

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER
DIVISION 7: HIMES CREEK (Headwaters to the Himes Ditch Headgate)

NOTICE OF CONDITIONAL WITHDRAWAL OF PARTY STATUS

Western Resource Advocates, by and through the undersigned counsel, submit the following Notice of Conditional Withdrawal of Party Status regarding the Staff ISF Recommendation on Himes Creek, Water Division No. 7. As grounds therefor, Western Resource Advocates states the following:

1. Based upon the original recommendation of the United States Forest Service, Colorado Water Conservation Board (CWCB) Staff urged the CWCB Board to declare its intent to appropriate the above-captioned instream flow water right for Himes Creek ("Himes Creek ISF") at its March 2019 meeting.
2. On March 21, 2019, the CWCB Board declared its intent to appropriate the Himes Creek ISF.
3. On May 31, 2019, Southwestern Water Conservation District and Dolores Water Conservancy District (collectively, "the Districts") each filed timely notices to contest the Himes Creek ISF under to Rule 5k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2 ("ISF Rules").
4. On July 1, 2019, Western Resource Advocates filed a timely Notice of Party Status in the contested ISF Appropriation under ISF Rule 5l.
5. On July 1, 2019, CWCB Staff and the Districts executed a stipulated agreement, attached hereto as Western Resource Advocates' Exhibit A. Under the terms of the agreement, CWCB Staff will recommend the inclusion of certain language in both the CWCB Board's final action on the Himes Creek ISF, as well as in any water court decree for the Himes Creek ISF. Exh. A at ¶ 4. In exchange, the Districts agree to withdraw their notices to contest, conditioned upon the CWCB Board's approval of the terms of the stipulated agreement. *Id.* at ¶¶ 5, 6.

6. In the event that the Board approves the terms of the stipulated agreement and the Districts withdraw their notices to contest, only parties that have expressed support for the Himes Creek ISF will remain in the docket. Accordingly, in order to foster a speedy resolution of the instant contested hearing, Western Resource Advocates submits this Notice of Conditional Withdrawal of Party Status.
7. Western Resource Advocates' withdrawal shall be effective only upon the Districts' withdrawal of their notices to contest the Himes Creek ISF. *See* Exh. A at ¶ 5. In the event that the Districts invoke their rights under paragraph six of the stipulated agreement, or so long as they otherwise remain active in the contested hearing, this Notice of Conditional Withdrawal of Party Status is void, and Western Resource Advocates' Notice of Party Status shall remain in full force and effect with Western Resource Advocates reserving all its rights thereunder to participate as a party in the instant contested hearing.

Wherefore, Western Resource Advocates hereby submits this Notice of Conditional Withdrawal of Party Status in the contested Himes Creek ISF Appropriation.

Respectfully submitted this 10th day of July 2019.



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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2019 the above **Notice of Conditional Withdrawal of Party Status** was served upon all parties and participants herein by email as follows:

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Robert K. Harris

**BEFORE THE COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

**STIPULATION AND AGREEMENT BETWEEN THE COLORADO WATER CONSERVATION BOARD
STAFF, THE SOUTHWESTERN WATER CONSERVATION DISTRICT AND DOLORES WATER
CONSERVANCY DISTRICT**

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER DIVISION 7: HIMES
CREEK**

The Southwestern Water Conservation District ("SWCD"), Dolores Water Conservancy District ("DWCD") and staff of the Colorado Water Conservation Board ("CWCB"), by and through their respective counsel, hereby stipulate and agree as follows:

1. The staff of the CWCB has recommended an instream flow water right appropriation for Himes Creek for all of the unappropriated flow in Himes Creek with an upper terminus located at the headwaters in the vicinity of UTM North: 4144335.05 UTM East: 328210.38 and the lower terminus at the Himes Ditch Headgate located at UTM North: 4143682.20 UTM East: 331098.52 ("Himes Creek ISF"), Water Division 7.
2. The CWCB declared its intent to appropriate the Himes Creek ISF at its meeting in March.
3. SWCD and DWCD each timely filed a Notice to Contest the Himes Creek ISF pursuant to Rule 5k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2.
4. The staff of the CWCB agrees to include the following term and condition in its recommendation for final action on the Himes Creek ISF and in any decree entered by the water court for the Himes Creek ISF:

In this case, the CWCB has determined, after taking into account recommendations from and analyses conducted by the US Forest Service (USFS) and Colorado Parks and Wildlife (CPW), the natural environment to be preserved and the minimum amount of water needed for this instream flow water right. The CWCB based these determinations upon the specific unique characteristics of the natural environment present in this segment of Himes Creek, taking into consideration existing limitations on the ability to further develop water within the Himes Creek Basin. In consideration of the following characteristics, the CWCB has determined that the instream flow appropriation made herein is appropriate because:

- A. The subject reach of Himes Creek is on a first and second order stream that supports a population of the San Juan lineage of Colorado River cutthroat trout, a lineage previously thought to be extinct.
- B. The small drainage basin, lack of significant tributaries, and physical isolation of this reach from the West Fork San Juan River precludes large scale movement of fish to seek better conditions if Himes Creek habitat is degraded.
- C. The Himes Creek cutthroat trout must be able to live, grow, and reproduce in a series of small turbulent pools. The pool habitat in the approximately two-mile long reach of Himes Creek is critical for both late summer (low flow) time period and over-winter survival of resident adults and juvenile fish.

In this case, the CWCB has based its determinations on the characteristics of the natural environment set forth above as well as other specific characteristics of Himes Creek, including that: the subject reach is upstream from all water rights on Himes Creek, the existence of downstream water rights commanding substantially all the flow makes future water development within the reach unlikely, there are no private lands located above or within the reach, and the subject reach is located on the national forest lands where the USFS is currently required to provide protection to native cutthroat trout based on federal statute, regulation, and Land & Resource Management Plan which will likely limit future water development in this reach.

The CWCB's determinations apply in this case only and are based upon the characteristics of Himes Creek enumerated above. This instream flow appropriation is not intended to, nor shall it, establish any legal or factual precedent or expectation or interest with respect to any other potential instream flow appropriation within the State of Colorado. SWCD and DWCD's agreement to not oppose entry of a decree confirming the Himes Creek instream flow appropriation shall not be construed as concurrence by these parties beyond any decree adjudicated herein or with the legal theories or technical methodologies relied upon by the CWCB. The Parties agree that they do not intend for any decree entered in this matter to have the effect of precedent or preclusion on any factual or legal issue in any other water matter and, to that end, the Parties agree that they each reserve the right to propose or to challenge any legal or factual position in any other matter without limitation by any decree entered herein.

- 5. In consideration of the mutual promises contained herein, SWCD and DWCD each agree to withdraw their Notice to Contest upon confirmation that the CWCB Board has adopted CWCB staff's recommendation to include the above-referenced term and condition in its final action on the Himes Creek ISF and in any decree entered by the water court for the Himes Creek ISF and, so long as the CWCB remains in compliance with the terms and conditions agreed upon herein, to not oppose any water court application filed by the CWCB to adjudicate the Himes Creek ISF. Provided, however, SWCD and DWCD reserve

the right to file a motion to intervene and accompanying statement of opposition in the water court adjudication in the event any party files a statement of opposition, solely to ensure that the CWCB remains in compliance with the terms and conditions agreed upon by the parties herein. The CWCB agrees not to oppose SWCD or DWCD's intervention under such circumstance.

6. In the event the CWCB Board declines to adopt CWCB staff's recommendation to include the term and condition referenced above in paragraph 4 in its final action on the Himes Creek ISF, this Stipulation is void and SWCD and DWCD's Notices of Contest shall remain in full force and effect.
7. This stipulation shall be binding upon and inure to the benefit of the parties, their successors and assigns.
8. The parties shall each bear their own attorney fees and costs associated with this matter.
9. CWCB shall provide counsel of SWCD and DWCD copies of its application to confirm a water right for the Himes Creek ISF and any proposed rulings or decrees that are submitted by the CWCB to the water referee or water court, as applicable. CWCB shall also provide said counsel with any Report of the Division Engineer issued in such case.
10. This stipulation may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

Stipulated and agreed to this 1st day of July, 2019.

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