



United States Department of the Interior

BUREAU OF RECLAMATION
Upper Colorado Region
Provo Area Office
302 East 1860 South
Provo, UT 84606-7317

IN REPLY REFER TO:

PRO-627
WTR-4.10/2.2.4.21

APR 05 2018

VIA ELECTRONIC MAIL ONLY

Kent L. Jones, P.E.
State Engineer
Division of Water Rights
1594 West North Temple, Suite 220
Salt Lake City, UT 84116-3154

Subject: Application to Appropriate No. A81080 (41-3747) – Colorado River Storage Project (CRSP),
Utah

Dear Mr. Jones:

The subject application has been filed by Stoel Rives LLP and Water Horse Resources, LLC to appropriate 76 cubic feet per second or 55,000 acre-feet from the Green River below Flaming Gorge Reservoir. Application No. A81080 is an application to appropriate and export water to the Front Range in Colorado. Under this application, it is proposed to divert water within the state boundaries of Utah and convey water represented as being part of Colorado's allocation of Colorado River water for use outside the Colorado River drainage.

This application, since it has been filed in Utah, is subject to Utah Code Title 73, Chapters 3 and 3a which pertain to *Appropriation* of water and *Water Exports* respectively. Even though this application has been filed as an *Application To Appropriate Water* in Utah, it seems likely that the applicant used this form because there is no other form provided by the State Engineer specifically for exporting water from the geographic boundaries of Utah to another state to supply that state water under the Colorado River Compact. Since the Green River is an interstate stream and one of the most significant tributaries to the Colorado River, it does not seem to be in the best interests of the Upper Basin states as a whole for this application to be filed and then acted on by just Utah's State Engineer. It is not clear why the applicant chose to file this application as it is presently constituted since the Green River crosses the Utah/Colorado border into Colorado roughly 6 miles downstream of the chosen points of diversion, and from its headwaters, it also crosses the Wyoming/Utah state line above Flaming Gorge Reservoir. It appears the applicants could have attempted to establish a diversion either in Wyoming or in Colorado for the same water without filing applications in Utah. Regardless of this, the Bureau of Reclamation will address the issues with the application as it has been filed and demonstrate that this application will have detrimental effects on the Colorado River system generally and federal projects specifically.

General concerns about this application and whether it meets the provisions of Utah Code 73-3-8 include:

1. The applicant's financial ability to implement this project. The costs just to design the project and other initial procedures could be many millions of dollars. The applicants should be required to provide evidence of sufficient funding to undertake this project. Without such evidence, this application should be considered on its face as an effort to speculate and should be rejected.

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2. Negative impacts to the Central Utah Project which supplies water to a significant portion of the population of Utah.
3. Potential impacts to Ute Indian Reserved water rights which could also cause impacts to the Central Utah Project and water rights in the Uinta Basin to fill these reserved rights.
4. The feasibility of this application cannot be evaluated without at least a preliminary design and cost estimate for the project.
5. Ultimately, the project should be contingent on the applicants obtaining all necessary right of ways, compliance with all laws related to the environment such as doing an Environmental Impact Statement, the National Environmental Policy Act, securing Bureau of Land Management permits for the project, and a myriad other details that appear not to be addressed by the applicant.
6. Other issues on the Colorado River such as salinity control. If pristine water is removed from the system near Flaming Gorge Reservoir it will impact efforts to reducing salt loads in the river generally.
7. This application and project have not been endorsed by regulatory entities in Colorado. If it relies on Colorado's allocation under the Compact, the appropriate regulatory and planning agencies in that state should endorse the application.

It is the position of Reclamation, that Application to Appropriate No. A81080 (41-3747) will impair Federal project water rights. Just above the proposed diversion points, Reclamation stores the entire flow of the Green River at Flaming Gorge Dam under a 1958 priority water right. Regardless of the diversion location for this project being below Flaming Gorge Reservoir or upstream of it, the impact of the proposed diversion to the reservoir and Green River system generally is the same. Water is released from Flaming Gorge to be delivered to Lake Powell each year pursuant to the CRSP authorization and our notice to the State Engineer in the annual operating plan. If the applicants divert water without a water service contract for water stored in Flaming Gorge, Application to Appropriate No. 81080 (41-3747) will impair Reclamation rights in Flaming Gorge.

As this application is reviewed, the following information regarding the purposes and operations of Flaming Gorge should be considered as this appropriation will directly impact the reservoir storage in Flaming Gorge.

Dual Nature of Flaming Gorge Reservoir Water Right. In 1958, when Application to Appropriate No. A30414 (Water Right No. 41-2963) was filed to cover the water storage in Flaming Gorge Reservoir, it clearly indicated that this reservoir would provide water to two distinct Federal Projects. The application states that Reclamation was appropriating water for irrigation, municipal, domestic and industrial uses for the Ultimate Phase of the Central Utah Project, and for the purposes of CRSP. Each of these Federal Projects are distinct and governed by different legislation. The proper function of Flaming Gorge Reservoir and use of Water Right No. 41-2963 are often confused by the dual purpose of the original application to appropriate.

CRSP Purpose of Flaming Gorge Reservoir. Unlike other Reclamation Reservoirs in Utah, Flaming Gorge Reservoir has a second Federal purpose from its authorization under the CRSP Act (CRSP Act of April 11, 1956, ch. 203, 70 State 105). The CRSP operations of Flaming Gorge Reservoir are controlled by Federal statutes and not the remaining beneficial uses listed in Water Right No. 41-2963. These CRSP

purposes are referenced in both the 1958 Application to Appropriate, and the 2001 Proof of Beneficial Use submitted for Water Right No. 41-2963. The Proof states:

“Flaming Gorge Dam and Powerplant was Authorized under the CRSP Act (ch. 203, 70 Stat. 105) of April 11, 1956. This act states, ‘In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Colorado Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident to the foregoing purposes...’”.

Ultimate Phase Purpose of Flaming Gorge Reservoir. The Federal legislation that govern the water rights for the Ultimate Phase of the Central Utah Project are similar to those for other Reclamation Projects water rights in Utah. These type of projects have acquired water rights solely through the State appropriation process and are limited to specific consumptive water uses listed on these water rights. The Ultimate Phase was eventually deauthorized by the Central Utah Project Completion Act (Public Law 102-575, 106 Stat. 4605, October 30, 1992), and the portions of Water Right No. 41-2963 associated with the Ultimate Phase were segregated off and assigned other water right numbers. The largest portion of the Ultimate Phase right (Water Right No. 41-3479) was transferred to the State of Utah through a March 12, 1996, assignment. Since these Ultimate Phase water rights were based on the consumptive uses of Flaming Gorge stored water, Reclamation believes these rights must stay tied to this stored water through CRSP water service contracts. This situation is reflected in the Assignment agreement which states:

“Upon release from Flaming Gorge Reservoir, said water right can be developed, diverted and perfected by the State of Utah as permitted by law. The State of Utah agrees that if it stores water in or benefits directly from CRSP Facilities, the State of Utah will enter into a water service contract with the United States.”

Lower Basin Deliveries and ESA Flows. In order to facilitate the comprehensive development of consumptive water use in the Upper Basin States, stored water is released from Flaming Gorge Reservoir to meet the Lower Basin Compact Obligations and to meet instream flow requirements set by the Upper Colorado River Endangered Fish Recovery Program and the Endangered Species Act (ESA). By meeting Compact and ESA obligations, Flaming Gorge Reservoir serves a vital role in protecting Upper Basin State’s water resources including all Utah’s water rights tributary to the Green and Colorado Rivers, even for those water users who never receive stored water from this reservoir. Reclamation believes these storage releases are protected by Federal Law and should be recognized and protected by the Utah State Engineer as a critical to Utah’s interests in the Colorado River.

CRSP Water Service Agreements. As stated in its authorization, Flaming Gorge Reservoir can also store water for “beneficial consumptive use”. Generally, this can occur by combining the federally stored water with a Utah water right for consumptive use through a CRSP water service agreement. The stored water can be used to provide a late season water supply to Utah water users when the natural unregulated flows in the Green River would have otherwise been insufficient to meet their needs, or during times of compact call curtailment. Reclamation believes this use of stored water could be invaluable to water users who need a very reliable water supply; especially those users holding junior water rights.

It is Reclamation’s position that, water rights that cause Flaming Gorge Reservoir to increase stored water releases to meet in-stream flow requirements or lower compact deliveries should be paired with Water Service Contracts to cover their use of CRSP water. Federal law, and past court cases set a clear

precedent defining when a CRSP Water Service Contract is needed. This position is consistent with Reclamation's handling of similar situations at other CRSP reservoirs in Colorado and New Mexico.

Ute Indian Water Rights Settlement. Title V of Central Utah Project Completion Act, contains a variety of provisions for the benefit of the Ute Indian Tribe, together with earlier agreements, form the Ute Indian Water Rights Settlement. The 1990 version of the Ute Indian Water Compact, which was recently ratified by the State of Utah, identified the Ute Indian Water Rights as having a October 3, 1861, priority date, which makes it one of the most senior water rights. It also identifies that the Tribe can take from the Green River 57,948 acre-feet of depletion. The Ute Indian Water Right settlement will incur a significantly increased demand on the Green River.

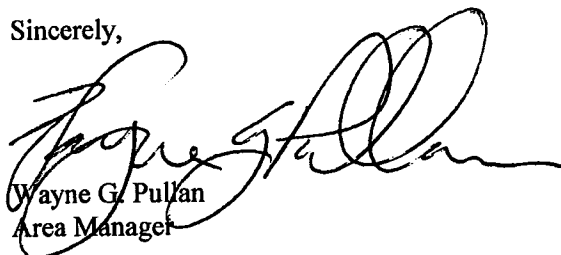
Flaming Gorge Reservoir only has a finite ability to supplement consumptive water rights in Utah, Wyoming, and Colorado. The remaining Flaming Gorge Reservoir water releases will be those required to satisfy senior water rights, meet ESA recovery flows, and meet obligations to the Lower Basin.

Water rights held in Reclamation's name for project purposes may be adversely impacted if this application is approved. These include Water Right Nos. 43-3822 for the Central Utah Project and 41-2963 for CRSP.

We request a hearing. Please provide us with a copy of your decision for our review and files.

If you have any questions, please contact Ms. Rachel Musil at 801-379-1245.

Sincerely,



Wayne G. Pullan
Area Manager

cc: Mr. Gene Shawcroft
General Manager/CEO
Central Utah Water Conservancy District
355 West University Parkway
Orem, UT 84058-7303



Doralee Cannon <doraleecannon@utah.gov>

Fwd: Important Incoming Mail 20180405_Application to Appropriate No. A81080 (41-374

1 message

waterrights DNR <waterrights@utah.gov>
To: Doralee Cannon <doraleecannon@utah.gov>

Thu, Apr 5, 2018 at 4:45 PM

I pretty sure this was pd on line

Mistie

----- Forwarded message -----

From: **Lovell, Zachary** <zlovell@usbr.gov>

Date: Thu, Apr 5, 2018 at 2:53 PM

Subject: Important Incoming Mail 20180405_Application to Appropriate No. A81080 (41-374

To: waterrights@utah.gov

Cc: Rachel Musil <rmusil@usbr.gov>, John Mann <jmann@usbr.gov>

See attached.

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Zac Lovell

File/ Mail Clerk

Bureau of Reclamation

Provo Area Office

302 E 1860 S Provo, Utah 84606

zlovell@usbr.gov

Phone: 801-379-1153

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