



C O L O R A D O

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

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

DATE: July 17-18, 2019 Board Meeting

AGENDA ITEM: 14 a. Instream Flow Appropriation on Himes Creek, Water Division 7 - Final Action

Background

On March 21, 2019, the CWCB formed its intent to appropriate an instream flow (ISF) water right on a segment of Himes Creek from its headwaters to the Himes Ditch headgate in Water Division 7. The U.S. Forest Service (USFS) recommended this segment for inclusion into the CWCB's Instream Flow and Natural Lake Level Program.

Water Division	Stream	Watershed	County	Upper Terminus	Lower Terminus	Length (miles)	Amount & Timing
7	Himes Creek	Upper San Juan	Mineral	Headwaters	Himes Ditch hdgt.	2.0	All Unappropriated Flow (1/1-12/31)

On May 31, 2019, the Southwestern Water Conservation District and the Dolores Water Conservancy District (collectively "Districts") filed Notices to Contest this ISF appropriation. In addition, on July 1, 2019, Western Resource Advocates (WRA) filed a Notice of Party status, and Trout Unlimited (TU) filed a Notice of Contested Hearing Participant status in this contested ISF proceeding.

CWCB staff (Staff) and the Districts entered into a stipulation and agreement on July 1, 2019. The Districts agreed to withdraw their Notices to Contest upon confirmation that the CWCB Board has adopted Staff's recommendation to include the agreed upon terms and conditions in the Board's final action and water court decree. WRA and TU have reviewed the stipulated language and have withdrawn their respective Notices of Party Status and Contested Hearing Participant Status.

While Bootjack Ranch, LLC (Bootjack) did not file a Notice of Party or Contested Hearing Participant Status, Staff expects to receive proposed terms and conditions from Bootjack for potential inclusion in any Himes Creek ISF water court decree, and anticipates discussing such terms and conditions with the Board at its July meeting.

Since all parties have withdrawn their objections, Staff recommends final action on the Himes Creek ISF.



Technical Investigations

The Board was provided detailed information regarding all field data, studies, and analyses for this stream segment at its March 21, 2019 Board meeting.

Natural Environment Studies

The USFS, Colorado Parks and Wildlife (CPW), and Staff conducted a number of studies and assembled a body of evidence and analysis that supports the finding that the natural flow regime is necessary to preserve the natural environment of Himes Creek. To formulate its recommendation, the USFS collected biologic and hydrologic data, conducted literature reviews, and consulted numerous experts. The USFS also contracted with an expert in fisheries biology to assess the Himes Creek fishery, perform a literature review, and comment on the fisheries habitat and associated flow requirements. CPW personnel support the overall USFS efforts for ISF protection for Himes Creek, and have prepared and submitted the following data and reports: the 2017 “Himes Creek Habitat Survey and Inventory Report,” four years of fish survey reports, genetics paper (Rogers et al., 2018), and the 2019 aquatic ecology literature review. Staff assisted CPW in some of these efforts. CPW, through its membership in the Instream Flow Council, requested and received a peer review of the USFS’s written flow recommendations; this peer review came from ISF and Colorado River cutthroat trout experts with the Wyoming Game and Fish Department. In addition, Staff hired an expert to provide information about step-pool channels and assess the state of the science to model sediment transport in these environments. The USFS conducted multiple 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, the USFS, along with CPW, collected biologic data that Staff reviewed and analyzed. Based on the results of these reviews and analyses, Staff prepared a recommendation to the Board that all of the unappropriated flow in the stream is necessary to preserve the natural environment to a reasonable degree.

Water Availability Studies

Staff conducted an evaluation of water availability for Himes Creek. Since the Himes Creek ISF recommendation is for all of the unappropriated flow, water availability identified the typical range of streamflows that may be protected with this ISF appropriation and provided an estimate of the magnitude of rare high flow events. Staff analyzed available data, including USGS gage records for nearby gages, diversion records, stream flow measurements, and StreamStats based statistics. Based upon its analysis, Staff has determined that water is available for appropriation on Himes 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 ISF appropriation(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. (2018).

Staff recommendation

Staff recommends that the Board take final action on the Himes Creek ISF appropriation and make the following determinations and take the following actions on Himes Creek, based on the information presented by the USFS and CPW at the March 21, 2019 board meeting, information contained in this memo, as well as the information presented by Staff both in writing and orally at the March 21, 2019 Board meeting:

- (1) Determine, pursuant to section 37-92-102(3), C.R.S. (2018), and based upon the review of the data and other information presented by Staff, CPW, and the USFS that for the ISF on Himes Creek for all of the unappropriated flow from its headwaters to the Himes Ditch headgate:
 - (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 March 21, 2019 as the appropriation date for this water rights.
- (3) Accept the following terms and conditions agreed upon between Staff and the Districts as part of this final action and include the terms and conditions in the water court decree 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 CWC 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 CWC 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 CWC'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 CWC. 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.

(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 the Districts in the water court application and decree for this ISF appropriation.

Attachments

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

Proposed ISF Himes Creek
Stipulation
Page 3

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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Proposed ISF Himes Creek
Stipulation
Page 4

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