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VIA EMAIL WTULLY@gp.usbr.gov and U.S. MAIL

Mr. Will Tully
 Bureau of Reclamation
 11056 West County Road 18E
 Loveland, CO 80537-9711

Re: Windy Gap Firing Project Draft Environmental Impact Statement

Dear Mr. Tully,

We are writing on behalf of Chimney Rock Ranch to express our serious concerns with the sufficiency of the Windy Gap Firing Project Draft Environmental Impact Statement.

Ranch Description.

Chimney Rock Ranch ("CRR") begins about one mile downstream of the existing Windy Gap Reservoir on the Colorado River. The ranch owns land on both sides of the river for about 5 miles. As currently configured, the ranch is a combination of other historic ranches. The priority dates for the earliest irrigation water rights for the ranch are more than 100 years old. The historic irrigation and cattle ranching operations continue at CRR.

The Colorado River is the heart of the ranch. It is the source of the irrigation water, an extraordinary aesthetic asset, and, importantly, is designated a "Gold Medal" trout stream by the Colorado Division of Wildlife ("CDOW") in the vicinity of the ranch. The "Gold Medal" designation is reserved for "the highest quality cold water habitats that have the capability to produce many quality size (14 inches or longer) trout."¹

There is no question that the proposed Windy Gap Firing Project ("WGFP") will adversely effect the Colorado River, the trout fishery and the environment in the vicinity of CRR. Some of that impact is acknowledged in the DEIS. For example, even using the suspect assumptions and analysis in the DEIS, the preferred alternative will result in a 21,283 AF decrease in average annual flows below Windy Gap (DEIS Table 3-2). The preferred alternative will cause flow levels in the river below Windy Gap to be at

¹ COLORADO WILDLIFE COMMISSION POLICY: "Wild and Gold Medal Trout Management," September 18, 1992, rev'd June 12, 2008.

or below 100 CFS more often (DEIS Table 3-7), and will raise the water temperature at those critical low flow levels by up to 4.0° C. (DEIS 3-96, 97, Fig. 3-38). The WGFP will decrease the amount of dissolved oxygen in the water at the ranch (DEIS Fig. 3-42), and increase both ammonia and inorganic phosphorous. (DEIS Fig. 3-44, 45, 46). It will cause a 24% loss of habitat for adult rainbow trout in 4 out of 10 years. (DEIS 3-137).

In short, CRR is at ground zero for the impacts of the WGFP. As the DEIS explains, the “greatest effect to fish habitat [from the WGFP] would occur in the reach between Windy Gap Reservoir and the Williams Fork River.” (DEIS 3-145). Even with the foregoing admissions, however, as we demonstrate below, the DEIS grossly underestimates the full range and magnitude of the environmental and economic damage that the WGFP will cause.

CRR is particularly concerned with the WGFP because it has already suffered the devastating impact of the whirling disease (“WD”) epidemic and the associated complete loss of the Colorado River rainbow trout fishery in the vicinity of the ranch. The existing Windy Gap Reservoir was a primary cause of that epidemic. In response to the WD crisis, CRR has worked extensively with CDOW and Colorado State University on numerous studies and programs to address WD and habitat issues in the Colorado River in the vicinity of the ranch. Most recently, CRR is working with CDOW on the introduction of a new strain of rainbow trout with greater resistance to the disease. CDOW hopes to use this new strain as brood stock in the rest of the State to replace the rainbow trout lost to WD.

CRR Comments on DEIS

The purpose of an EIS prepared under NEPA is to accurately inform both the public and federal decision makers concerning the environmental impacts of any proposed federal action. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *Sierra Club v. United States Dep't of Energy*, 287 F.3d 1256, 1262 (10th Cir. 2002). CRR is concerned that the WGFP DEIS serves neither of these purposes.

Our comments below are organized around the issues that cause the greatest concern for CRR, as follows:

1. Failure of the DEIS to discuss a real “no-action” alternative that characterizes the status quo and can serve as an accurate baseline against which the impacts of the WGFP can be measured.
2. Failure of the DEIS to address Senate Document 80 and the protections for the West Slope in that document.
3. Failure of the DEIS to sufficiently address proposals to mitigate the impact of the WGFP, in particular the lack of any discussion of the benefits that would result from making Windy Gap an off-channel reservoir.

4. Failure of the DEIS to sufficiently address the serious cumulative environmental impacts that the Colorado Big-Thompson Project, Windy Gap, and other transmountain diversion projects have or will cause.
5. Failure of the DEIS to address the likely environmental impacts of the preferred alternative in light of the most recent period of record.
6. Failure of the DEIS to address the likely environmental impacts of the preferred alternative in light of the science on climate change.
7. Failure of the DEIS to address the negative impact of the preferred alternative on private fishing, and private property values in the most impacted reach below Windy Gap.

DISCUSSION

1. Failure of the DEIS to discuss an actual “no-action” alternative.

The consideration of alternatives to the preferred action is the “heart” of every NEPA analysis. 40 C.F.R. § 1502.14. As part of the “reasonable range of alternatives” that must be discussed, an EIS must “include the alternative of no-action.” 40 C.F.R. § 1502.14(d). The consideration of a “no-action” alternative is intended to require that “agencies compare the potential impacts of the proposed major federal action to the known impacts of maintaining the status quo.” *Custer County Action Assoc. v. Garvey*, 256 F.3d 1024, 1040 (10th Cir. 2001). For the “no-action” alternative, “the current level of activity is used as a benchmark.” *Id.*

In contrast to the clear direction from the Tenth Circuit, and the NEPA regulations cited above, Reclamation’s DEIS contains no genuine “no action” alternative. Rather, where an explanation of the status quo is required, the DEIS offers the increased depletions that would result from the possible construction of Ralph Price Reservoir by the City of Longmont. Whether or not this reservoir will be built is purely speculative, particularly in the current economic climate. It is wrong for the DEIS to use this artificial baseline as the starting point to analyze the impacts of the WGFP. The effect of including the increased diversions that would result from the construction of Ralph Price within the “no action” alternative in the DEIS is that the real incremental impacts of the WGFP as measured against the status quo are not documented.

We are similarly concerned that the DEIS misrepresents the current level of Windy Gap diversions. In its comment letter, Grand County explains that the annual average diversions by Windy Gap have been closer to the 11,080 AF reported in the Water Resources Technical Appendix to the DEIS (Table 3, at 22) than the over 36,000 AF that are used to describe the existing condition in the DEIS analysis. (See DEIS Table 3-2, at 3-19). Again, the effect of this inflated baseline is to diminish the impacts of the WGFP postulated in the DEIS.

The lack of an accurate baseline from which to measure the impacts of the WGFP is a deficiency that infects the entire document. Thus, even the very serious impacts that are explained in the DEIS to the average annual river flow, the water quality and temperature, and the fish habitat are all grossly underestimated. Until a new DEIS with an analysis of the impacts of the WGFP against an accurate baseline is presented, federal decision-makers and the interested public have no basis to understand the actual environmental impacts of the WGFP. *See Half Moon Bay Fishermans' Mktg Ass'n v. Carlucci*, 875 F.2d 505, 510 (9th Cir. 1988) (“Without establishing the base line conditions which exist, there is simply no way to comply with NEPA.”). Reclamation cannot fulfill its fundamental obligations under NEPA based on the information in the current DEIS. A new NEPA document is required.

2. Failure of the DEIS to address Senate Document 80 and the protections for the West Slope in that document.

Because the WGFP will rely on Colorado-Big Thompson (“CBT”) facilities, Reclamation must determine whether the WGFP complies with Senate Document 80, the federal statute that authorized construction of the CBT project. Senate Document 80 contains requirements for use of CBT water on the East Slope, use of Green Mountain Reservoir for West Slope beneficiaries, and a number of provisions that specifically protect the headwaters of the Colorado River system in Grand County. Recognizing that CBT would “change the regimen of the Colorado River below Granby Reservoir[,]” Senate Document 80 sets out “primary purposes” for the operation and management of the CBT project, as follows

(1) to preserve the vested and future rights in irrigation; (2) to preserve the fishing and recreational facilities and the scenic attractions of Grand Lake, the Colorado River, and Rocky Mountain National Park; 3) to preserve the present surface elevations of the water in Grand Lake and to prevent a variation in these elevations greater than their normal fluctuations; 5) to maintain conditions of river flow for the benefit of domestic and sanitary uses of this water.

The DEIS recognizes the obligation to consider Senate Document 80, but with respect to the ability of the WGFP to comply, states: “This determination will be made available at a later time and is not part of this EIS.” (DEIS at 1-42). This is backwards. No aspect of the WGFP, including any further environmental review, should occur until there is a determination concerning whether WGFP can comply with Senate Document 80. *See* 40 CFR §§ 1508.27, 1502.16(c), 1506.2(d)(requiring an EIS to discuss any inconsistency between the proposed project and any federal, state or local plan or law).

Moreover, compliance with Senate Doc. 80 may require mitigation for the West Slope. Those mitigation measures would be part of this project, and would need to be specified and studied in this EIS for Reclamation to satisfy NEPA. The Department of the Interior’s recent NEPA regulations specify that the mitigation section of an EIS must

address any mitigation measures “required to make [a] proposal conform to applicable legal requirements, as well as any voluntary ameliorative design element(s).” 73 Fed. Reg. 61317 (to be codified 43 CFR § 46.130). With respect to this DEIS, Reclamation appears to be moving ahead in violation of its own regulations.

As discussed in the next section below, the mitigation measures identified in the DEIS are insufficiently discussed. Worse, the mitigation that could be achieved by taking Windy Gap Reservoir off-channel - - the measure that would provide the best protection from the environmental problems created by that facility for CRR and everyone else downstream - - is not even discussed.

3. Failure of the DEIS to sufficiently address proposals to mitigate the impact of the WGFP, in particular the lack of any discussion concerning the benefits of making Windy Gap an off-channel reservoir.

The DEIS effectively treats mitigation as a laundry list with minimally described possibilities, but no meaningful analysis. (DEIS 3-292-295). For many of the listed items, even the mitigation proposed is vague and speculative, including things that “might be” done if deemed appropriate by the proponent of the project. For example, on the critical question of low flows, the DEIS states that “the Subdistrict will work with Grand County, the Colorado Division of Wildlife, and others to determine if increasing bypass flows in the Colorado River from the existing minimum flow of 90 cfs to 135 cfs while Windy Gap is pumping during July and August would result in temperature reductions downstream of Windy Gap that would measurably benefit the trout fishery. If studies indicate that increased bypass flows would be effective, the Subdistrict would consider increasing required bypass flows under certain water supply conditions.” (DEIS 3-292).

The DEIS does not explain what studies are planned or underway to determine the effectiveness of increased bypass flows, nor what, if any, commitment the Subdistrict has made to actually increase bypass flows if the fishery experts find measurable benefits. This is not the meaningful or informative analysis of mitigation required in a NEPA document. *See, Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 353, (1989)). Without real mitigation proposals, and a discussion of the extent to which they actually would or would not effectively mitigate WGFP impacts, there is very little in this section that can be said to inform either federal decision-makers or the public.

The primary mitigation proposal that should be considered in the supplemental EIS is the possibility of making Windy Gap an off-channel reservoir. This proposal was frequently discussed as a possible solution to WD and the many other negative environmental impacts already caused by Windy Gap. (See Meyers, “Creating a river bypass might be the solution”, attached hereto as Exhibit A; see also Nehring and Thompson, *North American Journal of Fisheries Management* 23:376-384, 2003 (“This fishery might benefit greatly if a means could be devised to sequester actinospores produced in the Windy Gap Reservoir within the lake.”)). Even if Reclamation is able to demonstrate the Windy Gap is not still exacerbating the WD problem, taking this

reservoir off-channel by means of a bypass would mitigate the temperature increases, nutrient loading, and oxygen depletion that are caused by this facility. CRR believes that taking Windy Gap off-channel is the most certain mitigation to alleviate the problems from this facility, and it should be evaluated in the supplemental EIS.

The DEIS should also address the Grand County Stream Management Plan in its mitigation section, and there is no discussion of the carefully crafted flow recommendations in that document. The new DOI NEPA regulations direct Reclamation to “consult, coordinate, and cooperate with relevant State, local and tribal governments . . . concerning the environmental effects of any Federal action within the jurisdictions or related to the interests of these entities.” 73 Fed. Reg. 61317 (to be codified at 43 CFR § 46.155). In light of that direction, the County’s Stream Management Plan should be the guiding document in evaluating proposed mitigation.

4. Failure of the DEIS to sufficiently address the cumulative environmental impacts that the CBT project, Windy Gap, and other transmountain diversion projects have or will cause.

The DEIS contains an insufficient discussion of the serious environmental impacts that CBT, Windy Gap, and other transmountain diversion projects have already had on the Colorado River and its environs. The direct cumulative impact of those many existing projects includes serious reduction in water quantity and quality (including temperature), exacerbation of the whirling disease epidemic, and other environmental problems. These past impacts should be thoroughly discussed in the “cumulative impacts” section of the analysis. *See* 40 CFR 1508.7 (“Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . .); *see also Lands Council v. U.S. Forest Service*, 395 F.3d 1019, 1028 (9th Cir. 2004).

According to Grand County, on average, 65% of the total water in the headwaters of the Colorado River System is already diverted to the East Slope by existing transmountain projects, and that percentage will increase to 85% if both the WGFP and Denver Water’s planned Moffat Collection System expansion are implemented.²

CRR has already suffered adverse environmental impacts that are directly attributed to these lower river flows, including high temperatures resulting in fish mortality, increased nutrient loading, didymo (or “rock snot” – a nonnative algae creating thick, slippery mats on what was formerly a rock and gravel river bottom), and the spread of WD. CRR joins other commentators in noting that the impacts of Denver Water’s planned expansion of its Moffat Collection System Project should be considered in detail, and in connection with the WGFP. A single EIS evaluating the impacts of both projects is the only way to guarantee a complete understanding of the combined impact these projects will have on stream flow and the environment in the vicinity of CRR.

² Grand County has prepared and submitted the graph that is also attached here as Exhibit A. It compares the historic Colorado River hydrograph at Hot Sulphur Springs against the impact of various transmountain diversion projects, including Windy Gap.

A complete analysis of the past cumulative impacts of other water projects on the river must include an honest assessment of the central role that Windy Gap Reservoir has played in the spread of WD. Where such a discussion might reasonably be expected in the subject DEIS, the document states instead, “[t]he existing habitat conditions are generally favorable for all the fish species collected.” (DEIS at 3-130). In light of the complete destruction of the Colorado River rainbow trout fishery below Windy Gap, and the continuing presence of WD in the river, this comment must be changed. The science is irrefutable: “The fishery in the upper Colorado River downstream from Windy Gap Dam continues to suffer the ill effects of the whirling disease epizootic, with the rainbow trout population in particular exhibiting much lower levels of abundance and biomass than a decade ago.”³ As Charlie Meyers, the Outdoor writer for the Denver Post, summarized in the column that is attached as Exhibit B, “Windy Gap has been identified as the principal culprit in the infestation of the upper river where it pours from the water diversion project 3 miles west of Granby.”⁴

In contrast to the many published scientific papers documenting the central role of Windy Gap reservoir in spreading WD, the DEIS simply states, without citing any supporting authority, that “Windy Gap is no longer considered a major source of TAM [the worm that releases the WD parasite] in the upper Colorado River.” (DEIS at 3-133). In a similarly conclusory and unsupported statement, the DEIS asserts: “None of the alternatives are expected to increase the development conditions for the spread of WD in the Windy Gap Reservoir . . .”. (DEIS at 3-142). Given the documented devastation of the rainbow trout fishery caused by the WD spread from Windy Gap, this is a grossly insufficient analysis of a critical environmental issue. More is required.

The DEIS should be revised to add a thorough analysis of the direct and cumulative impacts of the WGFP in combination with historic operations of the CBT and other transbasin diversions, including the planned Moffat expansion. Only with an honest assessment of the cumulative impact of all of these projects can appropriate mitigation measures be developed.

5. Failure of the DEIS to address the likely environmental impacts of the preferred alternative in light of the most recent period of record.

Reclamation appears to have “cherry-picked” the period of record it analyzes. The study period that is used between 1950-1996 begins and ends with wet years. The most

³ Nehring and Thompson, *North American Journal of Fisheries Management* 23:376-384, 2003; *see also* “Colorado’s Cold Water Fisheries: Whirling Disease Case Histories and Insights for Risk Management”, Colorado Division of Wildlife, Aquatic Wildlife Research, Special Report No. 79, Nehring 2006.

⁴ Mr. Meyers went on to explain the magnitude of the loss: “The loss cut even deeper because these are no ordinary trout. Specifically noted as the Colorado River strain, these rainbows evolved over the years as a kind of super trout. DOW identified them as the cornerstone of a hatchery program aimed at spreading these highly successful river fish to many other streams around the state. Now the very source of the program was being lost.”

recent 12 years (1997 – 2008) should have been included. The past twelve years have been generally dry years, and are certainly significant for modeling the impacts of the WGFP into the future. By ignoring the last 12 years, Reclamation has ignored both the record drought year in 2002, and also the year of the greatest diversion under the Windy Gap water rights, which occurred in 2003. The limited period of study also ignores the change in the Colorado River call regime resulting from the 2003 Shoshone call agreement. The greatest diversions to the Front Range have occurred after this agreement was entered. The full available period of record should be studied.

6. Failure of the DEIS to address the likely environmental impacts of the preferred alternative in light of the science on climate change.

The DEIS cites an outdated 2001 report from the Intergovernmental Panel on Climate Change (IPCC) for the proposition that “predictions on changes in precipitation in the Colorado River Basin range from substantial increases to substantial decreases” to conclude that potential impacts of climate change should not be included in the analysis due to uncertainty. (DEIS 2-44). The DEIS has not, but must consider the best and most recent science on climate change. Including the following:

- The IPCC’s 2008 Technical Paper on Climate Change and Water states with “high confidence” that “many semi-arid and arid areas (e.g., . . . the western USA . . .) are particularly exposed to the impacts of climate change and are projected to suffer a decrease of water resources due to climate change.”
- On October 6, 2008, scientists from NOAA, the University of Colorado, and Colorado State University released a report on behalf of the Colorado Water Conservation Board for the benefit of state water planners. The report synthesizes the most current climate science, and projects decreases in runoff for the Upper Colorado due to climate change ranging from 6% to 20% by 2050. It cites one streamflow model that projects a 45% decline by 2050.
- The October 2007 EIS for the “Colorado River Interim Guidelines” prepared by the Bureau of Reclamation’s Lower Colorado office contained a 100-page appendix evaluating the state of climate science, potential impacts of climate change on the Colorado River Basin, and options for evaluating the effects of climate change on reservoir operations. In contrast, the WGFP DEIS dismisses the potential impacts of climate change in relation to the preferred alternative in a single page.
- Starting October 8, 2008, Governor Ritter hosted a three day conference on drought and climate change. The stated purpose of the event was to “help water providers, manager and planners from the public and private sectors prepare for the effects of drought and climate change by sharing the latest research, lessons and best practices.”

In short, there is scientific consensus that Colorado water resources will be altered by climate change. Reclamation must consider the best and most recent science, some of

which is noted above, and take a much harder look at climate change in relation to the impacts of the proposed WGFP.

7. Failure of the DEIS to address the negative impact of the preferred alternative on private fishing, and private property values in the most impacted reach below Windy Gap reservoir.

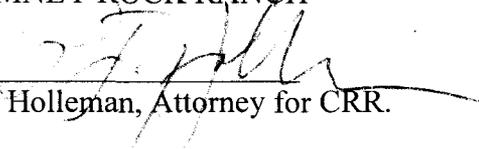
Finally, the DEIS completely fails to consider the economic consequences that the environmental impacts of the WGFP will have on CRR and other private lands along the Colorado River below Windy Gap. Water is generally an essential component of the tourist/agricultural/recreation economy in Grand County, but also a major component of the value of the private ranches like CRR on the Colorado River. While the DEIS documents the negative economic impacts of the WGFP on boating and many forms of public recreation, it is completely silent on the impact to private property values. The DEIS must honestly address those impacts, including whether the proposal will effect the "Gold Medal" trout fishery designation, and discuss what impact that would have for private property values, and tax revenues in Grand County. Those possible economic effects are directly related to the environmental impact of the project and should be studied. 40 CFR § 1508.14.

CONCLUSION

The DEIS does not contain a sufficient analysis of the environmental impacts of the proposed WGFP. It is silent on some very important points, such as the impact of the WGFP on private property values, and the mitigation that could be made by taking Windy Gap off-channel. Worse, in other critical respects, the DEIS is affirmatively misleading, as with the use of an artificially high baseline from which to measure the impacts of the new proposed project. The document we have reviewed simply does not comply with the basic informational purpose of NEPA. These problems and omissions can only be cured by a new DEIS or supplemental EIS, with adequate opportunity for federal decision makers and the impacted public to review and comment on the new document.

Thank you for the opportunity to comment. CRR looks forward to continued involvement in the EIS process to make sure the environmental impacts of the WGFP are accurately addressed.

CHIMNEY ROCK RANCH

By: 
Fritz Holleman, Attorney for CRR.

cc: Vernon A. Isaacs, Jr.

SPORTS TWO DAY

THE DENVER POST

Creating a river bypass might be the solution

Of all the strange notions ever conceived to cure Colorado's trout fishing ills, none can match this idea to build a river around a lake.

That's precisely what a plan hatched jointly by the Division of Wildlife and the Northern Colorado Water Conservancy District would accomplish in an attempt to reduce the ravages of whirling disease on the Colorado River in Grand County.

The scheme — and it's as serious as a stream devoid of trout — is to funnel the river through a channel that completely bypasses Windy Gap Reservoir. As the joke goes, it's an old trick, but it just might work.

As anyone who has followed the sad story of WD woes on the upper Colorado knows, Windy Gap has been identified as the principal culprit in the infestation of the upper river where it pours from the water diversion project 3 miles west of Granby.

For at least the past decade, the disease has wiped out rainbow trout reproduction for miles downstream. Brown trout, much more resistant to the malady, also have been depleted in the primary impact zone just below the dam. In areas of intense exposure, WD is universally fatal to young rainbows in the period before their skeletons are fully formed.

Shallow with a silt bottom, the 115-acre Windy Gap Reservoir is a perfect breeding habitat for tubifex worms, an essential host for the organism that causes the disease. DOW researchers noted the collapse of rainbow survival as far back as 1993 and almost immediately suspected Windy Gap as the pri-

mary culprit, a concern that came fact with research completed in 1997.

The loss cut even deeper because these are no ordinary trout. Specifically noted as the Colorado River strain, these rainbows evolved over the years as a kind of super trout. DOW identified them as the cornerstone of a hatchery program aimed at spreading these highly successful river fish to many other streams around the state. Now the very source of the program was being lost.



Charlie Meyers

Outdoors

serious improvement in trout survival over a period of years," said Barry Nehring, DOW's primary WD researcher and a national leader in the battle against a disease that has spread to nearly every trout-producing state.

Although admittedly costly and highly experimental, the plan quickly gained support from water users and conservationists. Northern Colorado Water Conservancy District, which completed construction of the small check dam in 1985 to divert water to thirsty cities along the northern Front Range, was quick to acknowledge the problem and now stands four-square

behind this remedy.

"We support the plan to the extent that DOW tells us it's a feasible solution," said Eric Wilkerson, the district's chief of operations. Wilkerson said his agency will donate the land needed for the diversion, help with the design, supervise construction and then maintain the channel. Money for the project, estimated at about \$5 million, must come from other sources.

With keen interest from various political and economic leaders, the time seemed right for federal funding legislation. Following the terrorist attacks Sept. 11, any notion of prompt congressional action quickly evaporated. Although no one can be certain when money might be available, much is known about what can be done when the time comes.

Wilkerson estimates that the diversion, which involves creating a secure river channel south of the reservoir, can be constructed in as little as six months. When the 2,000-foot-long channel is completed, most of the river water will flow around the reservoir. None of the portion that flows in ever will go downstream. Nehring is hopeful that the channel also will provide an opportunity for downstream trout to make a successful spawning run to the less infected habitat above the reservoir.

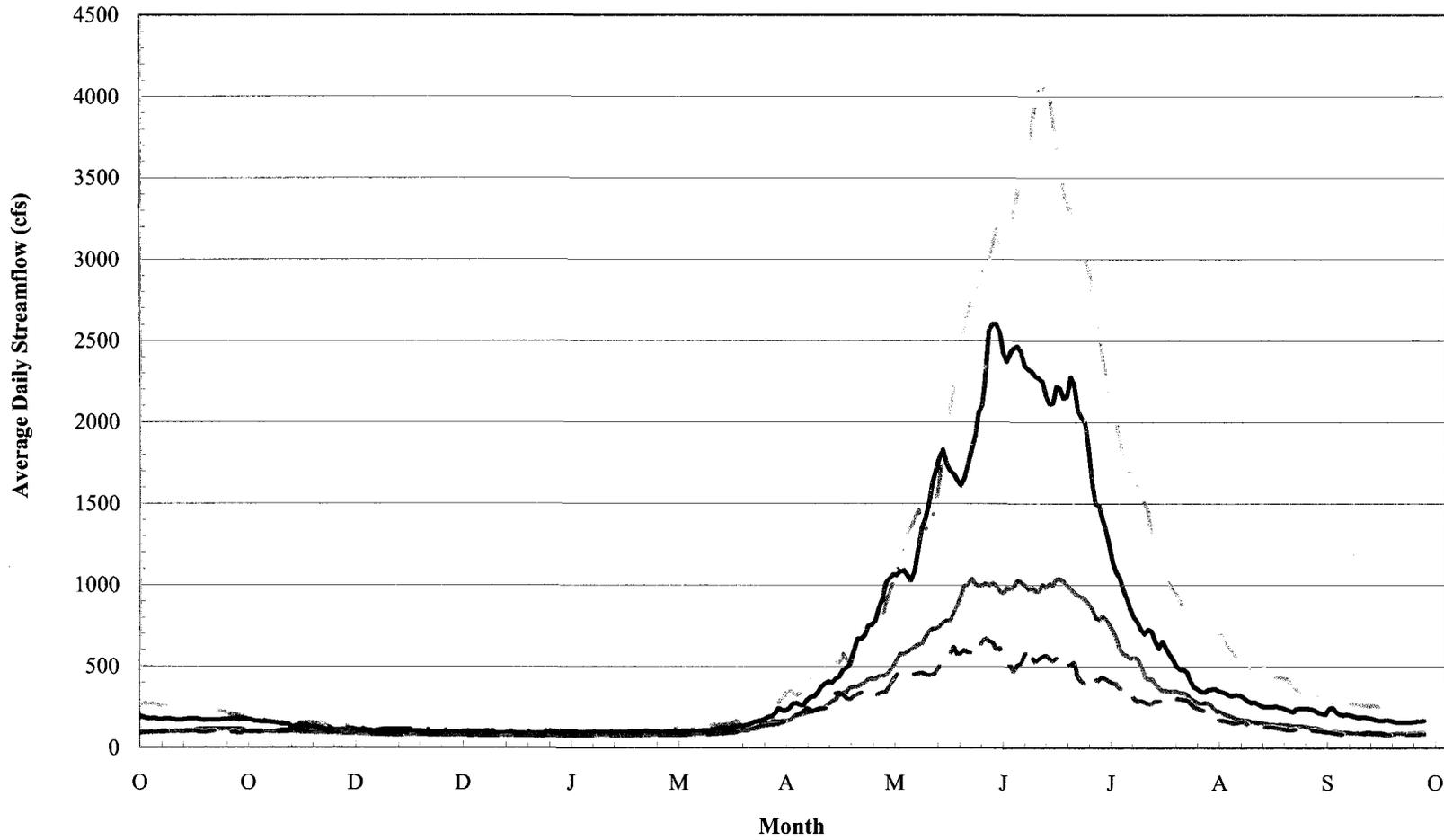
Nehring, who has watched the river's trout diminish steadily in the past seven years, is optimistic about a recovery.

"If we can get the rainbows going again, that will be wonderful. If not, the project still is worthwhile as a way to eliminate this primary source of infection. It's definitely worth a try."

Daily briefing

Exhibit A to
Chimney Rock letter

Colorado River Average Daily Flows at Hot Sulphur Springs (1904-1994)



1904-1936 (Pre-Moffat)

1937-1946 (Pre-CBT)

1947-1984 (Pre-WG)

1985-1994 (Post-WG)

Exhibit B to
Chimney Rock letter