

**TROUT UNLIMITED'S CLOSING STATEMENT**  
**1041 Permit Application**  
**Windy Gap Firing Project**  
**August 23, 2012**

**Summary**

The question before the Board of County Commissioners (BoCC) is whether to issue a 1041 permit for the Windy Gap Firing Project (WGFP) and if a permit is to be issued, under what terms and conditions. Under Grand County's 1041 regulations, to issue a permit, the BoCC has to find, among other things, that WGFP will not degrade water quality or significantly deteriorate aquatic habitat. *Grand County's 1041 regulations, §5-306(d), (f) and (g).*

The evidence in the record, as summarized during the hearing, shows that the Colorado River downstream of Windy Gap reservoir is in a state of decline; that the primary cause of that decline is the combined effect of periodic releases of large amounts of silt from the reservoir and a lack of sufficient peak flows to flush the silt downstream; and that, by increasing pumping and further reducing peak flows, WGFP has the potential to make existing aquatic habitat conditions in the Colorado River worse. The evidence also shows that, unless properly mitigated, WGFP is expected to cause or contribute to an increase in stream temperature standard violations in the Colorado River downstream of the reservoir. The Subdistrict presented no argument or evidence disputing these findings.

Mitigation and enhancement measures offered by the Subdistrict do not address the primary impacts of WGFP – increased reservoir pumping and further reduction of peak flows resulting in further deterioration of the aquatic habitat downstream of the reservoir.

Grand County's staff has recommended permit conditions that, if adopted by the BoCC with some modification, could be effective in preventing further deterioration while still enabling the Subdistrict to improve their yield. These conditions include a requirement to build a Windy Gap reservoir bypass or by-through; adequate flushing flow requirements; and pumping restrictions when stream temperatures near state standards. The specific staff recommendations and proposed modifications are discussed in more detailed below.

Trout Unlimited urges the BoCC to adopt staff's recommendations, as modified, as conditions of its 1041 permit or else deny the permit. We believe that approval of WGFP can result in improvement of river conditions, but only if both enhancements and the proposed permit conditions are implemented. If WGFP is approved without the proposed permit conditions, the primary problems affecting the Colorado River below the reservoir will get worse. Conversely, if the permit is denied, other legal means to address existing impacts are available, including Senate Document 80.

## Legal Standard

The county's 1041 regulations provide the legal standard by which the BoCC is to make a decision regarding the WGFP 1041 permit. The Subdistrict has submitted a letter arguing that the BoCC is pre-empted by state and federal law from imposing permit conditions protective of the Colorado River and Grand Lake. *GC Exhibit 55*. Grand County's environmental counsel, Barbara Green, is one of the State's authorities in pre-emption law and we defer to her expertise in responding to the Subdistrict's preemption arguments.

We do wish to register our concern, however, at the Subdistrict's argument that the state's fish and wildlife mitigation statute preempts the BoCC's decision on adequate mitigation. The statute requires the state to make *recommendations* on appropriate mitigation after the state's water development goals and needs have been considered. *C.R.S. §37-60-122.2(1)*. Such recommendations have no regulatory force or effect and, therefore, cannot preempt BoCC action. This is why the mitigation statute provides for no public process leading to the state decision or accountability for that decision through judicial review. *C.R.S. §37-60-122.2(3)*; *see also GC Exhibit 51*. To suggest that such statute should be used to preempt BoCC decisions is not only unfounded, it suggests a troubling misuse of the mitigation statute.

## Evidence in the Record

The record includes thousands of pages of discussion of potential WGFP impacts – most of them a part of the Final EIS for the project and related reports. Volume, however, does not equate to adequacy. For all of its pages of analysis, the Final EIS fails to look at the impacts of WGFP on the most affected reach of the Colorado River – the 8 or so miles of the river beginning immediately below Windy Gap reservoir. *TR Aug1 P238-240*; *TU Exhibits L and M (EPA's Final EIS comments)*; *UCRA Exhibit E (TU's letter to BOR re Final EIS)*.

The only comprehensive analysis available for this reach of the Colorado River is provided by an in-depth, multi-year study conducted by Barry Nehring, a Colorado Parks and Wildlife (CDPW) biologist, and approved by CDPW. *GC Exhibit 49 (Nehring Report 2011)*. As summarized by testimony provided by Mr. Fifer and Mr. Espegren at the hearing, the Nehring report documents significant declines in aquatic life species in the reach of the Colorado River downstream of the reservoir since the original Windy Gap project came on line. *GC Exhibit 49 at pp. 13-21*; *TR Aug2 PP62-3; 66-7*; *TR Aug2 PP234*. Some of these species are key indicators of aquatic health, their disappearance a warning that there is something wrong with the aquatic habitat. *See Espegren Testimony, TR Aug2 PP235-8.*

The primary causes of decline are identified in the Nehring Report as follows:

It is our conclusion that chronic sedimentation and clogging of the interstitial spaces in the cobble-rubble dominated riffles areas of the upper Colorado River

below WGD is the overarching problem that has increasingly compromised the biotic integrity and proper function of the river over the past 25 years. The proposed firming projects at Windy Gap and the Moffat Tunnel are only going to further exacerbate this situation.

*GC Exhibit 49 at p. 31; see also testimony of Mr. Fifer, TR Aug2 PP73-78; testimony of Mr. Espegren TR Aug2 PP232-4.*

As further explained in testimony provided by Mr. Fifer and Mr. Espegren, the problem is caused by the fact that Windy Gap is a shallow reservoir that traps sediment that would otherwise be available for spawning and macroinvertebrate habitat and releases it in large quantities whenever the reservoir is being maintained or during other events. The original Windy Gap substantially reduces the peak flows available to the river to move the larger volumes sediment, cobbles and rock. This has created a “perfect storm” where over time, these materials have become embedded or “armored,” substantially reducing the habitat available for macroinvertebrates and fish. *TR Aug2 PP80-82; TR Aug2 PP232-4; see also GC Exhibit 49 at pp. 80-82.*

The evidence also shows that, by further reducing peak flows, the combination of WGFP and Denver Water’s proposed Moffat Project will make existing degraded conditions worse. *GC Exhibit 49 at pp. 31 and 80.*

The Subdistrict did not dispute these findings at the hearing and the findings are undisputed in the record.

### **Permit Conditions**

Staff has recommended a number of permit conditions which, if adopted by the BoCC with a few modifications, may address the most significant identified impacts of WGFP, as described above. It is Trout Unlimited’s position that these conditions must be adopted as part of the 1041 permit or the permit denied.

#### Windy Gap Bypass (Condition 28)

It is clear from the record that a bypass around or similar modification of Windy Gap reservoir is essential if further deterioration of aquatic habitat conditions below the reservoir due to WGFP is to be prevented. The bypass is recommended by the Nehring Report, by EPA and by TU and UCRA’s experts. The construction of the bypass or similar modification, as opposed to the simple study of it, must be required in the permit.

Trout Unlimited supports staff’s recommended Condition 28 which states:

“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, the Subdistrict shall insure that construction of the bypass/by-through shall begin no later than commencement of construction of

Chimney Hollow Reservoir. The bypass/by-through study shall include measures to replace spawning gravel below Windy Gap.”

However, we prefer the language proposed by UCRA, which states:

“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.”

The reason for our preference is that UCRA’s language more specifically defines the benefits to be achieved by a bypass or similar modification and avoids later, needless disputes over what constitutes a “benefit” to the Colorado River. The benefits described are consistent with the Bypass Scope of Work recently negotiated with the Subdistrict.

Trout Unlimited opposes language proposed by the Subdistrict as such language offers no assurance that the bypass will ever be built. We do not object to delay in construction until such time as WGFP is built.

#### Flushing Flows (Condition 29)

The magnitude and duration of flushing flows needed to support a healthy aquatic life and habitat downstream of the Colorado River was subject to much debate during the hearing. Expert testimony, including testimony provided by Grand County’s own expert, shows that 600 cfs is insufficient. It is undisputed that (1) adequate flushing flows are indeed needed to support a healthy aquatic habitat, and (2) the magnitude and duration of needed flushing flows will change once the source of silt is removed (i.e, through the construction and operation of the bypass) and stream work, including stream de-armoring, is concluded.

With this in mind, Trout Unlimited supports staff’s recommended Condition 29, with the noted modifications, as an interim condition applicable until such time as information regarding needed

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 ~~the~~ ate-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.~~

As Mr. Espgren testified during the hearing and reflected in Grand County’s Stream Flow Management Plan, these flows are available under current conditions, even with

operation of the original Windy Gap project. Accordingly, they represent the status quo. Until such time as sufficient information is developed to accurately ascertain flushing flow needs, the status quo should be maintained.

Trout Unlimited further proposes the adoption of the following language, proposed by UCRA, as an added condition:

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.

Since flushing flow needs are expected to be reduced by the bypass and stream improvements, this provision ensures that the Subdistrict will not be subject to conditions that are more restrictive than needed to maintain aquatic habitat.

#### Stream Temperature (Condition 24)

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.

We believe the condition is consistent with the county's 1041 regulations which require a showing that the proposed water project will not decrease the quality of surface waters below state water quality standards. §5-306(f). The added sentence is proposed in recognition of the difficulty in ascertaining when pumping is occurring under WGFP as opposed to the original Windy Gap project and the fact that, as the operator, the Subdistrict is in the best position to develop said information.

#### Conclusion

The BoCC is faced with a historic decision that will have consequences for generations to come. By issuing a 1041 permit with the proposed conditions, the BoCC will give the Colorado River and its valuable fisheries the best chance to thrive.