



November 24, 2015

Via Certified Mail and Electronic Mail

Dan Jiron, Regional Forester
US Forest Service, Rocky Mountain Region 2
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RE: Objections to Rio Grande Reservoir Land Exchange Draft Decision Notice and Finding of No Significant Impact, Divide Ranger District, Rio Grande National Forest

Dear Regional Forester Jiron:

Objectors WildEarth Guardians (“Guardians”), Lead Objector, and Western Lands Project file this objection to the Draft Decision Notice and Finding of No Significant Impact (“Draft DN/FONSI”) for the Rio Grande Reservoir Land Exchange Project (“Project”). Notice of the Environmental Assessment (“EA”) and Draft DN/FONSI was published in the Valley Courier on October 14, 2015. Guardians participated in the scoping process for the Project by filing comments on December 3, 2014. Western Lands Project filed scoping comments on December 1, 2014. Objectors scoping comments are included as Attachment A, for your reference.

The Draft DN/FONSI recommends the implementation of Alternative 2, the proposed action involving the exchange of federal land for non-federal lands and concludes that the proposed action “will have no negative impacts to water resources, special status species, or minerals.” Draft DN/FONSI at 1 and 5. The analysis provided in the EA is insufficient to support such a conclusion and mitigation needs to be considered in order to address the environmental consequences of the proposed action.

Objections:

Issue #1—Rehabilitation of the Rio Grande Reservoir will negatively impact quality and quantity of river flows, fish and wildlife and wetlands.

The purpose and need of the Project, as described in the Rio Grande Reservoir Land Exchange EA, “is to provide SLVID [San Luis Valley Irrigation District (“District”)] long-term access to complete *current and future rehabilitation, operation, and maintenance of the Rio*

Grande Reservoir dam in the manner most in the public interest.”¹ EA at 4 (emphasis added). “The exchange will facilitate [the District’s] plans to complete rehabilitation of the dam on Rio Grande Reservoir.” EA at 11. The impetus for the repairs is to improve dam safety, avoid curtailment of flows to irrigators, and combat the “extremely high” seepage through the left abutment of the dam (2,500 gallons per minute). See DiNatale, Kelly, et al., *Multi-use of a Rehabilitated Reservoir for Improved River Administration, Flood Control, Agricultural, Domestic, Environmental and Recreational Benefits*, Managing our Water Retention Systems, at 860 (April 20-24, 2009).

The EA fails to evaluate the environmental consequences of the proposed action. Specifically, the EA fails to analyze the indirect and cumulative environmental effects associated with the District’s dam repairs on water quality and quantity; threatened, endangered, Region 2 sensitive species, management indicator species, and migratory birds; and wetlands and floodplains.

A. *Water quantity downstream of the Rio Grande Reservoir will be reduced as seepage through the dam is reduced or eliminated.*

Indirect Effects

Rio Grande Reservoir provides storage primarily for irrigation in the District, but also for augmentation of well pumping depletions and meeting fish and wildlife needs. The amount of water released from the dam can be roughly estimated by the flow at the Thirty-mile gauge. The amount of water measured at this gauge, however, is also influenced by seepage of water through the dam. EA at 25. It is estimated that 0-6 cubic feet per second (2500 gallons per minute) of water seeps through the dam into the river channel below. *Id.* If the dam leaked at this rate every day for a year, seepage alone would contribute over 4,000 acre feet of water to the river.

Lee Dobson—former hydrologist for the Rio Grande National Forest—stated in a memo dated August 14, 2008 to Dan Dallas regarding the proposal for dam and outlet work repairs that “[t]here are no bypass flow conditions for the [Rio Grande] reservoir. There has been sufficient leakage around the dam that the river never dries up below the dam.” He goes on to say,

If dam repairs successfully eliminate the leaks, such that the Rio Grande dries up below the dam, we would have a new condition to evaluate. The NEPA done for a permit to allow disturbances associated with maintenance and repair work would probably have to consider that change in conduction. I’m not sure we would get away with acknowledging that change in conditions (stream dewatering) without mitigation to provide for fish habitat and stream health.

See Attachment B—Comments submitted by Les Dobson to Dan Dallas regarding Rio Grande Reservoir Proposal for dam and outlet work repairs dated August 14, 2008.

¹ “With or without an enlargement, the Reservoir’s outlet works and spillway, and amelioration of seepage primarily along the left (northern) abutment were necessary to properly rehabilitate the Reservoir.” DiNatale Water Consultants, Inc., et. al, *Rio Grande Reservoir Multi-Use Study, Phase 3 Report* at 3 (December 8, 2011).

While the EA addresses the concern of future curtailment of water users based on failure to rehabilitate the dam, the EA does not likewise analyze the impact of eliminating seepage on the reach of the Rio Grande below the dam on water quantity and quality, fish and wildlife effects, or on wetlands. EA at 26. The EA fails to assess how much water seeps through the dam, the timing of that seepage and what environmental values downstream would be impacted. Further, the Forest Service fails to identify the mitigation needed to avoid such impacts to downstream reaches of the Rio Grande or provide any assurances that the river below the dams will not be dewatered.

Cumulative Effects

The EA does not analyze the cumulative impacts of “other past, present and reasonably foreseeable actions in the vicinity of the proposed action.” 40 C.F.R. §1508.7. Repairs, similar to those planned for Rio Grande Reservoir, are proposed at Continental and Santa Maria Reservoirs upstream. See Attachment C, *Legal Notice re: Continental Dam and Santa Maria Canal Rehabilitation Project*. The rehabilitation of Beaver Park Reservoir also commenced earlier this year. See Attachment D, *Legal Notice re: Beaver Park Dam Rehabilitation Project*.

The purpose of the Continental, Santa Maria and Beaver Park projects is to update the dam infrastructure and reduce seepage losses. These rehabilitation projects will all collectively reduce the amount of water that is available downstream. The rivers below each of these reservoirs may be dewatered if seepage is eliminated completely due to dam rehabilitation. This is particularly problematic during the non-irrigation season when there are no releases from the reservoirs. The cumulative impacts of the loss of seepage from these three upstream reservoirs in addition to that from Rio Grande Reservoir must be evaluated as a part of the cumulative effects of reservoir rehabilitation of the dam at the Rio Grande Reservoir. While the impact of reduction of seepage from one reservoir may be “individually minor,” the four actions are collectively significant on the water quantity and quality of the Rio Grande. 40 C.F.R. §1508.7.

Further, both Beaver Park and Continental Reservoirs are not and have not been storing water at their full capacities. Due to dam safety issues, the capacity of Continental Reservoir has been constrained from 27,000 acre feet to only storing 15,000 acre feet over the past several decades. Similarly, after a sinkhole recently appeared behind Beaver Park Reservoir, the reservoir can currently store only about half its capacity. Rehabilitation of these two reservoirs will allow additional upstream storage in the basin. That—along with the elimination or reduction in seepage losses due to reservoir repairs—will reduce the quantity of water in the Rio Grande and therefore harm river flows, fish and wildlife and wetlands downstream of the dam.

B. Fish and wildlife downstream of the Rio Grande Reservoir may be harmed by reduced flows in the river when seepage from the dam is eliminated or reduced.

Indirect Effects

The EA recognizes that “[d]am rehabilitation also has the potential to decrease water quality,” but does not likewise recognize the repairs will reduce water quantity below the dam

due to loss of seepage from the reservoir. EA at 38. In fact, the EA writes off the reach of the Rio Grande below the dam, stating:

SLVID releases no water from the dam between November and April of each year, as allowed by their senior water rights. No notable springs or tributaries offset the impact of water storage in the subject river reach. As a result, it is unlikely that the subject river reach could support meaningful populations of fish or other aquatic species during this period due to the loss of habitat associated with low water levels and the formation of ice.

EA at 37. The EA further concludes “[a]s the river immediately below the dam is presumed to not provide any crucial aquatic habitat, the impacts of release fluctuations is not expected to have more than a low short term impact on downstream habitat for fish and other aquatic species.” EA at 38. The conclusions reached, however, do not even acknowledge the existence of flows due to seepage or the impacts of rehabilitation on those flows. The EA again deduces, based on no analysis of the reach below the dam, “the river immediately below the dam *is presumed* to not provide any crucial aquatic habitat.” EA at 38 (emphasis added).

Cumulative Effects

The EA fails to analyze the cumulative impacts of loss of seepage from four reservoirs in the basin on fish and wildlife, as described in paragraph A, above. Such dam rehabilitation throughout the basin—and the resulting elimination of seepage and increase in upstream storage—will impact flows downstream of the Rio Grande Reservoir negatively impacting fish and wildlife.

C. Wetlands adjacent to or downstream of Rio Grande Reservoir may be dewatered when seepage from the dam is eliminated or reduced as the result of reservoir rehabilitation.

Indirect Effects

The U.S. Army Corps of Engineers’ 1987 Wetland Delineation Manual identified non-federal Parcel A-1 to include 1.26 acres of wetland located in a depression at the confluence of two natural stormwater drainages. This wetland is located directly below the Rio Grande Reservoir and is one of the parcels that will be obtained by the Forest Service upon execution of the land exchange. The EA does not address the consequences of rehabilitating the dam on water quantity downstream of the dam and likewise does not consider any impacts to the wetlands identified on non-federal parcel A-1. Instead, the EA concludes that “[n]o wetlands would be physically impacted as a result of the land transaction or SLVID dam rehabilitation activities.” EA at 41. However, it appears from the location of the wetlands and the fact that seepage downstream of the dam will be reduced as a result of the dam rehabilitations that wetlands would be impacted by this project. The Forest Service is responsible under section 1 of Executive Order 11990 to “minimize the destruction, loss or degradation of wetlands, and to preserve and enhance the natural and beneficial values of wetlands in carrying out the agency’s responsibilities.” The Forest Service must evaluate the significance of the reduction in flows downstream of the reservoir and ensure that it does not impact the wetlands it acquired through the land exchange.

Cumulative Effects

The EA also concludes “no cumulative impacts are anticipated.” EA at 41. The EA fails to analyze the cumulative impacts of loss of seepage from four reservoirs in the basin and the increase in upstream storage on wetlands, as discussed in paragraph A, above. Such dam rehabilitation throughout the basin—and the resulting elimination of seepage and increase in upstream storage—will impact flows downstream of the Rio Grande Reservoir negatively impacting wetlands acquired by the Forest Service in the exchange.

Issue #2—Water Quality effects analysis is deferred until the Corps conducts its own NEPA analysis upon issuing a Clean Water Act Permit under Section 404.

The EA recognizes that “[d]am rehabilitation activities subsequent to the land transaction would temporarily impact water quality below the dam site,” but fails to recognize any permanent impacts to water quality. EA at 26. Instead of analyzing the temporary and permanent decrease in water quality—both during construction and in the long-term—the Forest Service kicks the can down the road and relies on the review by the U.S. Army Corps of Engineers under the Clean Water Act (“CWA”). EA at 27. The EA concludes that “[c]ompliance with the permit would require avoidance and minimization of impacts to aquatic resources, including water quality.” EA at 27. Further, the EA provides “[c]ompliance with section 404 and 402 of the Clean Water Act would ensure that there would be no more than a minimal impact to aquatic species below the dam.” EA at 38. Based on this segmented analysis, the Forest Service concludes:

Due to the phased nature of construction, the temporary nature of any impacts, and the implementation of practices and controls to reduce or eliminate water quality impacts, as per the required compliance with the Clean Water Act, impacts to water quality are expected to be low to moderate.

EA at 27.

In defining the scope of analysis under NEPA, agencies “shall consider . . . connected actions.” 40 C.F.R. § 1508.25(a)(1). The purpose of requiring consideration of connected actions is to “prevent agencies from minimizing the potential environmental consequences of a proposed action (and thus short-circuiting NEPA review) by segmenting or isolating an individual action that, by itself, may not have a significant environmental impact.” *Citizens’ Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1028 (10th Cir. 2002). Instead of analyzing the effects of the proposed action in one environmental analysis and determining the significance of those effects or steps to mitigate the effects, the Forest Service artificially segments its environmental review for the land exchange and reservoir rehabilitation from the permitting required under the CWA.

Issue #3—Future reoperation of the dam is related to the proposed action and its effects must be analyzed simultaneously.

The District “also coordinates operation of the [Rio Grande] reservoir to assist with other water uses including river administration, compact compliance, and flood control.” EA at 3. However, concerns regarding future “reoperation” of the dam were dismissed in the EA as being independent of the proposed action. The EA provides that “[w]hile dam reoperation was investigated concurrently with the feasibility study for rehabilitation, the reoperation of the dam by altering releases to meet varying user demands is independent of and not contingent upon either the land exchange or dam rehabilitation.” EA at 9.

Under 40 C.F.R. §1508.25(a), an agency—in determining the scope of the required NEPA analysis—must consider not only the proposed action, but also three types of related actions: “connected actions,” “similar actions,” and “cumulative actions.” Dam operation, if not part of the existing action, is definitely a reasonably foreseeable action that is connected to the described proposal. Thus, as part of any NEPA analysis of the proposed land exchange, the Forest Service must consider in its assessment the inevitability of the reservoir rehabilitation and the necessity of dam reoperation.

Rehabilitation of the dam is dependent upon the District obtaining the necessary funding. The rehabilitation costs of the dam are estimated “at approximately \$22-\$26 million with the higher cost if hydropower is included.” See DiNatale Water Consultants, Inc., et. al, *Rio Grande Reservoir Multi-Use Study, Phase 3 Report* at 4 (December 8, 2011). The District has a limited ability to pay for such improvements. In order to obtain the funding for rehabilitation, the Board of Directors has approved the sale or long-term lease of storage space in the reservoir to other entities. Bliss, DiNatale, et al., *Challenges and Opportunities in Rehabilitating and Enlarging a 100-Year-Old On-Channel Reservoir*, Managing our Water Retention Systems, at 856 (April 20-24, 2009); Statewide Water Supply Initiative (SWSI). Such sale or lease of storage space will require reoperation of the dam in order to accommodate the storage and release of such water. Thus, the effects of the exchange, rehabilitation and reoperation of the reservoir are all related actions—interdependent on one another rather than independent—and therefore the effects should all be analyzed together in the same environmental assessment. The EA conducted for the Project does not analyze the effects of the exchange, reservoir rehabilitation and reservoir reoperation.

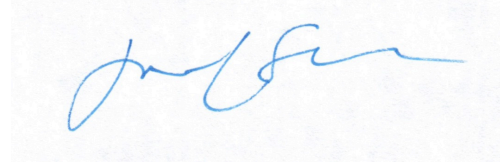
Issue #4—Rio Grande Cooperative Project provides no concrete assurances that flows, fish and wildlife and wetlands will be maintained below the Rio Grande Reservoir.

The Rio Grande Cooperative Project (“Cooperative Project”) is “a public/private project that would include coordinating operation of the publicly owned and operated Beaver Park Reservoir with that of Rio Grande Reservoir” EA at 28. The purpose of this project is to “improve timing of water deliveries in the basin that will benefit all basin water users.” EA at 28. While this Cooperative Project could potentially help mitigate the environmental effects of the Project, the Forest Service’s refusal to analyze the effects of the land exchange, reservoir rehabilitation, and reservoir reoperations collectively undercuts the ability to incorporate this Cooperative Project as part of the solution. As described, “[i]t is not possible to accurately

project how CPW would release its water out of Rio Grande Reservoir” and any beneficial or detrimental impacts to the environment. EA at 28.

Guardians and Western Lands Project appreciate your consideration of our objections to the Draft DN/FONSI for the Rio Grande Reservoir Land Exchange. We look forward to receiving your written responses to our objections and are interested in meeting with you to discuss the resolution of these matters. Please contact us at the email or phone number below.

Sincerely,



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Christopher Krupp
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Western Lands Project
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December 3, 2014

Via Electronic Mail

Kenna Pacheco
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RE: WildEarth Guardians' Comments on the Scoping Notice for the Rio Grande Reservoir Land Exchange Proposal (File Code: 5430-General)

Dear Ms. Pacheco:

WildEarth Guardians ("Guardians") submits this letter to provide the U.S.D.A. Forest Service, Rio Grande National Forest Office ("Forest Service") with comments on the scoping notice for the proposed *Rio Grande Reservoir Land Exchange, File Code: 5430-General dated October 17, 2014* ("Land Exchange"). The Forest Service's scoping notice initiates the environmental review process under the National Environmental Policy Act ("NEPA") for the Land Exchange. The Forest Service published the scoping notice for the Land Exchange in the Valley Courier on October 23, 2014; Guardians' comments are thus timely filed within 45 days of the date of publication.

WildEarth Guardians is a non-profit public interest environmental advocacy organization working to protect and restore the wildlife, wild places, wild rivers, and health of the American West. For the past two decades, Guardians has worked to secure flows for the iconic Rio Grande to protect the fish, wildlife, and plants that depend on the river and its riparian ecosystems for their survival. Upon receiving notice of the Rio Grande Reservoir Land Exchange, Guardians believes such an exchange—and the legal and political consequences resulting therefrom—will likely impact the interests of Guardians' members by reducing flows in the Rio Grande, threatening the survival of fish, wildlife and plants in the Basin, and limiting any public input or review of future water storage and development projects involving Rio Grande Reservoir.

In the proposed Land Exchange, the Forest Service seeks to facilitate the exchange of 6 acres of Rio Grande National Forest Service lands for 8 acres of private land owned by the San Luis Valley Irrigation District ("District"). The federal and non-federal lands proposed for exchange are located in the vicinity of the Rio Grande Reservoir in Hinsdale County, Colorado. The Land Exchange also includes the District's donation of 24 acres of land located in the Weminuche Wilderness to the United States.

The Forest Service describes the purpose of the Land Exchange in its scoping notice as follows:

The purpose of the proposed exchange is to facilitate SLVID's efforts to address dam safety through repair of the existing outlet works facility, dam face, and spillway for the Rio Grande Reservoir. The exchange would also reduce Forest Service administrative costs and improve management efficiencies by having facilities associated with the dam located off National Forest System lands.

U.S. Forest Service, *Forest Service Seeks Input on Rio Grande Reservoir Land Exchange Proposal*, (Oct. 21, 2014) available at <http://www.fs.usda.gov/detail/riogrande/news-events/?cid=STELPRD3820567>. Further, the Forest Service highlights the benefits of the Land Exchange as: (1) consolidating land ownership to create more logical boundaries and enhance contiguity between federal and non-federal lands; (2) eliminating non-federal inholdings within the Weminuche Wilderness Area; and (3) protecting the Weminuche Trail.

While Guardians generally supports consolidating land ownership, eliminating non-federal inholdings, and protecting trails within the Weminuche Wilderness Area, we remain very concerned that conveying federal land surrounding the Rio Grande Reservoir to a private entity provides the District with the opportunity to bypass laws and regulations that serve to protect the environment. Specifically, Guardians believes that once the exchange is approved the District will proceed to enlarge and expand storage in the Rio Grande Reservoir to the further detriment of the Rio Grande and the fish, wildlife, and plants that depend upon it for survival. Guardians' concerns regarding the proposed Land Exchange are detailed below:

1. *The Purpose of the Land Exchange is Impermissibly Narrow, Preventing an Adequate Environmental Analysis under NEPA.*

The Forest Service's stated purpose of the Land Exchange narrowly construes the action as facilitating the District's efforts to repair Rio Grande Reservoir to address dam safety issues. While dam maintenance may be the initial concern, the long-term goal is to expand Rio Grande Reservoir. In fact, the District and the State of Colorado (through the Colorado Water Conservation Board ("CWCB")) have already invested significant resources to study an expansion of the Reservoir. The District conducted a preliminary design and feasibility study in 2008 "to examine rehabilitation and enlargement alternatives, develop potential enlargement configurations, provide stakeholder input, and create a preliminary design to examine geotechnical aspects of rehabilitation and enlargement and environmental impacts." See DiNatale, Kelly, et al., *Multi-use of a Rehabilitated Reservoir for Improved River Administration, Flood Control, Agricultural, Domestic, Environmental and Recreational Benefits*, Managing our Water Retention Systems, at 860 (April 20-24, 2009). Further, the District investigated the hydrologic characteristics of the Basin downstream of the Reservoir to determine the potential benefits of future reoperation. *Id.* The stated purpose does not mention that the Land Exchange would help facilitate the expansion of Rio Grande Reservoir.

As such, the stated purpose of the Land Exchange—to address dam safety issues while reducing Forest Service administrative costs and improving management efficiencies—is too

narrow to allow for a proper alternatives analysis under NEPA. NEPA requires an analysis of the environmental impact of all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). Such an analysis must “[r]igorously explore and objectively evaluate all reasonable alternatives” to that action. 40 C.F.R. § 1502.14(a). If the Forest Service proceeds with its environmental analysis based on an impermissibly narrow purpose, then the approval could result in a NEPA analysis that does not adequately consider alternatives, resulting in a potential NEPA violation. *See Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 623 F.3d 633 (9th Cir. 2010). It is from an agency’s statement of purpose that the agency and the public may begin to determine whether the agency has fully analyzed the possible environmental impacts of the action and reviewed a reasonable range of alternatives to that action. *See Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1261 (E.D. Cal. 2006). Guardians is concerned that, with too narrow a purpose, the Forest Service will likely fail to adequately consider alternatives to the Land Exchange, thus violating NEPA.

For example, if the environmental analysis of the Land Exchange does not contemplate the environmental impacts of the exchange based on the potential expansion of Rio Grande Reservoir, then once the Land Exchange is approved the opportunity to evaluate and reduce the impacts of such action on the environment—through the NEPA process—will be foreclosed. The District admitted in correspondence with the CWCB that expansion of the Reservoir would potentially require a special use permit from the Forest Service, which would trigger environmental review under NEPA. *See Application Addendum, Response to Issue No. 2.* However, if the Forest Service relinquishes its interest in the land surrounding the Reservoir, that requirement and the subsequent environmental protections would dissolve. Therefore, under the circumstances, the Land Exchange would completely change the legal landscape, including the public input available on any modifications in the size or storage of the Reservoir, and the requirement to evaluate and ensure the environmental impacts are assessed and mitigated.

In order to fully understand and evaluate the potential environmental impacts of the proposed Land Exchange, the purpose stated by the Forest Service must be expanded to include the potential future enlargement of the Reservoir. Under 40 C.F.R. §1508.25(a), an agency—in determining the scope of the required NEPA analysis—must consider not only the proposed action, but also three types of related actions: “connected actions,” “similar actions,” and “cumulative actions.” Expansion of the Rio Grande Reservoir, if not part of the existing action, is definitely a reasonably foreseeable action that is connected to the described proposal. Thus, as part of any NEPA analysis of the proposed Land Exchange, the Forest Service must consider in its assessment the inevitability of the reservoir enlargement and the impact of such action on flows in the Rio Grande and on listed species downstream (e.g. Southwestern willow flycatcher and the Yellow-billed cuckoo).

2. *The Land Exchange is not in the Public Interest as Required by FLPMA.*

The Land Exchange is not in the public interest as required for compliance with the Federal Land Policy and Management Act (“FLPMA”). Under FLPMA, the Forest Service must determine that “the public interest will be well served” by a land exchange before approving such an exchange. 43 U.S.C. § 1716(a); see also 43 C.F.R. § 2200.0-6(b). This determination “shall give full consideration to better Federal land management and the needs of State and local

people, including needs for lands for the economy, community expansion, recreation areas . . . and fish and wildlife.” 43 U.S.C. § 1716(a). A determination that an exchange serves the public interest must be based, in part, on a finding that “[t]he intended use of the conveyed Federal lands will not . . . significantly conflict with established management objectives on adjacent Federal lands.” 43 C.F.R. § 2200.0-6(b). FLPMA further requires that this determination and the supporting rationale be made part of the administrative record. *Id.*

The Land Exchange is contrary to the public interest. First, it is not in the public interest to take a decision that impacts public resources out of the realm of a public notice and comment process and leave the decision up to a private entity. The Land Exchange seeks to do exactly that by removing any trigger for the federal environmental safety net provided by NEPA and the Endangered Species Act (“ESA”) and placing any decisions impacting the environment entirely in private hands. Second, the Land Exchange would effectively limit any public input or review of future water storage, management, and development projects involving the Rio Grande Reservoir. This is significant because water storage in this on-channel headwater reservoir impacts flows in the Rio Grande downstream and may dictate the fate of fish, wildlife, and plants in the Upper Rio Grande Basin. Third, the Land Exchange’s resulting downstream environmental impacts from any modification or repair will likely impact recreation areas, the economy, and fish and wildlife, including species listed under the ESA. For these reasons, the Forest Service cannot justify with “full consideration” that the Land Exchange is within the public interest and, therefore, the Land Exchange does not meet the requirements of FLPMA.

3. *The Land Exchange May Harm Endangered Species on the Rio Grande.*

The San Luis Valley (“Valley”) provides a home to many unique species that live in riparian communities along the Rio Grande, Conejos River, and smaller tributaries. ERO Resources Corporation, San Luis Valley Regional Habitat Conservation Plan, at 1 (Oct. 2012). Two such species in the Valley, the Southwestern willow flycatcher (*Empidonax trailii extimus*) and the Yellow-billed cuckoo (*Coccyzus americanus*) are listed as endangered under the ESA. *Id.* While section 7(a)(2) of the ESA requires all federal agencies “to insure that actions authorized, funded or carried out by them do not jeopardize the continued existence” of an endangered species or “result in the destruction or modification of habitat of such species,” there is no similar consultation requirement for the actions of private parties. 16 U.S.C. § 1536(a)(2). Thus, the proposed Land Exchange would act to circumvent the public environmental review process that serves to ensure protection of listed species and the habitats upon which they depend.

Any changes to the reservoir, even if the reservoir is only repaired, will potentially impact how and when water is delivered downstream. While safety may be the primary reason for repairing the reservoir and dam, repairs related to dam safety would also improve storage and retention by fixing problems with water loss. The “Rio Grande Reservoir has some serious dam safety and operational issues that must be addressed if it is to continue as a fully functioning Reservoir;” however, “[t]he key challenges are the high rate of seepage, malfunctioning outlet works, inadequate spillway, potentially unstable surrounding geology and the owner’s ability to pay for rehabilitation.” Bliss, DiNatale, et al., *Challenges and Opportunities in Rehabilitating and Enlarging a 100-Year-Old On-Channel Reservoir*, Managing our Water Retention Systems,

at 847 (April 20-24, 2009). Furthermore, because the District is “contemplating selling storage space in the Reservoir to pay for the rehabilitation,” it would “dramatically change operations at the Reservoir, maintaining water levels well above historical use.” *Id.* Any repairs to the dam and reservoir preventing water loss could have downstream environmental consequences that would not be analyzed if the Land Exchange occurs.

Rehabilitating the dam and reservoir would curtail seepage, which has been a problem since dam construction. “Seepage through the left abutment is significant (>2500 [gallons per minute]) when the reservoir stage is high.” *Id.* at 845. Fixing seepage problems would prevent water loss and facilitate water storage and retention efficiency, causing lower flows downstream of the dam. Rehabilitation could also fix the undersized spillway structure, which is not sufficient to pass the inflow design flood within the existing spillway channel. *Id.* at 851. The spillway overtops under peak rainfall conditions, when significant scour, erosion, and damage to the spillway chute dam result. *Id.* However, if the significant seepage and overtopping problems are fixed, the timing and volume of river flows would likely change.

Furthermore, the issue of funding the dam and reservoir repairs may ultimately result in selling storage space in the Reservoir to pay for the rehabilitation. Enlarging the Rio Grande Reservoir could modify downstream flows in the Rio Grande, impacting listed species and their habitat. An enlargement also threatens loss of wetlands that could possibly harm the river’s riparian and aquatic habitat, as well as the threatened and endangered fish and wildlife species that rely on that habitat.¹

In summary, Guardians opposes any federal land exchange with the underlying purpose or having the effect of bypassing laws or regulations designed to provide public input and environmental review and protection. The Land Exchange has the effect of circumventing an environmental analysis for actions to rehabilitate or enlarge the Rio Grande Reservoir. Guardians believes that the Forest Service must rework its statement regarding the purpose for the Land Exchange to more accurately reflect the full scope of the proposal. Further, the Forest Service must include a full analysis of the direct, indirect, reasonably foreseeable and cumulative impacts of the proposed Land Exchange including the potential expansion of Rio Grande Reservoir and its environmental impacts. Because the Land Exchange will effectively cut the public out of the decision making process for current and future modifications of the Reservoir, and because the proposal will have downstream environmental impacts that will remain unchecked, the Land Exchange is contrary to the public interest. Such an exchange cannot be approved in compliance with the FLPMA.

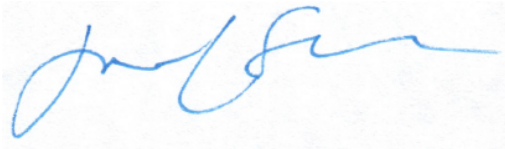
We look forward to participating in the environmental review process under NEPA going forward. We request that the Forest Service provide Guardians with notice of any environmental analysis that occurs (e.g. environmental assessment and/or environmental impact statement).

¹ The District reported that while it may not impact fens areas downstream of the dam site or other potential fens areas, an enlargement may inundate wetlands surrounding the reservoir. Thus, it anticipated that the U.S. Army Corps of Engineers would require the District to prepare a wetlands mitigation plan to compensate for inundated areas. (Application Addendum, Response to Issue No. 8).

Further, pursuant to 40 C.F.R. 1506.6(b)(1), Guardians requests that the Forest Service notify us via email if a finding of no significant impact or record of decision is issued.

We appreciate you considering our scoping comments on the proposed Land Exchange. We strongly encourage the Forest Service to take a “hard look” at the proposed Land Exchanged and its potential environmental consequences now and in the future.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Jen Pelz', is centered on the page. The signature is fluid and cursive.

Jen Pelz
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(303) 884-2702



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Kenna Pacheco
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Attn: Rio Grande Reservoir Land Exchange

December 1, 2014

Dear Kenna Pacheco:

The Western Lands Project is a non-profit, membership organization that conducts research, outreach and advocacy for reform in federal lands policy. We are writing today to comment on the scope of the environmental impacts analysis that will be prepared for the proposed Rio Grande Reservoir land exchange.

At first glance, this proposal is not controversial. It seemingly makes sense for both parties to clean up the landline boundaries around the Rio Grande Reservoir to enable more efficient land management. And eliminating non-Federal inholdings within Wilderness Areas is typically prudent.

Here, however, the actual benefits are likely to be insignificant while the harms to the environment could be substantial. Cleaning up the ownership boundaries around the reservoir does not provide considerable benefit when the other party to the exchange is a government entity that is not likely to unintentionally trespass. The Rio Grande NF probably has not had to devote any resources to managing the current boundary between the Forest and the San Luis Valley Irrigation District. Similarly, there's not likely to be any major benefit from acquiring the inholding when the inholding is held by a government body and is on the boundary of the designated Wilderness. The SLVID would not develop the parcel in a way that would impact the Weminuche Wilderness Area. The inholding's location would not require any road construction. More important to any benefits analysis, the proposed trade would also leave a small-inholding immediately to the west of donated parcel D2. That remaining inholding would largely temper any benefit of acquiring the other inholdings. In sum, the public benefits of the proposal are significant only on paper.

In contrast, the proposed change in landownership could substantially impact the Forest Service's ability manage natural resources, including protecting threatened and

endangered species. Completing the proposed exchange would give the SLVID ownership of all the land on which the Reservoir's dam sits. Without any federal connection to the dam (our understanding is that the dam currently sits on Forest land), federal agencies' ability to manage wildlife and other natural resources through laws such as the National Environmental Policy Act and the Endangered Species Act would be limited, at best. State natural resources laws are often less stringent than their federal counterparts, so the proposed exchange may have negative impacts on resources even though SLVID is complying with all relevant law.

The environmental assessment must address these issues. Please include a discussion of whether the benefits of the proposal will be tangible or mostly theoretical: that is, will the change in ownership boundaries result in any actual measurable management efficiencies? And, given the inholding that would remain post-exchange and the unlikelihood that the SLVID would ever develop the offered parcels, would the proposal have any tangible impact on the wilderness attributes of the Weminuche Wilderness Area? The EA should also discuss the reach of relevant federal laws, such as NEPA and the ESA, if the exchange were completed. A discussion of applicable Colorado law should also be included.

Thank you for the opportunity to comment on the scope of the environmental analysis for the proposed Rio Grande Reservoir land exchange. Western Lands Project wishes to receive all future public documents pertaining to this proposal.

Sincerely,

A handwritten signature in black ink that reads "Christopher J. Krupp". The signature is written in a cursive, slightly slanted style.

Christopher J. Krupp, Staff Attorney



USDA Forest Service
Rio Grande National Forest
<http://www.fs.fed.us/r2/riogrande>

1803 West Hwy 160
Monte Vista, CO 81144
719-852-5941 TTY 852-6271



USDI Bureau of Land Management
San Luis Valley Center

File Code: 2520-2/2540
Route To: (OGC)

Date: September 23, 2008

Subject: Rio Grande Reservoir – Legal Status and Analysis

To: Randy Karstaedt Director of Physical Resource, Region 2

The purpose of this letter is to transmit to you three documents. Upon their receipt, I request that the appropriate personnel on your staff, as well as the Office of General Counsel formally review and provide comment on them back to me for the purpose of accommodating our local interactions here with the San Luis Valley Irrigation District.

Provided with this cover letter are the following three documents:

1. Rio Grande Reservoir – Multi-Use Enlargement Study Update dated August, 2008. This is the briefing document provided to this office and related partners associated with the planned work on Rio Grande Reservoir.
2. Letter from Whiteing & Smith, Attorneys for the San Luis Valley Irrigation District. This letter was requested by me during our interactions with the District. It outlines the District's legal analysis of its position in regards to 1891 Rights Of Way (ROW) issues, and the Federal Reserved Rights Decree in 2000. This is the key document I am requesting be reviewed and commented on by your staff and OGC.
3. Memo from Les Dobson regarding the Whiteing & Smith analysis. This memo was requested by me from Les Dobson. Les is the former hydrologist for the Rio Grande National Forest (now Staff Officer, Clearwater NF) and was a key figure in the issues associated with the 2000 Reserved Rights Decree. Before his departure, Les was involved with me in discussions with the San Luis Valley Irrigation District regarding their plans for Rio Grande Reservoir, in particular, how their plans would impact their 1891 Act ROW and the Reserved Rights Decree. This memo simply provides Les' non-legal analysis of the situation based on his background knowledge. It is provided for reference and is not intended to supplant any analysis that your staff or OGC might provide through this request.

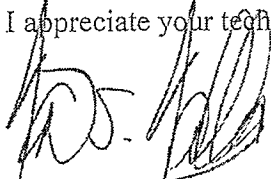
I anticipate you, your staff, or OGC might have additional questions or need information that might be held in this office. Please do not hesitate to call me or John Murphy, Recreation and Lands Program Leader here if you need additional information. Also be



It's Cool to Be Safe



aware that the situation outlined here in regards to Rio Grande Reservoir is similar in nature to other ROW's on this Forest such as Shaw Reservoir. The outcome of this technical assistance request will likely guide our efforts on other similar situations on this Forest and will thus be useful beyond the Rio Grande Reservoir situation as described here. I appreciate your technical assistance on this matter.

A handwritten signature in black ink, appearing to read 'Dan S. Dallas', written over the end of the main text block.

DAN S. DALLAS
Forest Supervisor/Center Manager

cc: John R Murphy, Philip N Reinholtz, Thomas Malecek, steve.silverman

Rio Grande Reservoir

Proposal for dam and outlet work repairs

Comments submitted by Les Dobson to Dan Dallas on August 14, 2008

I reviewed the opinion provided by Whiteing and Smith to Dan Dallas, dated August 9, 2008. My comments were requested by Dan Dallas by phone on August 12, 2008.

Since there is no proposal to enlarge the reservoir, the San Luis Valley Irrigation District continues to operate the reservoir under the conditions of their original USDI 1894 Easement and there should be no reason to consider a new authorization for the reservoir itself or to do NEPA on lands encompassed by the reservoir. Hopefully that keeps the current authorization for the reservoir intact; something that I think is beneficial for both the Forest Service and the Irrigation Company.

If NEPA is needed to allow repairs of the dam and outlet works, the scope of the NEPA should be very narrow and should not include the area currently inundated and permitted. I would suggest that it involve a whole new permit that only includes the lands impacted by disturbances associated with maintenance and repair work.

There are no bypass flow conditions for this reservoir. There has been sufficient leakage around the dam that the river never dries up below the dam. Given this ongoing condition, we agreed to accept the operation of this reservoir in our negotiated settlement and decree for Federal Reserved Instream Flow water rights. We even agreed to flexibility provided in their current water right decrees at that time, because we knew that they could only fill the reservoir once per year and current conditions provide for fish habitat on a continuous basis.

Whiteing and Smith addressed the seepage issue, by pointing out that seepage was included in earlier drafts of the decree but dropped from the final version. That is correct; however, in my understanding, if a future change in conditions is associated with any federal action, it would trigger a new analysis, as required by NEPA. So, it would be addressed in the future when such a proposal was made. If maintenance and repair work involves federal lands such that we have to do NEPA, the opportunity and responsibility exists for us to address this issue. The question then becomes, how would we handle that situation without reopening the decree?

If dam repairs successfully eliminate the leaks, such that the Rio Grande dries up below the dam, we would have a new condition to evaluate. The NEPA done for a permit to allow disturbances associated with maintenance and repair work would probably have to consider that change in condition. I'm not sure we would get away with acknowledging the change in conditions (stream dewatering) without mitigation to provide for fish habitat and stream health. What exactly that mitigation would have to be is the question. The more one looks at what is really needed to fully provide for aquatic life, the more one concludes that all water has to be released – a condition that would not be accepted by the project proponent. If agreement could be reached between those concerned about river health and the project proponent, then that agreement might answer the question of

necessary mitigation. That is, if other improvements associated with conservation pools and some release during the winter, would be accepted by say, Trout Unlimited, then we might be able to say that needed mitigation has been included. If that agreement is not reached, the door would be opened for litigation on the grounds that we have not complied with FLPMA and perhaps MUSYA.

If we were going to add a bypass flow condition to the reservoir operation, I would not do it as part of a permit. If we did that, we would most likely reopen our instream flow decree. I would let the process work to see if all parties can agree on a level of mitigation. If there is not agreement, however, I would consider a suite of alternatives that allow the proposed action to occur under different levels of mitigation and then as a deciding officer, I would select the alternative that provides some mitigation, but not enough to reopen the decree. If another group decides to take us to court on the grounds that we have not fully complied with the law, I would accept that as part of doing business. If a judge agreed with the complaining party and we were then forced to impose additional conditions to the permit, it would be done at the court's direction and the re-opener clause would not be triggered.

That is how I would recommend this situation be handled. I'm not sure that the additional statements from the Whiteing and Smith opinion are that relevant now that an enlargement is off the table. And I'm not going to address each point they make, because I don't have the decree with me and it would take a very careful study of both the decree and the water rights that we were subordinating to. But I will pass along a few thoughts that someone else can explore, if you decide you need to.

They apply the decree's statement that "we are not entitled to require the release of transmountain water to satisfy our instream flow needs" specifically to Rio Grande reservoir. It is correct that we cannot force the release of such water to meet our needs. However, I don't think that means the amount of such water they can choose to store in Rio Grande reservoir is unlimited. I would have understood that to apply to the amount of such water defined within the decrees we were subordinating to at that time.

Similarly, with respect to compact storage. I don't think we were agreeing to any new arrangement for new compact storage that might be proposed in the future. Taken to extreme, if this were true, they could build a reservoir of unlimited proportions and we would be helpless to apply any controls. I don't think that was ever the intent.

These latter points are probably not even relevant now to this proposed action, but I wanted to point out that I would not just accept the opinion provided Whiteing and Smith.

I do like their analysis of 1891 Easements. I hope that the validity of their current easement will not come up now that a reservoir enlargement is no longer being considered. But I do think we should ask OGC to respond to their opinion on this issue. As you know this is a relevant topic for several of our Ditch Bill cases as well and we have been waiting for an OGC response to it for some time now.

Respectfully, Les Dobson – Staff Officer, Clearwater National Forest.

WHITEING & SMITH

ATTORNEYS AT LAW
1136 PEARL STREET, SUITE 203
BOULDER, COLORADO 80302

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DRAFT SUBJECT TO REVISION

August 9, 2008

Dan Dallas
Forest Supervisor
San Luis Valley Public Lands Center
1803 West Highway 160
Monte Vista, CO. 81144

Re: Rio Grande Reservoir

Dear Supervisor Dallas:

During our meeting in November, 2007, you and your staff provided questions, insights, and suggestions that have been very helpful as the San Luis Valley Irrigation District has moved forward with its study of the potential multi-use functions that may be served by Rio Grande Reservoir. Also, Les Dobson's insights on the rights-of-way issues and the background of the negotiations that concluded with the Federal Reserved Rights Decree in 2000, were helpful to me as I work through the various legal issues applicable to the potential rehabilitation of the Reservoir. Since we met, the District's Board of Directors has decided to proceed with the rehabilitation of the dam and outlet works and leave to some other time further consideration of an enlargement. In light of our discussions in November, I think this decision alleviates many of your and your staff's concerns.

With respect to the rights-of-way and reserved rights decree in particular, I offered to provide you with an analysis which is set out in this letter. The District would appreciate receiving any response you or your legal counsel may have to this analysis. We certainly recognize that there may be some differing views. But, we are hopeful that those differences in view can be addressed and that a Reservoir project can be designed to better address the needs of all water users and interests in the San Luis Valley including those of the Forest Service.

A. Background

The Rio Grande dam is located on lands owed by the District. In 1927, the District and the Forest Service exchanged land and District received a patent to 146.81 acres that included the dam site, extended downstream along both sides of the Rio Grande approximately ¼ mile, and extended approximately ¼ mile along the north and south side banks of the Reservoir. A copy of the patent and plat showing the District's fee lands are attached. The remainder of the Reservoir and inundated

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land is included within the District's 1891 Act right-of way granted pursuant to an amended map of Rio Grande Reservoir dated July 20, 1916, and approved on June 16, 1919, Easement No. Pueblo 3471. *See* 43 U.S.C. § 946, as amended in 1898, 43 U.S.C. § 951. The rehabilitation of the Reservoir will not result in an enlargement of either the dam or reservoir footprint. The high water line will be unchanged.

The primary purposes for rehabilitating the Reservoir is to reduce seepage, construct an outlet works and spillway that will provide for safe and reliable operations that better meets the needs of the District and other water use demands, both consumptive and non-consumptive within the Basin. Most importantly from the water users' and State's perspective will be the ability to store compact water for delivery to New Mexico if needed to meet the State's obligations under the Rio Grande Compact. Under the existing Agreement to store compact water, during the irrigation season water that may be required for delivery to the State-line is stored in the Reservoir. It is then released later if needed to meet compact delivery requirements or, if not needed, it is marked over to the pre-compact reservoir owners and the direct flow irrigators. We anticipate a new agreement would make the stored compact water available to provide supplemental flows during the post-irrigation low flow periods and during the following year before the irrigation season begins. This would be subject to the Division Engineer's discretion. Space to store additional transmountain water will also provide opportunities to run water down the River at times of low flow to enhance flows through the stream channel and riparian habitat. It will also provide additional space for a conservation pool in the Reservoir.

This potential re-regulation of water in a manner that we hope meets the legal needs of the State and water users while better addressing non-consumptive needs, will not result in the storage of "new" water and will not result in water stored in excess of 51,113 acre-feet in any one year. These issues are discussed in more detail below in the section on the Forest Service's reserved rights decree.

B. Rio Grande Reservoir's 1891 Act Right-of-Way

The 1891 Act provides in pertinent part:

The right of way through the public lands and reservations of the United States is hereby granted to any canal company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any State or Territory, . . . to the extent of the ground occupied by the water of any reservoir and of any canals or laterals, and fifty feet on each side of the marginal limits thereof. . . .

43 U.S.C. § 946. Consistent with the Act's terms, the purpose for which the Reservoir was constructed and the only purpose for which it was originally used was irrigation. However, in recent years the Reservoir has stored small amounts of transmountain water for delivery downstream to augment new depletions resulting from new residential and related commercial development along the River primarily upstream of Alamosa. The augmentation program is operated by the San Luis Valley Water Conservancy District which was created and operates pursuant to state law. *See* C.R.S.

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§§ 37-45-101 *et seq.* Transmountain water also is stored by the Colorado Division of Wildlife for a conservation pool in the Reservoir and to meet DOW's needs at its various lakes and wildlife habitat areas. Native water is stored for compact purposes, as discussed above, and also pursuant to direct flow storage decrees. Those decrees allow authorized water users to store a portion of their direct flow irrigation water rights in the Reservoir for later delivery during that same irrigation season. It is anticipated that these same types of uses will continue in the rehabilitated reservoir. And, each of these uses was specifically recognized and incorporated in the Forest Service's reserved water rights decree for Water Division No. 3, discussed in more detail below. The primary use of stored water will remain irrigation.

The use of the Reservoir to store water for purposes other than irrigation is authorized and consistent with the 1898 amendment to the 1891 Act. The Act of May 11, 1898, 43 U.S.C. § 951, provided that:

Rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections 946-949 of this title may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage.

The use of the Reservoir for "purposes of a public nature" is authorized under the 1898 Amendment regardless of whether irrigation remains the primary end-use of the stored water. That position is consistent with the position presented by the Forest Service in 1986, during congressional hearings on the "Ditch Bill," Public Law 99-545. During those hearings, Douglas W. MacCleery, Deputy Assistant Secretary for Natural Resources and Environment responded to concerns that the Forest Service would challenge the validity of a facility's 1891 Act right-of-way based upon a change in the end-use of the water from irrigation to some other use as permitted under state law. In his letter to Senator Malcolm Wallop, Chairman of the Subcommittee on Public Lands, Reserved Water, and Resources Conservation, Committee on Energy and Natural Resources, Mr. MacCleery stated that:

The end use of water off the Federal lands, as it may change over time, casts no greater burden on the Federal property to carry water to its place of use.

* * *

The construction placed on the Act of 1891, as amended, by the Department for the rights of way it will administer does not prejudice or diminish the rights of grantees thereunder. We do not assert that the end-use of water, which may change from irrigation to municipal or other beneficial uses recognized under State law, in and of itself occasions a forfeiture of such rights-of-way.

* * *

The Department recognizes that long-standing uses ought not be diminished by insignificant defects in survey or description made many years ago, or a change in the end use of water off the Federal lands.

Statement of Douglas W. MacCleery, 132 Cong. Rec. 29919 (198_). Senator Wallop, included Mr. MacCleery's letter in the Congressional Record and, relying upon its assurances stated:

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With respect to the prospect of a departmental construction of the act of March 3, 1891, as amended by the act of May 11, 1898, whereby the holders of grants thereunder would face loss of their rights-of-way by reason of a change in the end use of the water carried to purposes other than primarily agricultural irrigation, the committee has been assured that no such construction of the statute is advanced by the Department [of Agriculture]. . . . Accordingly, no amendments to preclude such a construction are required.

Statement of Senator Wallop, 132 Cong. Rec. S15805-05 (198_). The MacCleery letter is set forth in its entirety in the Forest Service Handbook at Ch. 5509.11, § 62.12.

In light of this commitment to Congress, it is the District's opinion that the end-use of water stored in Rio Grande Reservoir does not affect the status of its 1891 Act right-of-way. But, for Rio Grande Reservoir, the majority of the water stored in the Reservoir will continue to be used primarily for irrigation. We interpret "primarily" to mean that the majority of stored water continues to be used for irrigation. In *Kern River Co. v. United States*, 257 U.S. 147 (1921), the Supreme Court recognized that the 1898 amendment could be read to allow use of a facility with an 1891 Act right-of-way *entirely* for purposes of a public nature other than irrigation. But, the Court concluded that the other uses of a public nature must be subsidiary to irrigation. *Id.* at _____. It is noteworthy that the case arose in the context of an entity that had obtained an 1891 Act right-of-way for a facility that could only be used to generate power. None of the water could be conveyed for use for irrigation. The case did not raise, and the Court did not address, the situation where the original use of water for irrigation has changed over the course of time to other uses approved under state law.

Subsequent tribunals addressing the issue have followed the *Kern River* analysis. In 1927, the District Court for California found that water could be used for other purposes of a public nature:

The purpose of the [1891] act of Congress was quite plainly to aid irrigation and other projects, having the main end in view to render dry lands productive. The supplying of communities either thickly or sparsely inhabited, with water for domestic and yard irrigation, is fairly within the main object to be accomplished.

United States v. Tujunga Water & Power Co., 18 F.2d 120, _____ (D.Calif. 1927). And, the Department of the Interior reviewed the legislative history of the 1898 amendment and found that: "[t]he use of a right of way for 'public purposes,' according to the legislative history of the bill, means helping municipalities procure a supply of pure water." *Zelph S. Calder*, 81 ID 339 (1974). The Department cited to House Report No. 279, 55th Cong., 2nd Sess. 1 (1898), in which Congress stated that the 1898 amendment's purpose was to furnish "water for domestic and public uses. Such a law will accrue to the advantage of supplying a pure-water supply to *many other useful purposes.*" *Emphasis added.*

The present and proposed uses of a rehabilitated Rio Grande Reservoir are well within the terms of the Act of March 3, 1891, 43 U.S.C. § 946, as amended by the Act of March 11, 1898, 43 U.S.C. § 951. Irrigation will remain the primary use of the water stored in the Reservoir. Any

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“other” uses are of a public nature: a) Compact water stored to assure that Colorado retains and utilize its full allocation of water under the Rio Grande Compact; b) Transmountain water used to provide a conservation pool in the Reservoir and to provide water to meet fish and wildlife needs throughout the Basin; c) Transmountain water to meet growing domestic demands in the Basin; and, 4) re-regulation of water released from storage to better meet instream and riparian needs. In our view, the 1891 Act right-of-way for the exiting Reservoir will remain valid and fully enforceable under this type of operating scenario.

C. The Forest Services’ Reserved Rights Decree

The Forest Service, Division No. 3 water users, and the State of Colorado reached a settlement of the Forest Service’s reserved water rights claims for the Rio Grande National Forest in 2000. That settlement is encompassed in the Decree issued on March 30, 2000, by the Water Court for Water Division No. 3 (the “Decree”). The Decree specifically addresses Rio Grande Reservoir at pages 88-90. The Decree establishes the parameters under which the Reservoir can store and operate without impact to the Forest Services’ reserved water rights.

First, the exercise of the District’s water storage rights are senior to and cannot legally be curtailed by the instream flow water rights.

Second, the following practices can continue without regard to their impact on the instream flow:

a) direct flow storage under the decrees in Case Nos. W-3979 (Rio Grande Canal), W-3980 (Irrigation District), and 95CW18 (Empire Canal);

b) exchanges into and between Rio Grande, Santa Maria, and Continental Reservoirs decreed in Case No. 90CW42 (Reservoir Owner Exchange), 90CW45 (Closed Basin Water Exchange), and 97CW10 (Fun Valley Exchange);

c) compact storage;

d) the Reservoir may store up to 51,113 acre-feet each year without regard to carry-over storage from a previous year. This includes water stored under the decrees and practices listed in a-c above; and,

e) *future direct flow storage so long as:*

- 1) annual storage is no more than 51,113 acre-feet, not including any carry-over water;
- 2) the flow at Del Norte remains greater than 2,150 c.f.s or more;
- 3) direct flow storage can occur at rates greater than 1,972 c.f.s. *only so long as*

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225 c.f.s. remains in the Rio Grande at the Thirty Mile Gage; and,

- 4) existing water rights changed to direct flow storage are not subject to paragraph 20 limitations so long as conditions 1-3 are met.

Third, significantly with respect to the rehabilitation of Rio Grande Reservoir, the final Decree did not include language from earlier drafts regarding seepage from the Reservoir. Early drafts discussed "favorable conditions of flow" resulting from seepage through the dam. That language was not included in the final version of the Decree. While the District does not believe that it could have been prevented from reducing the seepage, the Decree does not suggest any reliance on seepage and the District can rehabilitate the dam and outlet works and, to the extent feasible, reduce the seepage without impact to the Decree.

Finally, the District stores significant amounts of transmountain water in the Reservoir for the San Luis Valley Water Conservancy District and the Colorado Division of Wildlife. Paragraph 26 of the Decree provides that the United States has no interest in that non-native water:

The United States does not claim and is not entitled to call for or require any water from any reservoir, or any transmountain, imported, foreign, or nontributary water source in Colorado Water Division No. 3 to be used to quantify or satisfy instream flow for National Forest purposes.

This language excludes transmountain water stored in the Reservoir from any claim or call by the United States for its instream flow, or a claim that it counts against the Reservoir's annual 51,113 acre-foot storage limitation.

The rehabilitation of the Reservoir's outlet works can be accomplished within the terms of the Decree. The District's analysis indicates that, except in the very highest flow years (when the Forest Service's flow requirements would be exceeded) there is no unappropriated native water available for storage in the Reservoir. It is, therefore, unlikely that the District will store more than 51,113 acre-feet during a water year. Space will be provided by the District in a rehabilitated reservoir for the re-regulation of flows through Compact Storage, direct flow storage, and exchange. It will also be utilized to provide the Colorado Division of Wildlife with a permanent fish and recreation pool and to provide the San Luis Valley Water Conservancy District with permanently dedicated space to store transmountain water which is then released to the Rio Grande to replace out-of-priority depletions caused by residential uses.

1. Direct Flow Storage

Direct flow storage only occurs under specific flow parameters set forth in the direct flow decrees identified above. Any new direct flow storage is subject to the Decree's limitations summarized in sub-paragraph 3 above. As recognized in the Decree, the effect of direct flow storage "dampens or redistributes peak flows, but typically extend, the duration of seasonal highflows by reservoir releases." Generally direct flow water is stored at times of high flow and then released

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from the Reservoir for downstream delivery after the peak flow, thereby adding to the flow on a falling hydrograph. The rehabilitation of the Reservoir will not affect the operation of direct flow storage as contemplated in the Decree.

2. Compact Storage

The Decree provides that Reservoir operations consistent with the "Compact Storage Agreement" have no material adverse impact on the reserved instream flow water rights for the National Forest. Les Dobson indicated during our November meeting that he understood this to be a reference to the "Agreement" entered between the Rio Grande Water User Association, the Santa Maria Reservoir Company and the San Luis Valley Irrigation District and the State Engineer, dated February 3, 1987. Generally, that Agreement allows the State Engineer to store water that would otherwise be delivered during the irrigation season to the State-line. There is no limitation on the timing or amount of water the State Engineer can store. If the State Engineer determines that the stored water is needed to meet obligations under the Compact, he determines the timing and rate of flow of the delivery from storage. If the State Engineer determines that the stored compact water is not need for Compact purposes, it is divided, one-half to the owners of Rio Grande, Santa Maria and Continental Reservoirs (which is then divided one-half to the San Luis Valley Irrigation District and one-half to the Santa Maria Reservoir Company), and one-half to the direct flow rights on the Rio Grande. The water stored for the direct flow rights is released during the following irrigation season in three separate releases:

- a) at the time the River reaches its annual peak, to benefit junior direct flow water rights;
- b) at the time the River is at mid-stage in the declining hydrograph, to benefit middle-ranking direct flow diverters; and,
- c) at the time the River is at a low flow stage on the declining hydrograph, to benefit senior direct flow rights.

Any water available to the direct flow rights that is not released during the irrigation season following its storage passes to the reservoir owners.

While it is subject to future negotiations, the District anticipates some revision to the pattern for releasing stored compact water. In general, we anticipate that all compact water stored in Rio Grande Reservoir will be available to the State Engineer to meet compact dclivery requirements downstream at the State-line. Compact water not needed for compact purposes during the year in which it is stored will remain available to the State Engineer for compact purposes in subsequent years. The District anticipates that the release of stored compact water and, possibly other transmountain water stored by the Division of Wildlife and the Conservancy District, can be timed to better coincide with low-flow non-irrigation season periods to better meet winter fish and riparian habitat needs. This water would be delivered through the National Forest to the State-line or to points below the National Forest for use by the DOW or Conservancy District. Any release pattern will, however, be subject to the Division Engineer's discretion based upon his determination of what

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deliveries are required to meet the State's legal obligations under the Compact.

Based upon our analysis the release of stored water can be better timed to meet the Forest's instream flow needs and the needs of riparian habitat on a consistent basis throughout the winter low-flow period while still meeting the required purpose for which the water was stored and released. A change in the way in which stored compact and transmountain water is delivered that enhances flows during low flow periods does not require re-opening of the Decree. Because the District is not now pursuing an enlargement, we do not believe that review under NEPA will be required.

E. Can the Decree be re-opened?

Because the District is only proceeding with a rehabilitation of the Reservoir we do not believe there will be an opportunity to re-analyze the Decree through the NEPA process. But to the extent the Decree can be re-opened under its own terms, it can be done whether or not the District rehabilitates the Reservoir. But, we recognize that the District's actions may precipitate scrutiny of the Decree.

The Decree's re-opener provisions are limited to water users who are involved in land use permitting issues with the Forest Service. The re-opener provisions are found at paragraphs 18-24 of the Decree. First, under paragraph 19, the Decree can only be re-opened *if* the Forest Service exercises its power to grant or deny land use authorization by requiring the owner of an Existing Water Right (a water right recognized in the Decree) to relinquish part of its decreed water right to provide water for the instream flow or otherwise prevents or interferes with the exercise of an Existing Water Right.

Second, only the owner of the Existing Water Right that is injured by the Forest Service's action under paragraph 19 can petition the court to reopen the Decree and only as to the instream flow quantification point (QP) immediately downstream from the injured Existing Water Right. For example, if the Forest Service required the District to by-pass a portion of its decreed storage water as a condition of a special use permit for an enlargement, the District could seek to re-open the Decree with respect to QP-37N only. If the Rio Grande Water Users Association joined with the District, they could petition to re-open the Decree as to all decreed instream flow water rights in former Water District No. 20. And if the Rio Grande Water Conservation District and the State of Colorado joined, they could petition to re-open the entire Decree.

Third, if the court agrees to re-open the Decree under any of the three scenarios described above, the United States must prove its entitlement to and quantity of the reserved instream flow water. In all cases, the subordination of the United States' priority date remains in force.

The re-opener provisions provide that only water users in Division 3 can re-open the Decree. Others who do not hold water rights or, if they do, are not subject to Forest Service land use decisions, do not have any right to re-open the Decree.

DRAFT SUBJECT TO REVISION

Dan Dallas
August 9, 2008
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F. Conclusion

The San Luis Valley Irrigation District looks forward to working with the Forest Service as it moves forward with its rehabilitation of Rio Grande Reservoir. As set forth in this letter, we believe that the project can proceed within the terms and conditions of the District's right of way and of the Forest Service's reserved water rights decree. Moreover, we believe that Reservoir operations can be re-regulated to provide even greater benefits to the maintenance of flows, riparian and wildlife habitat within the Forest below Rio Grande Reservoir.

Sincerely,

Tod J. Smith

Pueblo 050622

4-1040-R

The United States of America,

To all to whom these presents shall come, Greeting:

WHEREAS, The San Luis Valley Irrigation District, being the owner of a certain tract of land situated and included within the limits of the Rio Grande National Forest, Colorado, has, under the provisions of the Act approved March 20, 1922 (42 Stat. 465), entitled "An Act To consolidate national forest lands", reconveyed and relinquished the said tract to the United States and has, under the provisions of said Act, selected in lieu thereof the following described tract of land:

The north half of the southeast quarter and the north half of the southeast quarter of the southeast quarter of Section fourteen and the Lots two, three, and four of Section thirteen in Township forty north of Range four west of the New Mexico Meridian, Colorado, containing one hundred forty-six acres and eighty-one hundredths of an acre, according to the Official Plat of the Survey of the said Land on file in the General Land Office:

NOT KNOW YE, That the UNITED STATES OF AMERICA, in consideration of the premises, HAS GIVEN AND GRANTED, and by these presents DOES GIVE AND GRANT, unto the said The San Luis Valley Irrigation District and to its successors, the tract above described; TO HAVE AND TO HOLD the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said The San Luis Valley Irrigation District and to its successors and assigns forever; subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts; and there is reserved from the lands hereby granted, a right of way thereon for ditches or canals constructed by the authority of the United States.

IN TESTIMONY WHEREOF, I, Calvin Coolidge,

President of the United States of America, have caused these letters to be made Patent, and the Seal of the General Land Office to be hereunto affixed.

GIVEN under my hand, at the City of Washington, the EIGHTH

(SEAL) day of NOVEMBER in the year of our Lord one thousand nine hundred and TWENTY-SEVEN and of the Independence of the United States the one hundred and FIFTY-SECOND

By the President:

Calvin Coolidge

By

Dwight B. Coughlin, Secretary.

M. P. LeRoy

Recorder of the General Land Office.

RECORD OF PATENTS: Patent Number 1009165

4-2122

GOVERNMENT PRINTING OFFICE

LEGAL NOTICE

OPPORTUNITY TO COMMENT

Rio Grande National Forest

Continental Dam & Santa Maria Canal Rehabilitation Project Hinsdale & Mineral Counties, Colorado

The Forest Service, Rio Grande National Forest, Divide Ranger District, proposes to prepare a Decision Memo for the Continental Dam and Santa Maria Ditch Rehabilitation Project. Continental Dam is located at 10,200 feet elevation in the headwaters of North Clear Creek, in the upper Rio Grande drainage, approximately 25 miles northwest of Creede, CO, accessed by Forest Service Road 513 off of Highway 149. Portions of the Santa Maria Canal in need of repair are located off Forest Road 509, south of Highway 149 (Section 1, T.41N, R.3W, Sections 7 and 8, T41N, R.2W). The proponent is the Santa Maria Reservoir Company.

The Continental Reservoir was built in 1925 and has a capacity of 27,000 acre feet of storage water. For the past two decades the capacity has been constrained to 15,000 acre feet. Repair work to the dam and spillway will allow the reservoir to store its maximum capacity. This repair work is scheduled for 2014. Repair work for portions of the Santa Maria Canal will occur in 2013. This rehabilitation project will occur within previously disturbed areas.

The Forest Service has made a preliminary determination that this proposal falls within a category of actions listed in regulations at 36 CFR 220.6(e), that are excluded from documentation in an Environmental Assessment (EA) or Environmental Impact Statement (EIS), and that there are no extraordinary circumstances that would preclude use of the following category: 32.2 (3) Approval, modification or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land.

More detailed project descriptions and other information are available for review at the Divide Ranger District Office in Del Norte, CO (719 657-3321) or on the Rio Grande NF web page: <http://www.fs.usda.gov/projects/riogrande/landmanagement/projects>.

This comment period coincides with public scoping and will be the only comment opportunity offered on this project. It is intended to provide those interested in or affected by the proposal an opportunity to make their concerns known before the Responsible Official makes a decision. Those who provide substantive comments or otherwise express interest by the close of the comment period may be eligible to appeal the decision pursuant to regulations at 36 CFR Part 215.

How to Comment and Timeframe

Written, facsimile, hand-delivered, oral, and electronic comments concerning this action will be accepted for 30 calendar days following the publication of this notice in the *Valley Courier*. The publication date in the newspaper of record is the exclusive means for calculating the comment period for this analysis.

Written comments must be submitted to: Tom Malecek, District Ranger, 13308 West Hwy 160, Del Norte, CO 81132; FAX Number: 719-657-6035. The office business hours for those submitting hand-delivered comments are: 8:00 am to 4:30 pm, Monday through Friday, excluding holidays. Oral comments must be provided at the Responsible Official's office during normal business hours via telephone 719-657-3321 or in person.

Electronic comments may be submitted to comments-rocky-mountain-rio-grande-divide@fs.fed.us or online at the project webpage under "Comment on Project". It is the responsibility of persons providing comments to submit them by the close of the comment period.

Individuals and organizations who would like to be eligible to appeal must meet the information requirements of 36 CFR 215.6(a)(3).

LEGAL NOTICE

OPPORTUNITY TO COMMENT Rio Grande National Forest **Beaver Park Dam Rehabilitation Project** **Rio Grande County, Colorado**

The Forest Service, Rio Grande National Forest, Divide Ranger District, proposes to prepare a Decision Memo for the Beaver Park Dam Rehabilitation Project, located approximately 5 miles south of South Fork, CO, accessed by Rio Grande County Road 20/FS Road 360 (Section 28, T.39N., R.3E.) The proponent, Colorado Parks and Wildlife (CPW), has presented 90 % design plans for Phase I spillway work scheduled for this summer; Phase II work on the sinkhole, outlet works and landslide area would occur the summer of 2014.

In the summer of 2010, a sinkhole appeared on the backside of the dam, which necessitated lowering the reservoir by 20 feet. It has been half full since then, impacting fishermen as well as water storage capabilities. This work, on mostly previously disturbed areas, will allow the reservoir to return to full capacity. During the summer of 2013, fishing will still be allowed. The proposed work in 2014 will necessitate draining the reservoir and fishing will not be allowed during 2014.

The Forest Service has made a preliminary determination that this proposal falls within a category of actions listed in regulations at 36 CFR 220.6(e), that are excluded from documentation in an Environmental Assessment (EA) or Environmental Impact Statement (EIS), and that there are no extraordinary circumstances that would preclude use of the following category: 32.2 (3) Approval, modification or continuation of minor special uses of National Forest System lands that require less than five contiguous acres of land.

More detailed project descriptions and other information are available for review at the Divide Ranger District Office in Del Norte, CO (719 657-3321) or on the Rio Grande NF web page: <http://www.fs.usda.gov/projects/riogrande/landmanagement/projects>.

This comment period coincides with public scoping and will be the only comment opportunity offered on this project. It is intended to provide those interested in or affected by the proposal an opportunity to make their concerns known before the Responsible Official makes a decision. Those who provide substantive comments or otherwise express interest by the close of the comment period may be eligible to appeal the decision pursuant to regulations at 36 CFR Part 215.

How to Comment and Timeframe

Written, facsimile, hand-delivered, oral, and electronic comments concerning this action will be accepted for 30 calendar days following the publication of this notice in the *Valley Courier*. The publication date in the newspaper of record is the exclusive means for calculating the comment period for this analysis. Those who would like to comment should not rely upon dates or timeframe information provided by any other source.

Written comments must be submitted to: Tom Malecek, District Ranger, 13308 West Hwy 160, Del Norte, CO 81132; FAX Number: 719-657-6035. The office business hours for those submitting hand-delivered comments are: 8:00 am to 4:30 pm, Monday through Friday, excluding holidays. Oral comments must be provided at the Responsible Official's office during normal business hours via telephone 719-657-3321 or in person.

Electronic comments may be submitted to comments-rocky-mountain-rio-grande-divide@fs.fed.us or online at the project webpage under "Comment on Project". It is the responsibility of persons providing comments to submit them by the close of the comment period.

Individuals and organizations who would like to be eligible to appeal must meet the information requirements of 36 CFR 215.6(a)(3).