
Applicant Subdistrict Responses of September 12, 2012

Windy Gap Firming Project 1041 Permit Conditions Review

Index:

Accepted Condition

Condition changed after
acceptance/Revision requested

Proposed change to Staff Revised

Conditions [additions](#)/[deletions](#)

Comments to Staff Revised

Conditions

Condition 1-Two Permits

Original Condition 1. The County Attorney will consider and respond to the relationship between the Windy Gap Project Permit and the 2012 Permit and advise the Board of County Commissioners. Once the Board of County Commissioners has been advised, it will make a determination on the relationship between the two.

Subdistrict Response [Acceptable]: acceptable as written.

No revision proposed.

Condition 2

Original Condition 2. The permit for the 2012 Permit will be in effect for the life of the project and considered a vested right as long as the project is in compliance with the terms and conditions of all permits and approvals for the 2012 Permit. The Subdistrict shall be responsible for all costs incurred by the County in evaluating the Subdistrict's compliance with the conditions of this 2012 Permit.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 2. No revision proposed.

The underlined language was added after the Subdistrict accepted the condition. The addition is not acceptable. The Subdistrict requests the staff return to the language of the original condition.

Condition 3

Staff Revised Condition 3. The 2012 Permit is not transferrable to any other entity unless the County approves such transfer by Resolution.

09/12/12 - Subdistrict Response: Acceptable

Original Condition 3. The 2012 WGFP is not transferrable to any other entity unless the County approves such transfer by Resolution.

Subdistrict Response [Revision proposed]: Condition no. 3 is acceptable but has a minor typographical error: the word Permit is missing. Please change to read "The 2012 Permit is not transferable..."

Condition 4

Staff Revised Condition 4. This 2012 Permit shall allow construction of Chimney Hollow Reservoir (the reservoir located on the East Slope identified in the Final Environmental Impact Statement for the Windy Gap Firing Project as the proposed action) and any reservoir or reservoirs on the East Slope that are constructed as an alternative or in addition to the reservoir identified in the Final Environmental Impact Statement; provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any alternative reservoirs does not exceed 90,000 AF, ~~and the impacts identified in the Final Environmental Impact Statement for the proposed action do not increase.~~

09/12/12 - Subdistrict Response:

This 2012 Permit shall allow construction of Chimney Hollow Reservoir (the reservoir located on the East Slope identified in the Final Environmental Impact Statement for the Windy Gap Firing Project as the proposed action) and any reservoir or reservoirs on the East Slope that are constructed as an alternative or in addition to the reservoir identified in the Final Environmental Impact Statement; provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any alternative reservoirs does not exceed 90,000 AF, which would limit the environmental impacts in Grand County to those identified in the final EIS.

Original Condition 4. The 2012 Permit allows construction of a 90,000 AF Chimney Hollow Reservoir or any reservoir or reservoirs on the East Slope that are constructed

as an alternative or in addition to the reservoir identified in the Final Environmental Impact Statement (Alternative Reservoir) provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any Alternative Reservoirs does not exceed 90,000 acre feet as long as the environmental footprint in Grand County is not affected.

Subdistrict Response [Revision proposed]: Modify to insert a period after “does not exceed 90,000 acre feet”. The reason the remainder of the sentence is not acceptable is that the term environmental footprint is ambiguous and subject to differing interpretations.

Condition 5

Staff Revised Condition 5. The 2012 WGFP shall not exceed the volumetric limits stated in the WGFP IGA for the Windy Gap project and 2012 WGFP. The 2012 Permit is contingent upon the participant's use of water in compliance with the Windy Gap decrees and Colorado law.

09/12/12 - Subdistrict Response: Acceptable

Original Condition 5. The 2012 WGFP shall not exceed the volumetric limits stated in the WGFP IGA for the Windy Gap and 2012 WGFP, and the 2012 Permit is contingent upon the participant's use of water is in compliance with the Windy Gap decrees and Colorado law.

Subdistrict Response [Revision proposed]. Condition no. 5 is acceptable but has a minor typographical error: "...is contingent on the participant's use of water is ...in compliance with the Windy Gap decrees and Colorado law." The word "is" should be stricken.

Condition 6

Staff Revised Condition 6. In order to satisfy the Subdistrict's compliance with its obligations under section 37-45-118(1)(b)(IV) of the Water Conservancy Act, the 2012 Permit shall not take effect until the WGFP IGA has been executed and is conditioned upon the Subdistrict's continued compliance with its obligations under the WGFP IGA.

09/12/12 - Subdistrict Response:

In order to satisfy the Subdistrict's compliance with its obligations under section 37-45-118(1)(b)(IV) of the Water Conservancy Act, the 2012 Permit shall not take effect until the WGFP IGA has been executed [by the Subdistrict and Grand County](#) and is conditioned upon the Subdistrict's continued compliance with its obligations under the WGFP IGA.

The reason for the change is that the Subdistrict has no control over other parties and cannot be deprived of a 2012 Permit due to the actions of third parties outside of its control.

Original Condition 6. In order to satisfy the Subdistrict's compliance with its obligations under section 37-45-118(1)(b)(IV) of the Water Conservancy District Act, the 2012 Permit shall not take effect until the WGFP IGA has been executed and is conditioned upon the Subdistrict's compliance with its obligations under the WGFP IGA. A breach of the WGFP IGA by the Subdistrict shall constitute a violation of this 2012 Permit.

Subdistrict Response [Revision proposed]: *The first sentence is acceptable as written. The second sentence which begins “A breach...” is not acceptable. The WGFP IGA should have its own independent enforcement provisions. Please add: “A breach of the WGFP IGA by the Subdistrict as determined by a final unappealable decision by a court of competent jurisdiction shall constitute a violation.”*

Condition 7

Staff Revised Condition 7. While the Subdistrict is not a party to the Grand Lake Clarity Agreement, the Board of County Commissioners has relied on the Clarity MOU in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, the 2012 Permit shall not be effective until the Clarity MOU and Contributed Funds Act Agreement (CFA Agreement) for executing the Colorado- Big Thompson (C-BT) West Slope Collection System Technical Review of Alternatives and Analysis and Plan of Study have been executed.

09/12/12 - Subdistrict Response: While the Subdistrict is not a party to the Grand Lake Clarity Agreement, the Board of County Commissioners has relied on the Clarity MOU in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, the 2012 Permit shall not be effective until the Clarity MOU [or any mutually agreeable substitute document](#), and Contributed Funds Act Agreement (CFA Agreement) for executing the Colorado - Big Thompson (C-BT) West Slope Collection System Technical Review of Alternatives and Analysis and Plan of Study have been executed [by Northern Water and Grand County](#).

The reason for the change is that the Subdistrict has no control over other parties and cannot be deprived of a 2012 Permit due to the actions of third parties outside of its control such as the Bureau of Reclamation.

Original Condition 7. While the Subdistrict is not a party to the Grand Lake Clarity Agreement, the Permit Authority has relied on the Grand Lake Clarity Agreement in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, the 2012 Permit shall not be effective until the Grand Lake Clarity Agreement and C-BT West Slope Collection System Technical Review of Alternatives Analysis and Plan of Study have been executed.

Subdistrict Response [Revision proposed]: *Requiring signature by Northern Water is agreeable, however the formal name of the document (which is referred to by yet another title in on page 7 is the “Contributed Funds Act Agreement (CFA Agreement) for executing a Colorado-Big Thompson (C-BT) West Slope Collection System Technical Review of Alternatives Analysis and Plan of Study.” Therefore, modifying the provision to read with the formal document name and “has been signed by Northern Water” is acceptable.*

Condition 8

Staff Revised Condition 8. The closing documents listed below are integral to the WGFP IGA, and the Board of County Commissioners has relied upon the WGFP IGA in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, this 2012 Permit shall not be effective until those documents have been executed, and Grand County has been provided with copies of same.

- Agreement with Northern Water
- Grand Lake Clarity Agreement (known as Umbrella agreement)
- Appraisal Study now know as Alternates Development Report
- Processed Materials Agreement
- Windy Gap Decree
- Grand County RICD Stipulation
- Learning by Doing Cooperative Effort
- Green Mountain Reservoir Administration
- Contracts for Delivery of Water to Grand Valley
- Guidelines for Meadow Pumpers Fund
- Guidelines for Measuring Devices Fund
- Form of Easement for Access for Telemetry
- Agreement Among Middle Park, Grand County and River District on Operating and Administering Water Apportionments and Carryover Balances
- Amendatory Contract (Carriage Contract)

Side letter from Subdistrict to Colorado River Water Conservation District re: no opposition to use of Windy Gap water for uses incidental to irrigation such as fish screen, fish ladder, etc.

09/12/12 - Subdistrict Response:

Revised Condition 8. The closing documents listed below are integral to the WGFP IGA, and the Board of County Commissioners has relied upon the WGFP IGA in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, this 2012 Permit shall not be effective until ~~those documents have been executed~~ the Subdistrict has complied with its obligations under the Windy Gap Firing Project IGA which sections are noted below, and Grand County is a signatory as follows:~~has been provided with copies of same.~~

- ~~Agreement with Northern Water~~ Intergovernmental Agreement between Northern Colorado Water Conservancy District, Grand County, Middle Park Water Conservancy District and Colorado River Water Conservation District – WGFP IGA, IV.
- Grand Lake Clarity Agreement (known as Umbrella agreement)
- Contributed Funds Act Agreement (CFA Agreement)~~Appraisal Study now know as Alternates Development Report~~
- Processed Materials Agreement
- Windy Gap Decree – WGFP IGA, V.D and VI.I
- Grand County RICD Stipulation – WGFP IGA, IV.L
- Learning by Doing Cooperative Effort – WGFP IGA, IV.N
- Green Mountain Reservoir Administration – WGFP IGA, VI.N

- [Arrangements](#) for Delivery of Water to Grand [Valley will be in accordance with WGFP IGA, III.F.4](#)
- Guidelines for Meadow Pumpers Fund – [WGFP IGA, IV.F](#)
- Guidelines for Measuring Devices Fund – [IGA, IV.G](#)
- Form of Easement for Access for Telemetry – [WGFP IGA, IV.G and H](#)
- ~~Agreement Among Middle Park, Grand County and River District on Operating and Administering Water Apportionments and Carryover Balances—Delete (not in IGA)~~
- Amendatory Contract (Carriage Contract)
- Side letter from Subdistrict to Colorado River Water Conservation District re: no opposition to use of Windy Gap water for uses incidental to irrigation such as fish screen, fish ladder, etc.

The Applicant has added specific references to the WGFP IGA to be more specific about requirements, the Agreement which has been stricken is completely outside the control of the Applicant and the Applicant is not a signatory to that agreement. It is not in the IGA.

Original Condition 8. The closing documents listed on page 12 of this certificate support the obligations of the Subdistrict under the WGFP IGA and the Permit Authority has relied upon the Subdistrict's obligations under the WGFP IGA in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, this 2012 Permit shall not be effective until those documents have been executed.

Subdistrict Response [Revision proposed]: The list of closing documents is over inclusive. Those that should be eliminated from the list are: the Windy Gap Decrees which do not get signed by any of the parties; the Green Mountain Administration Agreement which has no connection to the WGFP; the agreement among Middle Park, Grand County and the River District; and Form of Easements. It should be modified to provide for signature by the Subdistrict or Northern as applicable. Requiring signatures of entities outside the control of the Subdistrict or Northern is not acceptable.

Condition 9

Staff Revised Condition 9. The storage of water in Chimney Hollow Reservoir shall not commence until the water court approves the Windy Gap decree as amended by incorporation of the WGFP IGA. The Subdistrict shall provide Grand County with documentation of this approval.

09/12/12 - Subdistrict Response: Acceptable

Original Condition 9. The construction of the 2012 WGFP shall not commence until the water court approves the Windy Gap decree as amended by incorporation of the WGFP IGA. The Subdistrict shall provide Grand County with documentation of this approval. This condition does not preclude further planning and design for the project.

Subdistrict Response [Revision proposed]: Change “The Construction of” to “The storage of water in Chimney Hollow Reservoir shall not commence...” Strike the last sentence which begins “This condition does not preclude...”

Condition 10

Staff Revised Condition 10. The 2012 Permit shall not be effective until issuance of necessary state and federal permits and approvals for the 2012 WGFP, and this 2012 Permit is contingent upon Subdistrict's continued compliance with those terms and conditions. If there is a conflict between a term and/or condition in the 2012 Permit and a state or federal permit or approval, the term or condition that is the more protective of the environment shall control, unless otherwise preempted. Subdistrict shall provide Grand County with copies of all approved federal and state permits and approvals issued for the 2012 WGFP, which shall be attached to this permit. Following is a list of anticipated state and federal permits and approvals (this may not be a complete list):

- Clean Water Act 404 permit
- Colorado Department of Public Health and Environment ("CDPHE") 401 certification
- Fish and Wildlife Mitigation Plan, C. R. S. § 37-6-122.2
- Water Conservancy Act, C.R.S. § 37-45-101 et seq.
- Northwest Colorado Council of Governments Water Quality Management Plan ("NWCCOG 208 Plan")
- Amendatory Contract and companion documentation of Bureau of Reclamation determination of compliance with Senate Document 80
- Record of Decision issued by Bureau of Reclamation
- Record of Decision issued for Corps of Engineers

09/12/12 - Subdistrict Response: None of the following agencies: the Colorado Department of Health and Environment, Corps of Engineers, Colorado Parks and Wildlife, or the Bureau of Reclamation have delegated

the authority to Grand County to enforce compliance with the nine permits/approvals listed in this Condition 10. The language “protective of the environment” is ambiguous. The term concerning “preemption” is a judicial determination that may well lead to litigation.

The 2012 Permit shall not be effective until issuance of necessary state and federal permits and approvals for the 2012 WGFP. ~~, and this 2012 Permit is contingent upon Subdistrict’s continued compliance with those terms and conditions. If there is a conflict between a term and/or condition in the 2012 Permit and a state or federal permit or approval, the term or condition that is the more protective of the environment shall control, unless otherwise preempted.~~ Subdistrict shall provide Grand County with copies of all approved federal and state permits and approvals issued for the 2012 WGFP, which shall be attached to this permit. Following is a list of anticipated state and federal permits and approvals (this may not be a complete list):

- Clean Water Act 404 permit
- Colorado Department of Public Health and Environment (“CDPHE”) 401 certification
- Fish and Wildlife Mitigation Plan, C. R. S. § 37-60-122.2
- Water Conservancy Act, C.R.S. § 37-45-101 *et seq.*
- ~~Northwest Colorado Council of Governments Water Quality Management Plan (“NWCOG 208 Plan”)~~ [See Condition 14.](#)

- Amendatory [Carriage](#) Contract and companion documentation of Bureau of Reclamation determination of compliance with Senate Document 80
 - Record of Decision issued by Bureau of Reclamation
 - Record of Decision issued for Corps of Engineers
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Original Condition 10. The 2012 Permit shall not be effective until issuance of necessary state and federal permits and approvals for the 2012 WGFP, the terms and conditions of those permits and approvals are hereby incorporated by reference into this 2012 Permit, and this 2012 Permit is contingent upon the Subdistrict's compliance with those terms and conditions. If there is a conflict between a term and/or condition in the 1041 Permit and a state or federal permit or approval, the condition that is the more protective of the environment shall control. Grand County will not enforce the requirements of any state or federal permit or approval, but any violation of those permits and approvals will be a violation of the 2012 Permit. Subdistrict shall provide Grand County with copies of all approved federal and state permits and approvals issued for the 2012 WGFP. Following is a list of anticipated State and Federal permits and approvals (this may not be a complete list):

- Clean Water Act 404 permit
- CDPHE 401 certification
- Fish and Wildlife Mitigation Plan, C. R. S. § 37-6-122.2
- Water Conservancy Act, C.R.S. § 37-45-101 et seq.
- Clean Water Act 208 Plan (NWCCOG 208 Plan)
- Compliance with Senate Document 80
- Amendatory Contract
- Record of Decision issued by Reclamation
- Record of Decision issued for Corps

Subdistrict Response [Revision proposed]: Incorporation by reference of all state and federal permits into the 1041 permit is not acceptable. Similarly the term which provides that a conflict is resolved in favor of which term is more protective of the environment is subject to interpretation and is the opposite of the controlling law on preemption. Please see my letter of July 31, 2012 on the issue of pre-emption. Senate Document 80 is not applicable to WGFP. That is a CBT issue and Northern Water is not a permit applicant. Acceptable language reads as follows: "The 2012 Permit shall not be effective until issuance of necessary state and federal permits and approvals for the 2012 WGFP. Grand County will not enforce the requirements of any state or federal permit or approval. The Subdistrict shall provide Grand County with copies of all approved federal and state permits and approvals issued for the 2012 WGFP. Following is a list..." The entry which is not acceptable is Compliance with Senate Document 80.

Condition 11

Original Condition 11. The 2012 Permit shall terminate and be in no force and effect if construction of Chimney Hollow Reservoir, as defined in Condition 4 of this 2012 Permit, has not begun within ten (10) years of the latter of the issuance of the Record of Decision for the 2012 WGFP by Bureau of Reclamation or by the Corps of Engineers.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 11. No revision proposed.

Condition 12

Staff Revised Condition 12. Diversions and pumping associated with the 2012 WGFP must cease if the Grand County Water Apportionment provided by the WGFP IGA is not available for release.

09/12/12 - Subdistrict Response: Diversions and pumping associated with the 2012 WGFP must cease if the [Subdistrict has not complied with its obligation under WGFP IGA III F concerning Grand County water apportionment.](#)

Original Condition 12. Diversions and pumping associated with the 2012 WGFP must cease if the water provided by the Subdistrict to Grand County is not released and available for use by Grand County in accordance with the WGFP IGA.

Subdistrict Response [Revision proposed]: The “use of water” by Grand County is a problem that can be overcome by substituting the words “for the benefit of” and adding “unless those benefits are precluded by the actions of third parties”.

Condition 13

Staff Revised Condition 13. To show compliance with the 2011 Grand County Master Plan provision about Economic Base - Recreation and Tourism Based Industry, and Criterion 5-306(g) (Public Outdoor Recreation Areas), the County has relied upon the public access provided in paragraph IV D of the WGFP IGA, which reads as follows:

09/12/12 - Subdistrict Response: The Subdistrict is awaiting the Staff revision of this condition which was discussed on August 28.

Original Condition 13. To show compliance with the Master Plan, the Subdistrict shall provide the County with a plan for how loss of public access will be mitigated if the public access provided in the WGFP IGA is lost due to the sale of the property by Northern.

Upon execution of this WGFP Agreement, the Subdistrict will make arrangements with Northern Water to provide public access to that portion of Willow Creek located on Northern Water's lands for as long as Northern Water owns the lands adjacent to Willow Creek, if and to the extent that the public access will be managed by the Colorado Division of Parks and Wildlife or other entity acceptable to Northern Water.

Subdistrict Response [Unacceptable]: *The Grand County Master Plan is not imported wholesale into the 1041 Permit by the brief reference noted in the Certificate. I will also say this was never discussed at our several meetings regarding requirements and was*

included in the Certificate as a completely new issue. Most importantly the Master Plan is not referenced as a requirement in Grand County Regulation 5-306 which lists conditions of approval of a 1041 Permit.

Condition 14

Staff Revised Condition 14. Compliance with the conditions in this 2012 Permit shall constitute compliance with the NWCCOG 208 Plan.

09/12/12 - Subdistrict Response: Acceptable

Original Condition 14. The Subdistrict shall comply with recommendations for compliance with requirements of the 208 Plan as outlined in NWCCOG's letter dated July 6, 2012 which is incorporated into this 2012 Permit and attached hereto.

***Subdistrict Response [Unacceptable]:** This condition is clearly subject to preemption by state laws. In addition it attempts to hold the Subdistrict to a different standard than any other water diverter in Grand County by requiring that pumping of water cease only by the Subdistrict. This is not imposed on other upstream municipal water providers in Grand County, nor on water diverters within the reach who divert from the river. This condition reaches beyond the incremental impacts of WGFP and may not solve the issue of temperature raised in the NWCCOG letter. The place within the several processes ongoing to address this issue and look for real solutions is the Learning By Doing effort.*

Condition 15

Staff Revised Condition 15. Prior to delivery of water through the 2012 WGFP, Subdistrict shall provide the County with documentation of conservation plans for all municipal project participants and lessees and shall continue to provide documentation that participants are complying with the Water Conservation Act with regard to updating the conservation plans as required by state law.

09/12/12 - Subdistrict Response: Acceptable

Original Condition 15. Prior to delivery of water through the 2012 WGFP, Subdistrict shall provide the County with documentation of conservation plans for all municipal project participants and lessees and shall continue to provide documentation that participants are complying with the Water Conservation Act with regard to updating the conservation plans every seven years.

Subdistrict Response [Revision proposed]: The requirement of conservation by the water users is of course acceptable. Our concern is that the state law could change from seven years to some other term so we suggest eliminating "every seven years".

Condition 16

Staff Revised Condition 16. Subdistrict shall provide written notice to the County when units of the 2012 WGFP are sold or leased and verification that the new owner or lessee has complied with the Water Conservation Act.

09/12/12 - Subdistrict Response: Acceptable

Original Condition 16. Subdistrict shall provide written notice to the County when shares of the 2012 WGFP are sold or leased and verification that the new owner or lessee has complied with conservation requirements.

Subdistrict Response [Revision proposed]: Please add "Water Conservation Act" rather than "conservation requirements". Also change shares to units.

Condition 17

Original Condition 17. Within 30 days of acceptance of this 2012 Permit, the Subdistrict shall provide the County with written documentation of how use of water for fracking satisfies criterion c of the Grand County 1041 Regulations, if at all.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 17. No revision proposed.

Condition 18

Original Condition 18. This 2012 Permit is subject to the Subdistrict's compliance with the terms and conditions of the 1980 Agreement and 1985 Supplement that remain in effect after execution of the WGFP IGA.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 18. No revision proposed

Condition 19

Staff Revised Condition 19. Condition #7 above is essential to satisfaction of this criterion.

Original Condition 19. Condition #7 above is essential to satisfaction of this criterion also.

Subdistrict Response [Revision proposed]: Please see response to Condition 7 above.

Condition 20

Staff Revised Condition 20. Prior to the beginning of construction for Chimney Hollow Reservoir, the Subdistrict shall provide Grand County with a copy of an executed agreement between the Subdistrict and the wastewater treatment provider(s) to mitigate nutrient loading. This agreement shall include provision for the cost of improvements and additional operation and maintenance costs, if any, associated with those improvements.

09/12/12 - Subdistrict Response:

Prior to the beginning of construction for Chimney Hollow Reservoir, the Subdistrict shall provide Grand County with a copy of an executed agreement between the Subdistrict and the wastewater treatment provider(s) to mitigate nutrient loading.

The wastewater treatment plant agreements are outside County's authority and will be tailored to each entity and some of the entities may want agreement for other terms and/ or have financial limitations due to TABOR.

Original Condition 20. Prior to the beginning of construction for Chimney Hollow Reservoir, the Subdistrict shall provide Grand County with a copy of an executed

agreement between the Subdistrict and the wastewater treatment provider(s) to remove some of the nutrient loading entering Grand Lake. This agreement shall include the cost of improvements required plus whatever operation and maintenance costs the provider(s) require for the future.

Subdistrict Response [Revision proposed]: The first sentence is acceptable. The second sentence should be stricken.

Condition 21

Original Condition 21. The Subdistrict shall submit the Nutrient Reduction Plan required by Bureau of Reclamation to Grand County for review at the same time it is submitted to Bureau of Reclamation and the Corps of Engineers but no later than the execution of the WGFP IGA and closing documents.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 21. No revision proposed.

Condition 22

Staff Revised Condition 22. Within six months of issuance of the last Record of Decision for the 2012 WGFP, the Subdistrict shall submit to the County for review and approval .a robust monitoring plan to assure that nutrient loading from the 2012 WGFP for total nitrogen and total phosphorus is reduced to the 1:1 level, and a mitigation and monitoring plan to ensure that operation of the 2012 WGFP does not cause or contribute to (1) decreases in dissolved oxygen, (2) increases in manganese, (3) increases in bioavailable mercury, or (4) increases in Chlorophyll a; and that it does not cause or contribute to decreases in Secchi disk depth from July through September in Grand Lake, or complies with the clarity standard for Grand Lake when that is adopted. The monitoring plan shall include a schedule for monitoring and reporting and Subdistrict shall provide a publically accessible data base, and submit to Grand County summary reports on a schedule and in a form approved by Grand County. The 2012 WGFP shall be operated in compliance with the approved monitoring and mitigation plans in this paragraph.

09/12/12 - Subdistrict Response: What is requested by the staff is impossible to do. The sources of manganese and mercury are many and there is no way to show causes or prove the source. The Learning by Doing and/or Grand Lake Stakeholder group will receive all information. Nutrient monitoring does work and is an effective measure of nutrient reductions by the Subdistrict, which correlate to water clarity based on existing data. The data should be used by the signatories to the Grand Lake Clarity MOU. For this reason the following provision is acceptable: [“The Subdistrict shall submit copies of all monitoring plans and data required by federal permitting agencies for nutrient mitigation. The](#)

monitoring plan shall include a schedule for monitoring and reporting and the Subdistrict shall provide Grand County will all reports and data. The 2012 WGFP shall be operated in compliance with the state and federal nutrient reduction and nutrient monitoring plans.”

Original Condition 22. Within six months of issuance of the last Record of Decision for the 2012 WGFP, Subdistrict shall submit to the County a robust monitoring plan to assure that nutrient loading from the 2012 WGFP for total nitrogen and total phosphorus is reduced to the 1:1 level; and a mitigation and monitoring plan to ensure that operation 2012 WGFP does not cause an increase in manganese, mercury and chlorophyll a, a decrease in DO, a decrease in Secchi disk depth in Grand Lake. The monitoring plan shall include a schedule for monitoring and reporting and Subdistrict shall provide Grand County with all reports. The 2012 WGFP shall be operated in compliance with the Nutrient Reduction Plan and Nutrient Monitoring Plan.

Subdistrict Response [Revision proposed]: *Grand County will receive copies of all data and the federal permit monitoring plan. The Subdistrict will be in compliance with the state and federal nutrient plans. A separate independent plan is not warranted. This provision is acceptable if modified to track the federal and state monitoring requirements. A condition which reads: “The Subdistrict shall submit copies of all monitoring plans and data required by federal permitting agencies for nutrient mitigation. The monitoring plan shall include a schedule for monitoring and reporting and the Subdistrict shall provide Grand County will all reports and data. The 2012 WGFP shall be operated in compliance the federal nutrient reduction and Nutrient Monitoring Plans.”*

Town of Hot Sulphur Springs recommends: Develop and implement a plan to reduce nutrient levels. Develop and implement a long term waste monitoring program that tracks water temperature, nutrient levels, sediment, river bed condition, and other indicators of aquatic habitat health. The program must include measures, funded by the Subdistrict, for taking action to correct unacceptable conditions.

Condition 23

Original Condition 23. Installation of the real time water temperature gauges required by the Fish and Wildlife Mitigation Plan shall be a condition of this 2012 Permit and the Subdistrict must verify every spring, before the beginning of pumping, that these gauges are in good working order, that they remain so during the time of the year when the standard is in effect, and that they are replaced or repaired when necessary and timely to their need in reporting temperature.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 23. No revision proposed.

Condition 24

Staff Revised Condition 24. Notwithstanding proposed temperature mitigation in the Fish and Wildlife Mitigation Plan and other terms and conditions to address temperature that may be imposed as part of the 401 Certification or federal approvals for the 2012 WGFP, the 2012 WGFP shall not cause or contribute to temperature exceedances in the Colorado River below Windy Gap, at the points of measurement set forth in the Fish and Wildlife Mitigation Plan.

Trout Unlimited Response: *Trout Unlimited supports staff's proposed Condition 24 with the following modification:*

Notwithstanding proposed temperature mitigation in the Fish and Wildlife Mitigation Plan and other terms and conditions to address temperature that may be imposed as part of the 401 Certification or federal approvals for the WGFP, the 2012 WGFP shall not cause or contribute to temperature exceedances in the Colorado River below Windy Gap, at the points of measurement set forth in the Fish and Wildlife Mitigation Plan. The Subdistrict bears the burden of demonstrating that pumping is attributable to the original Windy Gap project as opposed to WGFP.

09/12/12 - Subdistrict Response: The approved Fish and Wildlife Mitigation Plan contains a requirement to stop pumping for temperature exceedance at 5.3.3 which is included here. The WGFP will of course comply with all State and Federal temperature terms and conditions. Additional requirements beyond or in conflict with those State and Federal requirements are not acceptable. Please change the condition to read:

“The 2012 WGFP will operate in compliance with the 401 certification and all applicable state and federal permit requirements concerning temperature.”

Original Condition 24. Installation of the real time water temperature gauges required by the Fish and Wildlife Mitigation Plan shall be a condition of this 2012 Permit and the Subdistrict must verify every spring, before the beginning of pumping, that these gauges are in good working order, that they remain so during the time of the year when the standard is in effect, and that they are replaced or repaired when necessary and timely to their need in reporting temperature.

Subdistrict Response [Revision proposed]: *The WGFP will of course comply with all State and Federal temperature terms and conditions. Additional requirements beyond or in conflict with those State and Federal requirements are not acceptable. Please change the condition to read: “The 2012 WGFP will operate in compliance with the 401 certification and all applicable federal permit requirements concerning temperature.”*

Condition 25

Staff Revised Condition 25. The Original Condition 25 has been removed, and “Original Condition 26” is now “Revised Condition 25”.

Original Condition 26. Because the delivery of the 10825 endangered fish water from Granby Reservoir is an essential consideration for compliance with the Endangered Species Act and compliance with the temperature standard, the Subdistrict must participate in securing approval of the 10825 agreement and must arrange with Northern to do the same.

Subdistrict Response [Acceptable]. acceptable as written.

Revised Condition 25. No revision proposed.

Original Condition 25. If the MWAT is exceeded, the Subdistrict shall immediately notify the County. Temperature mitigation may be suspended when there is no material causal relationship between the 2012 WGFP. The determination of causal relationship shall be based upon a model approved by the Colorado Parks and Wildlife, Grand County, and the Water Quality Control Commission.

Condition 26

Staff Revised Condition 26. Within six (6) months of issuance of Record of Decision by the Corps of Engineers for 2012 WGFP, the Subdistrict shall prepare and submit to Grand County for review and approval a fish and aquatic invertebrates monitoring plan to determine if the Fish and Wildlife Mitigation Plan, Fish and Wildlife Enhancement Plan, conditions in the Record of Decision, and additional water provided in the WGFP IGA would prevent the loss of aquatic habitat predicted in the Final Environmental Impact Statement. The monitoring information shall be provided to the Learning by Doing Management Committee, and monitoring shall continue as long as Learning by Doing requires this information. If the bypass/by-through is constructed, this monitoring plan shall be adapted as necessary to analyze the benefits of the bypass/by-through in consultation with the Learning By Doing Management Committee.

09/12/12 - Subdistrict Response: The purpose of Learning by Doing effort is to maintain flexibility where there is uncertainty and the reality is that many factors could affect invertebrates. The additional water from the WGFP IGA and habitat improvements from the Fish and Wildlife Enhancement Plan will improve the stream condition, but other factors could also impact invertebrates.

“The Subdistrict shall prepare and submit to Grand County a fish and aquatic invertebrates monitoring plan. The monitoring data shall be provided to the Learning by Doing effort and monitoring shall continue as long as the Learning by Doing effort requires this data. If the bypass/through is constructed, this monitoring plan shall be adapted as necessary in consultation with the Management Committee of Learning by

Doing.”

“Original Condition 27” is now “Revised Condition 26”.

Original Condition 27. The Subdistrict shall prepare and submit to Grand County a fish and aquatic invertebrates monitoring plan to determine if the enhancements for habitat restoration provided in the Fish and Wildlife Mitigation Plan and additional water provided in the WGFP IGA would prevent the loss of aquatic habitat predicted in the WGFP EIS. The monitoring information shall be provided to the Learning by Doing effort and monitoring shall continue as long as the Learning by Doing effort requires this information. If the bypass/through is constructed, this monitoring plan shall be adapted as necessary to analyze the benefits of the bypass/through in consultation with the Management Committee of Learning By Doing.

Subdistrict Response [Revision proposed]: *The applicant will prepare and submit to Grand County a fish and aquatic invertebrates monitoring plan. So the condition would read: “The Subdistrict shall prepare and submit to Grand County a fish and aquatics invertebrates monitoring plan. The monitoring information shall be provided to the Learning by Doing effort and monitoring shall continue as long as the Learning by Doing effort requires this information. If the by pass/through is constructed, this monitoring plan shall be adapted as necessary in consultation with the Management Committee of Learning by Doing.”*

Condition 27

Staff Revised Condition 27. If a bypass/by-through is constructed, the Subdistrict shall include in the design an effective plan for minimizing blowing dust and so long as such plan is submitted and implemented, blowing dust shall not constitute a violation.

09/12/12 - Subdistrict Response: If a bypass/by through channel is constructed the design shall include a plan for minimizing blowing dust. If such plan is implemented, blowing dust shall not constitute a violation of the 1980 Windy Gap Project 1041 Permit or the 2012 Permit.

“Original Condition 28” is now “Revised Condition 27”.

Original Condition 28. The Subdistrict shall prepare and submit to the County a plan for minimizing blowing dust if the bypass/bythrough is constructed. It might consider aquatic vegetation/revegetation to minimize against blowing dust.

Subdistrict Response [Unacceptable]: This condition should be determined at the time of the by pass/through design. It may also conflict with state and or federal permitting requirements in the future when the bypass/ through is built.

Condition 28

Staff Revised Condition 28. The bypass/by-through study shall commence on or before issuance of this 2012 Permit. If the results of the study demonstrate that the bypass/by-through will benefit the Colorado River, construction of the bypass/by-through shall proceed in accordance with the Request for Proposals, Windy Gap Reservoir Modifications which currently reads as follows:¹

Commitments for funding are being evaluated by the Subdistrict, Denver Water, and the State of Colorado with the intent of developing a new, mutually acceptable agreement among the members of the Technical Team and CPW regarding the commitment to, amount of, and conditions associated with, funding the WG bypass/flow-through (the "Implementation Agreement"). If the cost to implement the selected preferred alternative exceeds the amount committed in the Implementation Agreement, the Technical Team, CPW and others as appropriate will cooperatively pursue additional funding. If, after the best efforts of the parties, the additional funding cannot be obtained voluntarily, the Technical Team and CPW may elect to modify the selected preferred alternative utilizing the findings of the WG Study to allow construction to proceed within the budget of the committed funds.

Trout Unlimited Response: *We prefer the language proposed by UCRA.*

In an email dated August 26, 2012, Trout Unlimited requested to add the following language to Condition 28: "This permit be contingent upon an Implementation Agreement being reached."

¹ If this provision changes, the Condition will change accordingly.

Grand County Staff is okay with adding Trout Unlimited's above requested language to Condition 28.

09/12/12 - Subdistrict Response: The Subdistrict accepts the language in Staff Revised Condition 28. Condition 28 is what has been agreed to previously, which included Trout Unlimited.

“Original Condition 29” is now “Revised Condition 28”.

Original Condition 29. The bypass study should begin immediately, and if the results of the study demonstrate that the bypass/by-through will benefit the Colorado River, then the bypass/by-through shall commence as soon as possible after acceptance of this 2012 Permit.

Subdistrict Response [Revision proposed]: The bypass study should begin immediately. That sentence is acceptable with a period after “immediately”. If the result of the study demonstrates that the bypass/through will benefit the Colorado River, the Subdistrict will put forth its best efforts to work with Grand County and other stakeholders to obtain the funds to construct the bypass/through simultaneously with construction of Chimney Hollow Reservoir.

Town of Hot Sulphur Springs recommends: Completion of a study to address options for a water diversion system that allows the river to bypass Windy Gap dam. Construction of a dam bypass system by the Subdistrict.

Upper Colorado River Alliance Response: [Revision Proposed] “A study shall commence on or before issuance of this Permit in order to properly design a bypass or similar modification to take the negative effects of Windy Gap Reservoir off-channel and address stream channel armoring, sedimentation, loss of spawning gravel and other identified concerns. The Subdistrict shall insure that construction of the bypass or similar modification with such a design approved by the County shall begin no later than commencement of construction of Chimney Hollow Reservoir.”

Condition 29

Staff Revised Condition 29. If, during a five (5) year period, natural conditions meet or exceed flows of 600 c.f.s. required by the Fish and Wildlife Mitigation Plan so that the Subdistrict is not required to make releases or bypass water to achieve the required flow, then in the sixth year, Subdistrict shall provide a 1200 c.f.s. flow for 72 hours when required by Learning By Doing.

Trout Unlimited Response: Trout Unlimited supports staff's recommended Condition 29, with the noted modifications, as an interim condition applicable until such time as information regarding needed (sic)

*If, during a five (5) year period, natural conditions **do not** meet or exceed flows of ~~600~~ 1200 c.f.s. for a continuous 72-hour period, required by the Fish and Wildlife Mitigation Plan so that the Subdistrict is **not** required to make releases and/or curtail ~~bypass~~ water to achieve that ~~e~~ required flow , then in the sixth year, Subdistrict shall provide a 1200 c.f.s. flow for 72 hours ~~when required by Learning By Doing.~~*

09/12/12 - Subdistrict Response: "If during the five-year period natural conditions meet or exceed the 600 CFS flushing flow as required by the Fish and Wildlife Mitigation Plan approved by the Colorado Wildlife Commission, so that the Subdistrict is not required to make releases or bypass to achieve the required flow, and in the same five-year period the flow at the gauge below Windy Gap Dam does not exceed 1200 CFS, the Subdistrict in the sixth year will supplement the natural flows subject to the

availability of the Windy Gap Project water in storage and outlet capacity of Granby Reservoir to provide a flow of 1200 CFS for a period of 72 hours at the gauge below Windy Gap Dam. This condition is contingent upon modifications to the amendatory carriage contract that reduce loss as charged for storage of Windy Gap water on the West Slope to less than the current 10 percent."

"Original Condition 30" is now "Revised Condition 29".

Original Condition 30. If, during a five (5) year period, natural conditions meet or exceed flows of 600 c.f.s. as recommended by the SMP so that the Subdistrict is not required to make releases to achieve recommended stream conditions, then in the sixth year, Subdistrict shall provide a 1,145 c.f.s. flow for 72 hours to move large cobble and de-armor the stream.

Subdistrict Response [Revision proposed]: *Because we believe the provided language is unclear, we provide the following suggestion:* "If during the five-year period natural conditions meet or exceed the 600 CFS flushing flow as required by the Fish and Wildlife Mitigation Plan approved by the Colorado Wildlife Commission, so that the Subdistrict is not required to make releases or bypass to achieve the required flow, and in the same five-year period the flow at the gauge below Windy Gap Dam does not exceed 1200 CFS, the Subdistrict in the sixth year will supplement the natural flows subject to the availability of the Windy Gap Project water in storage and outlet capacity of Granby Reservoir to provide a flow of 1200 CFS for a period of 72 hours at the gauge below Windy Gap Dam. This condition is contingent upon modifications to the amendatory carriage contract that reduce loss as charged for storage of Windy Gap water on the West Slope to less than the current 10 percent."

Town of Hot Sulphur Springs recommends: Guarantee periodic river flushing flows of sufficient magnitude to adequately clean the riverbed and provide overbank riparian flows as well as quality aquatic habitat.

Upper Colorado River Alliance Response: "If during a five (5) year period, natural conditions do not meet or exceed 1200 cfs for a continuous 72-hour period, the Subdistrict is required to make releases and/or curtail diversions to achieve that flow in the sixth year for 72 hours. Upon completion of the bypass as required by this Permit and upon completion of the stream channel improvements contemplated in the Fish and Wildlife Enhancement Plan, the Subdistrict shall monitor conditions on the Colorado River in coordination with Learning by Doing to determine the preferred amplitude and duration of flushing flows to prevent harmful sedimentation from occurring and to maintain a healthy river."

Condition 30

Staff Revised Condition 30. Subdistrict shall prepare and submit to the County for approval a monitoring plan for riparian vegetation along the Colorado River and Willow Creek within sixty (60) days of issuance of the Record of Decision by the Corps of Engineers. Monitoring will continue until the Learning By Doing Management Committee has determined that riparian vegetation has not been adversely affected by the 2012 WGFP, or has recovered due to mitigation, stream restoration, or other efforts. At a minimum this monitoring must continue at least ten (10) years after commencing of pumping for the 2012 WGFP. Learning by Doing shall determine the need for extension of monitoring, past ten (10) year period, if any.

09/12/12 - Subdistrict Response: The federal Corps of Engineers would be the entity to impose such a permit condition. We suggest this concern be raised in the Learning By Doing process as that flexibility will allow monitoring, if shown to be needed. For these reasons, the Subdistrict feels that this condition as proposed is unacceptable.

“Original Condition 31” is now “Revised Condition 30”.

Original Condition 31. Subdistrict shall prepare and submit to the County for approval a monitoring plan for vegetation along the Colorado River and Willow Creek within thirty days of issuance of the ROD by the Corps of Engineers. Monitoring will continue until the Learning By Doing management team has determined that riparian and wetland vegetation has not been adversely affected by the 2012 WGFP, or has recovered due to mitigation or other efforts. At a minimum this monitoring must continue at least ten (10) years after commencing of pumping for the 2012 WGFP.

Subdistrict Response [Unacceptable]: Monitoring of vegetation is unacceptable as EIS studies indicate there is no impact. The federal Corps of Engineers would be the entity to impose such a permit condition. We suggest this concern be raised in the Learning By Doing process.

Condition 31

Staff Revised Condition 31. The 2012 Permit is not effective until the 5412.5 AF of Endangered Fish Water is legally deliverable from Granby Reservoir, and Grand County has been provided with written verification that delivery of the 5412.5 AF of water from Granby Reservoir will be made in perpetuity.

09/12/12 - Subdistrict Response: This is a Northern Water Agreement not a Subdistrict Agreement. The Northern agreement should be independently enforceable. It is acceptable to require:

“The 2012 Permit is not effective until the Intergovernmental Agreement between Northern Colorado Water Conservancy District, Grand County, Middle Park Water Conservancy District and Colorado River Water Conservation District – WGFP IGA is signed by Northern Water.”

“Original Condition 32” is now “Revised Condition 31”.

Original Condition 32. The 10825 water for the endangered fish must be approved and delivered from Granby Reservoir and Northern must provide Grand County written verification that it is able to provide the water in perpetuity if no longer required for the endangered fish.

Condition 32

Staff Revised Condition 32. On or before execution of the WGFP IGA, the Subdistrict shall submit to Grand County for approval a plan for maintenance of the rock structures below each pump site for the irrigators above Kremmling (listed in the WGFP IGA) that allows water to be captured and held so the pumps can reach the irrigation water more effectively.

09/12/12 - Subdistrict Response: This issue is to be discussed at September 17, 2012 irrigators meeting. The record in this matter shows no correlation whatever between irrigators ability to pump and the WGFP.

“Original Condition 33” is now “Revised Condition 32”.

Original Condition 33. Prior to execution of the WGFP IGA, the Subdistrict shall submit to Grand County for approval a plan for regular maintenance of the rock structures above each pump site for the irrigators above Kremmling (defined in the WGFP IGA) that allows higher water to be captured and held so the pumps can reach the irrigation water more effectively.

Subdistrict Response [Unacceptable]: I will initially note that the minimum flow rate in this portion of the river is 150 c.f.s., which should allow a reasonable diversion structure to provide water to these parties. In addition, there is an express provision for \$120,000 (pumper's fund) regarding this issue in the WGFP IGA which should be independently enforceable.