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June 24, 2011

Gary Butterworth, Chair
Chris Castilian, Member
Bill Kane, Member
James Pribyl, Member
Lenna Watson, Secretary/Vice-Chair
Colorado State Parks Board
1313 Sherman Street, Suite 618
Denver, Colorado 80203

Re: Proposed Memorandum of Agreement for the Over the River Project

Dear Messrs Butterworth, Castilian, Kane, and Pribyl and Ms. Watson:

This letter is submitted on behalf of the board of ROAR, Inc. and its members and supporters. ROAR is a Colorado not-for-profit organization comprised of residents of Bighorn Sheep Canyon, anglers, fishing guides, business owners and others who will be directly and adversely affected by the Over the River project. We urge the Colorado Board of Parks and Outdoor Recreation ("the Board") to deny the OTR Corporation's ("OTR") request that you enter into a memorandum of agreement ("the Agreement") authorizing near exclusive use of Arkansas Headwaters Recreation Area ("AHRA") facilities over almost 50 miles of its course. Not only is the proposed Agreement inconsistent with this Board's mission and strategic plan, it is also untimely given this Board's imminent merger with the Colorado Wildlife Commission ("Commission"), which unanimously opposed the Over the River project in May.

Further, the Board must comply with its own regulations and relevant statutes, and ensure adequate public participation. This should include a public hearing on this matter in the region that will be impacted by the project. Making a decision on the Agreement in a place so far away from the project area deprives affected residents of a chance to voice their concerns. We urge you to either reject the Agreement or table the decision until you can convene again with the Commission to consider OTR's proposal.

A. Over the River Is Inconsistent with State Parks' Mission

Stewardship of Colorado's natural resources is a central part of this Board's mission, vision statement, and strategic plan. According to your most recent strategic plan, stewardship involves environmental protection, preservation of habitats, and conservation.¹ The strategic plan also commits you to balancing recreational use with preservation and protection of natural

¹ COLORADO STATE PARKS, 2010 STRATEGIC PLAN 17 (2010).

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resources so that “sensitive wildlife habitat and native flora are conserved, maintained, and restored.”²

As the U.S. Bureau of Land Management (“BLM”) has identified in its draft environmental impact statement (“DEIS”),³ the Over the River project would have the opposite effect. One example from a long list of environmental harms is that the project would have significant impact on the highly sensitive bighorn sheep population, both in the short and long term,⁴ a fact that led to the Commission’s unanimous opposition in their May meeting in Salida. Additionally, the BLM has found that the project would result in the death and displacement of legally protected species, including the golden eagle,⁵ and may adversely impact the bald eagle, also protected under the law.⁶ Either occurrence may result in a violation of the federal Bald and Golden Eagle Protection Act, and this Board should not condone this action by approving the Agreement.

Even after OTR has dismantled and removed the non-permanent elements of the project, anchor bolts and other installments would permanently mar this scenic landscape. The project’s purported potential to increase tourism cannot justify taking an action that would so significantly and enduringly undercut State Parks’ commitment to environmental stewardship and the preservation of sensitive wildlife habitat.

The habitat surrounding the scenic Arkansas River deserves particularly careful protection, as affirmed in a legislative declaration that “it is the policy of this state to safeguard the recreational quality of the Arkansas river and the adjacent lands.”⁷ The long term environmental destruction that will result from this project is clearly inconsistent with that declaration of policy, especially given that safeguarding “recreational quality” requires considering the needs not only of the rafting industry but also of fishermen, hunters, hikers, birdwatchers, etc., all of whom would suffer the consequences of this project.⁸

Another central element of State Parks’ mission is to provide outdoor recreation opportunities.⁹ As the proposed Agreement mandates that OTR pay hundreds of thousands of

² *Id.* at 23.

³ U.S. BUREAU OF LAND MANAGEMENT, OVER THE RIVER DRAFT ENVIRONMENTAL IMPACT STATEMENT, DES 10-37, (July 15, 2010).

⁴ *Id.* at 4-3.

⁵ *Id.* at 4-19.

⁶ *Id.* at 4-51, 4-54.

⁷ C.R.S. § 33-12.5-102.

⁸ A summary of project impacts gleaned from OTR’s own plans, and our letter to the BLM noting flaws in the environmental analysis and requesting a supplement of that analysis are attached to this letter for your information.

⁹ STRATEGIC PLAN, *supra* note 1, at 20.

dollars to compensate State Parks for the resulting “recreation impact,”¹⁰ State Parks and OTR must recognize the severity of the project’s interference with State Parks’ (and the AHRA’s) fundamental purpose. In fact, according to the BLM, one “unavoidable adverse effect” of this project would be diminishing recreational users’ access – including access currently afforded to anglers, hikers, birdwatchers, hunters, etc. – to the AHRA and reducing the normal income derived from their activities.¹¹

Further, State Parks’ own studies, conducted in conjunction with the strategic plan, indicate that the public is hesitant to support even smaller scale development, such as campsites and other facilities, because it interferes with the experience that visitors value.¹² Certainly those same respondents would be equally if not more hesitant about such a large scale project, especially given that, although there is some development along the corridor, there are several long, scenic stretches where the only manmade structures are linear transportation elements. An angler standing in the river inside one of these beautiful canyon segments, or a boater floating through the same, hardly notices these elements in many sections of the canyon as they are often above the sight lines from the river itself.

B. Untimeliness in Light of Impending Consolidation with the Division of Wildlife

On July 1, 2011 – one week after the Board meeting – State Parks will become part of the newly consolidated Division of Parks and Wildlife,¹³ which will not only be obligated to uphold State Parks’ mission and mandate but will also have “all the powers, duties, obligations, and functions previously exercised by the Division of Wildlife.”¹⁴ Therefore, the Board should also consider whether the Over the River project is consistent with the Division of Wildlife’s (“DOW”) mission and strategic plan.

Last month, the Commission unanimously determined that the project is not consistent with DOW’s mission and wrote a letter to the BLM to express that it “has determined that even given the possibility of some mitigation, the Over the River project is inconsistent with the statutory obligations of the Wildlife Commission. Therefore, the Wildlife Commission wishes to state that it opposes the Over the River project and any approval or permitting of the project by the BLM *or any other* jurisdiction.”¹⁵ According to commissioner Dorothea Farris, “this is an inappropriate action that we [the Commission] cannot support,” and commissioner Robert Streeter said, “there are no redeeming values of this project from a fish and wildlife

¹⁰ JUNE 2011 PARKS BOARD MEETING INFORMATION 70.

¹¹ DEIS at 4-324. *See also* DEIS at 4-243 through 4-250.

¹² STRATEGIC PLAN, *supra* note 1, at 13.

¹³ At the same time, this Board will merge with the Commission.

¹⁴ S.B. 208, 68th Gen. Assemb., Reg. Sess. (Colo. 2011).

¹⁵ Letter from Tim Glenn, Chair, Colorado Wildlife Commission, to Helen Hankins, State Director, Bureau of Land Management Colorado State Office (May 9, 2011)(emphasis added).

perspective.”¹⁶ The Commission has thus advised this Board of its opposition to the proposed Agreement based on the Commission’s statutory obligations. One week from today, that statutory mission will also be yours. This Board is in no position to second guess the Commission’s findings regarding fish and wildlife preservation, which is the central element of its mission, soon to be your mission.

If this Board approves the proposed Agreement today, it will create a direct conflict with the Commission’s May 2011 position just days before your merger.¹⁷ Therefore, at the very least, this Board should delay consideration of the matter until the joint Parks and Wildlife Board officially convenes and sets forth guidelines for policymaking during the transition.

C. Untimeliness in Light of Ongoing Federal Assessments

Further, as representatives of Friends of the OTR project also requested of you in your last meeting, please read the Final Environmental Impact Statement (“FEIS”) prior to making your decision. The FEIS has not yet been released.¹⁸ It would be premature for this Board to take any action at this time since it has not seen the final assessment of impacts and the mitigation that may be required, and it is unfounded for the Board to simply assume that the required mitigation will “adequately and reasonably” compensate for the as yet unfinalized assessment of impacts on the natural assets that State Parks is responsible for protecting.¹⁹ To take action prior to considering this information would be making a decision in a vacuum. Finally, the Over the River project cannot go forward without BLM approval. Until the BLM reveals its “preferred alternative” and makes a decision on the project, it would be premature and a waste of taxpayer resources to deliberate over a project that could change or be denied, based on the FEIS and eventual BLM decision.

At a minimum, this Board should table this decision until it has considered all relevant information, including the FEIS, and completed its merger with, and considered the views of, the Commission.

D. State Parks Has Foregone Essential Procedural Steps

1. Arkansas River Recreation Management Plan Revision. Given the magnitude of this project and the lack of precedent for large art installations on land managed by State Parks,

¹⁶ Scott Willoughby, *Colorado Wildlife Commission Opposes Artist Christo’s “Over the River” Project*, DENVER POST, May 11, 2011, available at www.denverpost.com/outdoors/ci_18036816#ixzz1POV8JRlo.

¹⁷ In fact, this may have been one of OTR’s considerations in encouraging State Parks to consider this proposal prematurely. Christo’s income is derived from his collages that purport to depict his proposals, which increase in value based on the level of public knowledge and controversy over his projects.

¹⁸ Since the release date has been repeatedly delayed, we presume that BLM is struggling with the analysis. As of June 23, 2011, BLM’s website reports that the FEIS would be out this spring. That is obviously no longer accurate.

¹⁹ PARKS BOARD MEETING INFORMATION, *supra* note 10, at 69.

the policy change that would be required to approve the Agreement would necessitate revision of the Arkansas River Recreation Management Plan (“the Plan”). The proposed Agreement directly contradicts several of the policies outlined in the current version of the Plan. For example, the Plan requires that the land managers, including State Parks, “protect bighorn sheep habitat and prevent user conflicts between bighorn sheep and recreation users.”²⁰

The original Plan and the 2001 revision are the “product of a very comprehensive public involvement process.”²¹ Therefore, an action that is at odds with the Plan requires comparable public involvement.

2. Public Notice and Disclosure. The Parks Board posted the proposed Agreement only five business days before the meeting. The Board meeting agenda and attachments span 81 pages and include complex agreements that require significantly more time to review than the Board provided.

Additionally, the Board published only a redacted version of the proposed Agreement without providing any information about why OTR’s activities warrant confidentiality. We strongly urge the Board to be more forthcoming with information that so dramatically affects the public interest, or, at minimum, provide the public with justifiable reasons for withholding potentially crucial information.

3. Processes Required for Approving Special Activities. Although the Board claims it has the authority to enter into the Agreement under C.R.S. § 33-10-107(d), other applicable statutes demonstrate that the legislature did not intend to give the Board unlimited authority to enter into such agreements.

The Colorado regulations more appropriate for consideration of a major event so drastically affecting the carrying capacity of the AHRA is the process under 2 C.C.R. 405-1-703 governing “special activity.” The State Parks regulations require additional procedural review before approving any “special activity.” “Special activities” are “those events which have the potential for a significant adverse impact on park values or the health, safety or welfare of park visitors or which may otherwise require special planning/scheduling for proper management.”²² “Special activities shall require prior approval in the form of a special-activities permit.”²³ State Parks is instructed to deny the permit if it determines that the proposed activity would have a

²⁰ARKANSAS HEADWATERS, ARKANSAS RIVER RECREATION MANAGEMENT PLAN 2-2 (2001), *available at* <http://www.parks.state.co.us/Parks/ArkansasHeadwaters/Publications/Pages/ArkansasHeadwatersPublications.aspx>.

²¹ *Id.* at 1-1.

²² 2 C.C.R. 405-1-703.

²³ *Id.*

significant adverse impact on park values or would be inconsistent with area management plans or intended facility use.²⁴

The proposed Agreement would do both. As we demonstrate above, the Agreement would severely undermine State Parks' commitment to environmental stewardship and recreational opportunities in the AHRA. And, as also described above, the proposed Agreement is inconsistent with the Arkansas River Recreation Management Plan. On those substantive grounds alone, the Board must deny this proposal.

However, even if the proposed Agreement were consistent with all of State Parks' substantive regulations, the Board could not approve this proposal at this time because the regulations' procedural requirements have not been met. First, the regulations demand that, "[w]henver it is determined that any special activity will involve the use of a park or recreation area by a group of persons totaling more than the park's or recreation area's established carrying capacity a thirty day written public comment period and a public meeting shall be required prior to the granting of a permit."²⁵

According to the proponents of this proposal, it would not only draw tourists, it would increase the area's carrying capacity for boats per day. As the BLM has identified, "Due to the added attraction of exhibition for boating, rationing restrictions or defined carrying capacities would likely be violated by commercial operators during this period."²⁶ Therefore, State Parks must allow for a thirty day written public comment period, publish notice of this comment period in an appropriate newspaper, and meet other procedural requirements of its own regulations.²⁷ Thereafter, State Parks must conduct a hearing in the affected state park or within the county where the state park is located.²⁸ The Board has not completed any of these tasks and has not even taken the most preliminary step of developing a much needed Event Management Plan.²⁹ Before meeting all of these procedural requirements, the Board lacks the authority to approve the proposed Agreement. The DEIS states that State Parks would use the Special Activity regulations for the project.³⁰ Thus, the public has a reasonable expectation that there will be additional public participation opportunities associated with that process.

It would be a violation of state law and the public trust for this Board to circumvent the requirements of its own regulations by recasting what is undeniably a "special activity" as a

²⁴ *Id.*

²⁵ 2 C.C.R. 405-1-703(4).

²⁶ DEIS at 4-283. Since State Parks is a cooperating agency in the DEIS, we presume that it was involved in, or at least aware of, this determination.

²⁷ 2 C.C.R. 405-1-703(4).

²⁸ *Id.*

²⁹ PARKS BOARD MEETING INFORMATION, *supra* note 10, at 69.

³⁰ DEIS, Table 1-1 at 1-22.

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“cooperative agreement.” On this basis alone, this Board should disapprove the Agreement and direct OTR to go through the special activity permit process.

E. Summary and Conclusion

Thank you for your serious consideration of this matter. We hope that, after considering all of the substantive and procedural concerns presented, you will reject or, at the very least, table this proposal for further consideration at an appropriate time. We request that you keep the undersigned informed of your decisions regarding this matter.

Sincerely,

ROAR, Inc.

Ellen T. Bauder, PhD

Ellen T. Bauder, PhD
Vice President for Science

cc: Members of the Colorado Wildlife Commission