



STATE OF
COLORADO

Ebert - DNR, Jared <jared.ebert@state.co.us>

Re: Timnath Pit Substitute Water Supply Plan M1989-056

Comaniciu - DNR, Ioana <ioana.comaniciu@state.co.us>

Mon, Mar 11, 2019 at 4:22 PM

To: Michael Hein <michael.hein@state.co.us>, Mark Simpson - DNR <mark.simpson@state.co.us>

Cc: Jared Ebert - DNR <jared.ebert@state.co.us>

Please see attached SWSP approval for the Timnath Pit to cover shortfall depletions that were not replaced under the decree in case no. 2004CW006 for the period of November 2018 through March 2019.

Thanks Ioana

Ioana Comaniciu, P.E.
Water Resources Engineer



COLORADO

Division of Water Resources

Department of Natural Resources

P 303-866-3581 x 8246

1313 Sherman St., Suite 818, Denver, CO 80203

ioana.comaniciu@state.co.us | www.water.state.co.us

On Tue, Feb 26, 2019 at 5:14 PM Comaniciu - DNR, Ioana <ioana.comaniciu@state.co.us> wrote:

Hello Mike and Mark,

Attached for your review is a SWSP for the Timnath Pit to cover shortfall depletions that were not replaced under the decree in case no. 2004CW006 for the period of November 2018 through March 2016. The replacement water source for this shortfall is fully consumable water leased from the City of Fort Collins. Please let me know if you have any concerns.

Ioana Comaniciu, P.E.
Water Resources Engineer



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Approval 3384.pdf

306K

March 11, 2019

Mr. Paul Weiss, P.E.
Williams and Weiss Consulting, LLC
5255 Ronald Reagan Blvd, Ste. 220
Johnstown, CO 80534

Re: Timnath Pit Substitute Water Supply Plan (Plan ID 3384, WDID 0302539)
Case no. 2004CW006
Timnath Pit, DRMS File No. M-1989-056 (WDID 0303033)
SW ¼ Sec. 11 & N ½ N ½ Sec. 14, T6N, R68W, 6th P.M.
Water Division 1, Water District 3, Larimer County

Approval Period: March 11, 2019 through February 29, 2020
Contact Information for Mr. Weiss: 970-221-5159; pswwater@msn.com

Dear Mr. Weiss:

We have reviewed your letter of January 31, 2019, regarding your request for approval of a substitute water supply plan ("SWSP") on behalf of Don Kehn Construction ("DKC" or "Applicant") in accordance with § 37-90-137(11), C.R.S. to cover depletions caused by gravel mining operations at the Timnath Pit (M-1989-056). The required fee of \$257.00 for this substitute supply plan has been submitted (receipt no. 3690526). This plan was most recently approved on June 25, 2007 for operations through April 30, 2009. Since 2015, this site has been included in the Don Kehn Construction, Inc. augmentation plan decreed in Division 1 water court case no. 2004CW0006.

SWSP Operation

DKC operates this site and provides aggregate for asphalt and concrete paving plants on the site. The Timnath Pit is located in the SW ¼ of Section 11 and the N ½ of the N ½ of Section 14, Township 6 North, Range 68 West of the 6th P.M. Evaporative depletions and consumptive use associated with removal of aggregate material and ground water pumped for mining operations such as dust control and washing at the Timnath Pit are replaced under the plan for augmentation decreed in Division 1 water court case no. 2004CW006 (WDID 0302539). The replacement water source used in the decreed plan for augmentation consists of 3.5 shares out of a total of 64 Box Elder Ditch shares owned by DKC. In the decree in case no. 2004CW006, the Applicant's 3.5 shares Box Elder Ditch shares were changed to be used in addition to irrigation for augmentation, industrial, and commercial uses. Replacements of depletions at the site are being made via delivery of Box Elder Ditch shares to an on-site recharge pond. Due to inadequate Box Elder Ditch shares diverted into the recharge pond during the 2018 irrigation season, the lagged accretions were insufficient to offset the Timnath Pit depletions. Therefore, this SWSP is requested to allow DKC to use leased water from the City of Fort Collins as a supplemental replacement source to replace depletions not already replaced by the Box Elder Ditch shares' recharge accretion credits.



Depletions

According to the accounting for case no. 2004CW006 there was a shortfall of replacement supplies in the months of November and December 2018 of 0.62 acre-feet and 1.14 acre-feet respectively. In addition, projected shortfalls through March 2019 will total an additional 6 acre-feet, for a total shortfall of approximately 7.76 acre-feet for the non-irrigation period of November 2018 through March 2019.

Replacements

As mentioned above DKC owns 3.5 shares of the Box Elder Ditch Company, which was changed in case no. 2004CW006. The 3.5 shares of the Box Elder Ditch Company were historically used to irrigate on average 159.91 acres on DKC's property located in the SW $\frac{1}{4}$ of Section 11 and the N $\frac{1}{2}$ of the N $\frac{1}{2}$ of Section 14, Township 6 North, Range 68 West of the 6th P.M. Based on a farm irrigation efficiency of 50 percent and a ditch loss of 15 percent the court found that the average annual consumption associated with the historical use of the 3.5 shares was 142.6 acre-feet. The decree in case no. 2004CW006 limits the diversion season from April 1 through October 31. In addition, the decree in case no. 2004CW006 limits the maximum monthly and annual volumetric delivery to the amounts shown in the table below. In addition, during any consecutive thirty-year period, total deliveries were limited to 8,557.5 acre-feet.

| Maximum monthly and annual delivery limits in acre-feet | | | | | | | | |
|---|-------|-------|-------|-------|------|-----|-------|-------------|
| Apr | May | Jun | Jul | Aug | Sep | Oct | Total | Thirty-Year |
| 15.5 | 114.8 | 117.7 | 125.4 | 101.1 | 41.3 | 3.2 | 389.2 | 8,557.5 |

Paragraph 15.6 of the decree in case no. 2004CW006 requires that 25% of the daily diversions attributable to Applicant's 3.5 shares of the Box Elder Ditch Company be delivered to the Cache La Poudre River to meet the return flow obligations. The remainder of 75% of the daily diversion attributable to Applicant's 3.5 shares of the Box Elder Ditch Company shall be delivered to the recharge pond or a storage pond.

The shares will be diverted again beginning in April of 2019 into a recharge pit located on the Timnath Pit site.

For the portion of the replacement obligations not met by the recharge accretion credits water, DKC will use reusable effluent leased from the City of Fort Collins ("Fort Collins"). A copy of the lease agreement with Fort Collins was provided on February 26, 2019 and is attached to this letter. The lease agreement is for a total of 8.1 acre-feet to make up for shortfall that occurred or will occur during the months of November 2018 through March 2019, which will be released to the Cache La Poudre River according to the following schedule:

February 2019

February 4-February 8: 1.5 acre-feet
February 11-February 15: 1.5 acre-feet
February 18-February 22: 1.4 acre-feet
February 25-February 28: 1.4 acre-feet

March 2019

March 4-March 8: 1.2 acre-feet
March 11-March 15: 1.1 acre-feet

Under the lease, water will be delivered to the confluence of the Foothills Outfall Channel and the Cache la Poudre River in the NW ¼ of the NW ¼ of Section 34, Township 7 North, Range 68 West, 6th P.M. (just below Rigden Reservoir) upstream of the Timnath Pit site. Fort Collins' Fully Consumable Water will be attributable to the water that was previously stored in Rigden Reservoir (WDID 0303326) under the decree in case no. 2014CW3158. Fort Collins may select to use to deliver other water as defined to those listed in Exhibit B of the agreement.

The accounting must continue to be done in compliance with the 2004CW006 decree, except that the leased Fort Collins water will need to be included in the accounting.

Conditions of Approval

I hereby approve this substitute water supply plan, in accordance with § 37-90-137(11), C.R.S., subject to the following conditions:

1. This plan is approved with an effective date of March 11, 2019 and shall be valid through February 29, 2020 unless otherwise revoked or superseded by a decree. If this plan will not be made absolute by a water court action by the plan's expiration date, a renewal request must be submitted to this office with the statutory fee (currently \$257) no later than **December 1, 2019**.
2. This SWSP allows for the use of leased water from the City of Fort Collins as replacement water for the augmentation plan decreed in case no. 2004CW006. All water used for replacement purposes under this SWSP must be decreed for augmentation. The SEO must first approve any additional uses for which the water may be used. The replacement water, which is the subject of this SWSP, cannot be sold or leased to any other entity during the term of this SWSP without prior approval of the division engineer.
3. If any term or condition of this SWSP conflicts with any of the terms and conditions of the augmentation plan decreed in case no. 2004CW006, the terms and conditions of the augmentation plan shall control.
4. The accounting must be submitted in accordance with the terms and conditions of case no. 2004CW006. In addition, the Applicant shall verify that the entity making additional replacements has included the Applicant on their accounting and submitted their accounting to the division office and the water commissioner; for this SWSP, that entity is the City of Fort Collins.
5. The Applicant shall notify the District 3 water commissioner of the specific replacement supplies that will be used at least 48 hours prior to commencement of using the replacement water.
6. The name, address, and phone number of the contact person who will be responsible for the operation and accounting of this SWSP must be provided with the accounting forms to the division engineer and water commissioner.
7. All diversions shall be measured in a manner acceptable to the division engineer. The Applicant shall install and maintain measuring devices as required by the division engineer for operation of this SWSP.

8. Conveyance loss for delivery of augmentation water to the Cache La Poudre River is subject to assessment and modification as determined by the division engineer.
9. The amount of water made available under this SWSP shall only be included as a source of water for replacement of depletions in any projection required by the augmentation plan decree for the term of the approval of this SWSP, or the term of the agreement or other document which evidences the Applicant's right to use the water rights for augmentation, whichever is shorter.
10. The division engineer, or his designated representative, will administer all such water transported in the South Platte River or its tributaries under this SWSP, including water for replacement of depletions, past intervening headgates to ensure that such water is not intercepted or otherwise diminished in quantity by diversion, use or other interference by intervening water rights and to assure that such water remains available and suitable for Applicant's uses under this SWSP, except when any intervening headgate is diverting the entire flow of ("sweeping") the river. In the event that delivery past headgates which sweep the river requires the installation of a bypass structure or the use of an existing bypass structure by agreement with a third-party, Applicant is responsible for either installing a new bypass structure with a continuous recording measuring device(s) as approved by the water commissioner or securing an agreement with a third-party to use an existing bypass structure and providing such information and agreement to the division engineer.
11. The Division of Water Resources will not be responsible for any enforcement or administration of third party agreements that are not included in a decree of the water court.
12. Replacement water shall be made available to cover all out-of-priority depletions in time, place, and amount and shall be made available under the direction and/or approval of the water commissioner.
13. The State Engineer may revoke this SWSP or add additional restrictions to its operation if at any time the State Engineer determines that injury to other vested water rights has occurred or will occur as a result of the operation of this SWSP. Should this SWSP expire without renewal or be revoked prior to adjudication of a permanent plan for augmentation, all use of water under this SWSP must cease immediately.
14. In accordance with amendments to § 25-8-202(7), C.R.S., and "Senate Bill 89-181 Rules and Regulations" adopted on February 4, 1992, the State Engineer shall determine whether the substitute supply is of a quality to meet requirements of use to which the senior appropriators receiving the substitute supply has normally been put. As such, water quality data or analysis may be requested at any time to determine if the requirement of use of the senior appropriator is met.
15. The decision of the state engineer shall have no precedential or evidentiary force, shall not create any presumptions, shift the burden of proof, or serve as a defense in any pending water court case or any other legal action that may be initiated concerning this plan. This decision shall not bind the state engineer to act in a similar manner in any other applications involving other plans, or in any proposed renewal of this plan, and shall not imply concurrence with any findings of fact or conclusions of law contained herein, or with the engineering methodologies used by the Applicant.

Should you have any questions or comments, please contact Michael Hein in Greeley at 970-352-8712 or Ioana Comaniciu in Denver at 303-866-3581.

Sincerely,



for Jeff Deatherage, P.E.
Chief of Water Supply

Attachments: City of Fort Collins Lease Agreement

Ec: Michael Hein, Lead Assistant Division Engineer, Michael.Hein@state.co.us
810 9th Street, Suite 200, Greeley, CO 80631, (970) 352-8712

Mark Simpson, Water Commissioner, Water District 3, Mark.Simpson@state.co.us

Louis Flink, Tabulation/Diversion Records Coordinator, Louis.Flink@state.co.us

Jared Ebert, Division of Reclamation, Mining and Safety, Jared.Ebert@state.co.us

**AGREEMENT FOR THE RENTAL OF THE USE OF
CERTAIN FULLY CONSUMABLE WATER OF THE CITY OF FORT COLLINS**

This Agreement, dated January 28, 2019 is entered into by and between the following Parties: the City of Fort Collins, Colorado, a municipal corporation ("City"); and Don Kehn Construction, Inc., a Colorado corporation ("Renter").

Recitals

- A. The City owns and operates a municipal water supply system and various water rights and contractual and other rights to use water ("City Water Interests"). Water attributable to some of the City Water Interests can be used, reused, and/or fully consumed for various uses pursuant to the terms and conditions of their respective decrees, contracts, and other controlling documents ("City Fully Consumable Water").
- B. Pursuant to Article XII, Section 4 of the City Charter, if at any time the water supply is greater than the immediate needs of the City and its inhabitants, the Council may authorize the City Manager to permit the use of such surplus water by consumers outside the city at such rates as the Council may prescribe; provided that no vested right shall accrue under such permits.
- C. The City Manager, Utilities Executive Director, and their designees have been duly authorized by the City Council to rent the use of such surplus City Fully Consumable Water.
- D. Renter desires to rent the use of a certain amount of City Fully Consumable Water for the period of time and the uses defined below ("Subject Water").
- E. The City has determined that the City's water supply is currently greater than the immediate needs of the City and its inhabitants such that the Renter can use the Subject Water pursuant to the terms and conditions of this Agreement, which will benefit the City.

Agreement

- 1. **INCORPORATION OF RECITALS.** The Recitals set forth above are hereby incorporated into this Agreement as if fully set forth herein.
- 2. **RENTAL OF THE USE OF THE SUBJECT WATER.** The City agrees to deliver the Subject Water to Renter pursuant to the terms and conditions of this Agreement.
 - 2.1. **Volume.** The City agrees to deliver up to 8.1 acre-feet of the Subject Water to the Delivery Point (defined below) during the term of this Agreement. Renter shall have no rights to the Subject Water or any City Fully Consumable Water not delivered to Renter during the term of this Agreement.

2.2. **Approved Uses.** Renter shall only use the Subject Water delivered under this Agreement for the following uses: 2004CW6. Renter shall not be entitled to claim or use any return flows from the above-described use.

2.3. **Delivery Requests.** The City will deliver the Subject Water pursuant to the schedule attached hereto as Exhibit A. Deliveries will be made in increments of 0.1 acre feet. The City reserves the right to not make requested deliveries if such deliveries would not be beneficially used by Renter and result in waste (such as, by way of example and not limitation, deliveries of water for augmentation use may not be made during a free river period when depletions need not be augmented).

2.4. **Delivery Point.** The requested volume of the Subject Water will be delivered to the "Delivery Point", being: the confluence of the Foothills Outfall Channel and the Cache la Poudre River in the NW1/4 of the NW1/4 of Section 34, Township 7 North, Range 68 West, 6th P.M. (just below Rigden Reservoir. The City will bear any transit losses assessed on the delivery of the Subject Water to the Delivery Point. Renter shall bear any transit losses on the conveyance of the Subject Water from the Delivery Point downstream.

2.5. **Source of City Water.** The City Fully Consumable Water will be attributable to the City Water Interests that are lawfully available for the Renter's use as defined above including, but not necessarily limited to those listed in Exhibit B. The City shall have the sole discretion to select which City Water Interest to use to deliver the Subject Water to Renter.

2.6. **Force Majeure.** In the event that the City cannot deliver the City Fully Consumable Water to the Delivery Point due to circumstances beyond its control, the City will deliver the water to the Delivery Point as soon as practicable, but shall have no obligation to the Renter for the delay in such deliveries.

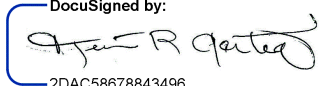
2.7. **Ownership and Assessments.** This Agreement only authorizes Renter to use the City Fully Consumable Water delivered to Renter pursuant to the terms and conditions herein. The City retains all ownership of the underlying City's Water Interests. In the event the City cannot make the Subject Water available to the Renter for the uses described herein due to circumstances beyond its control, including administrative interpretations or actions by the Colorado Water Division of Water Resources, the City shall have no obligation to Renter.

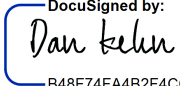
2.8. **Accounting.** The City will account for such deliveries to the Delivery Point in the City's accounting and report the same to the State Engineer's Office on a monthly basis. The City shall have no obligation related to the accounting or other obligations associated with the Renter's use of the City Fully Consumable Water. Upon request by Renter, the City will provide Renter with information on the specific City Water Interests used to deliver water to Renter under this Agreement provided, however, that the City shall have no obligation to provide such information to Renter until the City has submitted its final accounting for the subject time period to the Division Engineer for Water Division 1.

3. **PAYMENT.** Simultaneously with the execution of this Agreement, Renter has paid the City \$3,240 for the rental of the use of the Subject Water, consistent with the rates established by City Council pursuant to Article XII, Section 6 of the City Charter. Said payment is nonrefundable.
4. **TERM.** The term of this Agreement shall be from the above date through March 31, 2019.
5. **ASSIGNMENT AND TRANSFER.** This Agreement shall not be transferred or assigned by either Party without written approval of the other Party.
6. **NO THIRD-PARTY BENEFICIARIES.** This Agreement is entered into between the Parties for the purposes set forth herein. It is the intent of the Parties that they are the only beneficiaries of this Agreement and the Parties are only benefitted to the extent provided under the express terms and conditions of this Agreement.
7. **COLORADO LAW.** The Agreement shall be governed by the laws of the State of Colorado, insofar as any matter is not regulated by applicable laws of the United States.
8. **ENTIRE AGREEMENT.** The making, execution and delivery of this Agreement by the Parties has been induced by no representations, statements, warranties or agreements other than those expressed in this Agreement. This Agreement embodies the entire understanding of the Parties as to the subject matter hereof and there are no further or other agreements or understandings, written or oral, in effect between the Parties relating to its subject matter unless expressly referred to in this Agreement. Modification of this Agreement by the Parties may be made only by a writing signed by the Parties.

FORT COLLINS UTILITIES

RENTER

By:  2/7/2019
2DAC58678843496...
Kevin R. Grogg
Utilities Executive Director

By:  2/4/2019
B48F74FA4B2F4CC...
Dan Kehn
Don Kehn Construction

Approved as to Form:


 1/28/2019
9E5FF2B5502D4FC... Office
Eric Potyondy

EXHIBIT A
(Delivery Schedule)

February 2019

February 4 – February 8 – 1.5 acre-feet
February 11 – February 15 – 1.5 acre-feet
February 18 – February 22 – 1.4 acre-feet
February 25 – February 28 – 1.4 acre-feet

March 2019

March 4 – March 8 – 1.2 acre-feet
March 11 – March 15 – 1.1 acre-feet

EXHIBIT B
(City Water Interests)

The City Fully Consumable Water delivered under this Agreement will be attributable to the City Water Interests that are lawfully available for the Renter's use as defined above including, but not necessarily limited to, the following:

| <u>Water Interest Name</u> | <u>Decree References¹ and Notes</u> |
|---|--|
| Arthur Irrigation Company Shares or Effluent | Case No. 1992CW129; Case No. 2005CW323 |
| Colorado-Big Thompson Project Water | Attributable to North Poudre Irrigation Company Shares and allotment contracts with the Northern Colorado Water Conservancy District |
| Halligan Reservoir Enlargement Water Right | Case No. 2013CW3185 |
| Joe Wright Reservoir Water Rights | Case No. W-9322-78 |
| Larimer County Irrigating Canal No. 2 Company Shares and Effluent | Case No. 1992CW129; Case No. 2005CW323 |
| Michigan Ditch Water Rights and Effluent | Case No. W-1424; Case No. 1988CW206 |
| New Mercer Ditch Company Shares and Effluent | Case No. 1992CW129; Case No. 2005CW323 |
| North Poudre Irrigation Company Shares | Multiple Use Portion |
| Rigden Reservoir and Effluent | Case No. 2014CW3158 |
| Warren Lake Reservoir Company Shares and Effluent | Case No. 1992CW129; Case No. 2005CW323 |
| Water Supply Storage Company Shares and Effluent | Case No. 1992CW129; Case No. 2005CW323 |
| Windy Gap Units and Effluent | Case No. W-9322-78 |

¹ The decrees identified in the table are for reference purposes only and are not intended to be a comprehensive list of all relevant decrees.