



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

1313 Sherman Street, Room 718
Denver, CO 80203

P (303) 866-3441
F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Water Resource Specialist
Stream and Lake Protection Section

DATE: September 18-19, 2019

AGENDA ITEM: 10 a. Final Action on Contested ISF Appropriations:
Carnero Creek (Water Division 3)

Background:

On January 29, 2019, the CWCB formed its intent to appropriate an instream flow (ISF) water right on a segment of Carnero Creek in Water Division 3.

Waterbody	Watershed	County	Upper Terminus	Lower Terminus	Length (miles)
Carnero Creek	Saguache	Saguache	confluence South Fork and Middle Fork Carnero Creek	confluence with Mogotas Arroyo	9.81

Colorado Parks and Wildlife (CPW) recommended this segment for inclusion into the CWCB’s Instream Flow and Natural Lake Level Program.

On March 30, 2019, S&T Farms, LLC filed a notice to contest this ISF appropriation.

CWCB staff and S&T Farms, LLC have executed a stipulation containing terms and conditions to resolve issues related to the proposed ISF on Carnero Creek. The stipulation is attached to this memo. Upon final action by the CWCB on this appropriation that includes this stipulated language, S&T Farms will formally submit a withdrawal of its Notice to Contest. In the event the CWCB declines to adopt CWCB staff’s recommendation to include these terms and conditions in its final action on the Carnero Creek ISF, the stipulation will be void and S&T’s Notice to Contest shall remain in full force and effect.

Staff recommends the Board include the stipulated language between staff and S&T Farms in its final action on the Carnero Creek ISF.

Technical Investigations

The Board was provided detailed information regarding all field data, studies, and analyses for this stream segment at its January 29, 2019 Board meeting.



Natural Environment Studies

CPW conducted field surveys on this stream and found a natural environment that can be preserved to a reasonable degree. To quantify the resources and to evaluate instream flow requirements, CPW collected biologic and hydraulic data, and the CWCB staff reviewed and analyzed this data. Based on the results of these reviews and analyses, the CWCB staff prepared a recommendation of the amount of water necessary to preserve the natural environment to a reasonable degree.

Water Availability Studies

The CWCB staff conducted a water availability evaluation for the recommended segment of Carnero Creek. To determine the amount of water physically available for the Board's appropriations, staff analyzed available USGS gage records and diversion records using appropriate standard methods to develop a hydrograph for each of the recommendations. Staff also relied upon the flow measurements made as part of the field survey to further verify the amount of water physically available in each of the segments. Based upon its analysis, staff has determined that water is available for appropriation on Carnero Creek to preserve the natural environment to a reasonable degree without limiting or foreclosing the exercise of existing water rights.

Relevant Instream Flow Rules

5f. Date of Appropriation. The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

5h. Final Board Action on an ISF Recommendation. The Board may take final action on any uncontested Staff Recommendation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rule 5j-5q.

5i. Required Findings. Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

- (1) Natural Environment. That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.
- (2) Water Availability. That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.
- (3) Material Injury. That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of section 24-4-106(6) and (7), C.R.S. (2019).

Staff recommendation

Staff recommends that the Board make the following determinations and take the following actions on the appropriation identified in the attached table, based on the information contained in this memo as well as the information presented by staff both in writing and orally at the January 29, 2019 Board meeting:

- (1) Determine, pursuant to section 37-92-102(3), C.R.S. (2019), that for the ISF appropriation on Carnero Creek at the rates identified in the attached table:
 - (a) There is a natural environment that can be preserved to a reasonable degree with the recommended water rights, if granted;
 - (b) The natural environment will be preserved to a reasonable degree by the water available for the recommended appropriations; and
 - (c) Such natural environment can exist without material injury to water rights.
- (2) Pursuant to ISF Rule 5f., establish January 29, 2019 as the appropriation date for this water rights.
- (3) Direct staff to request the Attorney General's Office to file the necessary water right application and to include the terms and conditions contained in Staff's stipulation with S&T Farms, LLC in the water court application and decree for this ISF appropriation.

Attachments



Colorado Water Conservation Board Instream Flow Tabulation - Streams Water Division 3



Water Court Div.	Case Number	Stream	Watershed	County	Upper Terminus (UTM)	Lower Terminus (UTM)	Length (Miles)	Amount (CFS) (Dates)	Approp Date
3		Carnero Creek	Saguache	Saguache	confl SF & MF Carnero Creeks at E: 377513.93 N: 4196212.69	confl Mogotas Arroyo at E: 387851.17 N: 4190411.28	9.81	2.2 (12/01 - 02/29) 2.6 (03/01 - 11/30)	01/29/2019

<p>Totals for Water Division 3</p>	<p>Total # Appropriations = 1 Total # Appropriation Stream Miles = 9.8</p>
-------------------------------------------	----------------------------------------------------------------------------------------------

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

STIPULATION AND AGREEMENT BETWEEN STAFF OF THE COLORADO WATER CONSERVATION BOARD AND S & T FARMS, LLC

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER DIVISION 3:
CARNERO CREEK**

S&T Farms, LLC ("S&T") and staff of the Colorado Water Conservation Board ("Staff"), by and through their respective counsel, hereby stipulate and agree as follows:

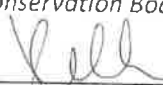
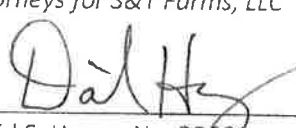
1. Staff has recommended an instream flow water right appropriation for Carnero Creek for 2.2 cfs (12/01 - 02/29) and 2.6 cfs (03/01 - 11/30) with an upper terminus located at the confluence with South Fork & Middle Fork Carnero Creeks UTM North: 4196212.69 UTM East: 377513.93, and the lower terminus at the confluence with Mogotas Arroyo UTM North: 4190411.28 UTM East: 387851.17 ("Carnero Creek ISF"), Water Division 3.
2. The Colorado Water Conservation Board ("CWCB") declared its intent to appropriate the Carnero Creek ISF at its meeting in January, 2019.
3. S&T timely filed a Notice to Contest the Carnero Creek ISF pursuant to Rule 5k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2.
4. S&T owns and operates the L Cross Ranch ("Ranch"), consisting of approximately 6,200 acres. Carnero Creek, including a substantial portion of the proposed Carnero Creek ISF reach, flows through the Ranch. S&T owns decreed water rights diverting from Carnero Creek, including the Omnibus Ditch, used to support agricultural and ranching operations on the Ranch. The Omnibus Ditch has priorities senior to the Carnero Creek ISF, totaling approximately 31.10 cfs, and diverts water for irrigation from a headgate located downstream of the lower terminus of the Carnero Creek ISF. Because the Omnibus Ditch includes several of the most senior priorities on Carnero Creek, operation of the Omnibus Ditch has the practical effect of bringing water through the Carnero Creek ISF. The Ranch is encumbered by a Deed of Conservation Easement, dated June 16, 1998 and recorded at Reception No. 323610 of the Saguache County real property records ("Conservation Easement"), for the benefit of the Nature Conservancy, to protect certain conservation values on the Ranch, including riparian habitat and aquatic resources. By entering into this Stipulation, S&T seeks to protect its ability to make certain future operational changes in a manner that will continue to facilitate the objectives of both the Conservation Easement and the Carnero Creek ISF.

5. Staff hereby agrees to include in its recommendation to the CWCB for final action on the Carnero Creek ISF, at the September 2019 CWCB meeting, that the final action and any decree entered by the water court for the Carnero Creek ISF include the following terms and conditions:
 - a. S&T Farms, LLC owns water rights in the Omnibus Ditch, decreed in Case No. 1110, District Court, County of Saguache, that it diverts at a headgate located approximately at UTM North: 4190387.0 UTM East: 388140, which is below the lower terminus of the Carnero Creek ISF right. S&T may subsequently desire to change water rights in the Omnibus Ditch to allow diversion at an upstream location(s) within the Carnero Creek ISF reach on the S&T property, including, without limitation, the Holland Ditch, Biehl Ditch, Cascias Ditch, Wilson Ditch, or Suzanna Ditch.
 - b. If S&T files a change of water right to allow for diversion of the Omnibus Ditch water right at upstream alternate points within the Carnero Creek ISF reach, including, without limitation, at the Holland, Biehl, Cascias, Wilson, or Suzanna Ditches, the CWCB may file a statement of opposition solely for the purpose of ensuring compliance with this stipulation, as long as the change of water right claim and resulting decree: (1) requires S&T to maintain at least 5 cfs of the Omnibus Ditch water right in Carnero Creek that can solely be diverted at the Omnibus Ditch headgate and not at any upstream alternate points within the Carnero Creek ISF reach, including, without limitation, at the Holland, Biehl, Cascias, Wilson, or Suzanna Ditches, (2) requires the foregoing 5 cfs to be measured at the Omnibus Ditch headgate or in Carnero Creek at the location of the Omnibus Ditch headgate, depending on whether S&T is diverting the 5 cfs at the Omnibus Ditch headgate, and (3) prohibits S&T from calling for the changed water right at any point of diversion except the Omnibus Ditch headgate when 5 cfs or less is present in Carnero Creek as measured at the Omnibus Ditch headgate or in Carnero Creek at the location of the Omnibus Ditch headgate, in order to ensure there is at least 5 cfs in Carnero Creek.
 - c. In the event S&T files for a change of water right for the Omnibus Ditch, or the Water Court enters a ruling or decree, that is not consistent with the terms and conditions referenced above, the CWCB may file a statement of opposition, protest, or motion to amend the decree, as applicable, without the above-referenced limitation in # 5.b. herein which restricts the CWCB to filing solely for the purpose of ensuring compliance with the stipulation.
 - d. CWCB shall not assert the Carnero Creek ISF as a basis for opposing any relocation by S&T of any existing headgate on Carnero Creek, provided such relocation is consistent with § 37-86-111, C.R.S.
6. In consideration of the mutual promises contained herein, S&T agrees to withdraw its Notice to Contest upon confirmation that the CWCB Board has adopted CWCB staff's

recommendation to include the above-referenced terms and conditions in its final action on the Carnero Creek ISF and in any decree entered by the water court for the Carnero Creek ISF. S&T agrees not to oppose any water court application filed by the CWCB to adjudicate the Carnero Creek ISF so long as the CWCB Board adopts and complies with Staff's recommendations described in paragraph 5, above, and S&T has been given the opportunity for review as described in paragraph 9, below.

7. In the event the CWCB Board declines to adopt CWCB staff's recommendation to include the terms and conditions referenced above in paragraph 5 in its final action on the Carnero Creek ISF, this Stipulation is void and S&T's Notice to Contest shall remain in full force and effect. If the Board declines to adopt the Staff's recommendation at its September 2019 meeting, the parties shall also seek to reschedule the deadlines for prehearing statements and a prehearing conference.
8. The parties shall each bear their own attorney fees and costs associated with this matter.
9. Prior to filing, CWCB shall provide counsel of S&T copies of its application to confirm a water right for the Carnero Creek ISF and any proposed rulings or decrees that are submitted by the CWCB to the water referee or water court, as applicable, so that S&T may ensure consistency with this Stipulation.
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.
11. This Stipulation shall bind and benefit the parties hereto and their assigns and successors-in-interest.

Stipulated and agreed to this 5th day of September, 2019.

<p>OFFICE OF THE COLORADO ATTORNEY GENERAL <i>Attorneys for Staff of the Colorado Water Conservation Board</i></p>  <hr/> <p>Jennifer Mele, No. 30720 1300 Broadway, 7th Floor Denver, CO 80203 (720) 508-6282 jennifer.mele@coag.gov</p>	<p>PETROS & WHITE, LLC <i>Attorneys for S&T Farms, LLC</i></p>  <hr/> <p>David S. Hayes, No. 28661 1999 Broadway, Suite 3200 Denver, CO 80202 (303) 825-1980 dhayes@petros-white.com</p>
-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------