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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-cv-2563-REB

SAVE THE COLORADO, *et al.*,

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, *et al.*,

Respondents, and

MUNICIPAL SUBDISTRICT, NORTHERN COLORADO WATER CONSERVANCY
DISTRICT, *et al.*,

Respondent-Intervenors.

**PETITIONERS' OPENING BRIEF FOR REVIEW OF AGENCY ACTION
(Oral Argument Requested)**

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INTRODUCTION

The Colorado River is dying a death of a thousand cuts. The river itself, once so mighty that it carved the Grand Canyon, rarely reaches its historical outlet in the Gulf of California due to numerous unsustainable diversions along its 1,450 mile course. The problem is equally stark in its headwaters, at issue here, where 67% of the water from the Colorado River is already diverted across the continental divide for use in the urban areas of Colorado's Front Range, leaving only a faint remnant of the natural river.

Now, the Bureau of Reclamation and the U.S. Army Corps of Engineers have authorized a project that would deal the final blow to these headwaters. If the Windy Gap Firming Project becomes operational, the additional diversions from this project, along with those proposed for Denver Water's Moffat Collection System Project, would leave only a trickle in the Rockies because around 85% of the river would then be diverted. Coupled with the anticipated decline in flows resulting from climate change expected in the Colorado River basin in the decades ahead, the outcome for the people and wildlife dependent on the Colorado will be bleak.

At the same time that new diversion schemes such as the Windy Gap Firming Project move forward to permanently remove water from the Colorado River basin, the states and major water users in the basin are scrambling to prop up the rapidly collapsing water supply system based on the river's declining flows. Major reservoirs, in particular Lake Powell and Lake Mead, are plummeting to historically low levels. Tensions between the Upper and Lower Basins have spiked as they confront the question of who will have to do without the water they have been promised. Already Drought Contingency Plans, which modify the existing operations of the Colorado River system, have been approved and fears of a compact call, when the Upper Basin states

will have to surrender their allocations to the Lower Basin states, are rising. These responses to declining flows in the river will come at a great cost and impact the millions who depend on the Colorado for water supply, recreation, and wildlife habitat.

Against this backdrop of looming crisis, Save the Colorado, Save the Poudre, WildEarth Guardians, Living Rivers, Waterkeeper Alliance, and Sierra Club (collectively, Colorado River Defenders) brought this suit in order to hold the federal government accountable to follow the legal mandates for informed decision-making and proper consideration of the environmental impacts of the Windy Gap Firming Project.

Reclamation's and the Corps' processes under the National Environmental Policy Act (NEPA) and the Corps' issuance of a permit under Section 404 of the Clean Water Act (CWA) fall far short of meeting the statutory mandates placed on agencies. First, the agencies improperly selected a narrow purpose and need of fixing the original Windy Gap project, rather than the correct purpose of water supply, which resulted in an analysis of potential alternatives that was far too narrow. Second, the agencies relied on wildly inflated projections of the water needs of the project participants, failing to independently evaluate the need for the project even in the face of contradictory data from commenters and the project proponents themselves. Third, Reclamation failed to disclose several shortcomings in its methodology, namely that it used data for stream flows which ignored the important daily variations that occur in the Colorado's flows, overestimated existing diversions by several thousand acre feet, and applied a model that explicitly does not apply to a regulated river such as the Colorado. Finally, the agencies did not adequately consider the direct and cumulative impacts of the project

on water quality in Grand Lake and on the Colorado River, specifically in light of the Moffat Project, climate change, and the potential for a compact call.

Each of these reasons requires this court to vacate the agency approvals and remand the issues to the agency, under either NEPA or the CWA. The government will argue that such remands are unnecessary because they may be able to carry out this project eventually, so why require more paperwork? Although NEPA does not prevent bad environmental decisions, it does prohibit uninformed decision-making and so these decisions cannot stand. Sending these issues back for further study will promote the twin aims of informed agency decision-making and informed public participation, and it will provide a continued opportunity for the Colorado River Defenders to make the case to the government and the public that the focus should be on finding ways to make existing water supplies go further, rather than continuing to drain the Colorado River and risk pushing it past an ecological tipping point.

STATEMENT OF ISSUES FOR REVIEW

I. Whether Reclamation and the Corps violated NEPA and the Clean Water Act by adopting an impermissibly narrow purpose and need, limited to fixing the broken Windy Gap project, and eliminating practicable alternatives that would not further drain the Colorado River or damage the ecosystem but would meet the true underlying purpose and need of supplying water to front range communities. (Claims 1, 3, and 7)

II. Whether Reclamation and the Corps violated NEPA and the Clean Water Act by failing to independently verify the Project's purpose and need by reviewing and relying on mere projections instead of available data on actual water use by the participants. (Claims 2 and 7).

III. Whether Reclamation violated NEPA when it conducted a flawed analysis of the Project, including by not identifying shortcomings in methodology such as failing to disaggregate monthly streamflow data, overestimating current diversions, and relying on improper stream morphology methods. (Claim 4)

IV. Whether Reclamation violated NEPA by failing to identify all indirect and cumulative environmental impacts of the Project, specifically related to the cumulative effects of other diversions such as the Moffat Project, the impacts of climate change or a potential compact call on the Colorado River, and the impacts of increased pumping through Grand Lake on water quality. (Claims 5 and 6)

LEGAL BACKGROUND

I. National Environmental Policy Act

NEPA promotes informed agency decision-making. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017). When reviewing a major federal action, an agency must “rigorously explore and objectively evaluate” all reasonable alternatives to a proposed action, in order to compare the environmental impacts of each alternative. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.14. NEPA imposes a duty on agencies to “use all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(f).

In order to comply with this duty, an agency must prepare an Environmental Impact Statement (EIS) to “serve as an action-forcing device” which “provide[s] full and fair discussion of significant environmental impacts” and “inform[s] decision makers and the public of the reasonable alternatives” to a proposed project. 40 C.F.R. § 1502.1.

While an agency may rely upon information provided by a private applicant in preparing

the EIS, and that private applicant may obtain information on environmental and engineering data from any source, the agency then “must independently evaluate the information and is responsible for its accuracy.” Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983). Further, NEPA requires that an EIS contain high-quality information and accurate scientific analysis, 40 C.F.R. § 1500.1(b), and if there is incomplete or unavailable relevant data, the EIS must disclose that fact. 40 C.F.R. § 1502.22. Agencies also have a continuing duty to gather and evaluate new information. *Friends of the Clearwater v. Dornbeck*, 222 F.3d 552, 559 (9th Cir. 2000).

NEPA regulations further require that agencies consider, evaluate, and disclose to the public “alternatives” to the proposed action and “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(C) & (E). This consideration of alternatives is the “heart of the [EIS],” 40 C.F.R. § 1502.14, and how an agency defines the project’s purpose “set[s] the contours for its exploration of available alternatives.” *Webster v. U.S. Dep’t of Agric.*, 685 F.3d 411, 422 (4th Cir. 2012). The alternatives evaluation must constitute a “substantial treatment,” presenting the impacts of the alternatives in comparative form “sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” 40 C.F.R. § 1502.14. The agency must consider the “relevant data and articulate a rational connection between the facts found and the decision made.” *New Mexico ex rel Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 713 (10th Cir. 2009). An agency must be objective in defining a reasonable range of alternatives. *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1168,

1170 (10th Cir. 2002). Agencies are also required to give independent and reasoned explanations for their conclusions. *Colo. Envtl. Coal. v. Salazar*, 875 F. Supp. 2d 1233, 1252 (D. Colo. 2012).

II. Corps' Clean Water Act and NEPA Obligations

Section 404 of the CWA authorizes the Corps to issue permits to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. § 1344. CWA regulations constrain issuance of permits by requiring that the Corps not permit a discharge that would result in significant degradation of the waters of the United States, or where a less environmentally damaging practicable alternative exists. 40 C.F.R. § 230.10. The Corps' key goals—goals that are repeated throughout its own guidance documents and memoranda of agreement—are to “avoid adverse impacts . . . to existing aquatic resources” and to “achieve a goal of no overall net loss” to wetlands. See, e.g., Memorandum of Agreement Between the Environmental Protection Agency and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines (Feb. 6, 1990).

In its purpose and need statement, the Corps “will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.” 33 C.F.R. § 325 App. B § 9(b)(4). In evaluating alternatives, the Corps “must focus on the accomplishment of the underlying purpose and need.” 33 C.F.R. § 325 App. B § 9(b)(5)(a). Reasonable alternatives are understood as “those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant.” Council on Environmental Quality, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026

(Mar. 23, 1981). The Corps has a duty to independently evaluate practicable alternatives to the proposed project “if such alternatives would have less adverse impact on the aquatic ecosystem [and no] other significant adverse environmental consequences.” *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1263 (S.D. Fla. 2009) (quoting 40 C.F.R. § 230.10(a)) (alterations in original). The Corps must consider in detail those reasonable alternatives that would accomplish the underlying purpose and need. 33 C.F.R. § 325 App. B § 9(b)(5)(a). These alternatives should be evaluated “to allow a complete and objective evaluation of the public interest and a fully informed decision regarding the permit application.” *Van Antwerp*, 709 F. Supp. 2d at 1268 n.28.

When an applicant provides information, the Corps “must ‘document in the record the independent evaluation of the information [submitted by the applicant for the EIS] and its accuracy, as required by [NEPA CEQ regulations] 40 C.F.R. 1506.5(a).’” *Id.* at 1263 (quoting 33 C.F.R. § 325 App. B(8)(f)(2)). While the Corps has a responsibility to consider the applicant’s objectives, “the burden of proving that a given alternative does not meet the applicant’s objective remains on the applicant . . . and the applicant’s assessment must be critically evaluated by the Corps.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004).

STATEMENT OF FACTS

I. The Original Windy Gap Project

To meet their projected need of 32,400 acre-feet¹ of water (“AF”) by 2000, COE7, six Front Range municipalities formed the Subdistrict in 1970 to develop “new and independent water supply for the use of those municipalities” COE51.² The

¹ An acre-foot is equivalent to 326,000 gallons of water, which is enough to supply two families of four for a year. BOR573.

² Only the Corps’ Bates numbers are cited to reference the original Windy Gap EIS.

Subdistrict subsequently developed the Windy Gap Project—a dam on the Colorado River to create a 445 AF reservoir, BOR15251, diverting 56,000 AF from the river. COE2. To get the Windy Gap water across the divide to the Front Range, the Subdistrict petitioned “for the use of any unused capacity” in the Colorado-Big Thompson (“C-BT”) pipeline, and in 1973, executed a contract with Reclamation. COE51. Conveyance of water through the C-BT, a federal facility, constituted federal action, triggering a NEPA analysis. COE19.

In 1981, Reclamation (then known as the Water and Power Resource Service) prepared a final environmental statement for the Windy Gap Project, identifying the purpose and need as supplying the municipal and industrial water needs of the six participants—Loveland, Longmont, Greeley, Estes Park, Boulder, and the Platte River Power Authority, COE16—through the year 2000. COE15-16. At the time, Greeley was projected to have a need for 39,704 acre-feet of water by 2000, and Longmont was projected to have a need of 22,604 acre-feet by 2000. COE17.

Commenters on the 1979 Windy Gap Project Draft EIS raised concerns that the future use projections were overstated. *See, e.g.,* COE258. History proved commenters’ concerns valid. For example, Greeley only used an average of 202 gallons per capita per day (gpcd) in the years between 1993 and 2002, BOR4537, compared to the projected use rate of 306 gpcd. COE17. As a result, Greeley only used between 19,000 and 25,000 acre-feet annually between 1993 and 2003, dramatically less than the projected 39,704, and an overestimate of at least 58%.

The original Windy Gap Project has failed to deliver the expected water supplies. The Windy Gap Project has averaged an annual yield of about 20% of the anticipated

deliveries between 1985 and 2004, and a firm yield of zero. BOR15255. There are several reasons for this deficiency. First, the Subdistrict didn't actually need the amount of water that it originally claimed. BOR15256. Second, the junior priority of the Windy Gap water rights means that they are subservient to the many senior rights in that same water. *Id.* Finally, and importantly here, the Subdistrict's poor planning which did not take account of limits in the C-BT system is a key reason why the water has not been diverted. The original contract for the Subdistrict's use of the C-BT infrastructure prioritizes C-BT water over Windy Gap water, so even when there is enough water to fill Windy Gap's junior water rights, there is not enough room in the C-BT pipeline to carry participant's water across the divide. *Id.*

II. The Windy Gap Firming Project

The Subdistrict proposed the Windy Gap Firming Project (Project) to make reliable or "firm" the annual yield of its Windy Gap water from zero to 30,000 AF. BOR15247. In order to do this, Reclamation echoed the Subdistrict's proposal to 'fix a broken project' based on the request that the government limit their scope of analysis. BOR14603.

To accomplish that goal, the Subdistrict set an extremely narrow purpose and need in the 2003 Alternative Plan Formulation Report. BOR319. That report, commissioned by and prepared for the Subdistrict, said that the purpose of the Project was to "provide a 'firm' supply of Windy Gap water" *Id.* The Subdistrict then used this inappropriately narrow purpose to eliminate otherwise viable alternatives that could have helped supply the participants with water. See BOR332; BOR371 (eliminating purchase of water for not meeting Project's purpose); BOR397–400 (eliminating non-structural alternatives for not meeting Project's narrow purpose); BOR403. The result

was a range of seven potential alternatives that could meet the narrow purpose of firming Windy Gap water, each of which involved development of at least one reservoir. BOR1112. The Subdistrict's Preferred Alternative involves construction of a new 90,000 AF reservoir at Chimney Hollow to store Windy Gap water on the Eastern Slope, as well as store, or "preposition," C-BT water to create room to move Windy Gap water through the C-BT system. BOR15876. The Project's participants also supplied the data for the future demand projections and modeling. BOR330; BOR422. In fact, the Report indicates that the demand projections were lifted from the Subdistrict's February 2000 "land-use based regional water demand projections." BOR320.

As it had with the original Windy Gap project, Reclamation unquestioningly accepted the data provided by the Subdistrict for the basis of the Draft EIS. BOR321; BOR1112–17. Reclamation adopted not only the proponent's environmental and alternatives impact analysis, but also the Subdistrict's projected future water need. BOR1112–17; BOR2790; BOR3107–08. Reclamation also accepted the Subdistrict's narrow characterization of the project's purpose—to firm Windy Gap water—as opposed to the more appropriate purpose—to meet the Participants' need for water. BOR2790. And again, just as in the original project, errors concerning water need projections resulted. Even when commenters raised concerns regarding how the future projections were calculated and the exclusion of non-structural alternatives during the Public Scoping Meetings in December of 2003, BOR2799–800, Reclamation specifically decided not to look into those issues in the Draft EIS. BOR14823.

Commenters were also worried about impacts to water quality, including how nutrient loading and changes in temperature would impact the water quality and aquatic

resources of the Colorado River, as well as Lake Granby, Shadow Mountain, and Grand Lake (collectively referred to as the Three Lakes). BOR2801. Recreational and socioeconomic issues were also raised, particularly regarding impacts to tourism and recreation industries in Grand County, such as effects on rafting on the Colorado River due to reductions in flow in the river and recreational boating at each reservoir. BOR2803. Further comments were provided about the need to evaluate the cumulative impacts of the Project. BOR2805–06.

In September 2005, Reclamation published a Purpose and Need Report discussing the demand projections for the Project participants. BOR4518. While the consultants who prepared this report claimed to update some of the demand projections submitted by participants, nothing in the record shows that they did not merely accept the participants' stated need. BOR4505–07. The Alternatives Report was also published in September of 2005 and based the examination of alternatives on the narrow purpose and need established in the Purpose and Need Report. BOR4253–55; BOR4257. While that document claimed that the purpose and need for the Project was “developed by Reclamation,” BOR4254, in fact, it states that the purpose is to “firm” water “from the existing Windy Gap Project . . .” *id.*, which is the same purpose proposed by the Subdistrict in its 2003 Alternatives Plan Formulation Report. BOR319. Adopting this narrow purpose and need allowed Reclamation to further adopt the exclusion of alternatives in the Subdistrict's 2003 Report. BOR4255-56. While other alternatives were added in the 2005 Alternatives Report, those alternatives were exclusively “new potential reservoir sites” BOR4261.

These two reports received immediate backlash. In November 2005, Grand County, a cooperating agency, sent a letter to Reclamation and the Corps informing them that the purpose and need for the Project was too narrow, inappropriately limiting the potential alternatives considered, and that the purpose of the Project “must be read in light of the underlying purpose and need” BOR4773. The letter went on to provide a legal analysis of why the agencies could not use a narrow purpose and need statement to “weed out reasonable alternatives from analysis.” *Id.* Grand County cautioned that the unreasonably narrow purpose of utilizing Windy Gap water rights resulted “in an overly constrained view of available alternatives,” by screening out non-structural alternatives and alternative transfer methods such as interruptible supply plans, which could satisfy the underlying need. BOR4776. Concerns were also raised by the Environmental Protection Agency (EPA), Western Resource Advocates (WRA), and the Sierra Club regarding the accuracy of the demand projections, suggesting that the numbers were overinflated and should be reevaluated before starting the Draft EIS, and regarding potential impacts of the Project. BOR4812; BOR4852; BOR2729. EPA, in particular, was concerned about the cumulative impacts to aquatic resources stemming from the overblown demand projections in combination with other planned diversion projects, BOR4812–13, and urged Reclamation to “fully explore the potential of water conservation to meet future water demands so that decision-makers have full information regarding the potential for meeting water demand” BOR4813.

Despite these early warnings, the Draft EIS, released in August 2008, COE3412, used the same demand numbers, COE3471, and retained the unreasonably narrow purpose and need, leading to an evaluation of just five alternatives. COE3415.

Reclamation brushed off concerns of the cooperating agency and other stakeholders, simply noting that “[c]urrent water projections may vary slightly from the estimates in 2005, but the need to firm Windy Gap water supplies has not changed.” BOR8578. Not only does this conclusory statement fail to heed the concerns of the commenters, but it also fails to acknowledge that one of the reasons the original Windy Gap Project failed was due to a lack of need. BOR15256.

Comments on the Draft EIS flooded in, urging Reclamation to re-evaluate its demand projections. EPA suggested re-examining demand through “an independent review of the Participants’ estimated and future water requirements.” BOR14821. WRA explained that actual demand was much lower than projected. BOR12156. Other commenters noted the oddity of the increase in demand. BOR9236. Some commenters emphasized that conservation would reduce supply needs. BOR9249.

EPA also expressed concern that the proposed plan had serious flaws and that consideration of other alternatives was needed. BOR14815-844. EPA pointed to short-term agricultural leasebacks, acquiring senior water rights, increased water conservation, and use of surface or ground water. BOR14818, BOR14823. Reclamation responded that “other EPA-suggested alternatives may provide alternate sources of water, but would not meet the project purpose and need” and dismissed them from consideration. BOR14823. However, as discussed below in Section I.B.1, EPA’s alternatives would have contributed to meeting the underlying need for water.

Before the release of its Final EIS, Reclamation’s lead project manager stated in a 2010 email that “[w]e are relying on information that we receive from the Subdistrict related to the participants’ requests for storage.” COE11403. In its 2011 Final EIS,

Reclamation again used the same 2005 demand projections and simply noted without support that “[w]hile Participant water supply and demand conditions may have changed slightly since the studies for the Draft EIS were completed, the water supplies and projected demands still provide a reasonable representation of the water needs for the 13 Participants.” BOR15267. In its 2014 ROD, Reclamation reasserted, again without support, that the Firming Project was needed to “meet a portion of the existing and future demands of the Participants.” BOR17702; BOR17709.

The Subdistrict’s Preferred Alternative for the Project involved constructing a new 90,000 AF reservoir at Chimney Hollow to store Windy Gap water on the Front Range, as well as store, or “preposition” C-BT water. BOR15876. Prepositioning would allow C-BT water to be stored in this new Front Range reservoir, would which make room to store and move Windy Gap water in the C-BT system. *Id.*

Of the handful of alternatives considered, each alternative involved construction of at least one reservoir. BOR1112. Furthermore, three of the five alternatives ultimately selected for review included siting a reservoir at Chimney Hollow. BOR15311. Because the Corps determined that “Chimney Hollow Creek within the proposed project area is considered a water of the U.S. . . .,” a 404 permit was required. COE18028. The Corps adopted Reclamation’s Final EIS shortly after its release in 2011. *See, e.g.*, COE13806; COE13808. Despite the fact that the Corps received numerous comments stating that it needed to reanalyze the project’s need, *see e.g.*, COE14530; COE11425–38, the Corps stated that “[t]here are no changes to the project or significant new circumstances or information that affect the analysis and conclusions in the WGFP FEIS.” COE14713.

III. The Colorado River

The Colorado River supplies water to approximately 40 million people throughout seven western states and Mexico, and provides essential habitat to fish, birds, and other wildlife. COE16308; Colorado River Drought Contingency Plan Authorization Act, Pub. L. No. 116-14, transmittal letter, at 1 (2019). Municipalities, farmers, and a vast number of businesses and individuals who enjoy the water-reliant recreation activities the Colorado River supports all depend on having adequate water in the river throughout its course. *Id.* The Colorado River Compact of 1922 provides the foundation of the “Law of the River,” and governs the management of water between the Upper and Lower river basins. COE17227.

In recent years, the Colorado River Compact has allocated more water than exists in the river, which has resulted in draining of several large reservoirs such as Lake Powell. COE17228. This deficit is only expected to get worse in the future due to climate change. *Id.*; Colorado River Drought Contingency Plan Authorization Act, Pub. L. No. 116-14, attach. B, at 1 (noting the “emerging scientific information regarding the increasing variability and anticipated decline in Colorado River flow volumes” – *i.e.*, climate change). As a result, the seven states recently submitted Drought Contingency Plans, including ways to reduce demand in the upper basin, which were approved by Congress on April 16, 2019. *Id.* attach. A2.

STANDING

Colorado River Defenders have standing to bring these claims. An organization has standing to bring suit on behalf of its members where at least one of the members would otherwise have standing to sue in their own right, the interests the organization seeks to protect are germane to the organization’s purpose, and neither the claims

asserted nor relief requested require the participation of any individual member in the action. *Wyo. Timber Indus. Ass'n v. U.S. Forest Serv.*, 80 F. Supp. 2d 1245, 1252 (D. Wyo. 2000).

For an individual member of an organization to be able to establish standing in her own right, she must show that she has (1) suffered an injury in fact (2) that is fairly traceable to the challenged action, and (3) that a favorable decision would likely redress. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The Supreme Court has long held that harm to the environment is the type of injury in fact sufficient to confer standing “if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff[.]” *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009).

Each of the petitioner organizations is an environmental organization with a mission focused on the health and protection of the environment and natural resources, including waterbodies such as the Colorado River. Save the Colorado and Save the Poudre are local organizations and Living Rivers/Colorado Riverkeeper, a Colorado Basin-wide organization which specifically work to protect the Poudre and Colorado Rivers through advocacy efforts aimed at restoring water quality and safeguarding their members’ interests in swimming, fishing, and rafting in these rivers. Wockner Decl. at ¶¶ 2-3; Weisheit Decl. ¶¶ 4-5.³ The other petitioner organizations—Waterkeeper Alliance, WildEarth Guardians, and Sierra Club—are regional or national organizations with an interest in water quantity and quality and with members who specifically live, work, or recreate in and near the Colorado River watershed. See, e.g., Estrin Decl. ¶¶ 4,6; Elliott Decl. ¶ 2; Easter Decl. ¶¶ 2, 4.

³ Declarations from members of each of the petitioner organizations are attached hereto.

Members of each organization will suffer harms to their recreational, economic, and aesthetic interests. Members enjoy rafting on the Colorado River. Fucik Decl. ¶ 11; Elliott Decl. ¶¶ 4-5; Weisheit Decl. ¶¶ 7, 13; Graham Decl. ¶ 4; Easter Decl. ¶ 6; Wright Decl. ¶¶ 4-7. Members also enjoy fishing on the river and in the Three Lakes System. Fucik Decl. ¶ 6; Easter Decl. ¶ 6. Other members will suffer aesthetic harm as they bike, kayak, or overlook the river and the lakes. Gerleman Decl. ¶ 6; Fucik Decl. ¶¶ 4, 5, 7; Wockner Decl. ¶¶ 7, 8, 10. Members also enjoy wildlife viewing that will be harmed by the project. Gerleman Decl. ¶ 6; Easter Decl. ¶ 6; Fucik Decl. ¶ 5; Wright Decl. ¶ 5.

Although many individual members have expressed concerns and described the ways in which they are harmed by the Project, this action does not rely on the participation of any individual member. *See Wyo. Timber Indus. Ass'n*. Thus, each of the petitioner organizations has standing to maintain this action.

STANDARD OF REVIEW

Under the APA, a reviewing court must determine whether the agency action at issue was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "An agency's decision is arbitrary and capricious if the agency (1) entirely failed to consider an important aspect of the problem, (2) offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, (3) failed to base its decision on consideration of the relevant factors, or (4) made a clear error of judgment." *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 704 (10th Cir. 2009) (internal citation omitted). Formal agency action must be set aside if it fails to meet statutory, procedural, or constitutional requirements, or is unsupported by substantial evidence. *Olenhouse v. Commodity*

Credit Corp., 42 F.3d 1560, 1574 (10th Cir. 1994). Although review of an agency's decision is generally limited to the administrative record, *Fla. Power and Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985), the reviewing court must still conduct a "thorough, probing, in-depth review." *Olenhouse*, 42 F.3d at 1574.

SUMMARY OF THE ARGUMENT

Reclamation and the Corps failed to ensure informed agency decision-making, instead simply using the NEPA and CWA § 404 permitting processes to rubber-stamp what had long been predetermined – the Subdistrict and the state wanted to fix the broken Windy Gap Project in an attempt to salvage some value from the disastrous original project. This desire, while understandable, reflects a cognitive bias known as the "sunk cost" bias⁴ that has thus far prevented the government from even considering changing course and finding ways to meet the water needs of the region without further draining the Colorado River down to a mere trickle. As a result, the records of decision approving the Windy Gap Firing Project should be rejected, for four main reasons.

First, Reclamation and the Corps failed to define the purpose and need of this project as water supply, instead focusing on the Subdistrict's overly narrow desire to fix the broken Windy Gap Project. Thus, the agencies only considered alternatives that involved building a new reservoir (or several) on the Front Range in order to store Windy Gap water, in an attempt to salvage the original project. The agencies refused to

⁴ Sunk cost bias occurs when, because of the time and capital already invested, a party continues to invest resources into a failed project rather than alternatives, to save face and salvage the original investment. See, e.g., Brian C. Gunia, Niro Sivanathan & Adam D. Galinsky, *Vicarious Entrapment: Your Sunk Costs, My Escalation of Commitment*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1238, 1238–39 (2009); Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27, 27–28 (1976)

look to the underlying purpose in this case, which is to meet the water supply needs of the project participants. This precluded serious, detailed consideration of alternatives such as acquiring more senior water rights, using short-term agricultural leases for immediate needs, conjunctive use of surface and groundwater, and conservation.

Second, Reclamation and the Corps improperly relied on projections of future water needs that were wildly inflated and contradicted by evidence in the record. Numerous commenters raised concerns that the government's projections assumed that water use would become less efficient in the future, while all available data indicated it would get more efficient. The Subdistrict's projections were also contradicted by updated information from the project participants themselves, which significantly downgraded the projected water needs into the future. Finally, and most importantly, as the approval process dragged on for many years, Reclamation and the Corps failed to update their inflated projections with actual use data in 2005, 2010, and 2015. Although relying on projections of the future is often necessary, projections are clearly inferior to actual data on past water usage. Yet the agencies failed to update its analysis with this available data, offering only vague, conclusory, and erroneous statements that actual use was not significantly different from the projections.

Third, although federal agencies are required to disclose the shortcomings of the methodologies that they use, in order to promote informed public participation, Reclamation did not do so in this case. Specifically, Reclamation relied on monthly aggregated streamflow data even though daily data was available and more appropriate; Reclamation overestimated existing diversions by between 9,000 and

25,000 AF; and Reclamation applied a streamflow morphology model that explicitly does not apply to highly regulated rivers such as the Colorado.

Fourth, and finally, Reclamation failed to consider the full range of direct and cumulative effects that the Windy Gap Firming Project would have on the Colorado River and on water quality in Grand Lake. For the Colorado River, Reclamation failed to adequately assess the impacts that Windy Gap would have in conjunction with the Corps-approved Moffat Project, and artificially narrowed its environmental impacts analysis as a result. Reclamation also threw up its hands in the face of uncertainty about climate change, even though available models would have allowed a quantitative, instead of merely qualitative, discussion of what impact the project would have on the Colorado River in light of foreseeable changes in precipitation patterns due to climate change. Furthermore, Reclamation refused to consider the very real threat of a compact call on the Colorado River and what that would mean in light of the Windy Gap Firming Project. Finally, although the Windy Gap Firming Project would enable more pumping of Windy Gap water back upstream through Grand Lake, in order to reach the C-BT tunnel system, Reclamation failed to consider the effects on water quality and clarity that would result from this increased pumping.

For each of these reasons, this Court should vacate the records of decision issued by Reclamation (under Claims 1-6) and the Corps (under Claim 7), and remand to the agencies for further decision-making consistent with federal law.

ARGUMENT

I. **THE GOVERNMENT’S NARROW PURPOSE AND NEED, TO FIX THE BROKEN PROJECT, ELIMINATED ALTERNATIVES THAT WOULD MEET THE FUNDAMENTAL NEED TO SUPPLY WATER.**

Reclamation and the Corps both adopted the Subdistrict’s narrowly-defined purpose and need statement, which, in turn, limited their consideration of alternatives to that purpose: to fix the broken original Windy Gap Project. The Subdistrict was so intent on fixing the original Windy Gap project that it irrationally ignored other—possibly better—ways of meeting any legitimate water needs. By accepting the Subdistrict’s narrow purpose and need, both agencies improperly limited their analyses. Reclamation and the Corps should have conducted independent analyses of the Project’s underlying purpose and need, which was to meet water supply demands. Because each failed to do so, the Project’s purpose and need was impermissibly narrow and excluded reasonable alternatives from consideration such as increased conservation, agricultural leasebacks, interruptible supply contracts, or acquiring more senior water rights from consideration that could meet the purpose and need to supply water.

A. Because the Agencies Adopted the Subdistrict’s Narrowly-Defined Purpose to Fix the Windy Gap Project, They Failed to Discern the Underlying Purpose to Supply Water.

Reclamation and the Corps adopted the Subdistrict’s impermissibly narrow purpose and need rather than independently determine the fundamental underlying purpose and need. The Project’s actual purpose and need is to supply water to meet the Participants’ existing and future needs, not to the fix a broken project by firming 30,000 AF water from Windy Gap. Their actions violated NEPA and the CWA.

1. The Project’s actual underlying purpose and need is water supply.

When evaluating the purpose and need for a proposed project, an agency must identify the *underlying* purpose and need of the project. 40 C.F.R. § 1502.13 (emphasis

added). The reviewing agency commits an error if it accepts a project's prime beneficiaries' too-narrowly-stated purpose or need, because NEPA requires that agencies "exercise a degree of skepticism in dealing with self-serving statements" from a project's prime beneficiaries. *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 667, 669 (7th Cir. 1997). The *Simmons* court held that it is unlawful for an agency to arbitrarily restrict its purpose so as to exclude otherwise viable alternatives. *Id.* at 666 ("If the agency constricts the definition of the project's purpose and thereby excludes what are truly reasonable alternatives, the EIS cannot fulfill its role. Nor can the agency satisfy the [National Environmental Policy] Act.").

In *Simmons*, the applicants' goal was to obtain a water supply from a specific source, and the defined purpose was to build a reservoir to achieve that goal. *Id.* at 669. While it was appropriate for the agency to consider this goal, it could not limit the purpose and need of the project. *Id.* The court found that the Corps "defined an impermissibly narrow purpose" and "therefore failed to examine the full range of reasonable alternatives and vitiated the EIS." *Id.* at 667. The Corps' misidentified purpose and need—to provide participants with water from a single source—was too narrow, in part, because the Corps failed to identify the project's underlying purpose and need: "a thirst for water." *Id.* The *Simmons* court made clear that federal agencies cannot "slip past the strictures of NEPA[s]" alternative requirements by contriving an impermissibly narrow purpose and need. *Id.* at 666. The Tenth Circuit has also held that an agency cannot merely adopt an applicant's narrowly-defined purpose. *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir. 2002). Additionally, Reclamation's NEPA guidance documents state that the purpose and need statement "is a critical element

that sets the overall direction of the process and serves as an important screening criterion for determining which alternatives are reasonable.” Dept. of Interior, Bureau of Reclamation, NEPA Handbook 6-5 (2012).

As in *Simmons*, the fundamental purpose and need here is a “thirst for water.” *Simmons*, 120 F.3d at 667. The Participants do not necessarily need the original Windy Gap project to work, they simply want water from any source. The Corps even determined in its Record of Decision that the “fundamental, essential, or irreducible purpose” of the Windy Gap Firming Project was water supply. COE18537 (quoting 40 C.F.R. § 230). And, despite their protestations to the contrary, the Subdistrict and Reclamation have acknowledged the underlying purpose of water supply as well. This is evident from a review of the objectives of the original project.

The intent of the original Windy Gap Project was to meet users’ future water needs.⁵ COE6. The processes that the Subdistrict hoped would achieve reliable water supply were described in the EIS for the original Windy Gap project and are discussed above at Sections I and II of the Statement of Facts. That original project sought to “meet[] the year 2000 projected water needs” for the six participants by “developing a new and independent water supply.” COE6; COE51. When the original project failed to deliver a reliable annual yield, the participants proposed “firm[ing]” the yield of Windy Gap water in an effort to “provide project participants with additional water supplies to meet a portion of their existing and future demands,” as Reclamation stated in the Project’s DEIS. BOR8522. Reclamation’s statement that the Project’s purpose is not to

⁵ As discussed *infra*, however, the estimates for water use were significantly greater than the recorded actual use.

“search for *other* sources of water” (emphasis added) implicitly concedes that obtaining water from some other source *could* be a possibility—but not, in its view, here, as the agreed-upon goal was instead to salvage the original project. BOR14603.

Like the original Windy Gap Project, descriptions of the Windy Gap Firming Project in its DEIS and FEIS confirm that the *actual*, underlying need of the Project is to supply water. Reclamation states that the Project would “provide more reliable water deliveries to Front Range and West Slope communities and industries[,]” and that the reason reliable water deliveries from the original project are needed are to “meet a portion of the existing and future demands of the Project Participants.” See BOR8524-25 (DEIS) and BOR15247 (FEIS). Additionally, although poorly executed here, the reason an agency would gather economic and demographic data is to have some insight into the likely demand for water so that the project could be structured to meet that demand (or a portion of it). See, e.g., BOR4505-4508 (section discussing Methods for Need Assessment in 2005 Purpose and Need Report). The fundamental purpose of both the original project and its subsequent, attempted “fix” is to provide a reliable supply of water to the participating municipalities.

Commenters warned Reclamation that its purpose and need was too narrow, see, e.g., BOR14603; BOR14624; BOR14792; BOR14821; BOR14919; BOR14928; BOR15077; BOR15198; but Reclamation dismissed the comments without any supporting analysis to explain how it reached its conclusions. Instead of giving a reasoned response to the concerns, Reclamation asserted, “the purpose of the [Project is] to fix a broken [original] project, not to search for other sources of water.” See, e.g., BOR14603, BOR14826. This statement is conclusory at best, and in any event

establishes a lack of independent analysis of the issue. Reclamation's failure to conduct NEPA's required analysis of the Project's underlying purpose and need prevented it from identifying this Project's *actual* purported need: to supply water. BOR2790.

2. *The agencies' adoption of the Subdistrict's project definition of fixing the broken project resulted in an impermissibly narrow purpose and need.*

NEPA promotes informed decision-making. *WildEarth Guardians*, 870 F.3d at 1237 (10th Cir. 2017). Accordingly, where the decision-making is clearly flawed due, in part, to a sunk cost bias obscuring feasible alternatives with far fewer environmental impacts, NEPA has been violated in a fundamental manner. The Subdistrict's decision—and Reclamation and the Corps' subsequent faulty acceptance—to invest more resources in the broken original Windy Gap Project is a textbook example of a sunk cost bias. This bias leads the impaired party to not consider other alternatives that may better meet its underlying goals. The fields of psychology and economics both say that a party wants to salvage a sunken cost rather than consider options that, although not connected to an original cost, might better achieve its goals. In economics, the party really just wants to get more money, whereas in water projects like this one, the party really just wants to get more water. So, the party justifies its actions by reasoning that the earlier bad decision will turn out to be a good one if it only spends more money fixing it. The party would have to accept failure if required to acknowledge that the first decision it made was a bad one, so it convinces itself not to acknowledge the problem. The field of law prohibits biased decision-making.

After making the initial bad decision to build the original Windy Gap project that resulted in zero firm yield, the Subdistrict didn't consider other options besides fixing that project. To do so would be to admit that the original Windy Gap project was an ill-

conceived project that reflected poor decision-making then and poor decision-making now. Nor does the Subdistrict want Reclamation or the Corps to conduct the proper independent analyses that would potentially reveal this bias. Under NEPA, a reviewing agency serves as a check on a project proponent's planning process. Instead, by sanctioning the Subdistrict's chosen course of action, Reclamation and the Corps suffered the same biased reasoning, resulting in decisions that were arbitrary and capricious under the APA.

This type of bias poses a real problem when it influences an agency's selected purpose and need under NEPA. The reason that purpose and need statements must not be too narrowly defined is due to the relationship between the scope of an agency's purpose and need statement and its ability to evaluate alternatives. In evaluating the scope of an agency's purpose and need statement, the Tenth Circuit considered a project with an underlying purpose of improving traffic flow in three cities in Salt Lake County, Utah. *Davis*, 302 F.3d at 1119 (10th Cir. 2002). There, the project proponents wanted to construct a new bridge at one specific point over the Jordan River to improve traffic flow, but the plaintiffs argued for consideration of alternatives that avoided an additional crossing at that location. *Id.* The Tenth Circuit determined that it would be a violation of NEPA to define the purpose and need for the project so narrowly that increased traffic capacity could only be achieved at the chosen location. *Id.* at 1119-20. The agency "could not define the project so narrowly that it foreclosed reasonable consideration of alternatives." *Id.* at 1119.

Here, sunk cost bias led Reclamation to adopt the Subdistrict's narrow purpose and need. Instead of first determining the existence of a need for a certain amount of

water, Reclamation simply accepted that *if* it fixed the broken original Windy Gap project, it could firm 30,000 AF water from it. As in *Davis*, it is the restrictive specificity that causes the problem: an underlying purpose and need of “improving traffic flow” or “supplying water” would enable the type of thorough consideration of alternatives that NEPA demands, but instead, the defendants in *Davis* and agencies here both adopted purpose and need statements which furthered the proponents’ chosen option and foreclosed other options (improving traffic conditions by expanding a specific roadway in *Davis*, and supplying water by building a specific reservoir in this case). The record shows that Reclamation wrongly accepted the Subdistrict’s need of firming 30,000 AF water based on its calculation in its 2003 Alternatives Plan Formulation Report, which said that fixing the original Windy Gap project would firm 30,000 AF water. BOR319. Reclamation reverse-engineered that number to serve as the Project’s narrow need. *Compare* BOR4504 (31,575 AF could be firmed by the Project) *with* BOR4498 (firm yield of 30,000 AF was the purpose).

Like Reclamation, the Corps also failed to scrutinize the Project’s purpose and need to ensure it was not overly narrow. When the Corps considers a § 404 permit, it must exercise independent judgment to identify the underlying purpose and need for the project. 40 C.F.R. § 230.10; 33 C.F.R. § 325 App. B § 9(b)(4). Here, although the Corps ultimately acknowledged the underlying purpose of water supply, COE18537, it nevertheless accepted the narrower need without independent verification. The Corps also received a number of comments alerting it that the Project’s proposed purpose and need to firm 30,000 AF water *from Windy Gap* was too narrow. COE18598. For example, in 2008—nearly ten years before the Corps issued its ROD—EPA objected to

the “narrow scope of the purpose and need statement in the DEIS for the issuance of a CWA Section 404 permit.” BOR14841. However, in response to these concerns, the Corps merely deferred to Reclamation’s faulty analysis, stating that “the Corps believes the purpose and need statement in [the Project’s] DEIS adequately represents the applicant’s intentions and needs[.]” BOR14842. This illogical acceptance of the project’s narrowly-defined need—even while correctly recognizing the true purpose of the project—resulted in the Corps’ acceptance of a narrow range of alternatives and precluded it from considering all reasonable alternatives that would achieve the underlying purpose of water supply while avoiding impacts to waters of the United States.

B. The Government’s Narrow Purpose and Need Eliminated Reasonable Alternatives That Could Supply Water to the Participants.

By adopting the Subdistrict’s impermissibly narrow purpose and need to fix the broken project by firming 30,000 AF water from Windy Gap, the government excluded reasonable alternatives from consideration that could meet the Project’s underlying purpose and need to supply water to meet the Participants’ needs. This arbitrary decision-making to limit the alternatives considered violated NEPA and the APA. Further, by failing to consider alternatives that avoid discharges into waters of the United States, the Corps violated the Clean Water Act.

1. Reclamation and the Corps excluded reasonable alternatives that could supply water to the Participants.

When an agency prepares an EIS, it must consider “all reasonable alternatives” in depth. 40 C.F.R. § 1502.14. The choice of which alternatives are “reasonable,” and the ensuing analysis, forms the “heart of the environmental impact statement.” *Id.* It follows that the scope of the selected purpose of the project determines the range of

alternatives selected; the broader the purpose, the wider the range of alternatives. *Simmons*, 120 F.3d at 666. If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role and the agency cannot satisfy NEPA. *Id.* On the other hand, the range of alternatives does not need to be infinite. *Utahns for Better Transp. v. U.S. Dept. of Transp.*, 305 F.3d 1152, 1166 (10th Cir. 2002). It must simply permit the agency to “[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” *Id.* (citing 40 C.F.R. § 1502.14(a)).

When agencies, like those herein, exclude reasonable alternatives that would have satisfied a project's underlying purpose and need, courts find that agency action to be arbitrary and capricious. In *Utahns*, environmental groups and the mayor of Salt Lake City challenged the Federal Highway Administration's decision to approve a transportation infrastructure project. 305 F.3d at 1162. The appellants alleged multiple violations of NEPA, including the failure to consider a number of practicable alternatives that would have met the underlying purpose of serving increased transportation needs. *Id.* at 1162, 1164-67. Specifically, the appellants claimed that the agencies violated NEPA by eliminating the Denver and Rio Grande Regional Alignment (D & RG) alternative from the FEIS. *Id.* at 1164.

On appeal, the Tenth Circuit agreed that the FEIS was inadequate for eliminating the D & RG alternative based on inadequate cost estimates and for failing to consider alternative sequencing of the elements of the project (among other reasons), and that the Corps' issuance of a 404 permit was arbitrary and capricious for failing to determine

whether certain other proposals were less damaging. *Id.* at 1192. Nothing in the record confirmed whether the agencies verified cost estimates or responded to comments submitted by the appellants on that issue. *Id.* at 1165. Thus, the court concluded that the FEIS was inadequate due, in part, to its elimination of the D & RG and other alternatives without adequate consideration or explanation.

As in *Utahns*, here, the agencies also excluded reasonable alternatives that would have satisfied the project's underlying purpose and need. Those alternatives include interruptible supply contracts, increased water conservation, agricultural leasebacks, and acquiring senior water rights. BOR4812. These other reasonable methods of supplying water to the Project participants should have been considered.

First, increased water conservation should have been evaluated. Commenters pointed out that water conservation is a common alternative to these types of projects, BOR14886, and that an "endless array of [water conservation] practices...can be implemented to preserve water, such as grey water reuse...and encouraging other conservation measures at home." BOR14947. Reclamation was told that each eastern slope Participant "should be required, to the maximum extent feasible, to implement reuse programs and make successive use of the foreign water," BOR14940, and that "there are vast amounts of [water conservation] tools and resources offered by the state to help assist communities with their water conservation efforts. There's little excuse for not [considering water conservation]." BOR14922. Despite these comments showing the reasonableness of water conservation, Reclamation and the Corps failed to include it in their range of alternatives.

Second, interruptible supply contracts are another reasonable alternative that Reclamation and the Corps failed to include in their range of alternatives. EPA explicitly told Reclamation that it should consider using “agricultural transfers including... interruptible, and rotating/fallowing transfers” because “it may... [be within] a reasonable range of alternatives required by NEPA as well as less damaging practicable alternatives required by the CWA.” BOR14818. These comments should have made Reclamation and the Corps recognize and include interruptible supply contracts in the range of reasonable alternatives, yet each agency still arbitrarily chose not to.

Third, Reclamation and the Corps also excluded agricultural leasebacks from their range of alternatives. EPA again argued for the “use of short-term agricultural leases for immediate temporary water supplies,” because it was a reasonable alternative under NEPA and required by the Clean Water Act. BOR14818. Other commenters urged Reclamation to consider “transfer of agricultural water rights... and... rotating fallowing agreements... [that] can meet the future water needs of expanding Front Range communities.” BOR14883. Those same commenters noted that “transferring water from agricultural to municipal use is substantially less expensive than was assumed in the... DEIS,” *id*, and that “the alternative of transferring agricultural water to municipal water use is [a] particularly compelling [alternative].” BOR14886. In spite of these comments, the government did not include agricultural leasebacks in their range of reasonable alternatives.

Finally, Reclamation and the Corps’ range of alternatives did not include the reasonable alternative of acquiring more senior water rights. EPA recommended acquiring senior water rights, noting that these senior water rights “have been available

to the project proponent since the original Windy Gap project.” BOR14823. Again, Reclamation and the Corps did not include acquisition of senior water rights in their range of reasonable alternatives, opting instead to only consider alternatives using reservoirs to firm up supplies with relatively junior water rights.

Each of the above alternatives were raised as potential options, yet omitted from detailed consideration. Reclamation’s response to comments shows that these reasonable alternatives were dismissed merely because they would not “fix the broken” Windy Gap Project. In response to EPA’s suggestion that it consider water conservation, interruptible supply contracts, agricultural leasebacks, and acquiring senior water rights, Reclamation stated “EPA-suggested alternatives may provide alternate sources of water, but would not meet the project purpose and need [to firm 30,000 AF water at the original Windy Gap project],” BOR14823. This reflects the biased decision-making that has fatally infected the entire approval process. NEPA is designed to prevent exactly this type of flawed decision-making by requiring that agencies truly do consider all reasonable alternatives.

A water supply project that *only* considers alternatives that involve the use of reservoirs is not a reasonable range of alternatives and does not reflect the “rigorous[] explor[ation] and objective[] evaluat[ion] [of] all reasonable alternatives” that NEPA requires. 40 C.F.R. § 1502.14(a). In comments to the Preliminary Draft EIS (PDEIS), Grand County, a cooperating agency, pointed out that the narrow purpose and need statement would lead to an impermissibly narrow range of alternatives that fail to satisfy NEPA’s requirement for agencies to take a “hard look” at environmental consequences. BOR14590; BOR14603. Similarly, the Colorado River District and many individual

commenters pointed out to Reclamation and the Corps that other sources of water exist that could meet the Project's underlying purpose and need, urging consideration of "additional conservation, reuse, and rotational fallowing of agricultural land on the Front Range." BOR14795; BOR14883.

Instead, Reclamation and the Corps limited their analyses to construction of new reservoirs because of the Project's narrow purpose and need. Reclamation explicitly stated that "alternatives were evaluated primarily on their ability to firm Windy Gap Project water supplies." BOR4279. Indeed, in direct contradiction with the spirit of NEPA's regulations and guidance, the agencies only considered alternatives "desirable from the standpoint of the [Participant]." Council on Environmental Quality, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (Mar. 23, 1981). Conducting an alternatives analysis so narrow as to exclude non-reservoir alternatives is an explicit violation of NEPA's requirements that agencies conduct an independent review of all reasonable alternatives that would meet the underlying purpose and need of the project. Moreover, comparing alternatives that all include building reservoirs does not provide a sharp definition of the issues or provide a "clear basis for choice among options by the decision maker and the public" mandated by NEPA. 40 C.F.R. § 1502.14.

2. The Corps excluded reasonable alternatives that could avoid impacts to waters of the United States.

When the Corps considers issuing a § 404 permit, it must consider reasonable alternatives that would meet the underlying need of the project while avoiding impacts to waters of the United States. 33 C.F.R. § 325 App. B § 9(b)(5)(a). Here, all the alternatives the Corps considered impacted the Colorado River, while each of the

nonstructural alternatives—which it refused to consider—would not have had an impact on the river. Also, because each considered alternative involved building a reservoir (activities that would inundate or damage wetlands), see, e.g., BOR15652, to firm 30,000 AF water from the original Windy Gap project—even, unbelievably, the No Action alternative—the Corps limited its analysis and failed to consider alternatives that could meet the Participants’ underlying needs while avoiding discharges to waters of the United States. This decision is a violation of the Clean Water Act and this Court should vacate the Corps’ ROD and require it to conduct the proper analysis of reasonable alternatives that would meet the Project’s underlying need.

Additionally, the “Corps has a duty to independently evaluate practicable alternatives to the proposed project ‘if such alternatives would have less adverse impacts on the aquatic ecosystem [and no] other significant adverse environmental consequences.’” *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1263 (S.D. Fla. 2009) (quoting 40 C.F.R. § 230.10(a)). That means that the Corps must seek to avoid impacts to waters of the United States, as that would be the least environmentally damaging approach, before it can select an alternative that would have impacts (even if mitigated) to waters of the United States. And, while the Corps does have a responsibility to consider the Participants’ objective to fix the broken project, the “[Participants’] assessment must be critically evaluated by the Corps.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004).

Despite this duty, the Corps failed to consider alternatives that would avoid a discharge by accepting the Subdistrict’s proposed need to fix the broken Windy Gap Project in its 2017 ROD. COE18538. Just like Reclamation, the Corps also received

comments alerting it that the Project's purpose and need was too narrow and excluded reasonable alternatives. COE18598. For example, in 2008—nearly ten years before the Corps issued their ROD—EPA objected to the “narrow scope of the purpose and need statement in the DEIS for the issuance of a CWA Section 404 permit.” BOR14818. However, in response to these concerns, the Corps agreed to Reclamation's faulty analysis, which it “narrow[ed] down the range of reasonable alternatives” that could meet the Project's purpose and need, BOR14823, saying it “agrees with Reclamation's analysis of the alternatives.” COE18541. And, just like Reclamation, despite these warnings, the Corps still failed to consider alternatives that would avoid impacts to waters of the United States by only considering reservoir options. Instead of addressing this raised issue, the Corps relied on the Subdistrict's narrow need for the Project to justify the exclusion of all other alternatives. See COE18538. By contriving a purpose and need so slender as to prevent its own consideration of any reasonable alternatives other than reservoirs that would divert water from Windy Gap, the Corps violated its duties under § 404(b)(1) of the Clean Water Act.

* * *

Reclamation's and the Corps' acceptance of the Subdistrict's stated purpose and need to fix a failed project led to a host of problems: the agencies failed to identify the true purpose of water supply and did not consider a reasonable range of alternatives beyond reservoirs. Further, the Corps failed its duty under the CWA to avoid impacts to waters of the United States because every alternative considered involved construction of a reservoir and impacted the Colorado River. Nonstructural alternatives could have accomplished the fundamental purpose of this project, while resulting in fewer

damaging environmental effects. Thus, the agencies acted arbitrarily and capriciously, and Colorado River Defenders should prevail on Claims 1, 3, and 7.

II. THE GOVERNMENT FAILED TO INDEPENDENTLY VERIFY THAT WINDY GAP WATER IS ACTUALLY NEEDED.

Reclamation and the Corps reverse-engineered the need for this project by adding up the firm yield goals for each participant in the Project. BOR4504 (31,575 AF could be firmed by the Project); BOR4498 (firm yield of 30,000 AF was the purpose). Thus, the Project arose from the Subdistrict's specific goal of building a new reservoir to hold more water from the Western Slope, rather than being driven by water demands. As a result, Reclamation and the Corps simply relied on a study done for the Subdistrict that purported to show a huge gap between future water supplies and future water needs, more, in fact, than the 30,000 AF that the Windy Gap Firming Project could provide. The agencies never verified that this need actually existed, even in spite of comments pointing out how dramatically overinflated the projections were. The agencies also failed to update the original projections as newer, lower projections were made as part of the Water Conservation Plans prepared by each water user. Most importantly, the agencies failed to replace their projections of future water needs (which are inherently uncertain) with actual water demand data, even as over a decade passed and many of the future dates became reality. This was a critical oversight, because the available data shows that water use in the relevant communities was flat or declining, and thus the need for the project perhaps did not exist. This failure by the agencies prevented both informed decision-making and informed public participation. As a result, both Reclamation and the Corps failed in their responsibilities under NEPA and the

Clean Water Act to ensure that the need for the project existed, resulting in fatally flawed approvals of the Windy Gap Firming Project.

A. The Record Contains Ample Evidence That Water Need Projections Were Dramatically Off-Target.

The 2008 Draft EIS projected that by 2006, nine of the firming project participants would face shortages of firm water supply. COE3490. However, 2006 had already passed, and no such crisis had occurred.⁶ Further, despite being published in 2008 and having access to the actual use data through 2006, the DEIS didn't include or update the participants' actual firm water shortages or surpluses for these years. *Compare, e.g., BOR4530–32 with BOR8577.* Nor is the government's failure to consider new information limited to the DEIS. Reclamation used these same demand projections formulated in 2005 nearly seven years later in its 2011 Final EIS and almost ten years later in its ROD. *Compare BOR4553 with BOR15266 with BOR17708.*

Agencies have a continuing duty to gather and evaluate new information. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000). While agencies are not required to update forecasts every time new data becomes available, they ordinarily may not rely on outdated forecasts. *Conservation Law Found. v. Fed. Highway Admin.*, 630 F. Supp. 2d 183, 211 (D.N.H. 2007). In *Conservation Law Found.*, the court found error where the defendants made no attempt to update traffic projections in a DEIS or FEIS even though they possessed—and provided to their experts—more recent projections. 630 F. Supp. 2d at 210. Defendants were not “free to reject without explanation” the most recent forecasts in favor of outdated ones. *Id.* By contrast, courts

⁶ For example, in 2005 Greeley had a firm supply of 43,850 AF and a projected need of 27,700 AF, while Longmont had a firm supply of 30,963 AF and a projected need of 25,900 AF. *Compare BOR15257 with BOR15266.*

are more sympathetic to use of older data where, for instance, the new data is officially approved a week before publication of a DEIS and the agency still manages to use it in at least a limited analysis. See *Audubon Naturalist Soc’y of the Cent. Atl. States, Inc. v. U.S. Dep’t of Transp.*, 524 F. Supp. 2d 642, 673-74 (D. Md. 2007). In this case, the agencies are due no such sympathy. The record shows that the agencies relied on outdated water demand projections contained in the 2005 Purpose and Need Report, BOR4489, BOR15267, even where, as discussed below, those projections were shown to be inaccurate and where updated data became available. This decision is an unexplained violation of the agencies’ NEPA obligations. See *Conservation Law Found.*, 630 F. Supp. 2d at 210.

The 2005 Purpose and Need Report acquired information about future water needs—which were used to make the demand projections—primarily from the Participants themselves and only gathered data from third parties “as necessary.” BOR4505. Rather than “exercising a degree of skepticism” about this data, Reclamation decided to accept Participants’ stated future demand needs in its EIS. BOR15256–57; *Simmons*, 120 F.3d at 667. Although Reclamation states that it “conducted an independent evaluation of the estimated current and future water requirements for each of the Project Participants to determine the need for the proposed project,” there is no evidence to show that this independent evaluation was ever done, and this conclusory statement fails to acknowledge that the majority of that data was gathered from the Project’s primary beneficiaries. BOR15256.

Multiple commenters brought these issues to the agencies’ attention very early in the process. In 2003, the Little Thompson River Watershed Stakeholders Group

suggested that the demand projections were overinflated and were “nothing more than the desires of the participating members . . . ,” not the actual water demand. *See, e.g.*, BOR1559. Also in 2008, during the public hearings, Jeff Thompson of Longmont noted that Longmont’s projected need was 327 gcpd, while the actual use for 2006 was only 195 gcpd: only 60% of the projected use. BOR9236. Another commenter pointed out that the firm water supply for the City of Longmont was higher than disclosed and the projected need for water was overstated. BOR15001.

EPA also raised concerns about use of these outdated projections and urged Reclamation to conduct an “independent review of Participants’ estimated and future water requirements and supply studies,” using “the most current economic and population growth indicators for future water demand and supply information in subsequent NEPA documentation.” BOR14821. EPA went on to state that the Participants’ water use per capita had dropped “37% between 1988 and 2003” and believed that the Participants could cut water demand even more. BOR14823.

WRA specifically recalculated the demand projections for the Project Participants based on the Colorado Water Conservation Board’s anticipated twenty-five percent water use reduction for state-wide water planning. BOR15209. Its calculations of the Project Participants’ per capita water use shows that water use falls from 194 gpcd (average 1998-2003) to 147 gpcd by 2033. BOR15209. WRA explained that, based on these conservation calculations, that existing firm supplies will meet the future water demands through 2030. BOR0015210. Reclamation replied—without supporting analysis—that WRA’s method was inappropriate and the Project Participants would

maintain conservation plans in accordance with the Water Conservation Act of 2004. BOR15209; BOR15216.

In addition to comments notifying Reclamation of problems with its projections, information from the project participants themselves contradicted Reclamation's initial figures. Between the DEIS in 2007 and the FEIS in 2011, the participants in the Project prepared Water Conservation Plans for the state, which are all part of the record. Each of these included revised projections for water demand into the future, which were significantly lower than the projections from the 2005 Purpose and Need Report. When compared to the projections used in the EIS, the updated projections contained in participants' individual Water Conservation Plans reveal the inaccuracies of the initial forecasting. For example, in the EIS, Greeley's 2030 projection was 53,500 AF, but its water conservation plan includes a 2030 projection of 44,135 AF—a 21.2% difference. Evans, a former participant, projected a 2030 need of 11,100 AF, but later updated its 2030 projection to 7965 AF—a 39.7% difference.

The agencies' decision to rely on the outdated projections from the 2005 report in spite of these updated projections from the Water Conservation Plans failed the requirement of NEPA to engage in informed decision-making. In *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers*, the Corps approved a permit to build a reservoir on the Cohoke Creek in Virginia. 606 F. Supp. 2d 121, 126 (D.D.C. 2009). In its alternatives analysis, only those alternatives that included reservoirs were carried forward for review. *Id.* at 129. The final EIS for the project was completed in 1997, but the Corps' final record of decision and issuance of the permit did not come until 2005. *Id.* at 128. As is the case here, substantial time passed and several important changes

occurred. The projected water need decreased substantially, the cost of the project increased, and the amount of water it would produce decreased. *Id.* The *Alliance to Save the Mattaponi* court found that the Corps acted improperly when it merely asserted that other alternatives may not have met the need and could have been more damaging to waters of the United States, but did not provide an adequate explanation for why there is no less-damaging practicable alternative, especially in light of evidence suggesting a much lower need, and by failing to reevaluate the actual need for the project using the significantly lower demand projections. *Id.* at 130.

Here, as in *Alliance to Save the Mattaponi*, both Reclamation and the Corps were aware of subsequent evidence of a significantly lower need for the Project, yet refused to reevaluate the need. Instead of complying with the duties imposed by NEPA and the CWA, the agencies relied on the 2005 demand projections throughout the process, simply noting that “[w]hile Participant water supply and demand conditions may have changed slightly since the studies for the Draft EIS were completed, the water supplies and projected demands still provide a reasonable representation of the water needs for the 13 Participants.” BOR15267. Faced with numerous credible and substantive comments that the need for the project was overinflated, and updated projections from the project participants’ themselves, Reclamation merely brushed them aside and failed to take any meaningful action. Reclamation should have reexamined its water use projections in light of the extensive record evidence before it. Reclamation’s cursory assertion to the contrary not only fails to constitute the reasoned explanation required by the APA, but its failure to reexamine its calculations in response to these legitimate

concerns is also arbitrary, capricious, and violates both NEPA and the APA. See, e.g., *Simmons*, 120 F.3d at 669.

B. Reclamation and the Corps Failed to Update Projections With Actual Water Usage Data.

Because of the many years that passed between the original need study in 2005 and the issuance of the RODs by Reclamation in 2014 and the Corps in 2017, the failure to replace projections of the future with actual water demand data, when such data was available, is a serious and fatal flaw underlying the agency approvals of the Project. Both Reclamation and the Corps failed their duties under NEPA and the CWA to independently verify the water need and to use the best available data.

An agency acts arbitrarily and capriciously when it fails to explain why a decision is proper in light of subsequent evidence of a greatly reduced need for a project. *Alliance to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F Supp. 2d at 129-30. In this case, as in *Alliance to Save the Mattaponi*, actual water use demonstrated that the 2005 water demand projections in the FEIS were much too high. This trend should hardly come as a surprise to the agencies, since the Final EIS expressly acknowledged that since 1988, there had been a “26 percent decrease in water use” BOR15263. For example, Longmont’s 2005 Water Conservation Plan shows that between 1997 and 2000, the average per capita water used was 114 gpcd, but that average water use since 2000 dropped 10 percent to about 103 gpcd. BOR9037. There are several reasons for this reduction in use, including educational efforts and increased conservation. *Id.* Another example of the 2005 projections outpacing actual use is reflected in Greeley’s 2008 Water Conservation Plan, which shows a reduction in use of 14 percent after 2002 “in spite of an 18.4 percent increase in population.” BOR9527.

Even though evidence showed a reduced need, Reclamation offered no reasoned explanation for why its continued reliance on outdated data was proper. Although Reclamation acknowledged that CEQ guidance on NEPA requires agencies to “use the best available information,” BOR15000, Reclamation continued to use water demand projections formulated in the 2005 Purpose and Need Report, rather than updating those numbers with actual use data provided by the Participants and commenters. Reclamation could have used actual demand data for 2005 and 2010 in its 2014 ROD, and the Corps could have used that data, plus the 2015 actual use data in its 2017 ROD. The government needed to address this issue, but it did not, and that decision was arbitrary and capricious and in violation of NEPA.

Evidence in the record is utterly lacking to support Reclamation’s conclusory assertion that “[w]hile Participant water supply and demand conditions may have changed slightly since the studies for the Draft EIS were completed, the water supplies and projected demands still provide a reasonable representation of the water needs for the 13 Participants.” BOR15267. Reclamation makes no attempt to explain how an overestimate of at least 58% for Greeley, for example, has only changed “slightly.” A nearly 60% decrease is not just a slight change, but instead a significant one that should have been addressed in the Final EIS, especially since it involved the largest water user participating in the Windy Gap Firming Project. Although Reclamation seems to assert that it did look at actual water use data, it did not bother to compile that data or compare it to its projections. Instead, it simply made the offhand and dismissive responses to comments which argued that the water demand projections were overstated. Given the substantial nature of the comments, this response was

insufficient. This court should not sanction Reclamation's attempt to sweep this stubborn issue under the rug by failing to provide actual use data to the public, and by failing to update its analysis. There is no indication that this data could not have been obtained and presented to the public.

* * *

Because Reclamation and the Corps essentially "rubberstamp[ed]" the applicants' proposed need of 30,000 AF, BOR452, and similarly failed to provide a reasoned explanation for included demand projections, the agencies violated NEPA. The agencies never explained why the actual need of the project continued to exist, despite the significantly reduced demands, and failed to independently verify the actual need for the project, even after being presented with substantial comments and evidence that the need was overestimated, and by failing to look at the applicants' self-serving information skeptically. Because the agencies similarly failed to provide a reasoned explanation for the demand projections, Reclamation and the Corps violated NEPA. For the reasons set forth above, the Petitioners should prevail on claims 2 and 7.

III. RECLAMATION FAILED TO DISCLOSE SHORTCOMINGS IN ITS DATA AND METHODOLOGIES WHEN DETERMINING THE PROJECT'S IMPACTS.

NEPA requires that the Environmental Impact Statement contain high-quality information and accurate scientific analysis. 40 C.F.R. § 1500.1(b). If there is incomplete or unavailable relevant data, the Environmental Impact Statement must disclose this fact. 40 C.F.R. § 1502.22. Thus, Reclamation was required to disclose any shortcomings in its chosen methodology relating to the Project's impacts and substantively explain the reliability of its decisions to commenters in its FEIS, but it failed to address the many shortcomings that commenters warned each about in its FEIS. Specifically, Reclamation failed to address the shortcomings associated with its

disaggregation⁷ of monthly stream flow averages to predict the daily averages, its overestimated existing Colorado River diversions, and its reliance on the Schmidt and Potyondy 2004 Report for stream flow morphology.

Courts will not defer to an agency's choice of methodology or data when the agency does not adequately explain its reliability or fails to disclose its shortcomings. *Hillsdale Env'tl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1178 (10th Cir. 2012) (noting that ordinarily, choice of methodology is entitled to deference so long as agency's method has a rational basis and considers relevant factors); *see also Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005) (finding that Forest Service violated NEPA when it relied on a model that excluded relevant variables related to sedimentation in the watershed and variables that related to impacts from high-intensity, short-term peak flows yet failed to disclose those limits of the model). That means while Reclamation has discretion to choose its methodology, it still must explain why that methodology is reliable. *Hillsdale*, 702 F.3d at 1178. When an agency relies heavily on a scientific model, that agency's analysis is incomplete if it inadequately discloses that model's shortcomings. *Lands Council*, 395 F.3d at 1031-32. Because the agencies did not properly discuss or address the shortcomings and limitations of their assessments, they violated the requirements of NEPA.

A. Reclamation Did Not Disclose the Shortcomings of Using Disaggregated Monthly Stream Flow Averages.

Commenters noted to Reclamation that disaggregating monthly stream flow averages to acquire a daily stream flow figure “mask[s] important stream flow changes

⁷ “Disaggregation” here refers to the mathematical process of converting flow reported as monthly values into flow reported as daily values. BOR15142.

that may have significant impacts on river ecosystems.” BOR15142. Commenters explained that the variance in daily stream flows is extremely important for river health and suggested Reclamation use actual daily data to avoid an over-estimate in flows. *Id.* Reclamation responded without including any analysis, stating that a daily model was not needed to assess the effects of low-flow periods that commenters had warned about and that disaggregation of monthly data was sufficient for the assessment of effects on aquatic resources. *Id.* Reclamation did not explain *why* using disaggregated monthly data was sufficient as opposed to using actual daily data. BOR0015142.

B. Reclamation Did Not Disclose the Shortcomings of Its Overestimation of Existing Diversions.

Commenters pointed out that Reclamation overestimated the existing Windy Gap diversions, which resulted in a gross understatement of the anticipated diversions from the Colorado River. BOR14592-94; BOR15143. These comments noted that average historical Windy Gap diversions were 11,080 AF, much lower than the 36,532 AF used by Reclamation. BOR14592.

These inflated baselines make the increased diversions from the Project seem less disruptive than they really are, preventing the agency from making informed decisions. The erroneous baseline number of 36,532 AF of diversions from Windy Gap was derived by Reclamation through modeling for diversions rather than using the actual amount of 11,080 AF. BOR6417. This is yet another example of Reclamation using inferior methods of gathering data when the actual data was available. Despite these concerns, nowhere in the administrative record does the Government explain how they came up with this number, merely stating that “under the existing conditions,

average annual Windy Gap pumping is *estimated* to be 36,532 AF/year.” BOR15426 (emphasis added).

It was only once Reclamation was confronted with this issue by Grand County that it came up with a rationalization for the wildly inflated diversions. Grand County pointed out that the amount of existing diversions were over-reported, and that the Water Resources Technical Report, as well as the Office of the State Engineer, both stated that the average diversions of Windy Gap for the time period selected for review by Reclamation total 11,080 AF per year. BOR14592. Other commenters noted that the “lack of an accurate baseline from which to measure the impacts of the [Project] is a deficiency that infects the entire” DEIS, BOR15059, and because this issue remained unsolved, the impacts analysis was fundamentally flawed and inadequate. See, e.g., BOR15057–59, BOR15143.

In response, Reclamation claimed that the average per year diversion from 2001 through 2008 were 27,450 AF per year, so the “estimated pumping conditions under existing conditions is much closer to recent operations” BOR14592. Reclamation did not update its analysis to use 27,450 AF as the baseline instead of 36,532; instead, it held its position and said that 36,352 AF was close enough, and failed to adjust its impacts analysis. Use of the actual amount would have effectively doubled the diversions in the impacts assessment. Specifically, using 27,450 AF as the baseline in Table 3-9 would have increased the effects on the Colorado River from -9,952 AF to -18,638 AF. BOR15428. This is a major shortcoming that was not adequately addressed in the EIS, and undermined the accuracy of its impacts analysis.

C. Reclamation and the Corps Did Not Disclose the Shortcomings of Their Stream Morphology Analyses.

In their responses to commenters, Reclamation and the Corps both failed to disclose the shortcoming associated with the use of the 2004 Schmidt and Potyondy study (an evaluation of stream morphology that compared changes in the range of channel maintenance flows to be used specifically for unregulated streams), where the Project is based on the heavily-regulated Colorado River. Reclamation and the Corps should have acknowledged in their FEISs that the 2004 study was to be used specifically for “quantifying channel maintenance flows on perennial, *unregulated*, snowmelt-dominated, gravel-bed streams.” BOR11898; Schmidt and Potyondy 2004, pp. iii..

The Colorado River is a highly regulated stream, something the Schmidt and Potyondy 2004 model explicitly says it is not equipped to address without significant adjustments. The report says, “channel maintenance flow regimes below large storage reservoirs or hydropower facilities . . . require different analysis techniques to address the wide variety of possible ecological or management conditions that may exist.” Schmidt and Potyondy 2004, pp. iii. Therefore, relying on the Schmidt and Potyondy 2004 report in the Project – which deals with the highly regulated Colorado River – required a different analysis of the channel maintenance flows to address the known shortcomings of the study.

Commenters noted to both Reclamation and the Corps between their FEIS and RODs that data from the 2011 Nehring Report should have been used when analyzing the impacts to stream morphology flushing rates, as opposed to their use of the 2004 Schmidt and Potyondy Study, because the Nehring Report’s findings (urging a minimum

of 3,334 cubic feet per second flow rates) were not considered in the FEIS. BOR17717; COE18610. Reclamation's conclusory response was that it "did not find the [Nehring] report's conclusions regarding the existing physical condition of the Colorado River below Windy Gap Reservoir useful in determining the environmental consequences," BOR17717, and did not explain its continued reliance on the 2004 Schmidt and Potyondy Study. The Corps justified its use of the 2004 Schmidt and Potyondy Study because "regulation of the [Colorado River]... has not perceptibly altered the [the river] below the dam during a period of sixty years." COE18610.

* * *

Reclamation's failure to address the shortcomings associated with its disaggregation of monthly streamflow averages, its overestimation of existing Colorado River diversions, and its reliance on the 2004 Schmidt and Potyondy study for stream flow morphology were arbitrary and capricious under the APA. Colorado River Defenders should prevail on Claim 4.

IV. THE GOVERNMENT FAILED TO ADEQUATELY EVALUATE DIRECT AND CUMULATIVE IMPACTS OF THE PROJECT.

NEPA requires that agencies consider all direct and cumulative impacts of proposed projects. 40 C.F.R. § 1508.25(c). Direct impacts are "caused by the action and occur at the same time and place." *Id.* at 1508.8(a). Cumulative impacts are those that result from combining incremental impacts of the action with past, present, or reasonably foreseeable future actions. *Id.* at 1508.7. Cumulative impacts can result from individually minor but collectively significant actions taking place over time, and should be considered regardless of which agency or person undertakes the other actions. *Id.* The requirement to consider all reasonable impacts must include an analysis of global

climate change under NEPA. See, e.g., *Border Power Plant Working Group v. Dep't of Energy*, 260 F. Supp. 2d 997, 1029 (S.D. Cal. 2007).

From first public notice of the Project in 2003, BOR0002795, commenters raised concerns both about direct and cumulative impacts that the Project would create. Despite these concerns, Reclamation and the Corps failed to adequately analyze cumulative impacts of the Project with past, present, and reasonably foreseeable future actions, as required by NEPA. *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1251 (10th Cir. 2011); 40 C.F.R. § 1508.25(a)(2). Commenters provided substantial evidence that this Project, when combined with additional diversions from the Colorado River and the effects of climate change, could have significant impacts on the ecologic and aquatic resources downstream of the Windy Gap Reservoir, see, e.g., BOR15051, BOR15061, COE17228-29. Reclamation and the Corps largely ignored the evidence of these reasonably foreseeable impacts, failing to quantitatively analyze the effects that climate change may have on the availability of water for the Project, especially given the junior rights at play and the ever-increasing likelihood of a compact call. Nor did the agencies adequately study the Project's effect on the water quality and clarity of the Three Lakes.

A. The Agencies Failed to Adequately Evaluate Direct and Cumulative Impacts to the Colorado River from the Project.

The NEPA regulations direct agencies to consider, among other things, the direct and cumulative environmental impacts of their proposed actions. 40 C.F.R. § 1508.25(c), see also *Front Range Nesting Bald Eagle Studies v. U.S. Fish and Wildlife Serv.*, 353 F. Supp. 3d 1115, 1133 (D. Colo. 2018) (citing *Colo. Env'tl. Coal. v. Office of Legacy Management*, 819 F. Supp. 2d 1193, 1212 (2011)). In reviewing the impacts

analysis, this Court should “examine the administrative record, as a whole, to determine whether the [agencies] made a reasonable, good faith, objective presentation of those impacts sufficient to foster public participation and informed decision making.” *Colo. Env'tl. Coal. v. Dombeck*, 185 F.3d 1162, 1177 (10th Cir. 1999).

A review of the record here shows that Reclamation and the Corps did not adequately consider many direct and cumulative impacts to the Colorado River ecosystem, like increased diversions, worsening climate change, or risk of a compact call. Each of these unique impacts to the ecosystem should have been evaluated in detail during the decision-making process.

1. *The Government did not adequately consider the cumulative impacts of the Project in combination with the Moffat Project.*

The Moffat Collection System Project is yet another proposed water diversion project that aims to divert water from the Colorado River headwaters to Colorado's Front Range through, in part, constructing the tallest dam in the state of Colorado and expanding the storage capacity of the Gross Reservoir by roughly 72,000 AF. See Availability of the Final Environmental Impact Statement for the Moffat Collection System Project, 79 Fed. Reg. 22957 (Apr. 25, 2014). The Moffat Project is obviously “reasonably foreseeable,” because it was identified in the NEPA process for the Windy Gap Firing Project. Because the agencies had information about the Moffat Project readily at hand, their analysis of the cumulative impacts of the two projects' added strain on the Colorado River should have been more robust and thorough. It was not.

First, the effects analysis for surface water hydrology impacts in light of the Moffat project was flawed. As discussed above, the diversion numbers to set the baseline conditions for the current flow rates in the Colorado River below Windy Gap,

used to analyze the combined effects of the Project and the Moffat Project, were inflated to 36,532 AF instead of 11,080 AF. BOR6417. The FEIS admits that Denver's diversions, "primarily from the Blue River and to a lesser degree from the Fraser River and Williams Fork River, are overstated in the cumulative effects hydrology used in the WGFP analysis." BOR15462. These inflated baselines make the increased diversions from the Project seem less disruptive than they really are, which prevents agency personnel from making informed decisions.

Another obvious flaw in the analysis of the cumulative impacts of the Project and the Moffat Project is that Reclamation used different models for the hydrologic effects assessment. BOR15417. As the court in *Southern Utah Wilderness Alliance v. United States Department of Interior* found, the failure to include data that an agency deems more accurate deprives the public of an opportunity to present "informed public input," and violates NEPA. No. 2:13-cv-01060-EJF, 2016 WL 6909036, at *11 (D. Utah Oct. 3, 2016). The Moffat Project employed the Platte and Colorado Simulation Model (PACSM) which provides daily data, while the Windy Gap Firming Project used the Colorado Decision Support System (CDSS) to calculate the cumulative impacts on the Western Slope, a system that only provides monthly data which must then be disaggregated to daily data. *Id.* This is contrary to Reclamation's own recognition that PACSM is the "most appropriate for the cumulative effects analysis," and "provides greater functionality on the Fraser and Colorado River." BOR3074. The FEIS provides that the accuracy of the CDSS model is lower primarily during the months of April and August (the rising and falling limbs of the hydrograph), but the agency claimed that "because Windy Gap diversions during this period are typically low, model results were

reasonable for assessing hydrologic changes.” BOR15417. The FEIS also noted that generally, depending on the amount of data needing to be estimated, “the overall accuracy of a daily model may not be significantly greater than a monthly model,” yet failed to explain whether that was the case here. *Id.* This explanation offers no concrete reason why CDSS would make more sense to use here. This constitutes a “harmful error” that deprived the public of “informed public input” and further fails to “articulate a rational connection between facts found and the decision made.” *Utahns for Better Transp.*, 305 F.3d at 1175.

Another flaw in the cumulative impacts analysis is that the geographic scope of the study area considered was too limited. Specifically, several commenters noted that Reclamation’s decision not to study surface water hydrology below Kremmling, BOR0015398, ignores the reality that cumulative impacts will extend downstream of Kremmling on the Colorado River. *See, e.g.*, BOR14809, BOR14776. Reclamation responded that the “downstream extent of the study area was initially based on the location where average monthly flow changes would be less than 10% under direct effects.” BOR14809. While this may seem like a reasonable reply, it obfuscates the fact that Reclamation did not include impacts from the Moffat Project in its direct effects analysis. BOR15418. Furthermore, limiting the geographic scope of the cumulative impacts analysis to the range of direct impacts disregards CEQ Guidance that states that in identifying geographic boundaries, the immediate area of the proposed action is sufficient for project-specific effect analysis, but the boundaries for the cumulative effects analysis “should be expanded.” Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act*, 12 (Jan. 1997).

2. *The Government failed to conduct an adequate analysis of the direct impacts of the Project in light of climate change.*

Reclamation and the Corps did not take an adequate look at the effects climate change would have on the Colorado River and water availability for the Project. The only analysis given was a qualitative assessment of potential future impacts, despite having been provided information and studies that would have allowed—and indeed, recommended—a detailed quantitative analysis of impacts. See BOR19508 (Reclamation report recommending that quantitative analyses be performed for projects on the Colorado River with greater than a 20-year look-ahead).

Courts have held that when an agency fails to consider climate change, an EIS cannot be considered sufficient. For example, in *WildEarth Guardians v. Zinke*, the court held that when BLM summarized the potential impacts of a project on climate change—via its greenhouse gas emissions—rather than conducting a quantitative analysis of those impacts, it failed to provide the necessary information for the public and agency decisionmakers to make informed decisions, and BLM did not sufficiently consider climate change when making those decisions. 368 F. Supp. 3d 41, 51 (D.D.C. 2019). Although the facts in *WildEarth Guardians* differ from this case somewhat (there, contributions of project to climate change; here, severity of impacts *in light of* climate change), the key point that it is unreasonable for an agency to conduct only a qualitative analysis when it has the data available to perform a quantitative analysis applies equally here. *Id.* at 77. Although qualitative discussions of climate change may contribute to informed decisionmaking, they alone are not enough when an agency has or could obtain readily-accessible data.

Here, the situation is even more egregious because the Government did not have to extrapolate data or conduct the studies on climate change, they simply had to apply data provided to their impacts analysis. While Reclamation increased the discussion of climate change from three paragraphs in a 492 page Draft EIS, BOR8649, to three pages in the Final EIS, BOR15348–50, BOR15454, this alone does not satisfy the imperative for a qualitative analysis of the impacts that climate change will have on the Colorado River. BOR15350. The Project looks forward to 2050, more than thirty years from now. *See, e.g.*, BOR15875. Yet Reclamation and Corps continued not to use a quantitative analysis of climate change impacts, claiming that because of “varied predictions in the magnitude and direction of climate changes,” and a lack of data about climate change in the Colorado River Basin, the hydrologic model for the Project could not include climate change and could only complete a qualitative analysis rather than a thorough review. BOR15454. However, the record shows that commenters gave Reclamation and the Corps access to other key climate change studies that would have helped fill the gaps in the data and allow a quantitative analysis. BOR15064.

Commenters, including EPA, suggested that Reclamation consider worst-case-scenario climate change effects to provide at least some evaluation of the potential effect that climate change may have on project impacts. BOR11882. Reclamation acknowledged that climate change may lead to increased river temperatures but failed to fully analyze the associated impacts. BOR15350. The impact of these increased temperatures was not analyzed, despite the fact that the evidence shows that the low flows below Windy Gap, caused by already existing transbasin diversions, “have resulted in higher than normal water temperatures stressing fish and aggravating

potential for ammonia toxicity.” BOR3797. For example, in 2001, “temperatures in the Colorado River below Windy Gap were recorded at 76 degrees, too high for trout.” *Id.* Even though current diversions have reduced flows that have led to raised temperatures in the Colorado River to levels unsustainable for aquatic life, *id.*, and the fact that this Project will further reduce those flows by another twenty percent, BOR15466, which will “result in greater relative increases in the upper range of daily temperatures,” BOR14155, Reclamation and Corps opted not to take a hard look at how climate change will impact the Colorado River. BOR15453, BOR15588.

3. *The Government failed to consider how cumulative impacts of the Project combined with other water diversions might hasten a compact call.*

Reclamation and the Corps should have looked at how the Project, in conjunction with other water diversion projects, such as the Moffat Project, and increased drought conditions due to climate change would impact the downstream users and increase the risk of a compact call. A “compact call” is an action that can be taken to require an upstream water user to limit or cease its diversions from the waterbody that is the subject of the agreement, or “compact,” (in this case, the Colorado River) in order to ensure that downstream users’ rights to the water are satisfied. Typically, a “compact call” arises in drought conditions when water is especially scarce. The junior nature of the Project participants’ Windy Gap water rights make them especially susceptible to a compact call. BOR15874. Nevertheless, the ever-increasing likelihood of a compact call was not included in the decision-making process. This is a surprising deficiency given that the Project’s Intergovernmental Agreement recognizes the looming danger of a future compact call. COE14780–81.

Increased diversions, like those called for by Windy Gap Firming Project, are particularly troubling when one considers that both the House and the Senate passed the Colorado River Drought Contingency Plan Authorization Act on April 8th, 2019. Pub. L. No. 116-14 (2019). An attachment to that bill, the Demand Management Storage Agreement, makes it clear that for the past twenty years, “the Colorado River Basin has experienced drought conditions that have contributed to decreased water supplies at key Colorado River reservoirs and increased uncertainty regarding water availability to sustain *existing* uses throughout the Basin.” *Id.* attach. A2, at 1 (emphasis added). As this shows, the Colorado River is already—and indeed, has for the past twenty years—been struggling to meet the water needs of Lower Basin States given the diversions already in place. The Agreement also specifically focuses on water conservation as a method of finding the water to deliver to the Lower Basin States. *Id.* at 4–5. It is counterproductive to spend millions of dollars on this Project when the states involved in the Colorado River Compact are already concerned that there is not enough water in the Colorado River now and that conservation measures should be implemented. Enabling additional diversions means that even more conservation measures will be necessary in order to meet Compact obligations.

Reclamation and the Corps should have discussed the possibility of a compact call, at the very least in the context of assessing foreseeable cumulative impacts of combined diversions from the Project and the Moffat Project.

B. The Government Inadequately Analyzed the Impact of Increased Pumping on Water Clarity and Quality in the Three Lakes System.

Like its impacts analysis of the Project on the Colorado River, the government failed to properly analyze direct impacts to the Three Lakes System, and failed to

“articulate a rational connection between facts found and the decision made” after receiving comments raising these concerns. See *Utahns*, 305 F.3d at 1175.

Commenters repeatedly identified fundamental flaws in the impacts analysis of increased pumping on the water clarity and quality of the Three Lakes System that never got resolved by Reclamation or the Corps. For example, the Three Lakes Watershed Association pointed out that the operation of the C-BT system has resulted in “years of inflows of chemically affected and silt laden water into Grand Lake from Shadow Mountain Reservoir,” which has reduced water clarity. BOR15133. Increased pumping from the Project will exacerbate this problem. *Id.*

Grand County further questioned the data used for future nutrient concentrations in the Three Lakes Water Quality Model for waters pumped by the Project, calling them “completely unrealistic projections.” BOR14649. Their concern was that the discharges from the waste water treatment plants (WWTPs) on the Fraser River will be pumped into the Three Lakes system by the Project, *id.*, and the model underestimated the in-lake concentrations of nutrients and the resulting algal response. BOR14650. In response, Reclamation admitted that “a certain level of treatment was assumed for future conditions for WWTPs in the Fraser River basin,” based on the success of measures applied to a different water body. BOR14650. While the Final EIS broadly discussed mitigation of the nutrients stemming from WWTPs on the Fraser River, it assumed that future upgrades to the WWTP would be effective in drastically reducing nutrient loads, and failed to adequately redress Grand County’s concerns. The Corps and Reclamation are required to address comments raising substantial issues and questions about the Project and failed to analyze environmental impacts of the Project

identified by Grand County or provide adequate explanation to the issues brought to their attention in violation of NEPA.

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Reclamation failed to fully analyze the cumulative and direct impacts of the Project, such as how reduced stream flows would negatively alter the ecosystem of the Colorado River or the effects of increased pumping on the water clarity and quality of Grand Lake. This oversight violates NEPA's requirement that agencies review all cumulative and direct impacts and was arbitrary and capricious under the APA. Accordingly, Colorado River Defenders should succeed on Claims 5 and 6.

CONCLUSION

When considering the implementation of a major project that may have significant environmental impacts, NEPA requires agencies to engage in thoughtful, informed decision making. These legal requirements were not met here. Reclamation and the Corps selected an impermissibly narrow purpose and need, which resulted in the exclusion of reasonable water supply alternatives from consideration. The agencies also failed to update need projections when actual water use data became available. Reclamation failed to fully disclose and address the shortcomings of its data and methodology, and failed to adequately assess the indirect and cumulative impacts of its proposed action. For these reasons, Petitioners request that the Court vacate both agencies' Records of Decision and enjoin any further activities associated with the Windy Gap Firming Project, as violations of the APA, NEPA, and the Clean Water Act.

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Respectfully submitted this 23rd day of May, 2019.

/s/ Sarah A. Matsumoto

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CERTIFICATE OF SERVICE

I certify that on May 23, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorneys of record.

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