



GARY R. HERBERT  
Governor

GREG BELL  
Lieutenant Governor

# State of Utah

## DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER  
Executive Director

### Division of Water Resources

DENNIS J. STRONG  
Division Director

January 7, 2010

Kent Jones  
Utah State Engineer  
Division of Water Rights  
1594 W. North Temple  
Salt Lake City, UT 84114-6300

89-74 (a35402)  
09-462 (a35874)

Kent:

I made a new year's resolution to take every opportunity to let Utah water users know more about the complexities of the operation of the Colorado River system, particularly how our continued use of water depends on compliance with the federal Endangered Species Act (ESA). Your hearing in Green River on January 12, 2010 is my first opportunity to do that. I want to clarify that the Division of Water Resources did not protest the change application at issue and my comments should not be taken as supporting or opposing any particular application. On the other hand, I would like this letter to be included in the hearing record. The information below is part of a story that Utah water officials need to understand if we want to continue to maximize our beneficial use of Colorado River water.

Under the Law of the River, including the Colorado River Compact and the Upper Colorado River Compact, Utah has a legal right to use a specified amount of water, but such use must occur against the backdrop of the ESA, the scope of which is complex and far-reaching. Many congressional efforts to change the main thrust of the ESA have failed. Recent federal court decisions have determined that the need to meet ESA requirements may trump water delivery requirements, even in some cases where water is provided under long-standing federal water delivery contracts. Thus, Utah's continued use of Colorado River water depends on careful consideration of ESA compliance.

Four endangered fishes inhabit the Colorado River Basin: razor back sucker, Colorado pikeminnow, humpback chub, and bonytail chub. In the 1970s when the Bureau of Reclamation and other entities proposed major water projects in the Upper Colorado River Basin, the U.S. Fish and Wildlife Service (FWS) responded by writing ESA "jeopardy opinions," which outlined how construction of the projects would jeopardize the continued existence of the endangered fishes. The ESA path around a jeopardy opinion is implementation of a reasonable and prudent alternative to the single-minded pursuit of project construction and water development.

In 1988 Utah, Colorado, Wyoming, Western Area Power Administration, and the Department of Interior signed a cooperative

1594 West North Temple, Suite 310, PO Box 146201, Salt Lake City, UT 84114-6201  
telephone (801) 538-7230 • facsimile (801) 538-7279 • TTY (801) 538-7458 • [www.water.utah.gov](http://www.water.utah.gov)



agreement to follow such a path. It is called the Recovery Implementation Program for Endangered Fish Species in the Upper Colorado River Basin (RIP). The program objective is to recover the four endangered fish species while at the same time allowing the states to develop their water entitlements under the Law of the River. Integral to the RIP is the Recovery Implementation Program Recovery Action Plan (RAP), which outlines specific actions needed to protect the fish species. A significant RIPRAP action item is providing instream flows as a means of habitat management. Another action item allows proponents of a water development project to pay a fee per unit of water withdrawn for expenditure by FWS to fund the recovery program. Utah has spent millions of dollars in furtherance of the goals of this program, and progress towards species recovery has been made, although a significant work remains to be accomplished. One matter of unfinished business is the establishment and protection of instream flows for the fishes in the mainstems of the Green, Colorado, and San Juan Rivers and certain of their tributaries.

After holding public meetings to gather input, in accords reached subsequent to the RIPRAP your predecessors agreed, as part of the recovery program, to establish some constraints on Green River flows. This is critical because the Green River has been designated as critical habitat for the four endangered fishes. One such agreement says: "...the public interest will be best served by adopting a policy to protect flows in the Green River from Flaming Gorge Dam downstream to the confluence of the Green River and Duchesne River for the summer and autumn periods" to protect endangered fish habitat. FWS saw this initial action as one that would be followed by additional flow designations. I know you have discussions underway to follow up in this regard, establishing year-round flows. Requests for consumptive use of Green River water should be analyzed with these discussions, and the need for continued ESA compliance, in mind. Otherwise, Utah's use of its Colorado River water could be jeopardized – not just future use, but existing uses as well.

I know this background is old hat to you, but I am not as sure other interested parties understand this history. And, I question whether such parties are aware of current developments related to Green River flows.

For example, the seven Colorado River Basin States and the Bureau of Reclamation have almost completed an agreement for a two-year study in the Colorado River Basin which will analyze basin supply and future demands, including environmental flows, and identify areas of shortage, both temporal and spatial, while investigating options to address such shortages. This analysis will include updating model studies to include water needed for ESA compliance and responding to recent drought hydrology. This study will likely develop a model that will allow a more detailed understanding and analysis of Green River ESA compliance. This will allow Utah to better address the impacts of future depletions on the Colorado River in Utah, and in particular, implications on the Green River.

**RECEIVED**

**JAN 07 2010**

**WATER RIGHTS  
SALT LAKE**

As we move forward with respect to water use in the Colorado River Basin I know you will keep at the forefront our continued ability to use our allocation from the river and comply with federal environmental statutes. It seems to me that having the information from the study and modeling mentioned in the preceding paragraph would greatly enhance your decision-making with respect to any significant application to use Green River water.

Please let me know if you have questions about any matter referenced in this letter.

Thank you,



Dennis J. Strong, P.E.  
Director

cc: Norm Johnson  
Mike Styler

**RECEIVED**  
JAN 07 2010  
WATER RIGHTS  
SALT LAKE