



November 22, 2016

Via Electronic Mail

Governor Hickenlooper

Governor.hickenlooper@state.co.us

Bob Randall, Executive Director

Department of Natural Resources

Robert.Randall@state.co.us

RE: McDonald Ditch Co. Project (Rio Grande)

Dear Governor Hickenlooper and Executive Director Randall:

I write to notify you of the State of Colorado's role in authorizing and condoning the possible extirpation of a newly discovered population of Rio Grande chub in the Rio Grande near Monte Vista, Colorado. Crucially, I also ask that you have your agencies protect this imperiled fish by delaying, if not permanently reconsidering, the completion of this project until the harm to this newly discovered and ecologically anomalous population can be considered.

Prior to discovery of the Rio Grande chub in the Rio Grande in July of 2016, the State of Colorado authorized, funded and supported the McDonald Ditch Company Project to remove an existing dam, construct a new diversion dam, and construct a weir in the Rio Grande (Project). Specifically, the Colorado Water Conservation Board funded the Project, the Water Quality Control Division issued Permit No. COR03M879 (which is now expired), and most recently the Colorado Division of Water Resources threatened to issue an order to remove the dam under section Colorado Revised Statutes Section 37-92-502(7). As of the date of this letter, the new diversion dam is complete and the Ditch Company plans to remove the old dam and construct the weir in less than a week, beginning on Monday, November 28, 2016.

WildEarth Guardians is extremely concerned about the environmental impact of the dam removal and weir construction on the Rio Grande and the species that inhabit the area, especially the Rio Grande chub, where the work is planned. Since the Division issued its Permit in 2014, new information has surfaced to prove that the critically imperiled Rio Grande chub (*Gila Pandora*)—last found on the main stem of the Rio Grande **a half-century ago**—exists in the Rio Grande, and this newly discovered population is directly threatened by the work authorized in the Permit at issue. On July 29, 2016 and again on July 30, 2016, a fisherman caught and photographed Rio Grande chub in the Rio Grande between the bridge at County Road 5 North and the original McDonald diversion structure. This is the exact location in the Rio Grande where the Division authorized and the

Division Engineer threatened to order the Ditch Company to remove the old dam and construct a grade control weir structure.

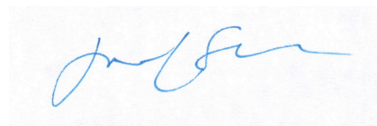
As background, the Rio Grande chub is native to the Rio Grande and is recognized as critically imperiled by several federal, state and local agencies. It is considered a “species of special concern” by the State of Colorado, a “sensitive species” by the U.S. Bureau of Land Management and the U.S. Forest Service, and “critically imperiled” by the Colorado Natural Heritage Program. In 2013, based on the status of the species and the continuing threats to its survival, we submitted a scientific petition to the U.S. Fish and Wildlife Service requesting listing the Rio Grande chub under the Endangered Species Act (ESA). On March 16, 2016, the Service found that the petition contained “substantial information” indicating that listing may be warranted. Guardians’ petition is attached for your reference and the link to the relevant 90-day finding¹ of the Service is included below.

Colorado law prohibits “any person” from taking “nongame wildlife deemed by the commission to be in need of management pursuant to this section.” Colorado Revised Statute Section 33-2-104(3); see also 2 Code Colo. Regs. § 406-1000(A) (Colorado Parks and Wildlife regulations prohibiting take of nongame wildlife). The Commission has designated the Rio Grande chub as a nongame fish under 2 Code of Colorado Regulations Section 406-1004(A)(1) and its take is therefore generally prohibited. Colorado Revised Statutes Section 33-2-102 further provides “the general assembly finds and declares that it is the policy of this state to manage all nongame wildlife . . . for human enjoyment and welfare, for scientific purposes, and to ensure their perpetuation as members of ecosystems.” In Colorado’s 2015 State Wildlife Action Plan, the Rio Grande chub is listed as a “Tier 1” species, defined as “the species which are truly of highest conservation priority in the state.” We do not believe that the State is upholding its duty to protect such imperiled species by continuing to approve and encourage the Project without first considering the impacts that it may have on this newly discovered and highly ecologically significant population of Rio Grande chub.

We understand from our other work with the State that it believes it is capable of managing imperiled species to prevent extinction and meet recovery objectives without the need to list the species under the Endangered Species Act. The Rio Grande chub is currently on its way to being listed by the Federal Government due to the failure of its range states to protect it. Therefore, we strongly encourage you take this opportunity to uphold your responsibility to the species as well as to fulfill your commitment to the citizens of Colorado to do everything in your power to ensure the survival and recovery of native species on the brink of extinction.

If you wish to discuss these matters further, please feel free to contact me at the phone or email address listed below.

Sincerely,



Jen Pelz
Wild Rivers Program Director

¹ <https://www.fws.gov/policy/library/2016/2016-05699.html>

(303) 884-2702

jpelz@wildearthguardians.org

cc: James Hart, McDonald Ditch Company
Craig W. Cotton, Division 3 Engineer, Division of Water Resources
Lillian Gonzalez, Permits Unit Manager, Water Quality Control Division
John Alves, Colorado Parks and Wildlife
Corey Kanuckle, U.S. Fish and Wildlife Service
Hildreth Cooper, Project Manager, U.S. Army Corps of Engineers
Rio Grande County Commissioners
Heather Dutton, Rio Grande Restoration Headwaters Project



November 22, 2016

Via Electronic Mail

Lillian Gonzalez, Environmental Protection Specialist
Colorado Department of Health and the Environment
lillian.gonzalez@state.co.us

RE: Colorado Discharge Permit No. COR03M879 (McDonald Ditch Co. Project)

Dear Ms. Gonzalez:

I write as a follow up to my voicemail yesterday and to notify you of our serious concerns related to the McDonald Ditch Company Project on the Rio Grande and request confirmation as to the status of the Permit (COR03M879). We believe that the Permit (COR03M879) expired by its own terms on October 15, 2015 and that the Permit **must** be re-evaluated before any additional work on the McDonald Ditch Company Project is commenced. Guardians requests that the Division order the halting of any continued work on the Project until the outstanding issues raised in this letter are resolved.

On September 20, 2014, the Water Quality Control Division issued Permit No. COR03M879 to the McDonald Ditch Company for the removal of an existing dam, the construction of a new diversion dam, and the installation of a weir grade control structure in the Rio Grande near Monte Vista (Project). While the construction of the new dam is complete, the Ditch Company is not finished with the Project and plans to begin removing the existing dam and constructing the weir in less than a week, on Monday, November 28, 2016.

WildEarth Guardians is extremely concerned about the environmental impact of the remainder of the Project on the Rio Grande and the species that inhabit the area where the work is planned, especially the Rio Grande chub. Since you issued the Permit in 2014, new information has surfaced to prove that the critically imperiled Rio Grande chub (*Gila Pandora*)—last found on the main stem of the Rio Grande **a half-century ago**—exists in the Rio Grande and this newly discovered population is directly threatened by the work you authorized in the Permit at issue. On July 29, 2016 and again on July 30, 2016, a fisherman caught and photographed Rio Grande chub in the Rio Grande between the bridge at County Road 5 North and the original McDonald diversion structure. This is the exact location in the Rio Grande where you have authorized the Ditch Company to remove the old dam and construct a grade control weir structure.

As background, the Rio Grande chub is native to the Rio Grande and is recognized as critically imperiled by several federal, state and local agencies. It is considered a “species of special concern” by the State of Colorado, a “sensitive species” by the U.S. Bureau of Land Management and the U.S.

Forest Service, and “critically imperiled” by the Colorado Natural Heritage Program. In 2013, based on the status of the species and the continuing threats to its survival, we submitted a scientific petition to the U.S. Fish and Wildlife Service requesting listing the Rio Grande chub under the Endangered Species Act (ESA). On March 16, 2016, the Service found that the petition contained “substantial information” indicating that listing may be warranted. Guardians’ petition is attached for your reference and the link to the relevant 90-day finding¹ of the Service is included below.

As you may well know, Colorado law prohibits “any person” from taking “nongame wildlife deemed by the commission to be in need of management pursuant to this section.” Colorado Revised Statute Section 33-2-104(3); see also 2 Code Colo. Regs. § 406-1000(A) (Colorado Parks and Wildlife regulations prohibiting take of nongame wildlife). The Commission has designated the Rio Grande chub as a nongame fish under 2 Code of Colorado Regulations Section 406-1004(A)(1) and its take is therefore generally prohibited. Colorado Revised Statutes Section 33-2-102 further provides “the general assembly finds and declares that it is the policy of this state to manage all nongame wildlife . . . for human enjoyment and welfare, for scientific purposes, and to ensure their perpetuation as members of ecosystems.” In Colorado’s 2015 State Wildlife Action Plan, the Rio Grande chub is listed as a “Tier 1” species, defined as “the species which are truly of highest conservation priority in the state.” As a result, the Division should halt all progress on the Project until the issues related to the Rio Grande chub are resolved.

As mentioned above, Permit No. COR03M879 required a “Construction Start Date” of October 15, 2014 and a “Final Stabilization Date” of October 15, 2015. The Ditch Company has failed to meet the deadline of October 15, 2015 for “Final Stabilization” of the Project as defined in the Permit. As a result, we ask that your office notify the Ditch Company that it will be in violation of state law if it proceeds with the remainder of its construction without getting an extension of Permit No. COR03M879. We also ask that you notify the U.S. Army Corps of Engineers that its reliance on the State’s 401 certification for the Project is no longer warranted given the expiration of the Permit and request that the Corps likewise revoke its 404 permit until additional investigation by both agencies occurs.

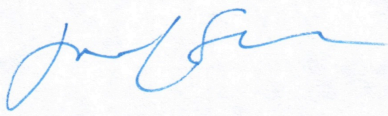
Further, we believe that because the Permit is expired and because there is significant new information regarding the aquatic life in that reach, the Division should reevaluate the criteria for issuing the Permit set forth in 5 Code of Colorado Regulations Section 1002-82.5 and reconsider its decision to approve the Project. The Rio Grande in that reach is classified as supporting “cold water aquatic life.” Specifically, this reach is thought to be “capable of sustaining a wide variety of cold water biota, including sensitive species” and “[w]aters shall be considered capable of sustaining such biota where physical habitat, water flows or levels, and abundance and diversity of species.”² CITE? Based on the presence of a critically imperiled species (not found on the Rio Grande for over 50 years), we request that the Division swiftly utilize its authority to ensure that the newly discovered population of Rio Grande chub near the Project site are not destroyed along with this habitat created by the existing structures.

¹ <https://www.fws.gov/policy/library/2016/2016-05699.html>

² Aquatic Life Use Attainment: *Methodology to Determine Use Attainment for Rivers and Streams*, Policy Statement 10-1, Colorado Department of Health and Environment, Water Quality Control Commission, available at: <https://www.colorado.gov/pacific/sites/default/files/Policy%2010-1completeprint.pdf>

If you believe any of the above information is incorrect or if you wish to discuss these matters further, please feel free to contact me at the phone or email address listed below.

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(303) 884-2702
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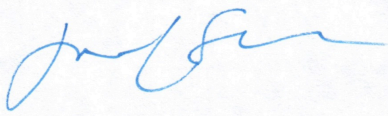
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