



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources
1313 Sherman Street, Room 718
Denver, CO 80203

September 8, 2020

Mr. Rick Baxter
Program Manager
Water, Environmental and Lands
Bureau of Reclamation, Provo Area Office
302 East Lakeview Parkway
Provo, Utah 84606
*Submitted via U.S. Mail and
online via lpp@usbr.gov*

Ref: State of Colorado's Comments on the *Lake Powell Pipeline Project Draft Environmental Impact Statement*

Dear Mr. Baxter:

The Colorado Water Conservation Board ("CWCB"), on behalf of the State of Colorado, thanks you for the opportunity to comment on the Draft Environmental Impact Statement ("DEIS") for the Lake Powell Pipeline Project ("LPPP") released by the Bureau of Reclamation ("Reclamation") in June 2020 as part of the National Environmental Policy Act ("NEPA") permitting process. CWCB operates as the water policy agency for the State of Colorado. It is governed by a 15-member board with responsibilities that include, among other things, protecting Colorado's interstate compact apportionments and collaborating with other western states and federal agencies.

As a fellow Upper Division State, Colorado respects Utah's interests in the LPPP to plan for current and future water demands within the State of Utah. However, the LPPP presents several unique issues that directly affect the interests of the State of Colorado and other Colorado River Basin States. In particular, the LPPP involves the delivery of water from the Upper Colorado River Basin to the Lower Colorado River Basin and diverts water from Lake Powell, a Colorado River Storage Project Act ("CRSP") facility that was constructed and is operated to protect the interests of Colorado, New Mexico, Utah and Wyoming. The CRSP system and in particular its reservoirs must be administered and managed in a manner that meets the needs of the Colorado River Basin States without jeopardizing Colorado's significant, legally protected rights to the waters of the Colorado River, or compromising its ability to serve the present uses and future needs of Colorado citizens. It is in the interest of protecting its rights and needs of its citizens that CWCB submits these comments on behalf of Colorado.



Colorado's Interests

The Colorado River and its tributaries supply over a third of Colorado's water needs, providing water to nearly 60 percent of the State's population. Because no major rivers flow into Colorado, Colorado must satisfy all its water demands from sources within the State. The Colorado River is simply an irreplaceable resource for Colorado. The significance of the Colorado River to Colorado is also reflected in the Colorado River Compact of 1922 ("Colorado River Compact") which apportions water to the Upper Basin, and Upper Colorado River Basin Compact of 1948 ("Upper Basin Compact") which apportions water among the Upper Division States and allocates to Colorado the largest percentage of the total amount of consumptive use available each year among the Upper Basin States. Colorado depends upon this allocation not only to meet its present needs, but also to provide for its future development. Indeed, it was precisely for the purpose of preserving its right to future development of Colorado River water that Colorado entered into the Colorado River Compact and Upper Basin Compact.

Given this relationship with the Colorado River, Colorado has a substantial interest in the efficient management and wise administration of the Colorado River system and its reservoirs.

Overview of Comments

The State of Colorado's comments consist of two parts. First, Colorado joins in the Six Basin States' Letter, submitted under separate cover to the Secretary of the Interior. Colorado strongly believes that the Six Basin States' comments must be addressed prior to the issuance of any Final Environmental Impact Statement ("FEIS") and Record of Decision ("ROD") and sets forth the appropriate mechanisms to address these outstanding issues.

Second, the State of Colorado submits the following general comments on the DEIS to address concerns specific to Colorado. These individual State comments are not intended to conflict or suggest any disagreement with the Six Basin States' comments. Rather, they are intended to identify and suggest means of addressing issues of unique interest to Colorado.

Law of the River

The LPPP is a complex undertaking that raises a number of legal issues and implicates the Colorado River Compact, the Upper Basin Compact, and other elements of the Law of the River.¹

Questions remain as to whether, under the Law of the River, Utah may use part of its Upper Basin apportionment to serve uses in the Lower Basin portion of Utah without obtaining the consent of the other Basin States in conjunction with additional authorization.² While the

¹ The "Law of River" refers to body of law affecting interstate and international use, management and allocation of water in the Colorado River system, including the Colorado River Compact, the 1944 Mexican Water Treaty, the Upper Basin Compact, several United States Supreme Court decisions and Supreme Court decrees in *Arizona v. California*, and numerous federal statutes and regulations.

² See Colorado River Compact Art. III(a).



DEIS states that Utah has been working on these issues with the Basin States, they have yet to be resolved.³

Colorado requests Reclamation adopt a consistent and accurate characterization of Utah's rights to water under the Colorado River Compact and the Upper Basin Compact, and recommends that any descriptions of available yield in the Upper Colorado River Basin reflect the position of all Upper Division states and how they operate. Otherwise, Colorado recommends that these descriptions identify and describe available yield from Utah's perspective and not speak on behalf of the other Basin States.

Colorado also requests Reclamation provide accurate and consistent descriptions of the Colorado River and its operations. For example, definition of Upper and Lower Basins, description of releases from Glen Canyon Dam (including timing of Secretary determinations and summary of operational tiers), discussion of the Article III(d) non-depletion obligation, identification of the Secretary of the Interior's role as water master in the Lower Basin, and descriptions of water apportioned under the Upper Basin Compact, should be carefully stated, and reflect a clear, accurate, and consistent understanding of the Law of the River and Colorado River operations throughout the Basin.⁴

Lake Powell

Lake Powell is the cornerstone of the CRSP system. CRSP is the critical mechanism for implementation of the Colorado River Compact because it allows the release water of to the Lower Basin in a manner that protects the rights and interests of the Upper Division States.⁵

The DEIS states that Lake Powell's purpose is to provide water storage to help the Upper Division States meet their "compact obligations" under the Colorado River Compact.⁶ Elsewhere, the DEIS explains that Lake Powell provides water storage to meet the "delivery requirements" to the Lower Basin in accordance with applicable federal laws, contracts and regulatory guidance that regulates the use of the Colorado River water among the seven Basin States and Mexico.⁷

The DEIS mischaracterizes the Upper Basin's compact obligations as "delivery obligations." The obligation under Article III(d) of the Colorado River Compact is, more accurately, an obligation for the Upper Division States not to deplete the flow of the Colorado River: the Upper Division States "will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 for any period of ten consecutive years"⁸ Colorado requests the FEIS appropriately characterize the Upper Division States' compact obligations.

³ "The Project Proponent [Utah Board of Water Resources] is addressing this question with the Colorado River Basin States." DEIS at 6.

⁴ See e.g., *id* at 6; DEIS, App'x C-25 at 4; DEIS, App'x C-10 at 2.

⁵ Colorado River Storage Project Act, Pub. L. 84-485, 70 Stat. 105 (1956).

⁶ "Lake Powell provides water storage for use in meeting the compact obligations consistent with the Law of the River. Specifically, Lake Powell provides storage needed to assist the Upper Division States in meeting their Colorado River Compact obligations." DEIS at 115; see also DEIS, App'x C-10 at 2.

⁷ DEIS, App'x C-11 at 49.

⁸ Colorado River Compact, Art. III(d).



Because any use of Lake Powell supply or capacity directly implicates rights of the Upper Division States, it is important that the FEIS make clear the source of water and water right for the LPPP. Additionally, Colorado requests that Reclamation clarify how this use of said water will be integrated into the Law of the River including but not limited to applicable federal laws and regulatory guidelines to avoid injuring the interests of the other Upper Division States.

In order to facilitate the delivery of water from Lake Powell, Utah has requested a water exchange contract with Reclamation. According to the DEIS, under that exchange contract, Utah “would forbear the diversion of a portion of the natural flows to which [Utah] is entitled and allow these flows to contribute to meeting the Endangered Species Act Upper Colorado River Recovery Implementation Program requirements in the Green River.”⁹ It further provides that “[i]n exchange, [Utah] would deplete an equal amount of water released from Flaming Gorge Dam throughout the year and available at Lake Powell. . . . This exchange contract would not entitle [Utah] to call for releases from Flaming Gorge.”¹⁰

Details of the dates and locations of the exchange contract negotiations and the exchange contract itself are not included in the DEIS documentation. While a draft of the exchange contract was recently provided to Colorado, Colorado is unable to evaluate possible effects to Flaming Gorge or Lake Powell, how Reclamation and Utah account for evaporation and transit losses or provide for monthly storage accounting, or how the change in location of water right will impact the Upper Division States because these issues are not identified and analyzed in the DEIS.

Colorado also requests that the inconsistencies associated with the type of contract that Utah has with Reclamation be corrected in the FEIS. For instance, the DEIS refers to the contract as both an exchange contract, as described above, and a delivery contract.¹¹

The DEIS provides that Utah has retained approximately 86,000 acre-feet of water for the LPPP from water that is already apportioned to it under the Upper Basin Compact, and that the water is available for use by an individual water user from Lake Powell via exchange.¹² It further provides that the “exchange contract would not entitle [Utah] to call for releases from Flaming Gorge,” and the exchange will “be in compliance with the 2006 Flaming Gorge ROD.”¹³ It is unclear if this will result in an outcome that is inconsistent with the Law of the River.

Colorado requests that Reclamation provide a full identification, disclosure and analysis of these issues that includes detailed descriptions and monthly of accounting mechanisms, evaporation and transit losses.

The Virgin River

The DEIS provides that the LPPP would deliver up to 86,249 acre-feet of water from Lake Powell to Sand Hollow Reservoir to provide additional water supplies for municipal use for communities in Southwestern Utah. Sand Hollow Reservoir is an off-channel reservoir that

⁹ DEIS at 4; *see id.* at 27.

¹⁰ *Id.* at 28.

¹¹ *Compare id.* at 4, 27–28, with *id.* at 162.

¹² *Id.* at 6.

¹³ *Id.* at 28.



currently stores water diverted from the Virgin River, a Lower Basin tributary that flows to Lake Mead. In addition to including these descriptions of Sand Hollow Reservoir and the Virgin River in the FEIS, Colorado requests Reclamation clarify the connection between the delivery of LPPP to Sand Hollow Reservoir to flows in the Virgin River drainage.

Colorado requests that the FEIS disclose and analyze the uses of LPPP water and all possible return flows to the Virgin River to assure that any connection between the LPPP water and the Virgin River is accounted for in a FEIS or ROD in a manner consistent with the Law of the River.

The DEIS acknowledges that modeling of “[f]lows under the Proposed Project scenario increased in the lower portions of the Virgin River near the state line because secondary demands in 2060 were not at a level to fully reuse all Virgin River and Proposed Project return flows”¹⁴ The DEIS adds that “[t]hese effects would decrease beyond 2060 as secondary demands would continue to increase and use more return flows.”¹⁵ The DEIS further provides that “[r]eturn flows associated with water delivery of Lake Powell water associated with the Proposed Project may result in increased flows into the Virgin River system contributing maintenance of or a potential increase in water flows, which would be beneficial to maintaining habitat for these species.”¹⁶ These statements suggest that Upper Basin water delivered via LPPP used in the Lower Basin portion of Utah would be transferred to the Lower Basin and yet possibly still charged to Upper Basin use, rather than Lower Basin use because the water is not physically present at Lee Ferry. If there are, as suggested by these statements in the DEIS and the Virgin River modeling data, return flows from the LPPP to the Virgin River, then there is an outstanding question as to how these return flows should be accounted for under Article III of the Colorado River Compact.

Additionally, according to the DEIS, the LPPP “would contribute to increased flows in the lower reaches of the Virgin River” which “may offset other cumulative projects that reduce flows in those same stretches.”¹⁷ However, other statements in the DEIS suggest that increased flows in the Virgin River would not be entirely offset by other projects along the Virgin River.¹⁸ For example, the DEIS states that “The amount of return flows would depend on how the system is operated, the existing demand at any specific time, the ratio of culinary, secondary, and reuse water serving that demand, and climate change.”¹⁹ Utah’s permit application for the LPPP limits use of the water to municipal uses. However, these statements in the DEIS imply that increased flows in the Virgin River from LPPP water would be offset by other projects along the Virgin River. The FEIS should clarify that the beneficial use of the LPPP water is limited to municipal uses and will not, for example, provide a firm yield to shorted agricultural water users in the Virgin River basin. In addition, any FEIS and ROD should contain appropriate provisions to address circumstances where the contemplated offsets do not occur.

The DEIS also provides contradictory statements related to return flows to the Virgin River between complete reuse at some future time, yet to be determined, and LPPP return flows

¹⁴ *Id.* at 122.

¹⁵ *Id.*

¹⁶ *Id.* at 188.

¹⁷ *Id.* at 118.

¹⁸ *See id.* at 122.

¹⁹ *Id.*



that benefit habitat.²⁰ These conflicting statements preclude Colorado from conducting a complete analysis of the alternatives and the potential impacts to Colorado's interests. Colorado requests that Reclamation provide additional information in the FEIS as to how these competing interests function together, how complete reuse will be achieved, and how reliance on such return flows will be addressed over time.

To that end, the FEIS and the ROD should also provide that any LPPP return flows to the Virgin River be charged against the consumptive use apportionment made to the Lower Basin by the Colorado River Compact, in which case it shall be credited as water reaching Lee Ferry pursuant to the Colorado River Compact.

Technical Considerations

While the impacts of annual depletions at Flaming Gorge were presumably considered in the Flaming Gorge Environmental Impact Statement and Record of Decision, there is no information in those documents or this DEIS to show monthly operations at Flaming Gorge, Lake Powell, or Sand Hollow Reservoir. Nor does the DEIS show the contents of Sand Hollow Reservoir, and it is unclear whether there is sufficient storage to store all Lake Powell pass-through releases from Flaming Gorge, or if storage will be required in Lake Powell. Because Utah cannot call for water to be delivered from Flaming Gorge, it appears that releases are based on the Flaming Gorge Environmental Impact Statement and Record of Decision, and thus likely assumes some form of storage in Lake Powell if the LPPP or Sand Hollow Reservoir do not have the capacity to take water at times and in amounts released from Flaming Gorge. Colorado asks that these technical issues are addressed, so that the corresponding legal implications for the Law of the River can be properly and comprehensively evaluated.

The DEIS also does not discuss the Lake Powell storage accounting on a month-to-month basis. Colorado asks that this issue be addressed in the FEIS operation's section to provide clarity about Utah's ability to divert the same quantity of water at Lake Powell as is released from Flaming Gorge. Additionally, the operating section in the DEIS does not adequately address annual accounting in Lake Powell.

Colorado requests Reclamation clarify in the FEIS why the proposed Navajo-Ute Settlement Project was not included in the foreseeable future depletion category and why the Dolores Project is considered in the No Action alternative's in the "reasonably foreseeable depletion" category for the baseline run.²¹ Colorado seeks clarification as to why the San Miguel Project was included in the "reasonably foreseeable depletion" category. Attachment A to Appendix C-10 showing "Reasonably Foreseeable Depletion Nodes" is not clear and appears to be incorrect. There are no additional depletions under the Dolores Project in the Basin Study and that project is currently at full buildout.

Colorado requests explanations as to why the Navajo-Ute Settlement Project, the Dolores Project, and San Miguel Projects are evaluated in this way, and asks that Reclamation correct the model to properly account for the Dolores and San Miguel projects and allow for a better understanding the No Action alternative.

²⁰ See *id.* at 123, 188.

²¹ DEIS, App'x C-10, Attachment A.



Colorado also requests Reclamation provide additional information as to whether LPPP water will serve as a source of recharge for the Navajo Sandstone Aquifer. If so, Colorado requests that the FEIS make clear whether Utah intends to seek a new recharge permit from the Utah State Engineer, or plans to operate under an amended version of Washington County Water Conservancy District's existing Recharge Application No. RC004 that allows for recharge in the amount of 15,000 acre-feet.²²

Colorado asks that Reclamation identify the Virgin River Daily Simulation Model ("VRDSM") stream reaches by location. It is unclear which reaches the VRDSM reach coding refers to.

Colorado requests that Reclamation quantify and report the annual volume of water that is modeled to enter Lake Mead as a result of the LPPP. Assuming that QX29 is the downstream node in the VRDSM, 19,113.4 acre-feet per year will enter Lake Mead as a result of the LPPP.²³

Colorado requests Reclamation remove the yellow highlighting in the "Absolute Difference" cells that only highlight difference above possible gage error.²⁴ Colorado also requests that Reclamation remove the sentence "Flow changes below gage error would not be measurable,"²⁵ and similar text found throughout the DEIS and its appendices. Modeled differences in flow between the No Action and LPPP alternatives do not have random error and differences would be measurable and should be reported as-is. Comparison to possible gage error is a meaningless metric, as the mean value of the gage reading will decrease if the true value of flow decreases, even if the gage has random error.

The LPPP appears to contribute to increased flows in the lower reaches of the Virgin River that were modeled in the VRDSM. This may offset other cumulative projects that reduce flows in those same stretches. This offset was not quantified within the VRDSM.²⁶ Colorado requests Reclamation provide additional information related to the apparent higher elevations in Lake Mead as a result of the increased flows in the Lower Virgin River and that Reclamation run Colorado River Simulation System ("CRSS") with estimated inflows to Lake Mead based on the VRDSM model output to see impacts to equalization releases from Lake Powell based on the 2007 Interim Guidelines and the Drought Contingency Plan ("DCP") and the operations that CRSS reverts to after expiration of the 2007 Interim Guidelines and the DCP.

The DEIS states that the VRDSM models 13,249 acre-feet of Washington County's 86,249 acre-feet of LPPP supply delivered and used in Apple Valley.²⁷ Colorado requests that Reclamation model the VRDSM with the full 86,249 acre-feet delivery to Sand Hollow Reservoir, assuming that the delivery to Apple Valley is not pursued. There is conflicting information in the DEIS regarding whether the Apple Valley turnout is likely to occur.²⁸

²² Recharge App. No. RC004.

²³ DEIS, App'x C-10 at 43.

²⁴ *Id.*.

²⁵ DEIS at 122.

²⁶ DEIS, App'x C-25 at 27.

²⁷ DEIS, App'x C-10 at 9.

²⁸ DEIS at 24.



Reservation of Rights

Colorado's comments are intended to highlight the broad issues that will require acknowledgement, specification, or clarification in the FEIS. Colorado may have other concerns with specific factual or legal assertions in the DEIS. However, these assertions do not appear to materially alter the analysis in the DEIS. In addition, in the course of reviewing the DEIS materials, Colorado may have overlooked other factual or legal assertions that impact Colorado. The failure to raise specific factual or legal assertions that could impact Colorado, or failure to correct what it believes to be an inaccurate assertion, shall not be construed as an admission with respect to any factual or legal issue or as a waiver of any rights for the purposes of any future legal, administrative or other proceeding.

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Colorado thanks Reclamation for the opportunity to provide these comments. We remain committed to working with Reclamation and other interested stakeholders to finalize NEPA compliance for the LPPP and assure that the Colorado River Basin States are able to use and develop water resources consistent with the Law of the River for years to come. In this effort, we ask that Reclamation consider the above comments and address them in the FEIS.

Rebecca Mitchell

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