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May 2, 2022

Douglas County Commissioners  
100 Third Street  
Castle Rock, CO 80104

Re: Renewable Water Resources Proposal to Export Water from the San Luis Valley to Douglas County

Commissioners Laydon, Thomas, and Teal,

In your role as Douglas County Commissioners, you have embarked on an information gathering exercise regarding the Renewable Water Resources (RWR) proposal to export water from the San Luis Valley to Douglas County. The San Luis Valley Water Conservancy District (SLVWCD) staff and Board have been participating in and closely monitoring the process. As your series of meetings regarding RWR's concept comes to a close, it is worth reviewing the information presented.

### **Water Availability**

A fundamental point of disagreement throughout the discussion of RWR's proposal is whether or not there is unused or available groundwater in the San Luis Valley. RWR's application for ARPA funding states there is unused water in the Valley. Further, representatives from RWR continue to repeat the "back of the envelop" estimate by United States Geological Service geologist, Philip Emery, that the San Luis Valley aquifers contain up to 2 billion acre-feet of water.

In the meeting with Douglas County on January 18<sup>th</sup>, RWR's engineer Bruce Lytle, utilized an outdated water budget and information from a non-current version of the Rio Grande Decision Support System (RGDSS) model. Mr. Lytle used these materials in an attempt to demonstrate that the RWR well field would be located in an area of high rim recharge and there is more water coming into the system than going out. At the same meeting, Deputy State Engineer Mike Sullivan, pointed out Mr. Lytle's use of outdated information.

On January 31<sup>st</sup>, Clinton Phillips, Engineer for the SLVWCD and Rio Grande Water Conservation District, provided a detailed water budget using the best available data, the current RGDSS model. The model shows an average deficit to the Rio Grande Basin's water balance of -41,000 AF/year over the 2011-2020 time period. Mr. Phillips also shared graphics from the most recent version of the RGDSS model and noted the area near RWR's proposed well field does not exhibit higher than normal recharge.

At the January 31<sup>st</sup> meeting, SLVWCD Manager Heather Dutton emphasized that all the water in the Rio Grande Basin is appropriated and current uses are unsustainable as they outpace supply. The Findings of Fact, Conclusions of Law, Judgement, and Decree in case 2004CW24 states, *"The confined and unconfined aquifers are also over appropriated, and the current rates of withdrawal from these aquifers exceed their long-term rates of recharge, the result of which is a groundwater overdraft or groundwater mining of the entire aquifer system."* The ruling from 2004CW24 also clearly and decisively puts to rest any credibility of

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Mr. Emery's estimate in paragraph 197, which states: *"this 'back of the envelope' calculation by Mr. Emery was just that, and does not represent at all what is currently known about the hydrogeography of the Valley...The San Luis Valley as a whole contains less than half the quantity of groundwater estimated by Mr. Emery, a part of which is of unusable quality and not economically recoverable."*

The combined facts of law and data show there are not 2 billion acre-feet of water in the aquifers and confirm that there is no unused or available water in the San Luis Valley.

### **Groundwater Rules**

Scarcity necessitates rules. In the San Luis Valley, rules have been promulgated by the Colorado State Engineer for decades and Douglas County has entertained extensive presentations regarding the Rules in the basin, specifically the 2004 Confined Aquifer Rules and the 2015 Rules Governing Groundwater in the Rio Grande Basin.

The Rules require well owners to mitigate the impacts their pumping causes to streams and rivers, and to take action to bring aquifers to sustainable levels. In his presentation to the Douglas County Commissioners, Mr. Phillips explained that the confined aquifer in the San Luis Creek Response Area, the hydrologic area where the RWR well field is proposed, is currently considered unsustainable. The five-year average of existing pumping occurring in this response area is 10,413 acre-feet per year. Mr. Phillips raised the concern that it might be impossible to consolidate 22,000 acre-feet of pumping, more than twice the current pumping, in the San Luis Creek Response Area while maintaining sustainable aquifer levels and mitigating stream impacts as required by the Groundwater Rules in the Rio Grande Basin.

The opponents of RWR's proposal have made great efforts to explain the importance of the Rules and communicate concerns about RWR's ability to comply. These concerns are reinforced by RWR's unwillingness to provide details regarding their plan to mitigate the injuries caused by pumping RWR's proposed wells. RWR claims to have used the RGDSS model to evaluate their concept, but has not provided data. Therefore, Douglas County or any other party evaluating the proposal cannot know the extent of the injury caused by RWR's project and it is impossible to claim there will be no impacts.

RWR representatives Sean Tonner and John Kim have repeatedly stated that RWR will comply with all Rules. However, that claim is contradicted at page 10 of RWR's proposal, which states: *"Colorado water law requires that injurious depletions be augmented but the Rules in the basin go beyond that requirement, requiring a 1:1 augmentation regardless of the injury issue. In fact, augmentation in some cases can result in a requirement of greater than 1:1 augmentation based on the cumulative depletions to groundwater and surface water supplies. These artificial boundaries and constraints are part of the current basin Rules. Because of these constraints, **modifications to these Rules are necessary prior to proceeding with a Water Court application.**"*

Former RWR attorney, Kevin Kinnear sent a letter to Attorney General, Phil Weiser which was provided to the Douglas County Commissioners in the memo for the January 31<sup>st</sup> meeting noting that, *"If the Project were to take place in any other area of Colorado, the standard for approving it would be simply non-injury to other water rights,"* he continues, *"However, the Project is to take place in the SLV, and this **creates a set of unique legal problems.** In fact, these legal hurdles are 'unique and among the most complex in the state.'* **Two rules in particular are most problematic:** (1) the requirement set forth in Rule 6.B.2 of the 2004 Confined Aquifer Rules, which requires the retirement of or change of an equivalent amount of withdrawals from the confined aquifer as well occur under the new withdrawals (i.e., '1-for-1 augmentation'); and (2) the

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*requirement set forth in Rule 8.1.7 of the 2015 Groundwater Rules that limit all ground water withdrawals in each sub-district ('Response Area') to the historical average amount withdrawn during the period 1978-2000. Rule 6.B.2 is problematic for the Project, because it would require the retirement of (or change of) a significant portion of all well diversions in the entire SLV that are from the confined aquifer."*

The Rules in place in the San Luis Valley exist to prevent injury and recover the aquifers to sustainable levels. RWR's disregard for and misrepresentation of the Rules has heightened the apprehension that RWR does not intend to comply with the Rules and will attempt to circumvent the Rules by seeking an exemption. This does not set well with the thousands of well owners that have undertaken the difficult task of replacing stream depletions and working to restore aquifer levels in compliance with the Rules.

### **Economic Considerations**

RWR has painted a bleak and disparaging view of the San Luis Valley, and incorrectly characterized the economic resources and value of water in the Valley. RWR claims it will add a lifeline to the community by paying twice the market value of water and developing a \$50,000,000 community fund. Page 23 of RWR's proposal notes the dedication of \$68,000,000 to purchase water rights. On January 31<sup>st</sup>, Tonner said, *"Originally, we were looking at one for one, we are at 1 for 1+. We're looking at between 32,000-34,000 acre-feet we'll retire for the opportunity to export 22,000."* Therefore, the purchase price proposed by RWR is \$2,000 per acre-foot.

The market in the San Luis Valley is variable depending on the location of the water supply. The SLVWCD manages a robust regional augmentation plan and was involved in a December 2021 transaction where surface water rights diverted from the Rio Grande and decreed for irrigation appraised for \$4,100 per acre-foot. While Marisa Fricke, Subdistrict #1 Manager for the Rio Grande Water Conservation District, has noted that water rights included in Subdistrict #1's 2021 well permit purchase program averaged \$3,100 per acre-foot. The source of these wells was the unconfined aquifer. There hasn't been a comparable water rights purchase or program involving confined aquifer wells, so it is hard to pin down a definitive market. However, it is reasonable to assume that RWR's proposed offer of \$2,000 per acre-foot is likely at or below market value, and certainly not twice the market value as Mr. Tonner has claimed. At the February 8<sup>th</sup> meeting, RWR's guest John Mattingly, shared his opinion that RWR's proposed offer for water rights was below market value.

While RWR's Community Fund gives the appearance of a generous incentive for the San Luis Valley, it woefully under values the long-term losses that will occur if land is dried up to allow water to be exported out of the Valley. At the February 7<sup>th</sup> meeting with Douglas County, Chad Cochran, rancher and loan officer with Farm Credit, noted that a conservative estimate of the reduction in the San Luis Valley's economy due to the lost agriculture production is \$53,000,000 *each year*. This estimate does not take into account the potential additional economic impacts to the neighboring hot springs, and State and Federally managed National Parks, National Forests, and wildlife refuges. A one-time pay-off of \$50,000,000 to the residents of the San Luis Valley is not a "win" for the community.

Contrary to RWR's statements, the community of the San Luis Valley is vibrant, determined to maintain its agriculture heritage, and working to ensure a thriving future for our residents. The SLVWCD believes we are better off keeping family farms and ranches intact and continuing with the community solutions, such as groundwater management subdistricts and conservation easements, to reduce our water use in order to match water supply, while keeping land productive.

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## Costs

The most surprising aspect of the RWR discussion has been the lack of attention to potential costs. RWR's proposal includes only four budget items: \$50,000,000 for the community fund, \$68,000,000 to purchase water rights, \$20,000,000 non-refundable initial payment from Douglas County, and fixed water purchase price for Douglas County of \$18,500 per acre-foot. In a letter dated January 27, 2022, John Kim acting on behalf of RWR adjusted the terms of the request to \$10,000,000 initial payment and \$19,500 per acre-foot fixed purchase price. RWR has not provided an itemized budget or even a lump sum estimate for total project costs. Further, RWR has downplayed the complexity of construction and permitting a project of this size and geographical reach. In a letter written by former RWR attorney Kevin Kinnear to Sean Tonner that was provided to Douglas County in the January 31<sup>st</sup> meeting memo, Kinnear asserted, *"It is possible that certain permits, such as County 1041 permits and discharge permits for use of streams as conduits might be required (and environmental studies might be necessary as part of that process). However, those permits relating to the construction and use of a pipeline have standards and criteria that, so long as met, should lead to approval."* RWR has not disclosed the extent to which permits may be required, the "standards and criteria" for each, and the process for application, review, and approval.

The only project cost estimates provided to Douglas County have been James Eklund's back of the napkin estimate of \$2 billion and Kelly DiNatale's detailed project budget, which was presented to Douglas County Commissioners on February 28th. Mr. DiNatale is a Front Range Water Engineer who has worked in the San Luis Valley and extensively on Front Range water supply projects, including working in the City of Westminster's water resources department for over 20 years. In his presentation, Mr. DiNatale noted the challenges with permitting and getting through water court, and discussed the information no RWR representative has been willing to provide - the costs to construct and operate the proposed project. Using information from comparable water projects, Mr. DiNatale estimated the combined cost to purchase water, obtain permits and a water rights decree, and build the project would be \$1,600,000,000 and the cost per acre-foot delivered to Douglas County would be \$82,600. Mr. DiNatale also concluded the operating costs would be \$45,200,000 per year. Therefore, assuming project construction is financed, the cost to the end user would be \$20 per 1,000 gallons.

Through the operation of its augmentation plan, the SLVWCD constantly analyzes water projects, including both water rights purchases and construction. The first step in any project is to summarize the components, create a timeline, and build a draft budget. It has been astounding to watch the conversations around RWR's proposal and request for a \$10 million contribution from Douglas County occur with the proponents only providing vague discussions of costs. However, the information provided by Mr. DiNatale shows the RWR proposal would be an expensive endeavor for all involved, especially the end user who would pay more than three times the current rate for water on the Front Range.

## Social Considerations

No water provider wants to partner with RWR to develop San Luis Valley water for use in Douglas County. On behalf of a majority of Douglas County water providers, Lisa Darling said the South Metro utilities have plans in place to supply water and RWR is not part of their plans. She went on to ask Douglas County to respect those plans and the hard work that has gone into them. There is still no end user for RWR's proposal.

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For three months, the Douglas County Commissioners have been asking questions of water experts. As your fact-finding endeavor concludes, it is time for you to ask yourself the following questions:

**Is it responsible governance to pursue a proposal with so many unknowns and a high risk of failure?**

RWR has failed to provide a budget, timeline, or engineering report for its proposal. These are standard components of any water supply project, as evidenced by the detailed information provided by many Douglas County Water Providers in their applications for ARPA funds. Because the proposal has not been fully studied, designed, or priced, it lacks the detail needed for a full evaluation. However, the estimated costs others have provided and the known hurdles such as water court, permitting, and construction make the proposal very risky. If this proposal is pursued and immediately commenced, it will likely take many decades to obtain a decree through water court and the needed local, county, state, and federal permits. Given the fact that the three current Douglas County Commissioners may choose to move on in the next 10-20 years, the responsibility for this risky, controversial project would be passed on to future boards.

**Is it fiscally responsible to invest taxpayer dollars in a project with such high costs?**

The estimates provided to Douglas County show the cost to supply water to Front Range residents would be well above other alternatives, which will be a burden on the end users, if the proposed project is ever built.

**Is it fiscally responsible to invest taxpayer dollars in a project with such great opposition?**

The costs to all parties involved would be great. The project would be a financial burden to the stakeholders in the San Luis Valley and Douglas County. We are prepared to represent the SLVWCD's interests and join the greater community of the San Luis Valley in water court, if needed. But isn't it worth pausing to ask, is it a good use of taxpayer funds for governments to be entangled in water court for what could easily take a decade given the complexity of the dispute? The constituents in the Valley would be better served if the water districts continue to use our resources to fund programs to better manage our limited water resources. Wouldn't Douglas County residents be better served by Douglas County spending its assets to stand alongside water utilities in the implementation of their carefully and responsibly planned projects, which do not include the RWR concept? It is not a positive outcome for Douglas County and the San Luis Valley water districts, counties and towns, environmental groups, farmers and ranchers, and others that have something to lose from RWR's project to spend millions in court battling over a proposal that has such a low chance of ever being built. This is a lose-lose for all of us.

**Is it ethical to move water from a water scarce region to satisfy rapid growth in another?**

Even if Douglas County determines the project can be constructed and operated, an important consideration is whether it should be. Experts have presented hours of information regarding the connectivity of the San Luis Valley's water resources. The proponents of RWR refuse to provide their model runs showing they can complete their proposal without injuring hydraulically connected farms and ranches, wetlands and streams, water supplies for all the Valley's residents, and critical wildlife habitat. It is inconceivable that RWR would assert its proposal will do no harm.

RWR's proposal sets the stage for a lengthy public battle which has already be characterized as "David vs. Goliath." This prolonged clash would be damaging to everyone involved and set Colorado back. RWR's project would allow Douglas County to prosper at the expense of the San Luis Valley. This is a worn-out and unnecessary way of doing business. Water providers across the Front Range and in Douglas County have worked diligently to change the way they obtain new supplies by developing projects that secure sustainable drinking water for their customers while supporting rural communities. Just as the water in the San Luis Valley is connected, so too are the communities in our state. We urge you to reject RWR's request for \$10

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million of public funds and encourage you to instead look toward and support projects that help ensure every Coloradoan has an opportunity to have a thriving future.

The infusion of infrastructure funding through federal and state sources provides a once in a lifetime opportunity to invest in legacy projects for communities across our state. We hope you will support projects that provide water for your community through responsible stewardship, innovative water sharing agreements, and partnerships with rural Colorado.

Sincerely,



Tyler Neely  
President, San Luis Valley Water Conservancy District