



November 1, 2021

Dear Boulder County Commissioners,

On behalf of the members of The Environmental Group (TEG), we urge you, in the strongest terms possible, to not settle the 1041 federal lawsuit with Denver Water at this point. In light of this evening's news that Judge R. Brooke Jackson will likely recuse himself from the case, resulting in a postponement of the hearing date and the assignment of a new judge, we ask that you cancel the public review meeting on November 2nd. This turn of events opens the opportunity for a more meaningful settlement negotiation and possible dismissal of the case.

For an issue of such consequence, the county's lack of effort to consult with either TEG or the constituents of the county for their input on settlement terms is remarkable and inexcusable. If you choose to accept the current settlement agreement, you must be prepared for a high level of outrage, anger and disappointment from your constituents, and the logical consequences that follow. As elected officials, county residents expect you to listen to their voices when decisions like this are made. We had no opportunity in this instance to be heard and have been denied due process.

The current terms of settlement are completely unacceptable. They do not come close to capturing the magnitude of the impacts of this project. The environmental damage, the impact to the quality of residents' lives, the cost to individuals and to the county, and the danger and harm resulting from construction activities are enormous. It is apparent from the terms of the current settlement that the county is taking the approach that "something is better than nothing." TEG understands that the chance of winning this case may be slim. But it would be better to lose and file an appeal than to settle on the current terms which are tantamount to nothing.

The proposed settlement provides \$10 million in cash, \$2.5 million of which is earmarked for individuals impacted by the project. If 2,500 area residents are impacted (and the number is likely higher) that is \$1,000 per person. If you spread that out over 7 years of construction, that is just under \$143 per person per year. This is a paltry sum and in no way commensurate with the hell this project will put residents through.

We understand the tough position the County finds itself in. It is in this position primarily because the County chose not to appeal the 2020 FERC decision authorizing the project to proceed. At that time, Save the Colorado strongly urged the county to appeal that decision. They did not do so because Denver Water assured the county that they had the 1041 process to rely on for recourse. This cut off the county's ability to challenge FERC in court.

On a related note, since at least 2008 Denver Water has intimated that they could invoke the “Federal Powers Act (FPA)” but failed to do so until they filed the 1041 federal lawsuit in July of 2021. When TEG and our legal counsel joined that lawsuit as intervenors in August 2021, our lawyers immediately did thorough case law research and discovered that the FPA has been held to override all state and local authorities in any case involving hydropower dams. We don’t know when the Boulder County lawyers became aware of this precedence. Had this been brought to light earlier, the whole 1041 situation would likely have been handled much differently, saving the county and TEG significant time and money.

As intervenors, we were privy to the transcript of the status call in October 2021 with Judge Jackson. The judge displayed gross prejudice in Denver Water’s favor, despite the admission that he knew nothing about the case. TEG was very impressed with the claim preclusion and laches argument proposed by the Boulder County attorneys. We believe the argument deserves its day in court. Given that we now have an opportunity for the case to be heard by a different judge we urge you to delay by rejecting the current settlement terms.

We demand you ask the court for an extension. You need to solicit public input and then decide if you want to settle or pursue your case in court. If you decide to settle, we ask that you work with the intervenors to put together an appropriate settlement proposal incorporating citizens’ input that is commensurate with the negative impacts of the project.

Sincerely,  
TEG Board of Directors