

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	▲ COURT USE ONLY ▲
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. By order dated November 7, 2002, the application was re-referred to the Water Judge for Water Division No 4. The case proceeded to trial on September 15-19, 2003, and this Court entered Findings of Fact, Conclusions of Law and Order and a Decree on December 26, 2003. The case was appealed, and following the Colorado Supreme Court’s ruling on March 14, 2005, the matter was remanded to this Court. The case is now before this Court. The Court, having undertaken such further investigations as it deems appropriate, and being fully advised, 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 Karen Shirley, Manager
 234 North Main, Suite 3C
 Gunnison, CO 81230
 970.641 6065

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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 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, the Colorado River Water Conservation District, the Colorado Water Conservation Board and the Colorado State Engineer and Division Engineer for Water Division No. 4, Trout Unlimited and Uncompahgre Valley Water Users Association. 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.

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- 6 A trial was held in this case from September 15 - 19, 2003. This Court entered a decree on December 26, 2003, and the CWCB and State Engineer and Division Engineer for Water Division No. 4 appealed. The Colorado Supreme Court's ruling was entered in *Colorado Water Conservation Board v. Upper Gunnison River Water Conservancy District*, 109 P 3d 585 (Colo. 2005) ("*CWCB v. Upper Gunnison*") on March 14, 2005, and the Supreme Court remanded the case to this Court (1) so that the CWCB could make its statutorily required findings and recommendation based on the stream flow amounts and recreation experience claimed by the applicant, and (2) so that this Court could then consider those revised findings and recommendation and further determine whether applicant's intended recreational in-channel diversion ("RICD") comports with the definition of "recreational in-channel diversion" found in S.B. 216 as articulated by the Supreme Court. All remaining issues having been settled among the remaining opposers, and the Court now enters this decree.
7. 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 trial date, three of the six structures had been constructed: two u-shaped dams referred to as structures five and six, and one double offset deflector device referred to as structure two. (References in this decree to structures as "built," "partially built," or "not yet constructed" refer to the status of construction at the time of trial.) The six structures will concentrate and control the flows of the Gunnison River for recreational boating purposes. A water right is decreed herein for each of the six structures. The six structures make up the Gunnison River Whitewater 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:

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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 attached as Exhibit A, and a design drawing of the Course is attached as Exhibit B. Both exhibits are incorporated herein by this reference. The precise location of the structures may be slightly different from the locations 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.

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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 Amounts 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
535	875	1200	1200	975	500	400	325	300	270

F Uses: Recreational boating including but not limited to kayaking, rafting, and canoeing.

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- 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
- 8 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 1175 cfs absolute and 125 cfs conditional in Case No. W1745. The Redlands Power Canal water rights referred to herein are the ones decreed for 670 cfs in Case No. CA1927; 80 cfs in Case No. CA8303; and 100 cfs in Case No. 94CW228.
- D. The Upper Gunnison 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.
- E. The Upper Gunnison District has also agreed to operate the water rights decreed 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, and the Court-approved stipulations with the other opposers.

CONCLUSIONS OF LAW

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9. 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.
10. 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 an RICD. C.R.S. § 37-92-103(4) and (10.3)
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, the Gunnison River Whitewater Course has been designed to be conducive to many types of whitewater boating for a variety of different skill levels, as applicant hopes to draw both locals and tourists, host competitions, enhance Western State College's outdoor recreation program, and strengthen the region's overall economy. *CWCB v. Upper Gunnison*, 109 P.3d at 589; 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. 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 7. C.R.S. § 37-92-103(7).
13. 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 represents 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 103(7)
14. The recreational in-channel diversion water right herein decreed meets the statutory definition of "recreational in-channel diversion." Thus, each flow rate herein decreed for the Gunnison River Whitewater Course, during the time period for which it is decreed, meets the definition of a "recreational in channel diversion" set forth in S.B. 216 and articulated

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- by the Colorado Supreme Court. C.R.S. § 37-92-103(10.3); *CWCB v. Upper Gunnison* 109 P.3d at 603.
15. The adjudication and administration of the water right decreed herein 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)
 16. 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).
 17. There is access to the Gunnison River Whitewater Course for recreational in-channel use C.R.S. § 37-92-102(6)(b)(III).
 18. There are no existing decreed instream flow water rights in the reach of the Gunnison River Whitewater Park, 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)
 19. The adjudication and administration of the water rights decreed herein, subject to the conditions of this decree, will promote maximum utilization of the waters of the state. C.R.S. § 37-92-102(6)(b)(V). The water rights decreed herein for the Gunnison River Whitewater Course conserve and efficiently use the available Gunnison River flow, thereby promoting maximum utilization. *CWCB v. Upper Gunnison*, 109 P.3d at 595.
 20. The water rights decreed herein should be able to 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. Nevertheless, applicant shall install such other adequate measuring devices as may reasonably be required by the Division Engineer.
 21. 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).

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22. 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).
23. 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 herein decreed during the claimed time periods with an appropriation date of October 20, 1998.
24. In order to comply with the Supreme Court's directives in *CWCB v. Upper Gunnison*, this Court was required to (A) remand this case to the CWCB for revised findings consistent with the Supreme Court's delineation of the CWCB's role; and (B) determine whether the applicant's requested water rights meet the definition of an RICD. *CWCB v Upper Gunnison* 109 P.3d at 603
- A. By order dated June 16, 2005, this Court remanded the case to CWCB. CWCB's stipulation filed herein provides that: "Pursuant to C.R.S. § 37-92-102(6)(a), the CWCB recommends that the water court grant the application for recreational in-channel diversion water rights, subject to the terms and conditions of [this decree.]" Pursuant to that same stipulation, CWCB has made the revised findings required by C.R.S. § 37-92-102(6)(b) and reported them to this Court as required by C.R.S. § 37-92-305(13) and the Supreme Court's remand order. The Court has duly considered said revised findings and recommendation.
- B. As provided in paragraph 14 above, Court concludes as a matter of law that each flow rate herein decreed for the Gunnison River Whitewater Course, during the time period for which it is decreed, meets the statutory definition of "recreational in-channel diversion" set forth in S.B. 216 and articulated by the Colorado Supreme Court C.R.S. § 37-92-103(10.3); *CWCB v Upper Gunnison* 109 P.3d at 603. Therefore, each amount herein decreed is "the minimum stream flow as it is captured, controlled and placed to beneficial use between specific points defined by physical control structures pursuant 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." C.R.S. § 37-92-103(10.3). The applicant's intended recreation experiences

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are reasonable in light of the amount of water in the Gunnison River in the reach during each time period for which an RICD flow rate is decreed. *CWCB v. Upper Gunnison*, 109 P.3d at 602-603

DECREE OF THE COURT

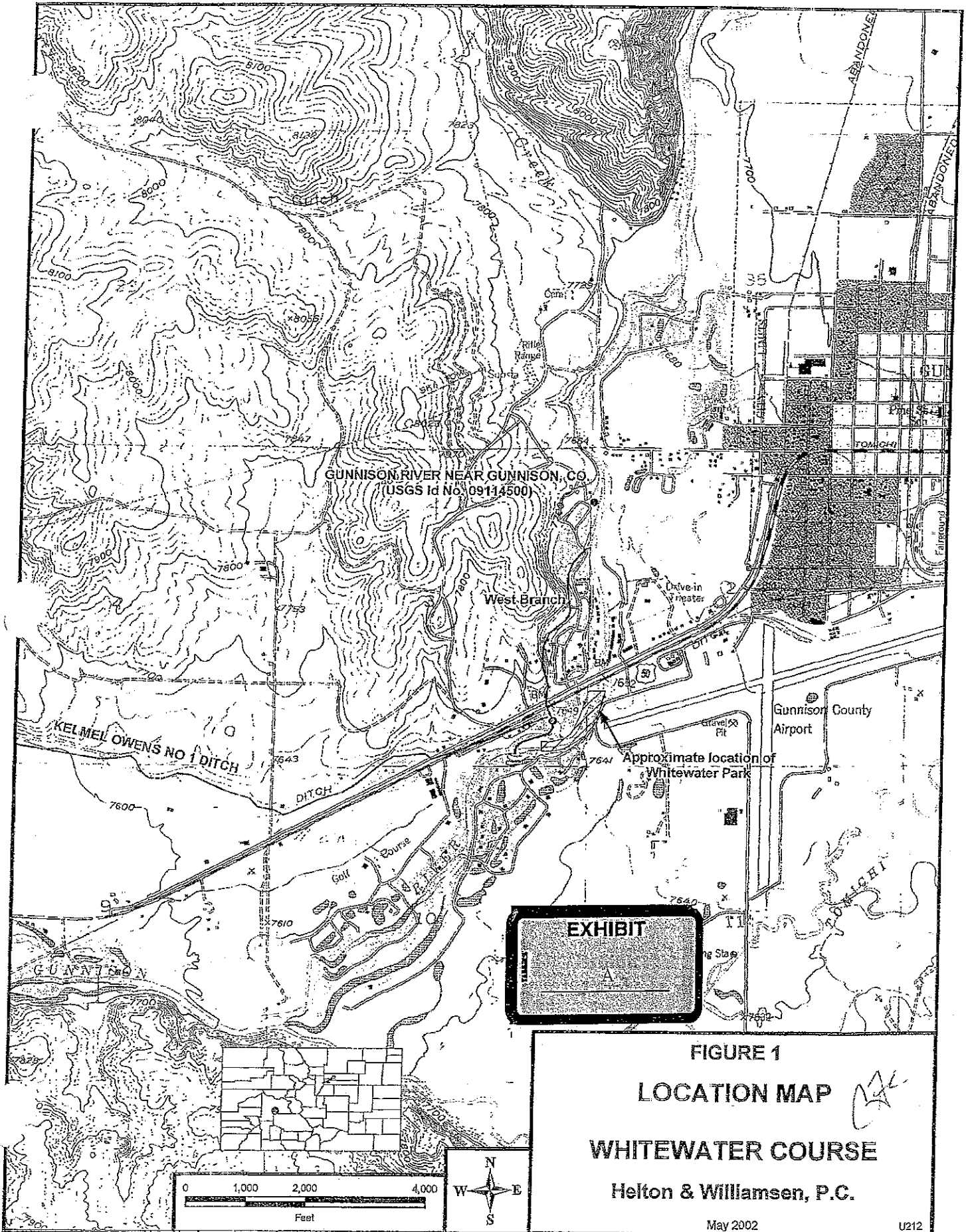
25. The foregoing Findings of Fact and Conclusions of Law are incorporated by this reference and modified as necessary to constitute the Decree of the Court.
26. The Court hereby grants the application for conditional water rights for recreational in-channel boating uses at the in-channel physical control structures and devices described herein in the amounts set forth in paragraph 7 above, during the claimed time periods, with an appropriation date of October 20, 1998.
27. Applicant shall provide such accounting for the water rights adjudicated herein as is reasonably requested by the Division Engineer.
28. 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.
29. The conditional water rights for the Gunnison River Whitewater Course are hereby continued in full force and effect until the last day of _____, 20___. To maintain such conditional water rights, an application for a finding of reasonable diligence shall be filed on or before the last day of _____, 20___, 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.

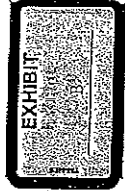
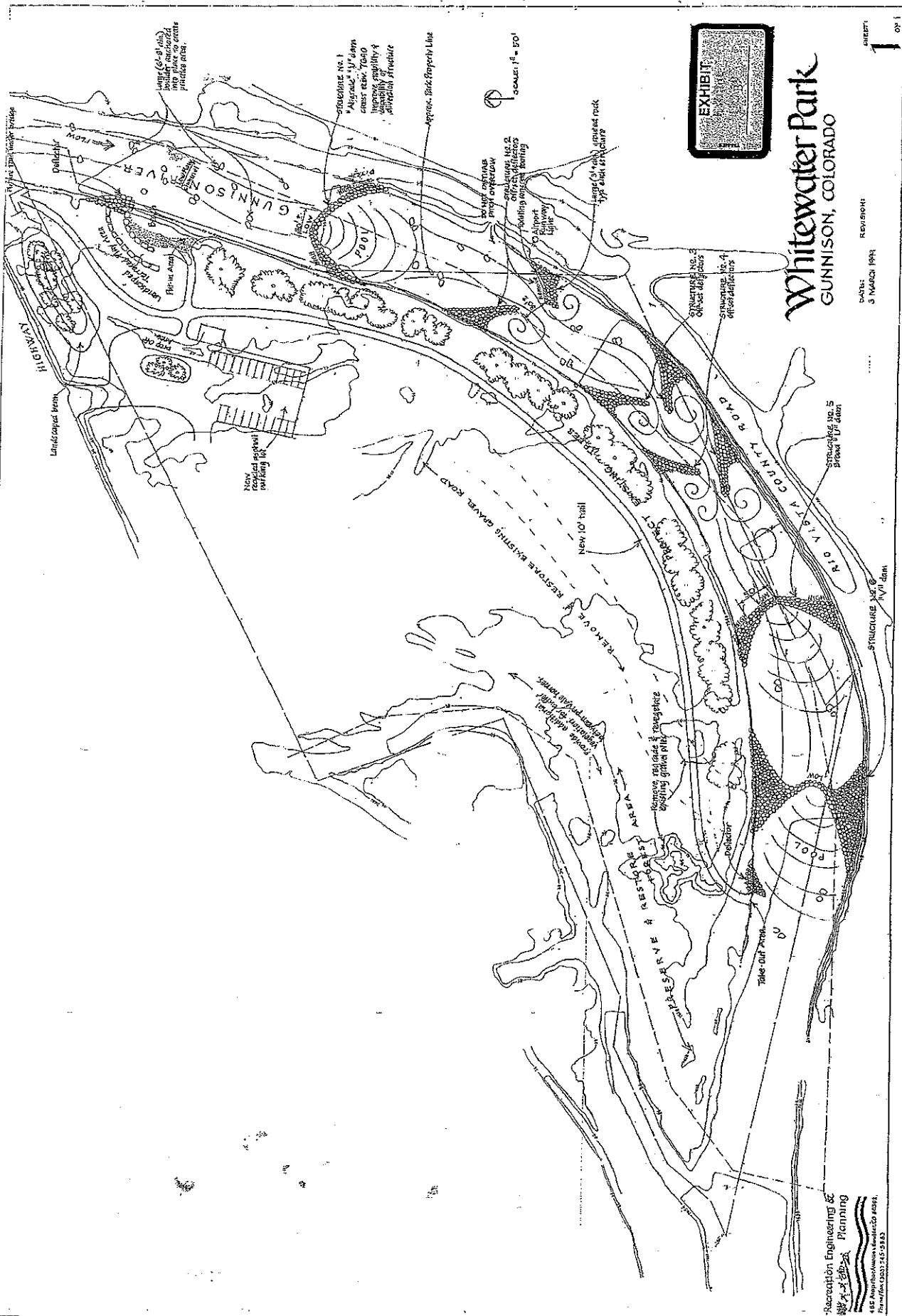
DATED this ____ day of _____, 2006

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BY THE COURT:

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





Whitewater Park
GUNNISON, COLORADO

DATE: 3 MARCH 1991
 REV/SHEET: 1 OF 1

Recreation Engineering &
 Planning
 4424 N. 1st Street
 Grand Junction, CO 81505

[Handwritten signature]