



Environmental Law Clinic
Student Law Offices
2255 East Evans Avenue
Suite 335
Denver, Colorado 80208
303-871-6140

June 30, 2020

Via Priority Mail to:

Ms. Marcia Gilles, Acting District Ranger,
c/o Matt Klein, Realty Specialist
White River National Forest
P.O. Box 190
Minturn, CO 81645

And via the public comment portal at: <https://cara.ecosystem-management.org/Public/CommentInput?Project=58221>

RE: Comments concerning Whitney Creek Geotechnical Investigation Project

Dear Acting District Ranger Gilles:

The Environmental Law Clinic at the University of Denver Sturm College Law provides these comments on behalf of Save the Colorado, WildEarth Guardians, Colorado Headwaters, and Sierra Club, Colorado Chapter (“Conservation Groups”) concerning the Forest Service’s consideration of the issuance of a Special Use Permit to the cities of Aurora and Colorado Springs (the “Homestake Partners”) for the proposed Whitney Creek Geotechnical Investigation Project. The Conservation Groups are nonprofit organizations dedicated to protecting regional waters, forests, wild spaces and wildlife from degradation and environmental harms. They work to achieve these goals by seeking to protect and restore flows in rivers and their tributaries, advocating for policy reform, and advancing climate solutions for current and future generations.

The Forest Service’s May 28, 2020 Notice and Request for Comments (“Scoping Letter”)¹ for this project indicates that the Forest Service anticipates that the decision to issue a Special Use Permit for the Whitney Creek Geotechnical Investigation Project (the “Proposed Action”) will qualify for a Categorical Exclusion under the National Environmental Policy Act (“NEPA”), thus exempting the decision from a rigorous environmental analysis. As the Conservation Groups explain below, the Proposed Action

¹ United States Department of Agriculture – Forest Service, Scoping Letter, May 28, 2020, available at https://www.fs.usda.gov/nfs/11558/www/nepa/113772_FSPLT3_5299145.pdf (last accessed June 30, 2020).

cannot be analyzed separately from the larger Eagle River Joint Use Water Project, does not qualify for a categorical exclusion under NEPA, and will significantly impact the environment such that preparation of an environmental impact statement is necessary.

LEGAL FRAMEWORK

The National Environmental Policy Act

The National Environmental Policy Act, or NEPA, is “our basic national charter for protection of the environment.” *Wilderness Workshop v. U.S. BLM*, 342 F. Supp. 3d 1145, 1150 (D. Colo. 2018) (quoting 40 C.F.R. § 1500.1(a)). The Supreme Court has described NEPA as having twin aims: government agencies are first forced to “consider every significant aspect of the environmental impact of a proposed action[,]” and second, to “inform the public of the potential environmental impacts of proposed actions and explain how their decisions address those impacts.” *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983). Thus, agencies must take a “hard look” at the environmental consequences before taking a major action, and must guarantee that the relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

When a government agency prepares to undertake or authorize an action that will “significantly affect[] the quality of the human environment,” the “hard look” at potential environmental impacts is typically accomplished through an environmental impact statement, or EIS. *Citizens’ Committee to Save our Canyons v. U.S. Forest Service*, 297 F.3d 1012, 1022 (10th Cir. 2002) (citing 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4.). The preparation of an EIS occurs in several stages. *Id.* Typically, an agency will announce its decision to evaluate a potential action through a process called scoping, in which the agency solicits comments and input from the public and other agencies with the goal of identifying specific issues to be addressed and studied. *Id.*; 40 C.F.R. § 1501.7. After reviewing input received during the scoping process, an agency will decide whether to prepare a draft EIS or a less-detailed Environmental Assessment, or EA. If the agency prepares an EA, and determines that the project will not significantly impact the human environment, the agency issues a “finding of no significant impact,” and the project may proceed (subject to administrative and judicial review). If the EA reveals that the impacts will or may be significant, the agency prepares a draft EIS.

While many major federal actions undergo analysis in an EA or EIS, agencies may consider certain actions as categorically excluded from NEPA review. 40 C.F.R. 1508.4. Generally, each agency has the authority to promulgate regulations defining the types of actions that may be excluded from NEPA review. *Citizens’ Committee to Save our Canyons*, 297 F.3d at 1023 (citing 40 C.F.R. § 1507.3(b)(2)(ii)). An agency’s authority to identify those actions it will consider exempt from NEPA review is subject to a caveat from the Council on Environmental Quality that requires the agency to “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” 40 C.F.R. § 1508.4.

Forest Service Authority

The Forest Service is authorized by statute to manage the national forests “to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States,” and for “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 475; *Robertson v. Methow Valley Citizens Council*, 490 U.S. at 336 (1989) (citing 16 U.S.C. § 528). When an entity proposes to occupy and use National Forest System lands, the proponent is required to contact the Forest Service office responsible for the management of the affected land as early as possible in advance of the proposed use, and must submit an application for use that satisfies the requirements of the applicable regulations. 36 C.F.R. § 251.54(a); 36 C.F.R. § 251.54(d). The decision of whether to issue a special use permit like the one sought by the Homestake Partners is a “major Federal action” within the meaning of NEPA. *Methow Valley Citizens Council*, 490 U.S. at 336.

THE PROPOSED ACTION

In an email to subscribers, which is also the “Scoping Letter” posted on the Forest Service website, about the “Whitney Creek Geotechnical Investigation Project for the USDA Forest Service USFS,” the Forest Service described the Proposed Action and request for comments:

The White River National Forest (WRNF) is inviting public comment on a proposal to consider issuing a special use permit (SUP) for the Whitney Creek Geotechnical Investigation project on National Forest System lands, and if so, under what terms and conditions. The investigations are needed to evaluate the feasibility of constructing a new dam and reservoir within the Homestake Valley. A Categorical Exclusion (CatEx) will be prepared pursuant to the National Environmental Policy Act (NEPA) to disclose the potential effects of the Proposed Action. The Forest Service would appreciate your input in helping to identify issues that will be addressed in the forthcoming environmental analysis. Additional project information can be found on the project web page: <https://www.fs.usda.gov/project/?project=58221>.

Specifically, the Proposed Action is the “issuance of a SUP to the Homestake Partners, authorizing them to conduct geophysical surveys and subsurface studies.” Scoping Letter at 2. The Scoping Letter describes the purpose of the project (to “evaluate opportunities to construct reservoir storage”) and the need for the project (to “obtain factual data necessary to identify and evaluate feasible reservoir alternatives for the Eagle River Joint Use Water Project to provide critical water supplies for human and

environmental purposes[.]”), and states that the proposed Special Use Permit for “Geophysical Survey” and “Subsurface Exploration” is designed to address the purpose and need.

The proposed Geophysical Survey would be conducted by up to four people over one to two weeks, and involves the use of geophones to record seismic responses along two potential dam alignments. *Id.* The proposed Subsurface Exploration would be conducted by up to four people for up to five days at each of ten proposed drilling locations. *Id.* To conduct the drilling, construction of temporary roads or “access routes” would be required; constructing these roads may necessitate the clearing or cutting of vegetation and trees. *Id.* at 3. The Scoping Letter and supporting technical report documents describe both of these components in greater detail.²

COMMENTS

The Forest Service must consider the impacts of the *entire* Eagle River Joint Use Water Project before issuing the special use permit for the Whitney Creek Geotechnical Investigations because the two actions are “connected.”

CEQ regulations require that “connected” or “closely-related” actions be discussed in the same environmental impact statement. 40 C.F.R. § 1508.25(a)(1). An action will be considered “connected” or “closely-related” in three circumstances: (i) the action automatically triggers another action requiring an environmental impact statement; (ii) the action “cannot or will not proceed unless other actions are taken previously or simultaneously;” or (iii) the action is an “interdependent part[]” of a larger action and depends on that larger action for its justification. *Id.* Often, courts find actions to be “connected” when one proposed action “could not occur but for the occurrence of the other.” *Citizens’ Committee to Save our Canyons*, 297 F.3d at 1029. Examples of connected actions include the sale of timber and the construction of a road to access that timber or two segments of a larger pipeline project. *Thomas v. Peterson*, 753 F.2d 754, 758 (9th Cir. 1985) (“It is clear that the timber sales cannot proceed without the road, and the road would not be built but for the contemplated timber sales[.]”); *Hammond v. Norton*, 370 F. Supp. 2d 226 (D.D.C. 2005) (finding that BLM acted arbitrarily and capriciously in concluding that one pipeline had independent utility from another in the same larger project).

One of the primary reasons for requiring agencies to consider “connected actions” in the same EIS is to prevent agencies from short-circuiting NEPA review by minimizing the potential environmental consequences from a proposed action through segmentation or isolation of an individual action that, standing alone, may not have a significant impact.

² In addition to the Scoping Letter, the online project file contains the project application, a supporting technical report and addendum to that report, a letter confirming acceptance of the application, and a press release. Whitney Creek Geotechnical Investigation project file, available at <https://www.fs.usda.gov/project/?project=58221> (last accessed June 30, 2020).

Citizens' Committee to Save our Canyons, 297 F.3d at 1029. 40 C.F.R. § 1508.25(a)(1) is part of a larger regulatory prohibition against “impermissible segmentation” under NEPA. *Id.* If allowed, the Whitney Creek Geotechnical Investigation would likely violate this prohibition.

The Whitney Creek Geotechnical Investigation is connected to the Eagle River Joint Use Water Project, and the two actions must be considered together in one EIS. Specifically, the two actions meet the definition of “connected” under 40 C.F.R. § 1508.25(a)(1)(ii) and (iii). The Scoping Letter explains that the SUP would authorize investigations that are “needed to evaluate the feasibility of constructing a new dam and reservoir within the Homestake Valley.” Thus, the action of constructing a new dam and reservoir “cannot or will not proceed” unless the Whitney Creek Geotechnical Investigation is conducted first. 40 C.F.R. § 1508.25(a)(1)(ii).

Additionally, the Whitney Creek Geotechnical Investigation only exists to support the potential dam and reservoir construction; it has no independent utility and is only justified by the potential future action that is the Eagle River Joint Use Water Project. The proposed action’s purpose and need further reveal the connected nature of the projects: the purpose is to “evaluate opportunities to construct reservoir storage” and it the need is to “obtain factual data necessary to identify and evaluate feasible reservoir alternatives for the Eagle River Joint Use Water Project[.]” *Id.* Therefore, by design, the Whitney Creek Geotechnical Investigation serves *only* to inform the Eagle River Joint Use Water Project. It is an “interdependent part” of a larger action [potential dam and reservoir construction] and “depend[s] on the larger action for [its] justification.” 40 C.F.R. § 1508.25(a)(1)(iii).

Because the Eagle River Joint Use Water Project cannot proceed without the Whitney Creek Geotechnical Investigation, and because the latter depends on the former for its justification, the two actions are connected. Accordingly, a full environmental assessment or environmental impact statement for the Eagle River Joint Use Water Project must be completed before the Forest Service issues any special use permit to the Homestake Partners.

The Whitney Creek Geotechnical Investigation does not qualify for categorical exclusion from NEPA.

The Scoping Letter suggests that the Forest Service anticipates that its decision to issue a special use permit to the Homestake Partners would fall within a categorical exclusion from NEPA. Scoping Letter at 1 (“A Categorical Exclusion (CatEx) will be prepared pursuant to the National Environmental Policy Act (NEPA) to disclose the potential effects of the Proposed Action.”). Under NEPA, a “categorical exclusion” refers to a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of the CEQ regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is

required. 40 C.F.R. § 1508.4. The Forest Service has promulgated regulations that explain when actions may be categorically excluded:

a proposed action may be categorically excluded from further analysis and documentation in an EIS or EA only if there are no extraordinary circumstances related to the proposed action and if: (1) the proposed action is within one of the categories [listed in] 7 CFR part 1b.3; or (2) the proposed action is within a category listed in 220.6(d) and (e).

36 C.F.R. § 220.6(a). Thus, actions undertaken by the Forest Service may only be excluded if they are specifically identified in 7 C.F.R. § 1b.3 or 36 C.F.R. § 220.6(d)-(e) and no extraordinary circumstances exist. If actions do not meet these two requirements, they should undergo full NEPA analysis.

At the outset, the Forest Service has not identified which subsection(s) of 7 C.F.R. § 1b.3 or 36 C.F.R. § 220.6(d) or (e) encompass the proposed Whitney Creek Geotechnical Investigation. Without additional information or explanation from the Homestake Partners or the Forest Service, none of the available exclusions appear to apply to the Whitney Creek Geotechnical Investigation. 7 C.F.R. § 1b.3 identifies seven categories of activities that have been determined by USDA not to have a significant individual or cumulative effect on the human environment, but none of those categories appear applicable in this case. The Whitney Creek Geotechnical Investigation consists of seismic surveys and subsurface investigation (test borings) designed to collect information about feasibility of the site for potential future dam and reservoir construction. On their face, those activities might look like “inventories, research activities, and studies,” *see* 7 C.F.R. § 1b.3(a)(3), but this exclusion contemplates “routine data collection,” and not data collection that will then be used in the next phase of a major project.

36 C.F.R. § 220.6(d) and (e) contain a lengthier list of potentially-applicable categorical exclusions, but again—without additional information from the agency or project proponents, the public is left to speculate which of the exclusions the Forest Service believes may apply. 36 C.F.R. § 220.6(d) lists exclusions for which no decision memo is required; examples include short-term orders to protect public health, adopting rules or policies that establish administrative or program processes, repair and maintenance of various types of sites, land transactions, and permits pertaining to ski areas. 36 C.F.R. § 220.6(d). None of these exclusions appear to apply in this case, so without additional information, the Whitney Creek Geotechnical Investigation should not be excluded from NEPA analysis without preparation of a CatEx decision memo or project file, at minimum. *See* 36 C.F.R. § 220.6(e).

The only exclusion that the Conservation Groups have identified as potentially applicable is that the Forest Service considers the proposed action to be a “short-term (1 year or less) mineral, energy, or geophysical investigation[] and [its] incidental support

activities that may require cross-country travel by vehicles and equipment, construction of less than 1 mile of low standard road, or use and minor repair of existing roads.” 36 C.F.R. § 220.6(e)(8). The Scoping Letter does not affirmatively state that the SUP will be issued for a term of less than one year, nor does it provide sufficient detail about the length and locations of the roads to guarantee that the construction will be limited to “less than 1 mile.” Scoping Letter at 2-3. While the application’s technical report includes some maps that purport to show locations of “access routes,” the report also includes the following equivocal caveat: “[t]hese are approximate and it is possible that localized site conditions may require modification to these alignments. Final locations and access route alignments would be coordinated with the U.S. Forest Service (USFS) to achieve USFS goals and provide the necessary equipment access.” November 27, 2019 Technical Report, Whitney Reservoir Siting Study (“Technical Report”), at 12. Thus, the actual locations and lengths of the roads are unknown. The Forest Service should determine that use of the categorical exclusion at 36 C.F.R. § 220.6(e)(8) is inappropriate without, at minimum, confirmation that the constructed roads will be less than one mile and will be limited in existence to one year or less.

Even if the Whitney Creek Geotechnical Investigation is the type of activity contemplated by 36 C.F.R. § 220.6(e)(8), the proposed action cannot be categorically excluded from NEPA analysis for two reasons. First, “extraordinary circumstances” exist such that use of a categorical exclusion is improper, and second, because the Whitney Creek Geotechnical Investigation is connected to the Eagle River Joint Use Water Project (see discussion *supra* at 4-5), any consideration of whether a categorical exclusion is appropriate should include the full project.

Extraordinary circumstances

Extraordinary circumstances are present where, even though an action may meet the definition of a certain categorical exclusion, conditions exist that justify further analysis and documentation in an EA or EIS. 36 C.F.R. § 220.6(b). To determine whether extraordinary circumstances exist, the Forest Service must consider certain resource conditions, including, but not limited to, the presence of any “federally listed threatened or endangered species or designated critical habitat,” “flood plains, wetlands, or municipal wetlands,” “Congressionally designated areas, such as wilderness, wilderness study areas, or national recreation areas,” “inventoried roadless area or potential wilderness area,” and “American Indians and Alaska Native religious or cultural sites[.]” 36 C.F.R. § 220.6(b)(1)(i)-(iv), (vi). Although the presence of one or more of the listed resource conditions does not preclude use of a categorical exclusion, “it is the existence of a cause-effect relationship between a proposed action and the potential effect on these resource conditions and if such a relationship exists, the degree of potential effect of the proposed action on these resource conditions that determines whether extraordinary circumstances exist.” 36 C.F.R. § 220.6(b)(2). In this case, many of the resource conditions are present and will be substantially impacted by the proposed action.

Specifically, the wetlands in the area of proposed action are a classic example of a resource that is “extraordinary.” The Forest Service has stated that the Homestake Creek wetlands and fens are of extremely rare and of high value. The fens in the drainage are critical and are not able to be mitigated in any manner.³ This is supported by scientists, water engineers, conservation groups and others nationwide. The Homestake Partners have not produced any data illustrating how they will address these irreplaceable fens. The technical report prepared by ERO Resources states:

Wetlands would be avoided during construction of temporary access routes to the extent possible and boring sites would be located outside of wetlands. Where avoidance of a wetland is not possible, wood mats made from trees, plywood, or other temporary structures may be used to protect wetlands during the short period of access travel.

Technical Report at 17. This simple description of efforts that “may be used to protect wetlands” is completely unacceptable. The Forest Service must describe the exact location of the surveys and exploration activity, map the wetlands—especially the high-value fens—and describe how the proposed action will completely avoid sensitive areas, or, to the extent it is possible, how the Homestake Partners will mitigate impacts to these areas.

In addition, the technical report fails to include the Gray Wolf, an endangered species listed under the U.S. Endangered Species Act, as a species that may be impacted by the proposed action.⁴ On June 12, 2020, Colorado Parks and Wildlife sent out a press release indicating the Gray Wolves have increased their range in Colorado and may be sighted across the state.⁵ At minimum, the Forest Service must identify and disclose the impacts of the proposed action on Gray Wolf range.

The presence of endangered species and rare, ancient fens are the type of conditions that justify further analysis of the Whitney Creek Geotechnical Investigation and render use of a CatEx inappropriate. Thus, the Forest Service should require preparation of and thoroughly review an EIS or, at the very least, an EA before issuing a SUP.

Connected action

Finally, because the Whitney Creek Geotechnical Investigation is connected to the Eagle River Joint Use Water Project (see discussion *supra* at 4-5), any consideration of

³ See, e.g., July 2019 Memorandum from Colorado Water Conservation Board, attached hereto.

⁴ Colorado Parks & Wildlife, “Learn About Wildlife: Wolves,” available at <https://cpw.state.co.us/wolves> (last accessed June 30, 2020).

⁵ Colorado Parks & Wildlife, Press Release, “Colorado Wolf Update,” June 12, 2020, available at <https://cpw.state.co.us/aboutus/Pages/News-Release-Details.aspx?NewsID=7481> (last accessed June 30, 2020).

whether a categorical exclusion is appropriate should include the full project. Upon review of 7 C.F.R. § 1b.3, and 36 C.F.R. § 220.6(d)-(e), the complete Eagle River Joint Use Water Project cannot be considered categorically excluded from NEPA. The complete project extends well beyond a short-term geotechnical investigation, will likely result in significant impacts to the environment, and, as described above, a plethora of extraordinary circumstances exist such that the Eagle River Joint Use Water Project must undergo full NEPA analysis.

The Whitney Creek Geotechnical Investigation and the Eagle River Joint Use Water Project will significantly impact the environment. Accordingly, the issues identified below and in other comments should be fully analyzed in an Environmental Impact Statement.

This project may have a significant impact on the environment and thus the Forest Service should prepare an EIS. The Council for Environmental Quality's (CEQ) regulations require agencies to prepare an EIS if a project *may* significantly affect the human environment. CEQ's regulations define significance in terms of context and intensity, which includes, *inter alia*, the scope of beneficial and adverse impacts, unique characteristics of the geographic area, degree of controversy, degree of uncertainty, and degree to which an action may affect species listed or critical habitat designated under the Endangered Species Act. 40 C.F.R. § 1508.27 (defining "significantly"). For the reasons discussed below and elsewhere in this letter, this project may significantly affect the human environment in the following ways:

Geological Faults

Of tremendous concern is the fact that the area in question, Homestake Creek, lies in a major fault zone. The entire region of the Rocky Mountains consists of extremely fractured geology and the location of the proposed action is a prime example. Today, there are over 400 dams at "High Risk" at this time in Colorado. The Conservation Groups saw no discussion of the fault zone in the Scoping Letter or supporting documents. The Forest Service must review and disclose the information about the geological dangers of potential earthquakes in the Homestake drainage area.

Trans-mountain Diversion

Trans-mountain diversions are a relic of the past in water planning and have not been built or planned for over forty years, since the demise of Two Folks in the 1980's. Front Range cities have developed conservation measures that have been extremely successful in allowing additional growth without destroying critical high elevation ecosystems. The cumulative negative impacts of sending critical waters to the Front Range must be addressed prior to any developments. As the nation moves forward in the decommission of dams across the country, it is highly questionable why this old technology is being considered.

Holy Cross Wilderness

The proponents have stated that some 500 acres of the Holy Cross Wilderness would be required to facilitate the proposed dam, roads and construction of the proposed water project. It is unclear to the Conservation Groups whether, and how, the use of this wilderness area would be an option short of Congressional action. The process involved in and resulting impacts of using Holy Cross Wilderness should be fully evaluated and disclosed.

Wetlands and Fens

The Forest Service has stated that the Homestake Creek wetlands and fens are of extremely rare and of high value. The fens in the drainage are critical and are not able to be mitigated in any manner. This is supported by scientist, water engineers, conservation groups and others nationwide, including in the attached July 2019 letter from the Colorado Water Conservation Board. The proponents have not given any data illustrating how they will address these irreplaceable fens.

Climate Change

Climate Change has had a profound negative effect on the Colorado River system. The results are a serious decline in moisture over the past 25 years. This has resulted in a 19% decline in flows in the Colorado River system. The proponents obtained the water right to the Homestake drainage in 1952. There is no question that this water right has also been reduced a substantial amount during the past 25 years and as a result of Climate Change.

Economic Values

Over the past 25 years, the economic value throughout the West Slope has grown substantially. Colorado attracts many visitors and new residents who are interested in accessing its plentiful outdoor recreation areas and activities, and a great deal of these resources can be found west of the Continental Divide. Outdoor recreation is a 62 billion dollar industry in the state, and primarily a result of the public lands in the West Slope. This important resource is directly related to the ranching and farming communities, small town environments, wildlife, and fishery resources on the West Slope.

Compliance with NEPA and Other Laws, Regulations, and Plans

The “heart” of any NEPA environmental impact statement is the alternatives analysis. 40 C.F.R. § 1502.14. Agencies must rigorously explore and identify all reasonable alternatives, including the “no-action” alternative, to any proposed major action. 40 C.F.R. § 1502.14(a), (d). The Forest Service must ensure that its analysis of *both* actions—whether to issue the SUP and any future action regarding the Eagle River Joint Use Water Project—comply with NEPA, including robust evaluations of alternatives to the proposed actions that include the alternative of “no action.”

In addition to warranting full NEPA analysis in an EIS, the proposed action is likely to implicate other laws, regulations, and plans that have either gone unconsidered or must be considered in greater depth. For example, the technical report asserts that the geotechnical investigation will comply with the Clean Water Act but fails to provide sufficient explanation in light of the proposed action's potentially-impactful activities. The Clean Water Act delegates authority to states to develop water quality standards for each waterway within the state's regulatory jurisdiction. 33 U.S.C. § 1313(c). The technical report notes the possibility of needing to obtain a § 404 permit and potentially crossing Homestake Creek to complete some proposed borings. If the Homestake Partners anticipate needing a § 404 permit for their activities, the Forest Service should require a more detailed description of the activities, permit terms, and best management practices to ensure that the proposed action does not cause or contribute to a violation of water quality standards.

Additionally, the technical report does not disclose whether and if the proposed action comports with the goals and objectives of the White River Forest Management Plan. Under the National Forest Management Act, projects like the proposed action must be consistent with the governing forest plan. 16 U.S.C. § 1604(i). The Forest Service must explain how this proposed action is consistent with the White River Forest Management Plan.

According to the technical report and U.S. Fish and Wildlife data, several federally listed threatened or endangered species potentially occur in and downstream of the project area. Technical Report at 18. The Canada Lynx has potential habitat in the vicinity of the project area, and the North American Wolverine and several fish, birds, and a plant species also occur in or downstream of the project area. The Forest Service must ensure that its actions comply with the Endangered Species Act. Section 7 of the Endangered Species Act imposes a substantive obligation on federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of" habitat that has been designated as critical for the species. 16 U.S.C. § 1536(a)(2). The Forest Service must explain how the Whitney Creek Geotechnical Investigation and the Eagle River Joint Use Water Project address and comply with the Act, including in the context of ongoing and future impacts from climate change and habitat fragmentation.

The failure of the Homestake Partners and the Forest Service to fully consider and analyze the above concerns—and others discussed in comments from the Wilderness Workshop—must be corrected. The Conservation Groups share and expressly adopt the concern raised by Wilderness Workshop, and reserve the right to provide additional comments on any new or revised materials submitted in connection with the proposed action, the Eagle River Joint Use Water Project, and any other related or connected actions or activities.

We appreciate the opportunity to highlight these substantial concerns as the Forest Service considers issuance of a Special Use Permit for the Whitney Creek Geotechnical Investigation. We hope that these comments are helpful, and we are available to discuss these concerns with you in greater detail if you wish.

Sincerely,

/s/ Sarah Matsumoto

Sarah A. Matsumoto
Kevin J. Lynch
Wyatt G. Sassman
University of Denver, Sturm
College of Law
2255 E. Evans Ave.,
Denver, Colorado 80208
Phone: 303-871-6140
smatsumoto@law.du.edu
klynch@law.du.edu
wsassman@law.du.edu

*Attorneys for Save the Colorado,
WildEarth Guardians, Colorado
Headwaters, and Sierra Club,
Colorado Chapter*

Attachments:

July 2019 Memorandum from Colorado Water Conservation Board re: fens



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718
Denver, CO 80203

P (303) 866-3441
F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Jojo La, Endangered Species Policy Specialist,
Interstate, Federal and Water Information Section
Kirk Russell, Finance Section Chief

DATE: July 17-18, 2019 Board Meeting

AGENDA ITEM: 6. Rocky Mountain Fen Research Project

Background:

The CWCB currently provides funding to the Colorado Mountain College Natural Resource Management Program (CMC NRM) to conduct research on the Rocky Mountain Fen. In 2018, \$100,000 of funds were granted to CMC NRM for long-term monitoring (2018-2021) of translocated historic fen-like materials. The following provides an update on the project.

In 2016, CMC NRM partnered with the City of Aurora Utilities Department, Board of Water Works of Pueblo, Army Corps of Engineers (Corps), U.S. Fish and Wildlife Service (Service), and U.S. Environmental Protection Agency to transplant and mitigate fen-like materials. Historic degraded and dewatered fen-like materials were mechanically harvested from the Hallenbeck Ranch (donor site) and translocated approximately 2 miles east of the ranch on the Hayden Homestead (CMC NRM-owned property). The fen-like organic soils and plant life were removed from the donor site in blocks or bales and reassembled in a specially-prepared groundwater-fed basin.

A fen is a special type of wetland whose impacts cannot be satisfactorily mitigated according to Corps and Service guidelines. In Colorado, the unique organic soil formation of fen wetlands took thousands of years. Fen wetlands support biodiverse plant communities serving essential ecological functions including filtering of contaminants in water. The translocation and mitigation of fen wetlands is especially important to water resources planning and development because the presence of fen wetlands increases the environmental permitting regulatory requirements for water projects. Jurisdictional determinations of wetlands are issued by the Corps, and determine whether a water will be regulated under Section 404 of the Clean Water Act. Federal agencies require that fen impacts be avoided to the maximum extent possible and if an impact to a fen is unavoidable, the functions and values of that fen must be replaced. Because of the impossibility of regenerating fen soils within a meaningful timeframe, regulatory and management agencies have determined that fen impacts are unmitigatedable. However, the unmitigatedable status of fen wetlands may be related to the lack of scientific investigation on fen mitigation.

Since 2016, long-term monitoring of the translocated Rocky Mountain Fen has occurred. 2018 data is currently being analyzed for trends on vegetation establishment, hydrology, soil, and water quality to determine the efficacy of the transplantation and mitigation techniques.

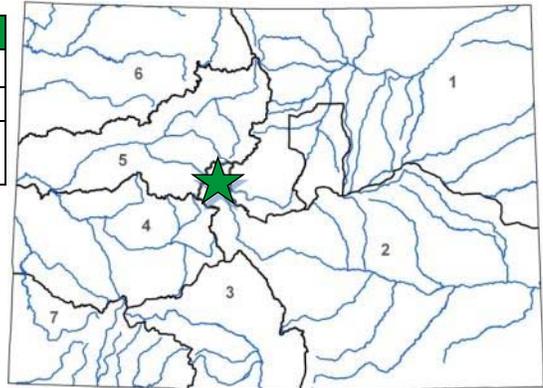
Staff Recommendation:

This item is informational only. No Board action is requested.





PROJECT DETAILS	
Project Cost:	\$100,000
Monitoring Period:	2018-2021
Funding Source:	Non-Reimbursable CWCB Construction Fund and Other



The Colorado Mountain College Natural Resource Management Program (CMC NRM), in partnership with the City of Aurora Utilities Department and the Board of Water Works of Pueblo, is conducting a research project to investigate fen mitigation techniques. A fen is a special type of wetland in which impacts cannot be satisfactorily mitigated according to Army Corps of Engineers and the U.S. Fish and Wildlife Services guidelines. This unmitigated status may be related to the lack of scientific investigation on fen mitigation. Thus, CMC NRM has assembled a technical team to develop techniques to translocate historic, degraded fen-like materials. The technical team includes fen experts, remediation construction representatives, as well as members from the U.S. Fish and Wildlife Service, Army Corp of Engineers, and U.S. Environmental Protection Agency.

LOCATION	
County:	Lake County
Water Source:	Groundwater
Drainage Basin:	Arkansas
Division: 2	District: 11

In 2016, heavy equipment was used to harvest a portion of a historic/hydrologically-altered fen. The degraded fen-like organic soils and plant life were removed from the donor site in blocks or bales to keep the soils and plant life intact. The fen-like materials were transported and reassembled in a specially-prepared basin on Colorado Mountain College property in Lake County, Colorado. The receiver basin was designed to mimic the form and function of natural fen basins.

The project has developed techniques for fen mitigation and translocation of fen-like materials that have already been degraded, dewatered, or in some way damaged. These materials have been protected and monitored to assess the efficacy of the transplantation. For the translocation, approvals to harvest and move the fen were granted by the Army Corp of Engineers, the U.S. Fish and Wildlife Service, the State of Colorado Mined Land Reclamation Board, and Colorado Parks and Wildlife.

CWCB funds have been used to monitor the translocated fen since 2018. Baseline monitoring of the donor site occurred prior to the relocation. After the fen was moved, a rigorous, intensive long-term monitoring program was developed—this is required to determine the success of the transplantation procedure and mitigation techniques. CWCB funds will be used for long-term monitoring of the transplanted fen until 2021.

