



December 5, 2023

Colorado River Drought Task Force
c/o Ms. Kathy Chandler-Henry, Chair
Via Electronic Mail: kathy.chandlerhenry@eaglecounty.us;
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Dear Colorado River Drought Task Force Members,

On behalf of the Upper Yampa Water Conservancy District (UYWCD), I would like to thank you all for the time and effort you have put into this expedited process to develop recommendations for the upcoming legislative session. The list of proposed recommendations the Colorado River Drought Task Force has put forth for review is commendable and we recognize that many recommendations on the list are worthy of support, comment, and consideration to the benefit of Colorado water users.

With ever-evolving recommendations, some that directly impact the Yampa River Basin and our District constituents, we felt it was imperative to wait for the final proposed recommendations to provide comment to the entire task force. As such, we hope that you understand our inability to provide comments to the Task Force earlier in the process or to address all the recommendations worthy of support on your short list. Due to the timing of the final proposed recommendations and the nature of our board's voting process, we have elected to only address areas of clarification and concern with the Industrial Water Users Proposed Tool, which will directly impact the Yampa River Basin. We believe the proposed recommendation could greatly benefit our basin and would like to offer our support if some of the proposed conditions can be clarified or corrected.

The UYWCD owns certain direct flow and storage water rights, absolute and conditional, related to the two existing reservoirs owned by the UYWCD and also related to planned future projects on the Bear River and on Morrison Creek. Some of those rights are junior to absolute and conditional water rights owned by the electric utilities and coal mines in the Yampa River basin, and some are senior to such utility/coal mine water rights. As a major owner and user of water rights in the upper Yampa River basin, and as a steward for future possible water projects that supports the wise and flexible existing and future water uses of the Yampa River and its tributaries within the District boundaries, we believe that parts of the Industrial Water Users Proposed Tool four legislation concepts (Concepts) submitted to the Drought Task Force may

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be beneficial to the upper Yampa River basin if constrained with certain guardrails, but other parts of the Concepts are potentially damaging and injurious to the present and future water users on the Yampa River including the UYWCD. The purpose of the following comments from the UYWCD is to set forth a description of the potentially damaging parts of the Concepts and to provide a description of certain guardrails and limitations on other parts of the Concepts for the Drought Task Force to consider.

First, proposed Concept number 4, for a Multi-Benefit Flow Enhancement Pilot Program involving the loaning of utility/coal mine absolute water rights to the CWCB, constitutes a classic “change” of use of absolute water rights. Under existing water law, this would require the utilities/coal mines to seek a decree for alternate flow enhancement in water court, thereby triggering a required determination of the historic consumptive (HCU) of the “changing” water rights. However, when combined with Concept number 1, the proposed language seems to imply changes of water rights would not be filed at all before completion and use of loan agreements for stream flow enhancement, or perhaps even finished before 2050. The UYWCD has concerns about this proposed modification. At the most, the maximum flow rates of utilities/coal mine absolute water rights which might be loaned for stream flow enhancement should only be the true HCU flow rates of the existing absolute rights as of the present time. Those were the “draft on the river.” If the power plants are closed, and no more water diverted to the plants, it is the HCU flow rates “draft” that would pass by the intakes and go on down the river. It should not be the cumulative paper total of all decreed utilities/coal mine water rights that would be the foregone “draft” going on down the river. For example, it is well known among water users on the Yampa River that the direct flow cumulative absolute decrees for water diversion from the Yampa River at the Craig Station intake pipe is somewhere between two and three times the physical historic diversion capacity of such intake pipe. The pipe can divert about 50 cfs and the 3 or more absolute water rights of Tri State at the intake cumulatively total well over 100 cfs. The proposed Concepts are currently unclear on when and how the HCU maximum flow rate physically diverted historically will be adjudicated. The proposed Concepts should expressly limit the flow rate which can be passed by the Hayden and Craig power plants under a new flow enhancement program not to exceed the HCU maximum flow rate physically diverted historically, and thus it should be a prerequisite of any loan for such stream flow purposes that the utility/coal mine first go to water court and adjudicate its HCU for the absolute flow decrees it proposes to loan to the CWCB. This flow determination should occur prior to 2029, not waiting until after 2050.



Some additional proposed language concerns include the wording of Concept number 1 and Concept number 2, which we believe should be materially revised to make clear that the portion of absolute water rights which are not confirmed as HCU flow in the near future (the “Excess Absolute Portions”) cannot receive the benefit of judicial disregard of non-use or reduced use, i.e., if such Excess is not in fact put to use at the historic decreed locations of diversions for utility/coal mine use in any year, then the owner gets a “zero use” that year for HCU purposes, and such Excess is fully exposed to abandonment as is the case with any other absolute water right going unused for 10 or more years.

Furthermore, the sentence near the bottom of Concept number 4 that “Any determination of HCU for purposes of this pilot program shall not be binding in any future water court action” should be deleted. The quantification of HCU should be as final for all future purposes as any other water court determination. Otherwise, the existing and future water users on the Yampa River would have to re-consider and/or re-litigate HCU of these utilities/coal mine water rights 30 or more years in the future. The UYWCD encourages the industrial water users to initiate the legal process now, not in 30 years. If HCU is not required to be judicially determined and confirmed for the “parked” absolute water rights of the utilities/coal mines by 2029 and the start of any loan program use, we fear that the gross cumulative sum of the decreed flow rates of all of the absolute water rights may receive 30+ years of “use credits” under the stream flow enhancement loan program, and in 30+ years, when such water rights might be used for future clean energy or might be sold and conveyed for other uses, the HCU now existing will be “expanded” into equaling nearly the paper decreed amounts, not the real HCU pre-2019.

Exemption from normal water right concepts of such Excess because the Excess “may be needed to support development of future clean energy generation projects” is so vague, speculative, and unascertainable as to be a guarantor against ever being abandoned. No other water user in Colorado, whether government or private, large corporate or small irrigator, has ever previously had that right and benefit, and it should not be allowed under the Concepts.

If a Concept number 4 stream flow enhancement program is developed, and if the utilities/coal mines adjudicate their HCU for absolute water rights, we believe the program details should include that the use as mainstem flow enhancement cannot make a call on the river and the loan program authorization should have that same limitation on the CWCB. Neither the CWCB nor the endangered fish program will have “control of the river” in the



lower river stretch. We also believe that although a loan is proposed not to exceed 120 days per year, the loaned right must not use that annual time limitation to “ratchet up” the flow rate. As in other change cases, the flow rate during that 120 days annually cannot exceed the flow rate, at the same time, as would have been available for diversion in the historic intake facilities from the river at that location at that time, under the HCU determination. The bypass loaned flow cannot exceed what would have been available at the original decreed locations. Lastly, considering the uncertainty on the Colorado River as a whole with respect to interstate issues and how intrastate curtailments will ever be determined and enforced, we suggested shortening the 10-year plus 10-year approval to a more appropriate duration that allows for flexibility with changing river conditions. After all, Substitute Supply Agreements are annual processes that have found a clear niche in Colorado water law. Durations of 3 or 5 years may be more appropriate.

Finally, Concept number 3 is wholly opposed by UYWCD. There is no “public benefit” in giving long-term life support to utilities/coal mine conditional water rights that would have, if ever constructed, constituted a draft on the river. Every conditional right, whether held by government, private parties, big corporations, small irrigators, is subject to sexennial due diligence case requirements, especially including the application of the “can and will” doctrine. Concept 3 absolutely enfeebles the “can and will” doctrine as applied in diligence cases, for only utilities/coal mines—wholly special interest legislation. If allowed here, other holders of conditional water in Colorado will want the same “free pass” on “can and will” if they say that their conditional right “may” be “needed” to support a vague conclusive statement of their industry’s future or purpose. The potential for abuse would then be impossible to rein in. Utilities and coal mines in the Yampa Basin own conditional water storage rights on proposed reservoirs that do not appear to be constructable. When the power plants are closed, the necessity for such additional storage is highly speculative. We do not perceive a public benefit for the utility industry to get exclusive relief on the necessity to prove diligence every six years for the undeveloped reservoir storage rights which have never been an actual draft on the river.

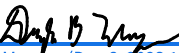
The last sentence of Concept 3(c) is a statutory finding that a utility/coal mine owner of a conditional water right in Division 6 gets a “pass” in mandatory finding of diligence if the owner, or “others in the electric utility industry or supporting the mining industry”, are “working at” technologies for clean energy transitions. That is far too vague. It isn’t restricted to location. It doesn’t define how “working on” will be interpreted or defined. No other major holder of conditional water rights in Colorado has that benefit, and the



UYWCD, which holds numerous conditional water rights for several projects to benefit the future “water works” for which conservancy districts were created, would not have the same right in similar circumstances. This Concept 3 is unwarranted legislation and should not be considered.

Along with these comments, The UYWCD extends an offer to work directly with the Industrial Water Users Proposed Tool proponents and Yampa River stakeholders to develop a more complete articulation of the legislative Concepts presented to the Drought Task Force. We appreciate your consideration of these lengthy comments and once again, express our gratitude for the work you have put into the development of the short list of proposed recommendations. Your ability to propose innovative solutions for legislative action on such a short timeline does not go unnoticed.

Sincerely,


[Doug Monger \(Dec 6, 2023 11:03 MST\)](#)

Doug Monger
President, Upper Yampa Water Conservancy District Board of Directors