

Windy Gap Bypass Funding Agreement

The Municipal Subdistrict of the Northern Colorado Water Conservancy District and its Windy Gap Firing Project Water Activity Enterprise, the Board of County Commissioners of Grand County, Colorado, Trout Unlimited, and Upper Colorado River Alliance (UCRA) (“Parties”) enter into this Windy Gap Bypass Funding Agreement (“WG Bypass Funding Agreement”) as of the latest date of execution of this WG Bypass Funding Agreement by the Parties.

I. Definitions

- A. “Bypass Study” is the study to be conducted by Colorado Parks and Wildlife as defined in Paragraph 2.3 of the WGFP Enhancement Plan and the Scope of Work/ Request for Qualifications, Windy Gap Reservoir Modifications Study dated November 2012, RFQ# PBA-1324 (attached as Exhibit “1” and fully incorporated herein by reference).
- B. “Chimney Hollow Reservoir” is that reservoir located on the East Slope identified in the Final Environmental Impact Statement for the Windy Gap Firing Project as the proposed action and any reservoir or reservoirs on the East Slope that are constructed as an alternative or in addition to the reservoir identified in the Final Environmental Impact Statement, (“Alternative Reservoir”), provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any Alternative Reservoirs does not exceed 90,000 acre feet.
- C. “CPW” is Colorado Parks and Wildlife.
- D. “Grand County” is a county of the State of Colorado created by Article XIV of the Colorado Constitution and C.R.S. § 30-5-128, for the purposes stated therein.
- E. “Subdistrict” is the Municipal Subdistrict, Northern Colorado Water Conservancy District, which is a political subdivision of the State of Colorado, formed under the provisions of C.R.S. §§ 37-45-101, *et seq.*, for the purposes stated therein and as created by the Decree dated July 6, 1970, Weld County District Court, State of Colorado.
- F. “Technical Advisory Team” is the team as defined in the Bypass Study.
- G. “Trout Unlimited” is a non-profit organization with offices in the State of Colorado. Its mission is to conserve, protect and restore North America’s cold water fisheries and their watersheds.

- H. "Upper Colorado River Alliance (UCRA)" is a 501(c) (3) nonprofit Colorado corporation whose mission includes protecting and preserving the aquatic health, riparian health, water resources and environment of the upper Colorado River Basin.
- I. "Windy Gap Project" is an existing water supply system that diverts Windy Gap Project Water from the Colorado River just below its confluence with the Fraser River pursuant to the Windy Gap Water Rights.
- J. "WGFP" is the Windy Gap Firming Project that is described in the Final Environmental Impact Statement and Record(s) of Decision for the Windy Gap Firming Project.
- K. "Windy Gap Bypass" is a modification to the existing Windy Gap Dam as necessary to bypass flows through and/or around Windy Gap Reservoir to meet the Study Objectives and Guidelines identified in the Bypass Study.
- L. "Windy Gap Project Water" is any water stored or diverted pursuant to the Windy Gap Water Rights.
- M. "Windy Gap Water Rights" are defined in the Decrees entered on October 27, 1980 in Civil Action No. 1768, District Court, Grand County, State of Colorado and Case Nos. W-4001, 80CW108, and 85CW135, District Court, Water Division No. 5; the Decree entered on February 6, 1989 in Case No. 88CW169, District Court, Water Division No. 5, State of Colorado; and the Decree entered on July 19, 1990, in Case No. 89CW298, District Court, Water Division No. 5, State of Colorado ("Windy Gap Decrees") and any subsequent diligence or other related decrees or amendments thereto.
- N. "WGFP Enhancement Plan" is the Windy Gap Firming Project Fish and Wildlife Enhancement Plan" dated June 9, 2011 that was approved by the Colorado Wildlife Commission and the Colorado Water Conservation Board. The WGFP Enhancement Plan defines the "Upper Colorado River Habitat Project."
- O. "WGFP Enterprise" is the Municipal Subdistrict, Northern Colorado Water Conservancy District, Windy Gap Firming Project Water Activity Enterprise, which is a water activity enterprise of the Subdistrict organized under and pursuant to Article X, Section 20, of the Colorado Constitution and C.R.S. §§ 37-45.1-101 *et seq.*

II. Relationship to 1980, 1985 and 2012 Agreements. This Agreement does not modify or amend in any respect the April 30, 1980 "Agreement Concerning the Windy Gap Project

and the Azure Reservoir and Power Project,” the March 29, 1985 “Supplement to Agreement of April 30, 1980” and the 2012 WGFP Agreement (IGA) (collectively the “1980, 1985, and 2012 Agreements”). This WG Bypass Funding Agreement is not, and will not be, incorporated within the 1980, 1985 and 2012 WGFP Agreement, but will be a Related Agreement.

III. Terms of the Agreement

- A. The benefits provided in this WG Bypass Funding Agreement are in addition to and are not a substitute for the mitigation required by governmental agencies with jurisdiction over the WGFP. The benefits provided in this WG Bypass Funding Agreement are in addition to and not a substitute for the WGFP Enhancement Plan.
- B. WG Bypass Funding Agreement Payments.
1. The Subdistrict and WGFP Enterprise shall provide up to \$500,000 for engineering and permitting of the Windy Gap Bypass at such time as all final required WGFP permits and authorizations have been issued and accepted, the Windy Gap Bypass Study has been completed, and there is no appeal pending at that time.
 2. The Subdistrict and WGFP Enterprise shall provide \$2,000,000, less the amount expended pursuant to Paragraph III.B.1, for the construction of the Windy Gap Bypass at such time as a contract for the construction of WGFP has been issued without litigation by the Parties: a) for the purpose of challenging the validity or adequacy of any local, state or federal permit or approval required for the construction and operation of the WGFP; or b) regarding the Windy Gap Project, Windy Gap Project Water Rights, or other rights and obligations related to the operation of the Windy Gap Project and WGFP other than an Application or other action brought by the Subdistrict for the purpose of confirming the rights associated with the WGFP. Nothing in this paragraph shall limit the County’s right to enforce the Windy Gap Project Permit.
 3. Donation of Land and Perpetual Operation and Maintenance for the Windy Gap Bypass. The Subdistrict and WGFP Enterprise shall donate an easement or right-of-way for the Windy Gap Bypass if required for the construction, operation and use of the bypass/pass through. The Subdistrict and WGFP Enterprise shall be responsible for the perpetual Operation and Maintenance of the Windy Gap Bypass.

C. WG Bypass Funding Agreement Requirements

Funding as set forth in Paragraph III. B. is subject to the following conditions:

1. The Bypass Study shall be conducted in accordance with Exhibit "1" or such other Scope of Work approved by CPW and acceptable to the Parties and Technical Advisory Team.
2. The Bypass Study must demonstrate that a Windy Gap Bypass will provide a benefit to the Colorado River consistent with the Study Objectives as included in Exhibit "1".
3. The performance of the Bypass Study or this WG Bypass Funding Agreement shall not require an amendment to or modification of the WGFP Enhancement Plan or any modification or supplement of the existing Windy Gap Firming Project Environmental Impact Statement.
4. The Parties agree that CPW shall be an integral part in obtaining all local, state, and federal permits for the Windy Gap Bypass. The Parties will cooperate with CPW for the purpose of obtaining such permits.
5. This WG Bypass Funding Agreement shall be a condition of any 1041 Permit for the WGFP issued by Grand County. This WG Bypass Funding Agreement shall not be, and shall terminate in the event that it is a condition of, incorporated within, or otherwise made a requirement of any other local, state, or federal permit or other approval for the WGFP.

D. The construction and operation of the Windy Gap Bypass shall not at any time cause, and shall not be operated in a manner, which will result in any adverse impact on, injury to, or other restriction or limitation on the exercise of the Windy Gap Water Rights and the operation and maintenance of the Windy Gap Project and WGFP, including, without limitation, a loss of yield, restrictions on the time and amount of pumping of the Windy Gap Project and WGFP, or an increase in demonstrated material cost of operation and maintenance of the Windy Gap Project and WGFP other than the direct cost of operation and maintenance of the Windy Gap Bypass. The Subdistrict and WGFP Enterprise shall also have the right to suspend or modify the operation of the Windy Gap Bypass for the purpose of avoiding injury or adverse impacts to downstream property or resources or to avoid a violation of any applicable laws.

E. There is no warranty or guarantee by the Subdistrict or WGFP Enterprise with respect to whether the construction and operation of the Windy Gap Bypass will provide any benefit to the downstream aquatic environment or other resources.

The Subdistrict and WGFP Enterprise shall have no further obligation under this WG Bypass Funding Agreement to take additional actions or measures in the event that the Windy Gap Bypass does not provide the anticipated results or benefits to the downstream aquatic environment or other resources.

- F. The Subdistrict and WGFP Enterprise have no obligation to provide additional funds for the permitting, design, and construction of a Windy Gap Bypass.
- G. The Parties will work together cooperatively, collaboratively, diligently, and in concert with others, in good faith to secure any required additional funding to construct the preferred alternative identified by the Bypass Study.
 - 1. The Parties, CPW and the Technical Advisory Team shall first meet and confer for the purpose of selecting a preferred alternative consistent with Exhibit "1". If, after the best efforts of the Parties, CPW and Technical Advisory Team, sufficient funding is not available for the preferred alternative, the Parties, CPW and the Technical Advisory Team shall identify any alternatives that meet the Study Objectives and Guidelines set forth in Exhibit "1", and that can be constructed utilizing available funds. If an acceptable alternative can be identified, the Parties, CPW and the Technical Advisory Team may elect to construct the selected alternative with available funds. If an acceptable alternative that can be constructed using available funds cannot be identified or agreed upon, the Parties shall continue to work together cooperatively, collaboratively, diligently, and in concert with others (including the Schmuck Children's Trust), in good faith until such additional funds are obtained to construct the preferred or acceptable alternative Windy Gap Bypass.
- H. Termination of this WG Bypass Funding Agreement. This WG Bypass Funding Agreement shall terminate in the event that the Subdistrict and WGFP Enterprise provide written notice to Grand County that they will not pursue the WGFP.
- I. Enforcement. In addition to any other remedy provided by law, the Parties further agree that the terms and conditions of this WGFP Bypass Funding Agreement are enforceable by specific performance and agree not to bring any defense to specific performance based on the doctrine of governmental immunity.
- J. Preservation of Governmental Powers. Except as specifically provided herein, nothing in this Agreement shall be construed as a limitation on or waiver of any review, approval, or permit authority, or a predetermination of any action taken there under, by any governmental or quasi-municipal entity including, without limitation, the regulatory or quasi-judicial power or authority of Grand County.

- K. No Third Party Beneficiary. This WG Bypass Funding Agreement does not create, and no person or party is entitled to assert, Third Party Beneficiary Status with respect to this WG Bypass Funding Agreement or the construction, operation and maintenance of the Windy Gap Bypass.

- L. Dispute Resolution. The Parties agree that if a dispute arises on any matter covered in this WG Bypass Funding Agreement, the Parties will confer in good faith and endeavor to resolve the concern. If the Parties reach an impasse, they will select a neutral third party mediator who would seek an acceptable voluntary solution to the conflict. For conflicts that involve a technical or scientific expert, the neutral third party mediator may select an independent technical or scientific expert, acceptable to the parties involved in the mediation, to review and make a recommendation on the matter. If the conflict cannot be resolved through the efforts of the mediator, then the affected parties may pursue any available legal or administrative recourse. Nothing herein shall preclude the commencement of any action that would otherwise be barred by a statute of limitations or the timely participation in any judicial or administrative process.

- M. UCRA and Trout Unlimited Withdrawal. For clarity, the purpose and objective of UCRA and Trout Unlimited's participation in this WG Bypass Funding Agreement is to ensure construction of the Windy Gap Bypass in a timely and expedient fashion and will work cooperatively and in good faith with the Parties to achieve that result. If, however, for any reason UCRA or Trout Unlimited determines this objective is not being achieved, they reserve their respective rights to withdraw from the WG Bypass Funding Agreement and pursue any and all available legal remedies.

- N. Integration of Understandings. This WG Bypass Funding Agreement is intended as the complete integration of all understandings between the Parties. No prior or contemporaneous additions, deletions, or other amendment hereto shall have any force or affect whatsoever, unless embodied herein in writing. No subsequent novation, renewal, addition, deletion or other amendment hereto shall have any force or effect unless embodied in a written agreement executed and approved by the Parties.

**BOARD OF COUNTY COMMISSIONERS
OF THE COUNTY OF GRAND
WATER**

By: _____
Chairman

Nancy Stuart

**MUNICIPAL SUBDISTRICT,
NORTHERN COLORADO
CONSERVANCY DISTRICT**

By: _____
President

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BOARD OF COUNTY COMMISSIONERS
 OF THE COUNTY OF GRAND
 WATER

By: Nancy Stuart
 Chairman

MUNICIPAL SUBDISTRICT,
 NORTHERN COLORADO
 CONSERVANCY DISTRICT

By: [Signature]
 President

ATTEST: *Ana K. Losene*
Clerk & Recorder

12/4/12
Date

ATTEST: *Erick W. Williams*
Secretary

1/3/13
Date

**WINDY GAP FIRING PROJECT
WATER ACTIVITY ENTERPRISE**

ATTEST: *Erick W. Williams*
Secretary

1/3/13
Date

By *John Williams*
President

1/3/13
Date

TROUT UNLIMITED

By _____

Date _____

**UPPER COLORADO RIVER
ALLIANCE**

By _____

Date _____

Draft
SCOPE OF WORK
REQUEST FOR QUALIFICATIONS (RFQ)
WINDY GAP RESERVOIR MODIFICATIONS STUDY
November 2012

RFQ# PBA-1324

The Colorado Division of Parks and Wildlife (CPW) is requesting Statements of Qualifications (SOQs) from qualified consultants to conduct a study of the conceptual design and evaluations of Windy Gap Reservoir modifications intended to improve the aquatic habitat in the vicinity of and downstream of the Windy Gap Reservoir.

Background

This study is being conducted as specified in the Windy Gap mitigation and enhancement plans submitted by Municipal Subdistrict of the Northern Colorado Water Conservancy District (Subdistrict) and approved by the Colorado Parks and Wildlife Commission in June 2011.

Study Objectives

The purposes of this RFQ is to obtain a proposal from a consultant or team of consultants to conduct a study that will evaluate, prioritize and recommend modifications to the existing Windy Gap Dam and related work necessary in order to bypass flows through and/or around Windy Gap Reservoir (WG Study). The objective of those modifications is to improve the aquatic biological health of the Colorado River at and below Windy Gap Reservoir, including reducing sedimentation and stream channel armoring problems; supporting a healthy riparian zone; and accommodating flows anticipated in the future.

Project Oversight

The consultant or consultant team will be chosen according to State statute. CPW and members of the Technical Advisory Team (the Team) will participate in the evaluation and ranking of SOQs. The Technical Advisory Team will also review and provide technical advice and input to CPW regarding the Statement of Work approved for the contract, as well as reviewing the alternative(s) identified during the project work, and other matters identified in this document. CPW will direct and manage the WG Study consistent with the contract and provide regular updates to the Technical Advisory Team. The Team will provide additional advice and input to CPW as needed on the conduct of the WG Study.

The Technical Advisory Team will be comprised of two representatives each from:

- Colorado River Water Conservation District
- Trout Unlimited
- Denver Water
- Grand County
- Middle Park Water Conservancy District
- Municipal Subdistrict of the Northern Colorado Water Conservancy District
- Schmuck Children's Trust
- Upper Colorado River Alliance.

Guidelines for the WG Study and Potential Modifications to the Windy Gap Dam (Guidelines)

The WG Study is subject to the following Guidelines

- A. The study recommendations must not negatively impact the ability of the Subdistrict and Denver Water to exercise its water rights. If the WG bypass/flow-through provides a benefit to the Subdistrict in exercising its water rights, such as reduced need for maintenance or sedimentation removal, those benefits will be described.
- B. Solutions must be proposed and implemented in ways that do not negatively impact the location or amount of water available to lawfully divert at headgates or other diversion points within the reach where the proposed work will be completed and will not negatively impact the rights and obligations contained in that Supplemental Agreement between the Subdistrict and Schmucks dated April 2, 1982 and the October 14, 1977 receipt and option contract between the municipal subdistrict and Howard Schmuck.
- C. Study recommendations shall seek to facilitate recovery of aquatic species diversity, including mayflies and stoneflies, sculpin, trout, and other species.
- D. The Study results shall seek to reduce harmful silt releases, reduce the capture of coarser materials, improve stream temperatures for coldwater vertebrates and invertebrates, reduce rooted aquatic vegetation, improve water quality, accommodate movement of species upstream and downstream of the Windy Gap Reservoir, and provide other benefits that have or may be identified associated

with reconnecting the Colorado River upstream and downstream of Windy Gap Reservoir.

- E. Study recommendations shall seek to prevent stream bed armoring and embeddedness.
- F. The final report for the study will describe the expected aquatic benefits, permanence of the benefits, ongoing maintenance concerns, impacts on riparian zone, ability to perform under expected low flow and high flow conditions, additional public benefits and any other factors deemed important by the CPW and the Technical Advisory Team.
- G. The specific in-channel improvement activities associated with the Upper Colorado River Habitat Project as described in the Fish and Wildlife Enhancement Plan will be determined in an effort separate from this RFQ.
- H. The WG bypass/flow-through should be conceptually designed to accomplish and, to the extent practicable, optimize the purposes and objectives described above under Study Objectives, while being cost efficient and subject to these Guidelines. The WG bypass/flow-through should be sufficiently planned and/or designed to allow a reasonable cost estimate for each option, with the understanding that more planning, permitting and design will be needed before implementing the selected option.

Study Budget and Funding

The budget for the WG Study is \$250,000. The Windy Gap Firming Project (WGFP) Intergovernmental Agreement (IGA) between the Municipal Subdistrict and CPW provides \$250,000 to CPW for this Study. The funding is expected to be transferred to CPW prior to December 31, 2012.

Study Area

The study area for the WG bypass/flow-through will be the Upper Colorado River from immediately upstream of the confluence of the Colorado and Fraser Rivers to an area immediately downstream of the Windy Gap Reservoir, although a larger area will be considered in identifying the benefits of such a structure.

Schedule

CPW anticipates hiring a consultant and beginning the WG Study in February 2013 and that the study will be completed by October 1, 2013. The approved contract will identify the WG Study schedule.

Work Tasks

The WG Study work tasks are as follows:

- Develop engineering alternatives for a structure that will bypass flows through and/or around Windy Gap Reservoir to best achieve the Study Objectives and consistent with the Guidelines for the WG Study and Potential Modifications to the Windy Gap Dam, above.
- Review available data. The Technical Advisory Team will provide a list of existing studies to be included in the background research. If necessary, perform sediment sampling to characterize sediment load upstream and downstream of Windy Gap Reservoir, and embeddedness upstream and downstream of Windy Gap Reservoir, and identify additional data needs and submit to Technical Advisory Team.
- Evaluate hydrology for alternatives including ability to pass peak flows and low flows and the ability of the new structures to withstand high flows.
- Perform hydraulic analysis of identified hydrology for the ability to move fine sediment and coarse bed loads.
- Meet with Technical Advisory Team to discuss preliminary alternatives.
- Evaluate ability of each alternative to affect sediment transport, sediment deposition, water quality (effects on temperature and/or nutrients) and fish passage.
- Identify any alternatives with fatal flaws or inability to satisfy the Guidelines.
- Provide cost estimates for alternatives.
- Identify ongoing operation and maintenance requirements of each alternative and associated costs.
- Identify permitting requirements of each alternative.
Assess relative ability of proposed alternatives to improve the aquatic environment and enhance river conditions to meet the purposes and objectives in Study Objectives and within the Guidelines.
- Provide a matrix that summarizes each option by cost, hydraulic benefits, aquatic benefits, and constraints/issues.
- Provide a recommended course of action that meets the Study Objectives and consistent with the Guidelines.

Deliverables

Technical Memorandum (draft and final versions). The CPW and Technical Advisory Team will review the draft Memorandum and provide comments to the Consultant.

Selection of Preferred Option. CPW and the Technical Advisory Team will cooperate in selecting the mutually acceptable WG bypass/flow-through

design to implement consistent with the Study Objectives and consistent with the Guidelines for the WG Study and Potential Modifications to the Windy Gap Dam, above

Funding of Construction of Preferred Option

CPW and the Technical Advisory Team are proceeding with this RFP to investigate, and analyze potential alternatives, as well as to designate a preferred alternative that best accomplishes the purposes and objectives set forth the Study Objectives and consistent with the Guidelines for the WG Study and Potential Modifications to the Windy Gap Dam, above utilizing the \$250,000 committed by the Subdistrict to complete the study. Alternatives for the funding for the construction of the bypass/flow-through have not been specifically identified. Commitments for funding are being evaluated by the Subdistrict, Denver Water, and the State of Colorado with the intent of developing a new, mutually acceptable agreement among the members of the Technical Team and CPW regarding the commitment to, amount of, and conditions associated with, funding the WG bypass/flow-through (the "Implementation Agreement"). If the cost to implement the selected preferred alternative exceeds the amount committed in the Implementation Agreement, the Technical Team, CPW and others as appropriate will cooperatively pursue additional funding. If, after the best efforts of the parties, the additional funding cannot be obtained voluntarily, the Technical Team and CPW may elect to modify the selected preferred alternative utilizing the findings of the WG Study to allow construction to proceed within the budget of the committed funds.

Flow Regime

This WG Study is not meant to address or evaluate the flow regime, including flushing flows, necessary to protect or optimize aquatic biological health of the Colorado River at and below Windy Gap Reservoir.

Reporting

Reporting shall include monthly updates to the Project Manager and one meeting with the Technical Advisory Team in order to discuss the preliminary alternatives.

Monitoring Criteria

A. Performance Measures and Standards:

The following performance measures and standards shall apply:

Timeline and deliverables: The following deliverables will be completed by the dates stipulated in the contract

- 1) Technical Memorandum (draft and final versions).
- 2) Selection of Preferred Option.

B. Reporting Requirements Monthly reports shall be submitted to the CPW Project Manager and will be reviewed by the Technical Advisory Team

C. Monitoring Requirements: The State will monitor the Consultant's performance by reviewing the monthly reports prior to making payments.

D. Noncompliance Resolution: Any problems with the project will follow the resolution process outlined below, before the remedies in Section 15 are immediately applied. In the event the State and the Consultant need to escalate a case regarding noncompliance, the following Resolution Team members and responsibilities have been identified.

Division of Parks and Wildlife	Consultant
<p><u>State / CPW TITLE (PERSON'S NAME)</u></p> <ul style="list-style-type: none"> • Entry point contact to the resolution process • Is responsible for ascertaining the project impacts based on the information provided • Owns resolution of most issues • Responsible for contacting CPW Leadership Team Resolution Project Manager in writing for situations which cannot be resolved at project level 	<p><u>Consultant / Project Manager – TITLE, CONSULTANT NAME (PERSON'S NAME)</u></p> <ul style="list-style-type: none"> • Entry point contact to the resolution process • Owns resolution of most issues
<p><u>Resolution Project Manager – CPW Leadership Team</u></p> <ul style="list-style-type: none"> • CPW advocate during the resolution process • Is responsible for ascertaining the timeline and financial impacts based on the information provided • Owns the problem and the overall action plan • Provides written notification to the Consultant identifying the 	<p><u>Consultant / Resolution Project Manager – TITLE, CONSULTANT NAME (PERSON'S NAME)</u></p> <ul style="list-style-type: none"> • Consultant advocate during the resolution process • Obtains additional resources, as needed • Works to ensure that Consultant parties are properly informed throughout the resolution • Responsible for contacting next

<p>noncompliance issue and expected actions on the part of the Consultant in order to remedy the situation</p> <ul style="list-style-type: none">• Obtains CPW and DNR approval for the action plan• Works to ensure that all parties are properly informed throughout the resolution• Responsible for contacting next level Resolution Manager if needed	<p>level Resolution Manager for the Consultant if needed</p>
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