Kevin J. Lynch, CO Bar No. 39873
Wyatt G. Sassman, CO Bar No. 51890
Sarah Matsumoto, CO Bar No. 52169
Environmental Law Clinic
University of Denver Sturm College of Law
2255 E. Evans Ave.
Denver, Colorado 80208
Tel: 303-871-6140
Fax: 303-871-6847
Emails: klynch@law.du.edu
wsassman@law.du.edu
smatsumoto@law.du.edu

Attorneys for Colorado River Defenders

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 17-cv-2563-WJM

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' REPLY IN SUPPORT OF PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

The Bureau of Reclamation and the U.S. Army Corps of Engineers (collectively, Respondents or the agencies) engaged in uninformed decision-making and acted arbitrarily and capriciously when they approved the Windy Gap Firming Project. Specifically, the agencies violated the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA) by adopting an impermissibly narrow purpose and need, which foreclosed a thorough consideration of reasonable alternatives that would meet the true need of supplying water to Front Range communities. Instead of identifying the true need—water supply—as the Project's purpose and need, they improperly narrowed the purpose to specifically include "firming" 30,000 acre feet of Windy Gap water. By narrowing the purpose, the agencies foreclosed consideration of a full range of reasonable alternatives that might have satisfied the need for water. The agencies also violated NEPA and the CWA by failing to independently verify the need for the Windy Gap Firming Project, and instead relied on outdated demand projections even where current, actual use data was available. Reclamation further violated NEPA when it conducted a flawed analysis of the impacts of the Windy Gap Firming Project by failing to disclose shortcomings in the methodology and data used in that analysis, and failing to thoroughly evaluate all cumulative and indirect impacts raised in comments, including issues surrounding a compact call and climate change. Finally, Petitioners have standing to allege violations of NEPA and the CWA. Accordingly, the agencies' Records of Decision should be vacated and set aside, and the agencies should be enjoined from undertaking any further activities associated with the Windy Gap Firming Project.

ARGUMENT

I. The Agencies' Stated Purpose and Need, Which Consistently was to Fix the Broken Windy Gap Project, was Too Narrow in Violation of NEPA.

a. The Respondents always identified the Windy Gap Firming Project as a way to fix the original Windy Gap Project, not simply the "consummation"[1] of a multi-phase project.

Respondents' creative characterization of the history of this project does not accord with the record. The original Windy Gap Project was not merely "incomplete"—it failed. In Respondents' own words:

- "…the Windy Gap Project has not been able to reliably deliver water supplies to Windy Gap Project unit holders." BOR4495.
- "Windy Gap allottees and the MPWCD have not been able to rely on Windy Gap water for water deliveries in either dry or wet years." BOR4502.
- "Because of the inability of the Windy Gap Project to provide reliable yields in both wet and dry years, the current firm yield is zero." BOR15255.
- "Due to limitations and constraints with the existing system, the current Windy Gap facilities, which were completed in 1985, are unable to deliver the anticipated firm yield of water." BOR 8497.
- "While the inability to divert water in dry years was anticipated when the Windy Gap Project was constructed, the inability to divert and store during wet years was not." BOR4503.
- "The Windy Gap Project has not provided the expected yield due to its junior water rights, periodic lack of unused capacity…in the C-BT Project, and

[1] Br. of Respondents at 5.

> demands to date not requiring the full yield of the Windy Gap Project…the Subdistrict concluded that the firm yield (the amount it can guarantee annually) of the Windy Gap Project is actually zero[.]"

These are not mere descriptions of the initial phase of a multi-phase project. Instead, these statements express the ways in which the original Windy Gap Project failed to meet Respondents' goals and expectations.

To Respondents' credit, they admit that the failures of the original project "led some to refer to the existing project as 'broken.'" Br. of Respondents at 5. Respondents left out the fact that the "some" to whom they refer is self-inclusive. *See, e.g.*, BOR14603 (Reclamation explaining that the Windy Gap Firming Project would "address the shortcomings of the Windy Gap Project" and that "the purpose of the WGFP [Windy Gap Firming Project] was to fix a broken project, not to search for other sources of water."). Thus, the project proponents and agencies never considered the Windy Gap Firming Project just an anticipated next phase of the original project; from its inception Respondents conceived of it as a fix for the original project.

It is correct that the EIS for the original Windy Gap Project contemplated the need for storage capacities other than the C-BT Project, as Respondents note on p. 5 of their brief. But Respondents are wrong that the Windy Gap Firming Project represents the "consummation" of the original project's plan. *Id*. The record reveals that the opposite is true: the original EIS did *not* recommend or even anticipate that additional storage capacity would be met by constructing new reservoirs like the one at the center of the firming project. Rather, the original EIS

> anticipated that this storage requirement could be accommodated either by utilizing available storage in Granby

> Reservoir…or by utilizing East Slope storage currently owned or leased by the Windy Gap participants…[s]ince there is currently over 400,000 acre-feet of privately owned storage within the boundaries of the Conservancy District with only a present demand for approximately 30,000 acre-feet, it is logical to assume that the storage requirements for Windy Gap water are at present available *without dependence upon new reservoir construction along the Front Range.*

BOR17963-65 (emphasis added). Thus, the record directly contradicts the agencies' claims that reservoir construction is merely "completing" an initial vision.

b. Relevant legal authority supports Colorado River Defenders' argument that Respondents' stated Purpose and Need was too narrow.

In their opening brief, the Petitioner organizations (collectively, Colorado River Defenders) focused their discussion of the legal authority that addresses defining purpose and need in the context of NEPA on *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997) because the facts in *Simmons* are so similar to the facts here. The 10th Circuit's decision in *Colorado Envtl. Coal. v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999) does not, as asserted by the Respondents, change the applicability of the *Simmons'* court's reasoning to the instant case or the agencies' obligations under NEPA. Br. of Respondents' at 15-17. The *Colorado Envtl. Coal*. court "[did] not perceive these authorities as mutually exclusive or conflicting." *Colorado Envtl. Coal*., 185 F.3d 1175. Rather, the 10th Circuit placed the onus on the agencies to "*take responsibility* for defining the objectives of an action and then provide legitimate consideration to alternatives that fall between the obvious extremes." *Id* (emphasis added).

In *Simmons*, the court explained that "[t]he general goal of Marion's application is to supply water to Marion and the Water District—*not* to build (or find) a single reservoir to supply that water." *Simmons*, 120 F.3d 669. So too is the case here: the general goal—the *true* purpose and need—is to meet participants' current and future water needs, *not* to meet those needs only by constructing a reservoir that makes the original Windy Gap project work.[2]

In *Simmons*, "the City of Marion and the Lake of Egypt Water District both want[ed] more water." *Id*. at 667. Here, the Windy Gap Firming Project participants[3] want to "meet existing and future municipal and industrial water requirements." BOR4495. In *Simmons*, Marion and the Water District defined the project purpose as supplying more water specifically through construction of a new reservoir. *Simmons,* 120 F.3d at 669-70. Here, the project participants and the agencies defined the purpose as "firming" a specific quantity of water from the existing Windy Gap project. BOR4498. In *Simmons*, the agencies only analyzed alternatives that involved supplying water by constructing a new reservoir. *Simmons*, 120 F.3d at 667. Here, the agencies only analyzed alternatives involving supplying water by constructing a new reservoir, and three of four alternatives they considered involve the Chimney Hollow reservoir specifically. BOR15300. The *Simmons* court found that in its wholesale acceptance of Marion's defined purpose, the Corps did not fulfill its "duty under NEPA to exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of

[2] For the reasons discussed in Section II, Colorado River Defenders do not concede that the actual underlying purpose of supplying water in the amounts sought by project proponents is based on accurate information or a good idea.
[3] "Participants" refers to the entities participating in the Windy Gap Firming Project.

the project." *Id*. (citing *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 209 (Buckley, J., dissenting)). This Court should find similarly here.

The 10th Circuit, in seeking to reconcile those cases like *Simmons*—in which courts have interpreted NEPA as precluding agencies from defining the objectives of their actions in terms so narrowly that they can be accomplished only by the applicant's proposed project—with cases in which the courts bar agencies from ignoring a private applicant's objectives, placed the responsibility directly on the agencies to define the objectives of an action. *Colorado Envtl. Coal*., 185 F.3d 1175. Agencies cannot wholesale ignore a private applicant's objectives, but also cannot wordsmith a project's purpose in such a way so that it is only achievable by a private party's preferred course of action. The key point is that it remains the *agencies'* obligation to perform a satisfactory analysis, even where a private applicant's objectives are considered. That obligation was not met here.

c. In addition to case law, Respondents are bound by statutory and regulatory authority and guidance that governs their actions.

When agencies review a major federal action, they 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. The purpose of the Environmental Impact Statement is to "provide full and fair discussion of significant environmental impacts" and "inform decision makers and the public of the reasonable alternatives" to a project proposal. 40 C.F.R. § 1502.1. While agencies may rely on information provided by private applicants in preparing the EIS, and a private applicant may obtain information and data from any source, the agencies are still obligated to "independently evaluate the information and [are]

responsible for its accuracy." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263 (1983). Agencies also must treat the EIS as a means of assessing the environmental impact of proposed agency actions, rather than "justifying decisions already made." 40 C.F.R. § 1502.2(g).

d. Thus, NEPA and its relevant regulations and guidance impose a number of duties on reviewing agencies, yet Reclamation and the Corps gave these requirements only cursory treatment in their brief. The agencies provided a short legal background section, Br. of Respondents at 9-11, but their argument section treats the relevant statutory and regulatory authority in a more conclusory fashion. For example, although the agencies discuss relevant case law, they did not respond to Petitioners' point that the NEPA *regulations* explicitly require a reviewing agency to identify the "underlying purpose and need" of a project. 40 C.F.R. § 1502.13; *see* Br. Of Respondents at 10-13 (attacking Petitioners for pointing to the project's "underlying" purpose while ignoring that the requirement originates in the NEPA regulations). Respondents' overly-narrow purpose and need excluded reasonable alternatives, and the stated bases for their exclusion are inconsistent with arguments now made by Respondents and Intervenors.

When a purpose and need is appropriately broad, it strikes the balance that the 10th Circuit requires and allows a reasonable range of alternatives to be considered. As Colorado River Defenders—and Respondents—identify, the Federal Highway Administration and Army Corps in *Utahns for Better Transportation v. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002), properly described the purpose of the Legacy Parkway (a proposed transportation project) as "meet[ing] the 2020 travel demand for the I-15 North Corridor." *Utahns*, 305 F.3d at 1170. Here, had the agencies stated the true purpose and need of the Windy Gap Firming Project, the properly defined purpose would have been something like "meeting the future water supply needs of Windy Gap Project participants." Instead, Respondents assert that the properly-defined purpose in *Utahns* is comparable to their own improper purpose of "firming the yield of the existing

Windy Gap Project" and call it acceptable. Br. of Respondents' at 23. It is not. Respondents might as well replace the phrase "firming the yield" with "fixing," since that is what they actually want to achieve, and fixing the existing Windy Gap project is, by its terms, too narrow to allow consideration of other ways to supply water that do not involve the original Windy Gap Project.

Respondents contend that the alternative of acquiring senior water rights was excluded, in part, because it is "costly and time consuming." Br. of Respondents at 27. The Alternative Plan Formulation Report, which sought to identify and evaluate alternatives capable of firming the Windy Gap Project water supply, was published over 16 years ago. BOR307, 320. In describing the potential alternative of purchasing senior water rights on the West Slope, Reclamation said that those purchases "would not meet the purpose and need of firming existing Windy Gap Project water supply or provide water by 2010[.]" BOR4281 (Alternatives Report). It is now 2019, and it is apparent that the chosen course of action is "time-consuming" as well. Respondents also said that acquiring senior water rights would be "costly," and yet the Subdistrict notes that the Windy Gap Firming Project will cost participants over $500 million to complete. Br. of Municipal Subdistrict, Northern Colorado Water Conservancy District at 2. The Respondents' reasons for adopting the Project participants' lack of consideration of a broader range of alternatives are not supported by the record.

Informed agency decision-making and public involvement are the "twin aims" of NEPA. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 703 (10th Cir. 2009) (citing *Balt. Gas & Elec. Co v. Natural Res. Defense Council*, 462 U.S. 87, 97 (1983). Neither the agencies nor the public have been properly informed

about other—perhaps better—uses of the over $500 million currently estimated to fix the Windy Gap project. NEPA serves to prevent this type of uninformed agency process by "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role" in forming and implementing the agency decision. *Robertson v. Methow Valley Citizens Council*, 409 U.S. 332, 349-50 (1989). It is arbitrary to exclude one alternative as being too "costly and time-consuming," while supporting an alternative that will cost hundreds of millions of dollars and proceed over multiple decades. *See, e.g., Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (describing arbitrary and capricious agency action). Moreover, since the Windy Gap Firming Project is, according to the agencies, "only expected to contribute about ten percent of the Participants' water needs in 2050[,]" the public should be afforded the opportunity to consider other, more efficient uses of the hundreds of millions of dollars this Project will cost. Br. of Respondents at 35 (citing BOR15290).

Respondents' argument around the inability of certain excluded alternatives to firm Windy Gap water identifies another key inconsistency. On one hand, Respondents assert that "the agencies did not dismiss all non-structural alternatives merely because they would not 'fix the broken' Windy Gap Project." Br. of Respondents at 23. Yet, on the other, as Respondents discuss why suggested non-structural alternatives were excluded from detailed consideration, the inability to firm Windy Gap water appears time and again as a reason those alternatives were excluded. *See, e.g.*, Br. of Respondents at 24 (discussing water conservation: "conservation alone does not meet all of the project water supply requirements or eliminate the need for firming existing Windy Gap

Project water supplies[,]" and interruptible supply contracts: "the contracts…would not meet the Project's purpose of creating a new supply of water, much less firming the Windy Gap water supply."); BOR371 ("[a]cquisition of existing water rights on the east slope would not be consistent with the purpose of firming the existing Windy Gap water right.").

The fact that *no* non-structural alternatives were given detailed consideration flows directly from the improperly narrow purpose and need. Had the purpose and need been appropriately defined as "water supply," or "meeting future water needs," it is possible that the alternatives analysis still would have included reservoir construction. It is further possible that some other alternatives not suggested by Colorado River Defenders could have met the purpose and need. But, "[w]hat other alternatives exist we do not know, because the Corps has not looked." *Simmons*, 120 F.3d 670.

The alternatives analysis is the "heart of the environmental impacts statement," designed to "sharply defin[e] the issues" and provide "a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. It is the duty of the agencies, not Colorado River Defenders, to identify and analyze an appropriate range of alternatives, and that can only be done when the adopted purpose and need does not foreclose consideration of reasonable alternatives that meet the project's true need. By defining their purpose and need statement so narrowly, the agencies excluded reasonable alternatives from consideration, in violation of NEPA. *Id*.

e. Respondents incorrectly characterized Colorado River Defenders' discussion of why a party would continue to invest in a failed project rather than alternatives because of sunk cost bias.

In discussing *why* Reclamation and the Subdistrict focused on fixing the Windy Gap project, Colorado River Defenders point to "sunk cost bias" as a reason that a party would "continue[] to invest resources into a failed project rather than alternatives, to save face and salvage the original investment." Br. of Colorado River Defenders' at 18 (quoting 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)).[4] In attempting to characterize the Petitioners' discussion of sunk cost bias as an argument that the agencies should not have considered "the Subdistrict's desire to complete its Windy Gap Project[,]" Respondents attack a straw man. Br. of Respondents' Br. at 19. Colorado River Defenders never claimed that the agencies should ignore the Subdistrict's desired objectives. Colorado River Defenders explicitly acknowledged that "an agency may rely on information provided by a private applicant in preparing the EIS," Br. of Colorado River Defenders' at 4-5, and simply argued that the agencies should have considered other alternatives alongside that of fixing the Windy Gap Project.

Colorado River Defenders discussed sunk cost bias to show *why* Reclamation and the Subdistrict focused on fixing the Windy Gap project, not to argue—as Respondents claim—that prior investments in projects should be disregarded. The

[4] As the article explains, this cognitive bias can affect original decision-makers as well as subsequent decision-makers who feel a sense of psychological connectedness to the original decision-maker, resulting in escalated commitments to earlier investments (hence, they become vicariously entrapped).

NEPA process is aimed at safeguarding against the type of biased decision-making that occurred here. It is one thing for an agency to simply "account[] for the Participants' past investments" in defining the purpose and need. Br. of Respondents at 18. It is another thing entirely for an agency to allow the cognitive bias of project proponents to compel them to follow a certain course of action. The cases Respondents cite do not stand for the proposition that past investments in a project should be the only—or even the primary—consideration in defining the purpose of a proposed action. *See, e.g.*, *Lee v. U.S. Air Force*, 354 F.3d 1229, 1238-39 (10th Cir. 2004); *Citizens' Committee to Save Our Canyons v. U.S. Forest Serv*., 297 F.3d 1012, 1031-32 (10th Cir. 2002); *Colo. Envtl. Coal. v. Dombeck*, 185 F.3d at 1175 (each case identifying past investment as one of multiple considerations taken into account when defining purpose of action).

Rather, consistent with *Simmons* and *Dombeck*, as discussed *supra*, agencies must define a project's purpose somewhere between the "obvious extremes" of being so narrow as to be able to only be accomplished by an applicant's preferred choice or ignoring the applicant's objectives completely. *Colo. Envtl. Coal*., 185 F.3d at 1174. Colorado River Defenders never argued that the Subdistrict's desired outcome should be completely ignored, but rather only that a private applicant's preference does not provide an excuse for an agency to fail to uphold its statutory and regulatory obligation to independently establish the defined project purpose and need.

Respondents acted arbitrarily and capriciously and specifically, violated NEPA and the CWA by adopting an impermissibly narrow purpose and need, which foreclosed a thorough consideration of reasonable alternatives that would meet the true need of supplying water to Front Range communities.

II. Respondents Acted Arbitrarily and Capriciously by Continuing to Rely on Outdated Water Use Projections When More Recent, Actual Use Data Existed.

Similar to the alternatives analysis, it was not the public's obligation to ensure that data justifying the need for the project was correct; that burden belongs to the agencies pursuant to 40 C.F.R. §§ 1502.22, 1502.24 (describing requirement of scientific integrity of analyses in EIS and requirement that incomplete or missing information relevant to impacts analysis be disclosed). The information about future water use that the agencies relied on was (1) prepared for participants and Reclamation by a third-party consultant who used the participants' estimates, (2) outdated, even as updated information became available, and (3) projected estimates for events that are now in the past, instead of actual use data about those events.

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 expected to update forecasts and projections every time new data becomes available, ordinarily, they may not rely on outdated forecasts. *Conservation Law Found. v. Fed. Highway Admin*., 630 F. Supp. 2d 183, 211 (D.N.H. 2007). Here, the agencies unlawfully relied on outdated projections even as those projections could have been updated, and relied on estimates even when actual data became available. The agencies' decision to ignore actual, newer information in favor of older projections violated their NEPA obligations.

a. Respondents were put on notice that they should independently verify projected water use, but failed to conduct such an analysis.

Respondents' argument that comments did not show initial projections to be inaccurate, Br. of Respondents at 31, entirely misses an essential function of the public

involvement process. The many comments urging the federal government to independently analyze the demand projections should not be viewed as merely an attempt to poke holes in the projected use figures. Rather, the comments put the agencies on notice that the *agencies* should undertake an independent evaluation of projected water use instead of relying only on old information prepared by an outside contractor at the behest of project proponents and Reclamation. When commenters raise significant concerns in the NEPA process, an agency must "demonstrate that it has considered [them] by explaining why it disagrees with them; it may not dismiss them without adequate explanation. *All. to Save the Mattaponi v. U.S. Army Corps of Eng'rs*, 606 F. Supp. 2d 121, 132 (D.D.C. 2009). The agencies here did not perform an independent verification of the contractor's reported figures, and commenters' concerns were summarily dismissed without adequate explanation.

For example, EPA pointed out that "future water use efficiencies should increase, not decline[,]" and Grand County inquired why the firming project was "needed for *existing* demand yet no water has been diverted in seven out of the past 20 years because of 'limited demand.'" BOR4812; BOR4054. These comments, along with others, should have prompted Reclamation to undertake NEPA's requisite "hard look" at the projections. Instead, Reclamation simply noted in its DEIS 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. That conclusory statement does not explain why projections were not independently reviewed, and is simply an arbitrary dismissal of a legitimate issue raised by commenters.

b. Respondents offer no explanation for why they did not review actual water use data.

Without justification, Respondents continued to rely on old *projections* about water use instead of documented, *actual* use data that became available as Reclamation's 2011 FEIS and 2014 ROD and the Corps' 2017 ROD were finalized. Throughout a fourteen year review, the agencies justified the Windy Gap Firming Project based on old demand projections that were assembled in 2005. *Compare* BOR4553 (2005 Projections) *with* BOR15266 (Reclamation's 2011 FEIS) *with* BOR17708-09 (Reclamation's 2014 Record of Decision) *and with* COE18538 (Corps' 2017 Record of Decision). Each of these stages provided an opportunity for the federal government to ensure that projected water use—indeed, the very need for water—continued to exist. At minimum, the agencies should have explained why replacing projections with actual historical use data was unnecessary. Instead, both agencies continued relying on old projections, which resulted in a major factual and analysis gap in the record. Therefore, despite indications that reviewing newer, actual use data would show that older projections were significantly off, *see, e.g.*, BOR4812, 4852, 2729, the record is deficient and does not confirm the agencies' conclusion that the need for water continues.

Colorado River Defenders attempted to remedy the agencies' record deficiency by hiring an expert to collect and analyze actual water use data. *See, e.g.*, ECF No. 33-1 (Ex. 1 to Colorado River Defenders' Mot. to Supp. ARs (Buchanan Report)). Unfortunately, the information and findings contained in the Buchanan Report are not part of the record. The agencies never argued that it would be impossible to review and

incorporate actual water use data into the record, they simply chose not to.[5] Because the agencies never bothered to review readily available, actual water use data and include it in the record, the record lacks the most current information that speaks to the reasonableness of the agencies' continued justification of the Windy Gap Firming Project. Reclamation could have incorporated at least six years of actual demand data into the FEIS and nine years of actual data in its ROD, and the Corps could have included twelve years of actual demand data in its ROD.[6] They did not, and their failure to do so or to even explain why they did not incorporate more recent, more accurate water use data was arbitrary and capricious and violates NEPA and the APA. *All. to Save the Mattaponi*, 606 F. Supp. 2d at 132 (D.D.C. 2009).

c. Even the evidence that *is* in the record shows that the projections, which contemplated dire shortages, do not comport with reality.

What information that does exist in the record supports Colorado River Defenders' argument that a closer look at the water use projections upon which the agencies' relied was required.

First, Respondents attempt to dismiss cited information from the 2008 Greeley and Longmont Water Conservation Plans because the data showed a decline in "per capita use, *not* the total water use[.]" Br. of Respondents at 36. Per capita water use and total water use are related. If per capita water use is declining, that will directly impact the resulting total use of water. The agencies assumed that as populations

[5] Indeed, they cannot argue that review of actual use data was impossible, because such a review could have been conducted, as the Buchanan Report would have shown if added to the record.

[6] Broomfield's effort to have this Court take judicial notice of its 2011 Water Conservation Plan, which also is not in the record, further highlights the record deficiency left in place by Reclamation and the Corps. Br. of Broomfield at 15 n.4.

increased, per capita water use would either increase as well or remain stable. Instead, had they evaluated conditions for a declining per capita use, the total demand figures may have also been lower or may have remained stable.

Second, it is arbitrary and capricious for the agencies to continue to say that projections provided in Water Conservation Plans "effectively confirmed the accuracy of the agencies' projections [in the EIS]." Petitioners pointed to the examples of Greeley and Evans as participants whose projections for 2030 changed dramatically between the time that the 2005 Purpose and Need Report was prepared to the time that the Water Conservation Plans were published. The fact that Evans is a no longer a project participant has no bearing on the accuracy of its initial projections or, more importantly, on the obligations of Reclamation and the Corps to ensure that the figures being used to justify the need for the Project are accurate. Br. of Respondents at 35. Even though Respondents characterize the overestimates as small, four out of five participants whose Water Conservation Plans included projections showed that the initial projections were higher than revised projections. The fifth participant's projections did not change either direction. At the very least, this difference signaled to the agencies that they should have reexamined the stated need to "firm" 30,000 AF of Windy Gap water.

Finally, it was the agencies' failure to update their water use projections with either more current projections or real-time use data that created this indefensible scenario with respect to the inadequate record in this case. The water conservation plans are just newer projections from the Project participants themselves. The agencies should have looked at actual historical use data, but instead of fulfilling their NEPA obligations to inform themselves and the public and reviewing that data, the agencies

opted for the path of least resistance and made no effort to update the water need projections with actual, documented use data. Their lawyers are now in the position of offering highly-technical arguments about what limited data and figures *are* contained in the record, *see* Br. of Respondents at 35-37, instead of being able to simply point to a comprehensive and updated set of numbers. No deference is owed to lawyers' post-hoc rationalizations for agency actions; it is well-established agency actions must only be upheld on the basis articulated by the agency itself in the administrative record. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 50 (citing *Burlington Truck Lines v. United States, supra,* 371 U.S. 156, 168 (1962)).

III. Respondents' Efforts to Paint Mitigation Proposed to Offset Impacts from the Project as Improvements, Rather than Required Ways to Mitigate Harm, Should not be Rewarded, and are Illustrative of the Larger Failings of Respondents' Impacts Analysis required by NEPA and the CWA.

a. The required mitigation measures that the agencies laud only exist as an offset to the damage the Projects will cause.

In their answering brief, the agencies tout a number of "mitigation and enhancement programs" focusing on wildlife habitat and water quality. Br. of Respondents' at 8. These projects may indeed confer some environmental benefits. But what the agencies and Subdistrict hope to deemphasize is the fact that these purported "enhancements" only exist to "offset the environmental impacts of the Project[.]" *Id*. Colorado River Defenders never argued that the Project did not include any mitigation. The only reason, then, to include a list of supposed benefits and mitigation measures is to attempt to obscure the flawed NEPA process and uninformed agency decision-making. These mitigation measures are a red herring.

b. The impacts analysis was flawed.

In defense of the inadequacy of their analysis of impacts connected to climate change, Respondents accuse Colorado River Defenders of "glossing over" the factual difference between this case and *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41 (D.D.C. 2019). Colorado River Defenders were in fact explicit that the cases were different: "there [*WildEarth Guardians*], contributions of a project *to* climate change; here, severity of impacts *in light of* climate change[.]" Br. of Colorado River Defenders at 54 (emphasis in brief). The agencies' criticism that Colorado River Defenders did not explicitly request a quantitative analysis of climate change impacts when certain climate change studies were provided is consistent with their other attempts to shift the burdens of their role onto the public. Br. of Respondents at 52 n.28. It is not the public's job to spoon-feed a reviewing agency with scientific data and also be expected to provide instructions to the agency on how to analyze it. It is the reviewing agency that is obligated to ensure that the environmental review process and the public are adequately informed, not the other way around.

Respondents unnecessarily overcomplicate Petitioners' point about assessing the potential impacts of the Windy Gap Firming Project in the context of a "Compact call." Br. of Respondents at 54. First, this was not a separate claim for relief, as Respondents appear to believe—it was an example of a flaw in the agencies' cumulative impacts analysis. And second, Petitioners' concern about a Compact call is simple: when the State of Colorado and the other Colorado River Compact states are preparing for potential drought conditions, in which water levels must be guaranteed to Lower Basin states by those in the Upper Basin, why is it prudent to move forward with a plan to divert *more* water out of the Colorado River? In evaluating possible

environmental impacts from major federal actions, agencies do not limit their analyses only to those concerns raised by commenters, so the fact the possibility of a Compact call was not raised early on by Colorado River Defenders did not preclude it from consideration.

Finally, the agencies' impacts analysis was inadequate due to their failure to adequately disclose shortcomings with their selected data and methodology. They did not explain why more precise, daily data about stream flow averages was not preferable to their selected disaggregated monthly data. BOR15142. They also did not properly explain their use of an inflated baseline, or of a stream morphology study explicitly limited to unregulated streams on a highly regulated stream such as the Colorado. These failings rendered their impacts analysis insufficient, in violation of NEPA and the CWA.

IV. Colorado River Defenders Have Standing.

The State of Colorado argues that Colorado River Defenders lack standing because they do not possess some concrete interest protected by the Colorado River Compact or the Colorado River Drought Contingency Plan. Brief of Colorado Department of Natural Resources at 4-6. The State claims that Colorado River Defenders have no specific rights "to use or administer water within Colorado," and as such, they lack standing under NEPA. Why the State bothers with such arguments for a portion of one of Petitioners' claims is unclear, since Colorado River Defenders never claimed to have the authority to administer water in Colorado, and never claimed that their standing in this case rested on any concrete interests protected by either the Colorado River Compact or the Colorado River Drought Contingency Plan.

Nevertheless, the State of Colorado identifies these documents as a basis for asserting that Colorado River Defenders lack standing to claim that the agencies violated NEPA by conducting a flawed cumulative impacts analysis. The State focuses on an inaccurate legal standard for standing in NEPA cases, and is wrong.

The requirement that a plaintiff have standing originates in the "Cases" and "Controversies" requirement of Article III to the U.S. Constitution. U.S. Const., Art. III § II; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). The well-recognized test for standing is that a plaintiff 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. *Id*. at 560-61. An organization may bring suit on behalf of its members where at least one of the members would otherwise have standing in their own right (i.e., satisfies the three-pronged test above), where the interests the organization seeks to protect are germane to the organization's purpose, and where neither the claims asserted nor relief requested requires participation of any individual member. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 342-43 (1977). Recreational and aesthetic interests in the environment, where injured, are sufficient to confer standing. *Summers v. Earth Island Inst*., 555 U.S. 488, 494 (2009). In analyzing a plaintiff's standing under NEPA, the Tenth Circuit has stated that

> the injury in fact prong of the standing test of Article III breaks down into two parts: (1) the litigant must show that in making its decision without following the National Environmental Policy Act's procedures, the agency created an increased risk of actual, threatened, or imminent environmental harm; and (2) the litigant must show that the increased risk of

> environmental harm injures its concrete interests by demonstrating either its geographical nexus to, or actual use of the site of the agency action.

Committee to Save the Rio Hondo v. Lucero, 102 F.3d 445, 449 (10th Cir. 1996).

Colorado River Defenders have satisfied that requirement. Colorado River Defenders introduced declarations of their members to explain how they will suffer injuries in fact to, *inter alia*, their recreational and aesthetic interests in the environment caused by the Windy Gap Firming Project. ECF Nos. 68-1 through 68-9 (Declarations of Gerleman, Estrin, Wockner, Weisheit, Wright, Fucik, Easter, Elliott, and Graham). Nowhere does any declarant or member claim to have an interest specifically protected by the Colorado River Compact or the Colorado River Draught Contingency Plan. *Id*. Neither does any member claim to be able to administer water use in the State of Colorado. *Id*. Instead, these declarants and members of the petitioning organizations describe recreational and aesthetic interests in the geographical area near the Windy Gap Firming Project reservoir system and how the Windy Gap Firming Project is likely to harm those interests. *See, e.g.*, ECF No. 68-5 (Declaration of Mark Easter, describing how he enjoys hiking and birding in area of the proposed Chimney Hollow reservoir, and how his enjoyment of those activities would be diminished if the Firming Project is built); ECF No. 68-9 (Declaration of Anne Gerleman, describing how she enjoys biking near the Windy Gap Reservoir, Lake Granby, and Shadow Mountain Reservoir due to the water quality and presence of wildlife, and her concerns that the Windy Gap Firming Project will negatively impact her enjoyment of biking by reducing water quality and presence of wildlife).

In arguing that Reclamation's cumulative impacts analysis was flawed, and thus violated NEPA, the Colorado River Defenders are not required to base, and have not based, their interest in a healthy Colorado River ecosystem or watershed on actually being a party to the Colorado River Compact. Numerous plaintiffs have been found to have standing based on injuries to similar types of environmental interests in the *quality* of water in a specific waterbody, even where the plaintiff asserts no formalized contractual "right" to the *quantity* of that water. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Envtl. Services (TOC), Inc.,* 528 U.S. 167, 183-84 (2000) (standing in Clean Water Act case where members of plaintiff organization described recreational and aesthetic interests in North Tyger River and how those interests were harmed by discharges of pollution)*; Committee to Save the Rio Hondo*, 102 F.3d at 450 (standing in NEPA case where two affiants expressed concern over a ski project's increased sewage discharges and nonpoint water pollution); *Black Warrior Riverkeeper, Inc., v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1280 (11th Cir. 2015) (standing to bring Clean Water Act and NEPA claims where members described their recreational use of waters in the Black Warrior River watershed and how those uses were harmed by visible pollution from mining operation); *Ecological Rights Foundation v. Pacific Lumber Co.*, 230 F.3d 1131, 1150-51 (9th Cir. 2000) (standing in Clean Water Act case where members of plaintiff organizations expressed concern about defendant's water pollution and how it negatively impacted their enjoyment of recreational activities at Yager Creek). In light of this consistent case law affirming standing based on injuries to aesthetic, recreational and other environmental interests similar to those confronting

Petitioners in this case, there is no question that the State's argument here misses the mark, and Colorado River Defenders have standing.

CONCLUSION

For the reasons stated above, Colorado River Defenders respectfully request that the Court vacate both agencies' Records of Decision and enjoin any further activities associated with the Windy Gap Firming Project.

Respectfully submitted this 15th day of August, 2019.

s/ Wyatt G. Sassman
Wyatt G. Sassman

s/ Sarah A. Matsumoto
Sarah A. Matsumoto
Kevin Lynch
Environmental Law Clinic
University of Denver
Sturm College of Law
2255 E. Evans Ave.,
Denver, Colorado 80208
(303) 871-6753

wsassman@law.du.edu
smatsumoto@law.du.edu
klynch@law.du.edu

Attorneys for Colorado River Defenders

CERTIFICATE OF SERVICE

I certify that on August 15, 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.

Daniel R. Dertke Daniel.dertke@usdoj.gov
David W. Gehlert david.gehlert@usdoj.gov

Attorneys for Respondents, United States Bureau of Reclamation and United States Army Corps of Engineers

Deborah L. Freeman dfreeman@troutlaw.com
Bennett W. Raley bwraley@mac.com
Peggy E. Montano pmontano@troutlaw.com
William Davis Wert dwert@troutlaw.com

Attorneys for Intervenor Municipal Subdistrict, Northern Colorado Water Conservancy District

Jennifer Lyn Mele Jennifer.mele@coag.gov
Scott Steinbrecher scott.steinbrecher@coag.gov

Attorneys for Intervenor Colorado Department of Natural Resources

Cynthia F. Covell cfc@alpersteincovell.com
Andrea L. Benson alb@alpersteincovell.com
Gilbert Y. Marchand, Jr. gym@alpertsteincovell.com

Attorneys for Intervenor City and County of Broomfield Colorado

Jason V. Turner jturner@crwcd.org
David C. Taussig davet@white-jankowski.com
Torie Jarvis qqwater@nwccog.org

Attorneys for Amicus Curiae Colorado River Water Conservation District, Grand County BOCC and Northwest Colorado Council of Governments

s/ Danielle C. Jefferis
Danielle C. Jefferis