

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

Civil Action No. 17-cv-2563-REB

SAVE THE COLORADO, a Colorado nonprofit corporation,
SAVE THE POUUDRE: POUUDRE WATERKEEPER, a Colorado nonprofit corporation,
WILDEARTH GUARDIANS, a nonprofit corporation,
LIVING RIVERS, a nonprofit corporation,
WATERKEEPER ALLIANCE, a nonprofit corporation, and
SIERRA CLUB, a nonprofit corporation.

Petitioners,

v.

UNITED STATES BUREAU OF RECLAMATION, and
UNITED STATES ARMY CORPS OF ENGINEERS.

Respondents.

FIRST AMENDED PETITION FOR REVIEW OF AGENCY ACTION

INTRODUCTION

1. This case boils down to inadequate analysis and poor decisionmaking resulting in significant water diversions from the already depleted Colorado River. The Colorado surges to life in the Rocky Mountains, picking up most of its water along the West Slope of Colorado, before heading southwest and draining an arid 246,000 square miles of land across seven western states. Unlike most rivers, however, the Colorado does not continue to grow as it moves to the sea—in fact, its waters seldom reach the Pacific Ocean. The principal cause of this dry-up is a series of massive transbasin diversions that send Colorado River water to Colorado’s Front Range, urban New

Mexico, and Southern California, where the water is lost to the river forever.

2. Even though the Colorado has long been overtaxed, the river continues to face new demands, often without adequate identification of the actual need for the proposed diversions or adequate consideration of the long-term consequences for the health of the river. This is exactly the issue in this case. Having failed to rationally consider the need or to take a hard look at the impacts of the proposed project, the Bureau of Reclamation (“Reclamation”) and the U.S. Army Corps of Engineers (“the Corps”) approved the Windy Gap Firming Project (“Firming Project”), to facilitate a diversion from the Colorado River sought by the Municipal Subdistrict (“Subdistrict”) of the Northern Colorado Water Conservancy District (“Northern Water”) that would fill a new 90,000 acre-foot (“AF”)¹ reservoir on the Front Range.

3. Beginning in 1970, the Subdistrict undertook a ten-year planning and analysis process. In 1981, Reclamation completed an environmental impact statement (“EIS”) and approved the original Windy Gap project (“Original Project”). The Original Project began diverting water from the Colorado River in 1985, but, despite the time and money spent, the Original Project failed to supply as much water as anticipated. In the early 2000s, the Subdistrict proposed building a new reservoir on the Front Range to secure and store new firm (*i.e.*, consistently available) water supplies. This proposal is the Firming Project.

¹ An acre-foot is equivalent to 325,851 gallons of water, which is enough to supply two families of four for a year. R. Waskom & M. Neibauer, *Water Conservation In and Around the Home*, Colo. State Univ. Extension, <http://extension.colostate.edu/topic-areas/family-home-consumer/water-conservation-in-and-around-the-home-9-952/> (last updated Oct. 2014).

4. The Firming Project is an ill-conceived and unnecessary project whose true nature has been obscured by the federal government's failure to engage in sound decisionmaking as required by the National Environmental Policy Act ("NEPA") and the Clean Water Act ("CWA"). Rather than rigorously exploring and objectively evaluating ways to meet the Subdistrict's actual water supply needs, the federal agencies accepted the Subdistrict's claimed need at face value and only considered reservoir options that would further the Subdistrict's preconceived goal of "firming" Windy Gap water supplies. This predisposition in favor of fixing the failed project infected the entire review and approval process.

5. The administrative record demonstrates that the government fell victim to a sunk cost bias. A sunk cost bias occurs when an organization invests a lot of time, money, and capital into a project, the project does not function as anticipated, and despite the existence of better solutions, the organization stubbornly forges ahead with its original choice. This scenario is a textbook case of what is variously called escalating commitment, sunk costs, or lock-in. See, e.g., Brian C. Gunia, Niro Sivanathan & Adam D. Galinsky, *Vicarious Entrapment: Your Sunk Costs, My Escalation of Commitment*, 45 J. EXPERIMENTAL SOC. PSYCHOL. 1238, 1238–39 (2009); Barry M. Staw, *Knee-Deep in the Big Muddy: A Study of Escalating Commitment to a Chosen Course of Action*, 16 ORGANIZATIONAL BEHAV. & HUM. PERFORMANCE 27, 27–28 (1976).

6. Because of the investment that went into the Original Project, Reclamation was predisposed to pursue the Firming Project to provide more water to Windy Gap

participants while disregarding the practicable alternatives that NEPA and the CWA require. NEPA aims to ensure sound government decision-making by promoting serious consideration of all reasonable alternatives that would meet the underlying need—in this case, augmented water supply. However, Reclamation did not seriously consider reasonable alternatives to provide additional water to Windy Gap participants and allowed the Subdistrict to plow ahead with its original choice—the Firming Project—and double down on its busted bet.

7. Throughout the course of the federal review of the Firming Project, members of Save the Colorado, Save the Poudre: Poudre Waterkeeper, WildEarth Guardians, Living Rivers, Waterkeeper Alliance, and Sierra Club (collectively, “Petitioners” or “Colorado River Defenders”), among many others, raised their concerns about alternatives and about flaws and gaps in the data and analysis. Despite these valid concerns brought before the reviewing agencies in a timely fashion, approval of the Firming Project continued unchecked. Reclamation and the Corps inadequately addressed the concerns, rubberstamped the Subdistrict’s assertions, and failed their duties to independently verify the results, data, and analysis in Reclamation’s EIS, as required by NEPA and the CWA. Accordingly, Colorado River Defenders challenge Reclamation’s and the Corps’ Records of Decision approving the Windy Gap Firming Project for numerous NEPA, CWA, and Administrative Procedure Act (“APA”) violations. Colorado River Defenders ask this Court to vacate Reclamation’s and the Corps’ Records of Decision and remand the decisions to the respondent federal agencies to

ensure they take an independent and hard look at the Firming Project, as the law requires.

JURISDICTION AND VENUE

8. This case is filed pursuant to D.C.Colo.LAPR 10.2(c) and challenges Reclamation's Record of Decision, issued December 19, 2014, and the Corps' Record of Decision, issued May 16, 2017, approving the Windy Gap Firming Project.

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1346 (civil action against the United States), and 28 U.S.C. § 1361 (action to compel an officer of the United States to perform his duty) because this case arises under the federal laws of the United States and respondents are agencies of the United States Government.

10. This Court may grant the relief requested pursuant to 28 U.S.C. § 2201 (authorizing declaratory relief); 28 U.S.C. § 2202 (authorizing injunctive relief); and 5 U.S.C. §§ 701-706 (providing for judicial review of agency action under the APA).

11. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the events or omissions out of which these claims arise took place in this district.

12. There exists now between the parties an actual, justiciable controversy within the meaning of the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

PARTIES

13. Petitioner SAVE THE COLORADO is a grassroots, free-standing 501(c)(3) nonprofit organization that strives to make a consequential difference in the protection and restoration of the Colorado River and its tributaries. Its focus is to challenge water

projects, support alternatives to proposed dams and diversions, fight and adapt to climate change, support river and fish species restoration, and remove unnecessary dams on the Colorado River.

14. Petitioner SAVE THE POUDDRE: POUDDRE WATERKEEPER is a 501(c)(3) nonprofit organization that aims to protect and restore the Cache la Poudre River. It opposes water projects that negatively affect rivers and instead encourages better alternatives. It engages in river restoration efforts, promotes education, and fosters coverage in the media.

15. Petitioner WILDEARTH GUARDIANS is a regional 501(c)(3) nonprofit organization working to protect and restore wildlife, wild places, wild rivers, and the health of the American West. It seeks to restore dynamic flows to western rivers, advocates for western water policy reform, and fights to restore healthy and sustainable aquatic and riparian ecosystems for future generations.

16. Petitioner LIVING RIVERS is a 501(c)(3) nonprofit organization that works to restore inundated river canyons, wetlands, and the delta of the Colorado River; repeal antiquated laws which represent the river's death sentence; reduce water and energy use and their impacts on the river; and recruit constituents to help revive the Colorado River.

17. Petitioner WATERKEEPER ALLIANCE is a 501(c)(3) nonprofit organization dedicated to protecting and restoring water quality to ensure that the world's waters are drinkable, fishable, and swimmable. Waterkeeper represents the interests of 176 member organizations and affiliates in the United States (and 160

abroad), as well as the collective interests of thousands of individual supporting members that live, work, and recreate in waterways across the country, including waterways that may be impacted as a result of the Firming Project.

18. Petitioner SIERRA CLUB and its Rocky Mountain Chapter is a 501(c)(4) nonprofit organization devoted to protecting and improving the natural and human environment. Sierra Club is the nation's largest grassroots environmental organization, with over three million members and supporters, and is committed to protecting the nation's lands and waters, promoting responsible use of the earth's ecosystems and resources, and restoring the quality of the environment.

19. The effects of the Firming Project would adversely impact recreation, conservation, and economic interests of one or more members of each of the petitioner organizations. These members have standing to sue in their own right, however, their participation is not necessary in this suit. Without the Firming Project these impacts would not occur.

20. These impacted interests are tied to the rivers and lakes that the petitioner organizations aim to protect.

21. The requested relief will redress the injuries of all petitioner organizations and their members.

22. Respondent UNITED STATES BUREAU OF RECLAMATION is an agency of the United States within the Department of the Interior. Reclamation had primary authority for conducting and publishing the EIS under NEPA for the Firming Project. Reclamation also issued a Record of Decision on December 19, 2014, which

permitted the Firming Project to go forward.

23. Respondent UNITED STATES ARMY CORPS OF ENGINEERS is an agency of the United States within the Department of the Army. The Corps served as a cooperating agency in the development of the EIS for the Firming Project. The Corps reviewed and authorized the CWA 404(b) permit for the Firming Project via a Record of Decision published on May 16, 2017.

LEGAL BACKGROUND

National Environmental Policy Act

24. NEPA promotes informed decisionmaking. *WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1237 (10th Cir. 2017).

25. NEPA imposes a duty on agencies to “use all practicable means . . . to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(f).

26. When undertaking a major federal action, an agency must “rigorously explore and objectively evaluate” all reasonable alternatives to a proposed action, in order to compare the environmental impacts of all available courses of action. 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.14.

27. To do so, an agency must prepare an EIS to “serve as an action-forcing device” and to “provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives” to a proposed project. 40 C.F.R. § 1502.1.

28. In considering identified impacts, the agency must consider “the relevant data and articulate a rational connection between the facts found and the decision made.” *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 713 (10th Cir. 2009) (alteration in original).

29. Courts will not defer to an agency’s choice of methodology when the agency does not adequately explain its reliability or fails to disclose its shortcomings. *Hillsdale Env’tl. Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1178 (10th Cir. 2012); *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005).

30. NEPA requires an agency to “analyze not only the direct impacts of a proposed action, but also the indirect and cumulative impacts of ‘past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.’” *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209, 1251 (10th Cir. 2011) (quoting 40 C.F.R. § 1508.7).

31. Cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable” 40 C.F.R. § 1508.8(b).

32. NEPA requires that agencies consider, evaluate, and disclose to the public “alternatives” to the proposed action and “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(C) & (E).

33. Further, the evaluation of alternatives must constitute a “substantial treatment,” presenting the impacts of the alternatives in comparative form “sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14.

34. Additionally, the agency must be objective in finding a reasoned choice of alternatives and must consider alternatives that, when integrated, meet the purpose. *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1168, 1170 (10th Cir. 2002).

35. The agency must identify the underlying purpose and need of the project. 40 C.F.R. § 1502.13.

36. An agency cannot “contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration.” *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997).

37. A proposed project’s purpose and need is too narrow when an agency fails to conduct an independent analysis and instead adopts an applicant’s proposed purpose that precludes reasonable alternatives to the proposed project. *Davis v. Mineta*, 302 F.3d 1104, 1113, 1119 (10th Cir. 2002).

38. The reviewing agency commits error if it accepts a project’s purpose or need as given by the prime beneficiaries. *See Simmons*, 120 F.3d at 667.

39. An agency cannot constrict its NEPA analysis to only the alternatives through which an applicant can reach its goals. *Id.* at 669 (noting that, while applicants may prefer to receive water from one source, the Corps could not limit its analysis to

water supply from that source).

40. NEPA puts upon agencies a duty “to exercise a degree of skepticism in dealing with self-serving statements” from a project’s prime beneficiaries. *Id.*

41. Further, an agency “must demonstrate that it has considered significant comments and criticisms by explaining why it disagrees with them; it may not dismiss them without adequate explanation.” *All. to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 132 (D.D.C. 2009).

42. Finally, an agency acts arbitrarily and capriciously if it dismisses a commenter’s substantial and credible evidence. *Ass’n Concerned about Tomorrow v. Slater*, 40 F. Supp. 2d 823, 827 (N.D. Tex. 1998) (citing *Avoyelles Sportsmen’s League v. Marsh*, 715 F.2d 897, 906–07 (5th Cir. 1983)).

Clean Water Act

43. Section 404 of the CWA authorizes the Corps to issue permits to regulate the discharge of dredged or fill material into waters of the United States, including wetlands. 33 U.S.C. § 1344.

44. Under Section 404(b)(1), the Corps shall not permit a discharge that would result in significant degradation of the waters of the United States, or where a less environmentally damaging practicable alternative exists. 40 C.F.R. § 230.10

45. Several of the Corps’ key goals—goals that are repeated throughout its own guidance documents and memorandums of agreement—are to “avoid adverse impacts . . . to existing aquatic resources” and to “achieve a goal of no overall net loss” to wetlands. See, e.g., Corps/EPA 404(b)(1) Memorandum of Agreement (1990).

46. If the EIS for a project is prepared by another agency, and that EIS is “inadequate with respect to the Corps permit action,” the Corps should “prepare an appropriate and adequate NEPA document to address the Corps involvement with the proposed action.” 33 C.F.R. § 325 App. B § 20.

47. In its purpose and need statement, the Corps “will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective.” 33 C.F.R. § 325 App. B § 9(b)(4).

48. Further, “[t]he Corps has a duty to independently evaluate practicable alternatives to the proposed project ‘if such alternatives would have less adverse impact on the aquatic ecosystem [and no] other significant adverse environmental consequences.’” *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1263 (S.D. Fla. 2009) (quoting 40 C.F.R. 230.10(a)) (second alteration in original).

49. The Corps must consider in detail those reasonable alternatives that would accomplish the underlying purpose and need. 33 C.F.R. § 325 App. B § 9(b)(5)(a). These alternatives should be evaluated “to allow a complete and objective evaluation of the public interest and a fully informed decision regarding the permit application.” *Sierra Club*, 709 F. Supp. 2d at 1268 n.28.

50. When information is provided by an applicant, the Corps “must ‘document in the record the independent evaluation of the information [submitted by the applicant for the EIS] and its accuracy, as required by [NEPA CEQ regulations] 40 C.F.R. 1506.5(a).’” *Id.* at 1263 (quoting 33 C.F.R. § 325 App. B(8)(f)(2)).

51. In evaluating alternatives, the Corps “must focus on the accomplishment

of the underlying purpose and need.” 33 C.F.R. § 325 App. B § 9(b)(5)(a). While the Corps has a responsibility to consider the applicant’s objectives, “the burden of proving that a given alternative does not meet the applicant's objective remains on the applicant . . . and the applicant’s assessment must be critically evaluated by the Corps.” *Greater Yellowstone Coal. v. Flowers*, 359 F.3d 1257, 1270 (10th Cir. 2004).

Administrative Procedure Act

52. The APA provides the standard of review for final agency action. See, e.g., *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1572 (10th Cir. 1994).

53. Upon reviewing agency decisions challenged under the APA, a court must “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706.

54. “Where an agency has failed . . . to explain the path it has taken,” or where “it omitted the critical step—connecting the facts to the conclusion,” a court “ha[s] no choice but to remand for a reasoned explanation.” *Dickson v. Sec’y of Def.*, 68 F.3d 1396, 1405, 1407 (D.C. Cir. 1995).

FACTUAL BACKGROUND

History of the Original Windy Gap Project and the Development of the Windy Gap Firming Project

55. An apt example of the sunk cost bias, the Firming Project seeks “to fix a broken project.” Final Environmental Impact Statement (“FEIS”), App. F, F-424.

56. Reclamation permitted the Original Project, owned by the Subdistrict, in 1981. FEIS, 1-5. The Original Project has operated since 1985. FEIS, 1-5.

57. The Original Project was intended to supply water to users on both Colorado's Front Range and West Slope by diverting as much as 56,000 AF of water out of the Colorado River each year at the Windy Gap Reservoir in Grand County, Colorado. FEIS, 1-7.

58. The Original Project would then use Reclamation's and Northern Water's Colorado-Big Thompson ("C-BT") Project facilities to store and convey most of that water to Windy Gap Project participants. FEIS, 1-4 to 1-8.

59. The C-BT Project diverts Colorado River water and pumps it from Granby Reservoir into Shadow Mountain Reservoir, where it is transported to the Front Range through Grand Lake and the Adams Tunnel. FEIS, 1-4 to 1-5.

60. Based on anticipated annual diversions of 56,000 AF from the Colorado River, Reclamation expected the Original Project to be able to deliver up to 48,000 AF to Front Range participants each year, after accounting for evaporation losses and West Slope deliveries. FEIS, 1-7, 1-9.

61. Between the Original Project's completion in 1985 and 2004, however, annual deliveries averaged less than 10,000 AF per year. FEIS, 1-9. This is only twenty percent of the projected annual deliveries. FEIS, 1-9.

62. For numerous reasons, the Original Project has been unable to deliver the expected water supplies to the participants. FEIS, 1-1.

63. In dry years, the Original Project often cannot deliver its anticipated yield for two main reasons. FEIS, 1-10.

64. First, Reclamation explained that, when water is limited, senior water

rights can prevent junior water rights from diverting to ensure these senior rights are filled. FEIS, 1-10. As a result, during dry years, Windy Gap's relatively junior water rights often cannot be diverted. FEIS, 1-10.

65. Second, Reclamation noted that a Memorandum of Understanding imposes instream flow requirements that also prevent Windy Gap diversions. FEIS, 1-10. This agreement mandates that the operators of Windy Gap Reservoir release water otherwise meant for Windy Gap participants to maintain minimum instream flows of 90 cubic feet per second ("cfs") from the Windy Gap diversion point to the mouth of Williams Fork River. FEIS, 1-7.

66. The Original Project's failings are not limited to dry years. FEIS, 1-10. In many wet years, the Original Project cannot deliver its anticipated yield because C-BT Project facilities are used at maximum capacity by the C-BT Project itself and are unavailable for conveyance and storage of Windy Gap water. FEIS, 1-10. By contract, C-BT Project water has priority over Windy Gap water for both storage and conveyance. FEIS, 1-10.

67. While Reclamation and the Participants anticipated the inability to divert in dry years, they somehow failed to anticipate "the inability to divert and store during an extended set of wet years," despite the existence of the contract giving C-BT Project water priority and the known physical limitations of the C-BT facilities. FEIS, 1-10.

68. This failure to adequately assess facility availability and to plan accordingly is the reason that the Subdistrict now wants to spend even more money to accomplish less than what it thought the Original Project would. See FEIS Executive

Summary (“ES”), ES-5 (explaining that the Original Project was expected to provide an annual firm yield of 48,000 AF, while the Firming Project would provide an annual firm yield of 30,000 AF).

69. The Original Project’s failure to deliver the anticipated amount of water to the participants is also a function of the lack of demand by participants for Windy Gap water. FEIS, 1-10. This lack of demand has reduced the amount of water delivered by the Original Project and also factored into the seven years where the project diverted no water from the Colorado River. FEIS, 1-10; *see also* FEIS, 3-11.

70. In short, the Original Project has failed to deliver the expected quantities of water both because demand is lacking and because it was so poorly planned that it cannot deliver water during wet years. *See* FEIS, 1-10.

71. Rather than accept the shortcomings of their Original Project and seek reliable alternative water supplies after three decades of failure, Firming Project participants want to “pursue measures through a joint project to firm Windy Gap water deliveries.” FEIS, 1-10.

72. Consequently, the Subdistrict proposed the Firming Project to Reclamation. FEIS, 1-1.

73. The Subdistrict hopes that this will “firm” the Original Project’s anticipated yield, increasing its firm annual yield from zero AF to approximately 30,000 AF. FEIS, 1-1.

74. The Firming Project involves constructing a new 90,000 AF reservoir to store Windy Gap water on the Front Range, and storing, or prepositioning, C-BT water

in that reservoir. FEIS, ES-7. Prepositioning allows C-BT water to be stored in this new Front Range reservoir which makes room to store and move Windy Gap water in the C-BT system. FEIS, ES-7.

75. Firming Project participants include the City and County of Broomfield, the Central Weld County Water District, the Town of Erie, the City of Evans, the City of Fort Lupton, the City of Greeley, the City of Lafayette, the Little Thompson Water District, the City of Longmont, the City of Louisville, the City of Loveland, the Platte River Power Authority, the Town of Superior, and the Middle Park Water Conservancy District. FEIS, 1-2 to 1-3.

Reclamation's Draft Environmental Impact Statement

Reclamation's Consideration of Purpose and Need

76. On August 29, 2008, Reclamation released its Draft EIS ("DEIS") for the Windy Gap Firming Project. FEIS, 1-46.

77. Rather than conduct an independent analysis in preparing the DEIS, Reclamation relied heavily on assertions, studies, and reports provided by the Subdistrict. *See, e.g.*, DEIS, 2-2 to 2-3.

78. Most importantly, Reclamation accepted the Subdistrict's narrow characterization of the project's purpose—to firm Windy Gap water—as opposed to the more appropriate purpose—to meet the actual need for water. *See, e.g.*, Windy Gap Firming Project Public Scoping Report, 1.

79. Reclamation also accepted the Subdistrict's proposed demand for water supply, despite a history of low demand rendering deliveries during the Original

Project's first twenty years at only about 20 percent of the originally anticipated amount. DEIS, 1-9 to 1-10.

80. In establishing demand for the Firming Project, Reclamation estimated, in its 2005 Purpose and Need Report, that participants would have a shortage of 64,000 AF of firm water supplies by 2030, and a shortage of over 110,000 AF by 2050. DEIS, 1-37.

81. Based on this data, Reclamation projected that nine of the fourteen Firming Project participants would face shortages of firm water supplies by 2006. DEIS, 1-38, Table 1-5.

82. By the time 2006 passed, despite the Original Project failing to provide any firm water yield, the participants suffered no such crisis. Additionally, despite being published in 2008, the DEIS did not include these participants' actual firm water shortages or surpluses for these years. See DEIS, 1-37 to 1-38.

83. Regardless of this lack of demonstrated demand, Reclamation adopted a purpose and need for additional storage that would deliver a firm annual yield of 30,000 AF of Windy Gap water. DEIS, 1-4, 1-39 to 1-40.

Reclamation's Screening of Alternatives

84. Reclamation (and the Corps) also reviewed and relied on the Subdistrict's 2003 Alternative Plan Formulation Report ("Alternatives Report") when Reclamation began the NEPA EIS process, stating: "Both agencies concurred that the [Alternatives Report] provided an excellent compilation of data and alternatives analysis. However, further refinement of the alternative screening and selection process was needed to

address the requirements of the [Clean Water Act's] 404(b)(1) Guidelines.” DEIS, 2-3.

85. Reclamation employed the Subdistrict's narrow purpose and need of “fixing” a broken project as one of the first screening categories to eliminate potential alternatives to the Firming Project participants' projected water shortages. DEIS, 2-3.

86. Thus, while the Subdistrict's Alternatives Report “evaluated” a “total of 171 different project elements,” Reclamation screened out the vast majority immediately because they did not fit the narrowly defined purpose and need. See DEIS, 2-2 to 2-6.

87. For example, Reclamation eliminated “Nonstructural Alternatives.” DEIS, 2-5. Reclamation's discussion for eliminating those was brief: “All nonstructural measures, except repositioning, were eliminated . . . [because of] conflicts with C-BT operations, adverse impacts on water deliveries to C-BT unit holders, and the inability to firm Windy Gap water.” DEIS, 2-5.

88. Reclamation also eliminated “Other Alternatives” (such as rearranging water right deliveries) because they did not meet the project's purpose and need, would not meet participant's goals for Windy Gap water, or would not be permitted by the C-BT Project. DEIS, 2-6.

89. Among these “Other Alternatives,” Reclamation eliminated water conservation because “conservation alone does not meet all of the projected water supply requirements or eliminate the need for firming existing Windy Gap Project water supplies.” DEIS, 2-6.

90. Reclamation did not independently evaluate the extent to which improvements in water conservation could address Firming Project participants' water

supply needs. DEIS, 2-6.

91. After a second round of screening focused on reducing impacts to wetlands, Reclamation screened out any remaining alternatives that did not meet its narrowly defined purpose and need. DEIS, 2-6 to 2-7.

92. By the end of this process, Reclamation excluded any alternative that would not result in construction of new storage and new diversions from the Colorado River. See DEIS, 2-14.

Reclamation's Consideration of Remaining Alternatives

93. Four action alternatives remained for NEPA evaluation after the screening process; all four involved diversions from the Colorado River to fill new Front Range reservoirs. DEIS, 2-14.

94. Three of these alternatives involved building the Chimney Hollow Reservoir on the Front Range, either with a 70,000 AF or 90,000 AF capacity. DEIS, 2-14.

95. The fourth alternative involved building the 60,000 AF capacity Dry Creek Reservoir on the Front Range. DEIS, 2-14.

96. Because Reclamation assumed that 90,000 AF of new storage was needed, the alternatives with Front Range reservoirs under 90,000 AF also involved constructing new West Slope storage to reach this storage amount; these alternatives involved building either the Jasper East Reservoir or the Rockwell/Mueller Creek Reservoir. DEIS, 2-3, 2-11.

97. Of these alternatives, the Subdistrict had proposed constructing the

“90,000 AF Chimney Hollow Reservoir using prepositioning to improve yield.” DEIS, 2-14. Reclamation also identified the 90,000 AF Chimney Hollow Reservoir as its preferred alternative. DEIS, 2-45.

98. Reclamation also considered a no action alternative. DEIS, 2-14. Under this alternative, Reclamation assumed that Firming Project participants would both seek other storage options and maximize Windy Gap water deliveries when available. DEIS, 2-15.

99. Among these storage options, Reclamation assumed that the City of Longmont would enlarge its Ralph Price Reservoir by 13,000 AF, and included an analysis of the impacts of enlarging that reservoir as part of its no action alternative. DEIS, 2-15.

100. Reclamation did not include analyses of other participant’s storage options because the participants had not identified any options. DEIS, 2-15, 2-17.

101. These considerations increased Reclamation’s modeled average year diversions from 36,532 AF under existing conditions to 43,573 AF under the no action alternative. DEIS, 3-19, Table 3-2.

Public Comments and Reclamation’s Responses on the Draft EIS

102. Reclamation accepted public comment on the DEIS from August 29, 2008 through December 29, 2008. FEIS App. F, F-3.

103. Western Resource Advocates (“WRA”) commented that Reclamation over-inflated population projections, Reclamation’s predicted per capita water use was arbitrary, and Colorado cities have experienced dramatic and sustained reduction in per

capita water use since 2002. FEIS App. F, Letter #1138, F-549 to F-552.

104. WRA recalculated the demand projections for Firming Project participants based on the Colorado Water Conservation Board's ("CWCB") anticipated twenty-five percent water use reduction for state-wide water planning. FEIS App. F, Letter #1138, F-556. WRA's calculations of Firming Project participants' per capita water use falls from 194 gallons per capita per day ("GPCD") (average 1998-2003) to 147 GPCD by 2033. FEIS App. F, F-556. WRA argued, based on these conservation calculations, that existing firm supplies will meet future water demands through 2030. FEIS App. F, Letter #1138, F-557.

105. Reclamation replied, without adequate explanation, that WRA's method was inappropriate and Firming Project participants would maintain conservation plans in accordance with the Water Conservation Act of 2004. FEIS App. F, F-556, F-563.

106. Among many points raised in its comments, the EPA noted other reasonable alternatives that Reclamation should have considered, such as acquiring more senior water rights, using short-term agricultural leases for immediate temporary water supplies, and conjunctive use of surface and ground water. FEIS App. F, Letter #1141, F-238 to F-239.

107. Reclamation responded that while it understands that "conservation is a key component," these suggested alternatives "would not meet the project purpose and need." FEIS App. F, F-238.

108. Additionally, Reclamation received many comments during its DEIS comment period—from cooperating agencies and governments, other governments,

organizations, and individuals—stating that its purpose and need was too narrow. See, e.g., FEIS App. F, Grand County Letter #1075, F-19, F-40; EPA Letter #1141, F-236; Summit County Letter #1120, F-334; Town of Fraser Letter #1069, F-343; Effected Businesses Letter #1110, F-424; WRA Letter #1138, F-545; Individual Comments by Topic, F-615.

109. Reclamation continually responded to these comments by noting that the purpose and need was “to fix a broken project, not to search for other sources of water.” See, e.g., FEIS App. F, F-19, F-236, F-336 to F-337, F-343, F-424, F-545.

110. Further, comments pointed out that Reclamation overestimated the existing Windy Gap diversions, which grossly understates the anticipated changes. FEIS App. F, Grand County Letter #1075, F-8 to F-10; FEIS App. F, Trout Unlimited Letter #1126, F-490. These comments noted that average historical Windy Gap diversions were 11,080 AF, much lower than the 36,532 AF used by Reclamation. FEIS App. F, Grand County Letter #1075, F-8.

111. In its response, Reclamation noted that from 2001 to 2008, Windy Gap diversions averaged 27,450 AF per year. FEIS App. F, F-8. According to Reclamation, the modeled number it used—36,532 AF—is “closer” to the recent average of 27,450 AF. FEIS App. F, F-8.

112. Reclamation did not explain why the modeled diversions were more appropriate than the much lower actual historical diversions, how it calculated the modeled diversions, or why the modeled diversions differed so greatly from the actual historical average. See FEIS App. F, F-8, F-490 to F-491.

113. Commenters repeatedly pointed out that the direct and cumulative impacts analysis should have included the Denver Water Moffat Collection System Project (“Moffat Project”). See, e.g., FEIS App. F, Bar Lazy J Guest Ranch Letter #1052, F-398; Chimney Rock Ranch Letter #1059, F-408; Greater Grand Lake Shoreline Association Letter #58, F-448; Trout Unlimited Letter #1126, F-495.

114. The Moffat Project, as currently proposed, will expand the existing Moffat Collection System and is anticipated to result in significant additional diversions from the Fraser River upstream of the Windy Gap diversion site. FEIS, 2-44. The Moffat Project will directly affect the availability of water for the Firming Project. FEIS, 2-44.

115. Reclamation provided conclusory responses that the FEIS fully considered the cumulative impacts of the Moffat Project. See, e.g., FEIS App. F, F-408.

116. Various groups also provided further examples of how Reclamation’s cumulative impacts analysis was insufficient. See, e.g., FEIS App. F, F-239 to F-242, F-497, F-501 to F-502.

117. Commenters questioned Reclamation’s analysis of water quality in Grand Lake, including questioning Reclamation’s methodology and statements that suggested a higher “flushing rate” would improve water quality. See FEIS App. F, Greater Grand Lake Shore Association Letter #58, F-447.

118. These comments stated that “every study we have ever seen shows exactly the opposite—increased flow is directly related to lower water quality.” FEIS App. F, Greater Grand Lake Shore Association Letter #58, F-447.

119. Reclamation responded by stating that, according to one study, higher

flushing rates improved water quality. FEIS App. F, F-447.

120. One comment faulted Reclamation for not considering how salinity and selenium would affect Colorado River water quality. FEIS App. F, F-626.

121. Reclamation noted that a reduction in Colorado River flows would reduce the volume of water available to dilute salinity and selenium, but simply responded that its models suggest that there would be enough water in the river to dilute any pollution. FEIS App. F, F-626.

122. Comments pointed out that Reclamation did not consider what impacts would occur as a result of increased drought conditions and pointed to Reclamation's failure to consider: impacts to the Colorado River's over-the-bank, habitat producing flows; climate change; and water quality effects on Grand Lake. FEIS App. F, Trout Unlimited Letter #1126, F-493 to F-496.

123. Additionally, these comments noted that the variance in daily stream flows is extremely important for rivers and the use of daily data disaggregated from an average will over-estimate flows. FEIS App. F, Trout Unlimited Letter #1126, F-489. Consequently, the commenter questioned Reclamation's disaggregation method and suggested that Reclamation should use actual daily data. FEIS App. F, F-489.

124. In its response, Reclamation stated that disaggregation was appropriate. FEIS App. F, F-489. It did not note any shortcomings of disaggregation, nor did it explain why it did not use daily data. FEIS App. F, F-489.

125. Commenters noted that Reclamation used a study from 1981 to calculate its flushing flow, while a more recent 2004 study would recommend much higher flows.

FEIS App. F, WRA Letter #1138, F-578 to F-580.

126. Reclamation did not explain its choice of the 1981 study's methodology or why it did not use the 2004 study's methodology. FEIS App. F, F-578 to F-580.

Reclamation's Final Environmental Impact Statement

127. Reclamation completed its FEIS in December, 2011. Bureau of Reclamation – Record of Decision (“BOR-ROD”), 5.

128. The FEIS did not contain any significant changes with regard to the purpose and need, the preferred alternative, or the other action alternatives. FEIS, ES-2 to ES-4.

129. Despite being prepared in 2011, the FEIS retained 2005 projections of water shortages instead of providing the actual data to determine project participant water supply demand. *Compare* DEIS, 1-38 *with* FEIS, 1-42; *Compare* DEIS, 1-18 *with* FEIS, 1-20.

130. Reclamation did expand its consideration of climate change from a few paragraphs in the DEIS to roughly three pages in the FEIS. *Compare* DEIS, 2-44 *with* FEIS, 2-49 to 2-51 & FEIS, 3-62.

131. However, because of “varied predictions in the magnitude and direction of climate changes,” Reclamation's hydrologic model for the Firming Project in the FEIS did not include climate change. FEIS, 3-62.

132. Instead, Reclamation provided a qualitative analysis of the potential effects of climate change, relying entirely on a report by the CWCB. FEIS, 2-51.

133. Reclamation did not substantially change its discussion of the effects that

the Firming Project would have on Grand Lake. It added charts without significantly altering its narrative or its data that indicate how the Firming Project would impact water quality in the natural lake. *Compare* DEIS, 3-107 to 3-108 *with* FEIS, 3-170 to 3-174.

134. While Reclamation identified new reasonably foreseeable future actions since the DEIS, it deemed most of these irrelevant or too minimal to adjust its data. See FEIS, 2-45 to 2-49. Similar to its Grand Lake analysis, its analysis of other rivers and lakes remained substantively the same. *Compare* DEIS, 3-86 to 3-129 *with* FEIS, 3-127 to 3-200.

Comments on the Final EIS

135. Reclamation received numerous comments on its Final EIS. BOR-ROD, 14.

136. In its Record of Decision, Reclamation only provided generalized summaries of issues raised by commenters. See BOR-ROD, 14–17. Reclamation left out the specifics and sources of data provided by commenters, leaving only its own responses as data sources. See BOR-ROD, 14–17.

137. These comments addressed still existing issues with water quality analysis, stream flow analysis, and use of older data. BOR-ROD, 14–17.

138. In response to concerns about failings in the FEIS's analysis of Grand Lake water quality, Reclamation only said that the FEIS addressed the issue. BOR-ROD, 14.

139. Comments also reflected concerns about how alterations in flushing flows will affect channel maintenance and suggested that Reclamation should use new data

for this analysis. BOR-ROD, 14–15.

140. Reclamation received additional comments regarding the use of flawed and outdated data to analyze environmental impacts. BOR-ROD, 14–16.

141. Commenters also questioned Reclamation’s dismissal of a 2011 report’s conclusions regarding the existing physical condition of the Colorado River below Windy Gap Reservoir. BOR-ROD, 16.

Bureau of Reclamation’s Record of Decision

142. On December 19, 2014, Reclamation released its Record of Decision for the Firming Project. BOR-ROD, 1. Reclamation determined that the FEIS complied with NEPA and decided to implement the Preferred Alternative. BOR-ROD, 18.

143. Specifically, Reclamation’s Record of Decision encompasses two actions: (1) approval of a new contract between Reclamation, the Subdistrict, and Northern Water covering water storage and exchange that would allow use of unused capacity in the C-BT Project as available; and (2) approval of a special use permit authorizing connection of the Subdistrict’s proposed Chimney Hollow Reservoir to Reclamation’s C-BT Project facilities. BOR-ROD, 18.

144. Reclamation based its decision, among other considerations, on its finding that the Subdistrict’s Preferred Alternative met the stated purpose and need. BOR-ROD, 19.

Public Comment and Corps’ Responses on the Section 404 Permit Application

145. The Corps served as a cooperating agency for both the DEIS and FEIS for the Firming Project. ACE-ROD, 1.

146. On August 13, 2008, the Subdistrict submitted a CWA Section 404 permit application to the Corps because its preferred alternative would result in the discharge of fill material into waters of the United States. ACE-ROD, 2.

147. Concurrent with the release of the DEIS, the Corps issued public notice for the CWA Section 404 permit. ACE-ROD, 2. The Corps accepted comments on the Firming Project through its issuance of the Section 404 Record of Decision. ACE-ROD, 7.

148. Numerous commenters suggested that, pursuant to CWA 404(b)(1) guidelines, the Corps must supplement the FEIS because of significant new circumstances and information. *See, e.g.*, ACE-ROD App. A, 4–5; ACE-ROD App. A, 43.

149. For example, multiple commenters pointed out that the Corps must collect and analyze additional data and supplement the FEIS because the FEIS does not include up-to-date data and accurate analysis. ACE-ROD App. A 24; ACE-ROD App. A, 45.

150. Additionally, the EPA suggested that the Corps should supplement the FEIS's climate change analysis, surface hydrology analysis, and stream morphology analysis. ACE-ROD App. A, 17, 34–35.

151. Commenters also pointed out that the Firming Project would drain tens-of-thousands of acre-feet from the top of the Colorado River each year, pushing the river over the brink of what it can sustain. ACE-ROD App. A, 39. The Corps simply denies this fact. ACE-ROD App. A, 39.

152. The Corps did not dispute commenters' arguments that the Colorado River system is already severely depleted due to extended drought in the Colorado River Basin. ACE-ROD App. A, 38.

153. The Corps received public comments pointing out that the purpose and need described in the FEIS was flawed and too narrow to satisfy NEPA and the CWA. ACE-ROD App. A, 40.

154. In response, the Corps stated "that the updated Purpose and Need statement in Chapter 1 of the FEIS is appropriate for this project and is compliant with NEPA regulations." ACE-ROD App. A, 40.

155. Other commenters provided evidence that the assumptions used by Reclamation and the Corps in the FEIS misrepresent the baseline flows for the Colorado River, which underestimates the impacts of the Firming Project by over fifty percent. ACE-ROD App. A, 45.

156. In response to these comments, the Corps simply adopts Reclamation's reasoning that Reclamation's model, developed with older data from 1950–1985, is more accurate in predicting baseline flows than more recent, actual data from 1985–2010 that commenters provided. ACE-ROD App. A, 45–53.

157. Commenters presented information to the Corps showing that the FEIS failed because it did not consider the potential for reduced availability of the water rights connected to the project as a result of a Colorado River Compact Call ("Compact Call"). ACE-ROD App. A, 123. Commenters noted that a proper analysis of climate change would have allowed the agencies to consider these risks. ACE-ROD App. A, 127.

158. The Corps' response did not mention the potential for a Compact Call and claimed that the data is simply not available to include a quantitative analysis of climate change. ACE-ROD App. A, 123–24.

159. Save the Colorado submitted several academic papers and reports to the Corps. ACE-ROD App. A, 123–27. Among them was a report published in 2016—several months prior to the Corps' Record of Decision—entitled “Climate Change and the Colorado River: What We Already Know.” ACE-ROD App. A, 124. This report contained a substantial amount of data regarding climate change and the Colorado River. ACE-ROD App. A, 124.

160. The EPA also suggested a model that would have allowed a quantitative analysis of the effects of climate change. ACE-ROD App. A, 34–35. The EPA recommended that the Corps complete this evaluation. ACE-ROD App. A, 34–35.

161. In response to Save the Colorado's academic papers and reports, the Corps stated that the methods and data of climate science are too uncertain to be valuable. ACE-ROD App. A, 123–24. In response to the EPA, the Corps again adopted Reclamation's response that a quantitative assessment of climate change is too uncertain. ACE-ROD App. A, 34–35.

162. Commenters pointed out that the Corps cannot rely on the flawed analysis in Reclamation's FEIS for, among other things, identifying a full range of reasonable alternatives, considering the Firming Project's direct, indirect, and cumulative impacts, and considering whether adverse effects can be mitigated. ACE-ROD App. A, 39–41.

163. Again, many commenters reiterated their concerns that had not been

adequately addressed following their comments on the DEIS and FEIS. *See, e.g.*, ACE-ROD App. A, 45, 91. These comments noted the insufficient analysis of flushing flows and the lack of a climate change analysis. *See, e.g.*, ACE-ROD App. A, 46, 95, 97, 107–10.

164. In response to all these comments, the Corps primarily referred to the FEIS itself or relies on Reclamation’s responses to comments. *See, e.g.*, ACE-ROD App. A, 39–41.

The Corps’ Record of Decision on the Section 404 Permit

165. The Corps issued its Record of Decision on May 16, 2017. ACE-ROD, Cover Page.

166. The Corps determined that the basic project purpose was simply water supply. ACE-ROD, 3. The Corps defined basic project purpose as “the fundamental, essential, or irreducible purpose of the proposed project.” ACE-ROD, 3.

167. Because the Corps determined that water supply was the basic project purpose, and because water supply does “not fundamentally require access or proximity to, or siting within, a special aquatic site,” the Corps concluded that the Subdistrict’s Preferred Alternative was not water dependent. ACE-ROD, 3.

168. The Corps noted that the 404(b)(1) Guidelines stipulate that, when a project is not water dependent, “practicable alternatives are (1) presumed to exist and (2) presumed to be less environmentally damaging than the Applicant’s Preferred Alternative, unless clearly demonstrated otherwise.” ACE-ROD, 3.

169. Despite determining that water supply was the basic project *purpose*, the

Corps decided that the basic project *need* was to firm water deliveries from the Original Project—that is, to fix the broken project. ACE-ROD, 4.

170. The entirety of the Corps' ROD analysis on this point stated: "Upon review the Corps agrees with the Applicant's stated project need" and then provided a reference to Reclamation's deficient FEIS. ACE-ROD, 4.

171. Having accepted Reclamation's need, the Corps also accepted Reclamation's alternatives, which excluded any alternative that would not result in increased and additional diversions from the Colorado River. ACE-ROD, 4.

172. Although the Corps identified that the basic project purpose was to increase participants' water supplies, the Corps never explained why that purpose could only be satisfied through attempting to fix the failed Original Project.

173. Aside from the direct effects of constructing a 90,000 AF reservoir at Chimney Hollow, the Corps recognized that the resulting indirect effects would include "flooding jurisdictional wetlands and other Waters of the U.S. due to the impoundment of water, as well as, downstream impacts to Chimney Hollow creek from regimenting the flow from the reservoir," and impacts to the Colorado River system itself. ACE-ROD, 3.

174. The Corps' ROD does not explain how the applicant's preferred alternative is less environmentally damaging than the no action alternative or any other action alternative considered as a part of the NEPA process. *See, e.g.*, ACE-ROD, 7.

175. The Corps' ROD only contains the conclusory statement: "Alternative 2 has been identified as the LEDPA [Least Environmentally Damaging Preferred Alternative]." ACE-ROD, 7.

FIRST CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
Reclamation's Selection of an Impermissibly Narrow Purpose and Need

176. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

177. An agency that fails to conduct an independent analysis and instead adopts an applicant's proposed purpose that precludes reasonable alternatives to the project violates NEPA. *See Davis v. Mineta*, 302 F.3d 1104, 1119–20 (10th Cir. 2002).

178. In its 2003 Alternatives Report, the Subdistrict stated the purpose of the firming project was to “identify and evaluate reasonable alternatives capable of firming the Windy Gap Project water supply”

179. In its Record of Decision, Reclamation stated that “[t]he purpose of the WGFP is to deliver a firm annual yield of about 30,000 AF of water from the existing Windy Gap Project”

180. When commenters suggested that water supply is the underlying purpose and need, Reclamation responded that the purpose and need is to “fix a broken project, not to search for other sources of water.”

181. Reclamation's identification of an impermissibly narrow purpose and need that precluded reasonable alternatives violates NEPA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

SECOND CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
*Reclamation's Failure to Independently Determine the Existence of Applicant's
Proposed Need*

182. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

183. Under NEPA, agencies have a duty “to exercise a degree of skepticism in dealing with self-serving statements” from a project’s prime beneficiaries. *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997). The agency commits error if it accepts a project’s purpose or need as given by the prime beneficiaries. See *id.* at 667.

184. Reclamation did not independently consider if the Subdistrict’s underlying need for 30,000 AF of water actually exists, despite commenters questioning the need. Instead, Reclamation relied upon the data supplied by the project’s prime beneficiary, the Subdistrict.

185. Specifically, multiple commenters submitted data, based on water conservation analysis and demand projections, that suggested a lower water demand exists.

186. Reclamation simply responded that the suggested data was faulty and did not explain why the Subdistrict’s data that it relied on was better.

187. Reclamation’s failure to independently verify the existence of the need for the project, especially after receiving comments suggesting that the need might not exist, violates NEPA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

THIRD CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
Reclamation's Improper Exclusion of Reasonable Alternatives

188. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

189. NEPA requires that agencies “rigorously explore and objectively evaluate” all reasonable alternatives and “study, develop, and describe appropriate alternatives to recommended courses of action.” See 42 U.S.C. § 4332(2)(C) & (E); 40 C.F.R. § 1502.14. Additionally, the agency must be objective in finding a reasoned choice of alternatives and must consider alternatives that, when integrated, meet the purpose. *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1168, 1170 (10th Cir. 2002).

190. Reclamation rejected nonstructural alternatives that would have met the underlying water supply purpose, such as purchase/leaseback arrangements, interruptible supply contracts, water exchanges, water conservation, purchasing more senior water rights, using short term agricultural leases or other temporary transfer methods, and conjunctively using surface and ground water, because of a purpose and need that were framed too narrowly.

191. Further, Reclamation failed to consider any integration of these alternate water supply options that could have met the underlying purpose. After the screening process, all of the remaining alternatives involved diversions from the Colorado River to fill new reservoirs on the Front Range.

192. Reclamation's failure to “rigorously explore and objectively evaluate”

reasonable alternatives other than reservoirs violates NEPA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

FOURTH CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
Reclamation's Failure to Disclose the Shortcomings of Its Data and Methods when Determining the Project's Impacts

193. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

194. Courts will not defer to an agency's choice of methodology or data when the agency does not adequately explain its reliability or fails to disclose its shortcomings. *Hillsdale Env'tl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1178 (10th Cir. 2012); *Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005).

195. Commenters identified shortcomings in Reclamation's methodology and data, including its overestimation of existing diversions, its water quality analysis in the Three Lakes System, its use of disaggregation and modeling to estimate daily stream flows, and its outdated methods for determining necessary flushing flows.

196. Despite these comments, Reclamation did not note any shortcomings or lack of reliability in its methodologies. Instead, Reclamation provided conclusory responses that its data and methods provided an accurate basis for estimating impacts.

197. Reclamation's failure to properly disclose the shortcomings of its data and methods, as well as Reclamation's conclusory responses and lack of transparency, violates NEPA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

FIFTH CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
Reclamation's Failure to Fully Analyze the Identified Environmental Impacts

198. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

199. An agency must consider all reasonably foreseeable impacts in an EIS. *Utahns for Better Transp.*, 305 F.3d at 1175. In doing so, the agency must consider “the relevant data and articulate a rational connection between the facts found and the decision made.” *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 713 (10th Cir. 2009).

200. An agency acts arbitrarily and capriciously if it dismisses a commenter’s substantial and credible evidence. *Ass’n Concerned about Tomorrow v. Slater*, 40 F. Supp. 2d 823, 827 (N.D. Tex. 1998).

201. Further, an agency “must demonstrate that it has considered significant comments and criticisms by explaining why it disagrees with them; it may not dismiss them without adequate explanation.” *All. to Save the Mattaponi v. U.S. Army Corps of Eng’rs*, 606 F. Supp. 2d 121, 132 (D.D.C. 2009).

202. Commenters provided substantial and credible evidence that additional diversions from the Colorado River, combined with an increasingly arid climate and the impending effects of climate change, could have significant impacts on the Colorado River’s morphology, habitat, and other aquatic resources downstream of Windy Gap Reservoir.

203. Despite this evidence, Reclamation did not consider these reasonably foreseeable impacts in its EIS.

204. Reclamation failed to fully analyze the effects that climate change may have on water availability for the Firming Project. Senior water rights holders can, when necessary, prevent diversion of physically available flows to ensure their rights are fulfilled, and, as the Colorado River Basin becomes increasingly dry, they are more likely to do so.

205. Additionally, other Colorado River Basin states, facing the challenges of a more arid climate, may claim water through a Compact Call—water that the Firming Project needs to achieve its firm yield goals.

206. Although Reclamation considered climate change in a limited fashion, Reclamation did not include its effects quantitatively, did not utilize current scientific findings about climate change, and did not provide a rational explanation of how climate change influenced its decisionmaking.

207. Further, Reclamation inadequately analyzed the Firming Project's effects—including water quality and clarity—on Grand Lake and the Three Lakes System because Reclamation claimed it lacked reliable data, despite what commenters provided.

208. Reclamation's failure to fully analyze all reasonably foreseeable impacts that were identified violates NEPA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

SIXTH CLAIM FOR RELIEF

Violation of the National Environmental Policy Act (42 U.S.C. § 4332)
Reclamation's Failure to Adequately Analyze Cumulative and Indirect Impacts

209. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

210. NEPA requires agencies to analyze the indirect and cumulative impacts of a proposed action with past, present, and reasonably foreseeable future actions.

Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1251 (10th Cir. 2011).

211. Reclamation failed to fully analyze the environmental impacts that the Firming Project and the Moffat Project will cumulatively have on the Colorado River. Specifically, Reclamation failed to analyze how the Firming Project and the Moffat Project would cumulatively impact Colorado River stream flows below Windy Gap.

212. Further, Reclamation failed to analyze how the Firming Project, along with the Moffat Project, would impact the overall Colorado River water management system, and, specifically, the likelihood of hastening a Colorado River Compact Call, potentially affecting all seven signatory states in both the Upper and Lower Divisions.

213. Reclamation's failure to adequately analyze the Firming Project's indirect and cumulative impacts on the Colorado River in conjunction with the Moffat Project violates NEPA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

SEVENTH CLAIM FOR RELIEF

Violation of the Clean Water Act (40 C.F.R. § 230)
The Corps' Violation of Clean Water Act Requirements

214. Each and every allegation contained in the preceding paragraphs of this petition is incorporated by references as if fully set forth herein.

215. When the Corps considers a 404 permit, it must independently define both the underlying purpose and need for the project. *Sierra Club v. Van Antwerp*, 709 F. Supp. 2d 1254, 1263 (S.D. Fla. 2009); 40 C.F.R. § 230.10; see also 33 C.F.R. § 325 App. B § 9(b)(4).

216. Further, the Corps is required to consider reasonable alternatives that would meet the underlying need and avoid impacts to the Waters of the United States. 33 C.F.R. § 325 App. B § 9(b)(5)(a).

217. The Corps identified an underlying purpose, but not an underlying need for the project. It defined the basic project purpose as increasing water supply. However, the Corps then accepted—without independent verification—Reclamation's narrowly defined need when it identified "fixing" the Windy Gap project as the project's basic need.

218. The Corps' illogical acceptance of Reclamation's narrow need, in the face of its own much broader definition of project purpose, led the Corps to accept the narrow range of alternatives in the FEIS—all of which affect the waters of the United States—and precluded the Corps from considering all of the reasonable alternatives that would achieve the underlying purpose and need of water supply and avoid impacts to the waters of United States.

219. The Corps' failure to independently define the underlying need, and its subsequent failure to consider reasonable alternatives that could accomplish its broadly defined purpose without impacts to the waters of the United States, violates the CWA and was arbitrary, capricious, and an abuse of discretion under 5 U.S.C. § 706.

REQUEST FOR RELIEF

WHEREFORE, Petitioners Save the Colorado, Save the Poudre: Poudre Waterkeeper, WildEarth Guardians, Living Rivers, Waterkeeper Alliance, and Sierra Club respectfully request that the Court enter judgment granting the following relief:

1. Declare that Reclamation's Record of Decision, as well as the analysis underlying it, violated NEPA and is arbitrary, capricious, an abuse of discretion, and contrary to law under the APA;
2. Declare that the Corps' Record of Decision violated CWA Section 404(b)(1) and is arbitrary, capricious, an abuse of discretion, and contrary to law under the APA;
3. Vacate Reclamation's December 19, 2014, and the Corps' May 17, 2017, Records of Decision for the Firming Project;
4. Enjoin any activities associated with carrying out the Preferred Alternative, including but not limited to construction activities at the site of the proposed Chimney Hollow Reservoir and any diversions from the Colorado River which are not permitted under the Original Project.

5. Award Petitioners their costs of litigation, including reasonable expert witness fees and attorney fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and/or any other applicable provisions of law; and

6. Grant petitioners such further relief as may be necessary and appropriate or as the Court deems just and proper.

Respectfully submitted,

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