Porzak Browning & Bushong LLP

Attorneys • at • Law

Please direct all correspondence to the Boulder office

Glenn E. Porzak
Michael F. Browning
Steven J. Bushong
Kristin Howse Moseley
Kevin J. Kinnear
Thomas W. Korver*

Karen L. Henderson
William D. Wombacher
**Also Admitted in Wyoming*

Boulder Office:
929 Pearl Street, Suite 300
Boulder, CO 80302
303 443-6800 Tel.
303 443-6864 Fax.

Vail Office:
953 S. Frontage Road W.
Suite 202
Vail, CO 81657

August 23, 2012

Board of County Commissioners, Grand County
c/o Lurline Underbrink-Curran
308 Byers Avenue
Hot Sulphur Springs, CO

Re: Windy Gap Firming Project – 1041 Application of the Municipal Subdistrict, Northern Colorado Water Conservancy District

Dear Commissioners,

The following represents the written closing comments of the Upper Colorado River Alliance (UCRA) regarding the Windy Gap Firming Project (WGFP) 1041 Permit Application. UCRA represents a large number of landowners and ranches on the upper Colorado River. We appreciate this opportunity to summarize our concerns and our recommendations.

I. SUMMARY OF POSITION. A decision on the 1041 Application needs to take into account the well-documented dramatic decline in aquatic health of the Colorado River since the original Windy Gap project was developed. That issue has largely been ignored by the Subdistrict. The primary reason the River is so imperiled is chronic sedimentation resulting from Windy Gap Reservoir operations coupled with the lack of flushing flow. It is important to note that in spite of all the prior trans-basin diversion projects (*see* Hydrograph attached to UCRA Exhibit Q), it was only after the much smaller Windy Gap project was built that the health of the river went into a tailspin. This shows not only that the predicted impacts of the original Windy Gap project were completely misunderstood, but that the River has reached a tipping point. The Subdistrict is now proposing to expand operations of Windy Gap Reservoir to more than double its diversions and further diminish the remaining flushing flows.

To comply with the 1041 Regulations the County must ensure sufficient mitigation to prevent further environmental degradation. Given the current River conditions there is no room for error. The County's Certificate of Recommendation does an excellent job of identifying conditions needed to help comply with 1041. In addition to various other critical provisions in the Certificate which UCRA supports, the following requirements are imperative in order to protect the health of the upper Colorado River from WGFP: (A) a well designed bypass to take the negative effects of Windy Gap Reservoir off-channel; (B) adequate flushing flows; and (C) curtailment of diversions that cause or contribute to temperature standard exceedances. All three of these requirements are included in the Certificate of Recommendation. UCRA supports the

Certificate of Recommendation, with some strengthening of the above three conditions as described below. This is the County's last best chance to protect this valuable resource.

II. ANALYSIS OF COLORADO RIVER ISSUES. Since UCRA's concerns are focused on the health of the upper Colorado River, the following analysis addresses just those issues.

A. The Upper Colorado River below Windy Gap Reservoir Is Dying.

The health of the upper Colorado River has declined dramatically since the Windy Gap Project was built. In roughly 35 years, aquatic insect diversity decreased 38% on the 29-mile reach of the Colorado River from just below Windy Gap to the confluence with the Blue River. Critical species including stoneflies, mayflies, and caddisfies declined by 40 to 60% in this reach while certain species, especially large mayfly and stoneflies that were once prevalent, are now rare or totally absent in this reach. This data is contained in the report issued by the Colorado Division of Wildlife dated June, 2011, entitled "Colorado River Aquatic Resources Investigation, Federal Aid Project F-237R-18," UCRA Exhibit B ("2011 CDOW Report"). The 2011 CDOW Report quantifies the impacts on the aquatic invertebrate community by comparing samples that were taken to establish the baseline aquatic health in the early 1980s before Windy Gap Dam, to samples taken in 2010 at the same locations.

Fish species have likewise been severely impacted. The native Mottled Sculpin, still commonly found upstream of Windy Gap Reservoir and on tributaries of the Upper Colorado River, has been eliminated downstream of Windy Gap. As reported in the 2011 CDOW Report, only a single Sculpin specimen was collected in the 29-mile reach of the Colorado River mainstem from below Windy Gap to the confluence with the Blue River. For comparison purposes, the average density of Sculpin on the Fraser River mainstem upstream of Windy Gap was 2,673/hectare.

It is also well documented that the once renowned Colorado River Rainbow Trout population was decimated in this 29-mile reach after Windy Gap. Even the Brown Trout, which initially benefited from the loss of the Rainbow Trout, have experienced declining numbers and size. In a December 29, 2008 letter from the Director of the Colorado Division of Wildlife to the Bureau of Reclamation, UCRA Exhibit L ("2008 CDOW Letter"), it is reported that in 1981 before Windy Gap, the Kemp-Breeze State Wildlife area included 89 trout per acre longer than 14 inches, while in 2007, the same reach had dropped to 21 trout per acre longer than 14 inches. That is an over 400% decline in quality fish since the Windy Gap project at a location many miles downstream of the hardest hit areas below Windy Gap dam. In a recent release, CDOW reports that total Brown Trout biomass at the Parshall Hole (further downstream and below the confluence with the Williams Fork), has decreased since even 2007, going from 264 pounds per acre to 131 pounds per acre. UCRA Exhibit P.

Concerns over the declining health of the upper Colorado River have been expressed by many entities, including Trout Unlimited, United States Environmental Protection Agency (USEPA) and Grand County. *See* UCRA Exhibits E, F, G and O. Individuals that have lived or worked on the River for decades provided eye witness accounts of what the scientists have documented. Bud Isaacs, manager of Chimney Rock Ranch on about 4 miles of the Colorado

River, testified to how Windy Gap led to the demise of the rainbow trout and the loss of large stonefly and mayfly species on his ranch, all of which still exist upstream. In fact, Mr. Isaacs' ranch was once used for collecting Colorado River Rainbow Trout eggs for stocking waters all over the State of Colorado before the rainbow trout died off. Rob Firth of Trout Unlimited and formerly with the Division of Wildlife testified to the loss of stonefly nymphs on the Colorado River below Windy Gap and a corresponding decline in overall body condition of the remaining fish, especially when compared to the Colorado River downstream of the Blue River where stoneflies and sculpin still exist. (8/2/12 Tr., pp. 281-281).

In conclusion, the aquatic life of the upper Colorado River is in a perilous state of decline that started after the original Windy Gap project was built. Any decision on necessary mitigation for WGFP must take into account these documented impacts in order to ensure that WGFP does not result in the demise of the River.

B. <u>Sedimentation Coupled with a Lack of Flushing is a Principal Cause of the Declining Health of the Upper Colorado River</u>.

The causes of the declining health of the upper Colorado River are also well documented. As testified to by Scott Fifer of Resource Engineering, chronic sedimentation is the primary culprit. Silt and sediment fills in and cements the interstitial spaces between the cobbles, resulting in an armoring of the stream channel over time. This robs many aquatic species of the habitat needed to survive. Additional contributing factors include the proliferation of rooted vegetative mats and algae that further smothers interstitial spaces. Stream temperatures that reach or exceed the aquatic health standards and elevated nutrient levels have also been cited as contributing factors. All of these problems were testified to by Scott Fifer and others at the hearing, were discussed by all the Planning Commission members at the Planning Commission hearing, and are well documented in the exhibits and sources cited above. The 2011 CDOW Report discusses and prioritizes all of these concerns at pp. 79-85, but concludes as follows:

> It is our conclusion that chronic sedimentation and clogging of the interstitial spaces in the cobble-rubble dominated riffle 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.

2011 CDOW Report, p. 31.

The sedimentation problem is directly tied to operation of Windy Gap Reservoir itself combined with the lack of adequate flushing flows. The effect of Windy Gap Reservoir is evident by the fact that stream channel armoring occurs downstream of Windy Gap, but not upstream. Although the Frasier River has health concerns from lack of flow, it has not experienced the stream channel armoring problem and consequently still has the aquatic insect and fish species that were lost downstream of Windy Gap. This provides strong scientific evidence that Windy Gap Reservoir itself is a large part of the problem that must be addressed. (*See* 8/2/12 Tr., p.85).

There is a very logical explanation for Windy Gap's negative effects. As explained by Scott Fifer, when stream flows enter Windy Gap Reservoir the sediment settles out as in most reservoirs. However, Windy Gap is exceedingly shallow, so that any disturbance (such as maintenance activities, rain storms or even wave action) can potentially re-suspend the silt and sediments causing a discharge of that material at lower flow when stream energy is insufficient to transport the material downstream, so the sediment is deposited on the stream bed. (8/2/12 Tr., pp. 77-80). To put this in perspective, Windy Gap Reservoir is a 112 acre reservoir that was made absolute for just 445 acre-feet, meaning the average depth of the Reservoir is about 4 feet when full. Since the Reservoir is obviously much deeper around the pumps, most of the Reservoir will be substantially less than 4 feet deep. (8/2/12 Tr. P.77). Further, the Municipal Subdistrict testified on cross examination at the hearing that it uses the storage in Windy Gap by repeatedly drawing down the Reservoir 2 – 3 feet and refilling, (8/1/12 Tr., pp. 285-286), meaning the water level gets drawn down close to the source of silt. Under those circumstances, it is not surprising at all that sediments and discolored water are discharged from the Reservoir at low flows as described in the 2011 CDOW Report, p.81, and as observed by Bud Isaacs and others (Tr. 8/2/12, pp. 91-92, 233-234).

The sedimentation problem is compounded by the loss of flushing flows. As testified to at the hearing, the peak spring runoff is typically inadequate to move the cobbles, which could otherwise break up the sediments and help clean the river. "It is evident that there has been a very large decline in the occurrence, amplitude and duration of *true* flushing flows since diversions of water at WGD began to occur in the mid to late 1980's." 2011 CDOW Report, p. 23. The loss of flushing flows also contributes to the build-up of the observed vegetative mats. The channel armoring problem has become so persistent that even when there was a sustained flushing flow of 5,000 cfs as occurred in 2011, Peggy Bailey of Tetra Tech testified that it was insufficient to break up the pre-existing armoring of the stream channel below Windy Gap in Segment CR4. (8/1/12 Tr., pp. 158-159).

C. <u>The Windy Gap Firming Project will Exacerbate the Existing Problems</u>.

Additional depletions will only make matters worse. WGFP will allow for additional depletions of 15,000 - 20,000 acre-feet as described below. The Denver Moffat Project expansion will add another 10,000 acre-feet of depletions. Combined, that will remove 20% of what is left of the average total flows in the upper Colorado River, with much of that occurring during a 60-75 day period during the spring flush so that some critical months may experience a 35% reduction in flushing flows. (8/2/12 Tr., pp. 98-100, 103). These new diversions will further deplete the already inadequate flushing flows, allowing an even greater accumulation of sediments and vegetative growth in the channels and further deteriorating the habitat for aquatic life. (*See generally,* Testimony of Scott Fifer and Greg Espegren).

The same conclusion was reached in the 2011 CDOW Report, pp. 31, 79, which states that the "proposed firming projects at Windy Gap and the Moffat Tunnel are only going to further exacerbate this situation." The USEPA goes into further detail in explaining how "important peak flow events will occur in 44-54% fewer years" with WGFP in place and questions whether it is possible for projected peak flows after WGFP to carry out the normal

functions needed to maintain a healthy river. UCRA Exhibit G, pp 9-10. Similar concerns were also identified by Trout Unlimited. (*See* UCRA Exhibit E; 8/2/12 Tr., pp. 238-240).

The Subdistrict downplays the impact of WGFP, claiming it will result in diversions of 9,000 acre-feet or less a year. However, the Subdistrict is comparing future diversions at Windy Gap under WGFP (estimated at 30,000 acre-feet) to a theoretical future condition called the "no action" alternative in the EIS, where other measures (including a different reservoir project with its own permitting requirements) are employed to increase Windy Gap diversions without WGFP. UCRA, Trout Unlimited, USEPA and even Grand County have been critical of this approach because it is misleading. The impact to the Colorado River is the increase in depletions, regardless of whether all of it is WGFP as proposed, or whether some of it could have been accomplished by other means. The existing depletions caused by Windy Gap are reflected by average diversions of approximately 11,000 acre-feet a year, which increased in more recent years to an average of 14,685 acre-feet a year. Thus, the impaired baseline of aquatic health described above is the result of 11,000 – 14,685 acre-feet of Windy Gap diversions. An increase to 30,000 acre-feet a year under WGFP, means more than a 2-fold increase in diversions beyond what already caused the drastic decline in the health of the Colorado River. (*See* 8/2/12 Tr., pp. 98-116 for testimony on these issues)

The EIS has come under attack on several fronts. *See, e.g.,* UCRA Exhibits C, D, E, F, G and H. Although this is not the forum to address those issues, the Subdistrict's reliance upon the EIS makes it imperative to note a few of the problems. For example, by modeling flows rather than using gage data, the EIS overstates the average available flushing flows by 300 cfs. (*See* UCRA Exhibits C and D, explaining that the model assumes maximum pumping even when a spill will occur, meaning the flushing flow is exaggerated by the addition of spilled water from Lake Granby). The result is that the model lessens the apparent impact that WGFP has on flushing flows by 53%. (*Id.*). Other problems have been identified by USEPA, TU and UCRA in the aforementioned exhibits, including discounting the effect of WGFP by another 71% by using the no action alternative discussed above. Even with all those concerns, the EIS still identifies a significant reduction in flushing flow, impacts on trout habitat and other concerns that will exacerbate the existing problems.

D. <u>A Bypass and Adequate Flushing Flows Are Critical to Any Mitigation of WGFP Impacts on the Upper Colorado River</u>.

The principal mitigation necessary to protect the Colorado River from WGFP is two-fold: a bypass around Windy Gap and adequate flushing flows. The importance of having <u>both</u> measures was testified to by Mr. Fifer and Mr. Espegren, and is described in the 2011 CDOW Report, and described by USEPA (UCRA Exhibit G, pp. 11, 15). As stated in the 2011 CDOW Report, p.79, "[e]ither one without the other will have virtually no chance of succeeding." Each measure is briefly discussed below.

First and foremost, a properly designed bypass around Windy Gap Reservoir is critical to take the negative effects of that impoundment off the river channel. This will address the chronic source of sedimentation at low flows as discussed in detail above. Further, as discussed in the 2011 CDOW Report, pp. 79-85, and by the USEPA (UCRA Exhibit G, pp. 11, 15), a

bypass will also help alleviate temperature concerns, rooted aquatic vegetation, whirling disease, and other deleterious effects associated with the shallow impoundment, while also reconnecting the Colorado River for aquatic life. Testimony of Peggy Bailey, Scott Fifer and Greg Espegren also suggests a bypass may allow spawning gravels to move downstream and help restore portions of the River that do not have such gravels anymore. As noted at the hearing, the need for a bypass was identified by every member of the Planning Commission as a critical shortcoming of the project. (8/1/12 Tr., p.172).

In fact, as Mr. Fifer testified at the hearing, there is no way to mitigate the impacts of WGFP without addressing the impacts of Windy Gap Reservoir itself. (8/2/12 Tr., pp. 118-119). There is simply not enough flushing flow remaining in the river to compensate for further reductions in those flows. (*See* Hydrograph included with UCRA Exhibit Q to illustrate this point). In fact, the available flushing flows since 1985 have equaled or exceeded 1,250 cfs 1 out of 2 years on average. (*See* Public Exhibit G prepared by Resource Engineering). Yet, that flow was clearly inadequate to prevent the stream channel armoring conditions from developing in the first place. Further reducing the available flushing flow will only make matters worse unless the discharge of sediments at low flows is stopped. As stated in 2011 CDOW Report, p. 81, "all the benefits of a true flushing flow are negated when accumulated sediments in a reservoir are mobilized, entrained and then flushed downstream during the low-flow period in late summer and fall." The result is that the "deposited sediments harden and require greater stream power for a longer duration to be mobilized and transported." *Id.* The truth of this conclusion became self evident in 2011 when, as Peggy Bailey testified, her research demonstrated that the extended flushing flow of 5,000 cfs was not adequate to break up the armored stream bottom below Windy Gap. (8/1/12 Tr., pp. 158-159; *see also,* 8/2/12 Tr., p.81). In short, only when combined with a bypass will a reasonable flushing flow condition have any chance of mitigating the impacts of WGFP.

Second, an adequate flushing flow of sufficient magnitude and duration given the width of the stream channel is critical for maintaining a healthy stream. The 2011 CDOW Report, p.81, references the need for a flushing flow of "substantially greater than 1,000 [cfs] for several weeks" stating that "[f]lows of lower magnitude and shorter duration will not result in the deep cleaning of the cobble-boulder substrates." USEPA similarly recommends "additional flushing flows of bankfull (1,245 cfs) and higher below WGD." (UCRA Exhibit G, p.11). Although flows in that range have not been adequate to prevent stream armoring problems from developing in the past, CDOW and EPA both recommend a bypass to address the source of sediments at low flow and mitigation to the stream channel itself (e.g. narrowing the stream channel and other improvements), which should collectively make flows in this range more effective. Until that work is completed, however, the necessary flushing flow to protect the River is difficult to ascertain.

The available flushing flow information in the record varies depending upon the size of the substrate being considered. The Final EIS relied principally upon a 1981 study used in the original Windy Gap EIS that calculated 450 cfs was needed to move fine grained particles, even though documented conditions on the River clearly show that was inadequate to prevent sedimentation. (*See* Resource Engineering analysis, p. 5, attached to UCRA Exhibit D). Using the U.S. Forest Service methodology, Resource Engineering calculated that a flushing flow of

3,334 cfs was needed to move the 3-5+ inch cobble. (*Id.*). The County's Stream Management Plan identified flushing flows of 600 to 850 cfs were needed to begin mobilizing spawning gravel, although Peggy Bailey testified that larger flows were needed to move bigger materials. (8/1/12 Tr., p. 158). The USEPA was critical of the EIS for focusing on fine sediments and states that flushing flows need to move larger cobble to maintain a healthy river. (UCRA Exhibit G, p.10). The EIS recognizes that 850 cfs or higher are needed to mobilize larger gravel, but USEPA states that even "flushing flows of 600 – 850 cfs are insufficient to maintain the channel and preserve ecological characteristics of the river." *Id.*

Based upon the available information, there is a real concern that the Municipal Subdistrict's proposal of a bypass flow of only 600 cfs for 50 hours one year out of three is insufficient even with a bypass and other stream channel improvements. Without a bypass, we know from River conditions over the past 35+ years that there is insufficient flushing flow to prevent the stream channel from becoming armored.

E. <u>Grand County Has the Legal Authority Under Its 1041 Regulations to Require Protective Conditions be Imposed</u>.

The Certificate of Recommendation provides a detailed explanation of the criteria the County must apply. This includes ensuring the project will "not significantly deteriorate aquatic habitats," providing for the "long-term protection of water resources and water quality" in Grand County, and required compliance with Senate Document 80 (as was required in the original 1041 permit for Windy Gap). One of the primary purposes set forth in Senate Document 80 is that the C-BT Project must be operated in a way "[t]o preserve the fishing and recreational facilities and the scenic attractions of Grand Lake, the Colorado River and Rocky Mountain National Park." Clearly, this provision has not been enforced and Windy Gap Reservoir, operating through the C-BT facilities, has been allowed to degrade – not preserve – the fishing in the Colorado River. Before allowing the Subdistrict to increase operation of Windy Gap Reservoir through the firming project, this issue needs to be addressed, and the best place to start is with a bypass

The Subdistrict asserts the County's 1041 regulations were preempted by the Colorado Wildlife Commission (WLC) process. UCRA strongly disagrees. The County has express statutory authority for its 1041 regulations. Moreover, the WLC process results in only a non-binding recommendation in the federal permitting process. Since the County's attorneys are responding to this legal issue, UCRA does not respond in detail. It should be noted, however, that one of the most prevalent concerns with the WLC process was the very weak interpretation of the authority the WLC has to impose environmental conditions. The result was a negotiated process leading to the mitigation and enhancement plans accepted by the WLC. While the mitigation and enhancement plans were included in the EIS and the Subdistrict has argued those plans should be sufficient for federal permitting, the Department of Interior has made it clear that it will be applying more stringent federal law (including Senate Document 80) in determining appropriate conditions.

F. The Certificate of Recommendation Addresses Most of the Colorado River Issues.

The Certificate of Recommendation (Certificate) provides a very good comprehensive set of conditions to help protect the Upper Colorado River from further deterioration. UCRA agrees that if finalized, the IGA will provide a benefit, especially with the opportunity to store and release water from Lake Granby to principally help with late season temperature issues (although there are questions on how much water will be reliably available on an annual basis). In addition, although entirely separate from WGFP, the ½ of the 10825 water (5412.5 acre-feet) to help C-BT achieve compliance with the biological opinion under the Endangered Species Act will also help provide supplemental flows, and the IGA's attempt to lock in that source even in the event that the endangered species are delisted is commendable. While these provisions will provide a benefit, they do not mitigate the impacts of WGFP. Mitigation requires adequate and enforceable bypass, flushing flow and temperature conditions which the Certification also addresses. Those conditions are discussed below.

1. Bypass Condition. UCRA supports the bypass condition proposed in the Certification (recommendation 29), as a critically necessary condition of any permit for the reasons discussed above, but with two changes. First, although a bypass study is important to properly design the bypass, the construction of the bypass should not be contingent on the findings of another study. The record is more than adequate to establish the need for a bypass and the Subdistrict has all but conceded that point. Second, UCRA believes it is important that in requiring the bypass, the condition should require that it be designed to address the identified sedimentation and stream channel armoring problems downstream. In other words, the bypass should be designed to solve the problem.

UCRA's concern on this latter issue is exemplified by the Subdistrict's recommended changes, which would only require the Subdistrict to "put forth its best effort to work with Grand County and other stakeholders to obtain funds to construct the bypass . . . ." That language is not a firm requirement to build a bypass for mitigation – it is an invitation to disagree over the funding needed to do it right. It should not be up to the Subdistrict to dictate to the County what it will spend on necessary mitigation. The Subdistrict has had ample time to determine the cost to build a bypass to correct the problems it created. The failure to do so should not weaken the required mitigation. UCRA recommends the bypass be mandatory for WGFP. Indeed, a bypass is also required to satisfy the original Windy Gap 1041 permit because that permit required compliance with Senate Document 80, and it is not clear how Senate Document 80 could ever be satisfied without taking the negative effects of Windy Gap off-channel.

Lastly, UCRA does not oppose the Subdistrict's desire to start construction of the bypass simultaneously with construction of Chimney Hollow Reservoir, subject to the other conditions in the Certificate.

> UCRA's Recommended Bypass Condition: 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.

2. Flushing Flow Condition. The flushing flow condition in the Certification (recommendation 30) is an improvement over the Subdistrict's proposal for the reasons set forth above, but UCRA proposes a few minor changes. First, as written, the recommendation suggests that 1,145 cfs for 72 hours is enough to move large cobble and de-armor the stream. That is not consistent with the record. Larger coble (3 – 5+ inches) requires over 3,300 cfs to move and 5,000 cfs for an extended period was not adequate to de-armor the stream, although it would undoubtedly have been adequate to clean the river bottom if not already armored. Second, UCRA agrees that 1,145 cfs or higher at least one year out of six is preferable to 600 cfs, although it is not clear that will be adequate. At a minimum, it should not be conditioned on whether any releases were required to achieve 600 cfs, as that could mean the higher flushing flow is never achieved. Lastly, given the lack of information on the necessary flushing flow once the bypass and other proposed river improvements are constructed, UCRA recommends that flushing flows be studied and monitored after such work is completed as part of Learning by Doing to best determine the preferred amplitude and duration of flushing flow to prevent harmful sedimentation from occurring and to maintain a healthy river.

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

3. Temperature Conditions. The temperature conditions in the Certificate (conditions 23-25) represent an improvement over the Subdistrict's proposal. UCRA suggests revising conditions 24 and 25 to be clear that WGFP shall not cause or contribute to exceedances of any temperature standards in the Colorado River below Windy Gap, and that the same is true for the original Windy Gap project under the terms of the County's prior 1041 permit. (*See* UCRA Exhibit K). UCRA is concerned with how the County would distinguish between WGFP and original Windy Gap project diversions for purposes of complying with water quality standards, and referencing compliance with the earlier 1041 permit is one way to address that concern. While a similar result is reached by requiring compliance with the 208 Plan outlined by NWCCOG as recommended in condition 14 of the Certification, UCRA understands that Staff may recommend weakening condition 14. Lastly, the causal relationship test described in condition 25 of the Certification could be misconstrued, because even if diversions are not causing the exceedance, they could still be contributing to it and would need to be curtailed in such circumstances.

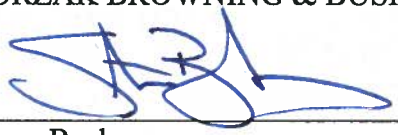
UCRA's Recommended Temperature Condition. Notwithstanding proposed temperature mitigation in the Fish and Wildlife Mitigation Plan and other terms and conditions to address temperature that may be imposed as part of the 401 Certification or federal approvals for the WGFP, the WGFP shall not cause or contribute to exceedances of any temperature standards in the Colorado River below Windy Gap at the points of measurement set forth in the Fish and Wildlife Mitigation Plan. Consistent with the County's 1041 Permit for the original Windy Gap project, the same points of measurement for temperature can be used to assure compliance with that original permit.

III. CONCLUSION. Windy Gap was a poorly conceived and analyzed project that has plagued Grand County since its construction. Rather than protect and preserve the fishery on the Colorado River as required by Senate Document 80 – Windy Gap has severely impacted it. The Colorado River is now at a tipping point and the Subdistrict wants to rely upon the same facility to increase its diversions. Notwithstanding all of this, through the hard work of Grand County Staff, the Subdistrict and many stakeholders, a path forward has developed that can mitigate the impacts of WGFP, but also potentially allow the River to start healing itself. While that is no easy task given that some 75% of the average annual flow of the upper Colorado River will be diverted at or above Windy Gap after WGFP and the Moffat Tunnel expansion project are operational, there are some critical steps that can and must be taken as described above. At the top of that list is a properly designed bypass coupled with adequate flushing flows.

Subject to all the conditions set forth in the Recommendation and the changes to three of those conditions as described in this letter, UCRA supports permitting of the WGFP. The ingredients to a success story are here. A properly conditioned permit that is strictly enforced will allow the Subdistrict to enlarge upon its water supply, while protecting the health of the Colorado River and, in turn, protecting the local economy and landowners of Grand County. The Colorado River is an invaluable resource that needs to be preserved. In the long term, the cost of doing this project right is small compared to the cost of doing it wrong.

Sincerely,

PORZAK BROWNING & BUSHONG LLP



Steve Bushong

cc: UCRA Board (Bud Isaacs, Alex Wiegers, Tony Kay, Bob Craig, Norm Carpenter, Bob Weaver)
Scott Fifer