

Porzak Browning & Bushong LLP

A t t o r n e y s • a t • L a w

Please direct all correspondence to the Boulder office

Glenn E. Porzak
Michael F. Browning
Steven J. Bushong
P. Fritz Holleman
Kristin Howse Moseley
Kevin J. Kinnear

Thomas W. Korver*
Eli A. Feldman
Katherine A. D. Ryan
Karen L. Henderson
**Also Admitted in Wyoming*

Boulder Office:
929 Pearl Street, Suite 300
Boulder, CO 80302
303 443-6800 Tel.
303 443-6864 Fax.

Vail Office:
953 S. Frontage Road W.
Suite 202
Vail, CO 81657
970-476-5295 Tel.
970-476-5309 Fax.

March 17, 2010

VIA EMAIL and HAND DELIVERY

Mr. Scott Franklin
Moffat EIS Project Manager
U.S. Army Corps of Engineers
9307 South Wadsworth Blvd
Littleton, CO 80128

Re: MOFFAT COLLECTION SYSTEM PROJECT; Public Comments Concerning the Draft Environmental Impact Statement dated October 30, 2009 and compliance with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70f, and the Clean Water Act ("CWA"), 33 U.S.C. §§ 1251-1387.

Dear Mr. Franklin:

This firm represents the Clinton Ditch and Reservoir Company and the Eagle Park Reservoir Company (collectively, the "Reservoir Companies"). As detailed below, the Reservoir Companies are interested stakeholders in the Moffat Collection System Project (the "Project"). On behalf of the principal shareholders and the boards of directors of the Reservoir Companies, we submit the following comments to the U.S. Army Corps of Engineers (the "Corps") concerning the Draft Environmental Impact Statement for the Project dated October 30, 2009 (the "DEIS"), detailing its inadequacy under both NEPA and CWA. The City and County of Denver, acting by and through its Board of Water Commissioners, is the Project proponent, and is referred to herein as "Denver." It should be noted at the outset that the Reservoir Companies are engaged in negotiations with Denver regarding the terms and conditions necessary to mitigate the impacts from the Moffat Project. Inasmuch as these negotiations are ongoing and have not been concluded, the Reservoir Companies provide the following comments.

I. Clinton Ditch and Reservoir Company

The Clinton Ditch and Reservoir Company is the owner and operator of Clinton Gulch Reservoir, and the water rights thereto. The current shareholders consist of the Town of Breckenridge; Copper Mountain Metropolitan District; Powdr – Copper Mountain, LLC; the

Town of Dillon; Dundee Realty U.S.A., Inc. d/b/a Arapahoe Basin Ski Area; the Town of Silverthorne; the Board of County Commissioners of Summit County; Vail Summit Resorts, Inc. d/b/a Breckenridge Ski Resort; Vail Summit Resorts, Inc. d/b/a Keystone Resort; and Winter Park Recreational Association. These shareholders represent every major water user and water provider in Summit County and the largest ski resort in Grand County.

II. Eagle Park Reservoir Company

The Eagle Park Reservoir Company is the owner and operator of Eagle Park Reservoir, and the water rights thereto. The principal shareholders consist of the Eagle River Water and Sanitation District; the Upper Eagle Regional Water Authority; the Colorado River Water Conservation District; and Vail Associates, Inc. The Eagle River Water and Sanitation District and Upper Eagle Regional Water Authority comprise the second largest municipal water provider on the West Slope, serving approximately 60,000 customers in Eagle County, with a service area that extends from the Town of Vail to Wolcott. The Colorado River Water Conservation District is a public water policy agency chartered by the Colorado General Assembly in 1937 to be “the appropriate agency for the conservation, use and development of the water resources of the Colorado River and its principal tributaries in Colorado.” The Colorado River Water Conservation District is comprised of 15 West Slope counties in which a majority of the Colorado River Basin in the State of Colorado exists. Vail Associates, Inc., is a wholly owned subsidiary of Vail Resorts, Inc. which, in turn, owns and operates the Vail, Beaver Creek and Arrowhead ski areas and related resort properties.

III. Summary of Comments

The Reservoir Companies and their shareholders collectively own hundreds of decreed water rights and water storage and conveyance facilities throughout the Colorado River basin. The Reservoir Companies and their shareholders also have significant interest in the protection of the recreational and environmental values of the Colorado River basin and its tributaries. To summarize the comments below, the Reservoir Companies believe that the DEIS relies on outdated hydrologic data and water demand projections, fails to adequately scrutinize the purpose and need for the Project, and fails to objectively consider alternatives to the Project.

The DEIS is so lacking in fundamental ways that it fails to comply with the basic procedural requirements of NEPA and fails to prove substantively under the CWA that the Project is (a) the least damaging practicable alternative (“LEDPA”) and (b) in the best interest of the Nation. The Reservoir Companies urge the Corps to reconsider the need for the Project, consider other alternatives if any need remains, expand the scope of the impacts analysis, collect more data, update its hydrologic modeling and demand projections, and prepare a supplemental EIS that permits informed public comment on the Project and provides sufficient information to determine whether a section 404 permit can be issued. In addition to the comments set forth herein, the Reservoir Companies also support and incorporate herein the comments and concerns of Eagle County, Grand County, Summit County, and the Colorado River Water Conservation District, which have each submitted extensive comments to the Corps under separate cover.

IV. Relevant Information From Case No. 02CW125, Water Division No. 5

Some of the shareholders of the Reservoir Companies were party to Case No. 02CW125, Water Division No. 5, which concerned Denver's Eagle-Piney/Eagle-Colorado Project. (See **Exhibit A** hereto, Trial Management Order ("TMO") for Summary of Issues, Stipulated Facts, Witness Lists and Exhibit Lists). During the course of that case, which went to trial in June 2007, the details of Denver's water supply and demand projections, modeling assumptions and other operational matters were established through depositions and trial testimony of Denver's consultants, staff and management.¹ Much of that testimony is directly relevant to the statement of purpose and need in the Moffat DEIS, and the Reservoir Companies urge the Corps to review said documents prior to issuing a supplemental or final EIS for the Project.

As a general matter, the DEIS is vitally dependent upon the 2002 Integrated Resource Plan ("IRP"), and its projections for water demand and supply. However, as set forth herein, the 2002 IRP is outdated and no longer contains reliable information. In this regard, Denver had planned to release updates to its IRP every five years, and had specifically stated that it was preparing to release an update in 2007. (Depo. Trans., G. Fisher at 4-5). Yet, as of March 2010, for unexplained reasons, no update of the IRP has been released. Instead, Denver and the Corps continue to rely on the outdated supply and demand projections in the 2002 IRP, which are merely updates from projections in the 1997 IRP.

The DEIS is equally dependent on the PACSM model for its estimates of environmental impacts. PACSM is a hydrologic model that was designed and run by Denver, based on hydrologic data from the study period of 1947 through 1991. By the time the Project would go online in 2016, that data would be 25 years old. PACSM carries potential biases due the fact that it was designed and run by the Project proponent and its data set is outdated. In this regard, it fails to account for recent variability in climate and hydrologic conditions which are known to have occurred since 1991 and which are expected to continue in the future.

The IRP and PACSM are essentially the two legs that the entire DEIS stands on. Yet, both are biased, outdated and unreliable. The lack of up-to-date information prevents the Corps from making accurate assessments of the need for the Project, the environmental impacts of the Project, and from considering practicable alternatives, which are its basic obligations under NEPA and the CWA. The Corps simply cannot carry out its governmental function until it has independently evaluated and reconciled the IRP and PACSM with the most current and best available scientific data and information.

¹ A collection of trial testimony and deposition transcripts from Case No. 02CW125 are attached hereto as **Exhibit B**. Exhibit B contains testimony for the following employees of Denver Water: John Bambei, Jr. - Chief of Engineering, H.J. Barry - Manager, William Bates - Water Resource Engineer, Greg Fisher - Chief Planner, Kathryn Kempke - Manager of Treasury Operations, David Little - Manager of Water Resources and General Planning, Steven Schmitzer - Chief of Water Resources Analysis. The deposition transcript of Douglas Jeavons - Director, BBC Research and Consulting, is also attached for purposes of explaining the econometric demand model that is used by Denver to project future water demands. This collection of transcripts and testimony is submitted for the review and consideration of the Corps and cooperating agencies and is intended to become part of the administrative record herein. References to Trial Transcripts and Deposition Transcripts herein are references to the above-described documents.

V. THE DEIS DOES NOT COMPLY WITH NEPA

A. Standards of Law Under NEPA

NEPA has twin aims: (1) “it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action”; and (2) “it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.” *Ecology Center, Inc. v. U.S. Forest Service*, 451 F.3d 1183, 1189 (10th Cir. 2006); *Baltimore Gas and Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983).

The EIS process provides the public with assurance that that the agency has “considered environmental concerns in its decisionmaking process . . . and, perhaps more significantly, provides a springboard for public comment.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *Utahns for Better Transportation v. U.S. Dep’t of Trans.*, 305 F.3d 1152, 1162-63 (10th Cir. 2002). “NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” *Robertson*, 490 U.S. at 349. The requirement of preparing an EIS “ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts [and] guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” *Id.*

Highlighting the importance of a robust alternatives analysis, the Tenth Circuit Court of Appeals recently stated:

The “heart” of an EIS is its exploration of possible alternatives to the action an agency wishes to pursue. 40 C.F.R. § 1502.14. Every EIS must “[r]igorously explore and objectively evaluate all reasonable alternatives.” 40 C.F.R. § 1502.14(a). Without substantive, comparative environmental impact information regarding other possible courses of action, the ability of an EIS to inform agency deliberation and facilitate public involvement would be greatly degraded. *New Mexico ex rel. Richardson v. Bureau of Land Management*, 565 F.3d 683, 708 (10th Cir. 2009).

The “scope” of an EIS is defined as “the range of action, alternatives, and impacts to be considered in an environmental impact statement.” 40 C.F.R. § 1508.25. While an agency may restrict its analysis to alternatives that suit the “basic policy objectives” of a planning action, *Seattle Audubon Soc’y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996), it may do so only as long as “the statements of purpose and need drafted to guide the environmental review process . . . are not unreasonably narrow.” *Richardson*, 565 F.3d at 709 (citing *Colo. Env. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1999); see also *Utahns for Better Transportation v. U.S. Dept. of Transportation*, 305 F.3d 1152 (10th Cir. 2002).

In *Richardson*, the Tenth Circuit found that the Bureau of Land Management violated NEPA by failing to consider all reasonable alternatives. Similarly, “The Seventh Circuit, and other courts, have interpreted this requirement to preclude agencies from defining the objectives of their actions in terms so unreasonably narrow they can be accomplished by only one alternative (*i.e.*, the applicant's proposed project).” *Dombeck*, 185 F.3d at 1175; *see, e.g., Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 669 (7th Cir. 1997); *see also Davis v. Mineta*, 302 F.3d 1104, 112-13 (10th Cir. 2002) (holding that federal agency violated NEPA by prejudging NEPA issues and failing to analyze any alternatives other than the preferred alternative); *Wyoming v. U.S. Dept. of Agriculture*, 570 F.Supp2d 13090, 1339 (D. Wyo. 2008) (holding that the existence of a reasonable, but unexamined alternative, renders the EIS inadequate).

B. The Statement of Purpose and Need is Inappropriately Narrow and the Corps Failed to Objectively Consider Practicable Alternatives

In the Moffat DEIS, the statement of purpose and need defines the objectives in terms so unreasonably narrow that they can be accomplished only by one alternative: the enlargement of Gross Reservoir. The DEIS accurately cites the CEQ regulations concerning its required alternatives analysis to the effect that “the emphasis is on what is reasonable rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint using common sense, rather than simply desirable from the standpoint of the applicant.” (DEIS at 2.0 citing “Forty Most Asked Questions Concerning NEPA,” Question 2a). But, the DEIS fails to apply that law. It accommodates the specific desire of the applicant to enlarge Gross Reservoir rather than the applicant’s basic policy need to meet water demands within its service area. The scope of the alternatives considered in the DEIS is simply too narrow to inform agency deliberation and facilitate public involvement. In this regard, the DEIS is result-oriented

In keeping with this predetermined result, every single alternative in the DEIS, except for the “No Action Alternative,” includes a major enlargement of Gross Reservoir - from 40,700 AF up to 72,000 AF. These are not mutually exclusive alternatives, but minor variations on one and the same Project. This, among other things, demonstrates that the DEIS fails to rigorously explore and objectively evaluate all reasonable alternatives, such as the other 150 water supply, cooperative actions, conservation, drought response and water reuse projects identified in the IRP. Given that the “heart” of an EIS is the document’s consideration of alternatives, and this DEIS fails to meaningfully consider any alternatives other than the enlargement of Gross Reservoir, it is fundamentally flawed and inadequate.

C. The No Action Alternative Mischaracterizes the Status Quo

One of the alternatives that must be considered under NEPA is the alternative of “no action.” (40 C.F.R. §1502.14(d))(hereinafter “No Action Alternative”). The No Action Alternative, generally, “may be thought of in terms of continuing with the present course of action until that action is changed.” (46 Fed.Reg. 18026, 18027 (Mar. 23, 1981)). An accurate description of the status quo is critical to an EIS because the No Action Alternative establishes

the baseline against which the proposed action and its alternatives are measured. *Friends of Se. 's Future v. Morrison*, 153 F.3d 1059. 1065-66 (9th Cir. 1998).

The No Action Alternative in the Moffat DEIS fails to accurately depict the status quo. The main premise on which the DEIS and No Action Alternative rely is that the demand in Denver Water's system is expected to exceed supply in 2016. (DEIS, ES-13, 1-11, K-5). This premise is false.

First, Denver's projections of supply and demand have undergone major changes since the 2002 IRP was released. Specifically, Denver's conservation goals have been accelerated by 35 years, which pushes back the date at which demands will exceed supplies well beyond 2016. Second, Denver can and will impose drought restrictions during times of water scarcity. Denver's Drought Response Plan has been successfully employed in the past to reduce demand by approximately 30% during times of water shortage. It should be expected to perform equally well during future droughts. Third, any shortfall between supplies and demands exists only when comparing dry year supplies to unrestricted average year demands. The DEIS does not present any evidence that a shortfall would exist if Denver compared dry year demands to dry year supplies or average year demands to average year supplies. Fourth, a major source of water yield, the Shoshone Agreement between Denver and Xcel Energy, was excluded from the expected water supplies, despite being recognized in the DEIS as a reasonably foreseeable action. Fifth, after running its complex econometric demand model, Denver arbitrarily increased its output by 5%. A 5% increase in projected demand amounts to approximately 17,000 AF, which is nearly the same firm yield that the Project seeks to develop. Sixth, the No Action Alternative erroneously includes 3,000 AF of demand for the City of Arvada. Denver is not obligated to supply this 3,000 AF if the Project is not constructed (i.e. if no action is taken). All of the above demonstrate that Denver's demand is not going to exceed supply in 2016, that Denver's alleged need for the Project is greatly overstated, and that the No Action Alternative seriously mischaracterizes the status quo.

1. Denver Accelerated Conservation Goals By 35 Years

According to the 2002 IRP, upon which the DEIS relies without much objective analysis, 16,000 AF of supply is expected to be realized through water conservation by 2030. However, Denver actually expects to achieve these 16,000 AF of conservation savings, plus another 13,000 AF, by 2016. In other words, the DEIS assumes only 16,000 AF of conservation by 2030, when it should assume 29,000 AF of conservation by 2016. (See Denver's "Tap-Smart" Conservation Plan attached as **Exhibit C**).

Consistent with this expectation, Mayor Hickenlooper announced in the 2006 State of the City Address that the City and County of Denver, in partnership with Denver's Board of Water Commissioners (the "Board"), "intends to embark on the most aggressive water conservation program in the history of Colorado" seeking to achieve "a 22% reduction in system-wide water use in the next decade – accelerating their original 2050 goals by 35 years." In 2006, the Board followed through on its promise by setting a conservation goal to reduce water use to 165 gallons per person per day by 2016 by implementing the "Tap-Smart" Conservation Plan. This represents a 22% reduction from average pre-drought use of 211 gallons per person per day.

Considering Denver's historical success in conservation and future commitments to increase spending and accelerate its goals, Denver can and will meet conservation savings on the order of 29,000 AF by 2016.

The DEIS identifies a total of 15,000 AF of unmet demand in Denver's near term. Given that the accelerated conservation savings alone will supply 13,000 AF of this demand (Denver considers conservation as new supply rather than as demand reduction), Denver's allegedly unmet demand in 2016 is no more than 2,000 AF. An unmet demand of 2,000 AF does not justify the construction of 72,000 AF of storage and the resulting environmental, economic and recreational impacts associated with increased transbasin diversions.

The DEIS should acknowledge this accelerated schedule for conservation and reevaluate the purpose and need for the Moffat project using the most current data and demand projections. Otherwise, its entire analysis, including the Section 404 analysis in Appendix K of the DEIS, rests on outdated and inaccurate projections of supply and demand and a faulty assumption that a major water supply shortage will occur in 2016. The outdated data also mischaracterizes the baseline conditions under the No Action Alternative and thereby underestimates the negative impacts of the Project and overestimates its benefits.

2. Denver Will Not Be Required to Meet "Unrestricted Demands" During Dry Years

The DEIS assumes that Denver Water will have to meet "unrestricted demands" in the future, totaling 345,000 AF by 2016. (DEIS at H1-1). It further concludes that a water supply shortfall will occur because Denver's dry year yield will be less than 345,000 AF at that time. (*Id.*). This is a faulty assumption because the projected demand of 345,000 AF in 2016 does not account for reductions in demand due to drought restrictions that will be imposed in dry years. (*See* IRP, Drought Response Appendix).

Denver will not have to meet "unrestricted demand" during drought conditions in the future. Since the 1970's Denver has instituted voluntary and mandatory watering restrictions in response to drought. (Depo. Trans., D. Jeavons at 37). Denver currently has a Drought Response Plan that it can and will employ in times of water shortage. (2004 Drought Response Plan, attached hereto as **Exhibit D**). According to the Plan, "If continued low stream flows stress water supplies, Denver Water will work with customers to implement this Drought Response Plan." (*Id.* at Introduction). The Plan provides:

Actual water supply and supply projections trigger drought response. The severity of the water supply picture determines the stage of drought declared and the corresponding level of response. The Drought Response Plan recommends a progressive response to worsening drought conditions. Recommended drought response measures are aimed at reducing water use by varying percentages, based on predicted reservoir storage. (*Id.* at Exec. Sum.).

The Drought Response Plan has proven to work extremely well in the past and should be expected to perform similarly in the future. For example, during the “moderate” drought of 2001 to 2004, Denver imposed drought restrictions, targeting a 30% reduction and actually achieving a 29% reduction in water use. (Trial Trans., June 14, 2007, p.49). If “moderate” drought conditions occur in 2030, according to Denver Water’s Drought Response Plan, it will target the same 30% reduction in demand, equivalent to approximately 104,700 AF. (See *Id.* at pp. 51-56). Thus, during “moderate” drought conditions in 2030, the targeted demand will be on the order of 244,300 AF, not 345,000 AF.

Moreover, Mr. Jeavons, Denver’s expert demand modeling consultant, stated that Denver’s “future demands will be lower if they increase conservation expenditures in real terms.” (Depo. Trans., D. Jeavons at 41). We now know that Denver has drastically increased its conservation expenditures. (See 2007 Tap-Smart Conservation Plan). Yet, the demand projection from the 2002 IRP has not been adjusted accordingly.

3. Denver’s Alleged Supply Shortfall Only Exists When Comparing Dry Year Yield to Average Year Demands

Another issue that was addressed in detail in Case No. 02CW125 was the method by which Denver estimates its firm annual yield. (See TMO, Stip. Fact Nos. 53-55; Trial Trans., Testimony of S. Schmitzer, June 14, 2007). The DEIS recognizes that “firm yield” is a “measure of a system’s ability to reliably supply water to meet demand during drought periods...” (DEIS at 1.4.2). Denver calculates its firm yield with the hydrologic model known as PACSM which determines the firm annual yield of its existing system by calculating the maximum average water demand, without drought restrictions, that could be met during the hydrologic study period of water years 1947 through 1991. The critical drought period, late summer 1953 to the spring of 1957, is the most limiting hydrologic factor for the firm annual yield of Denver’s system based upon the 1947-1991 study period. (TMO, Stip. Fact No. 55). In other words, Denver’s firm annual yield is based on the yield of its system during drought conditions, not average conditions.²

As set forth above and throughout the DEIS, unrestricted average annual demand is defined by Denver as the amount of water under average weather conditions and absent any emergency water use restrictions that may be imposed as a result of drought or other operational conditions. Denver’s demand forecast is based on a model that uses historic water usage from the years 1973 to 1999. In other words, Denver’s demand forecast is based on unrestricted demands during average weather conditions. (TMO, Stip. Fact No. 51; Trial Trans., G. Fisher, June 14, 2007, at 44).³

Any shortfall between supplies and demands exists only when comparing dry year supplies to unrestricted average year demands. The DEIS does not present any evidence that a shortfall would exist if Denver compared dry year demands to dry year supplies. In this regard, Douglas Jeavons, the main consultant that developed Denver’s econometric demand model,

² Denver’s average year yield is greater than its firm annual yield.

³ Denver’s demand during a dry year will be less than its demand during an average year because Denver will impose drought restrictions on its customers.

stated that he would compare dry year supplies to dry year demands if he wanted to know how Denver's system would perform during a drought. (Depo. Trans., D. Jeavons at p.16). The DEIS fails to make that comparison. Likewise, Steven Schmitzer, Denver's Chief of Water Resources Analysis, admitted that Denver has not compared dry year supplies to dry year demands, or compared average year supplies to average year demands. (Trial Trans., June 14, 2007, pp.141-146). Thus, any shortfall that may exist between supply and demand is a result of a flawed comparison of apples to oranges. The Corps should objectively analyze whether any water supply shortfall would exist if dry year supplies were compared to dry year demands, and average year supplies were compared to average year demands.

4. The Yield From the Shoshone Agreement Should Be Included In Denver's Dry Year Supply

In addition to the Drought Response Plan, Denver also has an agreement with Xcel Energy to reduce the call of the Shoshone Power Plant during dry years. (DEIS at 5-20). The DEIS states that the reduction of the Shoshone Call is likely to occur in 1 out of every 6 or 7 years. (DEIS at 5-47). Yet, the DEIS provides "The future operation of the Shoshone Call reduction was not reflected in PACSM because it would only occur under certain conditions which are difficult to include in the model ..." (DEIS at 5-20). The Reservoir Companies find this explanation unavailing. During a deposition of Denver's staff in Case No. 02CW125, it was established that the reduction of the Shoshone Call in 2003 resulted in 11,586 AF of increased yield to Denver. (Depo. Trans., W. Bates, p.182-83). Accordingly, the effect of the Shoshone Agreement is to increase the dry year yield of Denver's system by something on the order of 11,500 AF. The agreement is effective through 2032 and is included as a "reasonably foreseeable" water based action in the DEIS. Given that the Corps knows when the call reduction will occur, the likely (even if approximate) increase in yield as a result of the call reduction and the frequency of its occurrence, there is no reason not to include the increased yield in Denver's reasonably foreseeable supplies. The Shoshone Agreement alone is likely to satisfy two thirds of the alleged need that the Project is designed to meet.

5. Denver's Demand Forecast Was Arbitrarily Increased by 5%

Denver used a complex econometric demand model to estimate its future demands. (See Depo. Trans., D. Jeavons at 9-13). The model was carefully crafted to determine future demands based on household income, Denver Regional Council of Governments population estimates, housing density and other detailed parameters. (*Id.*). Yet, after running the econometric demand model, Denver arbitrarily increased its output by 5%, supposedly to account for historical inconsistencies between predicted and actual demand. (*Id.* at 22, 27-29; see also Trial Trans., G. Fisher, June 14, 2007, at 39-42).

The explanation for the 5% "calibration" was that the model, when "back-cast" against historic demands, would have underpredicted demand from the 1980's to 1999. (*Id.*). However, just as the model would have systematically underpredicted demand from the 1980's to 1999, it would have overpredicted demands from 1973 to the 1980's. (Depo. Trans., D. Jeavons at 28-29). It was arbitrary for Denver to "calibrate" the model based only on the period that the model underpredicted demands, which resulted in an overinflated future demand projection.

To put this “calibration” in perspective, 5% amounts to approximately 17,000 AF. (Trial Trans., G. Fisher, June 14, 2007, at 39-42). This is in addition to the 30,000 AF safety factor that is also added to the calculated demand model output. ((Depo. Trans., D. Jeavons at 21). Absent the arbitrary increase of 5%, Denver has no a need for new water supplies either in the near term or the long term. (*Id.*, see also IRP, Demand Appendix).

6. No Action Alternative Erroneously Includes 3,000 AF of Demand for Arvada

If the Project is not constructed, Denver is not obligated to supply an additional 3,000 AF to the City of Arvada. In other words, if no action is taken, there is no need to supply this 3,000 AF. This 3,000 AF of demand should therefore be excluded from the statement of purpose and need, and should be excluded from the No Action Alternative. To include this additional 3,000 AF of demand in the No Action Alternative is a clear error that renders the baseline conditions inaccurate and unreliable. In turn, all analyses of environmental impacts comparing the other alternatives to the No Action Alternative are flawed and erroneous. This error has the effect of overstating the benefits and understating the adverse impacts of the Project.

To summarize, the DEIS should include additional modeling including:

- (1) the most up-to-date conservation expenditures and goals (expected to supply 29,000 AF by 2016);
- (2) the imposition of the drought response measures set forth in the Drought Response Plan (expected to reduce demand by 30% during a “moderate” drought);
- (3) the reduction of the Shoshone Call when reservoirs are at or below 80% of storage on July 1 of any given year (expected to increase yield by 11,500 AF);
- (4) a fair and realistic comparison of dry year yield to dry year supplies (this would eliminate any water supply shortfall);
- (5) a fair and realistic projection of future demand that is not arbitrarily increased by 5% (this would reduce the demand projection by 17,000 AF); and
- (6) the removal of the 3,000 AF of demand for Arvada in the No Action Alternative.

Contrary to the scenario that the DEIS currently assumes as the status quo under the No Action Alternative, Denver will not run out of water in 2016. Accordingly, Denver does not need this Project.

D. The Corps Failed to Independently Evaluate the Project

40 C.F.R § 1506.5(c) provides:

[A]ny environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents.

In *Utahns for Better Transportation*, the 10th Circuit Court found the EIS inadequate because the Corps relied too heavily on the Utah Department of Transportation (“UDOT”) and contractors hired by UDOT to prepare the EIS, without sufficient independent analysis. 305 F.3d at 1186-87 (citing 40 C.F.R. 1506.5(c)). The Court’s concern in this regard was “whether the breach compromised the objectivity and integrity of the NEPA process...” *Id.* Similarly, in *Davis v. Mineta*, 302 F.3d 1104, 112-13 (10th Cir. 2002), the Court of Appeals held that federal agencies prejudged NEPA issues. In *Davis*, a municipality had contracted with a city for a predetermined result and the federal agencies failed to exercise independent review and failed to analyze any alternatives other than the preferred alternative. *Id.*

The Reservoir Companies have the same concerns with the Moffat Project DEIS, because the Project proponent has supplied all of the modeling and data that the Corps is relying on to make its determinations under both NEPA and the CWA. For one, the 2002 IRP was prepared by Denver and its consultants, and the Corps has relied on its conclusions and projections with merely superficial independent evaluation. An independent evaluation of Denver’s water demand projections, as required by § 1506.5(c), should have uncovered and evaluated the issues mentioned above that led to an overstated water supply shortfall and fabricated a need for the Project. Its failure to do so is evidence that the Corps failed to independently evaluate the data and modeling that was supplied by Denver.

Second, the PACSM model and its underlying data form the basis of the entire NEPA analysis, including Denver’s firm yield and stream flow projections, which, in turn project the environmental impacts on aquatic resources. PACSM is a model designed and run by Denver. Its outputs are taken at face value in the DEIS, without independent analysis or evaluation by the Corps or its contractors.

E. PACSM Data are Stale and Unreliable

Not only is PACSM designed and run by Denver, its data set is outdated and fails to account for recent changes in climate and hydrology. In this regard, PACSM is based on hydrologic data from the study period of water years 1947 through 1991. (TMO, Stip. Fact No. 53). Yet, the Project is not expected to go online until 2016. Accordingly, the scientific data relied upon to estimate water yield and impacts on aquatic ecosystems will be at least 25 years old as of the time the Project is expected to go online. The Reservoir Companies wonder

whether the PACSM model can accurately predict water yield and stream conditions in 2016 and beyond when it is based on data that is a quarter-century old.

Further, the question of whether the PACSM data ending in water year 1991 are reliable is of particular concern in light of potential impacts of climate change on the hydrologic cycle of the Upper Colorado and its tributaries. Denver is among several major water utilities that have joined the Water Utility Climate Alliance (“WUCA”). The WUCA released a white paper on climate change in January 2010 (attached as **Exhibit E**) that explains a major shift in how water supply planning was done in the past, and should be done in the future. Namely, traditional water supply planning “has used recorded weather and hydrology to represent future supply conditions.” (WUCA at p.1). “One core assumption behind traditional water resource planning is that climate exhibits *stationarity*. *Stationarity* means that the statistical properties of climate variables in future periods will be similar to past periods.” (*Id.* at 7). “The potential for significant changes in climate in the future has called into question the viability of only using historical hydrologic, weather, and demand information to make decisions regarding water supply and infrastructure investment.” (*Id.*).

The potential impacts of climate change on Colorado River basin hydrology has been documented by the Colorado Water Conservation Board in its report titled “Climate Change in Colorado: A Synthesis to Support Water Resources Management and Adaptation.” (the “CWCB Report,” attached as **Exhibit F**). As the DEIS acknowledges, the CWCB Report concludes that temperatures in Colorado have increased about two degrees during the last 30 years. (CWCB Report at Exec. Sum.; DEIS at 5-34). Since the PACSM data stopped in 1991, it would have missed two thirds of this temperature increase. More importantly, the CWCB found that “the lowest five-year period of Colorado River natural flow since records began in the late 1800’s occurred in 2000 to 2004 (9.9 million acre feet per year).” (*Id.*). Again, this critical data set is outside the purview of the PACSM model. Further, “Recent hydrologic studies of the Upper Colorado River Basin project multi-model average decreases in runoff ranging from 6% to 20% by 2050 compared to the 20th century average, although one statistical flow model projects a 45% decline by 2050.” (*Id.*).

Stationarity is no longer a valid assumption in a major water resources analysis. If the PACSM model fails to account for recent variability in the hydrologic cycle, it will not provide reliable estimates of stream flow or firm annual yield. This defect would pervade almost every aspect of the DEIS, which fundamentally relies on the model’s output. The Corps seems to accept that climate change will cause greater variability and greater extremes in water systems, but does not even attempt to quantify the impacts on water resources. (DEIS at 5-35). But, the lack of hard and fast data on the specific effects of climate change do not prevent the Corps from at least qualitatively analyzing the likely impacts on aquatic ecosystems, which would probably include negative impacts on fisheries, water quality, water temperature and minimum stream flows during the late summer and fall.

The Corps has an obligation to rigorously and independently evaluate the Project, the scope of alternatives and the environmental impacts. As an example, the October 2007 EIS for the “Colorado River Interim Guidelines” prepared by the Bureau of Reclamation’s Lower Colorado office contained a 100-page appendix evaluating the state of climate science, potential

impacts of climate change on the Colorado River Basin, and options for evaluating the effects of climate change on reservoir operations. In contrast, this DEIS dismisses the potential impacts of climate change in relation to the preferred alternative in a single page. (DEIS at 5-35).

The Reservoir Companies urge the Corps not to base its entire DEIS, including the impacts analysis that will form the basis of a permit decision under § 404 of the CWA, on a self-serving model supplied by the applicant, that is based upon stale and increasingly irrelevant data.

In addition, after recognizing the increased range of hydrologic variability that may result in the Upper Colorado River due to climate change, the Corps should address this variability by proposing adaptive management measures to cope with stream conditions and environmental impacts as they actually occur in the future, not as they are predicted to occur. Given that outdated and unreliable models form the basis of the DEIS, any § 404 permit should be conditioned on Denver's compliance with a detailed adaptive management plan.

F. The Corps Failed to Identify Conflicts With State and Federal Laws

NEPA regulations require that:

To better integrate environmental impact statements into State or local planning processes, statement shall discuss any inconsistency of a proposed action with any approved State or local plan and laws ... [w]here an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. 40 C.F.R. § 1506.2(d).

Colorado water law governs the use and administration of water in this state. The DEIS fails to consider inconsistencies between Colorado water law and the Project. As only one example, the water right decrees for the Moffat Tunnel Collection System do not permit water diverted through the Gumlick Tunnel to be redirected into the Moffat Tunnel and delivered to Gross Reservoir. But there is no discussion of how the Project conflicts with Colorado water law or how the Corps intends to reconcile its inconsistencies.

In addition, and more importantly, the Corps failed to discuss the inconsistency between the water reuse requirement of the Blue Rive Decree and the proposed Project. The Blue River Decree (Findings of Fact and Conclusions of Law and Final Decree, Consolidated Cases, Civil Action Nos. 2782, 5016, & 5017, U.S. District Court for the District of Colorado, October 12, 1955) addressed, among other things, the water rights of the United States for the Colorado-Big Thompson Project, including rights to water from the Blue River for Green Mountain Reservoir. Included in the Findings of Fact is a Stipulation of October 5, 1955, agreed to by all parties that contains provisions relating to Denver's use of returns flows from its Colorado River Basin water. ¶ 4(e), (f), &(g). This Stipulation, being approved by the Federal Court, is Federal law.

The intent of the Project is to export additional water out of the Colorado River Basin for use on the Front Range of Colorado. If constructed, the Moffat Project would join with other

existing projects constructed by Denver Water on the West Slope that transport water out of the Colorado River Basin across the Continental Divide for use in and around Denver. Approximately half of Denver's water supply presently comes from the West Slope.

Paragraph 4(e) establishes the requirement that importation of Blue River water shall be reduced by the quantity of Colorado River System return flow water above that quantity imported in the 1955 water year that is not utilized by exchange or otherwise:

(e) To the extent that the importation and the use of water from the Colorado River System, over and above the quantity of water diverted from that source during the last year being October 1st, 1954 to September 30, 1955, by reason of the return flow from the municipal systems of said cities increase the amount of water said cities may lawfully utilize from all sources in order to supply their municipal needs, through exchange or otherwise, to that same extent the right to divert water from the Blue River shall be correspondingly decreased, if such exchange is not exercised; provided, however, that the obligation to utilize water from the Colorado River System by exchange or otherwise shall be subject to the conditions, limitations, and safeguards set forth in the following subdivision, the same being subdivision (f) of this paragraph.

Paragraph 4(f) requires Denver to submit annual reports to the Secretary of the Interior showing, by month, the quantities of return flow from Colorado River water to the South Platte and the steps taken during the period to utilize such return flows to minimize Denver's demands for Blue River water:

(f) In order to accomplish the objectives set forth in the immediately preceding subdivision hereof, the same being lettered (e), each city undertakes to exercise due diligence, within legal limitation and subject to economic feasibility. To that end, [Denver] and [Colorado Springs] shall, respectively, submit to the Secretary of the Interior on or before December 31st of each calendar year, beginning with the year 1957, a report showing by months for the water year ended September 30th last past, the quantities of water diverted ... and whether and to what extent such water was used directly or placed in storage. After each city commences use of Blue River water said report shall also show by months for the same period the quantities of return flow from their municipal uses of such Colorado River water accruing to the South Platte River and to Fountain Creek respectively... Each such shall also show what steps, by legal action or otherwise, the reporting city has taken during the period covered by the report to utilize such return flow by exchange or otherwise to the extent water of the Colorado River system is included therein, so as to

reduce or minimize the demands of such city upon Blue River water. The United States of America reserves the right ... to apply to this court for injunctive or other remedial orders, suspending or proportionately reducing diversions or imposing conditions upon the taking of Blue River water ... if the United States shall establish as a fact that the city has failed to exercise due diligence in taking, with respect to return flow of water of the Colorado River System, all steps which, in view of legal limitations and economic feasibility, might reasonably be required of such city in establishing, enforcing, utilizing or operating a plan designed to accomplish said reduction by such city of its Blue River water use.

The Blue River Decree requires Denver to make full use, within legal limitations and subject to economic feasibility, of return flows from its Blue River water rights. Failure to so use such return flows, by exchange or otherwise, is to result in a corresponding reduction of Denver's Blue River diversion rights. The stated purpose of this requirement is "to reduce or minimize the demands of such city upon Blue River water." In *Denver v. Fulton Irrigating Ditch Co.*, 506 P.2d 144 (Colo. 1973), the Colorado Supreme Court stated: "In order to minimize the amount of water removed from Western Colorado, eastern slope importers should, to the maximum extent feasible, reuse and make successive uses of the foreign water."

While the specific purpose of these provisions of the Blue River Decree is to reduce or minimize Denver's transmountain diversions of Blue River water, the broader purpose as stated by the Supreme Court in *Fulton Ditch* is to ensure that Denver and other Front Range water suppliers do not take water from Western Slope streams unless and until absolutely necessary to meet actual requirements. The need for the Project and its impacts cannot be evaluated in isolation. It must be evaluated in light of the history and laws surrounding transbasin diversions from the Colorado River basin. The appropriate balance between efficient water use and reuse on the east slope, and additional diversions from the west slope, was established in 1955 by the Blue River Decree. The failure to even consider this historical balance and legal water reuse obligation is as fundamental flaw of the DEIS. The Corps should not issue a permit to Denver to construct the Project unless and until compliance with the Blue River Decree is established and independently confirmed by the Corps.

VI. THE DEIS DOES NOT COMPLY WITH THE CLEAN WATER ACT

A. Standards of Law Under CWA

Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, prohibits the filling or dredging of wetlands without first receiving a § 404(b) permit from the Corps. "A permit may not be issued if (i) there is a practicable alternative which would have less adverse impact and does not have other significant adverse environmental consequences, (ii) the discharge will result in significant degradation, (iii) the discharge does not include all appropriate and practicable measures to minimize the potential harm, or (iv) there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with [the Corps']

Guidelines for permit issuance.” *Utahns for Better Transportation v. U.S. Dept. of Transportation*, 305 F.3d 1152, 1163 (10th Cir. 2002) (citing 40 C.F.R. § 230.12(a)(3)(i-iv)). “The burden of proof to demonstrate compliance with the § 404(b) permit Guidelines rests with the applicant; where insufficient information is provided to determine compliance, the Guidelines require that no permit be issued.” *Id.* (citing 61 Fed.Reg. 30, 990, 30, 998 (June 18, 1996)). Further, issuance of a permit with insufficient information would be considered arbitrary and capricious. *Id.*

If the Corps finds the Project to be the least environmentally damaging practicable alternative (“LEDPA”), the Corps must also determine that the Project is in the public interest before it can issue a § 404 permit. 33 C.F.R. § 320.4(a)(1). In conducting a public interest review, the Corps is required to balance “benefits which reasonably may be expected to accrue from the proposal” against the “reasonably foreseeable detriments.” *Id.* The decision to grant or deny a permit should reflect “national concern for both protection and utilization of important resources.” *Id.* Thus, the federal regulations place the burden on the Corps to prove that (a) the Project is the LEDPA and (b) the Project is in the best interest of the nation.

B. The NEPA documents must be supplemented to comply with the CWA

“For actions subject to NEPA, the analysis of alternatives required for the NEPA environmental documents will in most cases provide the information for the evaluation of alternatives under the CWA Guidelines. If, however, the NEPA documents do not consider the alternatives in sufficient detail to respond to the requirements of the Guidelines, it may be necessary to supplement NEPA documents with additional information.” *Id.* (citing 40 C.F.R. § 230.10(a)(4)).

In this case, the Corps has stated that it intends to rely on the NEPA documents to inform its decision under § 404 of the CWA. (DEIS, App. K). However, for all of the reasons set forth in Section V above, which are incorporated herein equally as objections to the Corps’ satisfaction of the CWA guidelines, the NEPA documents are fundamentally flawed. The problems that pervade the NEPA documents undercut any § 404 permit decision that would be based on the NEPA documents. Such flaws include (1) the statement of purpose and need is unreasonably narrow, (2) the scope of alternatives that were considered is unreasonably narrow, (3) the No Action Alternative fails to accurately depict the status quo, (4) the Corps failed to independently evaluate and verify the PACSM model and the data and projections from the 2002 IRP, (5) the Corps failed to identify and reconcile conflicts between the Project and Colorado water law, and (6) the Corps failed to identify and reconcile conflicts between the Project and the reuse requirement of the Blue River Decree.

Since the DEIS is inadequate under NEPA, its analysis of environmental impacts is also inadequate to inform a decision under § 404 of the CWA. The Reservoir Companies urge the Corps to supplement the NEPA documents to comply with the substantive standards of the CWA, to objectively and rigorously evaluate whether there is a legitimate need for the Project, and to determine whether the Project is truly the LEDPA after considering all practicable alternatives, including water reuse, conservation, cooperative agreements, and all other projects and mechanisms available to meet Denver’s basic policy objective, which is to supply water to

its customers. Otherwise, the issuance of a permit with insufficient information would be considered arbitrary and capricious.

C. The DEIS fails to prove that the Project is the LEDPA.

An alternative is practicable if it is “available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* (citing 40 C.F.R. § 230.10(a)(2)). Unlike NEPA, which is a procedural statute, the CWA has substantive requirements. “The CWA test is not ... whether features of a proposal would make a more desirable project. Rather, the Applicant and the [Corps] are obligated to determine the feasibility of the least environmentally damaging alternatives that serve the basic project purpose. If such an alternative exists ... then the CWA compels that the alternative be considered and selected unless proven impracticable.” *Id.* at 1188 (emphasis added).

Like the Corps failure to comply with NEPA, the Corps’ failure to comply with the CWA also stems in large part from an improperly narrow and unexamined statement of purpose and need. The basic project purpose should be generally defined as meeting Denver’s water supply obligations, rather than narrowly defined as constructing a major enlargement of Gross Reservoir. Put simply, the Corps cannot prove that enlargement of Gross Reservoir is the LEDPA, and satisfy its obligations under the § 404 guidelines when it hasn’t considered anything other than the enlargement of Gross Reservoir.

In addition to the overly narrow, result-oriented statement of purpose and need, the DEIS fails to prove that the Project is the LEDPA because (a) an aggressive water conservation plan, which has already been adopted by Denver, should eliminate most of the alleged need for the Project, (b) executing the existing drought response plan will eliminate the alleged water supply shortfall in times of drought, (c) exercising Denver’s rights under the Shoshone Agreement should satisfy most or all of the alleged water supply shortfall, and (d) an independent analysis of the Denver’s supply and demand projections would show that there is no real or immediate need for additional water supplies given the 30,000 safety factor, the 5% arbitrary increase in the demand model, and flawed comparison of dry year supply to average year demand.

Beyond the nonstructural alternatives to a major reservoir expansion and increased transbasin diversions, Denver has other means of generating additional firm yield, such as cooperative projects with neighboring municipalities, lawn irrigation return flows, water reuse, gravel pit storage and a number of other less damaging alternatives. While the identification and evaluation of these alternatives are the responsibility of the Corps, the Reservoir Companies urge the Corps to rigorously evaluate the potential of the above alternatives, particularly potable and non-potable water reuse, which is technically and economically feasible *and* legally required, as explained above in the context of the Blue River Decree.

As one example of many practicable alternatives to the Project that were not adequately considered in the DEIS, the Reservoir Companies anticipate that Denver can meet most, if not all, of its projected demand deficit, if any, with re-usable return flows. Based on historical reuse of Roberts Tunnel return flows from 2000 through 2004, Denver generated about 20,000 AF of unused return flows that could have been legally reused to extinction. (See Summary of

Denver's Reports to USBR attached as **Exhibit G**). As Denver maximizes use of its Blue River water rights, the Reservoir Companies estimate that Denver will own on the order of 66,000 AF of reusable return flows. (*See Id.*). The DEIS even acknowledges that some of Denver's return flows remain available for other uses and that "the reusable return flows could be combined with other water sources to meet the entire needed 18,000 AF/yr of new firm yield." (DEIS at K-8). But the analysis of this potential source, and practicable alternative to the Project, inexplicably ends there.

As part of the Denver's reuse obligation, it can and will reuse return flows from residential lawn irrigation. While Denver would need to construct infrastructure to capture, treat and pipe lawn irrigation return flows ("LIRFs") back into its system, LIRFs have the ability to provide up to 12,000 AF of firm annual yield. (Depo. Trans., W. Bates at 173-180; Trial Trans., Day 2 at p. 127). Yet, the 2002 IRP and DEIS assume only 500 AF of supply from LIRFS. Capturing LIRFs is apparently technically and economically feasible, and would add significant firm annual yield to Denver's system. Denver plans on capturing LIRFs as it has adjudicated that source in Water Court, and has spent roughly \$2 Million Dollars quantifying the source. (Trial Trans., Day 2, p. 12-13). The DEIS assumption in this regard (500 AF for LIRFs) is yet another example of a gross underestimate of Denver's water supplies, that leads to an imaginary water supply shortfall.

Potable and non-potable reuse (not merely reuse by exchange) of excess return flows, including LIRFs, is economically, technically, and legally feasible, as evidenced by Denver's construction of its water reuse facility and adjudication of LIRFs. More importantly, Denver is legally obligated under the Blue River Decree to reuse its return flows before it constructs projects that would divert additional Western Slope water. Given the technical and economic feasibility, coupled with the preexisting legal requirement of the Blue River Decree, the Corps has the obligation to rigorously evaluate the potential of water reuse to satisfy Denver's demands and provide supplemental information to the public in this regard.

D. The DEIS fails to prove that the Project is in the best interest of the nation.

The Corps is obligated to consider whether the Project is in the best interest of the nation, not just whether it is desirable for Denver. By finding, based on stale, unreliable and biased data and modeling, that the environmental impacts of the Project are generally insignificant, the Corps essentially ignores all impacts on the west slope as negligible. The Colorado River and its tributaries are the lifeblood of recreation and agriculture for the west slope. It has been diverted and pumped to the Front Range for decades, by dozens of transbasin projects. While the impact of each of the existing and foreseeable transbasin diversion projects may be compartmentalized, the Colorado River is subject to death by a thousand cuts. The Corps must reevaluate, based on the most current and best available data and information, whether the Colorado River and its tributaries are at a tipping point, at which even relatively minor impacts can lead to major adverse ecological and economic consequences.

There is no question that the Project would cause significant degradation to the Colorado River. Not only would the Project itself have adverse impacts on the aquatic ecosystem, it is only one of several transbasin diversion projects that combine to drastically reduce streamflow.

The DEIS barely acknowledges, and quickly dismisses the Project's impacts on aquatic resources when it states, "overall, the cumulative effects of reasonably foreseeable projects and the Moffat Project on surface water is minor..." (DEIS 5-39). Yet, the DEIS also states that in combination with the Windy Gap Firming Project ("WGFP") and Shoshone Call reduction, the average annual flows of the Colorado River will decrease by approximately 60,600 AF or 9%. (Id.). The DEIS also acknowledges adverse impacts on water quality, sediment transport and water temperature. (DEIS 5-40). Contrary to the conclusion of the DEIS, however, these are hardly "minor" impacts, particularly when viewed in light of the hundreds of thousands of AF already transported out of the basin and degradation of the ecosystem caused by pre-existing projects. Indeed, according to Grand County, on average, 65% of the total water in the headwaters of the Colorado River System is already diverted to the East Slope by existing transmountain projects, and that percentage will increase to 85% if both the WGFP and the Moffat Project are implemented.

Moreover, the DEIS focused primarily on the average monthly streamflows to evaluate impacts to aquatic resources. Since the Project is designed to capture the highest flows in wet and average years, the Reservoir Companies suspect that it would have much more significant impacts on the peak flows than it has on the average flows. Major reductions of the already constrained peak flows are perhaps more important indicators of stream health than average flows. Similarly, the focus on average monthly streamflows may mask impacts to minimum stream flows, which, like peak flows, must be evaluated independently. Accordingly, in its supplemental analysis, the Reservoir Companies urge the Corps to take a hard look at the specific impacts of the Project on peak flows and minimum stream flows.

Demonstrating the Corps' failure to focus on the most significant environmental impacts - which will occur in the sending basin, not the receiving basin - Appendix M to the DEIS considers a 5,000 AF "Environmental Pool" for the benefit of streamflows on 17 miles of South Boulder Creek. There is no corollary for mitigation of impacts on the Colorado River and its tributaries. While the Reservoir Companies support the concept of mitigating impacts to South Boulder Creek, they are concerned with the absence of specific mitigation to improve the environmental conditions of a source area that is already massively depleted of native streamflow along approximately 57 miles of rivers and creeks. The "best interest of the nation" must include both sides of the Continental Divide.

VII. Conclusion

The data relied upon in the DEIS are outdated, including the supply and demand projections from the 2002 IRP and the data set that informs all of the PACSM model runs. Further reducing the reliability of the DEIS, these data and models were supplied by the project proponent and were not given sufficient independent evaluation by the Corps. The Corps failure in this regard is obvious due to its failure to identify most of the glaring errors and omissions identified above.

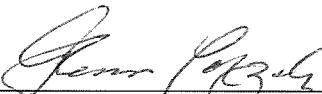
Contrary to a fundamental premise of the DEIS, Denver will not run out of water in 2016. No water supply shortfall would exist absent the faulty comparison of dry year yield to average, unrestricted demand, an arbitrary 5% increase in demand projections on top of a 30,000 AF

safety factor, failure to acknowledge LIRFs, the Shoshone Agreement and Denver's accelerated conservation goals. These are the conditions under which the statement of purpose and need should be rewritten. The failure of the DEIS to accurately depict the status quo in the No Action Alternative also pervades every aspect of the DEIS, in that it forces environmental comparisons of alternatives to an erroneous baseline condition. Put simply, the LEDPA cannot be determined when the environmental impacts are not known. Likewise, the Corps cannot make a sound decision regarding the nation's best interest, when its entire analysis rests on stale, biased and unreliable data.

Once the Corps has an objective understanding of Denver's real water demands and supplies, and documents them in a supplemental EIS, it can then meaningfully evaluate whether any unmet demands would remain. If any demands would remain unmet with no action, then the Corps should consider real "alternatives," rather than minor variations of the Project. In so doing, the Corps should rigorously consider cooperative arrangements, LIRFs, gravel pit storage and particularly, potable and non-potable water reuse of transbasin water, which is already a legal requirement under the Blue River Decree.

The Reservoir Companies thank you for your consideration and response to the above comments, and urge you to take the steps that are necessary to ensure the Project is rigorously and objectively evaluated with the most current scientific data and under the most realistic operating scenarios.

CLINTON DITCH & RESERVOIR COMPANY
EAGLE PARK RESERVOIR COMPANY

By: 

Glenn E. Porzak, General Counsel

cc w/out encl: Eagle Park Reservoir Company Board of Directors
Clinton Ditch and Reservoir Company Board of Directors
Eric Gross, Federal Energy Regulatory Commission
Andrea Parker, URS Corporation