

**FILED**  
IN DISTRICT COURT WATER DIVISION 7

**JUN 29 2020**

DURANGO, COLORADO  
DATE FILED: JUL 27, 2020 11:28 AM  
CASE NUMBER: 2019CW3028  
CLERK

<b>DISTRICT COURT, WATER DIVISION 7</b> <b>LA PLATA COUNTY, COLORADO</b> La Plata Combined Courts 1060 E. 2nd Ave. #106 Durango, CO 81301 (970) 247-2304	<b>FILED</b> IN DISTRICT COURT WATER DIVISION 7 <b>JUL 27 2020</b> DURANGO, COLORADO CLERK
<b>CONCERNING THE APPLICATION FOR WATER RIGHTS OF:</b>  <b>COLORADO WATER CONSERVATION BOARD,</b>  <b>IN HIMES CREEK, A NATURAL STREAM;</b>  <b>IN THE UPPER SAN JUAN WATERSHED,</b>  <b>IN MINERAL COUNTY, COLORADO.</b>	<b>▲ COURT USE ONLY ▲</b>  Case No.: 2019CW3028  Div. 7
<b>FINDINGS OF FACT, CONCLUSIONS OF LAW, RULING OF THE REFEREE, AND JUDGMENT AND DECREE OF THE WATER COURT</b>	

This matter comes before the Water Referee by Application of the Colorado Water Conservation Board ("CWCB") for a water right to preserve the natural environment to a reasonable degree filed on September 25, 2019, as amended by the CWCB's Amended Application for Water Rights to Preserve the Natural Environment to a Reasonable Degree filed on December 27, 2019 (together, the "Application").

The Water Referee for Water Division 7, having made such investigations as are necessary to determine whether or not the statements in the Application are true, having consulted with the Division Engineer for Water Division 7, and being fully advised in the premises, does hereby make the following Findings of Fact, Conclusions of Law, and Ruling of the Referee in this matter:

#### **FINDINGS OF FACT**

1. The statements in the Application are true.
2. The name and address of Applicant:

Colorado Water Conservation Board  
1313 Sherman Street, Suite 718

Denver, CO 80203

3. Notice and Jurisdiction: All notices of this matter required by law have been fulfilled and the Court has jurisdiction over the Application and all parties affected thereby, whether or not they have chosen to appear.
4. Opposers: Bootjack Ranch, LLC ("Bootjack") and Southwestern Water Conservation District ("SWCD") filed statements of opposition in this case. The time for filing statements of opposition has expired. On December 4, 2019, the Dolores Water Conservancy District ("DWCD") filed an Unopposed Motion to Intervene together with a statement of opposition. The Court granted DWCD's Unopposed Motion to Intervene by order of the Court dated December 4, 2019, ordering the DWCD be added as a party to this case and accepting for filing the DWCD's statement of opposition.
5. Summary of Consultation: The Division Engineer filed its Consultation Report of the Division Engineer with the Court pursuant to section 37-92-302(4), C.R.S., on December 23, 2019. The Referee has given the Consultation Report of the Division Engineer due consideration.
6. Name of water right: Himes Creek Instream Flow Water Right.
7. Legal Description: The Himes Creek Instream Flow Water Right is located in the natural stream channel of Himes Creek from its headwaters to the Himes Ditch headgate, a distance of approximately 2.0 miles. A map depicting the approximate location of the Himes Creek Instream Flow Water Right reach is attached as **Exhibit 1**.
  - A. Upstream Terminus: Himes Creek headwaters in the vicinity of:
    1. UTM: Northing: 4144335.05; Easting: 328210.38 (NAD 1983 Zone 13 North)
    2. Lat/Long: Latitude 37° 25' 47.67"N; Longitude 106° 56' 29.86"W
    3. PLSS: SW ¼ NW ¼ Section 24, Township 37 North, Range 1 West NMPM; 505' East of the West Section Line, 2400' South of the North Section Line

- B. Downstream Terminus: Himes Ditch headgate at:
1. UTM: Northing: 4143729.00 Easting: 331120.00 (NAD 1983 Zone 13 North)
  2. Lat/Long: Latitude 37° 25' 29.95"N; Longitude 106° 54' 31.04"W
  3. PLSS: SE ¼ SE ¼ Section 19, Township 37 North, Range 1 East NMPM; 308' West of the East Section Line, 913' North of the South Section Line
- C. The Universal Transverse Mercator (UTM) of the upstream and downstream termini will be used as the legal description for this decree. The Lat/Long and PLSS coordinates are provided as cross-reference locations only. The UTM, Lat/Long, and PLSS locations for the upstream and downstream termini were derived from CWCB GIS using the National Hydrography Dataset (NHD). The PLSS locations for the upstream and downstream termini were derived from using 2005 PLSS data from the U.S. Bureau of Land Management's Geographic Coordinate Database.
8. Source: Himes Creek, tributary to the West Fork San Juan River, tributary to the San Juan River.
9. A. Date of initiation of appropriation: March 21, 2019.
- B. How appropriation was initiated: Appropriation and beneficial use occurred on March 21, 2019, by the action of the CWCB pursuant to sections 37-92-102(3) and (4) and 37-92-103(3), (4) and (10), C.R.S. (2019).
- C. Date applied to beneficial use: March 21, 2019.
10. Amount of water claimed: All unappropriated flow (01/01 - 12/31), absolute.
11. Use of the Water: Instream flow to preserve the natural environment to a reasonable degree.

12. Terms and Conditions - Bootjack

- A. The adjudication and existence of the Himes Creek instream flow "ISF" water right shall not be a basis for opposing or objecting to, and the CWCB will not rely upon, the Himes Creek ISF water right as a basis for opposing or objecting to, Bootjack's reasonable maintenance, repair, restoration or rehabilitation of the Himes Ditch, including but not limited to the installation of a new headgate and flow box at the current location of Bootjack's existing point of diversion for the Himes Ditch, as described above in paragraph 7.B.
- B. The adjudication and existence of the Himes Creek ISF water right shall not be a basis for opposing or objecting to, and the CWCB will not rely upon, the Himes Creek ISF water right as a basis for opposing or objecting to, Bootjack's relocation of the Himes Ditch headgate under the terms of C.R.S. § 37-86-111, if properly applied, so long as Bootjack does not relocate the Himes Ditch headgate more than 200 feet from its existing location, as described above in paragraph 7.B. If the Himes Ditch headgate is relocated upstream pursuant to said statute and this paragraph, the terminus of the Himes Creek ISF shall be effectively revised to the new Himes Ditch headgate location.
- C. The appropriation of the Himes Creek ISF water right does not establish any legal or factual precedent or expectation or interest with respect to any other potential instream flow appropriation within the State of Colorado and Bootjack's agreement not to oppose entry of a decree confirming the Himes Creek ISF water right appropriation shall not be construed as a concurrence by Bootjack beyond any such decree. Bootjack and the CWCB agree that they do not intend for any decree entered for the Himes Creek ISF water right to have the effect of precedent or preclusion on any factual or legal issue in any other water matter and, to that end, agree that they each reserve the right to propose or to challenge any legal or factual position in any other matter without limitation.

13. Terms and Conditions - SWCD and DWCD

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 CWCB, SWCD, and DWCD 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 CWCB, SWCD, and DWCD 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.

### CONCLUSIONS OF LAW

14. Incorporation: The foregoing Findings of Fact are incorporated herein to the extent they constitute conclusions of law.
15. Notice and Jurisdiction: The Water Court for Water Division 7 has jurisdiction over the subject matter of these proceedings and over all persons, owners of property and water rights that may be affected hereby, whether or not they have chosen to appear. The Application in this matter and the resume publication of the Application placed such persons on notice of the relief requested by the Application and granted by this decree. §§ 37-92-203 and 302, C.R.S.
16. The CWCB has fulfilled all legal requirements for a decree for water rights including sections 37-92-302, 304 and 305, C.R.S.
17. Burden of Proof: The CWCB has complied with all requirements and has met its burden of proof to adjudicate the water rights requested in the Application and is therefore entitled to a decree approving the requested water right.

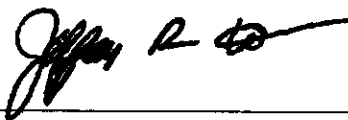
### RULING OF REFEREE

18. The foregoing Findings of Fact and Conclusions of Law are hereby approved and incorporated as the Ruling of Referee by this reference.
19. The Application is granted and a decree in the amount of all unappropriated flow (01/01 - 12/31), absolute, is hereby entered to preserve the natural environment to a reasonable degree in the natural stream channel of Himes Creek from its headwaters to the Himes Ditch headgate, as described in paragraph 7 above. The appropriation date for this water right is March 21, 2019.
20. The priority herein confirmed was filed in the water court in the year of 2019 and shall be junior to all priorities filed in previous years. As between all rights filed in the same calendar year, priorities shall be determined by historical date of appropriation and not affected by the date of entry of this Ruling of the Referee.
21. The CWCB shall install and maintain such measuring devices and keep such records as the Division Engineer may require for administration of this right.

It is accordingly **ORDERED** that this Ruling of the Referee shall be filed with the water clerk subject to judicial review.

DATED: 6/29/2020

BY THE REFEREE:



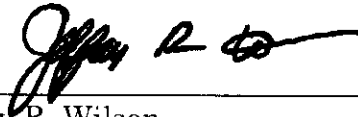
\_\_\_\_\_  
Jeffrey R. Wilson  
Water Referee/Water Judge  
Water Division 7, State of Colorado

## JUDGMENT AND DECREE OF THE WATER COURT

No protest was filed in this matter. The foregoing Ruling of the Referee is confirmed and approved and is made the judgment and decree of this Court.

DATED: 7/27/2020

BY THE COURT:



Jeffrey R. Wilson

Water Judge

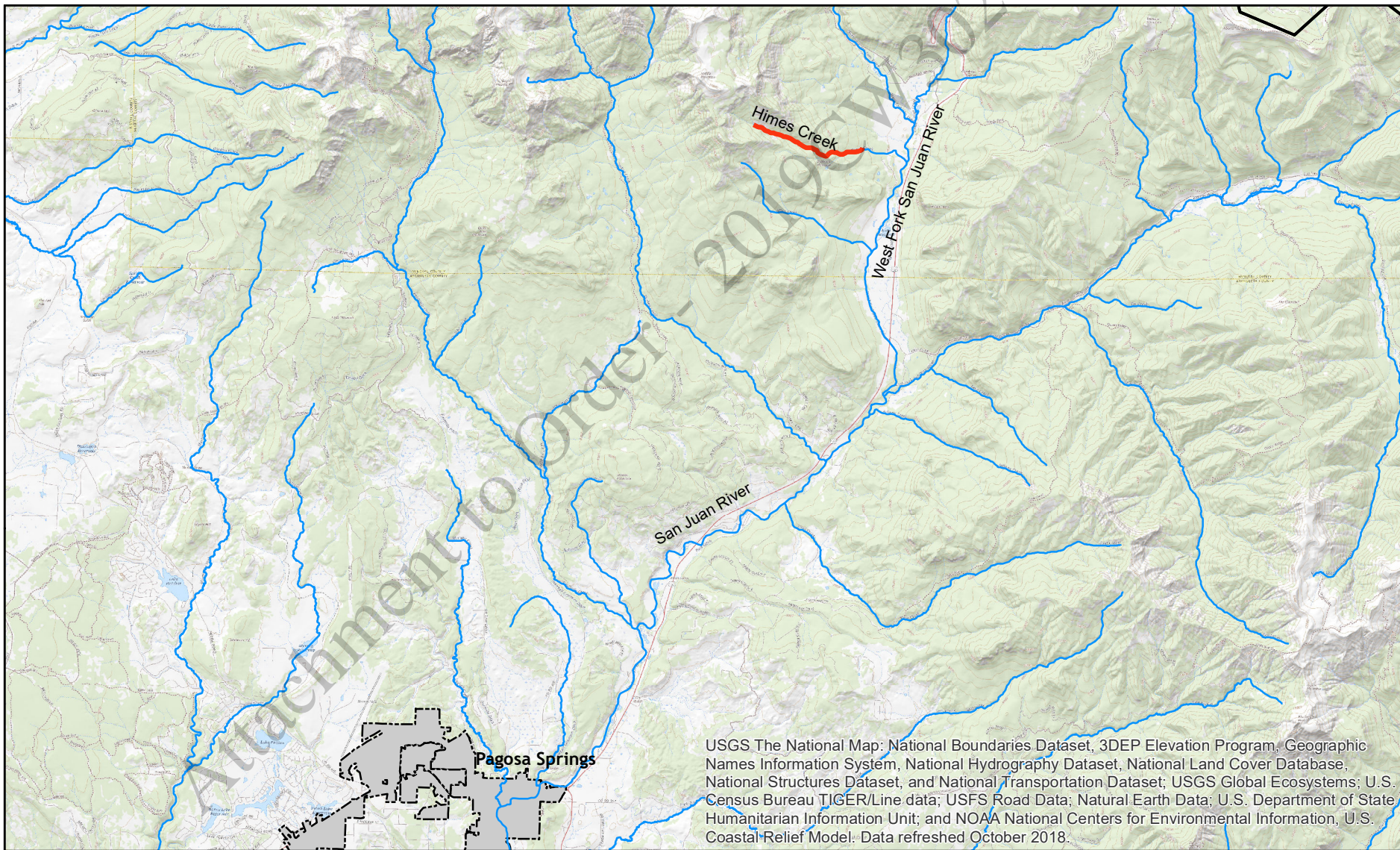
Water Division 7, State of Colorado



CHECKED FOR FORM AND ADMINISTRABILITY:

Robert Genualdi  
Robert Genualdi, Division Engineer  
Water Division No. 7  
160 Rockpoint Drive, Suite E  
Durango, CO 81301  
(970) 247-1845

6/26/20  
Date



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

Exhibit 1  
Himes Creek ISF  
Water Division 7

0 1.5 3 6 Miles

