

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF GRAND COUNTY, STATE OF COLORADO

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IN THE MATTER OF THE WINDY GAP FIRING PROJECT AREAS AND ACTIVITIES OF STATE INTEREST (1041) PERMIT APPLICATION OF THE MUNICIPAL SUBDISTRICT OF THE NORTHERN COLORADO WATER CONSERVANCY DISTRICT, ACTING BY AND THROUGH THE WINDY GAP FIRING PROJECT WATER ACTIVITY ENTERPRISE.

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GRAND COUNTY STAFF CLOSING STATEMENT

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This Closing Statement (“Staff Closing Statement”) regarding the above referenced matter is submitted this 23<sup>rd</sup> day of August 2012 on behalf of Grand County staff by and through Sullivan Green Seavy, LLC. The Staff Closing Statement contains two sections:

**Section I** is a summary of the evidence that supports the staff’s recommended findings contained in the *Certificate of Recommendation August 2012: 1041 Permit – 2012 Windy Gap Firing Project* (“*Certificate of Recommendation*”), and the *Revised Recommended Conditions of Approval for the Windy Gap Firing Project* (“*Revised Conditions*”) attached to this Staff Closing Statement as Attachment 1.

**Section II** is a response to the legal arguments presented by the Municipal Subdistrict of the Northern Water Conservancy District (“Subdistrict”) through its attorney, Peggy Montano, in a letter dated August 1, 2012 to Jack Di Cola.

**I. SUMMARY OF EVIDENCE TO SUPPORT PROPOSED FINDINGS AND REVISED RECOMMENDED CONDITIONS OF APPROVAL**

**A. General Considerations and Organization of Section I**

Part B of this Section I contains a summary of some, but not all of the evidence on the record to support the staff’s recommended findings contained in the *Certificate of Recommendation* and the staff’s *Revised Conditions*. Staff prepared the *Revised Conditions* after taking into account the evidence and testimony presented to the Board of County Commissioners during the August 1, and August 2, 2012 public hearing.

Under the Areas and Activities of State Interest Act (“AASIA”) or (“1041”), if the proposed activity does not comply with the County regulations, the permit shall

be denied. See C.R.S. § 24-65.1-501(4). Thus, staff has recommended conditions where, in the absence of a condition, staff finds that the Windy Gap Firing Project (“2012 WGFP”) would not satisfy a regulatory criterion. In other words, staff recommends that the Board approve the 1041 permit for the WGFP (“2012 Permit”) ( with these *Revised Conditions* in lieu of denial.

This Section I is organized by the criteria in the County 1041 Regulations. See Section 5-306, Grand County Guidelines and Regulations for Areas and Activities of State Interest, Chapter 5, Municipal and Industrial Water Projects. Note that Condition No. 25 from the initial conditions proposed in the Certificate of Recommendation has been deleted so the numbering system in the Revised Conditions changes with Condition 25 to the end.

### **B. Evidence to Support *Revised Conditions***

Citations for the evidence are from the transcript of the WGFP August 1 and 2 Board of County Commissioners hearing. “Trans 1” refers to the transcript of the August 1, 2012 Board of County Commissioners hearing, and “Trans 2” refers to the August 2, 2012 Board of County Commissioners hearing.

### **GENERAL CONDITIONS**

**Condition 1.** The County Attorney will consider and respond to the relationship between the Windy Gap Project Permit and the 2012 Permit and advise the Board of County Commissioners. Once the Board of County Commissioners has been advised, it will make a determination on the relationship between the two.

#### **Evidence on the Record to Support Finding/Conditions:**

None required.

**Condition 2.** The 2012 Permit will be in effect for the life of the project and considered a vested right as long as the project is in compliance with the terms and conditions of all permits and approvals for the 2012 Permit. The Subdistrict shall be responsible for all costs incurred by the County in evaluating the Subdistrict’s compliance with the conditions of this 2012 Permit.

#### **Evidence on the Record to Support Finding/Conditions:**

None required.

**Condition 3.** The 2012 Permit is not transferrable to any other entity

unless the County approves such transfer by Resolution.

**Evidence on the Record to Support Finding/Conditions:**

None required.

Condition 4. This 2012 Permit shall allow construction of Chimney Hollow Reservoir (the reservoir located on the East Slope identified in the Final Environmental Impact Statement for the Windy Gap Firming Project as the proposed action) and any reservoir or reservoirs on the East Slope that are constructed as an alternative or in addition to the reservoir identified in the Final Environmental Impact Statement; provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any alternative reservoirs does not exceed 90,000 AF, and the impacts identified in the Final Environmental Impact Statement for the proposed action do not increase.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.9 Curran/Certificate of Recommendation notes that the request for this permit is for the preferred alternative, 90,000-acre foot, Chimney Hollow Reservoir, or any reservoir or reservoirs on the East Slope. Subdistrict is not sure if it can get 90,000-AF with the proposed Chimney Hollow Reservoir. Proposed WGFP IGA would allow the project to proceed with alternate reservoirs as long as the environmental footprint doesn't change, and if total volume does not exceed the volumetric limit.

Trans 1, p.175 Curran/Certificate of Recommendation concludes that the 2012 Permit allows construction of a 90,000 AF Chimney Hollow Reservoir, or any reservoir or reservoirs on the East Slope that are constructed as an Alternative Reservoir identified in the Final Environmental Impact Statement and, provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any alternate reservoir does not exceed 90,000 AF, and as long as the environmental footprint in Grand County is not affected.

**Condition 5.** The 2012 WGFP shall not exceed the volumetric limits stated in the WGFP IGA for the Windy Gap project and 2012 WGFP. The 2012 Permit is contingent upon the participant's use of water in compliance with the Windy Gap decrees and Colorado law.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.13 Curran/Certificate of Recommendation notes that the 1980 and 1985 agreements had volumetric limits: 90,000 AF in any one year, not to exceed 65,000 AF per year in any consecutive 10-year period.

Trans 1, p.107 Curran/Certificate of Recommendation notes that the Final Environmental Impact Statement states the 2012 WGFP will not exceed the average annual diversion of 56,000 AF that was originally evaluated for the Windy Gap Project. The 1980 and 1985 agreements and the WGFP IGA have volumetric limits of 65,000 AF per year in any consecutive 10-year period

Trans 1, p.127-128 Curran/Certificate of Recommendation notes that of the 480 shares in the Windy Gap project, the 2012 WGFP will firm 440 of those shares. However, the WGFP IGA says that regardless of either project, the volumetric limits will remain the same - 90,000 AF in any one year, not to exceed 65,000 AF annually in any consecutive 10-year period - and the volumetric limits do not change if the shares are sold.

Trans 1, p.217 Curran/Certificate of Recommendation notes that the 40 shares will be served along with the other 440 shares within the volumetric limit placed on them in the 1980 and 1985 agreements and the WGFP IGA,

**Condition 6.** In order to satisfy the Subdistrict's compliance with its obligations under section 37-45-118(1)(b)(IV) of the Water Conservancy Act, the 2012 Permit shall not take effect until the WGFP IGA has been executed and is conditioned upon the Subdistrict's continued compliance with its obligations under the WGFP IGA.

**Evidence on the Record to Support Finding/Conditions:**

Certificate of Recommendation, p.18 Section VI F of the WGFP IGA states that the proposed WGFP IGA is intended to satisfy section 37-45-118(1)(b)(II) of the Water Conservancy Act.

**Condition 7.** While the Subdistrict is not a party to the Grand Lake Clarity Agreement, the Board of County Commissioners has relied on the Clarity MOU in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, the 2012 Permit shall not be effective until the Clarity MOU and Contributed Funds Act Agreement (CFA Agreement) for executing the Colorado-Big Thompson (C-BT) West Slope Collection System Technical Review of Alternatives and Analysis and Plan of Study have been executed.

Trans 1, p.135 Curran/Certificate of Recommendation notes that the Grand Lake Clarity Agreement says Bureau of Reclamation will meet the water quality standard for Grand Lake.

Trans 1, p.174 Curran/Certificate of Recommendation notes that Northern and Grand County have agreed upon the Grand Lake MOU clarity agreement, but the Bureau of Reclamation has not yet provided input. So it is important for the Board of County Commissioners to know the final form of that agreement and if it suits what is needed for Grand Lake.

Trans 1, p.176 Curran/Certificate of Recommendation concludes that, while the Subdistrict is not a party to the Grand Lake Clarity Agreement, the Board of County Commissioners has relied upon the Grand Lake Clarity Agreement in determining whether the 2012 Windy Gap project complies with its 1041 regulations.

Trans 2, p.45 Curran/Certificate of Recommendation notes that it is the intent of the Grand Lake Clarity Agreement to make the Bureau of Reclamation, Grand County and Northern stay vested in the process without making a determination what the next step would be.

**Condition 8.** The closing documents listed below are integral to the WGFP IGA, and the Board of County Commissioners has relied upon the WGFP IGA in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, this 2012 Permit shall not be effective until those documents have been executed, and Grand County has been provided with copies of same.

- Agreement with Northern Water
- Grand Lake Clarity Agreement (known as Umbrella agreement)
- Appraisal Study now know as Alternates Development Report
- Processed Materials Agreement
- Windy Gap Decree
- Grand County RICD Stipulation
- Learning by Doing Cooperative Effort
- Green Mountain Reservoir Administration
- Contracts for Delivery of Water to Grand Valley
- Guidelines for Meadow Pumpers Fund
- Guidelines for Measuring Devices Fund
- Form of Easement for Access for Telemetry
- Agreement Among Middle Park, Grand County and River District on Operating and Administering Water Apportionments and Carryover Balances

- Amendatory Contract (Carriage Contract)
- Side letter from Subdistrict to Colorado River Water Conservation District re: no opposition to use of Windy Gap water for uses incidental to irrigation such as fish screen, fish ladder, etc.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.6 Curran/Certificate of Recommendation notes that the Subdistrict and its parent entity, Northern, through an IGA, have offered enhancements to address current low flow conditions as well as Grand Lake clarity.

Trans 1, p.177 Curran/Certificate of Recommendation concludes that the closing documents listed on page 12 of the Certificate of Recommendation support the obligations of the Subdistrict under the WGFP IGA, and the Board of County Commissioners has relied upon the Subdistrict's obligations under the WGFP IGA in determining whether the 2012 WGFP complies with its 1041 regulations. Therefore, the 2012 Permit shall not be effective until those documents have been executed.

**Condition 9.** The storage of water in Chimney Hollow Reservoir shall not commence until the water court approves the Windy Gap decree as amended by incorporation of the WGFP IGA. The Subdistrict shall provide Grand County with documentation of this approval.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.104 Curran/Certificate of Recommendation notes that If the WGFP IGA is approved it will be attached to the water decree for the Windy Gap water rights, and it will go to water court to be approved so that it can be administered as anticipated.

**Criterion 5-306(a): The need for the proposed water project can be substantiated.**

**Proposed Finding:**

This criterion will be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

None.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.113 Curran/Certificate of Recommendation concludes that applicant has demonstrated the need for municipal, irrigation and industrial water. The need for water for hydraulic fracturing is new.

**Criterion 5-306(b): Assurances of compatibility of the proposed water project with federal, state, regional and county planning policies regarding land use and water resources.**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

**Condition 10.** The 2012 Permit shall not be effective until issuance of necessary state and federal permits and approvals for the 2012 WGFP, and this 2012 Permit is contingent upon Subdistrict's continued compliance with those terms and conditions. If there is a conflict between a term and/or condition in the 2012 Permit and a state or federal permit or approval, the term or condition that is the more protective of the environment shall control, unless otherwise preempted. Subdistrict shall provide Grand County with copies of all approved federal and state permits and approvals issued for the 2012 WGFP, which shall be attached to this permit. Following is a list of anticipated state and federal permits and approvals (this may not be a complete list):

- Clean Water Act 404 permit
- Colorado Department of Public Health and Environment ("CDPHE") 401 certification
- Fish and Wildlife Mitigation Plan, C. R. S. § 37-6-122.2
- Water Conservancy Act, C.R.S. § 37-45-101 *et seq.*
- Northwest Colorado Council of Governments Water Quality Management Plan ("NWCOG 208 Plan")
- Amendatory Contract and companion documentation of Bureau of Reclamation determination of compliance with Senate Document 80
- Record of Decision issued by Bureau of Reclamation
- Record of Decision issued for Corps of Engineers

**Condition 11.** The 2012 Permit shall terminate and be in no force and effect if construction of Chimney Hollow Reservoir, as defined in **Condition 4** of this 2012 Permit, has not begun within ten (10) years of the latter of the issuance of the Record of Decision for the 2012 WGFP by Bureau of Reclamation or by the Corps of Engineers.

**Condition 12.** Diversions and pumping associated with the 2012 WGFP must cease if the Grand County Water Apportionment provided by the WGFP IGA is not available for release.

**Condition 13.** To show compliance with the 2011 Grand County Master Plan provision about Economic Base - Recreation and Tourism Based Industry, and Criterion 5-306(g) (Public Outdoor Recreation Areas), the County has relied upon the public access provided in paragraph IV D of the WGFP IGA, which reads as follows:

Upon execution of this WGFP Agreement, the Subdistrict will make arrangements with Northern Water to provide public access to that portion of Willow Creek located on Northern Water's lands for as long as Northern Water owns the lands adjacent to Willow Creek, if and to the extent that the public access will be managed by the Colorado Division of Parks and Wildlife or other entity acceptable to Northern Water.

**Condition 14.** Compliance with the conditions in this 2012 Permit shall constitute compliance with the NWCCOG 208 Plan.

**Evidence on the Record to Support Finding/Conditions:**

1.10.2 WGFP Final Environmental Impact Statement "Prior to entering into a contract [Amendatory Contract] that would allow use of C-BT excess capacity, Reclamation must determine that the excess capacity contract is consistent with the provisions of Senate Document 80 (SD 80) and Reclamation's authority under Section 14 of the Reclamation Project Act of 1939 (43 U.S.C. § 389)".

Trans 1, 176. Curran/Certificate of Recommendation notes that proposed WGFP IGA constitutes partial compliance with Conservancy District Statute.

Trans 1, p.103-104 Curran/Certificate of Recommendation notes that 1980 and 1985 agreements are part of the water decree for Windy Gap, approved by the water court. If the WGFP IGA is approved it will be attached to the water decree, and it will go to water court to be approved so that it can be administered as is being anticipated.

Trans 1, p.115 Curran states "It is our opinion that if the Bureau of Reclamation issues amendatory contract for the carriage of that water, then they will also at that time make a decision on compliance with Senate Document 80."

Trans 1, p.115 Curran/Certificate of Recommendation notes that there is an issue with Grand Lake clarity; one of the WGFP IGA closing documents is an MOU on Grand Lake clarity with Northern, the Bureau of Reclamation and Grand County ("Clarity MOU"), and approval of the Clarity MOU is important to a finding of compliance with Senate Document 80.

Trans 1, p.120 Lane Wyatt testimony that with the conditions set forth on pages 24-25 of the Certificate of Recommendation, 2012 WGFP can comply with the NWCCOG 208 Plan; the focus from a water quality perspective is on temperature and Grand Lake clarity.

Trans 1, p.114 Curran/Certificate of Recommendation notes that WGFP IGA offers public access on Willow Creek. Counting on this to address Master Plan Economic Base and Land Use and Development portions of Master Plan.

Trans 2, p. 21-22 Curran/Certificate of Recommendation notes that promise of public access in WGFP IGA has been used to meet criterion. Need a plan if property sold and value to public lost. Willow Creek for fishing, due to sale of this property, would impact recreation and public values and be in conflict with the Master Plan criterion.

Trans 2 p.46-47 Eric Wilkinson testimony that the operation of the C-BT project, with the WGFP water going through under the carriage contract, must be in accordance with SD 80; operation of WGFP cannot cause the C-BT project to operate outside compliance with SD 80.

**Criterion 5-306(c): Municipal and industrial water projects shall emphasize the most efficient use of water, including, to the extent permissible under existing law, the recycling and reuse of water. Urban development, population densities, and site layout and design of storm water and sanitation systems shall be accompanied in a manner that will prevent the pollution of aquifer recharge areas.**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

**Condition 15.** Prior to delivery of water through the 2012 WGFP, Subdistrict shall provide the County with documentation of conservation plans for all municipal project participants and lessees and shall continue to provide documentation that participants are complying with the Water Conservation Act

with regard to updating the conservation plans as required by state law.

**Condition 16.** Subdistrict shall provide written notice to the County when units of the 2012 WGFP are sold or leased and verification that the new owner or lessee has complied with the Water Conservation Act.

**Condition 17.** Within 30 days of acceptance of this 2012 Permit, the Subdistrict shall provide the County with written documentation of how use of water for fracking satisfies criterion c of the Grand County 1041 Regulations, if at all.

**Condition 18.** This 2012 Permit is subject to the Subdistrict's compliance with the terms and conditions of the 1980 Agreement and 1985 Supplement that remain in effect after execution of the WGFP IGA.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.126 Curran/Certificate of Recommendation notes that each 2012 WGFP participant that is a municipal user is required to have a conservation plan and the Water Conservation Act requires that each plan be updated every 7 years.

Trans 1, p.113 Curran/Certificate of Recommendation notes that the application cites future needs for municipal, industrial and irrigation water, and includes fracking as a future industrial use.

**Criterion 5-306(d): Provisions to insure that the proposed water project will not contaminate surface water resources.**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

**Condition 19.** Condition #7 above is essential to satisfaction of this criterion.

**Condition 20.** Prior to the beginning of construction for Chimney Hollow Reservoir, the Subdistrict shall provide Grand County with a copy of an executed agreement between the Subdistrict and the wastewater treatment provider(s) to mitigate nutrient loading. This agreement shall include provision for the cost of improvements and additional operation and maintenance costs, if any, associated with those improvements.

**Condition 21.** The Subdistrict shall submit the Nutrient Reduction Plan required by Bureau of Reclamation to Grand County for review at the same time it is submitted to Bureau of Reclamation and the Corps of Engineers but no later than the execution of the WGFP IGA and closing documents.

**Condition 22.** Within six months of issuance of the last Record of Decision for the 2012 WGFP, the Subdistrict shall submit to the County for review and approval a robust monitoring plan to assure that nutrient loading from the 2012 WGFP for total nitrogen and total phosphorus is reduced to the 1:1 level, and a mitigation and monitoring plan to ensure that operation of the 2012 WGFP does not cause or contribute to (1) decreases in dissolved oxygen, (2) increases in manganese, (3) increases in bioavailable mercury, or (4) increases in Chlorophyll a; and that it does not cause or contribute to decreases in Secchi disk depth from July through September in Grand Lake, or complies with the clarity standard for Grand Lake when that is adopted. The monitoring plan shall include a schedule for monitoring and reporting and Subdistrict shall provide a publically accessible data base, and submit to Grand County summary reports on a schedule and in a form approved by Grand County. The 2012 WGFP shall be operated in compliance with the approved monitoring and mitigation plans in this paragraph.

**Evidence on the Record to Support Finding/Conditions:**

EPA letter, p.4-5 “Four of the lakes and reservoirs associated with WGFP (Granby Reservoir, Shadow Mountain Reservoir, Carter Lake and Horsetooth Reservoir) are already on Colorado’s Clean Water Act §303(d) List of Impaired Waters (“303(d) List”) with impairments either caused by, or exacerbated by, nutrients. Granby Reservoir, Carter Lake and Horsetooth Reservoir are impaired for their aquatic life use due to high levels of methyl mercury found in fish tissue which poses human health concerns. Low dissolved oxygen increases the availability of mercury to the food chain, and WGFP nutrient loads could reduce oxygen concentrations. Granby Reservoir, Shadow Mountain Reservoir, Grand Lake and Horsetooth Reservoir all have exceeded the water quality standard for manganese due to depleted dissolved oxygen, and the project could exacerbate these levels causing increased costs to municipal water suppliers.”

EPA letter, p.5 “Any addition of nutrients to impaired lakes would be expected to worsen the existing conditions. It is therefore important that the assessment of baseline conditions and the projection of nutrient loads caused by the project be accurate, and that the nutrient reductions through mitigation be measurable and conservative. . . . [T]he EPA identifies a number of instances where significant uncertainty remains regarding analyses, results or interpretation. Given the uncertainty involved with projected results, we also offer recommendations to assure adequate resource protection.”

EPA letter, p.5 “The EPA’s review of the FEIS identified areas of concern when documenting baseline water quality conditions, documenting baseline nutrient loads, modeling nutrient dynamics/effects, and in calculating the benefits of mitigation. We conclude from our review of these analyses . . . that the FEIS likely underestimates the amount of mitigation that will be necessary to assure nutrient neutral operation. The level of uncertainty left by the analyses argues for upgrading the commitment of mitigation beyond the proposed 1:1 ratio, and during project implementation: committing to confirm the baseline via monitoring; monitoring the actual project loads; monitoring lake water quality; and measuring the effectiveness of mitigation projects.”

Trans 1, p.132 Curran/Certificate of Recommendation notes that 2012 WGFP will exacerbate water quality in the Three Lakes with particulate-laden water.

Trans 1, p.133 Curran/Certificate of Recommendation notes that aesthetic value of Grand Lake is one of the 5 primary principles of SD 80; Grand Lake clarity issues existed prior to Windy Gap, have worsened over time, and will be exacerbated by 2012 WGFP.

Trans 1, p.135 Curran/Certificate of Recommendation notes that, in order to address the clarity in Grand Lake, the Clarity MOU must be executed, the subsequent step must be executed, and the supplemental funding agreement between Northern and the Bureau of Reclamation must be executed. The Clarity MOU keeps the parties engaged in working on this issue.

Trans 1, p.135 Curran/Certificate of Recommendation notes that the Clarity MOU says Bureau of Reclamation will meet the water quality standard for Grand Lake.

Trans 1, 138 Morris testimony that the Water Quality Control Commission adopted two standards - the narrative standard was effective immediately, implementation of the numeric clarity standard has a deferred to effective date of January 1, 2015 and consists of 4 meter Secchi depth clarity for the months of July through September.

Trans 1, p.139 Morris testimony that Bureau of Reclamation stop pump studies produced improved clarity in Grand Lake.

Trans 1, p. 140 Morris testimony that a study coordinated around the 2009 stop pump indicated that non-algal particulate matter moved with the water, and it was significantly more deleterious to clarity than nutrients. The source of these non-algal particulates is the root of a new study that started this year.

Trans 1, p.142 Curran/Certificate of Recommendation notes that the Final Environmental Impact Statement proposes a one-to-one reduction in nutrients, and proposes a non-point source reduction; there is still remaining nitrogen to be removed;

Trans 1, p.142 Curran/Certificate of Recommendation notes that as part of the nutrient reduction, Subdistrict will work with the Fraser Valley Consolidated Plant. It's assumed that it will take approximately \$3.3 million in improvements, and Subdistrict is offering money for operation and maintenance on an annual basis to support that operation. Plans for nutrient reduction still need to address remaining nitrogen.

Trans 1, p.143 Curran/Certificate of Recommendation notes that the Final Environmental Impact Statement states that manganese and Chlorophyll a will increase with the 2012 WGFP; dissolved oxygen will decrease. Secchi depth levels should decrease in Grand Lake. Mercury is also an issue.

Trans 1, p.146 Curran/Certificate of Recommendation notes that applicant proposes 1:1 nutrient reduction; non-algal particulates issue is not addressed.

Trans 1, p.174 Curran/Certificate of Recommendation notes that Northern and Grand County have agreed upon the Clarity MOU, but the Bureau of Reclamation has not yet provided input. So it is important for the Board of County Commissioners to know the final form of that agreement and if it suits what is needed for Grand Lake.

Trans 1, p.176 Curran/Certificate of Recommendation concludes that, while the Subdistrict is not a party to the Clarity MOU, the Board of County Commissioners has relied upon the Clarity MOU in determining whether the 2012 Windy Gap project complies with its 1041 regulations.

Trans 1, p.203 Applicant testimony acknowledges concern for condition of Colorado River and Grand Lake clarity.

Trans 1, p.247 Applicant testimony that Subdistrict analysis looked at the larger wastewater treatment plants (Fraser plant, Granby plant and Three Lakes plant) to determine which one would be the most cost effective to provide nutrient reduction. Based on the analysis the Subdistrict proposes to work with the Fraser plant for a major portion of the nutrient reduction. Subdistrict believes that this will accomplish the amount of reduction needed for phosphorus, but not for nitrogen.

Trans 1, p.248 Applicant testimony that Subdistrict looked at several operating ranch properties in the Willow Creek drainage, and there would be some modifications to those ranch operations that would result in nutrient reduction.

A couple of those ranches are ranches that would be dried up as a result of the Red Top Ditch 10825 project, so they would no longer be in high agricultural production.

Trans 1, p.249 Applicant testimony that the Subdistrict has entered into an agreement with C Lazy U ranch to provide funding for stream restoration and modifications that will reduce erosion, and changes in ranching operations such as application of fertilizer.

Trans 1, p.250 Applicant testimony that despite nutrient reductions achieved by changes to the ranching operations and the wastewater treatment plant operations, further reductions in nitrogen are still needed, so Subdistrict is in the process of looking for additional locations for nitrogen. Bureau of Reclamation has required Subdistrict to reach a one-to-one reduction of nutrients.

Trans 1, p.250 Applicant testimony that Subdistrict has begun monitoring to set the baseline for nutrients levels in those streams just below the ranches and the treatment plants; Subdistrict will continue monitoring and using the data to calculate whether or not nutrient reductions are being achieved. Subdistrict will be required by the Corps of Engineers to provide a detailed plan for monitoring.

Trans 1, p.255 Curran/Certificate of Recommendation notes that Corps of Engineers has required that the Subdistrict submit for approval a plan for nutrient reduction to achieve the one-to-one reduction.

Trans 1, p.221 Eric Wilkinson testimony that Subdistrict sees Grand Lake clarity as obviously a Northern issue. Northern has committed to supplement its repayment contract; in other words, add to its repayment contract through a supplement to ensure that Northern will continue to participate in the activities associated with studying and looking for a solution to Grand Lake clarity.

Trans 1, p.257 Applicant's testimony that Subdistrict has agreed to sign a Clarity MOU and to sign a supplement to the Subdistrict's prepayment contract with Bureau of Reclamation to work for a long-term solution to the Grand Lake clarity problems.

Trans 2, p.45 Curran/Certificate of Recommendation notes that it is the intent of the Clarity MOU to make the Bureau of Reclamation, Grand County and Northern stay vested in the process without making a determination what the next step would be.

Trans 2, p.160 Letters introduced into record as Exhibit 34 documenting Grand Lake clarity issues from 1954.

Trans 2, p.161 Morris testimony that the non-algal particulate matter from the 2009 McKutchen study was shown to be more than twice as important as the algae. And then dissolved organic carbon, and after that inorganic material, like rock chalk or silt.

Trans 2, p.177-178 Stahl testimony that there will be more days of pumping after 2012 WGFP is on line.

Trans 2, 180-181 Drager response to questions that Subdistrict proposed nutrient mitigation as a way to try and say that this project would not have a negative effect on Grand Lake. Not to say that it would improve the condition of Grand Lake.

Trans 2, p.214-215 Burke testimony that the current Three Lakes nutrient study has confirmed that nutrients and non algae particulates are currently contributing to the degradation of the water quality and water clarity in Grand Lake. The shallow depth, warm temperature and significant algae, and weed growth in the Shadow Mountain Reservoir all contribute to the water problems in Grand Lake.

Trans 2, p.215 Burke testimony that during the period that pumping did not occur, which was May through early September of 2011, the clarity of Grand Lake's water was shown by testing to have increased to a depth of over six meters, a 50-year record. Immediately upon resuming pumping, the clarity degraded to a depth of slightly over two meters, similar to measurements prior to the no pump period.

Trans 2, p.303 Paul testimony that we know exactly what's causing the problems in Grand Lake. It's pumping water. Pumping a lot of water, more than 200,000 AF every year, through Shadow Mountain and then into Grand Lake. Clarity gets better when pumping stops. Start pumping, the clarity gets worse. If we stop for a long period of time it gets really good.

**Criterion 5-306(e): The proposed water project is capable of providing water pursuant to standards of the Colorado Department of Health**

**Proposed Finding:**

This criterion will be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

None.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.142 Curran/Certificate of Recommendation concludes that the project is capable of providing water pursuant to regulations because municipal users have to treat to state water quality standards.

**Criterion 5-306(f): The proposed diversion of water from the source development area will not decrease the quality of peripheral or downstream surface and subsurface water resources in the source development area below that designated by the Colorado Water Quality Control Division on January 15, 1974 and effective June 19, 1974 or below stricter standards subsequently adopted.**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

**Condition 23.** Installation of the real time water temperature gauges required by the Fish and Wildlife Mitigation Plan shall be a condition of this 2012 Permit and the Subdistrict must verify every spring, before the beginning of pumping, that these gauges are in good working order, that they remain so during the time of the year when the standard is in effect, and that they are replaced or repaired when necessary and timely to their need in reporting temperature.

**Condition 24.** Notwithstanding proposed temperature mitigation in the Fish and Wildlife Mitigation Plan and other terms and conditions to address temperature that may be imposed as part of the 401 Certification or federal approvals for the 2012 WGFP, the 2012 WGFP shall not cause or contribute to temperature exceedances in the Colorado River below Windy Gap, at the points of measurement set forth in the Fish and Wildlife Mitigation Plan.

**Condition 25.** Because the delivery of the 10825 endangered fish water from Granby Reservoir is an essential consideration for compliance with the Endangered Species Act and compliance with the temperature standard, the Subdistrict must participate in securing approval of the 10825 agreement and must arrange with Northern to do the same.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.143 Curran/Certificate of Recommendation notes that the Colorado River is on 303(d) list for temperature exceedances; 2012 WGFP will exacerbate the temperature standard issues.

Trans 1, p. 143 Curran/Certificate of Recommendation notes that the Fish and Wildlife Mitigation Plan addresses the MWAT standard for the 2012 WGFP, but not for the Windy Gap project. Subdistrict proposes to install temperature gauges below Windy Gap and the curtailment of pumping if MWAT exceedance occurs when Windy Gap is pumping.

Trans 1, p.144 Curran/Certificate of Recommendation notes that, with installation of temperature gauges/monitoring stations, if County receives prompt notice of temperature exceedances the resources provided under Learning by Doing could be utilized to minimize impacts.

Trans 1, p.144 Curran/Certificate of Recommendation notes that we know the 5412 water, and possibly some of the other water that the County might have, could help address the temperature standard, especially at the time when Windy Gap isn't pumping. If the County is notified of temperature exceedances, the County may be able to do something with the resources that are provided under Learning by Doing.

Trans 1, p.157 Bailey testimony that Colorado River below Windy Gap Reservoir (CR 4) has exhibited chronic temperature exceedances in moderate and low-flow years, and begins to show chronic exceedances starting in July and usually lasting into August; depending on the year, there could be a month or six weeks of temperature exceedances, or in some years there were none, so it's flow dependent.

Trans 1, p.245 Applicant testimony that the Subdistrict proposes installation of real time temperature gauges and maintaining the gauges and making sure that they work every year.

Trans 2, p.84 Pfeifer testimony that bypass/by-through would reduce or eliminate high temperature events exacerbated by 2012 WGFP.

Trans 2, p. 301 Carpenter testimony that releases make a difference in temperature.

**Criterion 5-306(g): The proposed development and the potential diversions of water from the source development area will not significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands,**

**critical wildlife habitat, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance.**

**Aquatic Habitats:**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

**Condition 26.** Within six (6) months of issuance of Record of Decision by the Corps of Engineers for 2012 WGFP, the Subdistrict shall prepare and submit to Grand County for review and approval a fish and aquatic invertebrates monitoring plan to determine if the Fish and Wildlife Mitigation Plan, Fish and Wildlife Enhancement Plan, conditions in the Record of Decision, and additional water provided in the WGFP IGA would prevent the loss of aquatic habitat predicted in the Final Environmental Impact Statement. The monitoring information shall be provided to the Learning by Doing Management Committee, and monitoring shall continue as long as Learning by Doing requires this information. If the bypass/by-through is constructed, this monitoring plan shall be adapted as necessary to analyze the benefits of the bypass/by-through in consultation with the Learning By Doing Management Committee.

**Condition 27.** If a bypass/by-through is constructed, the Subdistrict shall include in the design an effective plan for minimizing blowing dust and so long as such plan is submitted and implemented, blowing dust shall not constitute a violation.

**Condition 28.** The bypass/by-through study shall commence on or before issuance of this 2012 Permit. If the results of the study demonstrate that the bypass/by-through will benefit the Colorado River, construction of the bypass/by-through shall proceed in accordance with the Request for Proposals, Windy Gap Reservoir Modifications which currently reads as follows:<sup>1</sup>

Commitments for funding are being evaluated by the Subdistrict, Denver Water, and the State of Colorado with the intent of developing a new, mutually acceptable agreement among the members of the Technical Team and CPW regarding the commitment to, amount of, and conditions

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<sup>1</sup> If this provision changes, the Condition will change accordingly.

associated with, funding the WG bypass/flow-through (the "Implementation Agreement"). If the cost to implement the selected preferred alternative exceeds the amount committed in the Implementation Agreement, the Technical Team, CPW and others as appropriate will cooperatively pursue additional funding. If, after the best efforts of the parties, the additional funding cannot be obtained voluntarily, the Technical Team and CPW may elect to modify the selected preferred alternative utilizing the findings of the WG Study to allow construction to proceed within the budget of the committed funds.

**Condition 29.** If, during a five (5) year period, natural conditions meet or exceed flows of 600 c.f.s. required by the Fish and Wildlife Mitigation Plan so that the Subdistrict is not required to make releases or bypass water to achieve the required flow, then in the sixth year, Subdistrict shall provide a 1200 c.f.s. flow for 72 hours when required by Learning By Doing.

**Evidence on the Record to Support Finding/Conditions:**

EPA letter, p.11 "We continue to recommend that additional flushing flows of bankfull (1240 cfs) and higher below WGD should be incorporated as mitigation for this proposed project. It is likely that flows in the 5-50 year recurrence interval range provide numerous ecological functions, including bedload transport, break-up of channel armoring, periphyton scour/disturbance and limitation of vegetation encroachment, and as such, flushing flows of this magnitude should be proposed at sufficient duration and frequency to maintain this reach of river."

EPA letter, p.13, "The FEIS characterization of aquatic life impacts is substantially limited because it does not include data within the first 8 miles downstream of WGD, the reach most likely to experience adverse effects. The Colorado DOW and other entities have collected macroinvertebrate and fish data from the reach immediately downstream of the diversion, although these data were not included the FEIS."

EPA letter, p.13 "Based upon new data released in the DOW Report (Nehring et al. 2011), significant effects of the original Windy Gap project may be occurring within the first few miles downstream of the diversion and the proposed project is likely to exacerbate these effects. The DOW report documents significant declines in mayfly, stonefly and caddisfly taxa (reduced by 54%, 40% and 62%, respectively) between 1981 and 2010 at sites downstream of the diversion, and the local extirpation of a native fish (mottled sculpin), and attributes these declines to current water withdrawals in the system and the related effects on channel functions. DOW also documents development of sediment beds and

associated mats of rooted aquatic vegetation below WGD. In explaining the biotic condition, DOW concludes that “chronic sedimentation and clogging of the interstitial spaces in the cobble-rubble dominated riffles areas of the upper Colorado River below WGD is the overarching problem that has increasingly compromised the biotic integrity and proper function of the river over the past 25 years. The proposed firming projects at Windy Gap and the Moffat Tunnel are only going to further exacerbate this situation.” The DOW report also notes, “The severe reductions in the frequency, magnitude and duration of high flushing flows below WGD since its construction in the 1980s, has severely reduced the stream power in the Colorado River downstream of Windy Gap.” The DOW report cites six stream ecosystem issues associated with water storage and export, including 1) restoration of channel connectivity, 2) channel reconfiguration, stream power and flushing flows, 3) sediment deposition and transport, 4) water temperature, 5) encroachment of rooted aquatic vegetation, and 6) whirling disease. The EPA agrees with this list, and recommends that the information in this report be used to inform the characterization of current conditions and predicted impacts and that mitigation be proposed to offset the incremental effects of this project that relate to these issues..”

EPA letter, p.15 “Although the FEIS acknowledges that WGFP will further reduce peak flows in the Colorado River in Grand County, and will have adverse impacts to aquatic life including reduction in trout habitat in the Colorado River, it does not include mitigation sufficient to offset these effects. Similarly, no mitigation is proposed for similar reductions in trout habitat in Willow Creek..”

Trans 1, p.146 Curran/Certificate of Recommendation/Application note that fish habitat will be reduced from Windy Gap to Williams Fork, and the greatest decrease will be in July and August. The diversions would increase in August from 6 times in 47 years to 15 times in 47 years; Final Environmental Impact Statement states that impacts are infrequent and offset by the Fish and Wildlife Enhancement plan, additional water to Grand County, and 10825 water. There is no way of knowing if these enhancements will address the lost habitat, and there is no mitigation proposed.

Trans 1, p.147 Curran/Certificate of Recommendation notes that the Nehring Report concludes that the significant issues to be taken into account in the relationship between hydraulic modifications and macro-invertebrates are (1) restoration of channel connectivity, (2) channel reconfiguration, (3) stream power and flushing flows, (4) sediment deposition and transport, (5) water temperature, (6) encroachment of rooted aquatic vegetation, and (6) Whirling Disease.

Nehring Report concludes that:

"Two things must be done if there is to truly be any hope of enhancement of aquatic ecosystem in the Upper Colorado River. In the future a bypass channel around Windy Gap and a major investment in stream channel reconfiguration where the Colorado River below Windy Gap Dam are both equally important. And the only way true enhancement has any possibility of success, either one without the other will have virtually no chance of succeeding."

Trans 1, p.148 Curran/Certificate of Recommendation notes that the Fish and Wildlife Mitigation Plan includes stream channel reconfiguration but there is no plan for where it would occur, what sections it would occur in, how it would occur, or what is the connectivity.

Trans 1, p.148 Curran/Certificate of Recommendation notes that a request for proposal for Windy Gap Reservoir modifications (bypass/by-through) has been negotiated by Grand County, the River District, Trout Unlimited, Denver Water, Middle Park, the Municipal Subdistrict, the Schmuck Children's Trust, and the Upper Colorado River Alliance; the County understands that there is a financial agreement being considered.

Trans 1, p.149 Curran/Certificate of Recommendation notes that the Planning Commission thought that the bypass/by-through was extremely important; the Commission expressed concern for financing the bypass/by-through.

Trans 1, p.156 Curran/Certificate of Recommendation notes that 600 c.f.s. is the flow that is required by the Fish and Wildlife Mitigation Plan for 50 hours; according to the stream management plan, 600 c.f.s. is a minimum.

Trans 1, p.158 Curran/Certificate of Recommendation notes that the Stream Management Plan recommends flushing flows of 600 c.f.s. once in two years for three days to clean the spawning gravels in the spawning beds. Higher flows are needed for channel-forming flows and flows that move the larger cobbles in this particular reach of the river. Prior to Windy Gap the flow that occurred about once every year or two ranged around 1100 c.f.s. In 2011, flows of that magnitude occurred, but the channel did not mobilize - it is armored as a result of heavy sedimentation filling the voids between the larger cobbles in the bed; this is a very poor habitat for fish.

Trans 1, p. 159 Bailey testimony that there is a distinct lack of spawning gravels, which indicates that the higher flows in 2010 and 2011 have moved the spawning-sized material downstream, and there is no longer replacement material - spawning material and sediment is being trapped in Windy Gap.

Trans 1, p.208 Wilkinson testimony that the Subdistrict/participants agree a study is needed to identify whether the Colorado River will benefit from the construction of a bypass/by-through; Subdistrict/participants are willing to accelerate the timeline for doing the bypass/by-through study, and to contribute the proposed \$250,000 to study the bypass/by-through proposal immediately.

Trans 1, p.209 Wilkinson testimony: "There has been questions about funding. Our participants have had many a discussion about funding of the bypass. And because of what they feel is a very robust mitigation and enhancement package that they have put on the table already, they are -- they are reluctant to add to that. But I will tell you that they have said that they will pledge \$2 million towards the construction of the bypass if the construction -- or if that \$2 million will get them to what I will refer to as an end point. When I say an end point, that means \$2 million, and that gets us done. Because they -- I don't want to put words in their mouth, but they feel that they are bleeding to death and they need to stop at some point in time. They feel that \$2 million towards this is an adequate contribution."

Trans 1, p.219 Wilkinson testimony: "The one caveat I'm going to put on it, as I -- this may be preemptive, but I will just tell you that in the condition by Ms. Curran that it be constructed as soon as possible after the issuance of a 1041 permit, our participants are not willing to spend that money until they are starting construction on Chimney Hollow Reservoir, because they don't want to spend \$2 million and not get the benefit of their bargain later. That's one of the end-point discussions. But are fully willing when they start construction to construct in parallel, and utilize that money, to construct in parallel the bypass at the same time."

Trans 1, p.220 Wilkinson testimony that: "our participants are not willing to spend that money until they are starting construction on Chimney Hollow Reservoir, because they don't want to spend \$2 million and not get the benefit of their bargain later. That's one of the end-point discussions. But are fully willing when they start construction to construct in parallel, and utilize that money, to construct in parallel the bypass at the same time."

Trans 1, p.280 Curran/Certificate of Recommendation notes that Subdistrict has agreed that if the bypass/by-through proves to be beneficial, it can be constructed on Subdistrict's property and the Subdistrict will handle the perpetual operation and maintenance.

Trans 1, p.281 Wilkinson testimony: "In my discussions we did support that aspect of the recommendation that said the study should start immediately. Our participants have said instead of their original plan to commit the quarter of a million dollars at the time that the permits were issued, and we had to go

ahead – the go-ahead with the project and start the bypass study then. They have allowed us, as representatives of the participants, to tell everyone that we are -- or they are willing to put the quarter-of-a-million dollars up right now to start it as soon as possible. That portion of then the bypass -- then construction of the bypass shall commence as soon as possible after the acceptance of the 2012 permit. I think I clarified that during my testimony, that our participants are still willing, obviously, to commit the \$2 million. But their term and condition is construction of the bypass as defined would start -- or at least the expenditure of their \$2 million on the construction of the bypass would start simultaneously with the construction of Chimney Hollow Reservoir.”

“I think I clarified that during my testimony, that our participants are still willing, obviously, to commit the \$2 million. But their term and condition is construction of the bypass as defined would start -- or at least the expenditure of their \$2 million on the construction of the bypass would start simultaneously with the construction of Chimney Hollow Reservoir.”

Trans 1, p282 Wilkinson testimony that if the bypass/by-through study shows that there is not a benefit to the Colorado River, and it's decided not to construct the bypass/by-through, Subdistrict does not want to be a position of not having a permit because construction of the bypass/by-through was a condition of the permit.

Trans 1, p.283 Montano states that the Subdistrict’s commitment to construction of the bypass/by-through would be ensured through a separate agreement.

Trans 1, p.284 Wilkinson testimony that the revised RFP for proposals on the bypass/by-through study commits participants in that RFP to look at an implementation agreement whereby the participants would look for funding sources; Subdistrict is pledging \$2 million through the WGFP IGA. Subdistrict is agreeing to the contents of the RFP, which implies that Subdistrict would participate in the implementation agreement to find ways to fund the bypass/by-through.

Trans 1, p.295 Drager testimony that under the Fish and Wildlife Mitigation Plan, flows will be increased from 450 c.f.s. to 600 c.f.s. for 50 hours once every three years; this is slightly different from the Stream Management Plan.

Trans 1, p.296 Drager testimony that the \$250,000 for a bypass/by-through study in the Fish and Wildlife Mitigation Plan and the \$250,000 for bypass/by-through study in the WGFP IGA under section IVR is the same money.

Trans 1, p.301 Drager testimony that flows such as 1200 CFS would be available under the mitigation provision only one or two years, but there were a couple other years when it was between 600 and 1200.

Trans 2, p.16 Montano states hat Subdistrict “will continue to work with Grand County and other stakeholders, of which are many to obtain funds to construct the bypass/by-through at the same time that Chimney Hollow Reservoir is constructed.”

Trans 2, p.30 Bailey testimony that this reach of the river is affected by excessive sedimentation, flows have not been moving the gravels through. Upper limits of flushing flows necessary to move cobbles and for channel-forming flows currently are estimates and guesses; analysis is appropriate in conjunction with bypass/by-through analysis and habitat restoration plan.

Trans 2, p.56 Isaacs testimony that CDPW report (John Ewert) shows loss of biomass (trout) - from 264 lbs/acre in 2007 to 111 lbs/acre last year. Studies conclude that the section of the Colorado River below Windy Gap is one of the most impaired rivers in the state. The stream has become armored, eliminating the spawning beds. The river above Windy Gap is healthy.

Trans 2, p.62 Pfeifer testimony that recent studies by CDPW show a 38% loss in the diversity of aquatic insects below the Windy Gap Dam, including several key indicator species.

Trans 2, p.66 Pfeifer testimony that the loss in diversity of aquatic insects extends from below the dam to 15-20 miles downstream; mayfly and stonefly have essentially been entirely removed from the stream.

Trans 2, p.68 Pfeifer testimony that above Windy Gap there is a healthy diversity of insects. Sculpin are no longer found in the river system for several miles below the dam; rainbow trout population is a very small percentage of the fish in the river and the brown trout population shows a decline.

Trans 2, p.72 Pfeifer testimony that the cause of the decline in aquatic organisms is sedimentation in the Colorado River causing a well-cemented, armored stream channel.

Trans 2, p.73 Pfeifer testimony that a combination of sediment, warming temperatures, and nutrients (aquatic mats) is the leading cause of the decline in the river.

Trans 2, p.80 Pfeifer testimony that flushing flows are important for movement and cleaning out sediments and removing accumulation of vegetative mats; because of the prolonged period of reduced flows, sediment has become

trapped and compacted in the interstitial spaces and the natural flows do not have the energy to move this out. One way to mitigate this effect is a higher flow for periods of time.

Trans 2, p.82 Pfeifer testimony quoting Nehring report conclusion that sedimentation and clogging of the interstitial spaces in the river below Windy Gap Dam is the overarching problem that has compromised biotic integrity and proper function of the river over the past 25 years; the 2012 WGFP will further exacerbate the situation.

Trans 2, p.82 Pfeifer testimony that state reports conclude there has been a very large decline in the occurrence, amplitude and duration of true flushing flows since the diversions at Windy Gap dam began; a true flushing flow requires a discharge substantially greater than a 1000 c.f.s. for several weeks; flows of a low magnitude and shorter duration will not result in deep cleaning of the cobble boulder substrate in riffles, shoots and pools.

Trans 2, p.83 Pfeifer testimony that EPA suggests that construction of bypass/by-through around Windy Gap Dam would reduce or eliminate high temperature events exacerbated by 2012 WGFP; EPA recommends that an additional flushing flow of a bankful of 1245 c.f.s. or higher below Windy Gap Dam should be incorporated as mitigation for 2012 WGFP.

Trans 2, p.84 Pfeifer testimony that there is a diverse species of aquatic insects above and well below Windy Gap Dam.

Trans 2, p.84 Pfeifer testimony that bypass/by-through would reduce or eliminate high temperature events exacerbated by WGFP.

Trans 2, p. 251 Ewert testimony that there would be huge benefit of bypass/by-through on trout.

## **Marshlands and Wetlands:**

### **Proposed Finding:**

This criterion will not be satisfied without conditions.

### **Proposed Condition(s) to Satisfy Criterion:**

**Condition 30.** Subdistrict shall prepare and submit to the County for approval a monitoring plan for riparian vegetation along the Colorado River and Willow Creek within sixty (60) days of issuance of the Record of Decision by the Corps of Engineers. Monitoring will continue until the Learning By Doing

Management Committee has determined that riparian vegetation has not been adversely affected by the 2012 WGFP, or has recovered due to mitigation, stream restoration, or other efforts. At a minimum this monitoring must continue at least ten (10) years after commencing of pumping for the 2012 WGFP. Learning by Doing shall determine the need for extension of monitoring, past ten (10) year period, if any.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.166 Curran/Certificate of Recommendation notes that reductions in streamflow and bank flow conditions could affect riparian vegetation; with monitoring to identify if this has occurred, resources provided under Learning by Doing could be utilized to minimize impacts.

**Groundwater Recharge Areas, Steeply Sloping or Unstable Terrain, Forests and Woodlands:**

**Proposed Finding:**

This criterion will be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

None.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.166 Curran/Certificate of Recommendation notes that the Final Environmental Impact Statement concludes that there will be no effect on groundwater levels and groundwater quality; because there is no construction in Grand County there will be no impacts to steeply sloping or unstable terrain or to forests and woodlands.

**Critical Wildlife Habitat, Big Game Migratory Routes, Calving Grounds, Migratory Ponds, Nesting Areas, and Habitats of Rare and Endangered Species**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

**Condition 31.** The 2012 Permit is not effective until the 5412.5 AF of Endangered Fish Water is legally deliverable from Granby Reservoir, and Grand County has been provided with written verification that delivery of the 5412.5 AF of water from Granby Reservoir will be made in perpetuity.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.33 Kuhn testimony that under the 10825 agreement, water users agreed to provide a permanent supply of 10,825 AF for endangered species.

Trans 1, p.40 Curran/Certificate of Recommendation notes that under the 10825 agreement, one of the agreements with Grand County is if the fish either are no longer endangered or they “go belly up”, Northern has agreed to make 5412 AF perpetual to Grand County.

Trans 2, p.169 Kuhn testimony that the 10285 agreement is a separate agreement, however under the WGFP IGA with Northern, Northern has committed to making it a permanent release of 5412 AF; if in the future the biological opinion changes, and they change quite often, and there is no requirement to release water to the 15-mile reach from Granby Reservoir, Northern is committing to make this a permanent arrangement. That would not happen without the WGFP IGA.

**Public Outdoor Recreational Areas**

**Proposed Finding:**

This criterion will not be satisfied without conditions.

**Proposed Condition(s) to Satisfy Criterion:**

See proposed conditions under Criterion 5-306(b) and Criterion 5-306 (d) above.

**Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.114 Curran/Certificate of Recommendation notes that WGFP offers public access on Willow Creek. Counting on this to address Master Plan Economic Base and Land Use and Development portions of Master Plan.

Trans 1, p.132 Curran/Certificate of Recommendation notes that the application states that the WGFP will not contaminate surface water resources

and the County disagrees. It will exacerbate water quality in the Three Lakes with particulate-laden water.

Trans 1, p.133 Curran/Certificate of Recommendation notes that aesthetic value of Grand Lake is one of the five primary principles of Senate Document 80; Grand Lake clarity issues existed prior to Windy Gap, have worsened over time, and will be exacerbated by 2012 WGFP.

Trans 1, p.135 Curran/Certificate of Recommendation notes that, in order to address the clarity in Grand Lake, the Clarity MOU must be executed, the subsequent step must be executed, and the supplemental funding agreement between Northern and the Bureau must be executed. The Clarity MOU keeps the parties engaged in working on this issue.

Trans 1, 138 Morris testimony that the Water Quality Control Commission adopted two standards - the narrative standard was effective immediately, implementation of the numeric clarity standard has a deferred to effective date of January 1, 2015 and consists of 4 meter Secchi depth clarity for the months of July through September.

Trans 1, p.139 Morris testimony that Bureau of Reclamation stop pump studies produced improved clarity in Grand Lake.

Trans 1, p. 140 Morris testimony that a study coordinated around the 2009 stop pump indicated that non-algal particulate matter moved with the water, and it was significantly more deleterious to clarity than nutrients. The source of these non-algal particulates is the root of a new study that started this year.

Trans 1, p.143 Curran/Certificate of Recommendation notes that the Final Environmental Impact Statement proposes a one-to-one reduction in nutrients, and proposes a non-point source reduction; there is still remaining nitrogen to be removed.

Trans 1, p.146 Curran/Certificate of Recommendation notes that applicant proposes 1:1 nutrient reduction; non-algal particulates issue is not addressed.

Trans 1, p.169 Curran/Certificate of Recommendation notes that Windy Gap permit contemplated public access to Windy Gap area, which did not occur; public access to recreational areas important to County.

Trans 1, p.174 Curran/Certificate of Recommendation notes that Northern and Grand County have agreed upon the Clarity MOU, but the Bureau of Reclamation has not yet provided input. So it is important for the Board of County Commissioners to know the final form of that agreement and if it suits what is needed for Grand Lake.

Trans 1, p.176 Curran/Certificate of Recommendation concludes that, while the Subdistrict is not a party to the Clarity MOU, the Board of County Commissioners has relied upon the Clarity MOU in determining whether the 2012 WGFP complies with its 1041 regulations.

Trans 1, p.203 Applicant testimony acknowledges concern for condition of Colorado River and Grand Lake clarity.

Trans 2, p. 21-22 Curran/Certificate of Recommendation notes that promise of public access in WGFP IGA has been used to meet criterion. Need a plan if property sold and value to public lost. Willow Creek for fishing, due to sale of this property, would impact recreation and public values and be in conflict with the Master Plan criterion.

Trans 2, p.160 Letters introduced into record as Exhibit 34 documenting Grand Lake clarity issues from 1954.

Trans 2, p.214 Burke testimony that the current Three Lakes nutrient study has confirmed that nutrients and non algae particulates are currently contributing to the degradation of the water quality and water clarity in Grand Lake. The shallow depth, warm temperature and significant algae, and weed growth in the Shadow Mountain Reservoir all contribute to the water problems in Grand Lake.

## **Unique Areas of Geologic, Historic or Archaeological Importance**

### **Proposed Finding:**

This criterion will not be satisfied without conditions.

### **Proposed Condition(s) to Satisfy Criterion:**

**Condition 32.** On or before execution of the WGFP IGA, the Subdistrict shall submit to Grand County for approval a plan for maintenance of the rock structures below each pump site for the irrigators above Kremmling (listed in the WGFP IGA) that allows water to be captured and held so the pumps can reach the irrigation water more effectively.

### **Evidence on the Record to Support Finding/Conditions:**

Trans 1, p.170 Curran/Certificate of Recommendation notes that Final Environmental Impact Statement states river levels are predicted to drop from 4 inches to 1 foot during 2012 WGFP pumping; the rock structures that form check-dams are important to irrigators for access water during low-level times..

## **II. COUNTY RESPONSE TO SUBDISTRICT LEGAL ARGUMENTS PRESENTED IN JULY 31, 2012 LETTER TO JACK DI COLA**

In the July 31, 2012 letter from Peggy Montano to Jack Di Cola, the Subdistrict argues that certain County conditions of approval would be preempted by the state Fish and Wildlife Mitigation Plan (FWMP) for the Windy Gap Firing Project. Ms. Montano further argues that any County conditions requiring the release of water or dedication of property would be preempted by the Regulatory Impairment of Property Rights Act. This section of the County closing statement addresses both those arguments.

### **Summary of Argument**

Neither the Fish and Wildlife Mitigation statute or Fish and FWMP preempt Grand County regulation of impacts to the aquatic environment caused by municipal and industrial water projects. The Activities of State Interest Act, C.R.S. § 24-65.1-101 *et seq.* (“AASIA” or “1041”) and the Land Use Enabling Act, C.R.S. § 29-20-102(1) delegate express authority to the County to designate and regulate environmental impacts of municipal and industrial projects. In contrast, the FWMP is only a recommendation to federal agencies and such plans are not independently enforceable as a matter of state law.

The Fish and Wildlife Mitigation statute does not preempt County regulation of impacts to the environment for three main reasons: First, there is no express language in that statute that shows a legislative intent to preempt local authority to regulate the impacts from municipal and industrial water projects. Second, there is no indication in that the legislature intended for the Fish and Wildlife Mitigation statute to occupy the field of fish mitigation, and finally, the Subdistrict has not shown that the County conditions of approval would result in an operational conflict with either the Fish and Wildlife Mitigation statute or FWMP.

The Regulatory Impairment of Property Rights Act (RIPRA) does not apply to the County’s 1041 conditions of approval because (1) it does not affect expressly granted land use authority of any local government; It applies to land use approvals not to “activities” of state Interest; and it applies to private property not public property. Even if it were to apply to the conditions, they satisfy the requirements of RIPRA.

#### **A. Grand County Regulation of Impacts to the Aquatic Environment is Not Preempted by the Fish and Wildlife Mitigation Plan (“FWMP”).**

The Subdistrict alleges that “any conditions that Grand County may impose on the approval of the Subdistrict’s 1041 permit [concerning fish and wildlife] will be preempted by the provisions of § 37-60-122.2, C.R.S.” The Subdistrict makes three arguments to support this theory: First, because the

FWMP is the “official state position” it “forecloses and prevents all inconsistent or contradictory local regulations” concerning fish and wildlife. Second, the legislature intended to preempt local regulation of fish and wildlife when it enacted C.R.S. § 37-60-122.2 and third, Grand County conditions that would conflict with or are more stringent than the FWMP would be preempted under the theory of operational conflict. Grand County staff disagrees with this analysis because it would be contrary to and severely undermine the purpose of AASIA, the Land Use Enabling Act, and render meaningless County requirements to protect the aquatic environment set forth in the County Regulations for Areas and Activities of State Interest that apply to municipal and industrial water projects.

**1. AASIA and the Land Use Enabling Act delegate express authority to the County to designate and regulate environmental impacts of municipal and industrial water projects.**

The Grand County 1041 Regulations were adopted pursuant to AASIA and the Land Use Enabling Act. Together these statutes delegate to local governments broad authority to regulate environmental impacts, including impacts to the aquatic environment, caused by water projects.

According to AASIA, “land use, land use planning and quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.” C.R.S. § 24-65.1-101(1)(c). AASIA delegates this responsibility to local governments. AASIA “encourages local governments to designate areas and activities of state interest, and promulgate guidelines for the administration of those areas and activities.” *City and County of Denver v. Bd. of County Comm’rs of Grand County, the Northwest Colorado Council of Governments, and Bd. of County Comm’rs of Eagle County*, 782 P.2d 753, 755 (Colo. 1989) (“*Grand County*”). See also C.R.S. § 24-65.1-101(2)(b). The Colorado Supreme Court accords “significant weight to a legislative declaration that a given matter is of statewide interest” and will “construe statutes to give effect to such a legislative purpose.” *Colorado Mining Association v. Bd. of County Comm’rs of Summit County*, 199 P.3d 718, 731 (Colo. 2009).

AASIA allows local governments to designate and adopt regulations for certain activities of state interest. C.R.S. § 24-65.1-402(1). One of these activities is “the efficient utilization of municipal and industrial water projects.” C.R.S. § 24-65.1-203(1)(h). The proposed WGFP falls within the definition of a municipal and industrial water project. County regulation of the impacts to the basin of origin caused by water projects is an appropriate use of 1041 authority. See *e.g. Grand County* at 755; *City of Colorado Springs v. Board of County Comm’rs of County of Eagle*, 895 P.2d 1105 (Colo.App. 1994)(“*Eagle County*”).

In addition to the authority granted under AASIA, the General Assembly “has explicitly endorsed environmental concerns as a legitimate concern in land use planning by local governments.” *Eagle County* at 1116. The Land Use Enabling Act confers on local governments the broad authority to adopt regulations for “[p]rotecting lands from activities which would cause immediate or foreseeable material danger to significant wildlife habitat and would endanger a wildlife species.” C.R.S. § 29-20-104, C.R.S. (2006). The statutory definition of “local government” includes counties. C.R.S. § 29-20-103(1.5)(b).

Consistent with the responsibility and authority to protect the environment delegated by AASIA and the Land Use Enabling Act, Grand County has addressed environmental concerns associated with municipal and industrial water projects by adopting its 1041 Regulations. One of the criteria adopted by the County protects wildlife and the aquatic environment. Before a permit can be issued, the Board of County Commissioners must find that the project will not:

*significantly deteriorate aquatic habitats, marshlands and wetlands, groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands, critical wildlife habitat, big game migratory routes, calving grounds, migratory ponds, nesting areas and the habitats of rare and endangered species, public outdoor recreational areas, and unique areas of geologic, historic or archaeological importance. (emphasis added). Grand County 1041 Regulations, 5-306(1)(g).*

The Certificate of Recommendation for the WGFP and other evidence on the record identify impacts to the aquatic environment that the WGFP will cause and proposes conditions of approval that, if satisfied, would allow the Board to issue a permit for the WGFP.

**2. The Colorado Fish and Wildlife Mitigation statute does not impose state regulations on municipal and industrial water project.**

The Fish and Wildlife Mitigation statute establishes the procedure by which the state formulates a position on fish and wildlife mitigation for water projects that require federal permits. A fish and wildlife mitigation plan adopted pursuant to section 122.2 is characterized throughout the statute as a “recommendation” to federal permitting agencies. *See e.g. C.R.S. § 37-60-122.2(1)(c).* According to the Assistant Attorney General representing the Wildlife Commission at the time the FWMP was adopted for the WGFP, “[m]itigation plans adopted pursuant to § 37-60-122.2, C.R.S. are not themselves independently enforceable as a matter of state law.” Mitigation

Memo, from Tim Monahan, Assistant Attorney General to Tom Remington, Director, Colorado Division of Wildlife, December 9, 2010 (“Mitigation Memo”), p. 7. Mitigation plans simply represent the “official state position” on appropriate *federal* mitigation of the fish and wildlife impacts that are expected to result from the construction, operation and maintenance of the proposed facility.

Once approved by the state, the recommended mitigation plan is transmitted to the federal agency from which the project applicant must obtain a permit, license or approval. “Such plans then become enforceable as a matter of law only if compliance with them is ultimately made a term or condition of the permit, license or approval issued by the authorizing agency.” Mitigation Memo p. 7. In other words, the purpose of the FWMP is to recommend mitigation to *federal* permitting agencies as the “official state position” which federal agencies may or may not incorporate into *federal* permits. Plans adopted under § 37-60-122.2 have no independent regulatory effect, and are not intended to be a substitute for federal regulatory requirements.<sup>2</sup> “Mitigation plans are only recommendations submitted to federal authorizing agencies for their consideration. In that sense they are more in the nature of the multitude of comments submitted by state agencies to federal agencies as part of a federal permitting or licensing process.” Mitigation Memo, p.7.

**3. Neither the Colorado Fish and Wildlife Mitigation statute nor the FWMP preempt County regulation of impacts to the aquatic environment.**

A state statute may preempt a county regulation in three ways: (1) the statute expressly preempts all local authority over the subject matter, (2) the statute impliedly evinces a legislative intent to occupy a given field, or (3) the county regulation may be partially preempted where its operational effect would conflict with application of the state statute. *Bd. of County Comm’rs v. Bowen/Edwards*, 830 P.2d 1045, 1058 (Colo. 1992) (*Bowen/Edwards*). Preemption is a matter of statutory interpretation. Colorado courts will “recognize a legislative intent to preempt local authority only if that intent is expressed in unequivocal language . . .” *Colo. Dep’t of Transp. v. City of Idaho Springs*, 192 P.3d 490, 495 (citing *Bd. of County Comm’rs v. Bainbridge, Inc.*, 929 P.2d 691, 710-11 (Colo. 1996) (“*Bainbridge*”). In order for a conflict to exist, both the state statute and the local resolution or ordinance must contain express or implied conditions that are inconsistent and irreconcilable with one another. *C & M Sand & Gravel v. Bd. of County Comm’rs*, 673 P.2d 1013, 1016 (Colo.App. 1983). If there is no such conflict, the authority of the empowered state and local entities is to be given effect. *Id.*

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<sup>2</sup> The FWMP for WGFP will be enforced through a contract between the state and the Subdistrict.

a. **Express Preemption.** There is nothing in the plain language of the Fish and Wildlife Mitigation statute that preempts local regulations enacted pursuant to AASIA that are designed to prevent impacts to the aquatic environment caused by municipal and industrial water projects. Ms. Montano asserts that the “express terms” of the Fish and Wildlife Mitigation statute “expressly mandate state-level regulation of the mitigation activities taken by applicants for water project permits on fish and wildlife resources.” Montano Letter, p. 5. However, as discussed above, § 37-60-122.2 does not delegate any regulatory authority to the state over water projects; it merely establishes a process for the state to develop a recommendation to federal permit agencies on fish and wildlife mitigation that should be imposed. In fact, the state has delegated express regulatory authority to *local governments* over the environmental impacts of municipal and industrial water projects.

Courts “will recognize a legislative intent to preempt local authority only if that intent is expressed in unequivocal language.” *Colorado Department of Transportation v. City of Idaho Springs*, 192 P.3d 490, 495 (citing *Bainbridge*, 920 P.2d at 710-11). There is no legislative intent to preempt local authority expressed in unequivocal language; neither the Fish and Wildlife Mitigation statute nor the FWMP makes any mention whatsoever of the express authority over municipal and industrial water projects delegated to local governments by AASIA. Without clear language taking away this authority, there is no express legislative intent to preempt local regulation under AASIA.

b. **Implied Preemption.** A state statute impliedly preempts a county regulation when the statute “evinces a legislative intent to completely occupy a given field by reason of a dominant state interest.” *Bowen/Edwards*, 830 P.2d at 1056-57. A state statute does not impliedly preempt a county regulation by merely “addressing certain aspects of those activities.” *Id.* at 1058. Although section 37-60-122.2 grants to the state the authority to establish the state’s official position on fish and wildlife mitigation for federally-permitted water projects, it does not mean that those water projects are free from every conceivable federal or local permit condition that might be imposed to protect the aquatic environment.

When the state legislature adopted § 37-60-122.2, it did so knowing that municipal and industrial projects have been designated as matters of statewide interest subject to local government regulation under AASIA. If the legislature intended to repeal or modify AASIA to limit local authority it would have done so, but it did not, and “repeals implication are not favored.” *See, e.g., Welch v. George*, 19 P.3d 675, 679 (Colo. 2000). (*See also* Mitigation Memo at 4 in response to questions 2 and 3 demonstrating that the Fish and Wildlife Mitigation Statute does not occupy the field concerning mitigation of all impacts and limited to only those disclosed in an EIS)

The state interest in establishing an official position on fish and wildlife

mitigation is not so “patently dominant” that it swallows by implication the clearly articulated state interest in local regulation of the environmental impacts of municipal and industrial water projects. Both regulatory regimes can be implemented harmoniously. Thus, the Fish and Wildlife Mitigation Statute and the FWMP do not impliedly preempt local regulation of the impacts to the aquatic environment of municipal and industrial water projects. *See Bowen/Edwards*, 830 P.2d at 1058.

**c. Operational Conflict.** To demonstrate an operational conflict between the FWMP and a County condition of approval, the Subdistrict must demonstrate that the condition “would materially impede or destroy the state interest.” *Bowen/Edwards*, 830 P.2d 1059-1060. The person challenging the condition bears the burden of proof to show the existence of an operational conflict. A trial court must determine the extent of an operational conflict “on an *ad hoc* basis under a fully developed evidentiary record.” *Bowen Edwards* at 1060. The Subdistrict asserts that County conditions of approval imposed on the WGFP regarding water quality or temperature would “completely conflict with the state’s statutory structure” for fish and wildlife mitigation plans. Montano Memo, p. 8. The Subdistrict’s argument is based solely on the fact that the FWMP represents the “official state position.” This argument fails, however, for several reasons.

Although the FWMP and several County conditions of approval address impacts to temperature and the aquatic environment, local regulations that address the same subject matter as the state are not automatically preempted. *Colorado Mining Association v. Summit County*, 199 P.3d 718, 725 (Colo. 2009). To prove an operational conflict between the FWMP and the proposed County conditions, the Subdistrict has the burden to show through evidence that the County conditions would “materially impede or destroy the state interest.” However, the evidence on the record shows that there is no conflict at all between the proposed conditions and the FWMP even though they address the same subject matter. The record before the Board of County Commissioners during this WGFP 2012 permit proceeding contains evidence that the mitigation proposed in the FWMP is not sufficient to satisfy criterion 5-306(1)(g) which prohibits a project that would “*significantly deteriorate aquatic habitats.*” The conditions recommended by the staff are in lieu of recommending that the project be denied for failure to comply with criterion 5-306(1)(g). The County staff is recommending slightly different methods to address impacts to the aquatic environment than the mitigation in the FWMP, but those conditions are intended to enhance, rather than conflict with, the mitigation in the FWMP. The Subdistrict can comply with both the FWMP and the conditions proposed by the County.

Also, any conditions of approval imposed by the County will have absolutely no effect on the “official state position” articulated to federal agencies. Regardless of conditions of approval the County may impose on WGFP to protect aquatic

resources, the state position remains the same. The FWMP already has been forwarded as a recommendation to the federal agencies. Those agencies may take the FWMP into consideration, but are not bound by it, when determining whether the WGFP satisfies federal permit requirements. See Brian W. Bevan, *Colorado's Official State Position Regarding Fish and Wildlife Mitigation Plans*, Vol. 41 No. 2 COLO. LAW. (February 2012). The County conditions certainly do not impede or destroy the state's position that was transmitted to federal agencies.

Finally, section 37-60-122.2 clearly establishes the process by which the state develops an official position on what federal wildlife mitigation should be, but AASIA delegates the responsibility for *regulating* municipal and industrial water projects to local governments. Conditions imposed by Grand County to address the impacts of the WGFP to the aquatic environment *further* the state interest in local regulation of municipal and industrial water projects. Thus, County conditions that address the impacts of the WGFP to water quality or temperature cannot possibly "materially impede or destroy the state interest."

## **B. Regulatory Impairment of Property Rights Act Does Not Apply to County Conditions of Approval.**

The Subdistrict states that a permit condition requiring releases of water to address water quality or temperature unrelated to the WGFP, or a requirement to provide public access for fishing on willow creek would violate the Regulatory Impairment of Property Rights Act ("RIPRA"), C.R.S. § 29-20-201 *et seq.* RIPRA, however, does not apply to conditions that might be imposed by the County on the WGFP pursuant to its 1041 Regulations.

### **1. Regulatory impairment of Property Rights Act.**

The General Assembly enacted RIPRA to "reinvigorate . . . the federal constitutional prohibition against taking private property for public use without just compensation and the state constitutional prohibitions against taking or damaging private property for public or private use." According to the Colorado Supreme Court, "RIPRA's practical effect was to codify the test for regulatory takings announced by the United States Supreme Court in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*."<sup>3</sup> *Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559, 563 (Colo. 2009) (citations omitted).

The United States Supreme Court "has not extended the rough proportionality test of *Dolan* beyond the special context of *exactions*—land-use decisions conditioning approval of development on the dedication of property to public

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<sup>3</sup> *Nollan v. California Coastal Commission*, 483 U.S. 825, 836-37, 107 S.Ct. 3141, 97 L.Ed. 2d 677 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 386-96, 114 S. Ct. 2309, 129 L.Ed. 2d 304 (1994).

use.” *City of Monterey, Ltd. v. Del Monte Dunes*, 526 U.S. 687, 143 L.Ed.2d 882, 900 (1999). The Colorado Supreme Court has observed: “[T]he plain language of *City of Monterey* suggests that a *Nollan/Dolan* analysis is appropriate in the narrow circumstance where the government conditions development on the *forfeiture of private property for public use.*” *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687, 697 (Colo. 2001) (emphasis added).

Under the RIPRA test, “[i]n imposing conditions upon the granting of land-use approvals, no local government may require a landowner to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis unless there is an essential nexus between the dedication or payment and a legitimate local governmental interest, and the payment is roughly proportional both in nature and extent to the impact of the proposed use or development of property.” C.R.S. § 29-20-203(1). The policy behind this test is to prevent an individual private property owner from being required “to bear burdens for the public good that should more properly be borne by the public at large.” C.R.S. § 29-20-201(2). *See also Krupp*, 19 P.3d at 695. RIPRA does *not* “affect the expressly granted land-use authority of any local government.” C.R.S. § 29-20-205 (emphasis added).

To bring a claim under RIPRA, a developer must notify the local government of a violation of § 29-20-203 within thirty days after a decision or action imposing a condition in granting a land-use approval that requires the property owner to dedicate real property to public use. The local government then has thirty days to notify the property owner of whether it will modify the condition. *See* C.R.S. § 29-20-204. The local government bears the burden of demonstrating that the dedication of property is “roughly proportional to the impact of the proposed use of the subject property” and that the dedication bears an “essential nexus to a legitimate government interest. C.R.S. § 29-20-204.

## **2. RIPRA does not apply to municipal and industrial water projects regulated pursuant to AASIA**

RIPRA applies to any land-use approval. “Land-use approval means any final action of a local government action that has the effect of authorizing the use or development of a particular parcel of real property.” C.R.S. § 29-20-202. In contrast, the County is regulating the WGFP pursuant to its authority to regulate “*activities of state interest*” under AASIA, in this case, municipal and industrial water projects. The County is not authorizing the “use or development of a parcel of property” therefore RIPRA does not apply to conditions imposed on the WGFP 2012 permit. Also, the existence of previously decreed water rights does not provide an exemption for the developer from regulation under AASIA; so long as the regulations do not serve to undermine these established water rights, they are a valid exercise of authority. *Grand County* at 764.

### **3. RIPRA does not apply to Subdistrict property.**

RIPRA applies to conditions of approval that would require the dedication of *private* property to the *public*. Although water rights are a type of property right, water rights are not private property when held by a public entity; they are public property. Moreover, public entities are not afforded constitutional protection from regulatory takings. Public entities have no privileges or immunities under the state constitution. *Enger v. Walker Field*, 181 Colo. 253, 508 P.2d 1245 (1973). *See also Board of County Commissioners v. E-470 Public Highway Authority*, 881 P.2d 412 (Colo.App. 1994). In addition, the federal constitution does not impose restrictions on the relationships between one political subdivision of a state and another. *See Town of Orchard City v. Board of Delta County Commissioners*, 751 P.2d 1003 (Colo. 1988); *see also Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939); *South Macomb Disposal Authority v. Township of Washington*, 790 F.2d 500 (6th Cir. 1986); *City of Colorado Springs v. Board of County Comm'rs of County of Eagle*, 895 P.2d 1105, 1119 (Colo.App. 1994) (cities lack standing to bring claim for violation of constitutional rights by County exercising 1041 authority).

RIPRA is intended to codify the federal constitutional prohibition against taking private property for public use without just compensation and the state constitutional prohibitions against taking or damaging private property for public or private use. Thus, the protections afforded by RIPRA do not extend to property held by a public entity.

### **4. If RIPRA were to apply to WGFP, recommended conditions of approval imposed in lieu of denying a permit are not covered by RIPRA.**

Assuming for the sake of argument that RIPRA does apply to conditions imposed on the WGFP, those conditions would be valid as long as “there is an essential nexus between the dedication or payment and a legitimate local governmental interest, and the payment is roughly proportional both in nature and extent to the impact of the proposed use or development of property.” C.R.S. § 29-20-203(1).

The General Assembly encourages local governments to regulate matters of statewide interest such as municipal and industrial water projects under AASIA. In addition, the General Assembly prohibits the construction of activities of state interest until all locally enacted 1041 regulations are satisfied:

The local government may approve an application for a permit to conduct an activity of state interest if the proposed activity complies with the local government's regulations and guidelines for conduct of such activity. If the

proposed activity does not comply with the guidelines and regulations, the permit shall be denied. C.R.S. § 24-65.1-501(4).

Thus, there is an “essential nexus” between any condition of approval imposed to ensure that the WGFP satisfies the County 1041 Regulations and a “legitimate local governmental interest.” Further, if there is evidence that there are impacts that would cause the WGFP to run afoul of any County 1041 Regulation, and a condition is tailored to address that impact, the condition would be “roughly proportional both in nature and extent to the impact.” Therefore, if RIPRA were to apply, the proposed conditions of approval meet its requirements.

### CONCLUSION

A quasi judicial decision by a Board of County Commissioners will be upheld by the Court if there is “competent evidence on the record” to support the decision. The court’s review is based solely on the record that was before the governmental body, and the decision must be affirmed unless there is no competent evidence in the record to support it. *IBC Denver III, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo.App 2008) citing *City & County of Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo.App. 2002); *accord O'Dell*, 920 P.2d at 50. " 'No competent evidence' means that the governmental body's decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.' " *O'Dell*, 920 P.2d at 50 (quoting in part *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986)); *Wolf Creek Ski Corporation v. Bd. of County Comm'rs of Mineral County*, 170 P.3d 821, 825 (Colo.App. 2007) citing *Bd. of County Comm'rs v. Conder*, 927 P.2d at 1343

As outlined in this Closing Statement, there is ample evidence on the record to support a decision by the Board to approve the 2012 Permit subject to the proposed findings and *Revised Conditions* recommended by the staff in this Closing Statement.

Although these *Revised Conditions* take into account objections and legal arguments made during the course of the proceedings, staff respectfully requests that the Board of County Commissioner provide an opportunity before its final decision for the parties to propose, wherever possible, mutually agreeable conditions for the Board’s consideration.

Attachment 1  
*Revised Recommended Conditions of Approval for the Windy Gap Firing  
Project*

GENERAL CONDITIONS

Condition 1. The County Attorney will consider and respond to the relationship between the Windy Gap Project Permit and the 2012 Permit and advise the Board of County Commissioners. Once the Board of County Commissioners has been advised, it will make a determination on the relationship between the two.

Condition 2. The permit for the 2012 Permit will be in effect for the life of the project and considered a vested right as long as the project is in compliance with the terms and conditions of all permits and approvals for the 2012 Permit. The Subdistrict shall be responsible for all costs incurred by the County in evaluating the Subdistrict's compliance with the conditions of this 2012 Permit.

Condition 3. The 2012 Permit is not transferrable to any other entity unless the County approves such transfer by Resolution.

Condition 4. This 2012 Permit shall allow construction of Chimney Hollow Reservoir (the reservoir located on the East Slope identified in the Final Environmental Impact Statement for the Windy Gap Firing Project as the proposed action) and any reservoir or reservoirs on the East Slope that are constructed as an alternative or in addition to the reservoir identified in the Final Environmental Impact Statement; provided that the cumulative active storage capacity of Chimney Hollow Reservoir and any alternative reservoirs does not exceed 90,000 AF, and the impacts identified in the Final Environmental Impact Statement for the proposed action do not increase.

Condition 5. The 2012 WGFP shall not exceed the volumetric limits stated in the WGFP IGA for the Windy Gap project and 2012 WGFP. The 2012 Permit is contingent upon the participant's use of water in compliance with the Windy Gap decrees and Colorado law.

Condition 6. In order to satisfy the Subdistrict's compliance with its obligations under section 37-45-118(1)(b)(IV) of the Water Conservancy Act, the 2012 Permit shall not take effect until the WGFP IGA has been executed and is conditioned upon the Subdistrict's continued compliance with its obligations under the WGFP IGA.

Condition 7. While the Subdistrict is not a party to the Grand Lake Clarity Agreement, the Board of County Commissioners has relied on the Clarity MOU in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, the 2012 Permit shall not be effective until the Clarity MOU and

Contributed Funds Act Agreement (CFA Agreement) for executing the Colorado-Big Thompson (C-BT) West Slope Collection System Technical Review of Alternatives and Analysis and Plan of Study have been executed.

Condition 8. The closing documents listed below are integral to the WGFP IGA, and the Board of County Commissioners has relied upon the WGFP IGA in determining whether the 2012 WGFP complies with its 1041 Regulations; therefore, this 2012 Permit shall not be effective until those documents have been executed, and Grand County has been provided with copies of same.

- Agreement with Northern Water
- Grand Lake Clarity Agreement (known as Umbrella agreement)
- Appraisal Study now know as Alternates Development Report
- Processed Materials Agreement
- Windy Gap Decree
- Grand County RICD Stipulation
- Learning by Doing Cooperative Effort
- Green Mountain Reservoir Administration
- Contracts for Delivery of Water to Grand Valley
- Guidelines for Meadow Pumpers Fund
- Guidelines for Measuring Devices Fund
- Form of Easement for Access for Telemetry
- Agreement Among Middle Park, Grand County and River District on Operating and Administering Water Apportionments and Carryover Balances
- Amendatory Contract (Carriage Contract)
- Side letter from Subdistrict to Colorado River Water Conservation District re: no opposition to use of Windy Gap water for uses incidental to irrigation such as fish screen, fish ladder, etc.

Condition 9. The storage of water in Chimney Hollow Reservoir shall not commence until the water court approves the Windy Gap decree as amended by incorporation of the WGFP IGA. The Subdistrict shall provide Grand County with documentation of this approval.

#### **CONDITIONS TO SATISFY CRITERION 5-306(b):**

**Condition 10.** The 2012 Permit shall not be effective until issuance of necessary state and federal permits and approvals for the 2012 WGFP, and this 2012 Permit is contingent upon Subdistrict's continued compliance with those terms and conditions. If there is a conflict between a term and/or condition in the 2012 Permit and a state or federal permit or approval, the term or condition that is the more protective of the environment shall control, unless otherwise preempted. Subdistrict shall provide Grand County with copies of all approved

federal and state permits and approvals issued for the 2012 WGFP, which shall be attached to this permit. Following is a list of anticipated state and federal permits and approvals (this may not be a complete list):

- Clean Water Act 404 permit
- Colorado Department of Public Health and Environment (“CDPHE”) 401 certification
- Fish and Wildlife Mitigation Plan, C. R. S. § 37-6-122.2
- Water Conservancy Act, C.R.S. § 37-45-101 *et seq.*
- Northwest Colorado Council of Governments Water Quality Management Plan (“NWCOG 208 Plan”)
- Amendatory Contract and companion documentation of Bureau of Reclamation determination of compliance with Senate Document 80
- Record of Decision issued by Bureau of Reclamation
- Record of Decision issued for Corps of Engineers

Condition 11. The 2012 Permit shall terminate and be in no force and effect if construction of Chimney Hollow Reservoir, as defined in **Condition 4** of this 2012 Permit, has not begun within ten (10) years of the latter of the issuance of the Record of Decision for the 2012 WGFP by Bureau of Reclamation or by the Corps of Engineers.

Condition 12. Diversions and pumping associated with the 2012 WGFP must cease if the Grand County Water Apportionment provided by the WGFP IGA is not available for release.

Condition 13. To show compliance with the 2011 Grand County Master Plan provision about Economic Base - Recreation and Tourism Based Industry, and Criterion 5-306(g) (Public Outdoor Recreation Areas), the County has relied upon the public access provided in paragraph IV D of the WGFP IGA, which reads as follows:

Upon execution of this WGFP Agreement, the Subdistrict will make arrangements with Northern Water to provide public access to that portion of Willow Creek located on Northern Water’s lands for as long as Northern Water owns the lands adjacent to Willow Creek, if and to the extent that the public access will be managed by the Colorado Division of Parks and Wildlife or other entity acceptable to Northern Water.

Condition 14. Compliance with the conditions in this 2012 Permit shall constitute compliance with the NWCCOG 208 Plan.

**CONDITIONS TO SATISFY CRITERION 5-306(c):**

Condition 15. Prior to delivery of water through the 2012 WGFP, Subdistrict shall provide the County with documentation of conservation plans for all municipal project participants and lessees and shall continue to provide documentation that participants are complying with the Water Conservation Act with regard to updating the conservation plans as required by state law.

Condition 16. Subdistrict shall provide written notice to the County when units of the 2012 WGFP are sold or leased and verification that the new owner or lessee has complied with the Water Conservation Act.

Condition 17. Within 30 days of acceptance of this 2012 Permit, the Subdistrict shall provide the County with written documentation of how use of water for fracking satisfies criterion c of the Grand County 1041 Regulations, if at all.

Condition 18. This 2012 Permit is subject to the Subdistrict's compliance with the terms and conditions of the 1980 Agreement and 1985 Supplement that remain in effect after execution of the WGFP IGA.

**CRITERION TO SATISFY CRITERION 5-306(d):**

Condition 19. Condition #7 above is essential to satisfaction of this criterion.

Condition 20. Prior to the beginning of construction for Chimney Hollow Reservoir, the Subdistrict shall provide Grand County with a copy of an executed agreement between the Subdistrict and the wastewater treatment provider(s) to mitigate nutrient loading. This agreement shall include provision for the cost of improvements and additional operation and maintenance costs, if any, associated with those improvements.

Condition 21. The Subdistrict shall submit the Nutrient Reduction Plan required by Bureau of Reclamation to Grand County for review at the same time it is submitted to Bureau of Reclamation and the Corps of Engineers but no later than the execution of the WGFP IGA and closing documents.

Condition 22. Within six months of issuance of the last Record of Decision for the 2012 WGFP, the Subdistrict shall submit to the County for review and approval .a robust monitoring plan to assure that nutrient loading from the 2012 WGFP for total nitrogen and total phosphorus is reduced to the 1:1 level, and a mitigation and monitoring plan to ensure that operation of the 2012 WGFP does not cause or contribute to (1) decreases in dissolved oxygen, (2) increases in manganese, (3) increases in bioavailable mercury, or (4) increases in Chlorophyll a; and that it does not cause or contribute to decreases

in Secchi disk depth from July through September in Grand Lake, or complies with the clarity standard for Grand Lake when that is adopted. The monitoring plan shall include a schedule for monitoring and reporting and Subdistrict shall provide a publically accessible data base, and submit to Grand County summary reports on a schedule and in a form approved by Grand County. The 2012 WGFP shall be operated in compliance with the approved monitoring and mitigation plans in this paragraph.

#### **CONDITION TO SATISFY CRITERION 5-306(f)**

Condition 23. Installation of the real time water temperature gauges required by the Fish and Wildlife Mitigation Plan shall be a condition of this 2012 Permit and the Subdistrict must verify every spring, before the beginning of pumping, that these gauges are in good working order, that they remain so during the time of the year when the standard is in effect, and that they are replaced or repaired when necessary and timely to their need in reporting temperature.

Condition 24. Notwithstanding proposed temperature mitigation in the Fish and Wildlife Mitigation Plan and other terms and conditions to address temperature that may be imposed as part of the 401 Certification or federal approvals for the 2012 WGFP, the 2012 WGFP shall not cause or contribute to temperature exceedances in the Colorado River below Windy Gap, at the points of measurement set forth in the Fish and Wildlife Mitigation Plan.

Condition 25. Because the delivery of the 10825 endangered fish water from Granby Reservoir is an essential consideration for compliance with the Endangered Species Act and compliance with the temperature standard, the Subdistrict must participate in securing approval of the 10825 agreement and must arrange with Northern to do the same.

#### **CONDITIONS TO SATISFY CRITERION (g)**

##### **Aquatic**

Condition 26. Within six (6) months of issuance of Record of Decision by the Corps of Engineers for 2012 WGFP, the Subdistrict shall prepare and submit to Grand County for review and approval a fish and aquatic invertebrates monitoring plan to determine if the Fish and Wildlife Mitigation Plan, Fish and Wildlife Enhancement Plan, conditions in the Record of Decision, and additional water provided in the WGFP IGA would prevent the loss of aquatic habitat predicted in the Final Environmental Impact Statement. The monitoring information shall be provided to the Learning by Doing Management Committee, and monitoring shall continue as long as Learning by Doing

Creek within sixty (60) days of issuance of the Record of Decision by the Corps of Engineers. Monitoring will continue until the Learning By Doing Management Committee has determined that riparian vegetation has not been adversely affected by the 2012 WGFP, or has recovered due to mitigation, stream restoration, or other efforts. At a minimum this monitoring must continue at least ten (10) years after commencing of pumping for the 2012 WGFP. Learning by Doing shall determine the need for extension of monitoring, past ten (10) year period, if any.

**Groundwater recharge areas, steeply sloping or unstable terrain, forests and woodlands:**

Appear to be satisfied.

**Critical wildlife habitat, big game migratory routes, calving grounds migratory ponds, nesting areas and habitats of rare and endangered species:**

Condition 31. The 2012 Permit is not effective until the 5412.5 AF of Endangered Fish Water is legally deliverable from Granby Reservoir, and Grand County has been provided with written verification that delivery of the 5412.5 AF of water from Granby Reservoir will be made in perpetuity.

**Public Outdoor Recreation Areas:**

Satisfied by conditions applied under (b) and (d) above.

**Unique areas of geologic, historic and archeological importance:**

Condition 32. On or before execution of the WGFP IGA, the Subdistrict shall submit to Grand County for approval a plan for maintenance of the rock structures below each pump site for the irrigators above Kremmling (listed in the WGFP IGA) that allows water to be captured and held so the pumps can reach the irrigation water more effectively.