

District Court Montrose County, State of Colorado 1200 No. Grand Avenue, Bin A Montrose, CO 81401 Telephone: (970) 252-4300	▲ COURT USE ONLY ▲
CONCERNING THE APPLICATION FOR WATER RIGHTS OF UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT IN GUNNISON COUNTY	Case No.: 02CW38 Div.: 2
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER	

This matter came on for a five day trial commencing September 15, 2003 on Applicant's Petition for a conditional water right for a whitewater course or whitewater park (kayaking, rafting and canoeing) located on the west edge of the City of Gunnison. Actively participating in the case in addition to Applicant were the Colorado River Water Conservation District, Colorado Water Conservation Board, Trout Unlimited and Uncompahgre Valley Water Users Association. These parties were represented respectively by Covell and Marchand for the Applicant, Fleming for Opposer Colorado River Water Conservation District, Coulter and Schneider for Colorado Water Conservation Board, Peternell for Trout Unlimited and Roushar for Uncompahgre Valley Water Users Association.

The Court heard testimony from John DeVore, chief executive officer of Gunnison County, Kathleen Curry, manager of the Upper Gunnison River Water

Conservancy District ("Applicant"), Greg Peterson, a board member of Applicant, Mark Schumacher, a past board member of the Upper Gunnison River Water Conservancy District and owner and operator of Three Rivers Resort which is in the whitewater business, Dr. Mark Gibson, a professor at Western State College in the outdoor recreation department, James Slattery, a civil engineer in the firm of Helton & Williamson as an expert, Gary Lacy, a civil engineer who designed the Gunnison Whitewater Park as an expert, Jim Lochhead an attorney who testified as an expert on various issues related to water law, Ted Kowalski, staff member of the Colorado Water Conservation Board who also testified as an expert with respect to policies and procedures of the board and other issues, Randy Seaholm, an employee of the Colorado Water Conservation Board and chief of the water supply protection section who testified as an expert and agent of the CWCB, Richard McLaughlin, civil engineer who testified as an expert on water resources and water park design.

This proceeding is the first application to be addressed by a Water Court under legislation enacted in 2001 establishing a specific procedure for "recreational in channel diversions" and restricting who can make such an application. Senate Bill 216. Recreational in channel diversions, as the name suggests, differ from "traditional" water rights which contemplate a diversion out of a stream to its place of use for some specific purpose, whether agricultural, mining, domestic or municipal, among others. This application contemplates a whitewater park for kayaking, rafting and canoeing, without diverting any water from the Gunnison River. The contested issues before the Court involve interpretation and application of this new legislation to this proposed use. Under

this legislation, the Colorado Water Conservation Board plays a critical role, including its review prior to trial in Court at which it is to make findings of fact which are entitled to a "rebuttable presumption" that they are correct and a recommendation to the Water Court considering the application. Here the Colorado Water Conservation Board has made findings of fact and recommended that the application be approved, but for a lesser amount than the Applicant seeks.

The Court hereby finds, concludes and orders as follows:

FINDINGS OF FACT

1. John DeVore, chief executive officer of Gunnison County, and Gunnison County, generally, were approached by the recreational boating community in 1997 to explore the possibility of a whitewater park. This group included representatives from Western State College.
2. Sufficient interest was generated that Gunnison County engaged Gary Lacy with an initial contract of \$11,000 to fund a preliminary design for a whitewater park. Exhibit 26 suggests he was initially contacted in January 1999.
3. There were a series of public meetings and hearings exploring the possibility, location and feasibility of a whitewater park.
4. A determination was made to establish a whitewater park "below the twin bridges" which would be a very short distance south of the point where the "west branch" of the Gunnison splits off from the main branch of the Gunnison River at the southwestern edge of the City of Gunnison near the

Gunnison Airport. At this location, which is also near the Gunnison County water treatment facility, the County owns much of the land west of the river.

5. Gunnison County approached the Applicant, the Upper Gunnison River Water Conservancy District and ultimately reached an agreement whereby Applicant would take the lead in obtaining a water right and the Board of County Commissioners would take the lead on construction of the whitewater park. This ultimately culminated in an intergovernmental agreement, Applicant Exhibit 1 dated March 26, 2002.
6. Applicant filed its application on March 31, 2002.
7. Ms. Curry, manager of Applicant, made a recommendation to the Board on the minimum flow. Specifically she suggested that it be structured to be subordinate to the Aspinall Wilson Subordination Agreement (discussed infra under the Gunnison River). The Board decided that they preferred to go in another direction, that is, with a meaningful water right not to be subordinated up front. Over the course of the summer of 2002 the Board held various public meetings and obtained input from the Board's consulting engineer, Mr. Slattery, to evaluate what flow was reasonable and what potential impact such flow rates might have.
8. Mr. Slattery's recommendation broke the boating season, May through September, down by semi-monthly averages. Based on the public input, the Board concluded that higher flows were necessary to satisfy the needs

and wishes of the boating community than those Slattery had recommended.

9. Based on that, Applicant's request, as contemplated with the semi-monthly adjustments, range from 570 cfs in early May to 1,190 cfs in late May to 1,460 cfs in early June to 1,500 cfs in late June to 1,100 cfs in early July to 530 cfs in late July, 460 cfs in early August, 390 cfs in late August, 300 cfs in early September and 270 cfs in late September. These quantities would convert to approximately 157,000 acre feet of water per year, roughly 41% of the estimated available water in the Upper Gunnison.
10. The course as designed by Mr. Lacy, is projected by him to cover approximately 1,000 feet in the Gunnison River, to have a total drop over that distance of approximately 10 feet and contemplated 6 features. Of those, structure no. 2 has been completed, structures 3 and 4 are partially completed and structures 5 and 6 have been completed. See generally exhibit 29.
11. While there is some dispute as to the calculations, his representation is that, as designed, the course could function with a range from 250 cfs to 2,000 cfs. Further, he represented that at 250 cfs the course as designed would attract many experienced kayakers.
12. The construction work commenced in April 2002 and continued to the "grand opening", which occurred Memorial weekend 2003. As noted, many of the structures are still either incomplete or not yet constructed.

13. The matter proceeded following application in the Water Court to a submittal to the Colorado Water Conservation Board as contemplated under the recent legislation addressing applications for recreational in channel diversion ("RICD"), typically referred to as Senate Bill 216 which became effective in 2001. This legislation was effective June 5, 2001. The application was submitted to the Colorado Water Conservation Board on April 10, 2002.
14. Consistent with Senate Bill 216, the Colorado Water Conservation Board adopted rules concerning "RICD" as of November 8, 2001, State exhibit 10.
15. The staff pre-hearing recommendation to the CWCB is State's exhibit 6.
16. The hearing before the CWCB occurred September 10, 2002 and a transcript of that is State's exhibit 8.
17. At the conclusion of the hearing the Board made various findings. Those findings were reduced to writing dated October 11, 2002. In relevant part, the findings are as follows:
 - (a) That 250 cfs of water from May through September be allowed and with that flow and the conditions in the recommendations set forth in the findings found
 - (i) The RICD will not impair Colorado's ability to fully develop and put to beneficial use its compact entitlements.

- (ii) The reach of the Gunnison River beginning with structure 2 to include structure 6 is an appropriate reach for the RICD.
 - (iii) The RICD will not cause material injury to any CWCB instream water flow rights.
 - (iv) Adjudication and administration of the RICD is consistent with and promotes maximum utilization of Colorado's waters.
 - (v) At the stream flow amount specified, the RICD will divert, capture and control water in its natural course and location if structures 2 through 6 are built and maintained as designed.
- (b) The recommendations include that the hours of this water right be limited to 6:00 a.m. to 10:00 p.m., that the RICD will not be in effect for exercising call rights when the hydrograph would permit the Redlands Power Canal or the Gunnison Tunnel to call their senior water rights (these issues will be discussed infra), that a call will be presumed futile when it would not in any event produce flows equal to or greater than 250 cfs, that the division engineer may direct Applicant to install, maintain and monitor at locations as needed by the division engineer measuring devices, that the right be limited to recreational boating purposes only and that a call only be honored

when a substantial number of persons are reasonably anticipated to use the course, in order to prevent waste.

18. Very shortly before trial Applicant and Opposer Colorado Water Conservation Board entered into a stipulation, filed September 4, 2003 which in relevant part provides that no call shall be placed or administered during any time that a valid call is being administered or could be administered on behalf of the water rights for the Gunnison Tunnel or the Redlands Power Canal and that Applicant will operate the water right with due consideration for its mandate as a water conservancy district.
19. The "law of the river" was testified to primarily by Mr. Lochhead and Mr. Seaholm. They did not materially disagree as to the law of the river. Briefly summarized, with no intent of making this ruling into a lengthy discussion on law and compacts affecting the Colorado River, the water in the Colorado River and its tributaries is impacted by, among others, the following significant laws, treaties, cases or policies: The 1922 Colorado River Compact, the 1944 Treaty with Mexico, the 1948 Upper Colorado Compact and various Acts of Congress including the Storage and River Basin Act of 1968. These witnesses together with Mr. Slattery testified with respect to the Gunnison River. There is minimal controversy between the witnesses with respect to the probative facts concerning the Gunnison River. Those would include and are perhaps most effectively illustrated by Applicant's exhibit 4. Those are as follows:

- (a) The Gunnison Tunnel Right with a 1905 priority for 1,300 cfs for the benefit of the Uncompahgre Valley Water Users Association which water is withdrawn below the last of the three reservoirs of the Aspinall Unit, discussed below.
- (b) The Redlands Power Canal Right has 670 cfs with a 1905 priority near the City of Grand Junction and an additional 80 cfs with a 1941 priority.
- (c) Although not yet quantified, the experts agreed that there was potential for a fish and wildlife endangered species flow requirement under federal statutes and regulations.
- (d) There is a pending application before this Court, 01CW5, by the United States for quantification of previously established but not quantified water rights in and for the Black Canyon National Park. Based on recent pleadings in that matter, that claim, with a 1933 priority, may be reduced to perhaps 300 cfs but at least as originally filed was for as much as 10,000 cfs.
- (e) The Aspinall Unit, 1957 priority is for 939,000 acre feet storage right and 5,450 cfs direct flow hydropower right.
- (f) On the Taylor River, which merges with the East River ten miles north of Gunnison to form the Gunnison River, the Taylor Park Reservoir first fill is a 1934 priority with 106,230 acre feet and a second fill 1986 priority of 106,230 acre feet.

- (g) Also significant and impacting the water rights in the Gunnison River are two Colorado Supreme Court cases arising out of the trans-mountain diversion application by Arapahoe County. Board of County Commissioners of Arapahoe County v. Crystal Creek Homeowners' Association, 14 P.3d 325 (Colo. 2000), and In re Board of County Commissioners of Arapahoe County, 891 P.2d 952 (Colo. 1995).
- (h) A subordination agreement contemplated since 1975 was codified and signed in 2000 whereby the United States agreed to subordinate 60,000 acre feet from the Aspinall Unit to upstream development, 40,000 above Blue Mesa Reservoir and 20,000 below Blue Mesa Reservoir.
20. Prior to passage of Senate Bill 216, a recreational instream flow right was first recognized in City of Thornton v. Fort Collins, 830 P.2d 915 (Colo. 1992). More recently recreational instream flow rights were applied for in what in this trial were referred to as the Golden, Vail and Breckenridge cases. Each of these three cases recognized water rights, for this purpose, which rights were affirmed as a matter of law based on 3-3 votes in the Colorado Supreme Court (69 P.3d 1027, 1028 and 1029, Colo. 2003). The filing of those cases, and in particular the Golden case, precipitated legislative action culminating in Senate Bill 216. The legislative history is State's exhibit 9.

21. In relevant part the legislative history reflects the following:

a. In the "Legislative Statement" it provides as follows:

SB 216 is designed to insure that decrees for recreational in-channel diversions, as recognized by the Colorado Supreme Court in the City of Thornton v. City of Fort Collins, supra, are integrated into the state prior appropriation system in a manner which appropriately balances the need for water based recreational opportunities with the ability of Colorado citizens to divert and store water under our compact entitlements for more traditional consumptive use purposes, such as municipal, industrial and agricultural uses...

It defines in-channel diversions such that only the "minimum" flow necessary to support the recreational activity can be sought...

b. Senator Entz, the state senator for the area in which this RICD is proposed, in testifying before the Senate Committee on Public Policy and Planning on April 12, 2001 made the following statements:

Entities could use the current law to claim very high flows at the state borders to essentially export water to California, Kansas and other states for use outside the state of Colorado.

Senator Entz in describing a revised draft of the legislation on May 3, 2001 states as follows:

The Bill now takes the Water Conservation Board, makes the Colorado Water Conservation Board responsible for making recommendations to the Water Court that are presumed to be accurate with respect to the control of water they must be shown to get a water right and ensuring that the amount of water being requested is reasonable and appropriate and any party can offer to rebut the CWCB's recommendations.

He goes on to state in response to a question as to "how much leeway does the Water Court have?" as follows:

Well, the Judge has the final say, it's just a fact that the CWCB has the opportunity to address different issues that they think would address that instream flow for kayaking."

c. Senator K (sic), on the same date states, "This amendment puts it back the way it was, which it is, it has been for a long time, where the Courts are the ones that make these decisions but it leaves the CWCB in this advisory capacity.

Senator Perlmutter responds to that by stating:

Just speaking to you solely as someone who tries lawsuits, a rebuttable presumption is stronger than an advisory suggestion or whatever by the CWCB. So basically what happens, whatever the CWCB says is taken by the Courts as true and accurate and appropriate, somebody then comes in has the burden, the burden then is on anybody else to try to overturn what the CWCB has said...But I just want everyone to understand that this is not an advisory kind of report given by the CWCB, but it is, it has a lot of evidentiary weight that the Court will take as true and accurate unless even greater evidence comes by the other folks.

d. Finally, at the same hearing on May 7, Rod Kuharich, director of the Colorado Water Conservation Board states as follows,

The recommendations have the rebuttable presumption, which the burden of proof is not a very stringent burden of proof. It's not the way the bill started out originally, which was arbitrary and capricious. So that the burden of proof is more reasonable in this process where both parties actually have the ability to present evidence to the Court.

CONCLUSIONS OF LAW

1. The Court's analysis must begin with the express language of SB 216.

The statute does the following:

- a. Defines a RICD (§ 37-92-103(10.3))
- b. Recognizes RICD as a beneficial use of water (§ 37-92-103(4));
- c. Specifies who may seek a RICD (§ 37-92-102(5));

- d. Delineates a procedure (submission to CWCB) for a RICD (§ 37-92-102(6)); and
- e. Requires CWCB to develop rules and make findings of fact as to delineated factors as well as a recommendation to the Water Court. These fact specific factors are compact impairment, stream reach, access, injury to instream flow rights, maximum utilization and a “catchall” other factors set forth by CWCB in its rules. (§ 37-92-102(6)(b)(I-VI).
- f. Further, the Water Court is to treat the findings of fact by CWCB as a rebuttable presumption and shall consider the Board’s recommendation (§37-92-305)(B).

2. The primary issue before this Court is whether Applicant has overcome the rebuttable presumption that 250 cfs for the entire rafting season is the appropriate quantity of water for its proposed whitewater park recreational use. The Court concludes as follows:

- a. The rebuttable presumption shifts the burden of going forward to the Applicant to demonstrate why the findings of the CWCB should not be followed by the Court. See East Twin Lakes Ditches and Water Works, Inc. v. BOCC of Lake County, 76 P.3d 918 (Colo. 2003). (In the context of statutory language of a rebuttable presumption with respect to abandonment of water rights.) See also In re Estate of Schlagel, 2003 WL 1089612 (Colo.App. March 13, 2003). Finally, Rule 301 of the Colorado Rules of Evidence reads as follows:

In all civil actions and proceedings not otherwise provided for by statute or by these rules, a presumption imposes upon the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

Accordingly, once CWCB concluded that 250 cfs for the entire rafting season was appropriate, Applicant had the burden of going forward to demonstrate why any greater amount is appropriate. To place any greater burden on Applicant, would move toward the quasi-judicial role for CWCB with an arbitrary and capricious standard of review, which the legislature considered and rejected. The Court concludes, based on the totality of the evidence presented, that Applicant has met its burden of proof to overcome the rebuttable presumption.

2. The second issue is precisely what is entitled to the rebuttable presumption.

Here counsel for CWCB acknowledged that there is no specific finding by CWCB that any more than 250 cfs of water would preclude the findings and recommendation it made. Indeed, counsel acknowledged that the same conclusions it reached would be true at 500 cfs. The Court would note that 500 cfs is more water than Applicant requests for 4 of the 10 semi-monthly periods. Rather, it appears that CWCB accepted and placed great emphasis and reliance on the course designer's statement that "expert kayakers would be attracted at 250 cfs."

From the evidence, it is clear that Lacy, the designer of the course, made a statement that the course, as designed would attract expert kayakers at 250 cfs. As was clear from the balance of his testimony and more so from the testimony of Mark

Schumacher and Dr. Gibson from Western State College outdoor recreation department, that conclusion needs to be clarified as to timing and context. Stated differently, 250 cfs of water at low water times with the design of the course in its present condition will attract expert kayakers. Conversely, that water flow at high water times will not. This was testified to primarily by Mark Schumacher and Dr. Gibson. The point was also made by Gary Lacy. To the extent Gunnison County has incurred the expense of construction as Mr. DeVore explained, it was to attract all types of boaters under the various river conditions together with the resulting positive economic impact. The Court is persuaded this objective would not be met at 250 c.f.s. during “high water” boating seasons.

As the Court queried counsel during closing arguments, the Court is struggling with precisely what findings of fact were made by CWCB. CWCB does not find that the amounts applied for either do or do not comport with the 102(6) factors. The Board does not find that 250 cfs is the maximum quantity which could comport with the 102(6) factors. The Court discussed the possibility that there is at least an implicit findings as to the latter component.

Looking at the statutory language, the Court concludes that Applicant’s interpretation of the statute is the more logical interpretation of the statutory language. That is, findings of fact are entitled to rebuttable presumption. Conclusions and conditions contained in the recommendation are not entitled to such rebuttable presumption. The statute directs the Court to “consider” the recommendation. Here the

Court must also note that counsel for CWCB have conceded that at even twice the CWCB recommended quantity, the 102(6) criteria would be satisfied.

3. The next critical issue for analysis of this application is the conflicting arguments with respect to the weight the Court should give to the phrase “minimum” stream flow for a reasonable recreational experience as utilized in the statute.

Based on the evidence presented at trial, other water courses range from 50 cfs to 2,000 cfs. Specifically, the Olympic course designed by CWCB’s expert, Ocoee in Tennessee, has a flow rate between 1,200 and 1,600 cfs. This is an “artificial course” below the Tennessee Valley Authority Dam. He has also designed courses with a minimum stream flow as low as 50 cfs.

CWCB places great emphasis on the statement by the Court’s designer, Lacy, that expert kayakers will be attracted at 250 cfs water. The Court has discussed this previously earlier in this Order. In discussing the Court’s function in interpreting legislative intent, the Court must first look at the statute. See generally People v. Smith, 77 P.3d 751, 755 (Colo.App. 2003):

Courts must construe each provision of comprehensive statutory scheme to effectuate the overall legislative intent. People v. Garcia, 64 P.3d 857, 2002 WL 58926 (Colo.App. 99CA2360), Jan. 17, 2002). To determine intent, courts give statutory terms their commonly accepted meaning. Where the statutory language is unambiguous and the legislative intent reasonably clear, courts do not apply other rules of statutory construction. People v. Triantos, 55 P.3d 131, 134 (Colo. 2002). In addition, courts should not presume the General Assembly used language idly. People v. J.J. H., 17 P.3d 159 (Colo. 2001).

In Empire Lodge Homeowners Association v. Moyer, 39 P.3d 1139 (Colo. 2001), the Court stated at p. 1152:

Our fundamental responsibility in interpreting a statute is to give effect to the General Assembly's purpose and intent in enacting the statute. Martin v. People, 27 P.3d 846, 851-52 (Colo. 2001). We should give effect to each word and construe each provision in harmony with the overall statutory design, whenever possible. See City of Florence v. Bd. of Waterworks, 793 P.2d 148, 151 (Colo. 1990). We also consider the General Assembly's course of action and intent when enacting, amending, and repealing statutes.

The statutory definition of a recreational in channel diversion is as follows:

37-92-103(10.3). "Recreational in-channel diversion" means the minimum stream flow as it is diverted, captured, controlled, and placed to beneficial use between specific points defined by physical control structures pursuant to an application filed by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for a reasonable recreation experience in and on the water.

§ 37-92-103(4), defining beneficial use, reads as follows:

- a. "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife, and also includes the diversion of water by a county, municipality, city and county, water district, water and sanitation district, water conservation district, or water conservancy district for recreational in-channel diversion purposes.

Under traditional water law principles, maximum utilization and beneficial use are balanced against speculation and waste. See generally Colorado River Water Conservation District v. Vidler Tunnel Water Company, 197 Colo. 413, 594 P.2d 566 (1979). Had the legislature intended to deviate from that balance in Senate Bill 216, they would have said so. Further, the Colorado Constitution, Article XVI, § 5 provides a Constitutional right to appropriate.

In Santa Fe Trail Ranches Property Owners Association v. Simpson, 990 P.2d 46

(Colo. 1999), the Court stated as follows:

The property right we recognize as a Colorado water right is a right to use beneficially a specified amount of water, from the available supply of surface water or tributary groundwater, that can be captured, possessed, and controlled in priority under a decree, to the exclusion of all others not then in priority under a decreed water right. See Shirola v. Turkey Canon Ranch Ltd. Liab. Co., 937 P.2d 739, 747-48 (Colo. 1997). A water right comes into existence only through application of the water to the appropriator's beneficial use; that beneficial use then becomes the basis, measure, and limit of the appropriation.

This is the essential premise of appropriation law throughout the west.

"Beneficial use is the measure and the limit of an appropriative right."

Joseph L. Sax, Robert H. Abrams & Barton H. Thompson, Jr., *Legal Control of Water Resources, Cases and Materials, Second Edition* 164 (1991).

After quoting the foregoing, the Court in Empire Lodge, *supra*, stated at p. 1147:

"Water right" means a right to use in accordance with its priority a certain portion of the waters of the state by reason of the appropriation of the same. § 37-92-103(12), 10 C.R.S. (2001). A water right is created when a person appropriates or initiates an appropriation of unappropriated water of a natural stream of the state. Shirola v. Turkey Canon Ranch Ltd. Liab. Co., 937 P.2d 739, 748 (Colo. 1997).

A right to use water of the natural stream arises from placing the unappropriated water to beneficial use; a conditional water right holds a place in the priority system to which the water right antedates in the event the appropriator places the unappropriated water to beneficial use. Dallas Creek Water Co. v. Huey, 933 P.2d 27, 35 (Colo. 1997).

Maximum utilization is a critical component of this state's objective to "maximize the beneficial use of all of the waters of this State." See also BOCC of Park County v. Park County Sportsman's Ranch LLP, 45 P.3d 693 (Colo. 2002). As described in Empire Lodge Homeowners Association v. Moyer, 39 P.3d 1139 (Colo. 2001), this analysis involves maximizing uses consistent with Colorado's interstate compact obligations. That Court stated at p. 1150:

As administration of water approaches its second century the curtain is opening upon the new drama of **maximum utilization** and how constitutionally that doctrine can be integrated into the law of vested rights." (emphasis in original). The 1969 Water Right Determination and Administration Act (1969 Act) contains the General Assembly's response. See Act of June 7, 1969, ch. 373 at 1200-1224. Both responses centered on: (1) reinforcing the adjudication and administration of decreed water rights in order of their priority; and (2) maximizing the use of Colorado's limited water supply for as many decreed uses as possible consistent with meeting the state's interstate delivery obligations under United States Supreme Court equitable apportionment decrees and congressionally approved interstate compacts. People ex rel. Simpson v. Highland Irrigation Co., 917 P.2d 1242, 1248, 1252-53 (Colo. 1996).

This analysis here must evaluate what impact this non-consumptive use will have. As to any downstream rights, the answer is none. As to any future upstream rights, the amount requested is estimated to be 41% of the available supply. This clearly will reduce junior upstream development, exchanges and trans-mountain diversion (of which none are presently identified). This Court is reluctant to intervene to usurp the Applicant's determination of the size and scope of a RICD, subject to the traditional criteria of speculation and waste. Accordingly, the Court will not second guess the Applicant in its requested amount.

The question really turns on what weight or emphasis to give to language in the definitional provision (C.R.S. § 37-92-103(10.3)) of "minimum stream flow"..."for a reasonable recreation experience in and on the water." The Court concludes that this language must be read in context with all of the other provisions. To preclude an Applicant from determining precisely the size and scope of any recreational in channel diversion would appear to infringe on the Constitutional right to appropriate. The counterbalance under traditional water law would be that there can be no speculative

use or waste. The Court concludes that that is still the standard which this Court must apply. Based on the discussion above, the Court is persuaded and finds that the amount sought in this instance does not reach the level of speculation or waste. The Court again notes that there is no finding by the CWCB that would suggest that there is.

Colorado has recognized RICD since City of Thornton v. City of Fort Collins, 830 P.2d 915 (Colo. 1992), and legislatively has restricted this water right in Senate Bill 216.

4. The final area for legal conclusions are what were referred to as the 102(b) factors. The Court concludes that the CWCB has not found nor does the Court, that at any of the levels requested by the Applicant this RICD will impair Colorado's ability to fully develop and put to beneficial use its compact entitlements, injure any CWCB instream flow right, is inconsistent with maximum utilization or will not divert, capture or control the requested water.

In considering the 102(b) factors, the Court concludes, based on the evidence presented,

- (a) The amounts requested will not impair Colorado's ability to fully develop and put to beneficial use its compact entitlements. The legislative history expresses concern of such a right at or near the state line precluding development up river. Here, the right sought is on the Upper Gunnison, roughly 150 miles from the state line, 10 miles downstream from the point where the East and Taylor Rivers meet to form the Gunnison River. Further, portions of these upper

tributaries are already over appropriated and therefore are already internally controlled.

CWCB's expert testified that his analysis was based on the question of whether there will be any impact. The Court concludes that such an analysis is inappropriate. Utilization of that analysis would presumptively preclude any RICD or any other water right for that matter since presumptively any water right will impact others. The Court concludes impairment, as used in the statute, connotes materiality rather than merely any impact.

- (b) Access is not disputed and is appropriate.
- (c) The reach is not disputed and is appropriate.
- (d) The RICD will not cause material injury to any CWCB instream flow rights, which, again, is not disputed.
- (e) The question of maximum utilization is perhaps the most problematic issue to be addressed, as noted earlier in this Order. First, a RICD is a non-consumptive use. Secondly, as evident by this case, the issue becomes one of what amount of water is reasonably necessary for the RICD. Should the minimum for "experts" be the limit – effectively what CWCB advocates – or should an Applicant have the ability to obtain an Olympic quality water course (50% more than the highest amount sought by the Applicant here) should they so decide. The Court concludes that the scope of the project, subject to waste, speculation and the

foregoing criteria, are up to the Applicant. CWCB may make a finding that the quantity applied for is excessive, but did not do so here.

- (f) As designed the course will divert, capture and control the water applied for in its natural course and location if built, again this was not disputed and is also the finding of the Court.

There is no serious controversy or dispute as to the traditional issues to be addressed in an application for a conditional water right.

Accordingly, the Court grants Applicant's conditional water right in the amounts requested as reflected in the attached decree.

Dated this 26th day of December, 2003.

BY THE COURT:

/s/ J. Steven Patrick

J. Steven Patrick
District Judge

xc: counsel of record; pro se parties (via CourtLink)

DISTRICT COURT, WATER DIVISION NO. 4, STATE OF COLORADO Montrose County Justice Center 1200 North Grand Avenue Bin A Montrose, CO 81401-3146 970.249.2859	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
CONCERNING THE APPLICATION FOR WATER RIGHTS OF THE UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT IN GUNNISON COUNTY	
Case Number: 02CW038	
DECREE	

This matter has come before the Court upon the application of Upper Gunnison River Water Conservancy District ("District" or "applicant") for surface water rights for recreational in-channel uses. The application was filed with the Water Clerk for Water Division No. 4 on March 29, 2002. Pursuant to C.R.S. § 37-92-203(7) and 301(2), the application was referred to the Referee for Water Division No. 4. The Court has entered Findings of Fact, Conclusions of Law and Order of even date with this Decree, which is incorporated in its entirety into this Decree. By order dated November 7, 2002, the application was re-referred to the Water Judge for Water Division No. 4. Having made such investigations as are necessary to determine whether or not the statements in the application are true, and being fully advised with respect to the subject matter of the application, the Court enters the following findings of fact, conclusions of law, and decree of the Court:

FINDINGS OF FACT

1. The name, address, and telephone number of the applicant is:

Upper Gunnison River Water Conservancy District
 c/o Kathleen E. Curry, Manager
 200 East Virginia Avenue
 Gunnison, CO 81230
 970.641.6065

2. Timely and adequate notice of the application was given in the manner required by law. None of the land or water rights involved in this application is located in a designated groundwater basin. The Court has jurisdiction over the subject matter of this proceeding

Upper Gunnison River Water Conservancy District
02CW038

and over all persons who have standing to appear as parties, whether they have appeared or not.

3. Statements of opposition were filed in this matter by Virgil and Lee Spann Ranches and Robert and Geraldine Howard; the City of Gunnison; Natural Energy Resources Company; Uncompahgre Valley Water Users Association; Colorado River Water Conservation District; Colorado State Engineer and Division Engineer for Water Division No. 4; Colorado Water Conservation Board; Trout Unlimited; and the objector group (referred to herein as the "Bullock objector group") consisting of Gerald E. Bullock, Thomas C. Kelley, Brenda M. Kelley, Roy B. Winslow, Helen Winslow, Paula J. Lehr, William F. Chambliss, Linda Chambliss, Kenneth R. Bergan, Mary T. Bergan, Ben Peterson, Jill Peterson, Karl R. Peterson, Ruth S. Peterson, Nancy Ruehle, Raymond L. Ruehle, Arthur I. Means, Toni M. Bullock, Linda M. Goldman, Mike Peterson, Carl Long, Ruth Marie Long, J. Craig Bryant, and Lu Ann L. Bryant. The time for filing statements of opposition has expired. No person or entity has sought to intervene.
4. The District reached stipulations with the following parties: Virgil and Lee Spann Ranches and Robert and Geraldine Howard; the City of Gunnison; the Bullock objector group; and the Colorado River Water Conservation District. These stipulations have been approved by the Court. Natural Energy Resources Company withdrew its statement of opposition.
5. On April 10, 2002, pursuant to C.R.S. § 37-92-102(5) and 37-92-305(16), the District submitted a copy of the application to the Colorado Water Conservation Board ("CWCB"). On May 20, 2002, the District requested a hearing before the CWCB pursuant to C.R.S. § 37-92-102(6)(a). A hearing was held before the CWCB on September 10, 2002. After deliberations conducted on September 10 and October 1, 2002, the CWCB submitted its October 11, 2002 Findings and Recommendations of the Colorado Water Conservation Board to the Water Court.
6. The water rights decreed herein are described as follows:
 - A. Names of structures: Gunnison River Whitewater Course (also referred to herein as the "Course"). The Gunnison River Whitewater Course is located in the Gunnison Whitewater Park and is designed to consist of six structures, consisting of three u-shaped dam structures and three double offset water deflector devices. As of the date of this decree, three of the six structures have been constructed: two u-shaped dams referred to as structures five and six, and one double offset deflector device referred to as structure two. The six structures will concentrate and control the flows of the Gunnison River for recreational boating purposes.

Upper Gunnison River Water Conservancy District
02CW038

The structures also incidentally create fish habitat and therefore serve related fishing purposes. A water right is decreed herein for each of the six structures. The six structures are collectively referred to as the Gunnison River Whitewater Course or Course.

- B. Legal description of structures: The Course is located downstream of Highway 50, near the City of Gunnison within the channel of the Gunnison River in Sections 2 and 3, Township 49 North, Range 1 West, of the New Mexico Principal Meridian, County of Gunnison, State of Colorado. This location is approximately 150 miles upstream of the state line. The approximate locations of the six structures which constitute the Course are as follows:

Structure 1 (not yet built): A "V" dam located within the channel of the Gunnison River located North 2 degrees East, a distance of 880 feet from the southwest corner of Section 2.

Structure 2 (built): Double offset deflectors located at points within the channel of the Gunnison River located North 5 degrees West, a distance of 610 feet from the southeast corner of Section 3.

Structure 3 (partially constructed): Double offset deflectors located at points within the channel of the Gunnison River located North 20 degrees West, a distance of 470 feet from the southeast corner of Section 3.

Structure 4 (partially constructed): Double offset deflectors located at points within the channel of the Gunnison River located North 31 degrees West, a distance of 470 feet from the southeast corner of Section 3.

Structure 5 (built): A "U" dam (described as a "V" dam in the application) located within the channel of the Gunnison River located North 50 degrees West, a distance of 510 feet from the southeast corner of Section 3.

Structure 6 (built): A "U" dam (described as a "V" dam in the application) located within the channel of the Gunnison River located North 67 degrees West, a distance of 660 feet from the southeast corner of Section 3.

The Course extends approximately one-quarter mile within the channel of the Gunnison River. A map depicting the location of the Course is incorporated by this reference, Applicant Trial Exhibit 30, and a design drawing of the Course is incorporated by this reference, Applicant Trial Exhibit 29. The precise location of the structures may be slightly different from the locations described above.

Upper Gunnison River Water Conservancy District
02CW038

Nevertheless, the structures will generally be distributed evenly through the stream reach described above. Provided that the locations of all the structures remain within the stream reach described above, any variation in structure location from the locations described herein may simply be described in subsequent applications and decrees for diligence or applications and decrees to make absolute the water rights decreed herein.

- C. Source: Gunnison River, tributary to the Colorado River.
- D. Appropriation:
- i. Date of initiation of appropriation: October 20, 1998.
 - ii. How appropriation was initiated: The appropriation was initiated by formation of the requisite intent to appropriate coupled with actions manifesting such an intent sufficient to put third parties on notice, including but not limited to, discussions in public meetings of the applicant's provision of water rights for the Course, design of the Course by Gunnison County, negotiation and execution of an Intergovernmental Agreement between Gunnison County and applicant, and applicant's authorization in a public meeting to proceed with an application for water rights for the Course in order to implement the Board's policy of improving water supplies for recreational purposes, to insure protection of Gunnison County's investments in the Course, and to insure that the purpose and function of the Gunnison River Whitewater Park can be maintained in the future, notwithstanding development of other water rights on the Gunnison River.
 - iii. Date water was first applied to beneficial use: Not applicable to these conditional water rights, although water has been applied to beneficial use.
- E. Amount claimed: The following amounts (expressed in cubic feet per second) are decreed herein for each of the specified semi-monthly time periods for each of the structures which makes up the Course:

May 1-15	May 16-31	June 1-15	June 16-30	July 1-15	July 16-31	August 1-15	August 16-31	Sept. 1-15	Sept. 16-30
570	1190	1460	1500	1100	530	460	390	300	270

Upper Gunnison River Water Conservancy District
02CW038

- F. Uses: Recreational boating including but not limited to kayaking, rafting, and canoeing. Water will also be used for incidental fishing purposes. However, no separate water right for fishing uses is being confirmed by this decree.
 - G. Name and address of owner of land on which structures are located: Gunnison County, Colorado, c/o County Manager, 200 East Virginia, Gunnison, CO 81230.
7. Applicant has agreed to the following conditions:
- A. When and to the extent releases made for recreational purposes from Taylor Park Reservoir reach the Course, applicant shall deduct the amount of such water reaching the Course from any call it places for the water rights decreed herein.
 - B. The water rights decreed herein shall not be administered in such a manner as to effect a call for water for the purpose of getting water into the Course between the hours of 10 p.m. and 6 a.m.
 - C. No call for the water rights decreed herein shall be placed or administered during any time that a valid call for water is being administered, or could be administered, on behalf of the water rights for the Gunnison Tunnel or the Redlands Power Canal. The Gunnison Tunnel water right referenced herein is the one decreed for 1300 cfs in Case No. W1745. The Redlands Power Canal water rights referred to herein are the ones decreed for 670 cfs in Case No. W1927; 80 cfs in Case No. W8303; and 100 cfs in Case No. 94CW228.
 - D. The Upper Gunnison District will operate the water rights sought herein with due consideration for its mandate as a water conservancy district including the water supply and augmentation needs of its constituents.
 - E. The Upper Gunnison District has also agreed to operate the water rights sought herein in a manner consistent with provisions of the aforementioned Court-approved stipulation between the Upper Gunnison District and opposers Virgil and Lee Spann Ranches and Robert and Geraldine Howard and in a manner consistent with provisions of the aforementioned Court-approved stipulation between the Upper Gunnison District and the Bullock objector group.

CONCLUSIONS OF LAW

8. The Court has exclusive jurisdiction over the subject matter of this proceeding pursuant to C.R.S. § 37-92-203, and over all persons or entities affected hereby, whether they have appeared or not.
9. The District, a water conservancy district, is an entity designated by S.B. 216, 2001 Colo. Sess. Laws 1187-1188 (hereinafter "S.B. 216"), as entitled to appropriate a recreational in-channel diversion ("RICD"). C.R.S. § 37-92-103(4) and (10.3).
10. The reach of the Gunnison River in which the Gunnison River Whitewater Course is located is an appropriate reach of stream for the intended use. C.R.S. § 37-92-102(6)(b)(II).
11. Applicant has effected an appropriation of water by demonstrating a specific plan and intent to divert the claimed amounts of water at the claimed time periods and to apply such water to beneficial use, specifically recreational in-channel boating use in the Gunnison River Whitewater Course. C.R.S. § 37-92-103(3)(a). Applicant has completed the "first step" toward the conditional appropriation by showing the requisite intent to appropriate accompanied by an open, physical demonstration of that intent. *City of Thornton v. City of Fort Collins*, 830 P.2d 915, 924-925 (Colo. 1992).
12. Recreational in-channel boating is a recognized beneficial use of water under Colorado water law. C.R.S. § 37-92-103(4) and (10.3); *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).
13. The amounts of water claimed and decreed herein will be controlled in the water's natural course in the Gunnison River during the claimed time periods by means of the u-shaped dam structures and offset water deflector devices constructed or proposed for construction in the Gunnison River Whitewater Course as described above in section 6. C.R.S. § 37-92-103(7).
14. The controlling of the claimed amounts of water during the claimed time periods by the proposed in-channel structures and devices and the use of such water for the intended recreational in-channel boating purposes:
 - A. represents a reasonably efficient practice of diversion and beneficial use. *Alamosa-LaJara Water Users Protection Ass'n v. Gould*, 674 P.2d 914, 934-5 (Colo. 1983); *City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992); C.R.S. § 37-92-103(4) and -(7); C.R.S. § 37-92-102(2)(b).

Upper Gunnison River Water Conservancy District
02CW038

- B. represents the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation was lawfully made by the applicant. C.R.S. § 37-92-103(4) and -(10.3); and
 - C. will create opportunities for the intended recreation experiences to occur. C.R.S. § 37-92-103(10.3). *See also City of Thornton v. City of Fort Collins*, 830 P.2d 915 (Colo. 1992).
15. The intended recreation experiences are reasonable. C.R.S. § 37-92-103(10.3).
16. By using the proposed in-channel structures and devices in a reasonably efficient manner to control that amount of water that is reasonable and appropriate to accomplish without waste the intended recreational in-channel boating purposes, and by thereby providing an opportunity for reasonable recreation experiences to occur, the proposed appropriation of water meets the beneficial use standards historically applied to water rights which standards, as recognized by Senate Bill 216, are also to be applied to "recreational in-channel diversions." *See* C.R.S. § 37-92-103(4) and -(10.3). *See also Santa Fe Ranches Property Owners Assoc. v. Simpson*, 990 P.2d 46, 53-54 (Colo. 1999).
17. The adjudication and administration of the claimed water right will not impair the ability of Colorado to fully develop and place to consumptive beneficial use its compact entitlements. C.R.S. § 37-92-102(6)(b)(I). There is no evidence of any active proposal for a transmountain project - by exchange or by direct diversion and/or storage - upstream of the recreational in-channel water rights decreed herein. To the extent there may be such a proposal in the future, the water rights decreed herein (a) will have no effect on any junior upstream direct flow or storage water rights for out-of-basin use and (b) will have a relatively limited effect on any junior exchange. As to opportunities for consumptive uses of water downstream of the water rights decreed herein - excluding the above-discussed possible future exchanges from Blue Mesa Reservoir - there is no impact because of the non-consumptive nature of these recreational in-channel water rights.
18. The adjudication and administration of the water rights described herein will promote maximum utilization of waters of the state as referenced in paragraph (a) of subsection (1) of C.R.S. § 37-92-102(1) or as discussed in broader terms in case law. C.R.S. § 37-92-102(6)(b)(V). *See, e.g., Board of County Commissioners of County of Arapahoe v. Crystal Creek Homeowners Assoc.*, 14 P.3d 325, 333 (Colo. 2000) (*citing Matter of Rules and Reg. Gov. Use, Control & Protection of Water Rights [also known as Alamosa-LaJara Water Users Protection Ass'n v. Gould]*, 674 P.2d 914, 935 (Colo.

Upper Gunnison River Water Conservancy District
02CW038

1983). The water rights decreed herein control water and place it to the intended beneficial uses via a reasonably efficient means of diversion without any waste. They are non-consumptive and should have a positive economic impact on the local area. They do not preclude other water development opportunities either downstream or upstream. In effecting the appropriation, the applicant balanced recreational uses with other uses and has agreed to operate the water rights decreed herein with due consideration for its mandate as a water conservancy district including the water supply and augmentation needs of its constituents.

19. There are no existing decreed instream flow water rights in the reach of the water rights decreed herein, or any affected downstream reach of the Gunnison River. Exercise of the water rights decreed herein will not cause material injury to any CWCB instream flow water rights. C.R.S. § 37-92-102(6)(b)(IV).
20. The water rights decreed herein can be adequately measured and administered through the proposed reach by using the U.S.G.S. Gunnison River at Gunnison gage and accounting for intervening diversions between that gage and the whitewater course.
21. There is access for recreational in-channel use. C.R.S. § 37-92-102(6)(b)(III).
22. Water is available for the claimed appropriation. *Board of County Commissioners of County of Arapahoe v. U.S.*, 891 P.2d 952, 962 (Colo. 1995).
23. The waters claimed by applicant can be and will be diverted, or otherwise captured, possessed, and controlled and will be beneficially used and the project can and will be completed with diligence and within a reasonable time. C.R.S. § 37-92-305(9)(b).
24. Subject to the terms and conditions herein, applicant is entitled to a decree confirming conditional water rights for recreational in-channel boating uses at the proposed in-channel physical control structures and devices in the amounts claimed during the claimed time periods with an appropriation date of October 20, 1998. Incidental fishing uses will also result, but no separate water right is herein decreed for fishing purposes.
25. The Court has duly considered the October 11, 2002 Findings and Recommendations of the Colorado Water Conservation Board to the Water Court. The Court concludes that the preponderance of the evidence supports the findings and conclusions contained in this decree.

Upper Gunnison River Water Conservancy District
02CW038

DECREE OF THE COURT

26. The foregoing Findings of Fact and Conclusions of Law are incorporated by this reference and modified as necessary to constitute the Decree of the Court.
27. The Court hereby grants the application for conditional water rights for recreational in-channel boating uses, with incidental fishing purposes, at the in-channel physical control structures and devices described herein in the claimed amounts during the claimed time periods with an appropriation date of October 20, 1998.
28. Applicant shall provide such accounting for the water rights adjudicated herein as is reasonably requested by the Division Engineer.
29. Applicant shall install adequate measuring devices as may reasonably be required by the Division Engineer.
30. The water rights and priority granted herein are based on the appropriation date confirmed herein and on the filing of the application in this case in the Water Court in the year of 2002. Said water rights and priority shall be administered as having been filed in 2002, and shall be junior to all water rights granted pursuant to applications filed in previous years. As between all water rights applied for in the same calendar year, priorities shall be determined by historical dates of appropriation and shall not be affected by the date of application or the date of entry of ruling.
31. The conditional water rights for the Gunnison River Whitewater Course are hereby continued in full force and effect until the last day of December, 2009. To maintain such conditional water rights, an application for a finding of reasonable diligence shall be filed on or before the last day of December, 2009, or a showing made on or before such date that such conditional rights have become absolute water rights by reason of the completion of the appropriation.

Upper Gunnison River Water Conservancy District
02CW038

DATED this 26th day of December, 2003.

BY THE COURT:

/s/ J. Steven Patrick

J. Steven Patrick
Water Judge
Water Division No. 4
State of Colorado

xc: counsel of record; pro se parties (via CourtLink)