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March 18, 2019

SENT VIA EMAIL

Colorado Water Conservation Board of Directors
Ms. Linda Bassi, Section Chief, Stream & Lake Protection
Colorado Water Conservation Board
Email: linda.bassi@state.co.us

**RE: Southwestern Water Conservation District's Comments on the Himes Creek
proposed instream flow appropriation**

Dear CWCB Board of Directors and Ms. Bassi,

I am writing on behalf of my client, the Southwestern Water Conservation District ("SWCD"), to provide comments and express our concerns regarding the proposed instream flow appropriation on Himes Creek. SWCD was formed by the Colorado Legislature in 1941 for the purpose of promoting the "conservation, use, and development of the water resources of the San Juan and Dolores rivers and their principal tributaries" and safeguarding all waters of these river basins to which the State of Colorado is entitled.¹ The proposed reach for the Himes Creek instream flow right lies within SWCD's boundaries, which encompass all or part of nine counties located in southwestern Colorado.

Staff and outside consultants for SWCD, the Dolores Water Conservancy District, CWCB, CPW and the United States Forest Service (USFS) have all spent a considerable amount of time over the last 2 years discussing the proposed instream flow appropriation on Himes Creek. We appreciate the time that your staff, and others, have devoted to those conversations. SWCD learned a great deal about the importance of the natural environment the USFS desires to protect through this instream flow appropriation and has come to support the overall objective of protecting the San Juan lineage of the Colorado River cutthroat trout. Unfortunately, despite everyone devoting a substantial amount of time and energy to these discussions, SWCD has not been able to come an agreement on the minimum amount of flow that is necessary to preserve the natural environment to a reasonable degree and therefore does not support the proposed Himes Creek instream flow appropriation in its current form.

The CWCB is authorized under the instream flow statute² to appropriate only the "minimum stream flow" necessary to preserve the natural environment to a reasonable degree. CWCB staff is recommending that, in this instance, the "minimum amount" is equal to "all

¹ Colo. Rev. Stat. § 37-47-101, *et seq.*

² C.R.S. § 37-92-102(3).

unappropriated flows” available within the proposed instream flow reach on Himes Creek. The proposed instream flow reach begins at the headwaters and extends approximately two miles downstream to the Himes Ditch headgate. There are no known water right diversions or uses made within the proposed instream flow reach. This means that the USFS, CPW and CWCB staff are recommending that, as a practical matter, the *minimum amount* of flow necessary to preserve the natural environment to a reasonable degree is 100% of the natural flow that is available each and every day of the year, regardless of whether it is a wet, dry or average year. That conclusion seems premature, particularly since there is additional scientific information that could be collected in order to quantify the minimum flow rate.

SWCD requests that the CWCB undertake additional efforts to quantify the minimum stream flows necessary to protect the natural environment to a reasonable degree before declaring its intent to appropriate this instream flow right. Two types of efforts that the CWCB could undertake are described below. There may be other preferred alternative methods of quantification that are also worthy of exploration.

- SWCD recommends that the CWCB reconsider whether there is an existing methodology capable of quantifying the necessary minimum flow rate. The CWCB staff's Executive Summary for Himes Creek provides that the “USFS evaluated the R2Cross methodology and determined that it is not an appropriate methodology to quantify the flow rates necessary to preserve the natural environment to a reasonable degree on Himes Creek.”³ The primary reason for this determination appears to be because pools, as opposed to riffles, are the most critical or limiting habitat within the Himes Creek instream flow reach.⁴ Yet, our review of information available through the CWCB's instream flow database, revealed at least a few scenarios in which it appears the R2Cross Methodology was used to quantify the minimum flow rate in similar step-pool stream environment. For example, the Executive Summary used to support CWCB staff's recommendation to appropriate the Grizzly Gulch instream flow right describes that instream flow reach as being approximately 2.1 miles long, located entirely on public land and on a high gradient stream that provides “a step-pool environment, in which small pools and very short riffles are separated by small waterfalls.”⁵ The BLM and Trout Unlimited relied on R2Cross to generate the instream flow right recommendation on Grizzly Gulch, which is a tributary to the Lake Fork of the Gunnison River in Hinsdale County and appears to share a number of similarities with Himes Creek.
- Second, SWCD recommends the USFS undertake additional data collection and site-specific evaluation so that the minimum flow rate for this particular reach on Himes Creek can be quantified based upon the actual needs of this specific natural environment. This information would allow the USFS to better identify the flow regimes necessary to flush sediment out of the pool habitat. For example, the USFS could begin collecting

³ Himes Creek Executive Summary at 4.

⁴ Himes Creek Executive Summary, Attachment B at 5-6.

⁵ Grizzly Gulch Executive Summary at 2-3. The Grizzly Gulch instream flow right was ultimately appropriated by the CWCB in amounts ranging from 0.6 cfs to 2.9 cfs and confirmed by the Division 4 Water Court in 09CW80.

SWCD's comments on Himes Creek Proposed Instream Flow Appropriation

March 18, 2019

field measurements and observations under a variety of hydrologic conditions to determine at what rates of flow sediment is adequately flushed from the pools.

Finally, SWCD also requests that the CWCB include no-precedent language in any decree that it seeks in connection with the appropriation of an instream flow right on Himes Creek in order to recognize the unique attributes of this appropriation (e.g., the proposed ISF is located at the headwaters, above all headgates and entirely on federal land). SWCD would appreciate the opportunity to work with the CWCB staff as it develops no-precedent language for the CWCB's consideration.

Thank you for your consideration of SWCD's comments and position on the Himes Creek proposed instream flow appropriation. We appreciate the time your staff, and others, have devoted to these discussions and hope to be able to continue those discussions moving forward. If you have any questions regarding SWCD's comments, please contact me at (303) 894-4488 or by email at bvanvurst@fwlaw.com.

Sincerely,

A handwritten signature in blue ink, appearing to read "Beth Van Vurst".

Beth Van Vurst
General Counsel
Southwestern Water Conservation District