



# United States Department of the Interior

BUREAU OF RECLAMATION  
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IN REPLY REFER TO:  
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DEC 19 2011

## MEMORANDUM

To: Central Files  
Attn: GP-6300 (MChastain)

From: Michael J. Ryan  
Regional Director

Subject: Senate Document No. 80 Determination

Teams for the Bureau of Reclamation, the Northern Colorado Water Conservancy District (District), and the Municipal Subdistrict (Subdistrict) have been negotiating a contract that would allow the Subdistrict to use excess (defined as "Unused" in the contract) capacity in the Colorado-Big Thompson Federal Reclamation Project (Project) for the Subdistrict's existing Windy Gap Project and future Windy Gap Firming Project. The negotiating teams have proposed a draft Contract No. 15XX650003 (2014 Contract<sup>1</sup>) to their respective principals for approval. As part of Reclamation's approval process, Reclamation must determine whether the 2014 Contract is consistent with the "Manner of Operations of Project Facilities and Auxiliary Features" portion of Senate Document No. 80, the congressional report that is part of the Project's authorization, which is incorporated here as Attachment 1. This document provides that determination.

The 2014 Contract contains several provisions that address this portion of Senate Document No. 80. The main provisions are found in Article 3, which states the general principles and the process for use of Project Unused Capacity. Starting with the general principles, the 2014 Contract states that the availability of Unused Capacity is "subject to the need for the use of said Project Works for Project purposes and the provisions of this 2014 Contract to satisfy . . . the 'Manner of Operations of Project Facilities and Auxiliary Features' portion of Senate Document No. 80." Through this language, the 2014 Contract expressly makes operations subject to the relevant portions of Senate Document No. 80 and its requirements.

Moving next to the process provisions of Article 3, the 2014 Contract specifies a process that considers Senate Document No. 80 requirements in several places. First, the Subdistrict's proposed operation under Article 3(a)(i) considers not only water to be used on the East Slope,

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<sup>1</sup> Capitalized terms used in this document have the same meaning as in the 2014 Contract.

but it also considers “Enhancement Water,” which is “Subdistrict Water<sup>[2]</sup> held in accounts maintained by the Subdistrict” for various West Slope interests.<sup>3</sup> This provides an opportunity for East Slope and West Slope interests to collaborate on the Subdistrict’s operational proposal to meet their mutual interests and comport with their agreements. The Article 3 provisions are consistent with Senate Document No. 80 intent to preserve the rights and interests of both the West and East slopes.<sup>4</sup>

Second, Article 3(c) calls for the Secretary to consult with various East Slope and West Slope interests to solicit their views on the Subdistrict’s operation proposal. Under Article 3(c)(iv), these consultations expressly include a consultation with Grand County’s Senate Document No. 80 representative, the River District, and others that the Secretary deems appropriate “regarding potential impacts, if any, of the Subdistrict’s Proposal on the operation of the Project pursuant to the “Manner of Operations of Project Facilities and Auxiliary Features” portion of Senate Document No. 80.” This consultation process is consistent with Senate Document No. 80’s requirement that Reclamation consider the views of West Slope interests to administer the Project as “an unprejudiced agency in a fair and efficient manner, equitable to all parties having interests therein.”

Third, Article 3(d)(i)(1) expressly states that certain criteria for the Secretary’s decision include a determination that “[t]he introduction, storage, conveyance, exchange, substitution, and delivery of Subdistrict Water will not cause a violation of the ‘Manner of Operations of Project Facilities and Auxiliary Features’ portion of Senate Document No. 80, including court decisions interpreting Senate Document No. 80.” By inclusion of this determination, the 2014 Contract ensures that the Secretary will make decisions regarding the Subdistrict’s Proposal that will not cause a violation of Senate Document No. 80.

In addition to Article 3, the 2014 Contract also contains provisions that recognize agreements between East Slope entities and West Slope entities. In my view, these agreements reflect a compromise between East Slope and West Slope entities regarding their respective interests. The 2014 Contract acknowledges these agreements and the compromises they reflect, but the 2014 Contract does not attempt to substitute a federal role for the role of each respective entity.

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<sup>2</sup> Article 1(u) defines “Subdistrict Water” as “the quantity of water yielded by the Windy Gap Water Rights. The water yielded from the Windy Gap Water Rights is not Project Water.”

<sup>3</sup> Article 1(i) defines “Enhancement Water” as “Subdistrict Water held in accounts maintained by the Subdistrict for the Middle Park Water Conservancy District (“Middle Park”), and for the Board of County Commissioners of Grand County (“Grand County”), including water provided by the Subdistrict for contractual obligations, all pursuant to the Colorado Water Conservancy Act (C.R.S. 37-45-101 et. seq.), the Agreement of April 1980, and the Supplement thereto dated March 1985, between the Subdistrict, the Colorado River Water Conservation District (“River District”), Grand County, Middle Park and the Northwest Colorado Council of Governments (“NWCCOG”), and the Windy Gap Firing Project Intergovernmental Agreement (“WGFP IGA”) approved by Grand County on December 4, 2012 between the Subdistrict, Grand County, the River District, Middle Park and NWCCOG.

<sup>4</sup> Senate Document No. 80, Colorado Big-Thompson Project, dated June 15, 1937 at 2-3.

Instead, Reclamation has respected its role under Senate Document No. 80 to administer the Project as “an unprejudiced agency in a fair and efficient manner, equitable to all parties having interests therein.” The 2014 Contract addresses these agreements in two ways.

First, the Subdistrict must comply with Article 14 of the 2014 Contract, which addresses “Federal, state, and local permits, approvals, and licenses (‘Permits and Approvals’) for the construction, implementation, and operation of the Windy Gap Firing Project.” These Permits and Approvals include those issued by West Slope entities. Article 14 leaves such Permits and Approvals to their own enforcement mechanisms, but also establishes a process for Reclamation and the Subdistrict to negotiate for benefits that are “comparable, in scope and cost, but not additional level of environmental benefit” if certain circumstances arise where environmental benefits contemplated by such permits and approvals are not being provided. Second, Article 15 addresses “other identified agreements” that the District and the Subdistrict may have with third parties, many of which are with West Slope entities. Like Article 14, Article 15 leaves such agreements to their own enforcement mechanisms, but also establishes a process for Reclamation and the Subdistrict to negotiate for benefits that are “comparable, in scope and cost, but not additional level of environmental benefit” if certain circumstances arise where environmental benefits contemplated by other identified agreements are not being provided. Articles 14 and 15 in the 2014 Contract reflect Reclamation’s role as the “unprejudiced agency” operating the Project in a way that does not replace East Slope or West Slope interests, but allows the agreements and compromises reached between the East Slope and the West Slope to be honored and continued.<sup>5</sup>

The final provision addressing Senate Document No. 80 concerns future negotiations that may occur to renew the 2014 Contract. To address Grand County’s unique role under Senate Document No. 80, Article 2 states that: “[t]he Secretary will notify the Grand County Board of County Commissioners when renewal negotiations have been requested. Any such renewal negotiations will be open to the public.” This provision clarifies that entities affected by Senate Document No. 80 will have an opportunity to participate in future contract renewal discussions.

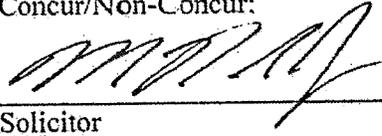
In conclusion, my determination is that the 2014 Contract meets the requirements of the relevant portions of Senate Document No. 80. The 2014 Contract ensures that the primary purposes of the Project as described in Senate Document No. 80 continue to be effectuated. In the 2014 Contract, Reclamation has maintained its role as the “unprejudiced agency” operating the Project by incorporating a process to solicit views from affected West Slope interests as it makes operational decisions, and Reclamation has respected the compromises made by East Slope and West Slope interests in their agreements and regulatory activities. Finally, Senate Document No. 80 recognizes and underscores Grand County’s interests related to the Project. The 2014 Contract attends to these interests. As a result of this, a September 22, 2014 Grand County letter to Reclamation encourages execution of the 2014 Contract.

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<sup>5</sup> As further indication of the 2014 Contract’s intent to not to affect agreements that may exist between the East Slope and West Slope, Article 24 expressly states that the 2014 Contract “in no way modifies, or affects the enforcement of, any contracts, agreements, or any other contractual obligations of the Subdistrict or the District with entities which are not party to this 2014 Contract.”

I have reviewed this memorandum and found it legally sufficient.

Concur/Non-Concur:

  
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Solicitor

12/12/14  
Date

Attachment