

Consent Agenda Item 1.b

March 11-12, 2020 Board Meeting

Case No. 19CW3086 (Water Division 2); Jerry and Julianna Henderson, Larry Knowles, Hartmut and Isabel Koelsch, The Lee R. Wheeler Living Trust dated March 20, 2002, Thomas and Karen Laier, and Delbert and Janet Jones

Summary of Water Court Application

Application for water storage rights, direct flow water rights, changes of water rights and approval of a plan for augmentation.

Staff Recommendation

Staff recommends that the Board ratify the filing of a Statement of Opposition filed on behalf of the Board in February 2020 to protect CWCB's instream flow water rights.

CWCB Instream Flow Water Rights

The CWCB holds water rights, including the following instream flow water right in Water Division 2 in the Arkansas River Headwaters Watershed, that could be injured by this application:

Case Number	Stream	Upper Terminus	Lower Terminus	CFS Rate (Dates)	Approp. Date
80CW0071 (Div. 2)	Three Elk Creek	headwaters in vicinity	confl Arkansas River	4 (1/1 - 12/31)	05/07/1980

Potential for Injury

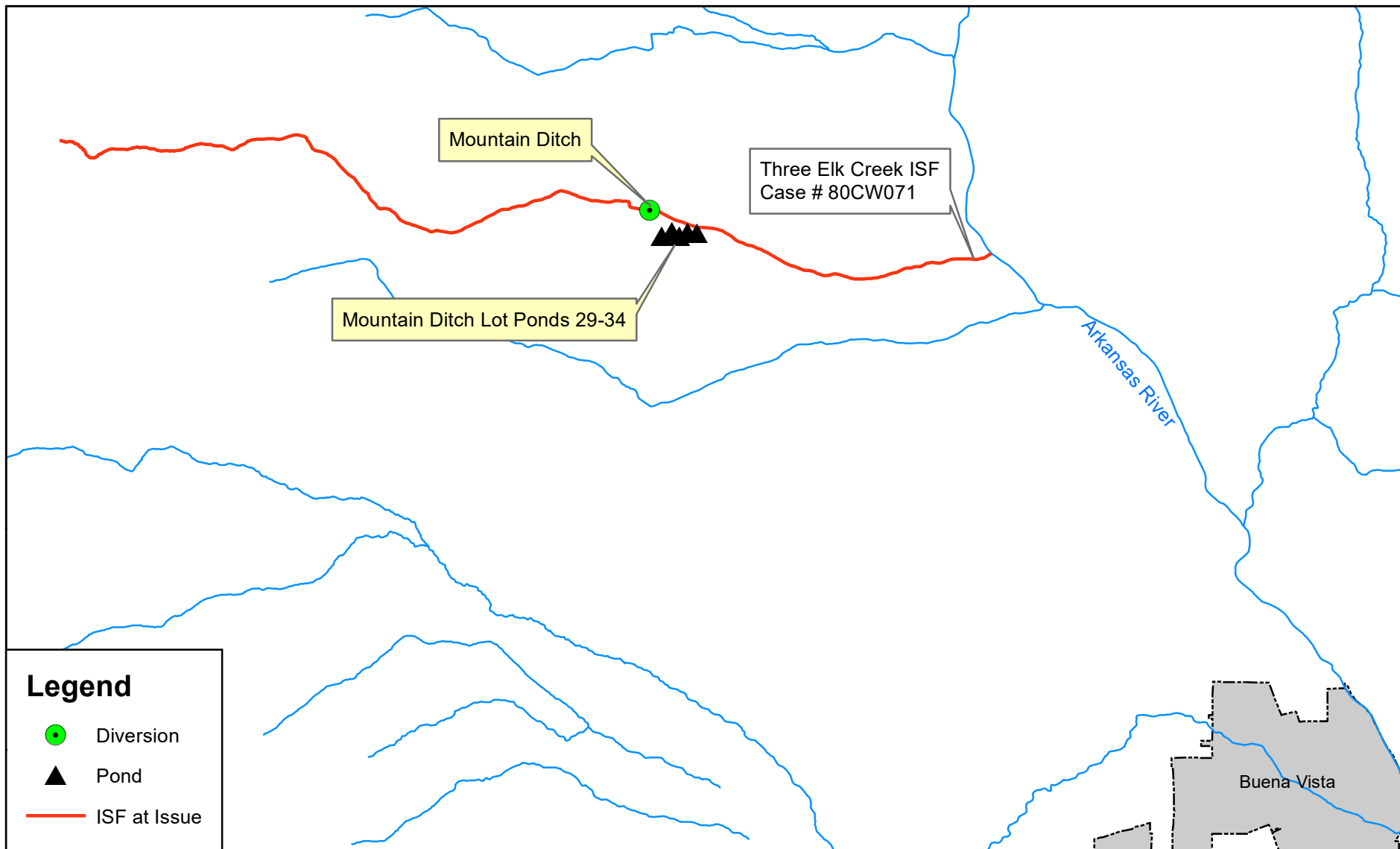
- The proposed change of water rights could cause an expansion of use and could alter the time, place and amount of historical return flows, which could injure the CWCB's instream flow water rights.
- The proposed plan for augmentation may not replace depletions in the proper time, place and amount, which could injure the CWCB's instream flow water rights.
- Some of the water rights are claimed with senior appropriation dates. The instream flow water right might be subject to these water rights under C.R.S. 37-92-102(3)(b) if the new water rights are sufficiently documented.

Other Objectors




No other Statements of Opposition were filed.

Attorney Representing CWCB

Christopher R. Stork, Assistant Attorney General, is assigned to this case and can be contacted at christopher.stork@coag.gov, or 720-508-6311.



Legend

-  Diversion
-  Pond
-  ISF at Issue



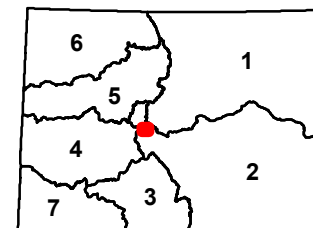
COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

March 11-12, 2020 CWCB Board Meeting
Consent Agenda Item 1.b. Statement of Opposition
Case No. 19CW3086 (Division 2)
Henderson, et al.

0 0.5 1 2 Miles



DISTRICT COURT, WATER DIVISION NO. 2, COLORADO

RESUME OF CASES FILED AND/OR ORDERED PUBLISHED DURING DECEMBER 2019 AND INVITATION TO JOIN STATE ENGINEER'S SUBSTITUTE WATER SUPPLY PLAN NOTIFICATION LIST AND/OR THE STATE ENGINEER'S PRODUCED NONTRIBUTARY GROUND WATER NOTIFICATION LIST

TO: ALL INTERESTED PARTIES

Pursuant to C.R.S. 37-92-302, you are hereby notified that the following is a resume of applications and certain amendments filed and/or ordered published during December 2019, in Water Division No. 2. The names and addresses of applicants, description of water rights or conditional water rights involved, and description of ruling sought as reflected by said applications, or amendments, are as follows:

CASE NO. 2019CW3086; JERRY AND JULIANNA HENDERSON, PO Box 5154, Buena Vista, CO 81211-5154, LARRY KNOWLES, 2250 N Piper Ave, Camp Verde AZ 86322-7516, HARTMUT AND ISABEL KOELSCH, PO Box 659, Longmont CO, 80502-0659, THE LEE R WHEELER LIVING TRUST DATED MARCH 20, 2002, THE VICKIE WHEELER LIVING TRUST DATED MARCH 20, 2002, 748 Road 20, Hugoton KS, 67951-5183, THOMAS AND KAREN LAIER, 18499 Vista Drive, Buena Vista CO 81211, AND DELBERT AND JANET JONES PO Box 5245, Buena Vista CO 81211-5425 in Three Elk Creek (a.k.a. "Three Mile Creek"), trib. to the Arkansas River. (Please address all pleadings and inquiries regarding this matter to Applicant's attorneys: Christopher L. Geiger and Margaret Casey, Balcomb & Green, P.C., P.O. Drawer 790, Glenwood Springs, CO 81602; 970-945-6546.)

Application for Storage Water Rights, Direct Flow Water Rights, Change of Water Rights and Approval of a Plan for Augmentation

CHAFFEE COUNTY

2. Summary of Application: Applicants seek cond. water storage rights for the Mountain Ditch Ponds (Lots 29 through 33), and direct flow water rights for the Mountain Ditch, Mountain Ditch Ponds Enlargement each as described herein. The foregoing individuals, together with Delbert and Janet Jones and collectively "Applicants," also seek a change in type, place and manner of use of senior irr. priorities decreed to the Mountain Ditch, and approval of a plan for aug. See **Exhibit 1** attached to the application for a general location map of each structure described below. (All exhibits mentioned herein are incorporated by reference and may be inspected at the office of the clerk of this Court.). The Applicants own interests in lots within Three Elk Estates, a residential subdivision located near Buena Vista, Colorado. **3. Name and Description of Storage Water Rights:**

Name of Structures: Mountain Ditch Lot 29 Pond, Mountain Ditch Lot 30 Pond, Mountain Ditch Lot 31 Pond, Mountain Ditch Lot 32 Pond, and Mountain Ditch Lot 33 Pond. (collectively, the "Mountain Ditch Ponds"). **Legal Descriptions:** **Mountain Ditch Lot 29 Pond:** SE1/4 NE1/4, Sec. 27, T. 13 S., R. 79 W., 6th P.M., 1,914 ft.

from N. Sec. Line, 1,250 ft. from E. Sec. Line, UTM NAD 83, Zone 13S, 4305566 meters Northing, 395445 meters Easting. **Mountain Ditch Lot 30 Pond:** SW1/4 NE1/4, Sec. 27, T. 13 S., R. 79 W., 6th P.M., 1,888 ft. from N. Sec. Line, 1,582 ft. from the E. Sec. Line, UTM NAD 83, Zone 13S, 4305574 meters Northing, 395344 meters Easting. **Mountain Ditch Lot 31 Pond:** SW1/4 NE1/4, Sec. 27, T. 13 S., R. 79 W., 6th P.M., 2,033 ft. from the N. Sec. Line, 1,858 ft. from the E. Sec. Line, UTM NAD 83, Zone 13S, 4305530 meters Northing, 395259 meters Easting. **Mountain Ditch Lot 32 Pond:** SW1/4 NE1/4, Sec. 27, T. 13 S., R. 79 W., 6th P.M., 1,877 ft. from the N. Sec. Line, 2,214 ft. from the E. Sec. Line, UTM NAD 83, Zone 13S, 4305577 meters Northing, 395179 meters Easting. **Mountain Ditch Lot 33 Pond:** SW1/4 NE1/4, Sec. 27, T. 13 S., R. 79 W., 6th P.M., 2,030 ft. from the N. Sec. Line, 2,473 ft. from the E. Sec. Line, UTM NAD 83, Zone 13S, 4305530 meters Northing, 395071 meters Easting. **Source:** Three Elk Creek (a.k.a. "Three Mile Creek"), trib. to the Arkansas River. **Name and Legal Description of Pt. of Diversion:** The Mountain Ditch Ponds are filled via the Mountain Ditch (WDID 1100706), which diverts from the S. bank of Three Elk Creek at the following location: **Decreed Location:** S. bank of Three Mile Creek at a Pt. from whence the N.E. corner of the NE1/4 NW1/4, Sec. 27, T. 13 S., R. 79 W., Chaffee County, Colorado, bears N. 16 deg. E. 1,247 ft. distant. **Actual Location:** NE1/4 NW1/4 of Sec. 27, T. 13 S., R. 79 W. of the 6th P.M., 1,135 ft. from the N. Sec. line and 2,381 ft. from the W. Sec. line of said Sec. 27. UTM NAD 83, Zone 13S, 4305803 meters Northing, 394936 meters Easting. This location is within 60 ft. of the decreed location. **Date of Approp.:** 12/31/1973 for uses claimed absolute in paragraph 3.10 of Application and 12/31/2019 for uses claimed cond. in paragraph of Application. **How Approp. Was Initiated:** Construction of, and beneficial use of water stored in, the Mountain Ditch Ponds. **Approx. Surface Area, Reservoir Capacity, Dam Height, Length of Dam:** *Mountain Ditch Lot 29 Pond:* 0.17 ac; 0.85 a.f.; less than 10 ft.; 40 ft. *Mountain Ditch Lot 30 Pond:* 0.14 ac; 0.70 a.f.; less than 10 ft.; 40 ft. *Mountain Ditch Lot 31 Pond:* 0.14 ac; 0.70 a.f.; less than 10 ft.; 40 ft. *Mountain Ditch Lot 32 Pond:* 0.10 ac; 0.50 a.f.; less than 10 ft.; 40 ft. *Mountain Ditch Lot 33 Pond:* 0.11 ac; 0.55 a.f.; less than 10 ft.; 40 ft. **Remarks:** Pond areas are calculated from aerial photos, and volumes are estimated from an average depth of 5 ft. Applicants intend to survey the Mountain Ditch Ponds when feasible in 2020. **Amount Claimed:** The volume for each structure is specified above, and the cumulative volume of all five ponds is 3.3 a.f. The ponds may be filled and continuously freshened and refilled throughout the year. **Rate of Diversion:** 1.7 c.f.s. per pond and 1.7 c.f.s. collectively for all Mountain Ditch Ponds. **Uses or Proposed Uses:** Pisc., fish and wildlife habitat, and fire prot. use in the Mountain Ditch Ponds (absolute). Aug. of the Mountain Ditch Ponds and replacement of hist. return flows from Mountain Ditch change of use, (cond.); Applicants reserve the right to demonstrate that this cond. use for replacement of hist. return flows is made absolute during the pendency of this case and seek a ruling and decree confirming its absolute status herein. **Remarks:** The Mountain Ditch Ponds were constructed on or about 1973 and are visible in 1975 aerial photography attached as **Exhibit 2**

to this Application. The Mountain Ditch Ponds do not intercept groundwater. Based upon knowledge of persons familiar with development of Three Elk Estates, the ponds have been operated more-or-less continuously since construction. Construction and operational practices of filling and maintaining water levels in the Mountain Ditch Ponds predate the Colorado Water Conservation Board's (CWCB) instream flow water right on Three Elk Creek decreed in Case No. 80CW71, Water Division 2. Pursuant to C.R.S. §37-92-102(3)(b), Applicants request that all of the CWCB's instream flow rights are subject to the Mountain Ditch Ponds Approp.s and practices in existence prior to Approp. of the instream flow rights.

4. Name and Description of Direct Flow Right: Mountain Ditch, Mountain Ditch Ponds Enlargement. Legal Description of Structures at Location of Diversion and Return: The Mountain Ditch, Mountain Ditch Ponds Enlargement water right will be diverted at the Mountain Ditch headgate described above. Source: Three Elk Creek, trib. to the Arkansas River. Date of Approp.: 12/31/1973 for uses claimed absolute below and 12/31/2019 for uses claimed cond. below. How Approp. Was Initiated: Construction and flow-through operation of the Mountain Ditch Ponds. Date Water Applied to Beneficial Use: 1973. Rate of Diversion: 0.5 c.f.s. Surface area of Ditch: The surface area of the Mountain Ditch is approx. 0.09 acres based upon a length of 2,750 ft. and average width of 1.5 ft. Uses or Proposed Uses: Flow-through diversion to support pisc., fish and wildlife habitat, and fire prot. uses (absolute), and for irr. of up to 10.0 acres in the S1/2 of the NE1/4 and E1/2 of the NW1/4 of Sec. 27, T. 13 S., R. 79 W., 6th P.M. and more particularly identified as Lots 29 through 34 on **Exhibit 1** (cond.); Applicants reserve the right to demonstrate that this cond. use for irr. is made absolute during the pendency of this case and seek a ruling and decree confirming its absolute status herein. Remarks: The Mountain Ditch has been used to provide continuous freshening flows to the Mountain Ditch Ponds since approx. 1973. Freshening flows are returned to Three Elk Creek approx. 0.4 miles downstream from the Mountain Ditch headgate at a Pt. in the SE1/4 NE1/4 of Sec. 27, T. 13 S., R. 79 W., 6th P.M., 1,792 ft. from the N. Sec. line and 997 ft. from the E. Sec. line of said Sec. 27; UTM NAD83, Zone 13S, 4305603 meters Northing, 395523 meters Easting. See "Confluence Pt." on **Exhibit 1**. Based upon knowledge of persons familiar with development of Three Elk Estates, the flow-through operation has occurred more-or-less continuously since the Mountain Ditch ponds were constructed. Operational practice of flow-through predates the CWCB's instream flow water right on Three Elk Creek decreed in Case No. 80CW71, Water Division 2. Pursuant to C.R.S. §37-92-102(3)(b), Applicants request that all of the CWCB's instream flow rights are subject to the Mountain Ditch, Mountain Ditch Ponds Enlargement Approp. and practice in existence prior to Approp. of the instream flow rights.

5. Change of Water Right: Name of Structure: Mountain Ditch. Original and all Relevant Subsequent Decrees: The Mountain Ditch priorities were decreed on 6/19/1890 in Civil Action 1127, in the District Court of Chaffee County, Colorado. Decreed Legal Description of Structure: See paragraph 3.4 of Application. Decreed Source of Water: Three Mile Creek (a.k.a. "Three Elk Creek"), trib. to the Arkansas

River. Approp. Dates and Total Amounts Decreed to Priority: Priority 146, 10/1/1885, 1.00 c.f.s. Priority 165, 8/25/1887, 1.44 c.f.s. Decreed Use: Irr. of 160 acres (proposed). Hist. Place and Amount of Use: The general location of the hist. irrigated area is shown on **Exhibit 1**, which depicts approx. 60 irrigated acres. A table of the hist. river headgate diversions at the Mountain Ditch, provided by Water Commissioner's Field Books, Division of Water Resources Annual Diversion Reports, Applicants' records and CDSS, is attached as **Exhibit 3**. Changed Uses: Applicants seek to: 1) add pisc., fish and wildlife habitat, and fire prot. uses through storage in the Mountain Ditch Ponds; 2) add aug. use for of out-of-priority storage in the Mountain Ditch Ponds and replacement of out-of-priority evap. from the Mountain Ditch Ponds and Mountain Ditch surface areas; 3) add replacement use for hist. return flows from the Mountain Ditch resulting from this change; and, 4) add irr. through storage in the Mountain Ditch Ponds to the existing decreed directflow irr. use of these priorities. Applicants also seek to designate or change the location of lands hist. irrigated by these priorities to include lands both below and above the ditch. After this change, future irr. uses under these priorities will be limited to no more than 10.0 acres in the S1/2 of the NE1/4 and E1/2 of the NW1/4 of Sec. 27, T. 13 S., R. 79 W., 6th P.M. and more particularly identified as Lots 29 through 34 on **Exhibit 1**. Detailed Description of Change of Use: Since construction of the Mountain Ditch Ponds on or about 1973, there has been a reduction in the area irrigated under the Mountain Ditch. Applicants seek to change both the type of use to add pisc., fish and wildlife habitat, and fire prot. uses through storage in the Mountain Ditch Ponds, aug. of out-of-priority storage in the Mountain Ditch Ponds, and replacement of Mountain Ditch hist. return flows to the decreed irr. use of these priorities, and to change the manner of use from direct flow to include storage rights. Applicants estimate hist. consumptive use from the Mountain Ditch irr. averaged 26.7 a.f./yr based upon diversion records included in **Exhibit 3**. The Mountain Ditch Ponds are presently unlined and are located within the hist. irr. place of use of the Mountain Ditch priorities. Applicants claim that seepage from the Mountain Ditch Ponds replicates hist. groundwater return flows. Applicants estimate the annual gross evap. from the surface areas of the Mountain Ditch Ponds is 2.1 a.f./yr (excluding Dec. through Feb. for icing conditions) and annual gross evap. from the surface of the Mountain Ditch is 0.3 a.f./yr (excluding Dec. through Feb. for icing conditions). Applicants estimate up to 10.0 acres of irr. will consume 19.0 a.f./yr at an annual consumptive irr. requirement of 22.83 inches per year. Applicants estimate that from time-to-time it may be necessary to fill or refill the collective 3.3 a.f. Mountain Ditch pond volume. Total projected depletions from pond evap., ditch evap., irr. and pond filling are estimated at up to 24.7 a.f./yr.

6. Plan for Aug.: Applicants request approval of a plan for aug. described as follows: Name of Structures to be Augmented: The Mountain Ditch Ponds described herein and the Mountain Ditch, Mountain Ditch Ponds Enlargement described herein. Water Rights to be Used for Aug.: Consumptive use credits available to Applicants from the dry-up of hist. irrigated areas under the Mountain Ditch priorities as described herein, and water released from Mountain Ditch Ponds

as described herein. Detailed Description of Plan for Aug.: To the extent not included in the change of use of the Mountain Ditch priorities above, this plan for aug. replaces out-of-priority depletions to fill the Mountain Ditch Ponds for the beneficial uses described herein, to replace out-of-priority evap. depletions from the surface areas of the Mountain Ditch and Mountain Ditch Ponds in order to allow the Mountain Ditch Ponds to be refilled and flowed through with the Mountain Ditch, Mountain Ditch Ponds Enlargement to maintain them full for these beneficial uses. When the hist. consumptive use credits from the Mountain Ditch priorities are not available for storage in the Mountain Ditch Ponds or to replace out-of-priority depletions from operation of the augmented water rights during a valid downstream call, water may continue to be diverted under the Mountain Ditch, Mountain Ditch Ponds Enlargement at up to 0.5 c.f.s. to maintain freshening flows so long as water is released from the Mountain Ditch Ponds in an amount equal to gross evap. from the surface area of the Mountain Ditch and Mountain Ditch Ponds. Estimated gross evap. is summarized in the table below and totals 40.75 inches.

Gross Monthly Evap. (ft)											
Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
0.03	0.10	0.20	0.31	0.42	0.53	0.54	0.44	0.37	0.26	0.14	0.05

Name and Address of Landowner upon which any New or Modified Diversion or Storage Structure is Located: The Mountain Ditch Ponds are each located on a single property owned by one of the Applicants. The headgate of the Mountain Ditch is located on property owned by Mt Columbia Elk Estates Assoc, c/o Three Elk Creek Estates, Po Box 110, Buena Vista, CO 81211.

THE WATER RIGHTS CLAIMED BY THE FOREGOING APPLICATION(S) MAY AFFECT IN PRIORITY ANY WATER RIGHTS CLAIMED OR HERETOFORE ADJUDICATED WITHIN THIS DIVISION AND OWNERS OF AFFECTED RIGHTS MUST APPEAR TO OBJECT AND PROTEST WITHIN THE TIME PROVIDED BY STATUTE, OR BE FOREVER BARRED.

YOU ARE HEREBY NOTIFIED that any party who wishes to oppose an application, or application as amended, may file with the Water Clerk a verified statement of opposition setting forth facts as to why the application should not be granted, or why it should be granted only in part or on certain conditions, such statement of opposition must be filed by the last day of February 2020, (forms available at Clerk's office or at www.courts.state.co.us, after serving parties and attaching a certificate of mailing, filing fee \$192.00). The foregoing are resumes and the entire application, amendments, exhibits, maps and any other attachments filed in each case may be examined in the office of the Clerk for Water Division No. 2, at the address shown below.

Witness my hand and the seal of this Court this 8th day of January, 2020.

Michele Sartorius



(Court seal)
Published:

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District Court, Water Div. 2
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