

Consent Agenda Item 1.e

March 15-16, 2023 Board Meeting

Case No. 22CW3125 (Water Division 5); Richard C. Blum Family Partnership, L.P.

Summary of Water Court Application

Application for Storage Water Right, Appropriative Rights of Exchange, Change of Water Right and 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 2023 to protect CWCB's instream flow water rights.

CWCB Instream Flow Water Rights

The CWCB holds water rights, including the following instream flow water rights in Water Division 5 in the Roaring Fork River Watershed, that could be injured by this application:

Case Number	Stream	Upper Terminus	Lower Terminus	CFS Rate (Dates)	Approp. Date
W-2656 (1975)	Hunter Creek	confl No Name Creek	confl Roaring Fork River	14 (1/1 - 12/31)	02/26/1975
W-2938 (1976)	Woody Creek	headwaters	confl Roaring Fork River	6 (1/1 - 12/31)	01/14/1976
W-2948 (1976)	Roaring Fork River	confl Difficult Creek	confl Maroon Creek	32 (1/1 - 12/31)	01/14/1976
79CW0190 (increased)	Hunter Creek	confl No Name Creek	confl Roaring Fork River	16 (1/1 - 12/31)	01/31/1979
85CW0639	Roaring Fork River	confl Fryingpan River	confl Crystal River	75 (10/1 - 3/31) 145 (4/1 - 9/30)	11/08/1985
85CW0646	Roaring Fork River	confl Maroon Creek	confl Fryingpan River	30 (10/1 - 3/31) 55 (4/1 - 9/30)	11/08/1985

Potential for Injury

- The proposed plan for augmentation and water exchange project may not replace depletions in the proper time, place, and amount, which could injure the CWCB's instream flow water rights.
- 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.
- Terms and conditions should accordingly be included in the decree entered in this case to ensure that the decreed water rights will not injure the CWCB's instream flow water rights.

- Additional terms and conditions should be included in the decree entered in this case to ensure that the decreed water rights will not injure the CWCB's water rights and flows protected on the Roaring Fork River, as decreed in Case No. 10CW184 for CWCB's interest in the Stapleton Brothers' Ditch water right.
- Additional terms and conditions should be included in the decree entered in this case to ensure that the decreed water rights will not injure the CWCB's instream water rights and flows protected on Hunter Creek, as decreed in Case No. 80CW18.

Other Objectors

Statements of Opposition were also filed by the City of Aspen and The City of Aurora, Colorado, acting by and through its Utility Enterprise.

Attorney Representing CWCB

Patrick L. Barker, Assistant Attorney General, is assigned to this case and can be contacted at patrick.barker@coag.gov, or 720-508-6297.

DIVISION 5 WATER COURT- DECEMBER 2022 RESUME

SUBSTITUTE WATER SUPPLY PLAN AND PRODUCED NONTRIBUTARY GROUNDWATER NOTIFICATION LIST

Section 37-92-308(6), C.R.S. directs the State Engineer to establish a notification list for each water division for the purpose of notifying interested parties of requests for the State Engineer's approval of substitute water supply plans ("SWSP") filed in that water division pursuant to section 37-92-308, C.R.S. The SWSP notification list is also used to provide notice of proposed water right loans to the Colorado Water Conservation Board for use as instream flows under section 37-83-105(2)(b)(II), C.R.S., notice of applications for the State Engineer's approval of interruptible water supply agreements under section 37-92-309(3)(a), C.R.S., notice of applications for fallowing-leasing pilot projects under section 37-60-115(8)(e)(II), C.R.S., notice of fire suppression ponds under section 37-80124(10)(a)(II)(E), C.R.S., and notice of storm water detention and infiltration facilities under section 37-92-602(8)(d), C.R.S.

Pursuant to Rule 17.5(B)(2) of the Rules and Regulations for the Determination of the Nontributary Nature of Ground Water Produced Through Wells in Conjunction with the Mining of Minerals, at 2 CCR 402-17 ("Rules"), the State Engineer is publishing this invitation to persons to be included on the Produced Nontributary Ground Water Notification List. According to Rule 17.5(B)(2) of the Rules, the State Engineer must establish a Produced Nontributary Ground Water Notification List for each water division within the State of Colorado for the purposes of ensuring that water users within each water division receive adequate notice of proceedings held pursuant to the Rules. In order to establish such notification list, the State Engineer is directed, in January of each year, to cause to have published in the water court resume for each water division this invitation to be included on the Produced Nontributary Ground Water Notification List for the applicable water division.

This notice is an invitation to be included on the SWSP or Produced Nontributary Groundwater notification lists. Sign up for these or other notification lists maintained by the State Engineer at: <https://dwr.colorado.gov/public-information/notification-lists>. Additional information is available on the Division of Water Resources' website at: <https://dwr.colorado.gov/>.

3. PURSUANT TO C.R.S., §37-92-302, AS AMENDED, YOU ARE NOTIFIED THAT THE FOLLOWING PAGES COMPRISE A RESUME OF THE APPLICATIONS AND AMENDED APPLICATIONS FILED WITH THE WATER CLERK FOR WATER DIVISION 5 DURING THE MONTH OF DECEMBER 2022. *The water right claimed by this application may affect in priority any water right 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.*

22CW3125 PITKIN COUNTY, COLORADO, COLORADO RIVER OR ITS TRIBUTARIES. Richard C. Blum Family Partnership, L.P., c/o Kevin L. Patrick, Esq. and John M. Sittler, Esq. Patrick, Miller & Noto, P.C., 229 Midland Ave, Basalt, CO 81621, (970) 920-1030. First Claim: For Storage Water Right Name of structure: Star Mesa Pond No. 1. Legal description: The centroid of the Star Mesa Pond No. 1 is located in Pitkin County: NW ¼ of the NE ¼, Section 22, Township 9 South, Range 85 West, of the 6th P.M. at a distance of 266 feet from the East section line and 1007 feet from the North section line (UTM X = 339511.11, UTM Y = 4347256.39, Zone 13). A map is on file with the court as Exhibit A. **Source: Run-off and precipitation occurring on-site which is tributary to Woody Creek and thence the Roaring Fork River and thence the Colorado River.** The pond will also be filled by a change of water right and consumptive use credits as described later in this application. Name and capacity of ditch used to fill reservoir: Red Mountain Ditch, Priority No. 205. Legal description of point of diversion: Pitkin County, SW ¼ of the SW ¼, Section 5, Township 10 South, Range 84 West of the 6th P.M. at a distance of 659 feet from the South section line and 763 feet from the West section line. A map is on file with the court as Exhibit B. Date of appropriation: On or before September 30, 1999, as evidenced by historical imagery. How appropriation was initiated: Survey, development of pond design, formulation of intent to appropriate water to the uses claimed and construction of pond. Date water applied to beneficial use: On or before September 30, 1999, as evidenced by historical imagery. Amount: 1.399 acre-feet, inclusive of open water surface areas, for aesthetic, piscatorial, wildlife, recreation, fire protection, and irrigation uses. Rate of diversion in c.f.s. for filling reservoir: natural precipitation and run-off, with the right to fill and refill when water is physically and legally available, and 0.0764 c.f.s. of Applicant's 0.375 c.f.s. in the Red Mountain Ditch Pr. No. 205 water right, will be stored to offset evaporative losses. Uses: Aesthetic, piscatorial, wildlife, recreation, fire protection, and irrigation as an irrigation control structure uses. Surface area of highwater line: 0.381 acres. Maximum height of dam: Under 10 feet. Length of dam: approximately 220 feet. Total capacity: 1.399 acre-feet. Active capacity: 1.399 acre-feet. Dead storage: 0.0 acre-feet. Applicant owns the land upon which the water right is located and where the water is placed to beneficial use. Remarks: The Star Mesa Pond No. 1 has historically served as an irrigation control structure for Applicant's Red Mountain Ditch water rights and will continue to do so. Second

Claim: For Storage Water Right Name of structure: Star Mesa Pond No. 2. Legal description: The centroid of the Star Mesa Pond No. 2 is located in Pitkin County: SE ¼ of the NE ¼, Section 22, Township 9 South, Range 85 West, of the 6th P.M. at a distance of 32 feet from the East section line and 2223 feet from the North section line (UTM X = 339571.37, UTM Y = 4346884.80, Zone 13). A map is on file with the court as Exhibit A. Source: Run-off and precipitation occurring on-site which is tributary to Woody Creek and thence the Roaring Fork River and thence the Colorado River. The pond will also be filled by a change of water right and consumptive use credits as described later in this application. Name and capacity of ditch used to fill reservoir: Red Mountain Ditch, Priority No. 205. Legal description of point of diversion. Pitkin County, SW ¼ of the SW ¼, Section 5, Township 10 South, Range 84 West, of the 6th P.M. at a distance of 659 feet from the South section line and 763 feet from the West section line. A map is on file with the court as Exhibit B. Date of appropriation: On or before September 30, 1999, as evidenced by historical imagery. How appropriation was initiated: Survey, development of pond design, formulation of intent to appropriate water to the uses claimed and construction of the pond. Date water applied to beneficial use: On or before September 30, 1999, as evidenced by historical imagery. Amount: 0.351 acre-feet, absolute, for aesthetic, piscatorial, wildlife, recreation, fire protection and irrigation as an irrigation control structure uses. Rate of diversion in c.f.s. for filling reservoir: natural precipitation and run-off, with the right to fill and refill when water is physically and legally available, and 0.0764 c.f.s. of Applicant's 0.375 c.f.s. in the Red Mountain Ditch Pr. No. 205 water right, will be stored to offset evaporative losses. Uses: Aesthetic, piscatorial, wildlife, recreation, fire protection, and irrigation uses. Surface area of highwater line: 0.151 acres. Maximum height of dam: Under 10 feet. Length of dam: approximately 165 feet. Total capacity: 0.351 acre-feet. Active capacity: 0.351 acre-feet. Dead storage: 0.0 acre-feet. Applicant owns the land on which the water right is located and where water is placed to beneficial use. Remarks: The Star Mesa Pond No. 2 has historically served as an irrigation control structure for Applicant's Red Mountain Ditch water rights and will continue to do so. Third Claim: For Appropriative Right of Exchange Name of structure: SM-GMT Appropriative Exchange. Location: Downstream exchange terminus: The confluence of the Colorado River and Roaring Fork River for contractual entitlements controlled by the BWCD, all as described in paragraph 48(B) of the application. Upper exchange terminus: The location of the return flows on Woody Creek. This location is estimated as being located as follows: NW ¼ of the NW ¼ of Section 23, Township 9 South, Range 85 West of the 6th P.M. at a point 785 feet from the North section line and 1,149 feet from the West section line. Source: See the water rights owned or controlled by the BWCD, all as described in paragraph 48(B) of the application. Date of appropriation: August 3, 2022. How appropriation was initiated: Field inspection, formulation of intent to apply water to beneficial use, and subsequent application to BWCD for Inclusion and Water Allotment Contract. Date water applied to beneficial use: N/A. Amount: 0.013 c.f.s., conditional. Use: Exchange to implement the plan for augmentation described in the application. A map describing the exchange reach is on file with the Court as Exhibit C. Remarks: All SM Exchanges utilize the same BWCD contract, include a portion of the Roaring Fork River and Woody Creek, and have an upstream terminus at the location of return flows on Woody Creek. Operation of an exchange with a lower terminus shall be considered operation of any other exchanges that are wholly contained within the longer exchange reach. For example, operation of the SM-GMT Appropriative Exchange shall be considered operation of both the SM-Fryingpan Appropriative Exchange and SM-Robinson Ditch Appropriative Exchange. Fourth Claim: For Appropriative Right of Exchange Name of structure: SM-Fryingpan Appropriative Exchange. Location: Downstream exchange terminus: The headgate and/or reservoir release points on the Fryingpan River described for the water rights owned or controlled by the BWCD, all as described in paragraph 48(b) of the application. Upper exchange terminus: The location of the return flows on Woody Creek. This location is estimated as being located as follows: NW ¼ of the NW ¼ of Section 23, Township 9 South, Range 85 West of the 6th P.M. at a point 785 feet from the North section line and 1,149 feet from the West section line. Source: See the water rights owned or controlled by the BWCD, all as described in paragraph 48(B) of the application. Date of appropriation: August 3, 2022. How appropriation was initiated: Field inspection, formulation of intent to apply water to beneficial use, and subsequent application to BWCD for Inclusion and Water Allotment Contract. Date water applied to beneficial use: N/A. Amount: 0.013 c.f.s., conditional. Use: Exchange to implement the plan for augmentation described in the application. A map describing the exchange reach is on file with the Court as Exhibit C. Remarks: All SM Exchanges utilize the same BWCD contract, include a portion of the Roaring Fork River and Woody Creek, and have an upstream terminus at the location of return flows on Woody Creek. Operation of an exchange with a lower terminus shall be considered operation of any other exchanges that are wholly contained within the longer exchange reach. For example, operation of the SM-GMT Appropriative Exchange shall be considered operation of both the SM-Fryingpan Appropriative Exchange and SM-Robinson Ditch Appropriative Exchange. Fifth Claim: For Appropriative Right of Exchange Name of structure: SM-Robinson Ditch Appropriative Exchange. Location: Downstream exchange terminus: The point of diversion as decreed is located on the North bank of the Roaring Fork River one-half mile below the mouth of Sopris Creek in Section 11, T. 8 S., R. 87 West, 6th P.M. (Eagle County, UTM Zone 13 NAD 83 coordinates: Northing 4359863, Easting 321622).. Upper exchange terminus: The location of the return flows on Woody Creek. This location is estimated as being located as follows: NW ¼ of the NW ¼ of Section 23, Township 9 South, Range 85 West of the 6th P.M. at a point 785 feet from the North section line and 1,149 feet from the West section line. Source: See the water rights owned or controlled by the BWCD, all as described in paragraph 48(B) of the application. Date of appropriation: August 3, 2022. How appropriation was initiated: Field inspection, formulation of intent to apply water to beneficial use, and subsequent application to BWCD for Inclusion and Water Allotment Contract. Date water applied to beneficial use: N/A. Amount: 0.013 c.f.s., conditional. Use: Exchange to implement the plan for augmentation described in the application. A map describing the exchange reach is on file with the Court as Exhibit C. Remarks: All SM Exchanges utilize the same BWCD contract, include a portion of the Roaring Fork River and Woody Creek, and have an upstream terminus at the location of return flows on Woody Creek. Operation of an exchange with a lower terminus shall be considered operation of any other

exchanges that are wholly contained within the longer exchange reach. For example, operation of the SM-GMT Appropriative Exchange shall be considered operation of both the SM-Fryingpan Appropriative Exchange and SM-Robinson Ditch Appropriative Exchange.

Sixth Claim: For Approval of Plan for Augmentation Including Change of Water Right Name of structures to be augmented: Star Mesa Pond Nos. 1 and 2, an open water surface channel between Star Mesa Pond Nos 1 and 2, and a wetland preserve with an open water surface area. Legal descriptions: Star Mesa Pond No. 1: See paragraph 3. Star Mesa Pond No. 2: See paragraph 15. An open water channel connecting Star Mesa Pond Nos. 1 and 2. A wetland open water surface feature centroid generally located as follows: SE ¼ of the NE ¼, Section 22, Township 9 South, Range 85 West of the 6th P.M. at a distance of 189 feet from the East section line and 2097 feet from the North section line (UTM X = 339524.56, UTM Y = 4346923.78, Zone 13). Water rights to be used for augmentation: Red Mountain Ditch Pr. No. 205. Date of original decree: Civil Acton No. 132, Garfield County District Court, May 11, 1889. Type of water right: Surface irrigation right. Legal description: Pitkin County, SW ¼ of the SW ¼, Section 5, Township 10 South, Range 84 West of the 6th P.M. at a distance of 659 feet from the South section line and 763 feet from the West section line. Source: Hunter Creek. Appropriation date: November 27, 1888. Amount: 13.0 c.f.s. Applicant owns an undivided 1/6 interest in 2.25 c.f.s. of this water right (0.375 c.f.s.). Amount to be included in plan for augmentation: 0.0764 c.f.s. Current use: Irrigation. Basalt Water Conservancy District ("BWCD") Allotment Contract for 2.90 acre-feet from the sources described in paragraph 48(B) of the application. Complete statement of plan for augmentation: Applicant is the owner of a 36.374 acre parcel in Star Mesa, an unplatted subdivision in Pitkin County. Historically 13.85 acres of this parcel were irrigation by the Red Mountain Ditch Pr. 205 water right. Applicant is the record owner of an undivided 1/6 interest in 2.25 c.f.s. decreed to that water right (0.375 c.f.s.). On or before September 30, 1999, the main residence and driveway and Star Mesa Pond Nos. 1 and 2 were constructed; a Guest House was constructed in 2000. Each of these footprints are located on land historically irrigated by Applicant's interest in the Red Mountain Ditch water right described above. The Star Mesa Pond Nos. 1 and 2 serve as irrigation control structure for Applicant's interest in the Red Mountain Ditch Pr. No. 205 water right and store water under their own priority. 2.18 acres of irrigated land were removed from irrigation in 1998 and an additional 0.64 acres removed in 2000, leaving 11.03 acres irrigated. The combined surface area of the Star Mesa Pond Nos. 1 and 2, and all open water features described above is approximately 1.22 acres. The Star Mesa Pond Nos. 1 and 2 will continue to be used as irrigation control structures as well as for the uses described above. Since Applicant is the owner of a portion of Priority No. 205 of the Red Mountain Ditch, the following calculations were used to estimate the diversions and historic usage of the water right owner by the Applicant: First, when the flows diverted were over 14.11 c.f.s. (the combined total of both the original construction Pr. 90 water rights and the First Enlargement Pr. 205 water right), the Applicant was entitled to 0.375 c.f.s. under its water right. If the diversions were between 1.11 c.f.s. and 14.11 c.f.s. it was assumed that the Pr. 90 water right was first satisfied and then the 1.11 c.f.s. decreed to that right was subtracted from the diversion amount. Applicant was then entitled to a proportionate amount of the diversion made under Pr. 205. From 1890 (the year water was diverted under Pr. 205) until 1998, a total of 13.85 acres were irrigated on the land belong to Applicant. After 2000, a total of 11.03 acres were irrigated as a result of the construction of the ponds, building footprints, and driveways. 0.0764 c.f.s. reflects the portion of Applicant's 0.375 c.f.s. interest in the Pr. 205 water rights which irrigated the 2.82 acres removed from irrigation. By this plan for augmentation, Applicant will fill and replace the evaporative depletions from the open water surfaces with consumptive use credits by virtue of the removal of 2.82 acres of land historically irrigated by Applicant's Red Mountain Ditch Priority No. 205 water right and by its 2.90 acre-foot allotment contract with the Basalt Water Conservancy District. Evaporative depletions total 3.5 acre-feet using a per acre evaporation rate of 2.89 feet as calculated using the SEO method outlined in the General Guidance for Substitute Water Supply Plans for Sand and Gravel Pits and SEO Policy No. 2004-3. The annual gross free water surface evaporation is 39.5 inches based on NOAA Technical Report NWS 33. The evaporative depletions from the 1.22 acres of open water surface area are set forth in Table 1 of the application. All water stored during free river periods would otherwise be tributary to Woody Creek. Water stored and used for evaporation replacement under Applicant's Red Mountain Ditch water right diverts from Hunter Creek and is fully consumptive between the headgate and the confluence of Woody Creek and the Roaring Fork River. Out-of-priority depletions and return flow obligations are shown on Table 2, on file with the court. Dry-up credits are sufficient to replace all evaporation depletions during the irrigation season, except in March, April, May, October, and November. A minimum of 2.90 acre-feet of BWCD contract storage releases (including a 10% transit loss) are required to fully augment all open water surface areas and replace return flow obligations from the change in use. Any excess consumptive use credits will be stored in the Star Mesa Pond Nos. 1 and 2 in May-September. Applicant will install appropriate measuring devices as requested by the Division Engineer and will develop an accounting plan acceptable to the Division Engineer. During times when an administrative call would preclude use of the exchanges described herein, and insufficient consumptive use credits are available for release to Woody Creek, Applicant will replace depletions by allowing one or more of the water bodies to drop in capacity and return water to the place of depletions on Woody Creek as depicted in Exhibit A on file with the court.

Seventh Claim: For Change of Water Right Decreed water right for which change is sought: Red Mountain Ditch, Priority No. 205, as described in paragraph 5 of the application. Amount of water that Applicant intends to change: 0.0764 c.f.s. Description of proposed change: Applicant intends to change 0.0764 c.f.s. decreed to Red Mountain Ditch, Priority No. 205, out of the 0.375 c.f.s. currently owned by Applicant, from irrigation use to augmentation use. Applicant intends to use the 0.0764 c.f.s. to augment the evaporative losses from the Star Mesa Pond Nos. 1 and 2 and open water surface areas in the plan for augmentation described in the application. The new place of use is the Star Mesa Pond Nos. 1 and 2 and open water surface areas described above and shown on the map on file with the court as Exhibit A. 2.82 acres, out of the 13.85 acres historically irrigated under Red Mountain Ditch, Priority No. 205 on Applicant's property, have already been removed from irrigation. Application owns the land upon which the changed water rights are placed to beneficial use.

YOU ARE HEREBY NOTIFIED THAT YOU HAVE until the last day of FEBRUARY 2023 to file with the Water Clerk a

verified Statement of Opposition setting forth facts as to why this application should not be granted or why it should be granted in part or on certain conditions. A copy of such statement of opposition must also be served upon the applicant or the applicant's attorney and an affidavit or certificate of such service shall be filed with the Water Clerk, as prescribed by Rule 5, CRCP. (Filing Fee: \$192.00) KATHY POWERS, Water Clerk, Water Division 5; 109 8th Street, Suite 104 Glenwood Springs, CO 81601.