

***Closing Argument in Support of a 1041 Permit for a
Municipal and Industrial Water Project under
Grand County Regulation Chapter 5***

for

***Municipal Subdistrict, Northern Colorado Water
Conservancy District, acting by and through the
Windy Gap Firming Project Water Activity Enterprise***

AUGUST 23, 2012

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I. Introduction—An Historic Opportunity

After two days of hearing on August 1st and 2nd it is clear that the Grand County 1041 Permitting requirements are met by the Application submitted on June 11, 2012; that the Colorado River will be in better condition with the Windy Gap Firming Project (WGFP) in place than it is under existing conditions due in large measure to the enhancements offered; and that the Applicant and its parent district, Northern Colorado Water Conservancy District (Northern Water) have put before Grand County through the WGFP IGA (Intergovernmental Agreement) and other agreements an unequalled historic opportunity to address existing concerns about the health of the aquatic and water resources in Grand County, including Grand Lake, and to address the direct effects of the WGFP as required by the Grand County 1041 Regulations. Though the Grand County 1041 Regulations do not encompass requirements concerning existing conditions, the focus of numerous stakeholders on existing stream and aquatic conditions has arisen at the same time as the 1041 Permit Application and is deeply intertwined with the Permit process. For this reason, the Applicant and the many witnesses at the hearing discussed many issues which legally fall outside the 1041 permit process. To address the concerns that the 1041 Permit not be granted without addressing the existing stream and aquatic conditions and to assure the enhancements to address those existing conditions as offered in the WGFP IGA and other agreements such as Learning By Doing and that the several Grand Lake water quality agreements and commitments are implemented, the Applicant is willing to accept that these other agreements would be signed by either the Applicant or Northern Water **before** the 1041 Permit would become effective. This will be further elaborated within this closing brief in the section entitled “Enforceability – A Long-Term Commitment.”

This closing argument is organized based upon concerns as understood by the Applicant at the hearing and will not cover matters which were included in the Application but appear to be undisputed or were not addressed at the hearing. References to the transcript of the hearing will be in italics and noted by date, page and line number as: *TR AUG1 or 2, P for Page number and L for line number(s)*. The argument also incorporates by this reference both the Applicant’s counsel’s letters of July 31, 2012 concerning legal issues submitted to Jack DiCola, County Attorney, and the August 1, 2012 letter, submitted during the hearing concerning permit conditions. Both letters are also attached to this closing argument for your convenience.

The scope of Grand County regulations under which the 1041 Permit is sought is Chapter 5 concerning municipal an industrial water projects it requires that the applicant do the following things: emphasize the efficient use of water through recycling and reuse to the extent permissible, ensure that the project will not contaminate surface water resources, comply with state, regional, and county planning policies, provide water pursuant to the standards articulated by the Colorado Department of Health, maintain and not decrease the quality of the peripheral and downstream surface and subsurface water resources in compliance with state water quality standards, ensure that the WGFP will not

significantly deteriorate wildlife habitats, recreational areas, and areas of particular geologic, historic, or archeological importance. *GC-5-306 (1)*. The WGFP meets all of these criteria and in combination with the robust enhancements goes far beyond this standard.

II. Important Key Facts about WGFP and the WGFP IGA as supported by the Record are:

- WGFP will divert an additional 9,000 to 10,000 acre feet at WG Reservoir and deliver an additional 8,000 to 9,000 acre feet of water at the Adams Tunnel. *TR AUG2 P113 L12-20 and TR AUG1 P230 L3-6.*
- Storage of Windy Gap water in Chimney Hollow Reservoir or other East slope storage of Windy Gap water does not require a storage decree. *TR AUG1 P14 L19 to P16 L3.*
- The full capacity of the pump station is 600 cfs and regardless of high flows in the river the 600 cfs is the physical limit of water that can be diverted from the Colorado River by the Windy Gap Pumping Plant. *TR AUG1 P240 L1-3 and P242 L1-17.*
- The fishery below Windy Gap Reservoir is a Gold Medal fishery based upon Colorado Division of Wildlife standards. *TR AUG2 P284 L2-9 and Exhibit P to UCRA.*
- The value of the mitigation and enhancement package offered in the WGFP IGA is \$40 to \$60 million. *TR AUG1 P206 L3-23.*
- Grand Lake clarity requires coordination with federal agencies, including the U. S. Bureau of Reclamation (Reclamation), and cannot be done by Northern Water or the WGFP alone. *TR AUG1 P133 L12 to P134 L17.* This process will take some time to comply with all federal environmental review requirements intended to minimize unintended consequences from changes to the Colorado-Big Thompson (C-BT) Project facilities or operations.
- The cost of a bypass of the WG Reservoir was roughly estimated to be \$5 to \$6 million in the few past years and the Applicant committed \$2 million at the hearing with the possibility of \$1 million of additional funds to be made available through a funding arrangement with Denver Water. *TR AUG1 P220 L17-23 and P213 L4-9 and P219 L15-22.*
- Granby Reservoir can hold approximately 535,000 acre feet of gross storage; approximately 465,000 acre feet of active storage plus approximately 70,000 acre feet of dead storage. *TR AUG1 P76 L11-16.*
- Pre-positioning of C-BT Project water in the proposed Chimney Hollow Reservoir makes storage space available in Granby Reservoir for Grand County and Middle Park Water Conservancy District (MPWCD) water. *TR AUG1 P66 L7-23.*
- Grand County's bucket of storage in Granby Reservoir varies but is up to 10,913 acre-feet as conservatively estimated by County Manager, Lurline Underbrink Curran. *TR AUG1 P85 L12-21.*
- MPWCD receives 2,300 acre feet of Windy Gap Project water annually and the option to pump 700 acre feet more in the WGFP IGA. The 2,300 acre feet are supplied from the Windy Gap Project at no cost to MPWCD. *TR AUG1 P46 L13-24.*

- Reservoir storage value is approximately \$3,000 per acre foot and the value of firm yield is approximately \$10,000 per acre foot. *TR AUG1 P89 L10 to P90 L15.*

III. Mitigation and Enhancement Costs are a Substantial Part of the WGFP and are provided to Grand County and to Grand County Organizations.

The value of the entire package of mitigation and enhancements was provided by Eric Wilkinson during the introduction of the Applicant's testimony and is estimated at \$40 to \$60 Million. *TR AUG1 P206 L3 to P207 L8.* The value of proposed mitigation and enhancements for the WGFP are 15% to 25% of the total Project costs. *TR AUG1 P207 L8-18.* The assets provided are both money and water as outlined below.

A. Three Lakes and Grand Lake in Particular

The Applicant and Northern Water understand that Three Lakes water quality and Grand Lake clarity impact mitigation are critically important to Grand County. Northern Water spends about \$1-\$2 million per year on continuing water quality efforts including studies and monitoring. Much of this expense is on Grand Lake and the Three Lakes system. The WGFP will provide funding (estimated to be \$4.3 million) to reduce nutrient inflow to the Three Lakes system to provide a one-to-one offset of effects of nitrogen from the WGFP on Three Lakes water quality and Grand Lake clarity. This includes improvements to Grand County wastewater treatment facilities and non-point source nutrient reduction on Grand County ranches as testified by Jeff Drager, *TR AUG1 P246 L7- P247 L13 and P248 L12-21.* The intent of these measures is that the WGFP will have no net effect on Three Lakes Water Quality. The FEIS displays the effects without mitigation while the mitigation will be provided as a part of the Project.

Three Lakes water quality issues currently exist without the WGFP and will be addressed by Northern Water and other stakeholders, including Grand County and Reclamation in other ongoing processes. Northern Water has provided and will continue to provide funding and active participation in Reclamation's Appraisal Study which analyzed potential alternative to improve the water quality and clarity in Three Lakes system in accordance with the Appraisal Study MOU. A long-term commitment of Northern Water to work with Reclamation and Grand County on Grand Lake clarity issues is provided in the Grand Lake Clarity MOU. Northern Water's water quality program, including over \$1 million in water quality monitoring and studies to better understand water quality issues in the C-BT and Windy Gap projects, is a commitment to an ongoing improvement effort formalized in the Grand Lake Clarity MOU.

B. Colorado River Corridor

Colorado River impact mitigation for temperature below WG Reservoir is also provided by the commitment of the WGFP to installation of real time temperature monitoring which will be directly available to Grand County and available to the public. *TR AUG1 P181 L18-P182 L2.* River diversions will also be curtailed or reduced when stream temperature standards are exceeded and the diversions are affecting the stream

temperature. Flushing flows will be provided and have been increased from 450 cfs to 600 cfs, and increased even more when WGFP storage levels exceed 2/3 capacity. Condition 30 in Applicant's August 1, 2012, letter concerning conditions: "If, during a five (5) year period, natural conditions meet or exceed 600 cfs flushing flows 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 bypasses to achieve the required flows, and in the same five (5) year period the flow at the gage below Windy Gap Dam does not exceed 1,200 cfs, the Subdistrict in the sixth year will supplement the natural flows, subject to availability of Windy Gap Project Water in storage and outlet capacity of Granby Reservoir, to provide a flow of 1,200 cfs for a period of 72 hours at the gage below Windy Gap Dam. This condition is contingent upon modifications to the Amendatory Carriage Contract that reduce losses charged for storage of Windy Gap Water on the West Slope to less than the current ten (10) percent." *TR Aug L2 P17 L1-17.*

C. Grand County Water

Grand County is also directly provided water that it can use to meet its needs. Water for streamflow enhancement is provided to Grand County in the WGFP IGA. Grand County will have the ability to use unused MPWCD supplies—up to 2,300 acre feet per year. Grand County's share of Windy Gap pumping is estimated to be 500 acre feet per year on average. Grand County will also have the ability to pump additional Windy Gap water up to 3,000 acre feet per year, when available under the Windy Gap water rights. Aquatic habitat enhancement measures are provided in the Fish and Wildlife Enhancement Plan authorized by the Colorado Wildlife Commission. This includes \$4 million provided by the Subdistrict (with an additional \$3.5 million from other sources) to restore aquatic habitat in the Colorado River from Windy Gap Reservoir to the Kemp-Breeze State Wildlife Area, a stream distance of approximately 14.4 miles. Further, \$250,000 of funding for study of a bypass around or through Windy Gap Reservoir has been committed and \$ 2 Million toward construction of a bypass or pass through was committed by Eric Wilkinson on behalf of the project participants at the 1041 hearing.

D. Additional Mitigation and Enhancement

Other Mitigation Measures are also a part of the package including Colorado River Endangered Species funding for the Upper Colorado River Recovery Program at \$405,000. A \$105,000 wetland mitigation bank is funded in addition to revegetation and enhancement of disturbed areas.

Other Colorado River enhancement measures include participation in Learning by Doing Cooperative Effort with Denver Water and west slope entities to coordinate mitigation, stream flow enhancements and stream restoration work. WGFP will provide \$500,000 to Grand County for an irrigation pump maintenance fund and funding for water measurement devices on Colorado River diversions which will allow coordination and protection of both Windy Gap Project waters released from Lake Granby by the Municipal Subdistrict at the request of Grand County or MPWCD as well as water

released from Lake Granby for the Upper Colorado River Recovery Program so those waters can be shepherded downstream for the benefit of the fishery en route to its final destination for beneficial use in the Grand Valley area.

Northern Water and the Municipal Subdistrict have committed in the IGA that it will not acquire water rights or pursue additional projects in Grand County without Grand County's permission, unless such efforts are necessary to address the requirements of an Upper Colorado River Compact delivery requirement that has been imposed on the Subdistrict. *TR AUG1 P216 L16-19.*

Other cooperative efforts by the Subdistrict and Northern Water on the West Slope are also committed. Northern Water developed a plan and led efforts to provide releases of 5,412.5 AF/year from Granby Reservoir which will improve streamflow conditions in Grand County and provide water to the Upper Colorado River Recovery Program in the 15-Mile Reach within Mesa County. *TR AUG1 P34 L3-12.* Northern Water and the Subdistrict have been active participants in the Wild and Scenic Rivers Stakeholder Plan. Northern Water, Reclamation and Grand County have entered into a separate MOU to finance and participate in the Appraisal Study for improved clarity in Grand Lake. Northern Water, Reclamation, and Grand County intend to continue moving ahead with Reclamation's planning process by initiating the development of a Request for Qualifications for a Grand Lake Clarity Technical Review, which was advertised by Reclamation on August 20, 2012.

E. MPWCD

Water supplies are provided for MPWCD. A firm annual water supply of 2,300 AF/year is provided. The benefit of additional pumping is also provided which yields an average annual supply of 700 AF as confirmed by the MPWCD consultants.

F. Additional Cooperative Efforts not Related to WGFP

The release of 5,412.5 acre feet of water from Granby Reservoir each and every year to provide benefits to the Colorado River in Grand County and the Colorado River Endangered Fish Recovery Program is an important commitment of Northern Water and the Subdistrict.

Northern Water and the Subdistrict have also committed to participate in the Shoshone Outage Protocol, as confirmed by the Testimony of Eric Kuhn, which is an important benefit to the West Slope. *TR AUG1 P28 L1-10.*

IV. Grand Lake issues of Nutrients and Clarity.

Over \$1 million is spent annually on West Slope water quality monitoring and studies. *TR AUG1 P221 L12-16.* The Applicant agrees that the cause of water quality and clarity problems in Grand Lake needs to be identified and a viable, effective, and efficient solution identified based on sound science. It should be noted that the Applicant also

recognizes that any carriage contract to convey either Windy Gap Project water or WGFP water through C-BT Project facilities which is entered into between the Applicant, Reclamation, and Northern Water will require that the C-BT Project is operated in compliance with Senate Document 80 at any time Windy Gap Project water or WGFP water is conveyed through the C-BT Project system. The Applicant proposes upgrades to the Fraser Waste Water Treatment Plant to contribute to its 1- to-1 nutrient reduction mitigation requirement. *TR AUG1 P247 L5-13*. As part of its nutrient reduction program, the Applicant has commitments that will change operations on three ranch properties to reduce non-point source runoff that contributes to nutrient levels in the Three Lakes system. *TR AUG1 P248 L17 to P250 L4*. The Corps of Engineers will require a detailed monitoring plan for water quality the results of which will be fully available to Grand County. *TR AUG1 P250 L25 to P251 L5*. Northern Water has agreed to supplement its Repayment Contract with the Bureau of Reclamation to ensure that Northern Water will continue to participate in the activities needed to determine a viable, efficient, and effective solution to Grand Lake clarity which is based on sound science and will not result in unintended consequences. *TR AUG1 P221 L21 to P222 L5*. A supplement to a long-existing contract is unusual and underscores the serious commitment of Northern Water to the resolution of the Grand Lake clarity issue.

Grand Lake Clarity is not a problem that can be solved quickly. By virtue of the federal ownership of the C-BT Project, it will take a federal process of study and federal permitting to make sure any changes to the project are based on sound science, are understood, and do not cause other unintended consequences.

V. Windy Gap Reservoir and the Need for Sound Science to guide the Construction of a Bypass or Though Pass.

The testimony at the hearing reporting that Windy Gap Reservoir is “like Chernobyl” or a Petri dish and that the Upper Colorado River is on the verge of collapse is reminiscent of the quote by Mark Twain who, upon hearing that his obituary had been published by the New York Journal, said “The reports of my death are greatly exaggerated.” The testimony by Trout Unlimited (“TU”) and Upper Colorado River Alliance (“UCRA”) after they testified in support of granting a 1041 Permit for WGFP is similarly greatly exaggerated. *TR AUG2 P254 L21-25*. There is no doubt that the continued health of the Upper Colorado River is a concern. Temperature and lack of flow at times cause stress to the fishery. The Windy Gap Project and the WGFP do not and will not divert at low flow periods because of the Projects’ commitments and obligations to respect the Instream Flow water rights held by the Colorado Water Conservation Board and because the water rights are typically out of priority in July and August and into the fall when low flow conditions occur, thus the Projects cannot be the cause of these low flow conditions. *TR AUG1 P13 L21 and P15 L2*. Minimum required instream flows that must be met before the Windy Gap Project or WGFP can pump are 90 cfs extending from below Windy Gap Reservoir to the confluence with Williams Fork River, 135 cfs from the confluence with the Williams Fork River to the confluence with Troublesome Creek, and 150 cfs from the confluence with Troublesome Creek to the confluence with the Blue River. *TR AUG1 P 231 L10-18*. The testimony about the existing condition of the river is not a result of the

WGFP. However, it is the recognition of concerns about the existing conditions of the river that have prompted Denver Water, Northern Water, the Subdistrict, Colorado Parks and Wildlife, and others to join together to cooperate in implementing a suite of measures to improve the river conditions. As a result of WGFP and other cooperative efforts, approximately 9,000 to 12,000 acre feet will be retimed from high flow periods to be used in low flow conditions at the discretion of Grand County and in coordination with other measures including the Learning by Doing process, with the specific propose of improving the condition and health of the river. *TR AUG1 P238 L23 to P239 L7.*

The possibility of a Windy Gap Reservoir bypass first came up during discussions by the Applicant with Colorado Parks and Wildlife. As a part of the now approved state Fish and Wildlife Enhancement Plan \$250,000 was committed to study the possibility of a bypass and to determine if such a facility would benefit the resource. The benefits that will be derived from the expenditure of public funds must be defined and the rationale behind building a bypass or through pass must be supported by sound science and survive public and professional scrutiny. The construction must not be rushed only to find out at a later time that either the benefits that were predicted to occur do not materialize, unintended consequences result, or unknown harm is done to the resource. The possibility of unintended consequences or harm to the resource must be minimized. The experts at Colorado Parks and Wildlife working with other scientists must first study the alternatives and then work with all deliberate speed to design and construct a bypass if the study demonstrates a benefit to the resource. Because of the intense interest in the bypass the project participants are in agreement to commit the \$250,000 immediately, even before permits for the WGFP are issued, to begin the needed study and evaluation. *TR AUG1 P208 L20-25 to P209 L1-4.*

Funding and construction of a bypass or though pass after the evaluation and study of benefits and design was also discussed as needing to finalize the WGFP process by Mr. Wilkinson at the hearing, who stated:

... and because of what they feel is a very robust mitigation and enhancement package that they (the WGFP Participants) have put on the table already, they are — they are reluctant to add to that. But I will tell you that they have said that they will pledge \$2 million towards the construction of the bypass if the construction — or if that \$2 million will get them to what I will refer to as an end point. When I say an end point that means \$2 Million, and that gets us done. Because they — I don't want to put words in their mouth, but they feel that they are bleeding to death and they need to stop at some point in time. They feel that \$2 million towards this is an adequate contribution. We have also had conversations with Denver and with the State of Colorado about possible funding. I do not want to speak for Denver, but I will — I think I do have permission to say this, and I hope all the Paula Daukas corrects me if I am wrong. But Denver has pledged a million dollars toward this effort. If the bypass is constructed they would like that million dollars to go to stream enhancement downstream under the Fish and Wildlife Enhancement Plan in exchange for taking a million dollars that we have already committed to the

enhancement plan and re-channeling that to the bypass. So the total there would be \$3 million.

TR AUG1 P209 L20 to P210 L19.

Greg Espregren testified on behalf of Trout Unlimited and was not credible that a specific flushing flow, based upon a model imported from the State of Washington, is needed. His high-flow number of 1,921 cfs is not based upon current Colorado River conditions and does not even consider the effect on WGFP yield with these proposed flushing flows in place. *TR AUG2 P242 L6-7 and P263 L4-5.* In addition, the requirement for such flows every other year is not supported by the record of peak flows in the river as the water is simply not available for long periods of time based on the historic record. *TR AUG2 P288 L2-7.*

Contrary to Mr. Espregren's flushing flow number, Peggy Bailey, Grand County's witness, testified that 600 cfs is a reasonable flushing flow target and the Applicant has agreed to provide that flow and more. *TR AUG2 P290 L11-18.* The proposed mitigation for the WGFP (as outlined in III.B, above) takes the annual variability into account and would actually use release of stored water to provide a 1,200 cfs flushing flow if it hasn't occurred in the previous 5 years.

Stream temperature below WG Reservoir will be measured real time by the stream flow temperature gages. The Shoshone Outage Protocol has a beneficial effect on river temperature as testified by Lurline Underbrink-Curran. *TR AUG1 P40 L4-19.*

VI. The Benefit of a Solid Water Supply is Provided to Grand County and Summit County Water Users through MPWCD.

Stan Cazier, counsel for MPWCD testified at the hearing that the 2,300 acre feet of supply provided in the IGA will protect 2,100 acre feet of existing MPWCD water contracts and MPWCD can pay for additional pumping to increase the amount of water available to MPWCD up to an average annual yield of 3,000 acre feet. *TR AUG1 P49 L23 to P50 L15.* A very important consideration for MPWCD is that the 2,300 acre feet are provided at no cost. *TR AUG1 P49 L19.* MPWCD will receive benefits under WGFP IGA to firm its Windy Gap water, and hence improve the reliability of its Windy Gap water supply for users in Grand and Summit counties. This result has been checked by MPWCD consulting engineers who have done their own modeling for MPWCD and did not rely on the modeling of the Applicant. This is characterized as a solid water supply by Mr. Cazier. *TR AUG1 P 51 L4.*

VII. Learning by Doing.

The uncertainties surrounding several issues are best addressed through a flexible cooperative program which is the Learning by Doing Cooperative Effort. Learning by Doing provides a formal mechanism to coordinate project operations as well as mitigation and enhancement measures to improve the condition of the Colorado River in the future. Better communication and coordination by all parties involved, for example

including the releases from the Historic Users Pool in Green Mountain Reservoir (HUP) and other reservoir releases and bypasses for endangered species purposes, can be used in coordination with other water provided in the WGFP IGA and other project operations to assist in improving the aquatic conditions of the river as demonstrated by the testimony of Jeff Drager concerning the stone fly hatch. *TR AUG1 P266 L1 to P267 L14*. Water provided by the IGA and the proposed flushing flows including flushing flows of at least 1,200 cfs every six years as specified in the certificate conditions proposed by the Grand County Manager should be used in the Learning by Doing process to effectively address future stream flow and aquatic conditions by utilizing available resources to realize the maximum benefits from those resources.

VIII. Enforceability of Mitigation and Enhancements; a Long-Term Commitment.

Ms. Underbrink-Curran introduced attorneys Green and Taussig to review what she termed the “paranoia provisions” in the IGA. *TR AUG1 P98 L18 to P101-L9*. These provisions address the enforceability of the IGA and the commitments of each party going forward. The Subdistrict is required to incorporate the IGA into the Windy Gap water right decrees and confirm compliance with the Water Conservancy Act. The mitigation measures which are conditions of federal permits, such as monitoring and water quality, are enforced through the Federal Agencies. As such the package of mitigation and enhancements are not dependant on enforcement in the 1041. Each has independent enforceability, Grand County has enforceability in the IGA, and because many if not most of the agreements are for conditions which pre-exist WGFP, they are not within the scope of the 1041. They are clearly within the scope of long term commitments and federal permits. Overall it is clear the focus on current river and lake conditions is reflected in the scope and reach of those many agreements. Neither the Applicant nor Northern Water are able or desire to get a 1041 Permit and then disappear from the commitments or focus on the water resource.

IX. Certificate Conditions Must Be Consistent with the IGA

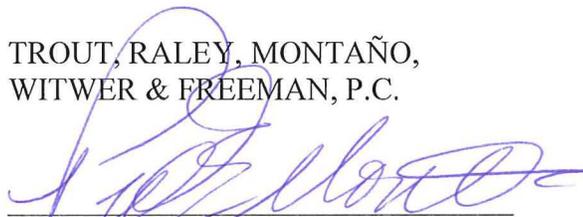
On Monday August 20, the Applicant received an email with a draft set of revised conditions and was advised that the staff’s closing brief would contain something similar to those revised conditions. In order for the WGFP to operate with clear requirements it necessary that the conditions in the 1041 be consistent with the IGA. Some of the conditions are not consistent and will undermine the understanding of the parties concerning what is required. In addition, though some conditions were modified, some key modifications requested by the Applicant were not made and do not allow the Subdistrict to accept the Permit if these conditions are included. Because of the short time the Applicant may supplement this response to the draft conditions at a later time. In addition it is our understanding that staff may desire to continue to work on mutually acceptable conditions and the Applicant is certainly open to this opportunity.

X. Conclusion.

The Subdistrict, the WGFP Participants, and Northern Water have worked over several years with the staff of Grand County and other interested stakeholders that testified in support of granting the 1041 Permit. While each had its own list of conditions tied to its testimony in support, each found that the WGFP will improve the river. The state of the river is steadily improving and future continued improvement is truly a work in progress. Through this process no party has gotten entirely what it wanted. What is clear is that a steady and sustained effort is underway to improve the condition of the aquatic resource of the Upper Colorado River in Grand County and to address the clarity concerns through rigorous application of solid scientific study of Grand Lake and the water quality in the Three Lakes system. Approving the 1041 Permit will continue those efforts and move the parties to a new level of commitment. Until the 1041 Permit is issued the long efforts to negotiate the WGFP IGA, and the benefits that will result from the approval of the WGFP IGA by its signatories and its ultimate implementation will not come to fruition.

The improperly named “no action” alternative was also discussed at the hearing. *TR AUG1 P102 L6-20 and AUG2 P108 L12-17*. The title of this alternative implies that nothing will happen however, the testimony demonstrates that actions will take place in the future under the existing Windy Gap Project. As Eric Wilkinson and Jeff Drager stated the Windy Gap Project Participants are continuing to grow into the Project. It was developed to meet future needs of the communities it serves and as the needs grow the water diversions grow over time. The “no action” alternative shows increased diversions without the enhancements or mitigation that come with the WGFP. The Applicant believes this can be accomplished without federal permits. The question was asked at the hearing, “What if the Permit is not approved,” then what?” There were various responses from the parties about litigation, advocacy with the Bureau of Reclamation over Senate Document No. 80 issues or other future federal permit processes that might occur at some uncertain time in the future. What no one said is that things would be better—no one testifying at the hearing believes that delaying or denying the 1041 Permit will improve the health of Colorado River or the clarity of Grand Lake. The Subdistrict therefore respectfully requests that the 1041 Permit be approved.

TROUT, RALEY, MONTAÑO,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Closing Argument in Support of a 1041 Permit for a Municipal and Industrial Water Project under Grand County Regulation Chapter 5* was served via e-mail on August 23, 2012, to the following:

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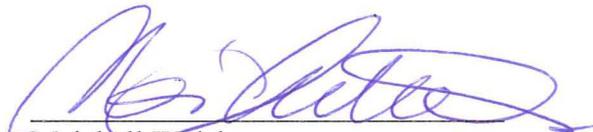
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July 31, 2012

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Re: Legal issues concerning the requested 1041 permit from Grand County for the Windy Gap FIRMING Project.

Dear Mr. DiCola,

Prior to the August 1 and 2 hearing I submit for the record, on behalf of the Applicant Municipal Subdistrict, Northern Colorado Water Conservancy District, the following legal analysis of issues pertinent to the certificate and 1041 requested permit. As you know the Subdistrict has filed its application for the 1041 under protest, reserving all rights to challenge the permit in its entirety and/or specific permit conditions or limitations and this legal analysis supports a number of the concerns regarding conditions in the existing certificate. We are hopeful that such litigation is not necessary, however, in an abundance of caution I am submitting this for inclusion in the record so as not to be precluded from raising these legal issues at a later date.

- I. Grand County may not preempt or enforce Federal or State laws or regulations unless that authority is specifically delegated to Grand County by the State or Federal Government, but may condition a 1041 Permit from becoming effective until such time as the Applicant receives its Federal or State approvals.**
 - A. Limitations on County Regulations Promulgated Under the Areas and Activities of State Interest Act**

The Areas and Activities of State Interest Act (AASIA or 1041 permit herein) permits a county government to designate matters of state interest within its jurisdiction and adopt guidelines by which county officials can administer these matters. § 24-65.1-402(1), C.R.S.

The county is also authorized to enact regulations that interpret its guidelines and explain how these guidelines apply in specific situations. § 24-65.1-402(2), C.R.S.

B. Preemption of County 1041 Regulations

Under Colorado law, counties are expressly prohibited from adopting a law or regulation that “is in conflict with any state statute.” § 30-15-411, C.R.S.; *see also Colo. Mining Ass’n v. Bd. of County Comm’rs*, 170 P.3d 749, 758 (Colo. Ct. App. 2007). If any regulation adopted by the county with regard to activities of state interest conflicts with any state statutory provision, the county regulations can be either partially or completely preempted. *Bd. of County Comm’rs v. Vandemoer*, 205 P. 3d 423, 428 (Colo. Ct. App. 2008).

The Colorado Supreme Court, in *Colorado Mining Association v. Board of County Commissioners of Summit County*, has indicated that preemption analysis routinely applies to conflicts in state and local legislation concerning land use authority. 199 P. 3d 718, 723 (Colo. 2009). Because Grand County as a statutory county only possess the powers expressly granted to it by either the state constitution or the General Assembly, Colorado courts typically apply the general rules for statutory construction to establish whether the state and local regulations may be harmoniously applied or whether the state statute must preempt any conflicting local regulation or permit condition. *See id.* at 723-224 (citing *Bd. of County Comm’rs v. Bainbridge*, 929 P. 2d 691, 698-99 (Colo. 1996)). Where a conflict exists between the state statute and local regulation, the state statute must govern the issue and will preempt the county’s authority to regulate land use issues. *Id.* at 724 (citing *Bainbridge*, 929 P. 2d at 705). This analysis is equally applicable to any condition on a permit.

The preemption doctrine recognizes that different levels of government may simultaneously attempt to regulate the same field. Requiring state statutes to take precedence over contradictory local or county regulations establishes a distinct system of priority in which state-level regulations must be given effect over a conflicting county regulations. *Id.* (citing *Bd. of County Comm’rs v. Bowen/Edwards Assocs., Inc.*, 830 P. 2d 1045, 1049 (Colo. 1992)). Where the potentially conflicting regulations address issues in which both the state and local governments have an interest, Colorado courts have typically applied a three-part analysis to determine whether state law will preempt the local regulation. *Town of Frederick v. North American Resources Co.*, 60 P. 3d 758, 761 (Colo. Ct. App. 2002).

First, state law will preempt conflicting local regulations if the state statute contains express language of preemption. *Id.* Second, a state statute may impliedly demonstrate a legislative intent to completely occupy a given field. *Id.* Finally, local regulations will be preempted by state law if the operational effect of the regulation conflicts with the application of the statute. *Id.*

1. Express Preemption

Express preemption is generally considered a matter of statutory interpretation. *Town of Carbondale v. GSS Props., LLC*, 169 P.3d 675, 682 (Colo.2007). A county regulation can be partially or completely preempted by conflicting state law if a state statute contains express language of preemption. Generally, Colorado courts will “recognize a legislative intent to preempt local authority only if that intent is expressed in unequivocal language.” *Colo. Dep’t of Transp. v. City of Idaho Springs*, 192 P. 3d 490, 495 (citing *Bainbridge*, 929 P. 2d at 710-11).

Where the statute does not specifically foreclose and prevent all local regulation, the statute has not expressly indicated that the state alone will be responsible for regulating in the area at issue. *Id.* Without an express indication that the intent behind the statute’s enactment was to bar local regulation, the statute thus “remains open to the possibility that the statewide planning process will leave some questions unresolved.” *Id.* In such a case, the absence of an express intent to preempt local authority allows local and county governments to fill the gaps left by the regulatory process at the state level. *Id.*

2. Implied Preemption

Like express preemption, implied preemption is also generally considered a matter of statutory interpretation. *Town of Carbondale*, 169 P.3d at 682. The preemption of local regulations “may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest.” *Bowen-Edwards*, 830 P. 2d at 1056-57. The legislature’s intent to preempt local regulations in certain fields “cannot be inferred merely from the enactment of a state statute addressing certain aspects of those activities.” *Id.* at 1058. Such an intent, where not expressly stated, may be inferred after considering the language used by the legislature when enacting the statute, the legislature’s purpose behind adopting such regulations, the scope of the legislation, and the circumstances under which the legislature intended the statute to operate. *Id.*

3. Operational Preemption

Operational conflicts between state and local regulations can arise “when a local interest is implemented in a way that materially impedes or destroys a state interest.” *City of Idaho Springs*, 192 P. 3d 490, 496 (citing *Bowen-Edwards*, 830 P. 2d at 1059). In these situations, the state law may partially or completely preempt the local regulations “to the extent that [the local regulations] conflict with the achievement of the state interest.” *Bowen-Edwards*, 830 P. 2d at 1059

C. Preemption of Grand County's Conditions on Approval of Windy Gap FIRMING Project Permit

The conditions that Grand County may seek to impose on the Subdistrict's 1041 permit for the Windy Gap FIRMING Project include, among others, fish and wildlife mitigation measures, water quality improvement efforts in Grand Lake, and the maintenance of temperature standards in the Lower Colorado River. On June 9, 2011, the Municipal Subdistrict, Northern Colorado Water Conservancy District submitted its Fish and Wildlife Mitigation Plan (FWMP) to the Colorado Wildlife Commission in accordance with § 37-60-122.2, C.R.S. In this FWMP, the Subdistrict has proposed a variety of mitigation measures for the effects that the WGFP may cause on either side of the Continental Divide. *See* Windy Gap FIRMING Project Fish and Wildlife Mitigation Plan 13 - 20. On the western slope, the Subdistrict has proposed two mitigation measures of particular relevance to Grand County: nutrient mitigation to lessen the impact to the water quality of Grand Lake and mitigation of temperature changes in the Colorado River. *See id.* at 15-17. Specifically, the Subdistrict's mitigation plan includes the development of nutrient reduction and removal efforts to be approved by the Bureau of Reclamation and the Corps of Engineers intended to offset any incremental impacts that the project may have on the water quality of Grand Lake. *Id.* at 17, 21. Additionally, the mitigation plan also outlines the Subdistrict's intention to install temperature monitoring stations to track the temperature in this segment of the river and to reduce pumping as necessary to maintain the river's temperature below the daily and weekly maximum average temperature thresholds. *Id.* at 15-16.

Section 37-60-122.2, C.R.S. requires the state to adopt the approved fish and wildlife mitigation plan as the "official position" with regards to the mitigation efforts developed by any applicant seeking to operate and maintain a water development project. At the same time, the state, through the Areas and Activities of State Interest Act, has authorized county governments to designate activities that constitute matters of state interest within the county's jurisdiction. *Gartrell*, 33 P.3d at 1247. Grand County, pursuant to the AASIA, has designated the efficient use of municipal and industrial water projects as an activity of state interest and has enacted regulations concerning the development of these water projects. Though no portion of the WGFP will be constructed or operated in Grand County, the Subdistrict has applied for a permit with the Grand County Board of Commissioners under protest. *See* Windy Gap FIRMING Project Fish and Wildlife Mitigation Plan at 13.

Of particular concern to the Subdistrict is the Grand County's potential to impose conditions on its permit that conflict with the fish and wildlife mitigation plan that has been approved by the state. However, because the Subdistrict's FWMP has become the official state position with regard to the mitigation measures outlined therein, any conditions that Grand County may impose on the approval of the Subdistrict's 1041 permit will be preempted by the provisions of § 37-60-122.2, C.R.S. *See* Letter from Governor John Hickenlooper to Will Tully, Bureau of Reclamation, October 6, 2011 ("[T]he fish and wildlife

mitigation plan for the Windy Gap Firming Project ... constitutes the official State of Colorado position with regard to mitigation of impacts from this project to these resources.”).

1. Official State Position

The General Assembly has recognized that the state is responsible for all “fish and wildlife resources found in and around state waters which are affected by the construction, operation, or maintenance of water diversion, delivery, or storage facilities.” § 37-60-122.2(a), C.R.S. To ensure that the state’s fish and wildlife are not adversely impacted by water projects, this measure requires project applicants to mitigate the harm caused by their projects “to the extent, and in a manner, that is economically reasonable and maintains a balance between the development of the state’s water resources and the protection of the state’s fish and wildlife resources.” *Id.* Under the terms of this statute, any applicant seeking to operate or maintain a water diversion, delivery, or storage facility, subject to certain exceptions, must submit a mitigation proposal to the Colorado Wildlife Commission. § 37-60-122.2(b), C.R.S. Once the Commission and the applicant agree to the terms of the mitigation plan, the Commission must forward the agreement to the Colorado Water Conservation Board. *Id.* If the Board approves of the agreement, the Board will then adopt the mitigation plan as the official state position as to the mitigation actions to be taken by the applicant. *Id.* Once an official state position regarding the mitigation plan has been approved, this position must be “communicated to each federal, state, or other governmental agency from which the applicant must obtain a permit, license, or other approval.” § 37-60-122.2(c), C.R.S. (emphasis added).

i. The Official State Position Adopted Pursuant to § 37-60-122.2 Preempts Any Contradictory Conditions Imposed by Grand County

The express terms of § 37-60-122.2 expressly mandate state-level regulation of the mitigation activities taken by applicants for water project permits on fish and wildlife resources. Only two state-level agencies – the Colorado Wildlife Commission and the Colorado Water Conservation Board – are responsible for approving the mitigation actions that are to be taken by these permit applicants. § 37-60-122.2(b), C.R.S. Moreover, once these agencies have approved the mitigation plan proposed by the applicant, this plan becomes the official *state* position as to the actions that the applicant must take with regard to mitigating the harm that the proposed project may caused to the state’s fish and wildlife populations. *Id.* These express terms articulated by the General Assembly in § 37-60-122.2, C.R.S. unequivocally mandate that the state alone regulate the area of fish and wildlife mitigation with regard to water projects.

Accordingly, this statute expressly forecloses and prevents all inconsistent or contradictory local regulation in this area and, thus, preempts any conditions that Grand County may seek to impose on the Subdistrict’s 1041 Permit concerning fish and wildlife.

See Colo. Dep't of Transp. v. City of Idaho Springs, 192 P. 3d 490, 495 (finding that local regulations are expressly preempted by state statutory authority if the legislature indicates its intent to preempt using "unequivocal language"). Under no circumstances did the General Assembly, in enacting this measure, expressly indicate that local governments, in addition to these two state agencies, would be allowed to also impose mitigation requirements on water project applicants. In fact, the General Assembly specifically stated that, once the official state position had been approved, the requirements of the mitigation plan must "be communicated to each federal, state, or *other governmental agency* from which the applicant must obtain a permit, license, or other approval." § 37-60-122.2(c), C.R.S. (emphasis added). This is applicable to Grand County as a governmental agency and the Windy Gap Firing Project 1041 permit.

ii. The Official State Position Adopted Pursuant to § 37-60-122.2 Impliedly Preempts Contradictory Conditions Imposed by Grand County

The legislature's intent to preempt local regulation of fish and wildlife mitigation actions required by an applicant's water project can be clearly inferred from the testimony given by supporters of the measure in the State Senate and House of Representatives, statements made by the drafters of the statute, the purpose driving the adoption of the statute, and the conditions under which the statute is designed to operate. *See id.*

Senator Tillman Bishop, in his testimony before the Senate, emphasizes that the purpose of creating an official state position as to the applicant's mitigation plan is to achieve and "maintain a balance between the development of the state's water resources and the protection of the state's fish and wildlife resources." Testimony of Sen. Tillman Bishop, Senate Testimony HB 87-1158, Apr. 9, 1987. Clyde Martz, the Director of the Department of Natural Resources at the time this statute was enacted, echoed Senator Bishop's sentiments in this regard; according to Martz, this statute provides the state with "an opportunity to establish a state position of balance, declare a policy of the state for balance in the development and protection of our water and wildlife resource[s] *and keep the decision-making on this policy at the state level where it belongs.*" Testimony of Clyde Martz, Senate Testimony HB 87-1158, Apr. 9, 1987.

Based on the statements made by Senator Bishop and Clyde Martz, the purpose of this statute is clearly to strike a balance between promoting the development of the state's water resources while simultaneously ensuring that such development does not have an adverse impact on the state's wildlife and water resources. According to this testimony, the balance between these two significant state resources must be articulated at the state level, in the form of an official state position on the mitigation measures to be taken by the water project applicant. Most importantly, however, is the assertion made by Clyde Martz that the decision-making concerning the development and protection of the state's water and wildlife resources should be retained by the state; these words clearly indicate that the

drafters of this fish and wildlife mitigation statute intended for the state alone to regulate the development and conservation of the state's water and wildlife. *See id.*

Additionally, testimony offered before the Senate discussing these mitigation requirements makes no room for local regulation of the state's water and wildlife resources. Martz specifically indicates that the intricate balance between developing water resources while conserving the state's wildlife population should be undertaken by specific agencies at the state level that are capable and qualified to address the impacts of water developments on wildlife. *See id.* In particular, Martz points to the expertise of the State Division of Wildlife and the Colorado Water Conservation Board; according to Martz, the legislature established the wildlife division to further the protection and preservation of the state's wildlife and related environment, while the Colorado Water Conservation Board was charged with responsibly regulating the development of water resources. *Id.* Consequently, these two agencies are most appropriately situated to regulate and any impacts that the development of the state's water resources will have on the state's wildlife populations and articulate a balance between these two state interests. *See id.*

According to Martz, this balance will be best achieved if the mitigation plan is initially created by the applicant and the Division of Wildlife and is subsequently reviewed and modified by the Colorado Water Conservation Board. *Id.* The goal of allowing these specific agencies to review and approve the mitigation plan is to take advantage of the expertise of these agencies and, therefore, ensure that the needs of both the developer and the affected resources are given adequate consideration. *See id.* Nowhere in their respective testimony does either Senator Bishop or Clyde Martz make room for the possibility that local government agencies will also take action to mitigate the potential harm caused by water development projects in their jurisdiction.

The implication of this testimony is that, because of the relative expertise of the Division of Wildlife and the Colorado Water Conservation Board, these two agencies should bear the sole responsibility of regulating the impacts to wildlife caused by water development projects. Consequently, based on the testimony by the drafters of the statute concerning the purpose and application of the state's mitigation rubric, the legislature clearly intended that regulation of the potential impacts by water development projects on state wildlife populations only occur at the state level; therefore, any conditions that Grand County should seek to impose on the Windy Gap Firing Project with regard to its impact on local fish and wildlife is preempted.

2. The Official State Position Adopted Pursuant to § 37-60-122.2 Operationally Preempts Contradictory Conditions Imposed by Grand County

The primary purpose of § 37-60-122.2, C.R.S. is to provide a means by which the state can balance the need for the development of water resources with the goal of preserving fish and wildlife populations that may be harmed by the construction,

operation, and maintenance of water development facilities. The Municipal Subdistrict, Northern Colorado Water Conservancy District submitted its Fish and Wildlife Mitigation Plan (FWMP) to the Colorado Wildlife Commission in accordance with § 37-60-122.2, C.R.S. In this FWMP, the Subdistrict has proposed a variety of mitigation measures for the effects that the WGFP may cause on either slope of the Continental Divide. *See* Windy Gap Firing Project Fish and Wildlife Mitigation Plan 13 – 20. On the western slope, the Subdistrict has proposed mitigation of temperature changes in the Colorado River. *See id.* at 15-17.

As previously discussed, § 37-60-122.2, C.R.S. requires the state to adopt an official position with regards to the fish and wildlife mitigation plan developed by any applicant seeking to operate and maintain a water development project. At the same time, the state, through the Areas and Activities of State Interest Act, has authorized county governments to designate activities that constitute matters of state interest within the county's jurisdiction. *Gartrell*, 33 P.3d at 1247. Of particular concern to the Subdistrict is the Grand County's potential to impose conditions on its permit application that conflict with the fish and wildlife mitigation plan that the Subdistrict has filed with the state.

The Subdistrict contends that operational conflicts may exist, depending on those conditions, between the state's mitigation requirements and any similar conditions that Grand County may seek to impose onto the Subdistrict's WGFP application. By approving the Subdistrict's FWMP, the state has designated this plan as the official state position with regard to all fish and wildlife mitigation measures required by the project. *See* Letter from Governor John Hickenlooper to Will Tully, Bureau of Reclamation, October 6, 2011 (“[T]he fish and wildlife mitigation plan for the Windy Gap Firing Project ... constitutes the official State of Colorado position with regard to mitigation of impacts from this project to these resources.”). Consequently, though Grand County may have an intense local interest in the temperatures of the Colorado River, these issues under the authority granted by the AASIA may well destroy the state's objective in achieving a balance between the development of water resources and the protection of wildlife. In enacting § 37-60-122.2, C.R.S., the General Assembly specifically intended to allow the state to regulate the impacts that water resources developments may have on state wildlife populations, and to allow local governments to modify the mitigation plan adopted as the “official state position” would frustrate the legislature's objectives.

Moreover, allowing Grand County to impose conditions that would conflict with or place more stringent mitigation requirements on the Subdistrict's FWMP would destroy the state's interest in articulating an official state position for this issue. Had the state contemplated the possibility that local governments could impose conditions on water resources development permits, the state would have no reason to articulate an official *state* position for the mitigation measures. If Grand County is permitted to impose conflicting or more stringent conditions on the permit, the state interest in balancing water resources development and wildlife conservation at the state level will be destroyed. *See City of Idaho Springs*, 192 P. 3d 490, 496 (citing *Bowen-Edwards*, 830 P. 2d at 1059). The

Subdistrict has included in its approved mitigation plan provisions requiring water quality and temperature monitoring; consequently, any conditions that Grand County seeks to impose on the Subdistrict's permit with regard to water quality and temperature will completely conflict with the state's statutory structure governing fish and wildlife mitigation plans for water development projects. *Bowen-Edwards*, 830 P.2d at 1059 (noting that state law can completely preempt local regulations "to the extent that [the local regulations] conflict with the achievement of the state interest").

II. Regulatory Impairment of Property Rights Act

A. Conditions Imposed by Grand County Requiring the Power to Release Water are Invalid

An additional condition that the Grand County may impose on the approval of the Subdistrict's 1041 permit concerns the County's power to release water in response to fluctuations of water quality or temperature in the Colorado River that are unrelated to the WGFP or a requirement to provide for public access for fishing on Northern Colorado water Conservancy District property on Willow Creek. A condition requiring the Subdistrict to allow the County to release WGFP water into the Colorado River or provide public access on the lands of the other District for impacts unrelated to the Project will constitute a violation of the Colorado Regulatory Impairment of Property Rights Act, § 29-20-201 *et seq.*, C.R.S.

1. Regulatory Impairment of Property Rights Act

The Regulatory Impairment of Property Rights Act (RIPRA) is a codification of constitutionally based standards established by the United States Supreme Court and routinely applied to promote the fair adjudication of land use disputes. *See* § 29-20-201, C.R.S. The Act prohibits local governments, when conditionally granting land use approvals, from requiring property owners to dedicate real property to the public "unless there is an essential nexus between the dedication ... and a legitimate local government interest, and the dedication ... is roughly proportional both in nature and extent to the impact of the proposed use or development of such property." § 29-20-203(1), C.R.S. Moreover, local governments are further prohibited from conditioning land use approvals unless the condition is based upon "duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rationally consistent manner." § 29-20-203(2), C.R.S.

Before the Act will apply in a given situation, the local government action must 1) impose conditions onto the granting of a land use approval and 2) require property owners to dedicate real property to the public. *See* § 29-20-203(1), C.R.S.; *see also Wolf Ranch, LLC v. City of Colorado Springs*, 207 P. 3d 875, 878-79 (Colo. Ct. App. 2008). If these two prerequisites are satisfied, the local government bears the burden of justifying its action based upon substantial evidence that the dedication of real property is "roughly

proportional to the impact of the proposed use of the subject property” and that the dedication bears an essential nexus to a legitimate government interest. § 29-20-204(2), C.R.S. No loss of public fishing access is documented in the record of impacts from WGFP so no commandeering of Northern Water property is allowed as a 1041 permit condition by RIPRA.

2. Conditions Imposed onto Grand County’s Approval of The Subdistrict’s 1041 Permit Constitutes “Conditions Imposed onto the Granting of a Land Use Approval”

The AASIA (House Bill 1041) has been recognized by Colorado courts as a “comprehensive land use law” authorizing counties to engage in a specific manner of land use planning by regulating land use developments involving activities of statewide interest. *Bd. of County Comm’rs v. Gartrell Inv. Co., LLC*, 33 P.3d 1244, 1247 (Colo. Ct. App. 2001). Because the AASIA has been historically considered a comprehensive land use law and because Grand County regulates municipal water projects pursuant to the AASIA, Grand County’s approval of the Subdistrict’s permit application would constitute a land use approval. As such, any conditions imposed onto Grand County’s approval of the Subdistrict’s permit would constitute conditions imposed onto the granting of a land use approval and would, thus, fall within the scope of RIPRA. See § 29-20-203(1), C.R.S.

3. Perfected Water Rights Constitute Real Property

Colorado courts have determined that “[n]ot every condition on land use triggers the Act;” however, any condition requiring the dedication of real property to the public is sufficient to trigger the application of RIPRA. *Wolf Ranch*, 207 P. 3d at 879. Northern water property along Willow Creek falls squarely into this category. The Colorado Supreme Court has noted that, “[w]hen perfected, water rights exist as real property in Colorado under its constitution and laws.” *Dallas Creek Water Co. v. Huey*, 933 P. 2d 27, 37, n.8 (Colo. 1997). Because water rights constitute real property under Colorado law, RIPRA applies to conditions imposed by Grand County mandating the Subdistrict allow the County to release water belonging to the participants in the WGFP. See *id.*

4. The Power to Require Public Access to Land of Northern Water and the Power to Release WGFP Water Bears No Essential Nexus to a Legitimate Local Government Interest

A condition imposed by a local government onto a development approval bears no essential nexus to a legitimate government interest where “the condition ... utterly fails to further the end advanced as the justification for the prohibition.” *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). Some of the certificate’s conditions of approval of the Subdistrict’s 1041 permit rest on the County’s ability to release WGFP water to remedy water quality, fish flows, or temperature fluctuations are to address current conditions. The environmental impacts of concern to Grand County result not from

WGFP but from other water development projects that are currently ongoing. Though Grand County may have an interest in maintaining the environmental quality of its waters, these proposed conditions fails to further the County's goal of promoting water quality since the impacts about which the County is concerned are unrelated to the impacts caused by WGFP. Similarly, a wholesale importation of the County Master Plan desire to promote recreation into the 1041 permit conditions by the requirement to provide access for fishing on Northern Water's property is unrelated to the impact of WGF and in violation of RIPRA. Even in situations involving a legitimate government purpose, a condition entirely unrelated to this purpose is inadequate to justify the imposition of the condition on the permit's approval. *Id.*

5. The Power to Release WGFP Water and to provide Fishing Access for Recreation on the Lands of Another Water District is not a Condition Roughly Proportional to the Impacts Caused by the WGFP

In addition to demonstrating that a condition imposed on a development permit bears an essential nexus to a local government interest, the government must also show that the condition "is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). In other words, the condition must be roughly proportional to the impacts caused by the development. These impacts are the existing condition and more directly linked to prior water development projects than to WGFP. Furthermore, requiring the Subdistrict to allow the County to release WGFP water interferes with the participant's ability to control the uses to which their water is put and, accordingly, this condition interferes with the Subdistrict's property interest in its water rights and land interests of Northern Water.

B. The Regulatory Impairment of Property Rights Act is Applicable to Public Entities

RIPRA does not specifically regulate actions against "private landowners," but the Act does focus its attention on "private property." Northern Water, as a water conservancy district, is authorized "to take by appropriation, grant, purchase, bequest, devise, or lease, and to hold and enjoy ... water rights, and sources of water supply, and any and all real and personal property of any kind within or without the district necessary or convenient to the full exercise of its powers." § 37-45-118, C.R.S. Water Conservancy districts are authorized to own water rights and real and personal property and water rights are construed as private property under Colorado law. *Dallas Creek Water Co. v. Huey*, 933 P. 2d 27, 37, n.8 (Colo. 1997) ("[w]hen perfected, water rights exist as real property in Colorado under its constitution and laws."). The language of the Act does not specifically preclude its applicability to government-owned property as long as the property in question is "private property." Several cases that categorize vested water rights as private property: *Gardner v. State*, 614 P.2d 357, 360 (Colo. 1980) ("A water right is a legal right to use water; often, it is characterized as a property right."); *Sherwood Irr. Co. v. Vandewark*, 138 Colo. 261, 263-64,

331 P.2d 810, 812 (1958) (“That water is a valuable property right, subject to sale and conveyance, is recognized in Colorado.”). *Armstrong v. Larimer County Ditch Co.*, 1 Colo. App. 49, 27 P. 235 (1891) (“The right to the use of water secured by legal appropriation is property, and a proper construction of the various provisions of the constitution on the subject harmonizes that instrument with the declaration of the Bill of Rights, ‘that private property shall not be taken or damaged for public or private use without just compensation.’”).

III. Scope of Conditions that Grand County May Place on the Subdistrict’s 1041 Permit for the Windy Gap Firing Project

A. Conditions Placed on Permits

Generally, the county may only deny an applicant’s permit to conduct an activity of state interest if the county cannot impose conditions that are sufficient to bring the application into compliance with the county’s regulations. Grand County’s AASIA regulations indicated that all permits for the efficient use of municipal and industrial water projects shall be approved if the applicant meets certain enumerated criteria. *See* Grand County Activity of State Interest Regulations § 5-306(1), at 41.

The criteria outlined in Grand County’s regulations require that the applicant comply with state, regional, and county planning policies, emphasize the efficient use of water through recycling and reuse to the extent permissible, ensure that the project will not contaminate surface water resources, provide water pursuant to the standards articulated by the stated Department of Health, maintain and not decrease the quality of the peripheral and downstream surface and subsurface water resources in compliance with state water quality standards, ensure that the project will not significantly deteriorate wildlife habitats, recreational areas, and areas of particular geologic, historic, or archeological importance. *Id.*

Because the county can only deny the applicant’s permit for failure to satisfy the criteria outlined in the county’s regulations, any conditions placed on the permit’s approval must concern compliance with the above-stated criteria. Consequently, Grand County cannot impose any conditions on the approval of the Subdistrict’s WGFP permit that do not relate to the Subdistrict’s compliance with the county’s regulations. For instance, considering the phrasing of the county’s regulations, the approval of the permit is contingent on the project not decreasing the quality of peripheral or downstream surface or subsurface water; accordingly, Grand County cannot condition the approval of WGFP’s permit on improving the quality of the water in Grand Lake that has, in the past, been negatively impacted by previous water projects. Similarly, it cannot require action that the Subdistrict does not have the ability to perform such as requiring the Bureau of Reclamation or other entity to take a certain action.

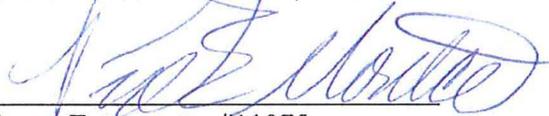
Mr. Jack DiCola
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IV. Conclusion

A 1041 Permit is not a vehicle to be used to resolve issues with parties who are not applicants for a permit, nor concerns due to conditions which pre-exist WGFP. Many of the Permit conditions unfortunately seem designed to address those concerns. The Applicant respectfully submits that other agreements and processes underway are more fitting for those purposes.

DATED: July 31, 2012

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August 1, 2012

Jack DiCola, Esq.
Grand County Attorney
308 Byers Ave.
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Re: Conditions on 1041 permit dated August 1 and 2, 2012

Dear Jack,

Some time ago, I agreed to provide you with a response to each condition in the 1041 staff recommended permit. In addition, I request an additional overall provision having reviewed and discussed these conditions with the Subdistrict staff. The conditions are numerous, subject to differing interpretations in many instances and important to both our clients and for these reasons, I suggest adding an overall provision that provides Grand County will give notice to the Subdistrict if the staff believe a violation may occur or is occurring and provide a right to cure within a stated time. The Subdistrict has every intention to adhere to its agreements should we reach closure on a permit the Subdistrict can accept, however, even in that instance it will be to our clients mutual benefit to have a procedure in place that allows discussion and action for a cure to a condition rather than embark on formal and expensive hearing processes if a violation of a condition is suspected or likely. If you would like me to propose language for such a condition I am willing to do so. The conditions I refer to begin on page 44 of the Certificate.

Conditions which are acceptable as written: 1, 2, 11, 17, 18, 21, 23 and 26. 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 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.

Conditions which are acceptable with specific modification to the language:

Condition 4-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.

Mr. Jack DiCola
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Condition 6- 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- 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- 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- 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- 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 12- 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 15 - 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".

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Condition 16- Please add "Water Conservation Act" rather than "conservation requirements". Also change shares to units.

Condition 19- Please see response to Condition 7 above.

Condition 20- The first sentence is acceptable. The second sentence should be stricken.

Condition 22- 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."

Condition 24- 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- The temperature monitoring program will be accessible to Grand County and if there is an exceedance Grand County can be notified through the alarm system that will send out notices as preprogrammed. In this way Grand County will get a direct notice without it being relayed through the applicant. The model to be used for a determination of a causal relationship shall be as determined by Colorado Parks and Wildlife. The correction to the first sentence of the word "between" should be corrected to use the word "with".

Condition 27- 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 29- 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.

Condition 30 – Because we believe the provided language is unclear, we provide the following suggestion: "If, during a five (5) year period, natural conditions meet or exceed 600 cfs flushing

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flows 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 bypasses to achieve the required flows, and in the same five (5) year period the flow at the gage below Windy Gap Dam does not exceed 1,200 cfs, the Subdistrict in the sixth year will supplement the natural flows, subject to availability of Windy Gap Project Water in storage and outlet capacity of Granby Reservoir, to provide a flow of 1,200 cfs for a period of 72 hours at the gage below Windy Gap Dam. This condition is contingent upon modifications to the Amendatory Carriage Contract that reduce losses charged for storage of Windy Gap Water on the West Slope to less than the current ten (10) percent.”

Condition 32- 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 Northern Water Agreement is signed by Northern Water”.

Unacceptable conditions with a rationale for each:

Condition 13 - 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 - 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 NWCOG letter. The place within the several processes ongoing to address this issue and look for real solutions is the Learning By Doing effort.

Condition 28 - 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 31 - 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.

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Condition 33 - 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.

Sincerely,



Peggy E. Montano
Trout, Raley, Montano,
Witwer & Freeman, P.C.

cc: Eric Wilkinson, NCWCD
Jeff Drager, NCWCD