



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Chief
Brandy Logan, Water Resource Specialist
Stream and Lake Protection Section

DATE: May 17, 2022

AGENDA ITEM: 15 b. Final Action on Uncontested 2022 Instream Flow Appropriation: Spruce Creek (Water Division 5)

Staff Recommendation: Staff requests that the Board make the following determinations and take the following actions on the Spruce Creek appropriation identified in Table 1. The information necessary to support these determinations is contained in this memo, the recommendation letter and documentation submitted by the Bureau of Land Management, and in staff’s memo and oral presentation provided at the January 24, 2022 Board meeting.

- (1) Determine, pursuant to section 37-92-102(3), C.R.S. (2022), that for the ISF appropriation identified in Table 1:
 - (a) There is a natural environment that can be preserved to a reasonable degree with the recommended water rights, if granted;
 - (b) The natural environment will be preserved to a reasonable degree by the water available for the recommended appropriation; and
 - (c) Such natural environment can exist without material injury to water rights.
- (2) Pursuant to ISF Rule 5f., establish January 24, 2022 as the appropriation date for this water right.
- (3) Accept the provisions in the Galloway, Inc., d/b/a Blue Valley Ranch (“BVR”) Stipulation and agree to include them in any subsequent Water Court application, filings, and decree.
- (4) Request staff to work with the Attorney General’s office to file an application for this water right in water court by the end of the calendar year.

Table 1.

Div	Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus	Flow Rate cfs/ Timing
5	Spruce Creek (Increase)	Blue	Grand Summit	3.54	headwaters	a location just above the Hoagland Canal headgate	0.4 (04/15 - 06/30)

Background:

On January 24, 2022, the CWCB formed its intent to appropriate an instream flow (ISF) water right on Spruce Creek (Water Division 5). No notices to contest this appropriation were filed during the notice and comment period. The Bureau of Land Management (BLM) recommended



this stream for inclusion into the CWCB's Instream Flow and Natural Lake Level Program. Pursuant to ISF Rule 5h., this uncontested stream segment described in Table 1 is being recommended to the Board for Final Action. BVR provided a conditional letter of support to the CWCB board for the January 2022 appropriation, dependent on inclusion of certain terms and conditions on the water right as a part of the appropriation. The terms and conditions contained in the attached stipulation with CWCB staff satisfied BVR's concerns and as a result BVR supports the appropriation of the Spruce Creek ISF.

Technical Investigations

The Board was provided detailed information regarding all field data, studies, and analyses for this stream segment at its January 24, 2022 Board meeting. A brief overview of the analyses is provided below.

Natural Environment Studies

The BLM conducted field surveys on this streams and found a natural environment that can be preserved to a reasonable degree. To quantify the resources and to evaluate instream flow requirements, the recommender collected and analyzed biologic and hydraulic data. CWCB staff reviewed all analyses and prepared a recommendation for the amount of water necessary to preserve the natural environment to a reasonable degree this stream segment.

Water Availability Studies

The CWCB staff conducted an evaluation of water availability for this stream. To determine the amount of water physically available for the Board's appropriation, staff analyzed available streamflow models, and streamflow measurements. In addition, staff analyzed existing water rights and consulted with the Division Engineer's Office to identify any potential water availability problems. Staff used this information to develop a hydrograph showing the amount of water available this recommendation. Based upon its analysis, staff has determined that water is available for appropriation on this stream to preserve the natural environment to a reasonable degree without limiting or foreclosing the exercise of existing water rights.

Relevant Instream Flow Rules

5f. Date of Appropriation. The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

5h. Final Board Action on an ISF Recommendation. The Board may take final action on any uncontested Staff Recommendation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rule 5j-5q.

5i. Required Findings. Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

- (1) Natural Environment. That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.
- (2) Water Availability. That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.
- (3) Material Injury. That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of section 24-4-106(6) and (7), C.R.S. (2022).

Attachment: Blue Valley Ranch Stipulation

**BEFORE THE COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER
DIVISION NO. 5:**

**SPRUCE CREEK
(Increase)**

GRAND AND SUMMIT COUNTIES, COLORADO

**STIPULATION AND AGREEMENT BETWEEN STAFF OF THE COLORADO WATER
CONSERVATION BOARD AND GALLOWAY, INC., D/B/A BLUE VALLEY RANCH**

Staff of the Colorado Water Conservation Board (“CWCB”) and Galloway, Inc., d/b/a Blue Valley Ranch (“BVR”), by and through their respective counsel, hereby stipulate and agree as follows:

1. The staff of the CWCB recommended an instream flow water right appropriation for Spruce Creek in the amount of 0.4 cfs (4/15 – 6/30) with an upper terminus located at the headwaters in the vicinity of UTM North: 4417390.06, UTM East: 379009.02 and with a lower terminus at the Hoagland Canal headgate at UTM North: 4421229.09, UTM East: 381495.21 (“Spruce Creek ISF”). The proposed appropriation would be an increase to the existing instream flow water right on Spruce Creek decreed in Case No. 85CW645. BVR provided a conditional letter of support to the CWCB board for the January 2022 appropriation, dependent on inclusion of certain terms and conditions on the water right as a part of the appropriation. The terms and conditions below satisfy BVR such that BVR supports the appropriation of the Spruce Creek ISF.

2. BVR owns four water rights decreed to divert from Spruce Creek (three of which also have an alternate point of diversion on Spruce Creek) plus a fifth decreed water right to divert from a tributary of Spruce Creek with an alternate point of diversion on Spruce Creek. More specifically, the High Ditch (Spruce Creek), Abbett and Bennett Ditch, and Abbett and Loser Ditch were all originally decreed to divert from Spruce Creek in the proposed Spruce Creek ISF reach and all three of those water rights were later decreed an alternate point of diversion at the Hoagland Canal on Spruce Creek, which is just downstream of the lower terminus of the proposed Spruce Creek ISF reach.

3. Staff agrees to recommend that the CWCB Board modify the legal description of the lower terminus of the Spruce Creek ISF to describe a location just above the Hoagland Spruce Creek Flume, described as UTM North: 4421209.28, UTM East: 381464.83. All future proceedings regarding the Spruce Creek ISF in front of the CWCB Board shall have a reach with the lower terminus of the Spruce Creek ISF at the location just above the Hoagland Spruce Creek Flume as described above in this paragraph 3. Further, CWCB staff will recommend to the CWCB

Board that the application to the water court for the Spruce Creek ISF and any proposed ruling and decree in such water court case shall have a reach for the Spruce Creek ISF with a lower terminus just above the Hoagland Spruce Creek Flume as described above in this paragraph 3.

4. The CWCB further agrees to recommend that the CWCB Board include the following terms and conditions in any application filed with the Water Court to adjudicate the Spruce Creek ISF and in any decree entered by the Water Court for the Spruce Creek ISF:

A. The CWCB recognizes that the following are valid existing water rights that are senior to the subject instream flow water right sought¹ herein.

Structure	WDID	Decree	Appropriation Date	Amount	Uses	Source
Hoagland Canal (Spruce)	3600945	CA1390	4/25/1910	5 cfs	Irrigation	South Spruce Creek (nka Spruce Creek)
High Ditch (Spruce Cr)*	3600656	CA1277	7/15/1883	5 cfs	Irrigation	Spruce Creek
Abbett and Bennett Ditch*	3600501	CA1277	4/24/1883	3.5 cfs	Irrigation	Spruce Creek
Polly Abbett Ditch*	3600782	CA1277	5/31/1884	1 cfs	Irrigation	Abbett Gulch
Abbett and Loser Ditch*	3600502	CA1277	4/24/1883	2 cfs	Irrigation	Spruce Creek

*Indicates water right has an alternate point of diversion at the Hoagland Canal as decreed in Case No. W-2322.

The High Ditch (Spruce Creek), Abbett and Bennett Ditch, and Abbett and Loser Ditch are decreed to divert from Spruce Creek in the proposed ISF reach and all three of those water rights have a decreed alternate point of diversion at the Hoagland Canal on Spruce Creek. The Polly Abbett Ditch is decreed to divert from Abbett Gulch (tributary to Spruce Creek), but it also has an alternate point of diversion at the Hoagland Canal. In addition to being an alternate point of diversion for those four ditches, the Hoagland Canal has its own water right decreed to divert from Spruce Creek.

B. If, due to naturally occurring circumstances outside the control of BVR, changes to the natural channel of Spruce Creek occur or repairs to the Hoagland Canal Spruce Creek Flume or headgate, High Ditch (Spruce Creek) headgate, Abbett and Bennet Ditch headgate, or Abbett and Loser Ditch headgate are needed so that it becomes necessary that the headgate or diversion structure for any of these water rights be moved or relocated in order to continue diverting the decreed rights at a decreed location on Spruce Creek and the move is otherwise consistent with C.R.S. § 37-86-111, the instream flow appropriation sought herein shall not be relied upon in any way (a) to prohibit or condition any such move of the point of diversion and related diversion infrastructure, and (b) to require a change of water right associated with any move of the point of diversion.

¹ Note this will be “decreed” instead of “sought” in the decree.

- C. The CWCB will not require BVR to pay for or construct a measuring structure that would be used to administer the Spruce Creek ISF.

5. In consideration of the mutual promises contained herein, BVR agrees that upon CWCB Board approval of all CWCB staff recommendations contained herein, BVR shall not file a notice to contest the Spruce Creek ISF in the administrative proceedings, and BVR shall not oppose the Spruce Creek ISF in any Water Court proceeding to adjudicate the Spruce Creek ISF consistent herewith. Provided, however, BVR reserves the right to file a statement of opposition in any such Water Court adjudication to ensure that the CWCB remains in compliance with terms and conditions agreed upon by the parties in this Stipulation and Agreement as further described in paragraphs 3 and 4 above and 6 below.

6. The CWCB staff shall provide counsel for BVR copies of the following for the purposes of ensuring consistency with the terms and conditions of this Stipulation and Agreement: (A) the CWCB's proposed application to the Water Court to adjudicate the Spruce Creek ISF before it is filed and (B) any proposed ruling and decree proposed by the CWCB before it is filed with the Water Court. So long as BVR reasonably approves the form of the application to be filed in Water Court as being consistent with this Stipulation and Agreement, it shall not initially file a statement of opposition. However, if the draft ruling or decree is inconsistent with this Stipulation and Agreement, or if issues are raised in the proceedings that may reasonably impact BVR, BVR shall be allowed to intervene in said case to enforce the provisions of this Stipulation and Agreement and protect its interests, and CWCB shall consent to said intervention.

7. In the event the CWCB Board declines to adopt any of CWCB staff's recommendations contained herein, (a) this Stipulation and Agreement is void and BVR may late file a Notice to Contest; (b) the parties will coordinate with the CWCB Board and its Hearing Officer to schedule the deadline for prehearing statements and rebuttal statements, and schedule the prehearing conference; and (c) neither party will have waived any rights, claims or defenses as a result of this Stipulation and Agreement.

8. This Stipulation and Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns and shall be enforceable.

9. The parties shall each bear their own costs and attorneys' fees associated with this matter.

10. This Stipulation and Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

Stipulated and agreed to this 29 day of March, 2022.

OFFICE OF THE COLORADO
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