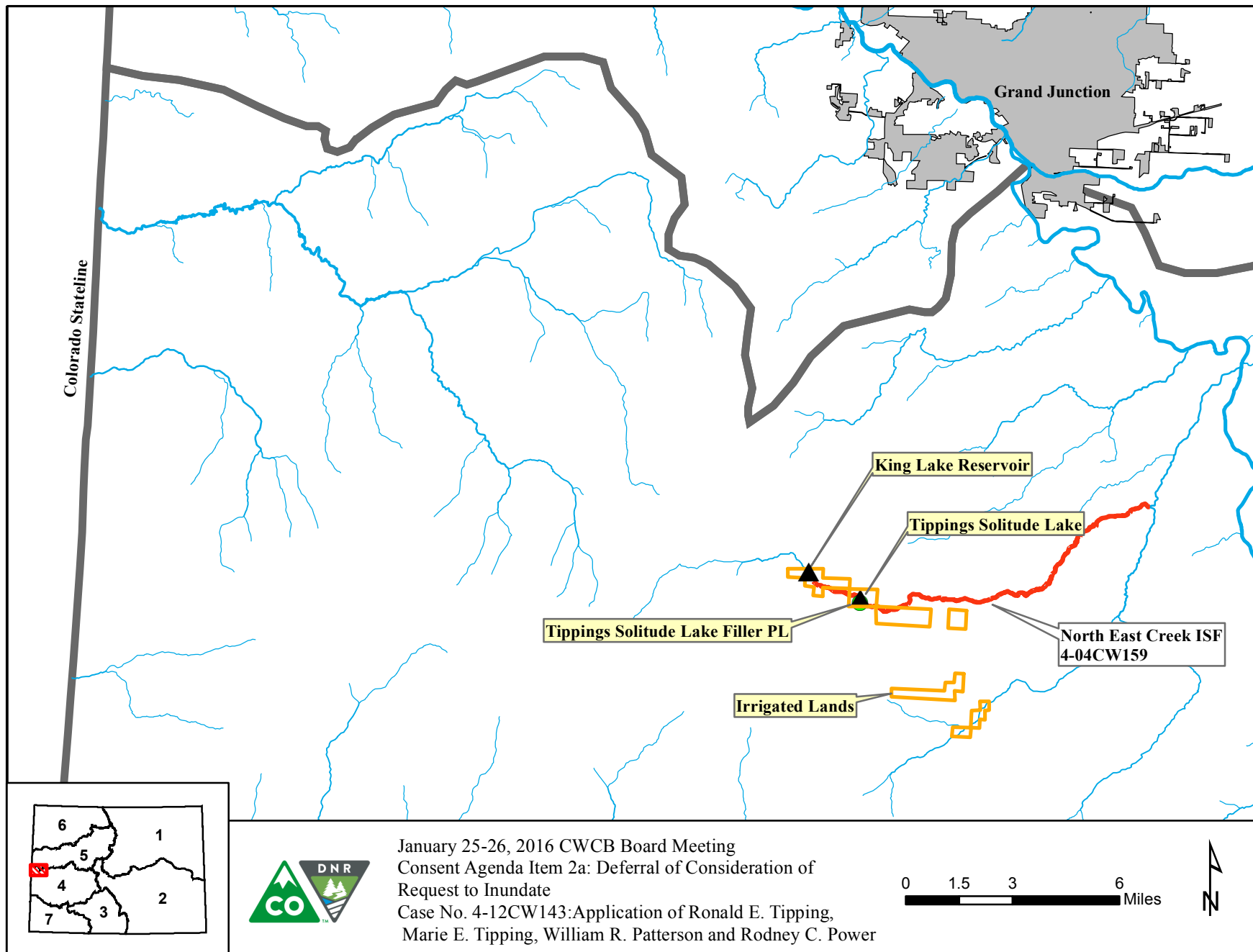


EXHIBIT A

Stipulation language excerpt regarding deferral of inundation request:

Ronald E. Tipping, Marie E. Tipping, William R. Patterson and Rodney C. Power (collectively "Applicants"), and Opposer, the Colorado Water Conservation Board ("CWCB"), by and through their respective counsel, hereby stipulate and agree as follows:

b) Applicants acknowledge that the CWCB holds an instream flow water right on North East Creek decreed in Case No. 04CW159, to preserve the natural environment to a reasonable degree ("NE Creek ISF"). The NE Creek ISF is senior in priority to the Tippings Solitude Lake and Tippings Solitude Lake Filler Pipeline water rights decreed herein (collectively, the "Solitude Lake Water Rights"). Construction and filling of the Tippings Solitude Lake will inundate a portion of North East Creek on which the NE Creek ISF is located. Applicants and CWCB have agreed to the following terms and conditions to protect the NE Creek ISF:

- i. Applicants agree that no construction, filling, diversion or storage of water for the Tippings Solitude Lake shall occur and no absolute water rights shall be granted for the Solitude Lake Water Rights unless and until:
 - (a) The Applicants have filed and CWCB has approved a request to inundate pursuant to Rule 7 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level program, 2 CCR 408-2 ("ISF Rules"), or any comparable successor rule, filed by the Applicants with CWCB regarding the construction of the Tippings Solitude Lake, and the Applicants have complied with or agree to comply with any conditions and provide mitigation required by the CWCB in connection with such approval; or
 - (b) Applicants and the CWCB have otherwise reached an agreement pursuant to the CWCB rules and regulations enacted under C.R.S. §§ 37-60-108 and 37-92-102(3), or their successor statutes, that addresses the potential injury that may occur to the NE Creek ISF from the exercise of the Tippings Solitude Lake water right.
- ii. The CWCB may deny the request to inundate filed by Applicants if it determines, pursuant to the ISF Rules in effect at that time, that mitigation is insufficient or the request is inconsistent with the goals of the instream flow program or for other good reason. Prior to any construction that would cause inundation of the NE

Creek ISF, Applicants will comply with the CWCB rules in effect at that time regarding the mitigation to be made upon inundation of the NE Creek ISF.

- iii. Applicants have applied for a Clean Water Act Section 404 permit for the Tippings Solitude Lake. To assist the CWCB in its evaluation of potential injury to the NE Creek ISF, Applicants agree to provide to the CWCB staff copies of any draft and final environmental assessments or environmental impact statements for the Tippings Solitude Lake that are prepared in connection with the 404 permit application. Such information will be provided to the CWCB staff at or prior to the time that Applicants file with the CWCB their request to inundate a portion of the NE Creek ISF pursuant to the ISF Rules.
- iv. Upon reasonable notice to Applicants, the CWCB shall have access to accounting records for the Solitude Lake Water Rights that have been completed and submitted to the Division Engineer and to any measuring devices used to measure diversions and storage of water under those water rights.
- v. As used in this Paragraph 21.B., "Applicants" includes the heirs, successors and assigns of the current Applicants in this case.

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