

# STATE OF COLORADO

## Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721  
Denver, Colorado 80203  
Phone: (303) 866-3441  
Fax: (303) 866-4474  
www.cwcb.state.co.us



May 6, 2011

Via E-Filing

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

John W. Hickenlooper  
Governor

Mike King  
DNR Executive  
Director

Re: Colorado's Comments on the Draft Study Reporting for the Proposed Lake Powell Pipeline and Hydroelectric Project - FERC – Project No. P. -12966

Jennifer L. Gimbel  
CWCB Director

Dear Secretary Bose,

The Colorado Water Conservation Board (“CWCB”) appreciates the opportunity to comment on the Draft Study Reports (“Studies”) for the Lake Powell Pipeline and Hydroelectric Project (“LPPP” or “Project”). As a fellow Upper Colorado River Basin state, Colorado respects Utah’s interest in the LPPP to plan for current and future water demands. Colorado supports administering and managing the Colorado River system and its reservoirs to meet the needs of the Colorado River basin states and other stakeholders without jeopardizing Colorado’s significant, legally protected rights to the Colorado River. In support of these interests, we submit general comments to acknowledge basin-wide issues associated with the LPPP that will require clarification, in the Studies and/or in subsequent documentation through the Federal Energy Regulatory Commission’s (“FERC”) Integrated Licensing Process, to assure the Project’s successful integration into the legal and operational framework for the Colorado River.

Colorado’s comments are as follows:

**Legal Framework:** The LPPP is a very complex undertaking that raises a number of legal issues, involving the Colorado River Compact of 1922 and other elements of the Law of the River.<sup>1</sup> Utah has discussed some of these issues through informal communications or consultations among the Basin States. Before the FERC licensing and NEPA permitting processes are completed, it will be essential for Utah to formally document how the LPPP will be implemented consistent with the Law of the River.

**Lake Powell as Water Source:** The CWCB understood the LPPP would be based on water rights upstream of Lake Powell that could then be wheeled through the Lake Powell facility for delivery to the southwestern corner of the state. In contrast, the Studies describe the LPPP as contemplating use of

<sup>1</sup> In this letter, the “Law of the River” refers the body of law affecting interstate and international use, management an allocation of water in the Colorado River system, including the 1922 Colorado River Compact, the 1944 Mexican Water Treaty, the 1948 Upper Colorado River Basin Compact, several United States Supreme Court decisions and Supreme Court Decree in Arizona v. California, and numerous federal statutes and regulations.

“Lake Powell water.”<sup>2</sup> Because any use of Lake Powell storage supply or capacity directly implicates the interests and rights of the Upper Division States, it is important that LPPP licensing and permitting documents (including the Studies) clearly specify the source of water and water right for the LPPP. Furthermore, Colorado requests that Utah clarify how use of said water will be integrated into the Law of the River to avoid injuring the interests of the other Upper Division states.

**Virgin River:** The Draft Surface Water Resources Study (Report 18) describes how operation of the LPPP could affect flows in the Virgin River drainage - a Lower Basin tributary that flows to Lake Mead. The Study does not, however, adequately address how the LPPP's affect on Virgin River flows will be accounted for in a manner consistent with the Law of the River. This issue should be contemplated as the LPPP feasibility, licensing and permitting processes progress.

**Colorado River Descriptions:** The CWCB recommends that Study descriptions of the Colorado River and its operations be reviewed and edited to assure their accuracy— e.g. Draft Water Quality, Surface Water Resources, and Climate Change Reports (Reports, 17, 18 and 19). Although these descriptions are summary in nature, it is important that they not misstate or mischaracterize the law – i.e., definition of Upper and Lower Basins; description of releases from Glen Canyon Dam (timing of Secretary determinations, 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; water apportioned under the Upper Basin compact, etc. Additionally, the Study descriptions on the available yield in the Upper Colorado River Basin do not necessarily reflect the position of all Upper Basin states or how they operate. As such, Colorado recommends that these descriptions focus on Utah's position and operations and not speak on behalf of the other basin states – i.e., the Climate Change Study's description of water availability as viewed by the Upper Basin states.

**Reservation of Rights:** The CWCB's comments are intended to highlight overarching issues that will require clarification as the LPPP studies and licensing process continue to progress. The CWCB's failure to provide specific comments regarding details of the LPPP, shall not be construed as an admission with respect to any factual or legal issue, or a waiver of any rights for the purposes of any future legal, administrative or other proceeding. Furthermore, the CWCB reserves the right to comment further on LPPP documentation as Utah completes the Draft Cultural Resources Study, issues the cumulative affects analyses for the Studies, and proceeds with subsequent phases of the Integrated Licensing Process.

The CWCB thanks the Utah Division of Water Resources and FERC for the opportunity to provide these comments. We remain committed to working with you on the LPPP, and look forward to preserving our collaborative relationship on the Colorado River.



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Jennifer Gimbel  
Director  
Colorado Water Conservation Board

cc: Dennis Strong, Director Utah Division of Water Resources

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<sup>2</sup> See e.g., The Studies' Summary Project Descriptions refer to “use” and “conveyance” of or “supply” from “Lake Powell water.” Furthermore, the alternative analyses compare affects of Lake Powell and non-Lake Powell water sources for the LPPP.