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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:

This firm represents the Clinton Ditch and Reservoir Company and the Eagle Park Reservoir Company (collectively, the "Reservoir Companies"). As detailed below, the Reservoir Companies are concerned about the impacts of the Windy Gap Firing Project ("WGFP") on West Slope water supplies. On behalf of the principal shareholders and the boards of directors of the Reservoir Companies, we submit the following comments on the WGFP Draft Environmental Impact Statement ("DEIS").

The Clinton Ditch and Reservoir Company is the owner and operator of Clinton Gulch Reservoir, and the water rights thereto. The current shareholders consist of the Town of Breckenridge; Copper Mountain Metropolitan District; Copper Mountain Resort, Inc.; the Town of Dillon; Dundee Realty U.S.A., Inc. d/b/a Arapahoe Basin Ski Area; the Town of Silverthorne; the Board of County Commissioners of Summit County; Vail Summit Resorts, Inc. d/b/a Breckenridge Ski Resort; Vail Summit Resorts, Inc. d/b/a Keystone Resort; and Winter Park Recreational Association. These shareholders represent every major water user and water provider in Summit County and the largest ski resort in Grand County.

The Eagle Park Reservoir Company is the owner and operator of Eagle Park Reservoir, and the water rights thereto. The principal shareholders consist of the Eagle River Water and Sanitation District; the Upper Eagle Regional Water Authority; and Vail Associates, Inc. The Eagle River Water and Sanitation District and Upper Eagle Regional Water Authority comprise the second largest municipal water provider on the West Slope, serving approximately 60,000 customers in Eagle County, with a service area that extends from the Town of Vail to Wolcott.

Vail Associates, Inc., is a wholly owned subsidiary of Vail Resorts, Inc. which, in turn, owns and operates the Vail, Beaver Creek and Arrowhead ski areas and related resort properties.

The Reservoir Companies and their shareholders collectively own hundreds of decreed water rights and water storage and conveyance facilities throughout the Colorado River basin. Our overriding concern is that the WGFP DEIS has inappropriately limited its analysis of West Slope impacts to the direct impacts felt in Grand County, and has not adequately considered the intricate physical and legal relationships that cause the impacts of any increased transmountain diversions from the Colorado River to ripple through all of the watersheds in the Upper Colorado basin. In short, any additional transmountain diversion out of the Colorado River will put additional pressure on West Slope water supplies and adversely impact the West Slope's important recreation economy. We believe the DEIS must more thoroughly study those broader impacts.

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

1. Failure of the DEIS to address Senate Document 80 and the protections for the West Slope in that document.
2. Failure of the DEIS to address Colorado water rights law and the proposed expansion of the Windy Gap water rights that is apparent in the proposed action.
3. 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 already caused, and that the WGFP and Denver Water's planned Moffat Collection System expansion will exacerbate.
4. 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.
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 adequately discuss mitigation for the West Slope.

DISCUSSION

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). We are concerned that the WGFP DEIS serves neither of these purposes.

1. 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, and the “primary purposes” set out above. 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).

The failure to consider the protections in Senate Document 80 is of particular concern at present, because, as you are undoubtedly aware, the Bureau of Reclamation has placed a moratorium on issuing new contracts for Green Mountain Reservoir water. In other words, the facility that was built to mitigate the impacts of the CBT project transmountain diversions is not presently available for West Slope water users. There should not be any new transmountain diversions for WGFP or any other plan until this situation is resolved.

2. Failure of the DEIS to address Colorado water rights law and the proposed expansion of the Windy Gap water rights that is apparent in the proposed action.

The Reservoir Companies are concerned that the “pre-positioning” concept for the exchange of Windy Gap and CBT water rights exceeds what is allowed by the relevant water right decrees. The DEIS explains this “prepositioning” as follows:

Prepositioning would involve the use of available Adams Tunnel capacity to deliver CBT water into [the newly constructed] Chimney Hollow Reservoir to occupy storage space that is not occupied by Windy Gap water. The delivery of CBT water from Granby Reservoir into Chimney Hollow Reservoir would create space for Windy Gap water in Granby Reservoir. When Windy Gap water is

diverted into Granby Reservoir, the CBT water in Chimney Hollow Reservoir would be exchanged for a like amount of Windy Gap water in Granby Reservoir.

(DEIS ES-6). The Reservoir Companies share the concern expressed by Grand County, the Colorado River Water Conservation District (“CRWCD”), Trout Unlimited and others that this proposal violates important principles of state water law. First, the Windy Gap water rights are not decreed for storage in Chimney Hollow or Granby. Second, the CBT water is not decreed for storage in Chimney Hollow. The water rights cannot be stored as planned without a change of water rights under Colorado water law to ensure that there is no expansion of use, and no injury to other water users as a result of this new proposal. The DEIS does not address this issue, except to cite a comment by the previous State Engineer concerning administration. (DEIS at 3-7). There is no point in further analyzing a project that cannot be implemented under state law. See 40 CFR §§ 1508.27, 1502.16(c), 1506.2(d).

3. Failure of the DEIS to sufficiently address the serious cumulative environmental impacts that CBT, Windy Gap, and other transmountain diversion projects have already caused, and that the WGFP and Denver Water’s planned Moffat Collection System expansion will exacerbate.

As Grand County has clearly communicated, the peak of the historic hydrograph represented by the annual high-spring snowmelt runoff has already been taken from the Colorado River system. 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. Those massive diversions have had serious environmental impacts on the West Slope, and put additional pressure on water rights and water supply in the entire Upper Colorado basin. 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).

With respect to the future impacts of the WGFP in connection with Denver’s planned Moffat Collection System expansion, we believe that a single EIS evaluating the impacts of both projects, as additive depletions on top of the many transmountain diversions that already impact this river system, is the only way to guarantee a complete understanding of the combined impact these projects will have on the environment and the water rights regime in the entire Upper Colorado River basin. We join those other West Slope entities asking that you seriously consider a new NEPA document that analyzes the combined impact of these two projects.

4. 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.

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.*

The Reservoir Companies share the concern of other commentators that the DEIS uses an artificial baseline as the starting point to analyze the impacts of the WGFP. In particular, there is no basis to include the increased diversions that would result from the speculative expansion of Ralph Price Reservoir by the City of Longmont within the “no action” alternative. We are similarly concerned that the DEIS misrepresents the current level of Windy Gap diversions. In its comment letter, Grand County explains that the existing 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 3-9).

The lack of an accurate baseline from which to measure the impacts of the WGFP is a deficiency that infects the entire document. 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 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.”). A new NEPA document is required.

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 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 adequately discuss mitigation for the West Slope.

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 proposal is vague and speculative, including things that “might be” done if deemed appropriate by the proponent of the project. 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.

Among other mitigation proposals that should be addressed, the DEIS should consider the Grand County Stream Management Plan. There is no discussion of the carefully crafted flow recommendations in that document in the mitigation section. 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.

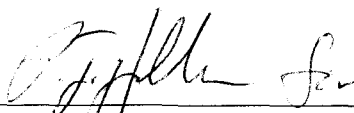
Although the DEIS rejects water conservation as an alternative, it does not explain why water conservation by the Front Range communities that would receive this additional Windy Gap water should not be added as an additional mitigation measure. The DEIS does, after all, recognize that “[t]o meet future water requirements will require continued improvements in water conservation in addition to the proposed WGFP.” (DEIS 1-18). Similarly, the DEIS does not, but should have discussed in the mitigation section a requirement that WGFP participants reuse to extinction all or a significant portion of their Windy Gap water.

CONCLUSION

The DEIS does not contain a sufficient analysis of the environmental impacts of the proposed WGFP. The 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. The Reservoir Companies looks forward to continued involvement in the EIS process to make sure the impacts of the WGFP are accurately addressed.

CLINTON DITCH & RESERVOIR COMPANY
EAGLE PARK RESERVOIR COMPANY

By:  for GEP
Glenn E. Porzak, General Counsel

cc: Eagle Park Reservoir Company Board of Directors
Clinton Ditch and Reservoir Company Board of Directors