

<p><b>DISTRICT COURT, WATER DIVISION NO. 4, COLORADO</b></p> <p>Montrose County Justice Center 1200 N. Grand Avenue, Bin A Montrose, Colorado 81401-3146</p> <hr/> <p><b>CONCERNING THE APPLICATION FOR WATER RIGHTS OF UPPER GUNNISON RIVER WATER CONSERVANCY DISTRICT</b></p> <p>in Gunnison County, Colorado.</p>	<p>Filed in the District Court Water Division 4</p> <p>DEC 06 2007</p> <p>OCT 22 2007</p> <p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number: 07 CW 71</p>
<p align="center"><b>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, AND JUDGMENT AND DECREE OF THE WATER COURT</b></p>	

This matter comes before the Referee upon the application of the Upper Gunnison River Water Conservancy District (District) for a change of water right. The Referee, having made such investigations as are necessary to determine whether the statements in the application are true, and having become fully advised with respect to the subject matter of the application, hereby enters and makes the following findings of fact, conclusions of law and ruling.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The District's Application for Change of Water Right was filed on May 28, 2007.
2. Timely and adequate notice of the pendency of this proceeding *in rem* was given in the manner required by law. This Court has jurisdiction over the subject matter of this proceeding and over all who have standing to appear as parties, whether they have appeared or not.
3. A timely Statement of Opposition was filed by Cockrell Investment Partners, L.P. No person or entity sought to intervene. The time for filing statements of opposition and motions to intervene has expired.
4. The District has resolved all issues between the District and Cockrell Investment Partners, L.P. and has reached agreement with the Division Engineer regarding issues related to administration.

5. The District adjudicated a recreational in-channel diversion water right that is decreed to the Gunnison Whitewater Park in Case No. 02CW038, Water Division No. 4 ("RICD Water Right"). Under the terms of the District's decree dated January 12, 2006, the RICD Water Right is decreed in amounts varying from 270 c.f.s. to 1,200 c.f.s., conditional, during specified time periods for recreational boating, including, but not limited to, kayaking, rafting and canoeing.

6. Paragraph 8.D. of the RICD Water Right decree contains the condition that the District "will 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". This condition derives from a stipulation between the District and the Colorado River Water Conservation District approved by, and made an order of, this Court in Case No. 02CW038.

7. The condition contained in paragraph 8.D. of the RICD Water Right decree reflects the District's commitment to exempt from the call of the RICD Water Right the depletions from diversions by junior water rights by subordinating the RICD Water Right to such junior water rights, subject to the volumetric limitation described in paragraphs 8 and 17.

8. Senate Bill 06-37, now codified within §37-92-103(10.3) C.R.S. ("SB 37"), by its terms applies only to a recreational in-channel diversion water right "filed on or after the effective date" of SB 37. However, by agreement among the District, the Engineers, and the CWCB, the change of water right approved by this Decree will incorporate into the RICD Water Right the presumption codified in SB 37 that there will not be material injury to the RICD Water Right from subsequent appropriations, including those appropriations through non-exempt wells that are legally permitted, constructed, and in use, if the cumulative instantaneous effect on the recreational in-channel diversion caused by the depletions from such appropriations does not exceed 5.4 c.f.s. (two percent of the lowest decreed rate of flow for the RICD Water Right) measured at the Gunnison Whitewater Park ("the material injury presumption"). The presumption that material injury will not occur from depletions of two percent is reasonable and rational.

9. The change of water right approved by this Decree thus effectively subordinates the RICD Water Right to such subsequent appropriations subject to the volumetric limitation described in paragraphs 8 and 17.

10. This change of water right will allow appropriations junior to the RICD Water Right, including those appropriations through non-exempt wells that are legally permitted, constructed, and in use, to be made without the need for augmentation of the RICD Water Right where such appropriations would otherwise be required to provide augmentation to the RICD Water Right but for this Decree.

11. Incorporation into the RICD Water Right of the material injury presumption does not in and of itself constitute abandonment of any part of such water right.

12. Incorporation into the RICD Water Right of the material injury presumption means that the original flows claimed for the RICD Water Right may not have been the minimum stream flow for a reasonable recreation experience that promoted maximum utilization, but only to the extent of two percent of the lowest decreed rate of flow, and incorporation into the RICD Water Right of the material injury presumption does not affect the Court's finding in Case No. 02CW038 that the District could apply the entire decreed amount of the RICD Water Right to beneficial use.

13. The change of water right proposed by the District will not injuriously affect the owner of or persons entitled to use water under vested water rights or decreed conditional water rights; therefore, pursuant to §37-92-305(3) C.R.S. (2006), the District is entitled to a decree approving the change of water right described herein.

### **JUDGMENT AND DECREE**

14. The foregoing Findings of Fact and Conclusions of Law are incorporated into and form a part of this Decree, as if fully set forth herein at this point.

15. The facts alleged in the Application are true.

16. The District's application for change of water right is GRANTED; the presumption that there will not be material injury to the RICD Water Right from upstream appropriations, including those appropriations through non-exempt wells that are legally permitted, constructed, and in use, if the cumulative effect on the recreational in-channel diversion caused by the depletions from such appropriations does not exceed 5.4 c.f.s. (two percent of the lowest decreed rate of flow for the RICD Water Right) measured at the Gunnison Whitewater Park is hereby incorporated into the RICD Water Right.

17. The District shall not call and the Division Engineer shall not administer a call placed by the RICD Water Right until the cumulative instantaneous depletion to the RICD Water Right from diversions by adjudicated water rights, and those appropriations through non-exempt wells that are legally permitted, constructed, and in use, with priorities or permit dates junior to the RICD Water Right exceeds 5.4 c.f.s., measured at the Gunnison Whitewater Park. In determining whether said volumetric limit has been exceeded, the instantaneous depletion to the RICD Water Right shall be accumulated in order of the priority dates or permit dates of the junior appropriations benefitting from the subordination decreed herein.

18. Except as specifically modified by the incorporation into the RICD Water Right of the presumption that there will not be material injury to the RICD Water Right from subsequent

depletions from appropriations if the cumulative effect on the recreational in-channel diversion caused by such appropriations does not exceed two percent of the lowest decreed rate of flow for the RICD Water Right, measured at the Gunnison Whitewater Park, all terms and conditions of the Decree dated January 12, 2006 in Case No. 02CW038, Water Division No. 4, shall remain in full force and effect.

19. The District shall provide an annual accounting reasonably acceptable to the Division Engineer. The particular form and type of accounting necessary for the general subordination of the RICD Water Right is not decreed herein except that, as guidelines, the District and the Division Engineer have agreed to the following terms regarding accounting:

a. On or before April 1, 2008, the District shall provide to the State Engineer and Division Engineer, a report listing the names of agents for the District who have the authority to call the water Right and listing the diversion structures that qualify for the general subordination of the RICD Water Right under the terms of this Decree, listed according to the priority date or permit date of the junior appropriations benefitting from the subordination decreed herein. The report shall also include a calculation of the cumulative instantaneous depletion to the RICD Water Right by the listed structures, accumulated in order of the priority dates or permit dates of the junior appropriations benefitting from the subordination decreed herein.

b. Following delivery of the initial report described in paragraph 19.a, on or before April 1 of each subsequent year, the District shall provide to the State Engineer and Division Engineer, an annual report. The annual report shall include an updated listing of the diversion structures that qualify for the general subordination of the RICD Water Right under the terms of this Decree, which separately identifies the structures which have been added to or removed from the listing since the initial report or previous annual report.

20. The estimates of diversions and related depletions for the structures listed in the annual reports required by paragraph 19 are prepared solely for the purpose of accounting for the depletion to the RICD Water Right caused by junior appropriations according to the terms of this Decree and shall not affect the amount of diversions or depletions that may lawfully be made by such structures under the water rights decreed thereto.

21. Nothing contained in this Decree shall be construed as an assignment of the RICD Water Right or as a limitation on the District's right to place a call on the Gunnison River for the RICD Water Right, other than as explicitly described herein.

22. Nothing contained in this Decree shall be interpreted to relieve junior appropriators who benefit from the general subordination approved in this Decree from the requirement to provide augmentation of their depletions to any other senior water right in order to prevent injury to vested water rights and decreed conditional rights.

23. The District shall notify this Court of any change in mailing address.

24. This decree shall be filed with the water clerk and a copy shall be filed with the State Engineer and Division Engineer, Water Division No. 4.


25. Pursuant to § 37-92-304(6), C.R.S. (2006), this court retains jurisdiction over this matter for reconsideration of the question of injury to the vested rights of others for a period of ten years from and after the date that this ruling becomes the decree of this court.

Dated this 22<sup>nd</sup> day of October, 2007.

  
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Aaron R. Clay, Water Referee

No protest was filed to this matter. The foregoing ruling is confirmed and approved and is made the Judgment and Decree of this Court.

Dated this 6<sup>th</sup> day of December, 2007.

  
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J. Steven Patrick, Water Judge