



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Robert Viehl
Chief, Stream and Lake Protection Section

DATE: September 15, 2021

AGENDA ITEM: 11. Final Action - 2021 Contested ISF Appropriation on Rincon la Vaca Creek
(Water Division 7)

Staff recommendation

Staff requests that the Board make the following determinations and take the following action on the Rincon La Vaca Creek instream flow (ISF) appropriation identified in Table 1. The information necessary to support these determinations is contained in this memo, the recommendation letter, and documentation submitted by Colorado Parks and Wildlife (CPW), and in staff’s oral and written presentations provided at the January 25, 2021 Board meeting.

- (1) Determine, pursuant to section 37-92-102(3), C.R.S. that for the Rincon La Vaca Creek ISF appropriation identified in Table 1:
 - (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 25, 2021 as the appropriation date for this water right
- (3) Direct staff to work with the Attorney General’s office to file an application for this water right in water court by the end of the calendar year.

Table 1

Waterbody	Water Division	Watershed	County	Upper Terminus (UTM)	Lower Terminus (UTM)	Length (miles)	Amount (cfs)
Rincon La Vaca Creek	7	Upper San Juan	Hinsdale	Headwaters in the vicinity of E: 288830.29 N: 4170340.18	Confluence Los Pinos River at E: 294776.30 N: 4171003.14	4.47	1.2 (11/1-4/30) 2.8 (05/01-10/31)



Background

CPW recommended this segment on Rincon La Vaca Creek for inclusion into the CWCB's Instream Flow and Natural Lake Level Program at the January 25, 2017 ISF workshop.

On January 25, 2021, the CWCB formed its intent to appropriate ISF water rights on a segment of Rincon La Vaca Creek.

On March 31, 2021, the Southwestern Water Conservation District (SWCD) filed a notice to contest this ISF appropriation. No other entities filed for Party status or Hearing Participant status and the deadline to do so has passed.

On July 17, 2021, CWCB staff, CPW, and SWCD signed a Stipulation and Agreement in this matter.

On July 19, 2021, SWCD withdrew its notice to contest the ISF appropriation on Rincon Lava Creek.

On July 19, 2021 the Hearing Officer vacated the hearing and associated prehearing deadlines and returned the matter to the CWCB for further administrative action.

Technical Investigations

The Board was provided detailed information regarding all field data, studies, and analyses for the recommended Rincon La Vaca Creek stream segment at its January 25, 2021 Board meeting. A brief overview of the analyses is provided below.

Natural Environment Studies

CPW conducted field surveys on Rincon La Vaca Creek 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 and analyzed biologic and hydraulic data. CWCB staff reviewed all analyses and prepared a recommendation for the amount of water necessary to preserve the natural environment to a reasonable degree for Rincon La Vaca Creek.

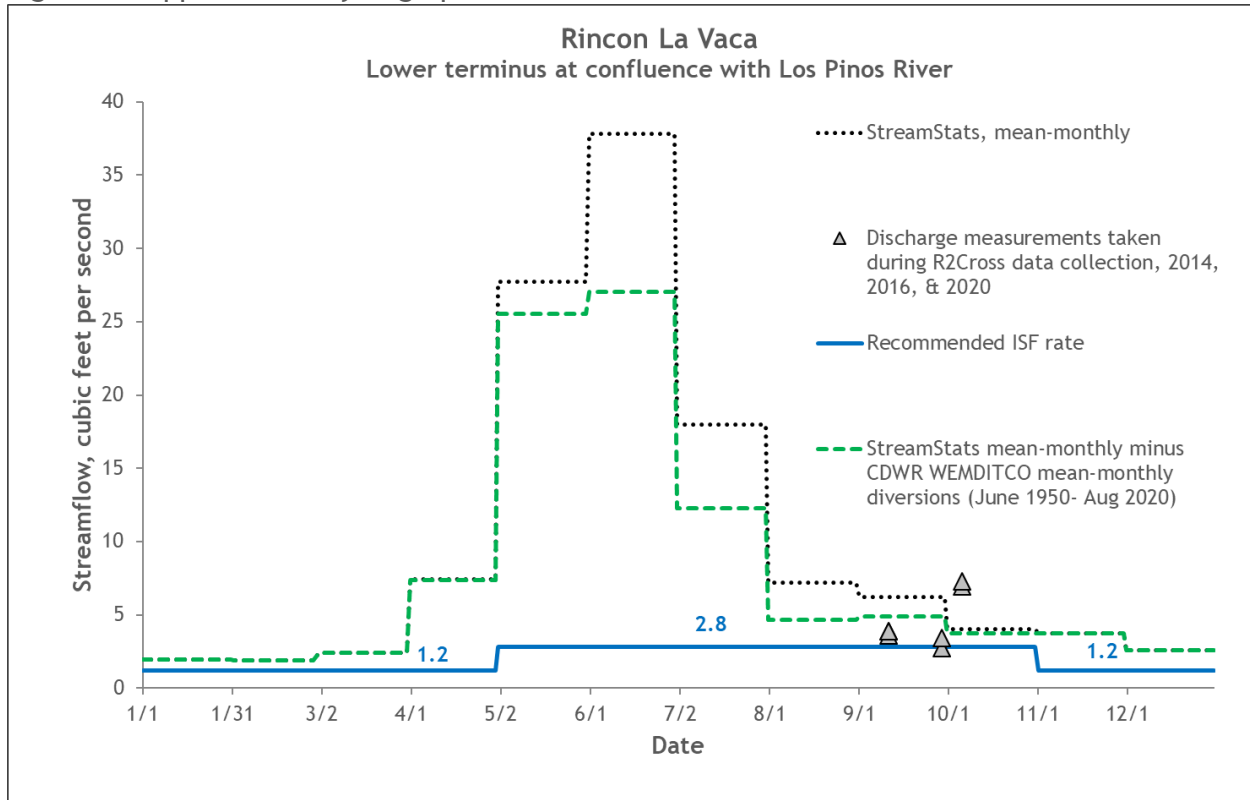
Water Availability Studies

CWCB staff conducted an evaluation of water available for the Rincon La Vaca Creek recommendation. To determine the amount of water physically available for the Board's appropriation, staff analyzed available streamflow models and streamflow measurement records. In addition, staff analyzed existing water rights and consulted with the Division Engineer's Office to identify any potential water availability issues. Staff used this information to develop a hydrograph showing the amount of water available for the recommendation. Based upon its analysis, staff determined that water is available for appropriation on the recommended reach of Rincon La Vaca Creek to preserve the natural environment to a reasonable degree without limiting or foreclosing the exercise of existing water rights.

In discussions with CWCB staff and CPW, SWCD requested further clarification on staff's water availability analysis and the interplay between the Weminuche Pass Ditch and the Rincon La Vaca ISF. CWCB staff clarified that it is not contemplating an agreement with CPW in regards to its Weminuche Pass Ditch water rights, and no agreement is required to meet the water availability requirement for this ISF. To more effectively illustrate the water availability analysis, CWCB staff provided a revised hydrograph and a more detailed description of the analysis to SWCD.

The revised hydrograph, shown in Figure 1, displays the mean-monthly flow estimate from StreamStats, the proposed ISF rates, and a green dashed line that shows the StreamStats mean-monthly flow estimate minus the mean-monthly diversions from the Weminuche Pass Ditch. This hydrograph demonstrates that this ISF appropriation does not rely on Weminuche Pass Ditch operations and that water is available for appropriation. In the Stipulation and Agreement, the parties agreed that the water availability analysis and hydrograph demonstrate there is sufficient water available for appropriation of the Rincon La Vaca ISF based on the information provided by CWCB staff.

Figure 1. Supplemental Hydrograph



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.

Attachments

- 1) Stipulation and Agreement between the Colorado Water Conservation Board Staff, the Southwestern Water Conservation District and Colorado Parks and Wildlife.
- 2) Withdrawal of Notice to Contest Instream Flow Appropriation on Rincon La Vaca Creek.
- 3) Order Regarding Unopposed Motion to Vacate Hearing and Prehearing Deadlines and Prehearing Conference.

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER
DIVISION NO. 7:**

RINCON LA VACA CREEK

**STIPULATION AND AGREEMENT BETWEEN THE COLORADO WATER
CONSERVATION BOARD STAFF, THE SOUTHWESTERN WATER
CONSERVATION DISTRICT AND COLORADO PARKS AND WILDLIFE**

The Southwestern Water Conservation District (SWCD), Colorado Parks and Wildlife (CPW) and staff of the Colorado Water Conservation Board (CWCB), by and through their respective counsel, hereby stipulate and agree as follows:

1. CWCB staff and CPW recommended the CWCB Board appropriate an instream flow right on Rincon La Vaca Creek, in the amount of 2.8 cfs from May 1 through October 31 and 1.2 cfs from November 1 through April 30, with an upper terminus located at the headwaters in the vicinity of UTM North: 4170340.18 UTM East: 288830.29 and the lower terminus at the confluence with the Los Pinos River located at UTM North: 4171003.14 UTM East: 294776.30 (the “Rincon La Vaca ISF”), Water Division 7. The proposed instream flow reach is approximately 4.47 miles and is located entirely within the Weminuche Wilderness of the San Juan National Forest.
2. The CWCB declared its intent to appropriate the Rincon La Vaca ISF at its meeting in January of 2021.
3. SWCD timely filed a Notice to Contest. No other party filed a Notice to Contest or filed for Contested Hearing Participant status.
4. The proposed instream flow appropriation is located on Rincon La Vaca Creek, which is tributary to the Los Pinos River (aka, the Pine River) and included within SWCD’s boundaries. As described in its Notice to Contest, SWCD has no objection to the CWCB appropriating a junior instream flow right at the headwaters of Rincon La Vaca Creek. However, SWCD filed a Notice to Contest because SWCD was unable to understand some of the information regarding the instream flow appropriation as presented.
5. SWCD subsequently engaged in several discussions with CWCB staff and CPW.

6. As a result of these discussions, CWCB staff created a hydrograph that, along with showing estimates of mean monthly streamflow, also accounts for the mean-monthly diversions through the Weminuche Pass Ditch, a diversion structure located within the proposed instream flow reach that is owned and operated by CPW. The parties agree that the water availability analysis and hydrograph demonstrate there is sufficient water available for appropriation of the Rincon La Vaca ISF based on the information provided by CWCB staff.
7. CWCB staff agrees to present its Board with the water availability analysis and above-referenced hydrograph to demonstrate that water is available for appropriation of the Rincon La Vaca ISF. Staff's continued recommendation is based on the water availability analysis and the hydrograph.
8. CPW recommended the Rincon La Vaca ISF because of its interest in sustaining the cutthroat trout fishery in Rincon La Vaca Creek, and a new ISF reach could provide additional opportunities to protect the fishery. CPW continues to support the appropriation of the Rincon La Vaca ISF. CPW intends to continue to consider possible concepts that could provide supplemental water to the ISF once it is decreed.
9. SWCD continues to support the CWCB's and CPW's efforts to protect the natural environment on Rincon La Vaca Creek throughout the entire proposed instream flow reach. Based on the foregoing, SWCD agrees to withdraw its Notice to Contest.
10. The parties shall each bear their own attorney fees and costs associated with this matter.
11. This Stipulation and Agreement 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.

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Stipulated and agreed to this 17th day of July, 2021.

OFFICE OF THE COLORADO
ATTORNEY GENERAL
*Attorney for Staff of the Colorado Water
Conservation Board*



Jennifer Mele, #30720

OFFICE OF THE COLORADO ATTORNEY
GENERAL
Attorney for Colorado Parks and Wildlife



Elizabeth M. Joyce, #46484

VAN VURST LAW, LLC
*Attorney for the Southwestern Water
Conservation District*



Beth Van Vurst, #36931

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2021, I transmitted by electronic mail a true and correct copy of the foregoing **STIPULATION AND AGREEMENT BETWEEN THE COLORADO WATER CONSERVATION BOARD STAFF, THE SOUTHWESTERN WATER CONSERVATION DISTRICT AND COLORADO PARKS AND WILDLIFE** to the following:

Hearing Officer

Amy Beatie Deputy Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 Amy.Beatie@coag.gov

Party Status

<u>Colorado Water Conservation Board</u> Rob Viehl Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3237 rob.viehl@state.co.us	<u>Colorado Water Conservation Board</u> Jennifer Mele First Assistant Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6282 jen.mele@coag.gov
<u>Colorado Parks and Wildlife</u> Elizabeth Joyce Colorado Parks and Wildlife Area Office 2300 S. Townsend Ave. Montrose, CO 81401 970-819-1037 elizabeth.joyce@coag.gov	<u>Southwestern Water Conservation District</u> Beth Van Vurst Van Vurst Law, LLC 822 S. Race Street Denver, Colorado 80209 720-664-6442 beth@vanvurst-law.com



Beth Van Vurst

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER
DIVISION NO. 7:**

RINCON LA VACA CREEK

**WITHDRAWAL OF NOTICE TO CONTEST INSTREAM FLOW APPROPRIATION
ON RINCON LA VACA CREEK**

The Southwestern Water Conservation District (SWCD), by and through its undersigned counsel, hereby withdraws its Notice to Contest the instream flow appropriation for Rincon La Vaca Creek (CWCB ID: 18/7/A-002). SWCD is withdrawing its Notice to Contest because it has entered into a Stipulation with Colorado Water Conservation Board (CWCB) staff and Colorado Parks and Wildlife (CPW) regarding this matter, which provides for such withdrawal and is being filed concurrently herewith. Therefore, pursuant to paragraph 9 of the Stipulation, SWCD hereby withdraws its Notice to Contest.

Respectfully submitted this 19th day of July, 2021.

By:



Beth Van Vurst, #36931
Van Vurst Law, LLC
Telephone: (720) 664-6442
Email: beth@vanvurst-law.com

*Attorney for the Southwestern Water
Conservation District*

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2021, I transmitted by electronic mail a true and correct copy of the foregoing **WITHDRAWAL OF NOTICE TO CONTEST INSTREAM FLOW APPROPRIATION ON RINCON LA VACA CREEK** to the following:

Hearing Officer

Amy Beatie Deputy Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 Amy.Beatie@coag.gov

Party Status

<u>Colorado Water Conservation Board</u> Rob Viehl Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3237 rob.viehl@state.co.us	<u>Colorado Water Conservation Board</u> Jennifer Mele First Assistant Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6282 jen.mele@coag.gov
<u>Colorado Parks and Wildlife</u> Elizabeth Joyce Colorado Parks and Wildlife Area Office 2300 S. Townsend Ave. Montrose, CO 81401 970-819-1037 elizabeth.joyce@coag.gov	<u>Southwestern Water Conservation District</u> Beth Van Vurst Van Vurst Law, LLC 822 S. Race Street Denver, Colorado 80209 720-664-6442 beth@vanvurst-law.com



Beth Van Vurst

BEFORE THE COLORADO WATER CONSERVATION BOARD

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION
DIVISION NO. 7: RINCON LA VACA CREEK**

**ORDER REGARDING UNOPPOSED MOTION TO VACATE HEARING AND ASSOCIATED
PREHEARING DEADLINES AND PREHEARING CONFERENCE**

THIS MATTER comes before the Hearing Officer on the Unopposed Motion to Vacate Hearing and Associated Prehearing Deadlines and Prehearing Conference filed by the Staff of the Colorado Water Conservation Board (“CWCB Staff”). The Hearing Officer, having reviewed the notice and motion, and being otherwise adequately advised, GRANTS the motion.

The Hearing Officer finds that good cause exists and the case will be best served if the hearing and associated prehearing deadlines and prehearing conference are vacated.

The Prehearing Conference scheduled for July 19, 2021, is hereby VACATED.

The Hearing in this matter set for September 15-16, 2021, is hereby VACATED.

The Deadlines for Prehearing Statements and Rebuttal Statements are hereby VACATED.

This matter is returned to the Colorado Water Conservation Board for further administrative action.

Dated this 19th day of July, 2021.

By the Hearing Officer:

/s/ Amy W. Beatie

Amy W. Beatie
Deputy Attorney General
Colorado Attorney General’s Office
1300 Broadway, 7th Floor
Denver, CO 80203
720-508-6295
Amy.Beatie@coag.gov

Certificate of Service

Contested CWCB ISF Appropriation on Rincon La Vaca Creek

I hereby certify that on July 19th, 2021, a true and correct copy of the foregoing **ORDER REGARDING UNOPPOSED MOTION TO VACATE HEARING AND ASSOCIATED PREHEARING DEADLINES AND PREHEARING CONFERENCE** was served via email to the parties referenced in the Party Status below:

Hearing Officer

Amy Beatie Deputy Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, Colorado 80203 720-508-6296 amy.beatie@coag.gov cc: john.watson@coag.gov

Party Status

<u>Colorado Water Conservation Board</u> Rob Viehl Colorado Water Conservation Board 1313 Sherman Street, Room 718 Denver, CO 80203 303-866-3441 ext. 3237 rob.viehl@state.co.us	<u>Colorado Water Conservation Board</u> Jennifer Mele First Assistant Attorney General Natural Resources & Environment Section Office of the Colorado Attorney General 1300 Broadway, 7th Floor Denver, CO 80203 720-508-6282 jen.mele@coag.gov
<u>Colorado Parks and Wildlife</u> Katie Birch DOI, BLM, Colorado State Office 2300 S. Townsend Ave. Montrose, CO 81401 970-819-1037 katie.birch@state.co.us	<u>Southwestern Water Conservation District</u> Beth Van Vurst Van Vurst Law, LLC 822 S. Race Street Denver, Colorado 80209 720-664-6442 beth@vanvurst-law.com

/s/ John Watson
John Watson