

Colorado Water Conservation Board's Amended Comprehensive Findings of Fact
 Board of County Commissioners of Pitkin County
 Case No. 5-10CW305
 January 27, 2014

I. The Colorado Water Conservation Board (Board) submitted Comprehensive Findings of Fact to the Court for Case No. 5-10CW305 after deliberation in public meetings held on July 12 and 21, 2011. Subsequently, the Applicant significantly revised its proposed decree for a Recreational In-Channel Diversion (RICD) water right in the subject case. Considering the specific amounts and activities as claimed in the revised proposed decree dated January 15, 2014, and after deliberation in a public meeting held on January 27, 2014, the Board makes the following amended findings about the proposed RICD:

a. The Board must consider whether the adjudication and administration of the RICD water right would materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements. The Board makes the finding that there remains unallocated Colorado River apportionment available for consumptive beneficial use within Colorado. The Board also finds that the adjudication and administration of the proposed RICD, for the flow amounts and time periods summarized below and specified in the proposed decree, dated January 9, 2014, would not materially impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements but could have an impact on the manner, cost, and timing of such development:

Period	Flow Rate (cfs)
April 15 – May 17	240
May 18 – June 10	380
June 11 – June 25	1,350
June 26 – Aug. 20	380
Aug. 21 – Labor Day	240

The Board makes the following findings about the proposed RICD for the flow amounts and time periods claimed:

i. There remains unappropriated water that Colorado could place to consumptive beneficial use upstream of the proposed RICD reach. The RICD could impair Colorado's ability to fully develop and place to consumptive beneficial use Colorado's compact entitlements under the Colorado River compact, the Upper Colorado River Basin compact, and the associated "Law of the River" upstream of the proposed RICD. However, effects on upstream compact development are significantly reduced because the Applicant has limited the flow rates sought by seeking less than 50% of the total average historic volume of stream flows for the RICD reach; therefore, the requirements of section 37-92-305(13)(f), C.R.S. (2013), no longer apply. The proposed decree also provides that Pitkin County cannot call for water under the RICD

water right if such call will not produce at least 60 cfs at the control structures. Additionally, Pitkin County has agreed to only place a call for the RICD water right when such a call will produce flows at the decreed control structures during daylight hours. Furthermore, Pitkin County has included the following terms and conditions to further reduce the RICD's ability to call, as well as reduce the RICD's impact on upstream compact development:

24.F. Pitkin County shall not place a call on, and the water right decreed herein shall be administered as subordinate in priority to up to 3,000 acre-feet of depletions between April 15 and Labor Day (the latest date for Labor Day being September 7) ("RICD Season") on the Roaring Fork River and its tributaries that (a) have point(s) of diversion upstream from the Pitkin County River Park Project stream reach, (b) are not senior to the water right decreed herein by virtue of their year of filing, appropriation dates, or both, and (c) are decreed by the Water Judge for Water Division No. 5 based upon applications filed between January 1, 2011 and the fifteenth anniversary of the entry of the decree herein ("Fifteenth Anniversary"). The following procedures shall be used to identify the water rights that are included in this subordination:

- (i) The RICD Season volume of water assigned to a decreed water right for purposes of inclusion in the subordination shall be either (a) the volume of a water right in acre-feet specifically decreed for diversion and storage, refill of such storage, and refill to replace evaporation loss from such storage, during the RICD Season or (b) the RICD Season volume of depletions in acre-feet expressly authorized by the decree for a direct flow water right or, if no depletion volume is expressly authorized by the decree, the RICD Season volume obtained by (i) multiplying the decreed diversion rate in cubic feet per second (cfs) times 1.98 (to convert cfs to acre-feet) times 143 days per RICD Season, or (ii) dividing the decreed diversion rate in gallons per minute (gpm) by 449 (to convert gpm to cfs) and then multiplying the result times 1.98 (to convert cfs to acre-feet) times 143. Water rights decreed as non-consumptive as to the upstream terminus of the Pitkin County River Park Project stream reach shall be included in the subordination and shall be assigned a RICD Season diversion volume of zero.
- (ii) On or before April 15 of each year, Pitkin County shall prepare and file with the Division Engineer a summary of all the water rights decreed in the preceding calendar year that meet the requirements of paragraph 24.F. above, all of which will be included in the subordination, as well as a summary of all decreed water rights included in the subordination for all prior years beginning 2011. The summary shall include the identity of each water right by decree number, name, and the annual volume of water assigned to each water

right for purposes of the subordination. Pitkin County shall serve the summary on counsel of record for all opposers herein or any other person or entity requesting a copy of the summary; in addition, such summary shall be provided to all those who are on the Water Division No. 5 SWSP notice network. The opposers and any other person or entity, whether a party to this proceeding or not, shall have 45 days within which to file objections to the summary with the Division Engineer. If no objections are filed, the summary shall be deemed final for purposes of the subordination for that year, except as otherwise provided in subparagraph (iii) below. If objections are filed and the parties are unable to resolve the objections, any party may file a petition with the Water Judge to hold a hearing to resolve objections.

- (iii) After the 3,000 acre-feet per RICD Season limit on the subordination is reached or all applications filed between January 1, 2011 and the Fifteenth Anniversary are decreed or otherwise disposed of, whichever occurs first, no further action by Pitkin County shall be required under subparagraph (ii) above. For purposes of administration, the priority date for water rights decreed herein shall be the earlier of the date of when the RICD Season limit is reached or the Fifteenth Anniversary. In the event that the 3,000 acre-feet RICD Season limit is reached by virtue of a water right that will exceed the 3,000 acre-feet RICD Season limit if included in its entirety, only that portion of the water right needed to bring the RICD Season limit to 3,000 acre-feet shall be included in the subordination, and the remaining portion of the water right shall be administered as junior to the Pitkin County RICD water right. If any conditional water rights included within the subordination are thereafter canceled by the Water Judge or otherwise abandoned prior to the Fifteenth Anniversary, Pitkin County shall notify the Division Engineer and the opposers of the identity and RICD Season volume of diversions of the additional water rights to be included in the subordination, if any, determined using the criteria in subparagraph (i) above, as a result of any such cancelation of conditional water rights or abandonment.
- (iv) After the Fifteenth Anniversary or when the 3,000 acre-feet RICD Season limit is reached, whichever is earlier as provided herein, and pursuant to section 37-92-103(10.3), C.R.S. (2013), the presumption that there will not be material injury to the Pitkin County RICD water right from subsequent appropriations or changes of water rights by any individual water right appropriations or water right changes shall be determined in accordance with the provisions of section 37-92-103(10.3).

- (v) After the Fifteenth Anniversary or when the 3,000 acre-feet limit RICD Season limit is reached, whichever is earlier as provided herein, Pitkin County shall notify the Water Court, the Division Engineer, and the opposers that no further action by Pitkin County shall be required under subparagraph (ii) above, and that the priority date for purposes of administration has been established pursuant to subparagraph (iii) above, subject to the cancellation or abandonment of conditional water rights prior to the Fifteenth Anniversary as allowed by subparagraph (iii) above.

Given these terms and conditions, the Board finds that the RICD will not materially impair the ability of the State of Colorado to consumptively use its compact entitlements.

- ii. In the case of compact curtailment under the "Law of the River", it may be necessary to exchange water through the proposed RICD reach in order for the beneficiaries of post-compact water rights to realize necessary beneficial use of water yielded from pre-compact water rights or other water sources not affected by compact administration. Such exchanges could allow benefitted post-compact water rights to continue to divert during a compact curtailment. To address this factor, the Board finds that the following condition is an acceptable provision in the proposed decree:

24.C. During any period identified by the Upper Colorado River Commission in a finding issued pursuant to Article VIII(d)(8) of the Upper Colorado River Basin Compact of 1948 for curtailment of Colorado River basin water uses within Colorado, which the State of Colorado has agreed to implement in a manner that impacts water diversions within Water Division 5, the Pitkin County RICD water right will be administered in accordance with the compact curtailment rules adopted by the State Engineer or such other state agency as may, in the future, be empowered to adopt rules or otherwise act to assure compliance with interstate water compacts that are then in effect, if any, including any such rules intended to avoid, delay, or limit the severity of such a compact curtailment. If no such compact curtailment rules are then in effect, Pitkin County shall not exercise the Pitkin County RICD water right during the period of any such Compact curtailment. The Pitkin County RICD water right shall be administered in accordance with any rules promulgated by the State of Colorado related to Colorado River compact compliance. The Pitkin County RICD water right decreed herein is not intended to materially impair the ability of Colorado to fully develop and place to consumptive beneficial use those waters available by law and interstate compact.

- iii. The Board finds that the distance of the proposed RICD to the State line is considerable, which demonstrates that the location of the RICD will have a reduced impact on Colorado's ability to develop its compact entitlements.
 - iv. The proposed RICD is in close proximity to potentially suitable upstream points of diversion and upstream storage that may be utilized by those who would place the water to consumptive beneficial use. However; given the limitations, terms and conditions described in paragraphs I.a.i. and I.a.ii. above, the Board finds that the proposed RICD does not materially impair the ability of the State of Colorado to consumptively use its compact entitlements.
 - v. The existence of suitable downstream points of diversion for consumptive beneficial use before the water leaves the State serves as a factual basis for the Board to determine that the RICD should be granted under this factor. There are numerous potential downstream diversions and potential storage reservoirs that could be used so that the State of Colorado may fully develop and place to consumptive beneficial use its compact entitlements.
 - vi. Exchange opportunities within the State may be adversely impacted by the existence of the proposed RICD. Additionally, the Colorado River basin is over-appropriated, or "water critical" during a portion of the proposed RICD season. However, the Board finds that these impacts will be mitigated by the limitations, terms and conditions described in paragraphs I.a.i. and I.a.ii. above. Therefore, the Board finds that the proposed RICD will not materially impair Colorado's ability to fully develop and place to consumptive beneficial use its compact entitlements.
- b. The Board must consider whether the exercise of the proposed RICD would cause material injury to existing instream flow (ISF) water rights. The Board makes the following findings about the proposed RICD regarding the potential of material injury to existing ISF water rights:
- i. As summarized below, there are two existing ISF water rights held by the CWCB in or directly downstream of the proposed RICD reach. The nature and extent of these ISF water rights do not serve as a basis to deny the proposed RICD application.

CWCB Case No.	Stream	Amount (cfs)	Approp. Date	Counties
5-85CW646	Roaring Fork River	30 (10/1-3/31) 55 (4/1-9/30)	11/8/1985	Eagle & Pitkin
5-85CW639	Roaring Fork River	75 (10/1-3/31) 145 (4/1-9/30)	11/8/1985	Eagle, Garfield & Pitkin

- ii. In addition to the ISF rights above, the CWCB and Pitkin County adjudicated a change of Pitkin County's Stapleton Brothers' Ditch water right in Case No. 10CW184, allowing a portion of the water right to be

used for instream flow purposes. The stream segments in which the Stapleton Brothers' Ditch may be used for ISF purposes include the RICD reach. As a result, the Stapleton Brothers' Ditch water right may be used up to the amounts identified below, in addition to the minimum ISF amounts:

	May	June	July	Aug.	Sept.	Oct.
Maximum Flow Rate (cfs)	0.89	0.59	0.64	0.50	0.40	0.15

- iii. Should the proposed RICD be constructed, the Board finds that the proposed RICD will not affect the natural environment that the ISF water rights protect during the construction and maintenance process because the Applicant will consult with the Colorado Division of Parks and Wildlife (CPW) before and during construction and maintenance of the RICD structures to ensure that CPW finds that these actions will not injure the natural environment that the ISF water rights protect.
- c. The Board must determine whether the adjudication and administration of the proposed RICD, in the amounts claimed, would promote maximum utilization of the waters of the State. The Board makes the following findings about the proposed RICD regarding maximum utilization of waters of the State:
- i. The Board finds that there are probable future upstream junior appropriations for direct diversion or storage that may be adversely affected by the proposed RICD. However, the Board finds that these impacts will be significantly reduced by the limitations, terms and conditions described in paragraphs I.a.i. and I.a.ii. above. Given these terms and conditions, the Board finds that there should be adequate opportunity to allow upstream junior appropriations for direct diversion and storage and the proposed RICD will promote maximum utilization of the waters of the State.
 - ii. The Board finds that the proposed RICD appropriation for the flow amounts sought and the time periods specified, will promote maximum utilization. The proposed RICD may impact future changes, transfers, or exchanges of water rights from points of diversion or storage downstream of the RICD to points upstream of the RICD. However, the Board finds that these impacts will be significantly reduced by the limitations, terms and conditions described in paragraphs I.a.i. and I.a.ii. above. Given these terms and conditions, the Board finds that there is adequate opportunity to allow future changes, transfers, and exchanges of water from points located downstream of the proposed RICD to points located within or upstream of the proposed RICD.
 - iii. The Board finds that the proposed RICD appropriation promotes maximum utilization of Colorado's water resources because the Applicant has proposed a reasonable means to use, divert, capture and control the water for the RICD

- so as to minimize the call upon the river and avoid waste as described in paragraphs I.a.i. and I.a.ii. above.
- iv. The Board finds that there is a reasonable demand for the recreational activities sought for the time periods and flow rates claimed in the proposed decree dated January 9, 2014 and summarized above.
 - v. The Board finds that the proposed decree, dated January 9, 2013, has appropriate limitations upon the time of day and the time of year during which the proposed RICD would be exercised; thus promoting maximum utilization of waters of the State.
 - vi. The Board finds that the depths and individual flow rates of the proposed RICD promote maximum utilization for the flow amounts sought for the individual time periods.
 - vii. The Board finds that the frequency and duration of the requested amounts of water for the proposed RICD for the requested periods promote maximum utilization of waters of the State.
 - viii. The Board finds that the relationship of the requested individual RICD flow rates to the historic appropriated and unappropriated flow rates for each time period requested demonstrate that the proposed RICD will promote maximum utilization of Colorado's water resources.
 - ix. The Board finds that the application meets the elements of the definition of a RICD, as defined in section 37-92-103(10.3). The application has been filed by a county government, the Applicant has shown that the water will be beneficially used at the maximum flow rates claimed, and has provided evidence that there is a demand for a reasonable recreational experience.
 - x. The Board finds that the proposed RICD conserves and efficiently uses the available stream flow, and therefore promotes maximum utilization of Colorado's water resources.
 - xi. The Board finds that the RICD will work together with existing and/or future uses within the State of Colorado to promote maximum utilization of waters of the State.
 - xii. The Applicant has included descriptions of each recreational opportunity sought at each flow amount sought. The Board finds that the Applicant is seeking flow rates that are the minimum amount necessary to provide for the reasonable recreational experiences sought.
 - xiii. The Board finds that unappropriated native flows exist in the proposed RICD stream reach during the periods claimed, and the percentage of unappropriated flows claimed by the proposed RICD indicate that the proposed RICD will promote maximum utilization of waters of the State.