

Water attorney letter raises Vandaveer dry-up issues

by Joe Stone

Attorney Jennifer DiLalla sent a letter to the Salida Natural Resource Center Development Corporation board of directors in August claiming the NRCDC has injured the city of Salida's Tensassee Ditch water rights.

Background

Salida acquired its Tensassee Ditch water rights, which were historically used to irrigate the Vandaveer Ranch, in 2004.

In 2009, Division 2 Water Court issued a decree (case no. 04CW125) changing the legal use of the city's Tensassee Ditch water so that it could be used to help meet the city's water needs.

Since that time, no Tensassee Ditch water has been used for irrigation on the Vandaveer property, and most of the ranchland has dried up as a result.

According to the court decree, the city is entitled to use 360.6 acre-feet of water per year, as long as the "163 acres of land historically irrigated by the Water Rights" is completely dried up below the root zone – a depth of 8 feet.

The court decree requires the city to submit an annual dry-up report to the agency that administers water rights in the Arkansas River basin – the Colorado Division of Water Resources Division 2 Engineer's Office.

Based on those reports and a field inspection, Assistant Division Engineer Steven Kastner notified Salida city officials in August 2011 that 29.44 acres of the Vandaveer land had "not been adequately dried up."



The South Arkansas River flows through a portion of the Vandaveer Ranch that must be dried up to a depth of 8 feet for the city of Salida to make full use of its Tensassee Ditch water right. Most of the land in question lies less than 8 feet above the surface of the South Arkansas River.

Randy Hendrix, the engineer hired by the city to prepare the annual dry-up reports, said he started working for Salida “5-6 years ago” and that he visits the parcel in question and reports his findings to the city “every year.”

According to Hendrix’ most recent report (Aug. 1, 2017) “the amount of acreage dried up has not changed since August 17, 2011, when the City received a letter from the Assistant Division Engineer confirming dry-up status.”

Hendrix’ reports indicate the city must refrain from using 17.4 percent of its Tennesee Ditch water each year, a reduction of 62.74 acre-feet.

Accounting and Storage

Attorney DiLalla’s letter to the NRCDC makes the following demand: “To compensate the City for the lost yield to the Water Rights, the NRCDC will need to pay the City no less than \$250,000 as the replacement cost for 62.74 acre-feet of water.”

However, Water Commissioner Brian Sutton said the city of Salida has been taking full credit for drying up the land in recent years, in spite of reports from the city’s own engineer showing that the parcel in question has not been dried up.

“This whole thing started in the Pueblo (Division Engineer’s) Office,” Sutton said. “About 17 percent of the dry up is not claimed, and someone noticed that Salida was taking credit for 100-percent dry up.” Sutton said that the 29.44 acres is all sub-irrigated by a high water table and that it would be difficult to dry up that land.

Additionally, “the city is flush with water,” Sutton said. “There’s no danger of them being short of water somehow. I don’t even think the city will notice this loss of 17 percent. ... Their account in Pueblo Reservoir is full, so they can’t store any more water anyway. They have no place to put it.”

Sutton said the city could sell or lease the extra water but that companies in the market for water generally want to buy or lease the water for multiple years. The city has room to store the water in Pueblo and North Fork reservoirs in drier years.

Dry-up Responsibility

The letter from the city’s water attorney also cites “the dry-up provisions of the Stipulated Decree,” referring to those provisions as the “Dry-Up Covenant.”

The letter insists, “The NRCDC must comply with the Dry-Up Covenant’s requirements.”

However, the court decree states that it is the city of Salida’s responsibility to dry up the land in order to use the water for other purposes.

Other water attorneys have advised that the owner of a water right is generally obligated to dry up the land, even if the land is not owned by the owner of the water right, unless some other contractual agreement is in place.

The letter from the city’s water attorney makes no reference to such an agreement, and a thorough search of records at the Chaffee County Clerk’s Office yielded no such contract, indicating that the city, not the NRCDC, should be responsible for drying up the land.

The letter also states, “The NRCDC at minimum must not interfere with the City’s rights of ingress to and egress from the Ranch and unfettered use of the 29.44-acre portion of the Ranch.”

Colorado law grants the owner of a water right legal access to land owned by another party and the right to take action “within reason” to remedy water rights issues like this one.

Ron Mazzeo, NRCDC board president, said the city had not contacted him or other board members about access to the land and that the city already has access through a gate secured with a city-owned padlock.

Crippen Spring Ditch

Crippen Spring, near the south edge of the 29.44-acre parcel, flows into a ditch that crosses the parcel and delivers water to Jim Treat’s property, which adjoins the Vandaveer property.

Treat owns the 1897 Crippen Spring Ditch water right and said he does not believe the city could dry up the 29.44 acres without injuring his 2 cubic-foot-per-second water right, which would violate state water law.

Treat said water seeps into the Crippen Spring Ditch as it flows across the Vandaveer property, so piping water to his land directly from the spring would deprive him of the seep water that is part of his water right.

Practical Matters

Engineers Kastner and Hendrix both expressed doubts that the 29.44 acres could be dried up, a sentiment echoed by Water Commissioner Sutton.

According to the court decree, if the city wishes to use more of the Tennessee Ditch water, it can monitor the depth to the water table and submit monthly reports to the Division Engineer's Office to receive partial credit for drying up the land.

Hendrix confirmed that groundwater monitoring should be the next step if the city wishes to take some credit for drying up the land. Monitoring would require the installation of monitoring wells or piezometers.

As Kastner said, "They (city of Salida) may never be able to get full credit for drying up that acreage, and they shouldn't get full credit since the high water table obviously helped irrigate that part of the ranch.

"These are the typical issues you get into when you change a water right."



Water in the Crippen Spring Ditch makes its way across part of the Vandaveer Ranch property on its way to Jim Treat's adjacent property. The red circle indicates the location of Crippen Spring near the south edge of the Vandaveer parcel that has not dried up. Treat owns the 1897 Crippen Spring Ditch water right and said he does not believe the city could dry up the Vandaveer parcel without injuring his water right.