



Granted

The moving party is hereby ORDERED to provide a copy of this Order to any parties who have entered an appearance in this action within 10 days from the date of this order.

James B. Boyd
District Court Judge
Date of Order attached

DISTRICT COURT, WATER DIVISION NO. 5,
COLORADO

109 Eighth Street, #104
Glenwood Springs, CO 81601

CONCERNING THE APPLICATION FOR WATER
RIGHTS OF THE COLORADO WATER
CONSERVATION BOARD

IN SUMMIT COUNTY

COURT USE ONLY

Case Number: 05CW264

DECREE OF THE WATER COURT

The Application in this case was filed on December 28, 2005. The Application 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 Title 37, Colorado Revised Statutes, known as the Water Right Determination and Administration Act of 1969. The Application was re-referred to the Water Judge by Order filed on December 15, 2009.

The Water Judge, having made such investigations as are necessary to determine whether or not the statements in the application are true, having consulted with the Division Engineer, and having become fully advised with respect to the subject matter of the application, does hereby make the following findings of fact and conclusions of law and enters the following decree in this matter:

1. Application. This matter involves the Application for Change of Water Right filed by the Colorado Water Conservation Board ("CWCB"). The current mailing address and phone number of the Applicant is as follows:

Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, Colorado 80203
(303)- 866-3441
00029641

2. **Jurisdiction.** All notices required by law have been duly given and the District Court in and for Water Division No. 5 (the “Water Court”) has jurisdiction over the application and all parties affected thereby, whether or not they have chosen to appear.

3. **Objectors.** Statements of opposition were timely filed by the following (collectively, the “Objectors”): City of Aurora, Blue River Ranch, LLC, Colorado River Water Conservation District, Colorado Springs Utilities, City and County of Denver, and S.G. Company, LLC.

4. **Consultation Summary.** The Court has received and duly considered the comments of the Division Engineer in the Summary of Consultation dated May 10, 2007, issued in the companion Case No. 05CW265.

5. **Background.** This matter concerns a requested change to the Peabody #1 Ditch and Peabody # 1, Lund Enlargement & Extension Water Rights (“Subject Water Rights”), described in Section 6 below. The CWCB acquired the Subject Water Rights from the Colorado Water Trust by means of an acquisition agreement dated December 22, 2004 and amended on August 1, 2005 and May 28, 2008 (the “Acquisition Agreement”). The CWCB proposes to change the use of the Subject Water Rights to instream flow use pursuant to C.R.S. § 37-92-102(3), to preserve and improve the natural environment to a reasonable degree in the following four stream reaches: (1) the segment of Boulder Creek from the headgate of the Peabody #1 Ditch to the confluence with the Blue River, (2) the Blue River from the confluence of Boulder Creek to the confluence with Lund Gulch, (3) the Blue River from the confluence with Lund Creek to the confluence with Slate Creek, and (4) the Blue River from the confluence with Slate Creek to Green Mountain Reservoir.

Consistent with the Acquisition Agreement, this change reserves the consumptive use portion of the Subject Water Rights remaining in the Blue River downstream of the four instream flow segments for use by the Colorado Water Trust or its assignee the Colorado River Water Conservation District, as decreed in Case No. 05CW265.

6. **Description of the Subject Water Rights:**

A. **Peabody #1 Ditch (the “1904 Priority”):**

- i. **Original Decree:** March 2, 1910, Case No. W-1277, in the District Court in and for Summit County, Colorado.
- ii. **Decreed point of diversion:** NE1/4 of the NE1/4, Section 12, Township 4 South, Range 79 West of the 6th P.M., Summit County, Colorado.

- iii. Source: Boulder Creek, tributary to the Blue River.
- iv. Appropriation date: May 23, 1904
- v. Amount: 5.0 cfs, absolute
- vi. Use: Irrigation

B. Peabody #1, Lund Enlargement & Extension (the "1915 Priority"):

- i. Original Decree: July 5, 1916, Case No. 1520, in the District Court in and for Summit County, Colorado, for 1.5 cfs absolute and 2.0 cfs conditional. The 2.0 cfs conditional was made absolute in Case No. 86CW151, Water Division No. 5, State of Colorado.
- ii. Decreed point of diversion: NE1/4 of the NE1/4, Section 12, Township 4 South, Range 79 West of the 6th P.M., Summit County, Colorado.
- iii. Source: Boulder Creek, tributary to the Blue River.
- iv. Appropriation date: May 15, 1915.
- v. Amount: 3.5 cfs, absolute.
- vi. Use: Irrigation

7. Historical use: The Subject Water Rights were historically diverted from Boulder Creek via the Peabody #1 Ditch headgate to irrigate approximately 63 acres along Lund Gulch, located in the SE ¼ of the SE ¼ of Section 19, the SW ¼ of the SW ¼ of Section 20, the NW ¼ of the NW ¼ of Section 29, and the NE ¼ of Section 30, Township 3 South, Range 78 West of the 6th P.M. The lands historically irrigated are depicted by the map attached hereto as Exhibit A. The annual consumptive use of water from such irrigation averaged 73 acre-feet. Available diversion records indicate that the Peabody Ditch has frequently diverted the entire 8.5 cfs. However, the historical consumptive use resulting from such diversions was generally satisfied by the diversions under the senior 1904 Priority described above. Because return flows from historical use accrued to the Blue River at Lund Gulch, depletions to Boulder Creek and the Blue River between Boulder Creek and Lund Gulch from historical use of the Subject Water Rights were equivalent to diversions. Since return flows to Lund Gulch and the Blue River at Lund Gulch

accrued in the same month as water was applied for irrigation, depletions to the Blue River below Lund Gulch from historical use were equivalent to consumptive use of the irrigation water.

8. Proposed change:

A. Instream Flow Segments. Applicant proposes to change the use of the Subject Water Rights from irrigation to instream flow use pursuant to C.R.S. § 37-92-102(3) in the following stream segments: Reach 1: Boulder Creek from the headgate of the Peabody No. 1 Ditch to the confluence with the Blue River (approximately 3 miles); Segment 2: the Blue River from Boulder Creek to the confluence with Lund Gulch (approximately 3.2 miles); Segment 3: the Blue River from Lund Gulch to Slate Creek (approximately 1 mile); and Segment 4: the Blue River from Slate Creek to Green Mountain Reservoir (approximately 6.9 miles). The CWCB will use the Subject Water Rights in the applicable stream reaches (1) to preserve the natural environment to a reasonable degree within the segments described above by supplementing existing instream flow water rights up to their decreed amounts in Case Nos. 77CW3646, 87CW297, and 87CW298; and (2) to improve the natural environment in the applicable stream segments by protecting flows above the decreed instream flow amounts by the amounts decreed herein. The Colorado Water Trust and the Colorado River Water Conservation District have applied to use the consumptive use portion of the Subject Water Rights downstream of the above instream flow segments in Case No. 05CW265.

B. Instream flow operations. The Subject Water Rights will not be diverted from the stream, but will instead remain in the stream for instream flow use by the CWCB to preserve and/or improve the natural environment to a reasonable degree in the applicable stream segments as set forth below.

1. Segment 1 and Segment 2 (Boulder Creek to Blue River and Blue River from Boulder Creek to Lund Creek). In these segments, water in the amounts of the average historical diversion rates will be used to preserve and improve the natural environment to a reasonable degree. Because return flows from historical irrigation use of the Subject Water Rights accrued to the Blue River below Segments 1 and 2 (i.e., in Segment 3), historical diversions on the Subject Water Rights depleted Segments 1 and 2 in the amount of those diversions, less a 7.5% ditch loss within the Boulder Creek drainage. Accordingly, instream flow use of the Subject Water Rights in Segments 1 and 2 shall be equivalent to the average historical diversions, less ditch loss, as shown in Table 2.

2. Stream Segments No. 3 and 4 (Blue River from Lund Gulch to Slate Creek and Blue River from Slate Creek to Green Mountain Reservoir). In these segments, water in the amounts of the average historical depletions of the Subject Water Rights will be used to preserve and improve the natural environment to a reasonable degree. Because return flows from historical irrigation use of the Subject Water Rights accrued to the Blue River in Segments 3 and 4, and accrued in the month of irrigation, instream flow use in Segments 3 and 4 shall be equivalent to,

and based upon, average historical consumptive use of the Subject Water Rights. The average monthly consumptive use is set forth below in Table 2 below.

C. In the Acquisition Agreement, the Colorado Water Trust has reserved the consumptive use portion of the Subject Water Rights for use downstream of the segments wherein the Subject Water Rights will be used for instream flow purposes. Therefore, the Colorado Water Trust or its assignee the Colorado River Water Conservation District may bring about the beneficial use of the historical consumptive use of the Subject Water Rights downstream of the instream flow segments on the Blue River as fully consumable reusable water by law pursuant to and in accordance with the change of water rights decreed in Case No 05CW265.

Table 1
Summary of Proposed Use

Instream Flow Segment	Preserve Natural Environment	Improve Natural Environment	Priority Date
Boulder Creek Segment 1	Historical diversion to bring the stream flow up to the decreed ISF amounts	Historical diversion amount	1904 & 1915
Blue River Segment 2	Historical diversion to bring the stream flow up to the decreed ISF amounts	Historical diversion amount	1904 & 1915
Blue River Segment 3	Historical consumptive use to bring the stream flow up to the decreed ISF amounts	Historical consumptive use amount	1904
Blue River Segment 4	Historical consumptive use to bring the stream flow up to the decreed ISF amounts	Historical consumptive use amount	1904

Table 2
Instream Flow Amounts for Changed Water Rights Based on Historical Use

	Stream Segments		
	Segments 1 and 2		Segments 3 and 4
	1904 Priority	1915 Priority	1904 Priority
	cfs	cfs	Cfs
May	0.31	0.04	0.02
June	3.15	0.49	0.45
July	3.51	0.33	0.35
August	2.63	0.2	0.24
September	0.87	0	0.14
October	0.31	0	0

D. Exercise of the Subject Water Rights for instream flow uses will be subject to the Terms and Conditions set forth in Paragraph 9 below.

9. Terms and Conditions. The requested change of water rights can be granted without injury to existing absolute water rights or decreed conditional water rights if the following terms and conditions are imposed:

- A. The Subject Water Rights shall be left in the stream and shall no longer be used to irrigate the 63 acres historically irrigated thereby, as described in paragraph 7 above, which land will be permanently dried up. The headgate of the Peabody No. 1 Ditch will be removed or rendered inoperable and the initial reach of the ditch eradicated in order to assure to the reasonable satisfaction of the Division Engineer that no irrigation water will be applied to the land that was historically irrigated by the Peabody Ditch No. 1.
- B. The Subject Water Rights may be exercised for instream flow purposes only during the period May 1 through October 31 of each year.
- C. The CWCB's rate of instream flow use of the Subject Water Rights shall be limited to the rates set forth in the Tables 1 and 2 in Paragraph 8 above, as applicable to each stream reach.
- D. The Subject Water Rights may be exercised for instream flow use only when the Subject Water Rights are in priority. Use of the Subject Water Rights for instream flows will be limited to the amount of water legally and physically available at the original point of diversion under the 1904 Priority and 1915 Priority up to the

monthly flow rates of the historical diversions under those respective priorities identified in the columns of Table 2 labeled “Segments 1 and 2.” Any calls made for the Subject Water Right shall be in the full amount needed to produce at the historical headgate of the Peabody Ditch No. 1 the amounts set forth in Table 2 under Segments 1 and 2 for the applicable month.

- E. The headgate of the Subject Water Rights was located on Boulder Creek, a tributary to the Blue River. As a result, the Subject Water Rights could not historically be used to “call” upon water rights diverting from the Blue River. Accordingly, as changed herein, the Subject Water Rights may not be used to exercise a “call” upon any water rights diverting water from the Blue River. However, the instream flows produced by virtue of the lawful exercise of the Subject Water Rights shall be conveyed through the CWCB instream flow reaches by the Division Engineer, who shall not allow the diversion of such water while it is flowing through the CWCB instream flow reaches.
- F. The Applicant shall install, operate, and maintain measuring devices as may be required by the Division Engineer to administer the water rights changed herein.

10. Stipulations. Applicants have entered into and the Court hereby approves and incorporates into this decree the stipulations with all objectors filed in this matter.

11. Retained Jurisdiction. The change of water rights herein shall be subject to reconsideration by the Court on the question of injury to the vested water rights and decreed conditional water rights of others for a period of five (5) years after entry of the decree herein.

12. Findings. The foregoing paragraphs are hereby fully incorporated and made a part of this decree. The Court finds that the CWCB has satisfied all necessary legal prerequisites and hereby rules that the water rights described above are hereby granted. The Court further finds that under the terms and conditions set forth above, there will be no injury to any owner of or person entitled to use water under a vested water right or a decreed conditional water right as a result of the decree entered herein.

13. No precedent. The findings of fact, conclusions of law and decree stipulated hereto were completed as a result of substantial discussions, negotiations and compromises by, between and among the Applicants and Objectors. It is specifically understood and agreed by the parties hereto, and found and concluded by the Court, that the acquiescence by the parties to a stipulated decree under the specific factual and legal circumstances of this 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, or

laches, nor to any administrative practice or precedent, by or against any of the parties hereto in any other matter, case or dispute; nor shall testimony concerning such acquiescence of any party to a stipulated decree herein be allowed in any other matter, case or dispute. All parties stipulate and agree that they each reserve the right to propose or to challenge any legal or factual position in any other matter filed in this or any other court, without limitation by these findings, conclusions, judgment and decree.

The application is **GRANTED** and a decree is hereby entered changing the use of the Peabody # 1 Ditch and Peabody #1 Ditch, Lund Enlargement & Extension rights from irrigation uses to instream flow use in accordance with the terms and conditions herein.

Dated this _____ day of _____, 2010.

BY THE COURT:

Hon. James B. Boyd
Water Judge

This document constitutes a ruling of the court and should be treated as such.

Court: CO Garfield County District Court 9th JD

Judge: James B Boyd

Current Date: Apr 14, 2011

Case Number: 2005CW264

Court Authorizer

Comments:

Exhibit A submitted with the proposed decree on January 25, 2010, is incorporated into this Decree.

/s/ **Judge James B Boyd**