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District Court, Water Division 6, State of Colorado  
 Routt County Courthouse  
 1955 Shield Drive, P.O. Box 773117  
 Steamboat Springs, CO 80477  
 (970) 879-5020

CONCERNING THE APPLICATION FOR WATER  
 RIGHTS OF DEERWOOD SERVICE COMPANY,  
 LLC

IN ROUTT COUNTY, COLORADO

▲ COURT USE ONLY ▲

Case No. 2005 CW 23

**FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, AND  
 DECREE OF THE COURT**

THIS MATTER has come before the Water Referee on an Application for Change of Water Right and Approval of Plan for Augmentation and Exchange (the "Application") filed by the Applicant, Deerwood Service Company, LLC. The Referee, having reviewed the Application and the other pleadings in this case, having considered the comments of the Division Engineer, and now being fully advised with respect to this matter, enters the following Findings of Fact, Conclusions of Law, and Ruling of the Water Referee and Decree of the Water Court (the "Ruling and Decree"):

**FINDINGS OF FACT**

1. Filing and Jurisdiction. A properly verified application was filed in this matter by the Applicant on June 28, 2005. Timely and adequate notice of the Application was given in the manner provided by the statute. See §37-92-302, C.R.S. (2006). All notice required by law for the filing of the Application have been given, and the Referee has jurisdiction over the Application.

2. Name, Address and Telephone Number of Applicant:

Deerwood Service Company, LLC  
 c/o Teresa Audesirk, Chairman  
 P.O. Box 881546  
 Steamboat Springs, CO 80488  
 (970) 870-1834

c/o Karl D. Ohlsen, Esq.  
Mary Mead Hammond, Esq.  
Carlson, Hammond & Paddock, LLC  
1900 Grant Street, Suite 1200  
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(303) 861-9000

3. Overview: The purpose of the application is to provide replacement water for any out-of-priority depletions that may result from operation of the DP Well Nos. 3 and 4 by the Deerwood Service Company, LLC (“Deerwood”) and the use of water by its customers. The application sought a change of water rights decreed to Deerwood Pond in Case No. 94CW 148 and a conditional appropriative right of exchange on Trout Creek. Applicant has determined not to pursue the change or the conditional appropriative right of exchange as part of this matter. Deerwood serves the following subdivisions:
- a. Deerwood Ranches Subdivision, located in portions of Sections 20, 21, 28, and 29, T. 5 N., R. 85 W. of the 6<sup>th</sup> P.M., Routt County, Colorado, as described in the plat filed at No. 12095 of the real property records of the Routt County Clerk and Recorder (“Deerwood Ranches”). Deerwood will provide water service to 26 residential lots at Deerwood Ranches.
  - b. Creek Ranch Land Preservation Subdivision, located in portions of Sections 7, 8, 9, and 17 through 21, T. 5 N., R. 85 W., 6<sup>th</sup> P.M., Routt County, Colorado, as described in the plat filed at 12787 of the real property records of the Routt County Clerk and Recorder (“Creek Ranch”). Deerwood will provide water service to 39 residential lots and one ranch headquarters at Creek Ranch.
  - c. The Wilkerson property, described as follows: All of Lot 14, Section 28, and Tract 157, Sections 28, 29 and 33, all in T. 5 N., R. 85 W., of the 6<sup>th</sup> P.M., Routt County, Colorado, according to the resurvey approved October 19, 1916 by the U.S. Surveyor General’s Office (“Wilkerson Property”). Deerwood will provide water service to 4 residential lots on the Wilkerson Property.

The area served by Deerwood is referred to collectively as the “Deerwood Service Area.”

4. Statements of Opposition. Statements of opposition were filed in this case by Twentymile Coal, LLC, formerly known as Twentymile Coal Company (“Twentymile”), the State and Division Engineers, and the Colorado Water Conservation Board (“CWCB”). The time for filing statements of opposition has expired. Deerwood entered into a stipulation with Twentymile that was approved by the Water Court on August 20, 2012. Deerwood entered into a stipulation with the State and

Division Engineers that was approved by the Water Court on June 16, 2012. The CWCB approved an Injury with Mitigation Plan, with conditions, on September 14, 2011, and Deerwood entered into a stipulation with the CWCB that was approved by the Water Court on June 16, 2012.

5. All Persons Bound. All persons affected by the Application, whether appearing or not, are parties hereto and are bound by this Ruling and Decree, all notices required by law having been given and the Water Court having jurisdiction over the subject matter of this proceeding. See §§37-92-302, 37-92-203, C.R.S. (2006).

### **Plan for Augmentation**

6. Name of Structures to be Augmented:
  - a. DP Well No. 3 (Expired Permit No. 065617-F):
    - i. Legal Description: Located in Lot 12 of Tract 145 per the Resurvey (SE1/4 NE1/4 – original survey), Section 20, T. 5 N., R. 85 W., of the 6<sup>th</sup> P.M. Located 4,170 feet from the west line and 2,691 feet from the south line of Section 20. Also located North 47 degrees, 37 minutes, 38 seconds East, 3,992.24 feet from AP 3 Tract 159.
    - ii. Source: Groundwater tributary to Whetstone Creek and Trout Creek, tributary to the Yampa River.
    - iii. Prior Adjudications: DP Well No. 3 was previously adjudicated in the following cases:
      - a) Case No. 94CW93, District Court, Water Division No. 6, decree dated May 31, 1995, 50 g.p.m. conditional, with an appropriation date of May 24, 1994, for a central domestic water supply serving 26 lots at Deerwood Ranches.
      - b) Case No. 99CW13, District Court, Water Division No. 6, decree dated October 12, 1999, 50 g.p.m. conditional, with an appropriation date of April 9, 1999, for domestic, irrigation, stockwater, and fire protection on 39 residential lots and one ranch headquarters at Creek Ranch.
      - c) Case No. 2001CW81, District Court, Water Division No. 6, decree dated February 11, 2002, 50 g.p.m. conditional, with an appropriation date of June 13, 2001, for domestic, irrigation, stockwater and fire protection for 4 lots on the Wilkerson property.

Each water right decreed to this structure will be augmented under this plan when the stream depletions resulting from the exercise of that water right are out-of-priority.

- iv. **Separate Appropriations:** DP Well No. 3 is subject to separate and independent appropriations adjudicated in Case Nos. 94CW93, 99CW13, and 01 CW8 1. The rate of flow specified in each decree represents the total amount appropriated for the combined uses adjudicated in those cases.
  - v. **Annual Diversions:** The combined annual average amount of groundwater to be withdrawn through DP Well Nos. 3 and 4 pursuant to these three water rights shall not exceed 100 acre-feet.
  - vi. **Well Permit:** Well Permit No. 65617-F expired on April 17, 2008. DP Well No. 3 is not currently equipped with a pump, and is not currently in use by Deerwood.
- b. DP Well No. 4 (Permit No. 065618-F):
- i. **Legal Description:** Located in Lot 18 of Tract 159 per the Resurvey (SE1/4 SW1/4 - original survey), Section 20, T. 5 N., R. 85 W., of the 6<sup>th</sup> P.M. Located 632 feet from the south line and 1,374 feet from the west line of Section 20. Also located North 13 degrees, 32 minutes, 51 seconds East, 650.88 feet from AP 3 Tract 159.
  - ii. **Source:** Groundwater tributary to Whetstone Creek and Trout Creek, tributary to the Yampa River.
  - iii. **Prior Adjudications:** DP Well No. 4 was previously adjudicated in the following cases:
    - a) Case No. 94CW93, District Court, Water Division No. 6, decree dated May 31, 1995, 200 g.p.m. conditional, with an appropriation date of May 31, 1994 (142 g.p.m., decreed absolute in Case No. 200 1CW22, Water Division No. 6, decree dated October 9, 2002) for a central domestic water supply serving 26 lots at Deerwood Ranches.
    - b) Case No. 99CW13, District Court, Water Division No. 6, decree dated October 12, 1999, 200 g.p.m. conditional, with an appropriation date of April 9, 1999, for domestic, irrigation, stockwater, and fire protection on 39 residential lots and one ranch headquarters at Creek Ranch.

- c) Case No. 2001CW81, District Court, Water Division No. 6, decree dated February 11, 2002, 200 g.p.m. conditional, with an appropriation date of June 13, 2001, for domestic, irrigation, stockwater, and fire protection for 4 lots on the Wilkerson property.

Each water right decreed to this structure will be augmented under this plan when the stream depletions resulting from the exercise of that water right are out-of-priority.

- iv. Separate Appropriations: DP Well No. 4 is subject to separate and independent appropriations adjudicated in Case Nos. 94CW93, 99CW13, and 01 CW8 1. The rate of flow specified in each decree represents the total amount appropriated for the combined uses adjudicated in those cases.
- v. Annual Diversions: The combined annual average amount of groundwater to be withdrawn through DP Well Nos. 3 and 4 pursuant to these three water rights shall not exceed 100 acre-feet.

7. Previous Decrees for Water Rights to be Used for Augmentation:

a. Deerwood Pond (Second and Third Fillings):

- i. Legal Description: Dam located in the SE 1/4 NW1/4 of Section 20, T. 5 N., R. 85 W., of the 6<sup>th</sup> P.M., at a point North 37 degrees, 16 minutes, 51 seconds East, 4,389.78 feet from the Southwest Corner of said Section 20. The dam is located 1,770 feet South of the North line of Section 20, Township 5 North, Range 85 West of the 6<sup>th</sup> P.M., and 2,670 feet East of the West line of Section 20, Township 5 North, Range 85 West of the 6<sup>th</sup> P.M.
- ii. Source: Unnamed tributary to Trout Creek, tributary to the Yampa River.
- iii. Prior Adjudications: Deerwood Pond Second and Third Fillings were previously adjudicated in the following cases:
  - a) Case No. 99CW13, District Court, Water Division No. 6, decree dated October 12, 1999, 13.6 acre-feet conditional, with an appropriation date of April 9, 1999, for domestic, irrigation, stockwater, fire protection, fishery, aesthetic, recreational, exchange and augmentation in connection with Deerwood Ranches and Creek Ranch (“Second Filling”).

- b) Case No. 2001CW81, District Court, Water Division No. 6, decree dated February 11, 2002, 13.6 acre-feet conditional, with an appropriation date of June 13, 2001, for domestic, irrigation, stockwater, fire protection, fishery, aesthetic, recreational, exchange and augmentation in connection with the Wilkerson Property (“Third Filling”).

b. Whetstone Reservoir, First Enlargement:

- i. Legal Description: Located in the NE 1/4 of Section 20, T. 5 N., R. 85 W., of the 6<sup>th</sup> P.M., Routt County, Colorado.
- ii. Source: Whetstone Creek and its tributaries and natural runoff of the Whetstone Creek drainage above the Whetstone Reservoir, including natural springs located in said drainage, tributary to the Yampa River.
- iii. Prior Adjudications: The Whetstone Reservoir First Enlargement was decreed in Case No. 2000CW78, District Court, Water Division No. 6, decree dated July 3, 2003, 150 acre-feet conditional (126.24 acre-feet, plus refill of 23.76 acre-feet), with an appropriation date of December 2, 2000, for irrigation, livestock, piscatorial, recreation, aesthetics, augmentation, replacement, and exchange.

8. Water Demands. In order to comply with the Injury with Mitigation Plan approved by the CWCB, as described in Part 11.f. of this decree, Deerwood has agreed to limit its water demands for each subdivision to the volumetric amounts set forth below as the “Capped Water Demand.”

- a. Deerwood Ranches: The Capped Water Demand for Deerwood Ranches was calculated based on 26 residential lots, each with a primary and secondary dwelling unit (3.5 persons per primary dwelling and 2 persons per accessory dwelling), 10,000 square feet of lawn irrigation (the maximum size allowed by the water service agreements), and 2 horses per lot.

	Capped Water Demand
In-house demand:	9.32 acre-feet/year
Livestock demand:	0.64 acre-feet/year
Irrigation demand:	12.91 acre-feet/year
<b>TOTAL:</b>	<b>22.87 acre-feet/year</b>

- b. Creek Ranch: The Capped Water Demand for Creek Ranch was calculated based on 39 residential lots and one ranch headquarters remainder parcel, each with a primary and secondary dwelling unit (3.5 persons per primary dwelling and 2 persons per accessory dwelling), 4,000 square feet of lawn irrigation

(the maximum size allowed by the water service agreements), and 2 horses per lot.

	Capped Water Demand
In-house demand:	14.34 acre-feet /year
Livestock demand:	0.99 acre-feet/year
Irrigation demand:	7.94 acre-feet/year
TOTAL:	23.27 acre-feet /year

- c. Wilkerson Property: The Capped Water Demand for the Wilkerson Property was calculated based on 4 residential lots, each with a primary and secondary dwelling unit (3.5 persons per primary dwelling and 2 persons per accessory dwelling), 4,000 square feet of lawn irrigation (the maximum size allowed by the water service agreements), and 2 horses per lot.

	Capped Water Demand
In-house demand:	1.43 acre-feet /year
Livestock demand:	0.10 acre-feet/year
Irrigation demand:	0.79 acre-feet/year
TOTAL:	2.32 acre-feet /year

Deerwood's annual total diversions from the DP Wells No. 3 and 4 shall be limited volumetrically to 48.46 acre-feet per year, combined. Tables A1 through A8, showing actual water demand from 2003 through 2010, are attached as Exhibit 1. Table B1, B2, and B3, summarizing annual capped water demand and estimated monthly capped water demand are attached as Exhibit 2 and incorporated by this reference. Pursuant to Part 10 of this decree, Deerwood shall augment all out-of-priority diversions from DP Wells No. 3 and 4, as determined by actual metered pumping.

9. Consumptive use. Water used for domestic purposes will be treated using individual sewage disposal systems, which are assumed to be 10% consumptive, and irrigation consumptive use is calculated to be 1.73 acre-feet per year per acre irrigated. The maximum consumptive use based on the Capped Water Demand set forth in Part 8 under this augmentation plan for each subdivision is as follows:

- a. Deerwood Ranches.

	Based on Capped Water Demand
In-house use:	0.93 acre-feet /year

Livestock use:	0.64 acre-feet/year
Irrigation use:	10.33 acre-feet/year
TOTAL:	11.9 acre-feet /year

b. Creek Ranch.

In-house use:	1.43 acre-feet /year
Livestock use:	0.99 acre-feet/year
Irrigation use:	10.33 acre-feet/year
TOTAL:	8.77 acre-feet /year

c. Wilkerson Property.

In-house use:	0.14 acre-feet /year
Livestock use:	0.10 acre-feet/year
Irrigation use:	0.64 acre-feet/year
TOTAL:	0.88 acre-feet /year

Based on the Capped Water Demand volumetric limits set forth in Part 8, above, Deerwood's annual total consumptive use from DP Wells No. 3 and 4 shall be limited to 21.55 acre-feet. Total annual and estimated monthly consumptive use for all uses based upon the Capped Water Demand set forth in Part 8 is set forth in Exhibit 2. Pursuant to Part 10 of this decree, Deerwood shall augment all out-of-priority diversions under this decree, as determined by actual pumping.

10. Statement of Plan for Augmentation. Deerwood will divert water from DP Wells No. 3 and 4 and deliver it for use within the Deerwood Service Area. Diversions from DP Wells No. 3 and 4 affect the flow in Trout Creek approximately 2,540 feet upstream from the confluence of Trout Creek and Whetstone Creek, at a point identified as the Point of Depletion in Exhibit 3 attached hereto. Given the complex geology at the well locations and extending to the Point of Depletion, for the purpose of this decree, Deerwood has not calculated the timing of depletions to Trout Creek, including lagged depletions; and has not taken credit for return flows from lawn irrigation and septic systems, including lagged return flows. For that reason, when Trout Creek is under administration, Deerwood will replace an amount equal to the lesser of its actual diversions for the duration of the call, in rate, volume and timing, or the amount to which the calling water right is injured, pursuant to the terms and conditions set forth in Part 11, below. Water stored in Deerwood Pond under the Second and Third Fillings and/or Whetstone Reservoir, First Enlargement will be released pursuant to this Ruling and Decree and at the direction of the Division Engineer. Releases shall include amounts necessary to allow for transit losses in amounts determined by the Division Engineer. Augmentation water will be conveyed



in Whetstone Creek to the point of replacement required pursuant to the terms and conditions set forth in Part 11, below. Applicant will install measuring devices and account for its diversions and replacements made pursuant to this plan for augmentation, as required in Part 11, below.

11. Terms and Conditions. Applicant will operate its plan for augmentation subject to the following terms and conditions:
  - a. When a call is in effect on Trout Creek at or below the headgate for Trout Creek Ditch No. 2, Deerwood Service Company will release from its storage supplies water at a rate and in a quantity equal to the lesser of the amount of Deerwood's simultaneous actual diversions from the DP Wells No. 3 and 4 or the amount by which the calling right is short of its maximum allowable diversions.
  - b. In addition to the releases set forth in Part 11.a., Deerwood will simultaneously release water in an amount equal to transit losses assessed by the Division Engineer.
  - c. It is Deerwood's intent to ensure that it has sufficient augmentation water to fully augment all domestic and stock watering demands within the Deerwood Service Area. Under this augmentation plan, Deerwood shall place irrigation restrictions on its consumers as necessary to ensure a full augmentation supply for domestic and stock watering demand. In order to ensure that Deerwood has stored sufficient water to fulfill the terms and conditions set forth in this Ruling and Decree, Deerwood shall:
    - i. submit to the Division Engineer and the objectors, on or before March 15<sup>th</sup> of each year, a projection of its expected annual domestic and stock watering use for the current year, in the form attached hereto as Exhibit 4. The projection will be based on the prior year's actual use, plus any new taps and/or certificates of occupancy within the Deerwood Service Area for the projected year, and shall base annual domestic and stock watering use on actual use during January through March and November through December of the prior year, projected for a 12-month period;
    - ii. calculate a Minimum Storage Amount for the current year, defined as 110% of the projected annual domestic and stock watering demand, plus projected transit losses equal to 5% of the projected domestic and stock watering demand (actual releases of transit loss amounts will be subject to adjustment at the Division Engineer's discretion), plus projected evaporative surface losses from storage for the following 12-month period. If at any time Deerwood does not have the Minimum

Storage Amount in its storage structures, Deerwood will prohibit lawn irrigation using the DP Wells No. 3 and 4, whether or not a senior call is then in effect on Trout Creek. Deerwood will not allow irrigation to resume until Deerwood's available storage exceeds the Minimum Storage Amount, and irrigation may continue so long as storage exceeds the Minimum Storage Amount;

- iii. submit, on or before the 10<sup>th</sup> day of each month, an accounting statement substantially in the form attached as Exhibit 6 hereto, setting forth the amount diverted using DP Wells No. 3 and 4 in the prior month, the amount in storage at the conclusion of the prior month, and any amounts released from storage in the prior month;
  - iv. notify the Division Engineer and objectors if in any month Deerwood's actual domestic and stock watering use exceeds the projection of its expected domestic and stock watering use for that month, and provide the Division Engineer and the Opposers a revised projection of its expected annual domestic and stock watering use and minimum storage amount for that year;
  - v. notify the Division Engineer and objectors if the amount in storage is less than the minimum storage amount set forth in the annual 1-year projection submitted as of March 15<sup>th</sup> or as revised pursuant to the preceding paragraph.
- d. Pursuant to its agreement with the Division Engineer in this matter, Applicant will operate Deerwood Pond such that the water physically stored in Deerwood Pond shall be stored pursuant to the decrees entered in Cases No. 99CW13 (Second Filling) and 01CW81 (Third Filling).
- e. Objector Twentymile owns Trout Creek Ditch No. 2, which is senior to the water rights decreed to DP Wells No. 3 and 4. Trout Creek Ditch No. 2 diverts at its original point of diversion on Trout Creek upstream from the confluence of Trout Creek and Whetstone Creek, but downstream from the Point of Depletion identified in Exhibit 3 hereto. Trout Creek Ditch No. 2 was changed in Case No. W-1502-78, Water Division No. 6, Routt County District Court, which allowed the water right to be diverted at its original headgate for irrigation use, or at alternate points of diversion downstream from the confluence of Trout Creek and Whetstone Creek. Diversions at the alternate points of diversion are limited to the amount of water legally and physically available at the original point of diversion. In order to ensure that the Trout Creek Ditch No. 2 is protected by this augmentation plan, the following terms and conditions shall apply when Trout Creek Ditch No. 2 is the calling or swing water right:

- i. When the Trout Creek Ditch No. 2 water right is diverted for irrigation of the historically irrigated lands, Deerwood will release augmentation water from its storage structures on Whetstone Creek and will divert the augmentation water directly from Whetstone Creek into the Trout Creek Ditch No. 2 where it crosses Whetstone Creek.
  - ii. When Trout Creek Ditch No. 2 water right is diverted pursuant to the change decree entered in Case No. W-1502-78 at alternate points of diversion, Deerwood will deliver its augmentation water to the confluence of Whetstone Creek and Trout Creek.
  - iii. The Division Engineer shall administer all water diverted pursuant to this augmentation plan as water that was legally and physically available at the original point of diversion for the Trout Creek Ditch No. 2 for the purpose of complying with paragraphs 9.I. and 19.I. of the decree entered in Case No. W-1502-78.
- f. Injury with Mitigation Plan. The CWCB has adjudicated a 5 c.f.s. instream flow right for Trout Creek in Case No. 77W1338, Water Division No. 6, Water District 57. The reach of the instream flow right is 24 miles, with the upper terminus being the outlet of Sheriff Reservoir, and the lower terminus being Trout Creek's confluence with Middle Creek in Section 6, Township 5 North, Range 85 West of the 6<sup>th</sup> P.M. Deerwood's out-of-priority diversions through DP Wells No. 3 and 4 may cause injury to this instream flow right when flows in Trout Creek are at or below 5 c.f.s., because Deerwood cannot replace its out-of-priority depletions within the affected reach of the instream flow as part of the augmentation plan decreed herein. Therefore, Deerwood applied for the CWCB's approval of an Injury with Mitigation Plan to offset any potential injury to the instream flow caused by out-of-priority depletions from Deerwood's wells.

The CWCB and Deerwood agree that approximately 23.3% of depletions caused by withdrawals from DP Wells No. 3 and 4 affect Trout Creek within a one-mile reach upstream from Trout Creek's confluence with Whetstone Creek. At full build-out for the three subdivisions within the Deerwood Service Area, as described in Part 3 of this decree, and with well diversions from DP Wells No. 3 and 4 capped at the volumetric limits set forth in Part 8 of this decree, the CWCB and Deerwood agree that depletions from the wells to Trout Creek above its confluence with Whetstone Creek will reach a maximum rate of 0.04 c.f.s. in July of any year, with a maximum monthly depletion of 2.39 acre-feet during that month. Based on the 5 c.f.s. instream flow, the potential injury for the operation of Deerwood's wells will be approximately 0.8% of the instream flow decreed right.

The CWCB has considered this application pursuant to its “Injury with Mitigation Rule” instream flow Rule 8i(3) and section 37-92-102(4)(a), C.R.S. (2011) and has reached an agreement with Deerwood regarding an Injury with Mitigation Plan pursuant to the Rule. The CWCB has found that the terms and conditions of the Injury with Mitigation Plan and of this decree, as described herein, will result in the CWCB protecting its ISF right and preserving the natural environment to a reasonable degree in a manner that minimizes any impacts that may be caused to the CWCB’s instream flow right by Applicant’s operations. The CWCB has the discretion to apply the Injury with Mitigation Rule pursuant to its statutory authority to enter into decrees, stipulations and other contractual agreements, including enforcement agreements, that it determines will preserve the natural environment to a reasonable degree under section 37-92-102(4)(a). The CWCB has the statutory authority to determine how to preserve the natural environment to a reasonable degree and to determine whether an injury with mitigation water right can provide adequate environmental benefits to offset and negate any environmental impact to its instream flow.

Consistent with the Injury with Mitigation Plan, the CWCB agrees that it will request that the Division Engineer administer any call for its instream flow water right on Trout Creek Decreed in Case No. 6-77W1338 to be based on gauge location as follows: (1) CWCB may place a call for its water right from any gauge located either upstream or downstream of the “injury reach”; (2) If CWCB chooses to place a call from a gauge within the “injury reach,” the only water rights that will be curtailed are those filed for with the Court after December 31, 2001. Furthermore, the CWCB agrees that, in view of the specific facts and circumstances presented by this matter and the Injury with Mitigation Plan, any call for the instream flow right based upon a gauge located upstream of the “injury reach” shall only be administered as against water rights located upstream of the gauge. The “injury reach” is defined as that reach between the location where Applicant’s depletions impact the stream and the location where Applicant replacement water accrues to Trout Creek (at the confluence with Whetstone Creek). So long as CWCB’s instream flow right is administered as provided in this paragraph, the Injury with Mitigation Plan will not interfere with the regular administration of CWCB’s instream flow water right or applicant’s water rights within the priority system.

If, in the future, any court holds that administration of the Injury with Mitigation plan results in a subordination of the CWCB’s instream flow water rights to any water rights other than as provided in the forgoing paragraph, and if that holding becomes binding in this case the Applicant must, at the CWCB’s discretion: (1) provide replacement water to prevent injury to those rights so that no subordination of the instream flow water rights occurs; or (2) provide additional mitigation adequate to enable the CWCB to preserve the natural environment to a reasonable degree with the subject instream flow water rights.

The CWCB and Deerwood agree to allow Deerwood to complete the following Mitigation Project to offset the potential injury caused by Deerwood's out-of-priority depletions: Deerwood has identified two locations on Trout Creek the restoration of which would enhance the wildlife habitat and riparian nature of Trout Creek in the affected reach. Each is characterized by continued high flow erosion, including wasting banks, and instability. The continued erosion has prevented development of woody shrub cover and has increased the width of the creek thus diminishing habitat carrying capacity in the area. Deerwood will install toe rock in the channel substrate, grade the banks, harvest site-specific woody shrubs and transplant them to the restored bank, and other activities, with the intent to deepen the channel and lower water temperatures for fish habitat as well as stabilize the creek bank for each of the sites. The Company will then coordinate with the Creek Ranch Owners Association to ensure continuous maintenance on the new structures, to implement noxious weed control measures, and to ensure that grazing practices in the pastureland protect the riparian habitat. The Mitigation Project is described in more detail in Exhibit 5 to this decree.

As part of the Injury with Mitigation Plan, Deerwood shall comply with the following terms and conditions:

- i. Improvements. Deerwood agrees that it will complete construction of the mitigation measures set forth in Exhibit 5 to this decree by November 30, 2012. Specifically, Deerwood will construct two additional habitat structures as set forth in the exhibit within the stretch of Trout Creek affected by depletions from the operation of the Applicant's wells. The structures will be constructed for stream restoration and habitat purposes, and shall generally be designed to consolidate the banks of the creek, decrease the channel width-to-depth ratio, stabilize the banks and increase riparian vegetation and pool creation with the intent to lower temperature in the creek and enable an increased fishery carrying capacity. Until the above-described mitigation measures are in place and fully operational, Deerwood shall replace any out-of-priority depletions, in time, place and amount, to Trout Creek that would reduce flows in Trout Creek below the decreed instream flow rate.
- ii. Maintenance. Deerwood will commit to permanently maintaining the structures and improvements in Trout Creek that provide the mitigation benefits, and acknowledge that any injurious depletions to Trout Creek caused by operation of Deerwood's wells will cease in the event the mitigation structures and improvements in Trout Creek are not maintained.

- iii. Additional Controls. Deerwood will coordinate with the Creek Ranch Owners Association to implement noxious weed control measures, and to ensure grazing practices in the pastureland protect the riparian habitat to a reasonable degree.
  - iv. Inspection access. Deerwood will allow access for the CWCB and the Division of Wildlife staff to inspect the mitigation structures, and, if necessary, to perform biological stream monitoring, subject to reasonable limits and provisions for advanced notice.
  - v. Measuring devices. Deerwood agrees to install, replace and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed by the Division Engineer as necessary to administer the terms of the Injury with Mitigation Plan and the Ruling and Decree.
  - vi. The provisions of this Part 11.f. and the Injury with Mitigation Plan shall not alleviate Deerwood of its responsibility to replace out-of-priority diversions as required pursuant to this decree.
- g. Deerwood has elected to augment its out-of-priority depletions by replacing its actual simultaneous diversions from DP Wells No. 3 and 4 when Trout Creek is subject to a senior call at or downstream from the headgate for Trout Creek Ditch No. 2. Deerwood has not made a determination of the timing and quantity of total, lagged, or net depletions from its well diversions for the purposes of this Ruling and Decree, and will not take credit for total, lagged or net return flows from its irrigation or septic systems for the purpose of this augmentation plan. Deerwood may file a motion and application to amend the augmentation plan decreed herein, subject to resumé notice and notice to all parties in Case No. 05CW23, to incorporate calculations of total, lagged and net depletions and return flows as part of this augmentation plan and to allow Deerwood to limit its augmentation replacements, and correspondingly its Minimum Storage Amount, to net depletions, rather than actual diversions, when Trout Creek is under administration. Nothing in this Ruling and Decree shall, or is intended to, prohibit Deerwood from amending its plan for augmentation to do so.
- h. Within 30 days of entry of a ruling and decree in this matter, Deerwood will apply for a new well permit allowing use of DP Well No. 4 to supply water to 70 residential-accessory units and ranch headquarters, fire protection, stock watering, and the irrigation of 10 acres. Within 30 days after entry of a ruling and decree in this matter, Deerwood will apply to permit DP Well No. 3 as a monitoring hole. Deerwood will not operate DP Well No. 3 pursuant to the decrees in Cases No. 94CW93, 99CW13, and 01CW81, or pursuant to the augmentation plan decreed herein, until after receiving a permit for use of DP

Well No. 3 pursuant to the terms of those cases and the augmentation plan described herein.

- i. Deerwood Service Company is not the owner of the Whetstone Reservoir water right, the Whetstone Reservoir, First Enlargement water right, or the lands underlying Whetstone Reservoir. Water will be stored and released pursuant to the Whetstone Reservoir, First Enlargement water right in Whetstone Reservoir pursuant the decree entered in Case No. 00CW78 and pursuant to an agreement between Deerwood and the owner of the Whetstone Reservoir water right, the Whetstone Reservoir, First Enlargement water right, and the land underlying Whetstone Reservoir. A copy of any agreement pursuant to this Part 11.i. will be submitted to the Division Engineer, with a copy to objectors, prior to storage of water pursuant to the decree in Case No. 00CW78 in Whetstone Reservoir.
  - j. Deerwood shall install and maintain measuring devices approved by the Division Engineer on its wells and storage structures capable of measuring the amounts diverted, stored, and released. In addition, Deerwood shall prepare and provide to the Division Engineer storage area capacity curves for Deerwood Pond and Whetstone Reservoir, showing the volume and surface area at incremented depths in the storage structures.
12. Finding of No Injury: The foregoing plan for augmentation will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. See §37-92-305(3), C.R.S. (2006).

### CONCLUSIONS OF LAW

13. Application. The application is one contemplated by law. See §37-92-302, C.R.S.
14. Jurisdiction. The Referee has jurisdiction over the subject matter of this proceeding. See §37-92-304, C.R.S.
15. Statutory Authorization. The application for approval of a plan for augmentation described herein is, as a matter of law, permissible and authorized by statute. See §§37-92-302(1)(a), 37-92-103(5), and 37-92-30(3), C.R.S.
16. Terms and Conditions. The terms and conditions as set forth in this Ruling and Decree are adequate to prevent injury to the vested rights of others, including the owners of, or persons entitled to use, water under a vested water right or a decreed conditional water right. See §37-92-305(3), C.R.S.
17. Administration. The plan for augmentation as described in this Ruling and Decree is capable of administration by the state water officials.

### **RULING OF THE REFEREE**

It is hereby the Ruling of the Referee that the foregoing Findings of Fact and Conclusions of Law are incorporated in this Ruling and Decree by this reference, and that the Application is hereby granted, subject to the terms and conditions set forth herein.

18. Adjudication of Augmentation Plan. The plan for augmentation described herein is hereby approved, subject to the terms and conditions stated herein.
19. Measurement and Accounting. The Applicant shall install such measuring devices, provide accounting, and supply information as may reasonably be required by the Division Engineer for operation of this plan. Applicant shall also file an annual report with the Division Engineer by November 15<sup>th</sup> of each year summarizing diversions and replacements made under this plan.
20. Reporting. The Applicant shall prepare and submit to the Division Engineer monthly reports and an annual written summary of the pumping of DP Wells No. 3 and 4, the storage in Deerwood Pond and Whetstone Reservoir, First Enlargement, and the releases from Deerwood Pond and Whetstone Reservoir, First Enlargement, for augmentation purposes.
21. State and Division Engineers. Pursuant to §37-92-305(8), C.R.S., the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.
22. Retained Jurisdiction. Pursuant to §37-92-304(6), C.R.S., the Court shall retain continuing jurisdiction of this case on the question of injury to vested water rights or decreed conditional water rights of others until five years after Deerwood provides notice to the Division Engineer and the Objectors that the Deerwood Service Company has reached 75% of its maximum buildout. In addition, the Court shall retain continuing jurisdiction of this case on the question of injury to the instream flow water right decreed on Trout Creek in Case No. 77W1338, Water Division No. 6, Water District 57 for a period of five years after the CWCB makes a call for its instream flow right based upon the installation of a measuring gauge within the instream flow reach decreed in that matter. Any aggrieved party to this case may request at any time within the applicable period of retained jurisdiction a hearing before the Court for the purpose of reconsideration of the question of injury to vested water rights, decreed conditional water rights, or the instream flow water right. Any such request shall be made by petition to the Court, served on all parties herein and made in good faith, stating with particularity the factual basis upon which it is asserted that injury has occurred or will occur. The party lodging the petition shall have the burden of proof to establish the prima facie facts and injury alleged in the



petition. If a prima facie case of injury to vested water rights is established, the Applicant shall bear the burden to show (a) that no injury claimed by the other party has occurred or will occur, or (b) that any modification to this Ruling and Decree sought by the other party is not required, or (c) that any term or condition proposed by the Applicant in response to the petition is adequate to avoid injury. The Court shall also retain jurisdiction during the term of the augmentation plan approved herein to review determinations by the Division Engineer under the foregoing paragraph 21, and to enforce the Injury with Mitigation Plan referred to herein in Part 11.f.

23. Filing. This Ruling and Decree shall be filed with the Water Clerk and a copy filed with the State Engineer and Division Engineer.

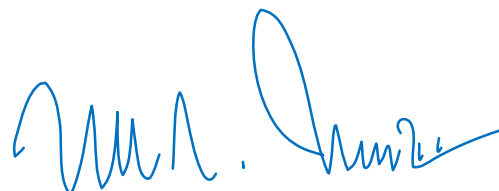
Dated this 23<sup>rd</sup> day of August, 2012.

/s/ Michael A. O'Hara, III  
Michael A. O'Hara, III  
Acting as Water Referee  
Water Division No. 6  
State of Colorado

#### JUDGMENT AND DECREE

The Court finds that no protest was filed in this matter. The foregoing Ruling is confirmed and approved, and is hereby mad the judgment and decree of this court.

Dated: September 30, 2012



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Michael A. O'Hara, III, Water Judge  
Water Division No. 6, State of Colorado

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

**Court:** CO Routt County District Court 14th JD

**Judge:** Michael Andrew O'Hara

**File & Serve**

**Transaction ID:** 46056184

**Current Date:** Sep 30, 2012

**Case Number:** 2005CW23

**Case Name:** In the interest of: DEERWOOD SERVICE COMPANY LLC

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/s/ **Judge O'Hara, Michael Andrew**