



Granted

The moving party is hereby ORDERED to provide a copy of this Order to any pro se parties who have entered an appearance in this action within 10 days from the date of this order.

James B. Boyd
District Court Judge
Date of Order attached
EFILED Document

CO Garfield County District Court 9th JD
Filing Date: Apr 14 2011 2:03PM MDT
Filing ID: 37046497
Review Clerk: Kathy Hall

DISTRICT COURT, WATER DIVISION NO. 5,
COLORADO
109 Eighth Street, #104
Glenwood Springs, CO 81601

CONCERNING THE APPLICATION FOR WATER RIGHTS OF COLORADO WATER TRUST and COLORADO RIVER WATER CONSERVATION DISTRICT, ACTING BY AND THROUGH ITS COLORADO RIVER WATER PROJECTS ENTERPRISE

IN SUMMIT AND GRAND COUNTIES

▲ COURT USE ONLY ▲

Case Number: 05CW265

DECREE OF THE WATER COURT

The Application in this case was filed on December 28, 2005. The Application was referred to the Water Referee for Water Division No. 5, State of Colorado by the Water Judge of said Court in accordance with Article 92 of Title 37, Colorado Revised Statutes, known as the Water Right Determination and Administration Act of 1969. By Order dated December 15, 2006, Applicants were granted leave to and filed a First Amendment to the application. An unopposed motion to amend the caption to add Grand County was filed on September 29, 2008, and Publication of the Application and First Amendment thereto was accomplished in Grand County in October, 2008. The Application was re-referred to the Water Judge by Order filed on December 15, 2009.

The undersigned Water Judge, having made such investigations as are necessary to determine whether or not the statements in the application are true, having consulted with the Division Engineer, and having become fully advised with respect to the subject matter of the application, does hereby make the following findings of fact, conclusions of law and enters the following decree in this matter:

- 1. Application.** This matter involves the Application for Change of Water Right and an Appropriative Right of Exchange filed by the Colorado Water Trust (the "Water Trust") and the Colorado River Water Conservation District, acting by and through its Colorado River Water Projects Enterprise (the "River District")(collectively, the "Applicants"), as amended (the "Application"). The current mailing address and phone numbers of the Applicants are as follows:

Colorado Water Trust
1430 Larimer Street, Suite 300
Denver, CO 80202
(720) 945-2897

Colorado River Water Conservation District
(acting by and through its Colorado River
Water Projects Enterprise)
Attn.: General Manager
P.O. Box 1120
Glenwood Springs, CO 81601
(970) 945-8522

2. **Jurisdiction.** All notices required by law have been duly given and the District Court in and for Water Division No. 5 (the “Water Court”) has jurisdiction over the application and all parties affected thereby, whether or not they have chosen to appear.

3. **Objectors.** Statements of opposition were timely filed by the following (collectively, the “Objectors”): City and County of Denver, acting by and through its Board of Water Commissioners (“Denver”), the City of Aurora (“Aurora”), Blue River Ranch, LLC and S.G. Company, Colorado Springs Utilities (“Colorado Springs”), the United States of America, Bureau of Reclamation (“USA”), and the Colorado Water Conservation Board (“CWCB”). The time for filing additional statements of opposition has now expired. Aurora and S.G. Company withdrew their statements of opposition. The remaining Objectors have all stipulated to the entry of this Decree.

4. **Consultation Summary.** The Court has received and duly considered the comments of the Division Engineer in his Summary of Consultation dated October 6, 2006, which was supplemented on May 10, 2007.

5. **Background.** The matter concerns a requested change to the Peabody #1 Ditch and Peabody #1 Ditch, Lund Enlargement & Extension water rights described in Section 6 below (the “Subject Water Rights”). The Water Trust is a non-profit Colorado corporation whose purposes include the acquisition and donation to the CWCB of existing absolute water rights in furtherance of the CWCB’s instream flow water acquisition program authorized by C.R.S. §37-92-102(3). In furtherance thereof, the Water Trust entered into an Acquisition Agreement with the CWCB dated December 22, 2004 (the “Acquisition Agreement”) whereby the Water Trust agreed to acquire and donate the Subject Water Rights to the CWCB for conversion to instream flow purposes, subject to a reservation allowing the Water Trust to use, or allow others to use, the consumptive use portion of the Subject Water Rights downstream of Green Mountain Reservoir, all as more fully set forth in the Acquisition Agreement and the related Special Warranty Deed from the Water Trust to the CWCB dated October 11, 2005 and recorded on October 17, 2005 in the real property records of Summit County, Colorado at Reception No. 804745 (the “Deed”). The CWCB has filed an application in Case No. 05CW264 to change its interest in the Subject Water Right for instream flow purposes in order to preserve and improve the natural environment in four stream reaches (the “CWCB Instream Flow Reaches”) as follows: (1) Boulder Creek from the headgate of

the Peabody Ditch to the confluence with the Blue River; (2) the Blue River from Boulder Creek to Lund Gulch; (3) the Blue River from Lund Gulch to Slate Creek; and (4) the Blue River from Lund Gulch to Green Mountain Reservoir.

Consistent with the Acquisition Agreement, the Water Trust reserved in the Deed the right to use the consumptive use portion of the Subject Water Rights downstream of the confluence of the Blue River with Green Mountain Reservoir, including the right to assign or sell said right of use. The Water Trust has contracted to sell the right to such downstream consumptive use to the River District. The Water Trust and the River District filed this Application to allow the historical consumptive use of the Subject Water Rights (the "HCU Credits") to be used by the River District below Green Mountain Reservoir in compliance with its statutory authority including but not limited to using the HCU Credits in connection with its Colorado River Water Marketing Program. The River District's Colorado River Water Marketing Program provides for the beneficial use of water through contracts with end users from the River District's storage capacity in Wolford Mountain and other reservoirs.

In order to facilitate the River District's use of the HCU Credits, the River District obtained an Excess Capacity contract from the Bureau of Reclamation to allow storage of the HCU Credits in Green Mountain Reservoir under certain terms and conditions described in such contract (the "GMR Storage Contract"). By amendment to the subject application filed by the Applicants on December 8, 2006, the River District also seeks an appropriative right of exchange to exchange the HCU Credits into Wolford Mountain Reservoir pursuant to the exchange described in Section 10 below.

6. Description of the Subject Water Rights:

- A. Peabody #1 Ditch (the "1904 Priority")
 - i. Original Decree: March 2, 1910, Case No. 1277, in the District Court in and for Summit County, Colorado.
 - ii. Decreed point of diversion: NE1/4 of the NE1/4, Section 12, Township 4 South, Range 79 West of the 6th P.M., Summit County, Colorado.
 - iii. Source: Boulder Creek, tributary to the Blue River.
 - iv. Appropriation date: May 23, 1904
 - v. Amount: 5.0 cfs, absolute
 - vi. Use: Irrigation

- B. Peabody #1, Lund Enlargement & Extension (the “1915 Priority”):
- i. Original Decree: July 5, 1916, Case No. 1520, in the District Court in and for Summit County, Colorado, for 1.5 cfs absolute and 2.0 cfs conditional. The 2.0 cfs conditional was made absolute in Case No. 86CW151, Water Division No. 5, State of Colorado.
 - ii. Decreed point of diversion: NE1/4 of the NE1/4, Section 12, Township 4 South, Range 79 West of the 6th P.M., Summit County, Colorado.
 - iii. Source: Boulder Creek, tributary to the Blue River.
 - iv. Appropriation date: May 15, 1915.
 - v. Amount: 3.5 cfs, absolute.
 - vi. Use: Irrigation

7. **Historical use**: The Subject Water Rights were historically diverted from Boulder Creek via the Peabody #1 Ditch headgate to irrigate approximately 63 acres of land along Lund Gulch, located in the SE1/4 of the SE1/4 of Section 19, the SW1/4 of the SW1/4 of Section 20, the NW1/4 of the NW1/4 of Section 29, and the NE1/4 of Section 30, Township 3 South, Range 78 West of the 6th P.M. The lands historically irrigated are depicted on the map attached hereto as Exhibit A. The annual consumptive use of water from such irrigation averaged 73 acre-feet. All of the historical consumptive use resulting from such use is attributable to diversions of the 1904 Priority described above.

8. **Proposed change**:

A. New Uses. Applicants propose to change the use of the Subject Water Rights to allow use of the HCU Credits in the River District’s Water Marketing Program consistent with the River District’s Wolford Mountain Reservoir decrees in Case Nos. 87CW283, 87CW284, 95CW281, 98CW237 and 03CW302 (pending). Such use to include the following beneficial uses: municipal, domestic, irrigation, agricultural, livestock, hydro-power production, evaporation, piscatorial, and recreational (with the right to reuse and successively use the water to extinction, consistent with the River District’s Wolford Mountain Reservoir decrees in Case Nos. 87CW283, 87CW284, 95CW281, 98CW237 and 03CW302 (pending) and pursuant to the River District’s Colorado River Water Marketing Program. The water may be used directly for such purposes, and/or it may be used for such purposes by augmentation, replacement and exchange by the River District or its contractors in connection with applicable law.

Applicants also seek to store the HCU Credits in Wolford Mountain Reservoir pursuant to the exchange described in Section 10 below and/or in Green Mountain Reservoir pursuant to the River District’s GMR Storage Contract, for subsequent use for said purposes.

B. Operation of change of water rights. The Subject Water Rights will not be diverted from the stream at the headgate of the Peabody #1 Ditch , but will instead remain in the stream for instream flow use by the CWCB to preserve and/or improve the natural environment to a reasonable degree within the CWCB Instream Flow Reaches in accordance with the CWCB change of water rights in Case No. 06CW264. The HCU Credits will be available for use by Applicants below the CWCB Instream Flow Reaches as follows.

1. Volumetric HCU Credits. The HCU Credits available to Applicants on the Subject Water Rights will be limited to the following volumes.

Period	Acre Feet
May	1.3
June	26.9
July	21.4
August	14.8
September	8.5
Annual	73.0

2. Rate of Flow of HCU Credits. When the Subject Water Rights are in priority, they will generate HCU Credits at the same rate of flow as they generate Instream Flow Credits in CWCB Instream Flow Reaches 3 and 4 pursuant to Paragraph 8.B.2(c) of the decree in Case No. 05CW264, which rates are set forth in the following table:

Period	c.f.s.
May	0.02
June	0.45
July	0.35
August	0.24
September	0.14

3. Protection and conveyance of HCU Credits to new places of use. The HCU Credits produced by virtue of the lawful exercise of the Subject Water Rights

shall be conveyed through the CWCB Instream Flow Reaches to the new places of beneficial use, storage, or exchange at or below Green Mountain Reservoir by the Division Engineer, who shall not allow the diversion or consumptive use of the HCU Credits while they are flowing through the CWCB Instream Flow Reaches.

4. Use of HCU Credits.

(a) Place of use. The HCU Credits will be put to beneficial use on the Blue River downstream of Green Mountain Reservoir; on the Colorado River downstream of the mouth of Muddy Creek; and on Muddy Creek at or downstream of Wolford Mountain Reservoir (pursuant to the Exchange in Paragraph 10 below).

(b) Uses allowed. The HCU Credits may be consumptively used at the above-stated locations for the beneficial uses described in Section 8.A above . The water may be used directly for such purposes, and/or it may be used for such purposes by augmentation, replacement and exchange by the River District or its contractors in accordance with applicable law.

(c) Reuse. The HCU Credits may be used, reused, and successively used to extinction for the above-stated purposes at the above-stated locations.

(d) Storage. The HCU Credits may be stored in Green Mountain Reservoir and in Wolford Mountain Reservoir (pursuant to the Exchange in Paragraph 10 below) for subsequent use.

D. Applicants' exercise of the Subject Water Rights to generate HCU Credits will be subject to the terms and conditions set forth in Paragraph 9 below.

9. Terms and Conditions. The Court finds that the requested change of water rights can be granted without injury to existing absolute water rights or decreed conditional water rights if the following terms and conditions are imposed:

A. The Subject Water Rights shall no longer be used to irrigate the 63 acres historically irrigated thereby, as described above in Paragraph 7, which land will be dried up. Applicants shall remove or render the headgate of the Peabody Ditch #1 inoperable and eradicate the initial reach of the ditch in order to assure to the reasonable satisfaction of the Division Engineer that no irrigation water will be applied to the land that was historically irrigated by the Peabody Ditch No. 1.

B. The Subject Water Rights may be exercised for direct flow use or diverted into storage only during the period from May 1 through September 30 of each year. After storage, the Subject Water Rights may be released from storage for subsequent

beneficial use at any time. Nothing herein shall prevent the River District from carrying over the HCU Credits in Wolford Mountain Reservoir from one year to the next, or from releasing and using any HCU Credits stored in Green Mountain Reservoir and/or Wolford Mountain Reservoir at any time of the year.

C. The volume of HCU Credits generated by the Subject Water Rights shall be limited to the volumes set forth in the tables in Paragraph 8.B.1 above, and generated at the rates set forth in Paragraph 8.B.2 above.

D. The Subject Water Rights may be exercised, and HCU Credits shall accrue, only when the Subject Water Rights are in priority. HCU Credits will be limited to the amount of water legally and physically available to the Subject Water Rights at their original point of diversion.

E. The headgate of the Subject Water Rights was located on Boulder Creek, a tributary to the Blue River. As a result, the Subject Water Rights could not historically “call” upon water rights diverting from the Blue River. Accordingly, as changed herein, the Subject Water Rights may not exercise a “call” upon any water rights diverting water from the Blue River. However, the HCU Credits produced by virtue of the lawful exercise of the Subject Water Rights shall be protected from diversion by others pursuant to Paragraph 8(B)(3) above.

F. The Applicant shall account for the HCU Credits generated by the Subject Water Rights, and shall provide such accounting to the Division Engineer, and to any party that requests it, at least monthly during the season of use of the Subject Water Rights.

G. The Acquisition Agreement expressly prohibits the Applicants from exercising the right to use the HCU Credits via exchange to uses located upstream from Green Mountain Reservoir, or on the Colorado River upstream of the confluence with the Blue River. Notwithstanding the foregoing, the CWCB has consented to storage of the HCU Credits by the River District in Wolford Mountain Reservoir for subsequent release for beneficial uses by the River District or its assigns in a manner consistent with the uses contemplated by the River District’s decrees for Wolford Mountain Reservoir, so long as such use does not cause injury to any instream flow water rights held by the CWCB.

H. Pursuant to C.R.S. § 37-83-101, the Division Engineer shall assess appropriate transit losses on the amount of HCU Credits conveyed through the Blue River and the Colorado River pursuant to this change of water rights.

10. Appropriative Right of Exchange.

- A. Name: Moser Consumptive Use Exchange to Wolford Mountain Reservoir.
- B. Location of Structures and Exchange Reaches:
- (i) Downstream Terminus: Confluence of Muddy Creek and the Colorado River located 1855 feet from the east section line, and 185 feet from the north section line, NW1/4 of the NE1/4, Section 25, Township 2 North, Range 80 West of the 6th P.M.
 - (ii) Upstream Terminus: Wolford Mountain Reservoir, an in-channel reservoir on Muddy Creek, located at 2091 feet from the east section line, and 2884 feet from the south section line, SW1/4 of the NE1/4, Section 25, Township 2 North, Range 81 West of the 6th P.M.
- C. Date of Appropriation: October 15, 2008.
- D. Maximum Rate of Exchange: 37 cfs, conditional, for exchanges accomplished by release of HCU Credits previously stored on account of the Subject Water Rights in Green Mountain Reservoir; 0.45 cfs conditional, for exchanges accomplished by release of HCU Credits conveyed through the CWCB Instream Flow Reaches, Green Mountain Reservoir, and the Blue River without storage in Green Mountain Reservoir.
- E. Maximum Volume of Exchange: 73 acre feet annually.

11. Terms and Conditions. The Court finds that the requested appropriative right of exchange can be granted without injury to existing absolute water rights or decreed conditional water rights if the following terms and conditions are imposed:

- A. Notice: The River District shall provide the Division Engineer at least 24 hours notice prior to the exercise of the exchange decreed herein.
- B. Wolford Mountain Reservoir Substitution Accounts: The HCU Water will be stored in, and accounted toward the fill of the River District's pool in Wolford Mountain Reservoir and will not impact the fill or use of Denver's substitution pool in Wolford Mountain Reservoir or the substitution account maintained by the River District in Wolford Mountain Reservoir for the benefit of Colorado Springs Utilities.

C. Measurement and Accounting: The River District shall install measuring devices, provide accounting, and supply calculations regarding the amount and timing of diversions and replacements as may be required by the State and Division Engineers for the operation of the exchange decreed herein.

D. Transit Losses: Transit losses, if any, shall be determined (and modified from time to time as appropriate) and assessed upon the exchanges by the State Engineer in accordance with §§ 37-83-101, 37-83-104, and 37-87-102(4).

12. Stipulations. Applicants have entered into and the Court hereby approves and incorporates into this decree the stipulation with the objectors filed in this matter.

13. No precedent. The findings of fact, conclusions of law and decree stipulated hereto were completed as a result of substantial discussions, negotiations and compromises by, between and among the Applicants and Objectors. It is specifically understood and agreed by the parties hereto, and found and concluded by the Court, that the acquiescence by the parties to a stipulated decree under the specific factual and legal circumstances of this matter and upon the numerous and interrelated compromises reached by the parties shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, *stare decisis*, *res judicata*, estoppel, or laches, nor to any administrative practice or precedent, by or against any of the parties hereto in any other matter, case or dispute; nor shall testimony concerning such acquiescence of any party to a stipulated decree herein be allowed in any other matter, case or dispute. All parties stipulate and agree that they each reserve the right to propose or to challenge any legal or factual position in any other matter filed in this or any other court, without limitation by these findings, conclusions, judgment and decree.

14. Use of Green Mountain Reservoir. The River District shall exchange or store water in Green Mountain Reservoir only so long as it has consent of the United States, and such use is within the effective time period of such consent. The River District recognizes that Green Mountain Reservoir is owned and operated as part of the Colorado-Big Thompson (C-BT) Project by the U.S. Bureau of Reclamation. Any use of the C-BT Project facilities by the River District for storage, exchange, or otherwise, will occur only with the written permission of the owner of said reservoir, and will be made consistent with such policies, procedures, contracts, charges and terms as may be lawfully determined by the U.S. Bureau of Reclamation or its successors in interest, in their good faith discretion. This Decree does not give the River District any right to ownership or use of any C-BT Project structure, or any rights of ownership or rights to purchase or receive allocation of C-BT Project water. Moreover, the River District shall not operate the rights decreed herein in a manner that would interfere with the lawful operation of the C-BT Project. This Decree (or any omission herefrom) shall not be interpreted to limit,

diminish or amend in any way any existing absolute or conditional water rights of the United States for Green Mountain Reservoir.

A. Entry of the Decree in this matter has no effect on the authority of the United States to regulate and/or deny use of federal facilities of the Bureau of Reclamation. The River District recognizes that the consideration and action on requests for any necessary federal contracts and authorizations shall be carried out pursuant to all pertinent statutes, regulations and policies applicable to the occupancy and use of Bureau of Reclamation facilities, including, but not limited to General Reclamation Law, Colorado-Big Thompson Project authorization legislation, the National Environmental Policy Act, and the Endangered Species Act.

B. The River District agrees that the entry of this Decree shall not in any way limit or affect the authority of the Bureau of Reclamation with respect to the agency's consideration of and action on such requests for contracts, approvals, or authorizations. The River District and the United States recognize that the authority of the Bureau of Reclamation to impose terms and conditions, and/or to deny such requested contracts, approvals or authorizations, is not in any way limited, affected or enhanced by entry of this Decree or by agreements between the River District and others to which the United States is a party.

C. The River District acknowledges that it cannot use C-BT Project facilities as contemplated under this Decree until and unless it applies for and obtains any approval of the Bureau of Reclamation necessary to allow it to store water in or utilize those facilities and satisfies the terms and conditions imposed by such approvals and authorizations.

D. The HCU Water stored in Green Mountain Reservoir under this decree will not count towards the fill of Green Mountain Reservoir and may only be stored in Green Mountain Reservoir if and when excess capacity is available pursuant to the terms of the River District's contract with the Bureau of Reclamation.

15. Retained Jurisdiction. The change of water rights herein shall be subject to reconsideration by the Court on the question of injury to the vested water rights and decreed conditional water rights of others for a period of five (5) years after entry of the decree herein. Pursuant to C.R.S. § 37-92-304(6) the Court may extend the period of retained jurisdiction if it determines that the non-occurrence of injury shall not have been conclusively established.

THEREFORE, the Court ORDERS as follows:

- I. The change of water right described in Section 8 above is hereby approved, subject to the terms and conditions set forth in Sections 9 and 14 above.
- II. The appropriative right of exchange described in Section 10 above is hereby awarded, subject to the terms and conditions set forth in Section 11 above.
- III. The appropriative right of exchange decreed in Section 10 above shall be administered as having been filed in calendar year 2008 and shall be junior to all priorities filed in previous years. As between all rights filed in calendar year 2008, the priority of the exchange shall be determined by its date of appropriation set forth above and not affected by the date of the entry of this decree.
- IV. This decree shall be filed with the Water Clerk subject to judicial review.
- V. An application for a finding of reasonable diligence shall be filed in the same month and six years after the entry of the decree in this case in order to maintain the conditional right of exchange unless a determination has been made before then that the exchange has been made absolute
- V. A copy of this decree shall be filed with the appropriate Division Engineer and State Engineer.

Dated this ____ day of _____, 2010.

BY THE COURT:

Hon. James B. Boyd
Water Judge

EXHIBIT A

[SEE ATTACHED MAP OF HISTORICALLY IRRIGATED ACREAGE]

EXHIBIT B

AVERAGE ANNUAL AND MONTHLY HISTORIC CONSUMPTIVE USE

Month	Acre Feet
January thru April	0.0
May	1.3
June	26.9
July	21.4
August	14.8
September	8.5
October thru December	0.0
AVERAGE ANNUAL	73.0

This document constitutes a ruling of the court and should be treated as such.

Court: CO Garfield County District Court 9th JD

Judge: James B Boyd

Current Date: Apr 14, 2011

Case Number: 2005CW265

Court Authorizer

Comments:

Exhibit A to the proposed decree filed on June 7, 2010, is incorporated into this Decree.

/s/ Judge James B Boyd