LIVING RIVERS
COLORADO RIVERKEEPER®

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November 2, 2018

Mr. Jared Baxter
Bureau of Reclamation
Provo Area Office
302 East 1860 South
Provo, UT 84606-7317

Sent via email to: greenriverblock@usbr.gov

Re: Comments on the Draft Environmental Assessment for the Green River Block Water Rights Exchange Contract

Dear Mr. Baxter,

Living Rivers & Colorado Riverkeeper submit the following comments for the Draft Environmental Assessment (DEA) of the Green River Block Water Exchange Contract. Thank you for the opportunity to participate in this public process. We also thank you for extending the comment period from October 18 to November 2.

INTRODUCTION

Living Rivers is a nonprofit organization based along the Colorado River in Moab, Utah. Moab is the county seat of Grand County and the western boundary of our county is the Green River. Living Rivers has approximately 1,200 members. Since its inception in 2000, Living Rivers has been engaged in advocating for responsible management of the Colorado River system. Living Rivers was designated as the official Colorado Riverkeeper in 2002 by the Waterkeeper Alliance, comprised of more than 350 on-the-water advocates who patrol and protect more than 100,000 miles of rivers, lakes and coastlines on 6 continents. Many Waterkeepers in the Western US depend on the scarce water resources of the Colorado River basin. Living Rivers' trustees, partners, and members live, work, recreate and rely on the waters of the Green and Colorado Rivers.

This DEA examines the impacts of a contract between the State of Utah and the Bureau of Reclamation (Reclamation) which outlines agreements on water released from Flaming Gorge Dam, operated by Reclamation, for use in Utah by Utah water rights holders. The Green River Block water rights, held by private and public water suppliers, mostly along the Green River in Utah, amount to 72,641 acre-feet (af). This water from Flaming Gorge is available for consumption to the counties of eastern Utah.

Incidentally, we recognize a controversy amongst stakeholders that releases from Flaming Gorge Dam, in the Upper Basin Division, and conveyed by pipeline to Washington County, Utah, which is in the Lower Basin, may not be an appropriate use under the 1922 Compact. When the time comes for Reclamation to prepare the DEA for the Lake Powell Pipeline Contract of 86,000 acre-feet (annual), we would appreciate Reclamation's clarification on this matter, at that time.

From 2000 to 2005, Living Rivers, Colorado Riverkeeper and Center for Biological Diversity participated in the National Environmental Policy Act (NEPA) for an Environmental Impact Statement (EIS) process in regards to re-operations at Flaming Gorge Dam.[1] We participated fully in the NEPA process for the 2007 Interim Guidelines EIS.[2] In 2010, we provided comments on the Green River Pumping Project Environmental Assessment (EA).[3] Since 2012, we jointly participated in the EIS for Long Term Experimental Management Plan for operations at Glen Canyon Dam.[4] We also participated in the 2012 Water Supply and Demand Study (Basin Study), which was not a NEPA process, but was authorized by the 2009 SECURE Water Act.[5]

Joining this comment letter for the Green River Block DEA are the following groups: Green River Action Network, Upper Green River Network, Las Vegas Water Defender, Waterkeeper Alliance, Save The Colorado, Utah Chapter of the Sierra Club, Holiday River Expeditions, Colorado Outward Bound, Colorado River and Trails, Dinosaur River Expeditions, OARS, and One-Way River Works.

While we appreciate the attempt to tie the Green River Block water withdrawals to releases from Flaming Gorge Dam to protect critical habitat and maintain minimum flows in the Green River (Reaches 1, 2 & 3) we are concerned about the inadequate modeling of future hydrology in the DEA and the lack of a basin-wide comprehensive Environmental Impact Statement evaluating how future Drought Contingency Plans (DCP) will influence Flaming Gorge reservoir levels. Additionally, we question which specific water rights will be left in tributaries by the State of Utah in exchange for water out of Flaming Gorge Reservoir and how these will be accounted for. We also question the legal validity of these water rights, since the appropriate intention by Reclamation, in 2009, was to let them lapse (50-years after 1959).[6]

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[1] http://www.livingrivers.org/archives/article.cfm?NewsID=90

[2] http://www.livingrivers.org/archives/article.cfm?NewsID=766

[3] http://www.livingrivers.org/pdfs/LRletterGreenRiverPumpingProject.pdf

[4] http://www.riversimulator.org/Resources/NGO/LTEMP/LTEMPeisCommentsLivingRivers31Jan2012.pdf

[5] http://www.livingrivers.org/pdfs/LivingRiversCBDComments2013.pdf

[6] http://www.riversimulator.org/Resources/Pipelines/UltimatePhase/ExtensionRequestDuchesneWaterConservancyDistrict2009Reclamation.pdf

Moreover, the DCP for the Upper Basin Division explains that there is flexibility within the Record of Decision (ROD) for dam operations at Flaming Gorge, Aspinall Unit, and Navajo, to release water annually (up to 2 million acre-feet has been proposed) to maintain the safe generation of hydropower at Glen Canyon Dam to the expiration date of the DCPs in 2026. The emergency evacuation of water from reservoirs in the upper basin might work for one year, but it is uncertain it would work in subsequent years. We worry that the measures proposed in the Upper Basin DCP may empty the upper basin reservoirs, threaten critical habitat below, and eventually compromise the recovery programs for the endangered fish. This situation would also negatively alter water quality for human uses, such as the degradation of drinking water and irrigation water. Such actions resemble a quote from Aldo Leopold, “Girdling the old oak to squeeze one last crop out of the barnyard has the same finality as burning the furniture to keep warm.”

Demand Management strategies for the Upper Basin Division DCPs are premature for implementation. For example, large-scale forbearance agreements have yet to be negotiated, as are the funding mechanisms. The uncertainties that surround DCP and the basin-wide impacts that will result make it premature and difficult to impossible to consider those impacts, as NEPA requires they must, in the DEA for the Green River Block Water Rights Exchange.[7]

Furthermore, it is not clear to us if the proposed action has been properly defined in the DEA. For example, the users of this water are not defined, the locations of the withdrawals are not defined, the amount that the users would divert at such locations has not been defined, and an accounting system to ensure that the State of Utah is leaving water in tributaries in exchange for water from Flaming Gorge as not been defined. Without having empirical information, it is difficult for the public to understand what the impacts might be to the ecosystems of the Green River and its tributaries, such as the Yampa River, the White River, the Duchesne River, the Price River, the San Rafael River, and finally the tributaries of Lake Powell which include the Dirty Devil River and the Escalante River. If the public can’t assess the proposed action and its potential impacts properly, then we have to assume that neither can the US Fish and Wildlife Service, the Tribes or other cooperating agencies.

The heightened concern for us are the endangered and threatened fish in the lowermost section of Reach Three, starting at the vicinity of the San Rafael River mouth where the last diversion occurs. We understand the nursery habitat at lower Reach Three suffers from incidental water withdrawal by natural evaporation and evapotranspiration (ET), along with a much-slowed river current and a general shallowness in this particular reach. On our river trips in the summer, we have witnessed fish morality due to heat stress and low oxygen levels, especially for the flannelmouth sucker. We have witnessed juvenile fish being stranded in detached backwaters that heat in the sun and make for easy foraging by fish-eating predators. A release from Flaming Gorge dam to augment the flows and reduce river temperatures and reconnect backwaters in Reach

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[7] http://www.livingrivers.org/pdfs/Press/ColoradoRiverLeadersToDiscussIdeaOfMandatoryWaterCuts-AcrossState.pdf

Three would take many days to arrive; a delay of time that a suffering and vulnerable fish does not have. This situation is happening right now and we expect future water scarcity issues will make this situation only worse.

Consequently, we also worry about river navigation through the submerged sandbar sections of the Green River in lower Reach Three. For example, in the first week of July, in the low water year of 2012, and during a science trip in Canyonlands National Park, it was necessary to off load passengers from row boats and push them into deeper water—twelve times—and specifically the 40 river miles between Fort Bottom and the Confluence with the Colorado River.[8]

HISTORY

These water rights were originally held in Flaming Gorge Reservoir by Reclamation as part of the "Ultimate Phase" of the Central Utah Project. This water was originally intended to supply the Uintah Unit (partially completed) and the Ute Indian Unit (never completed) of the Central Utah Project. In 1992, Congress signed the Central Utah Project Completion Act which deauthorized the Ultimate Phase, compensated the Northern Ute Tribe for construction projects not completed by the United States, and encouraged the tribe to quantify their water rights. Thus far, a Ute Water Compact has not been ratified by all bands of the Ute Tribe.

Reclamation held the Ultimate Phase water rights until 1996, when it transferred those rights to the Utah Board of Water Resources who, instead of granting them to the Northern Ute Tribe as originally intended, opened these rights up for development in Utah. Some water has been put to use by private and public users along the Green River and, potentially, in the drainage of the Colorado River in Grand County and San Juan County. These rights are collectively referred to as the Green River Block. All of the undeveloped rights from the Ultimate Phase have transferred back to the Utah Board of Water Resources, and they are planning on using them to supply the Lake Powell Pipeline for consumptive use in Washington and Kane Counties. Incidentally, this water exchange to Kane and Washington counties are now junior in priority to the developed Central Utah Project.[9] The Utah Division of Water Rights has granted extensions of time to put the water to beneficial use to all the public water suppliers holding undeveloped Ultimate Phase water rights. According to Reclamation, all of the undeveloped Ultimate Phase water rights were supposed to lapse on October 6th, 2009. The majority of the rights being discussed in the Green River Block should have lapsed on that date; the exceptions are the ones already developed and being put to beneficial use by private users.

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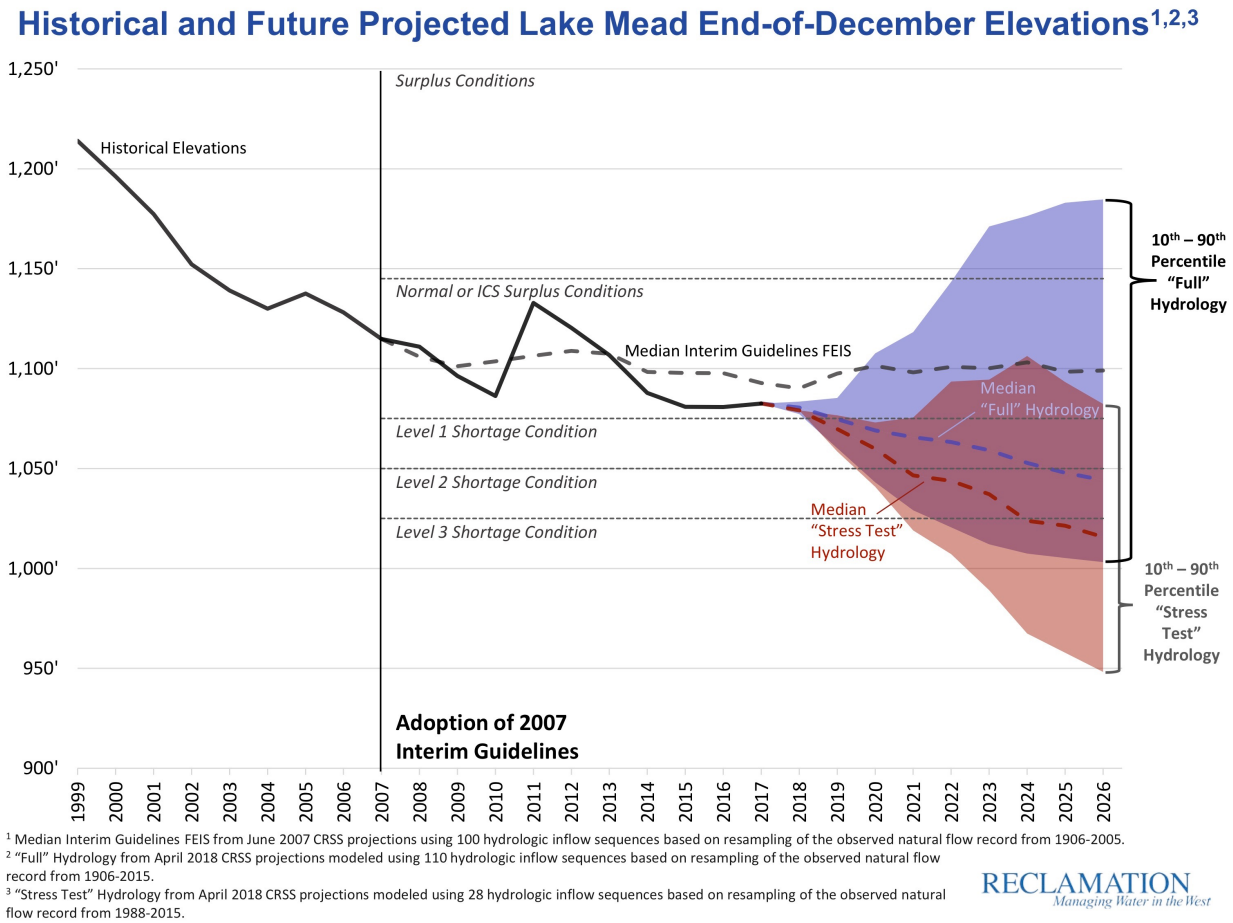
[8] Personal Communication with John Weisheit in Moab, Utah.

[9] http://www.riversimulator.org/Resources/Pipelines/FedAgreementWithUtah2011.pdf

1. THE DRAFT EA MUST ADDRESS CHANGING HYDROLOGY DUE TO CLIMATE CHANGE IN MODELING AND IN SECTION 3.3.1.5. CUMULATIVE EFFECTS

The DEA put forth by Reclamation uses quite complex modeling (Colorado River Simulation System, CRSS) to verify the existence of water in Flaming Gorge Reservoir for the water rights exchange. Given that, we are surprised that the model does not use the most current data available. The model needs to reflect the fact that our future inflow hydrology cannot be expected to mirror the first hundred years. We are in an era of unprecedented climate change, as acknowledged by Reclamation in the 2012 Colorado River Basin Supply and Demand Study.[10] The Colorado River Basin is in its nineteenth year of drought. Using hydrology from the last one hundred years (beginning in 1906) is inaccurate as a base for modeling future inflow hydrology, and it puts communities relying on the river at risk.

In the 2012 executive summary of the Colorado River Basin Supply and Demand Study, Reclamation claims, "climate change may put water users and resources relying on the



[1] Median Interim Guidelines FEIS from June 2007 CRSS projections using 100 hydrologic inflow sequences based on resampling of the observed natural flow record from 1906-2005.
[2] "Full" Hydrology from April 2018 CRSS projections modeled using 110 hydrologic inflow sequences based on resampling of the observed natural flow record from 1906-2015.
[3] "Stress Test" Hydrology from April 2018 CRSS projections modeled using 28 hydrologic inflow sequences based on resampling of the observed natural flow record from 1988-2015.

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[10] https://www.usbr.gov/lc/region/programs/crbstudy.html

river at risk of prolonged water shortages in the future."[11] They go on to analyze current climate predictions and come up with a median expected decrease in Colorado River flow of about 9% by 2060.[12] This number is very low compared to other studies that suggest a conservative estimate could be closer to 20%,[13] but even at a 9% decrease in river flow, the Upper Basin will be required to finalize DCPs that involve such interconnected operations of reservoirs, including Flaming Gorge.

Lake Powell and Lake Mead are at risk of dropping to critically low levels before 2026 as seen by the graph (preceding page) entitled "Historical and Future Projected Lake Mead End-of-December Elevations" produced by Reclamation.[14] It is important to look at the "stress-test" hydrology based on flows from recent history (1988-2015) which many scientists think more accurately reflect our current state than "full hydrology" which includes an abnormally wet time early in the historical record. Stream flows are extremely likely to continue to decline throughout the century, causing all states to be required to use less water than was originally allocated by the Law of the River.

The 30-year average of unregulated flows into Lake Powell, which is used for the determinations of the Annual Operating Plan[15] for dam operations of the Colorado River Basin, will lower significantly in 2020. The current and last 30-year averages both include the pluvial that occurred during the 1980s (1971-2000 and 1981-2010). The time frame 1971-2000 averaged 12.6 million acre-feet per year (AFY). The more recent 30-year average (1981-2010) was 10.83 million acre-feet per year, a de-

The 30-year average in Annual Operating Plans

Lake Powell Unregulated Inflows	AOP Reference (hyperlinked above)	30-year average
1906 - 1968 (mean)	1970 AOP	No entry ??
1971-2000	2005 AOP	12.06
1971-2000	2010 AOP	12.04
1981-2010	2015 AOP	10.83
1981-2010	2018 AOP	10.83
1991 - 2020	To be determined	9.0 ??

[11] Bureau of Reclamation. 2017.Colorado River Basin Water Supply and Demand Study Executive Summary. p 26. https://www.usbr.gov/watersmart//bsp/docs/finalreport/ColoradoRiver/CRBS_Executive_-Summary_FINAL.pdf

[12] Bureau of Reclamation. 2017. Colorado River Basin Water Supply and Demand Study Executive Summary. p 7. https://www.usbr.gov/watersmart//bsp/docs/finalreport/ColoradoRiver/CRBS_Executive_-Summary_FINAL.pdf

[13] Udall, B. and J. Overpeck (2017), The twenty-first century Colorado River hot drought and implications for the future, Water Resource. Res., 53, 2404– 2418, doi:10.1002/2016WR019638.

[14] Bureau of Reclamation. http://www.riversimulator.org/Resources/States/ContingencyPlanning/Reclamation/MasterPresentationLBDCPandReclamationJune2018.pdf

[15] https://www.usbr.gov/uc/water/rsvrs/ops/aop/index.html

crease of 1.77 MAF.[16] The next 30-year average of unregulated flows into Lake Powell will decrease again because of the millennial drought, which was due in large part simply to increased temperatures in the basin.[17]

Live Storage Capacity of Colorado River Basin Reservoirs by % and by Decade

Water Year	Capacity%	Water Year	Capacity%	Water Year	Capacity%	Water Year	Capacity%
1980	90.3	**1990**	72.76	**2000**	85.1	**2010**	55.46
1981	82.07	**1991**	70.75	**2001**	77.87	**2011**	64.86
1982	89.49	**1992**	69.21	**2002**	63.54	**2012**	57.05
1983	97.74	**1993**	81.2	**2003**	57.13	**2013**	50.21
1984	95.03	**1994**	75.48	**2004**	50.03	**2014**	50.37
1985	91.98	**1995**	86.36	**2005**	58.59	**2015**	50.83
1986	92.14	**1996**	84.83	**2006**	56.21	**2016**	50.62
1987	90.98	**1997**	92.53	**2007**	53.88	**2017**	55.2
1988	87	**1998**	93.65	**2008**	57.12	**2018**	46.97
1989	80.38	**1999**	93.65	**2009**	57.38	**2019**	
Average	**89.65%**		**82.04%**		**61.69%**		**53.51%**
Notes:	Impacts to hydropower production may occur at capacities near or below 35%						
	Impacts of low capacity reservoirs include degradation to water quality						
	Lake Powell filled for the first time in 1980; filling of the reservoir began in 1963						

The Reclamation modeling for the 2007 Interim Guidelines has proven to be wrong.[18] Like this DEA, the 2007 modeling used CRSS and sampled the historical natural flow record (1906-2005). It is crucial that we stop using modeling that fails to play out in the real world, especially when we are living with the consequences right now. The seven basin states are currently preparing emergency Drought Contingency Planning (DCP) documents because the 2007 models failed to predict the situation we are in. If we had accurately predicted and planned for this scenario, we might be in better shape to deal with the consequences of the 19-year Millennial Drought. Notice in the graph (next page) the "risk assessed at the adoption of the 2007 Interim Guidelines" compared to the risk reassessed in 2018.

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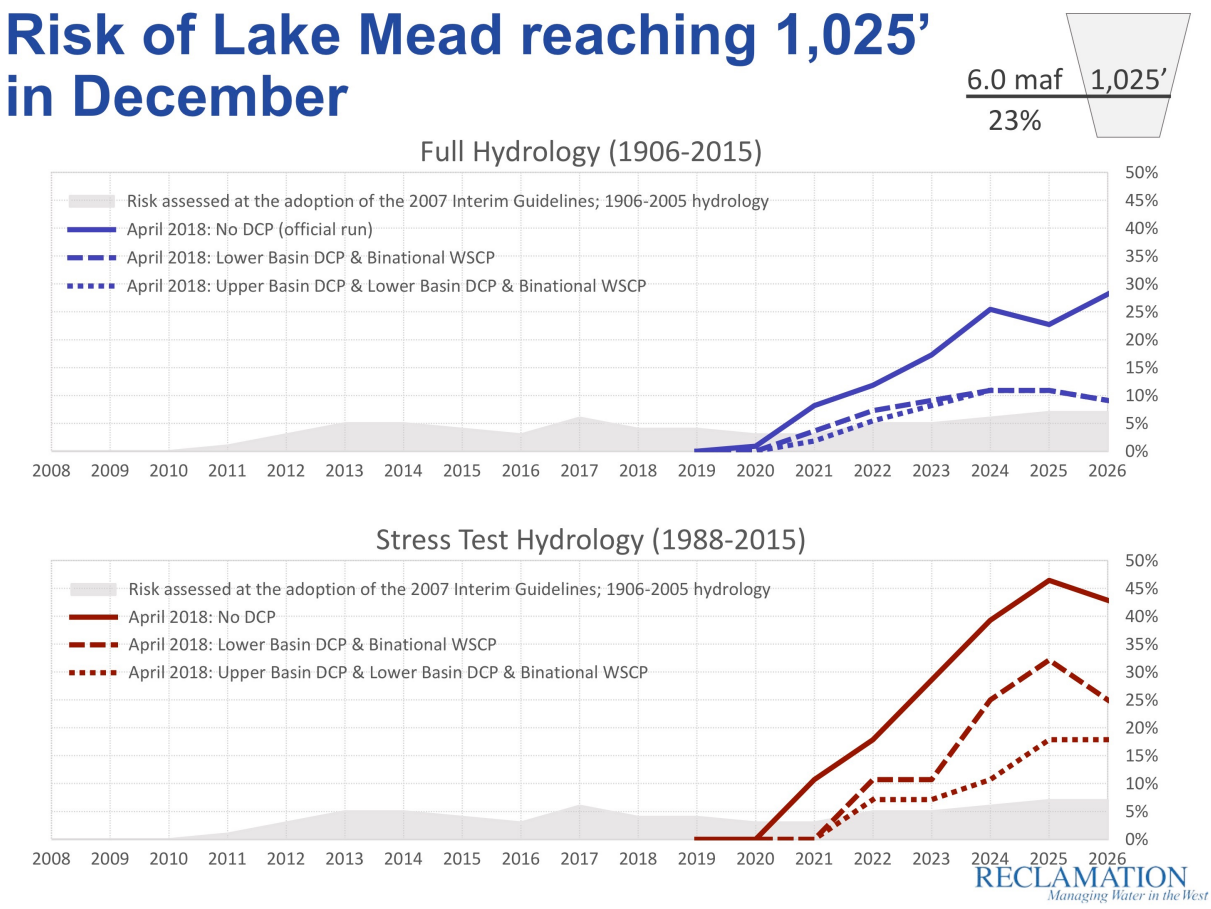
[16] Annual Operating Plans: https://www.usbr.gov/uc/water/rsvrs/ops/aop/index.html

[17] Xiao, M., Udall, B., Lettenmaier, P. (2018). On the causes of declining Colorado River streamflows. American Geophysical Union. p. 10-12, 39. doi: 10.1029/2018WR023153.

[18] CAP Press Release. Feb. 13 2008. "Lake Mead not going dry." Accessed at http://www.riversimulator.org/Resources/Press/LakeMeadDryCAPdozierFulp.pdf



In a 2007 letter to the Upper Colorado River Commission, Rick Gold (UC Regional Director) outlined what Reclamation believes to be a safe allowable annual release from Flaming Gorge Dam, which is 165,000 acre-feet. The letter says, "The analysis presumes that Wyoming, Utah, and Colorado will continue to develop their water supplies."[19] Was a contract for releases from Flaming Gorge for the Ute Tribe assumed in this modeling? Was the Green River Block also counted in modeling as a "future depletion?" Were climate change or DCPs accounted for in this analysis? Would Reclamation still claim there is 165,000 acre-feet available in Flaming Gorge for development? The DEA needs to address these questions.

Given the reality of diminishing Colorado River water, and the fact that Reclamation is acknowledging the changing hydrology in other situations, the DEA should include modeling that accurately reflects future climate models and does not rely on outdated numbers from the past century. The hydrologic situation due to climate change should be addressed in section 3.3.1.5. Cumulative Effects, of the DEA.

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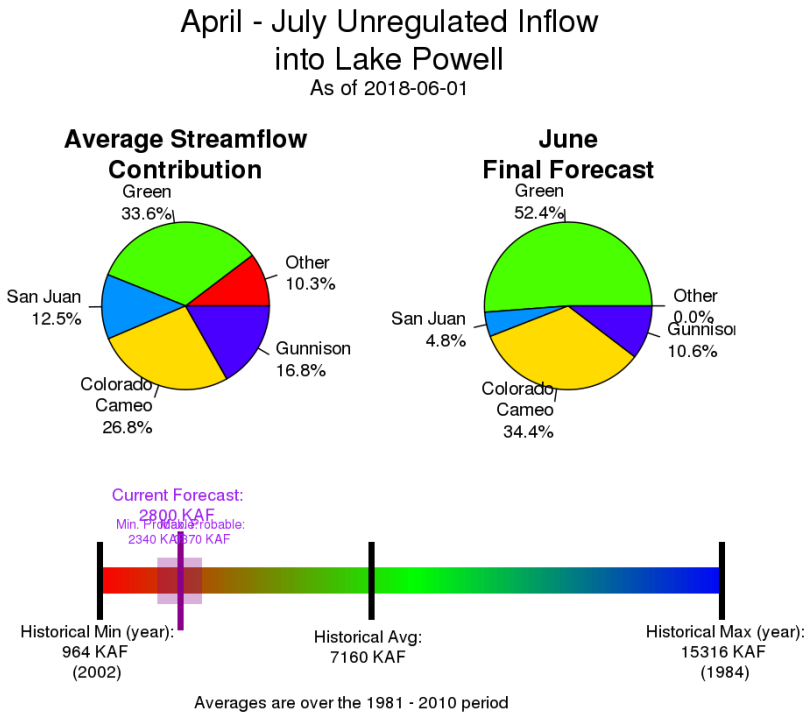
[19] Letter from Rick Gold, Bureau of Reclamation to Don Ostler, Upper Colorado River Commission (March 3, 2007). "Water Marketing from Flaming Gorge Reservoir." Accessed at: http://www.riversimulator.org/Resources/UCRC/UCRCflamingGorgeWaterAvailibilityReclamation2007.pdf

2. NEPA REQUIRES THAT A PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT ON THE UPPER BASIN DROUGHT CONTINGENCY PLAN BE PREPARED BEFORE THE DRAFT EA ON THIS CONTRACT CAN BE COMPLETED

Currently, the Upper Basin States are in the process of negotiating a DCP to deal with the likelihood of future water shortages. A key element in this plan will be the coordinated operations of Navajo, Blue Mesa, and Flaming Gorge Dams. In order to determine whether there is sufficient hydrology for releases from the Flaming Gorge Dam to fulfill Utah's Green River Block water rights, we need to understand these coordinated dam operations and include them in the modeling. The DEA for the Green River Block should be put on hold until the requirements of the DCP are clarified.

In addition, before the Upper Basin DCP can be finalized, and because it is a major federal action, a basin-wide Programmatic Environmental Impact Statement (PEIS) must be prepared that addresses the requirements and potential impacts of coordinated operations of the Navajo, Blue Mesa, and Flaming Gorge Dams. It is essential that this basin-wide PEIS be incorporated in planning for releases from Flaming Gorge Dam, because the operations of these dams will be tied together to ensure compact obligations are met and to prevent critical shortages in Lake Mead.



The importance of evaluating the Upper Basin DCP and its potential to affect Flaming Gorge discharges is illustrated by the pie charts (above),[20] which demonstrate that the Green River could maintain reasonable hydrology while the rest of the Colorado River Basin declines. Lake Powell and Lake Mead will require water from Flaming Gorge to maintain operational elevations. This is because as climate change progresses, the Green River is predicted to be more likely to maintain average snowpack than other drainages in the Colorado River Basin.[21] This year presents a good example of this pattern emerging. The Colorado River Basin Forecast Center under NOAA states:

> "April-July unregulated inflow forecasts for some of the major reservoirs in the Upper Colorado River Basin include Fontenelle Reservoir 980 KAF (135% of average), Flaming Gorge 1120 KAF (114% of average), Blue Mesa Reservoir 270 KAF (40% of average), McPhee Reservoir 46 KAF (16% of average), and Navajo Reservoir 174 KAF (24% of average). The Lake Powell inflow forecast is 2.80 MAF or 39% of average. This would be the 5th lowest April-July inflow on record for Lake Powell dating back to 1964."[22]

We specifically request that the Upper Basin DCP be the subject of a PEIS that is conducted when re-consultation of Interim Guidelines begins on January 1, 2021, if not before. We also request the preparation of a new Hydrologic Determination for the Upper Basin. Additionally, we request that this basin-wide PEIS include consultation with an independent science panel that is involved from the very beginning of the process and that the National Academy of Sciences also sign-off on the PEIS, as well.

The overarching problems that must be thoroughly studied in such a system wide, programmatic evaluation should include, but not limited to:

> • Diminished water supply and water quality • Increased water demand • Over allocation of water rights • Quantifying the water rights of the First Nations • Impacts to national wildlife refuges, parks and monuments (including the international biosphere at the Colorado River delta) • Removal of exotic species • Sedimentation in the reservoirs • Dam, spillway, and floodplain safety • Modernizing the Law of the River • Alternative energy production and conservation • Water storage and conservation alternatives

Our request for a comprehensive PEIS for the Upper Basin DCP is supported by the federal district court of the District of Columbia, which confirmed, in its decision in EDF v. Higginson, that NEPA requires a comprehensive EIS to evaluate proposed federal

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[20] Colorado River Basin Forecast Center, NOAA. June 1, 2018. Accessed at: https://www.cbrfc.noaa.gov/dash/data/PowellPieChart.png

[21] Xiao, M., Udall, B., Lettenmaier, P. (2018). On the causes of declining Colorado River streamflows. American Geophysical Union. p. 10-12, 39. doi: 10.1029/2018WR023153.

[22] Colorado River Basin Forecast Center, NOAA. June 1, 2018 Water Supply Forecast Discussion. Accessed at: https://www.cbrfc.noaa.gov/wsup/pub2/discussion/current.pdf

projects within the entire Colorado River Basin: "All parties to this action agree that NEPA requires the Department of Interior to prepare environmental impact statements that evaluate the synergistic and cumulative effects of the proposed federal projects."[23]

Colorado River management is in critical flux right now with rapidly changing hydrology and the development of a new DCP that will significantly impact Flaming Gorge Dam operations. Jim Lochhead, CEO and manager of Denver Water, was quoted in Aspen Journalism as saying, "With the repeat of historic hydrology beginning in the year 2000, Lake Powell will be dry, and when I say dry I mean empty, within about three years. . . .What we are asking for is that the contingency plans be put into place. We need to have those plans in place before the system collapses."[24]

Consequently, the DEA for the Green River Block Water Rights Exchange should be tabled as premature, since an accurate assessment of water availability in Flaming Gorge can only follow the development of dam operation guidelines under an Upper Basin DCP. In addition, a PEIS is necessary to meet NEPA requirements. Such a PEIS, focused on the Upper Basin DCP, must be completed before the DEA examining the Green River Block Water Exchange can be finalized.

3. THE LEGALITY OF THE MAJORITY OF GREEN RIVER BLOCK RIGHTS IS IN QUESTION

The legality of the water rights that are the subject of the proposed exchange is in question. After 1996, the water rights of the Ultimate Phase were given out by the State of Utah to those who applied for them. The undeveloped rights should have been extinguished 50-years after 1959, if not developed, but instead the state has granted numerous extensions to public water suppliers.

Reclamation's own Area Manager for the Provo Area Office, Bruce Barrett, lodged several protests to water rights from this block. In a protest letter to the Utah Division of Water Rights he states, "After the "Ultimate Phase" was deauthorized, Reclamation assigned this portion of the appropriation to the Utah Board of Water Resources with the understanding that any portion of this water right not developed within 50-years of the original approval date (ending on October 6, 2009) would lapse."[25]

Rather than facilitate depletions based on these illegitimate rights (we are not referring to the small subset of water rights in the Green River Block that are already being put to

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[23] Environmental Defense Fund (EDF) v Higginson. June 21, 1978. (655 FR 2d, 1981). Accessed at http://www.riversimulator.org/Resources/Legal/GCD/1981EDFvHigginson655FR2d.pdf

[24] Gardner-Smith, Brent. Sept. 19, 2018. "Mandatory curtailment of water rights in CO raised as possibility." Aspen Journalism. Accessed at: https://www.aspentimes.com/news/local/mandatory-curtailment-of-water-rights-in-co-raised-as-possibility/

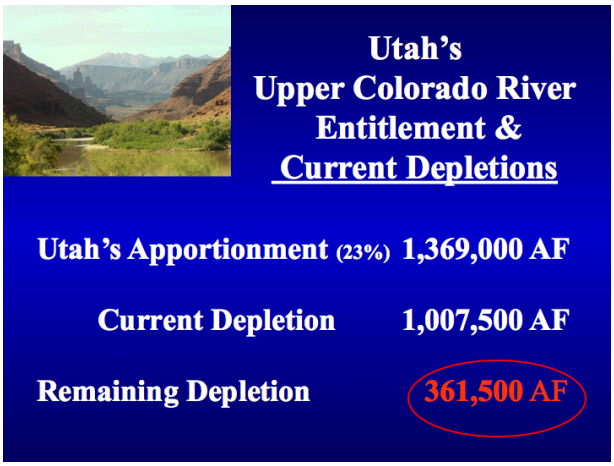
[25] Letter from Bureau of Reclamation to Utah Division of Water Rights. December 7, 2009. Accessed at: https://www.waterrights.utah.gov/asp_apps/DOCDB/DocImageToPDF.asp?file=/docSys/v920/y920/y92000nr.tif

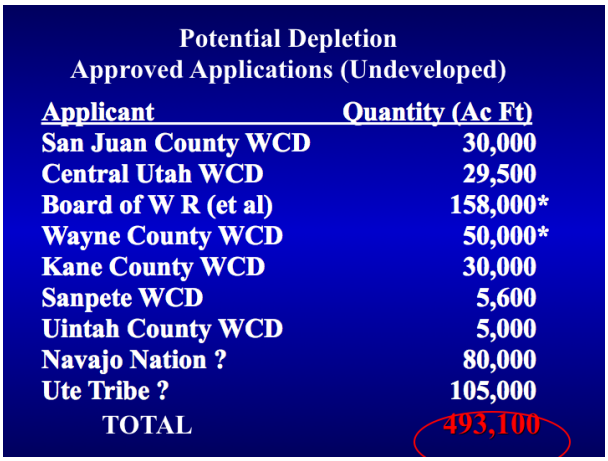
use by private interests), we strongly recommend that the Bureau of Reclamation defer completion of the EA on the Green River Block Water Rights Exchange until a Ute Water Compact is ratified by all parties, sources for the water rights that the tribe is entitled to have been identified, and the legality of the rights that will be subject of the exchange has been clarified.

4. UTAH'S OVERALLOCATION OF WATER THAT IS THE SUBJECT OF THE PROPOSED EXCHANGE

Currently, pursuant to the Colorado River Compact and associated "Law of the River, Utah has 1,369,000 AFY (acre-feet per year) water available to use. In 2009, the Utah Division of Water Resources claimed that Utah had already depleted 1,007,500 AFY, with an additional 493,100 AFY in approved applications that are awaiting development. As enumerated below, these major undeveloped water users include the Northern Ute Tribe (105,000 AFY), the Utah Navajo (81,500 AFY), the Green River Block for Uintah County (72,600 AFY), and the Lake Powell Pipeline (86,000 AFY), among others (the Green River Block and the Lake Powell Pipeline are grouped together as "Board of W R (et al.)."[26]

These new developments increase Utah's depletions to above the current maximum depletion levels allowed to Utah, not even considering the likely cutbacks necessary to uphold Colorado Compact requirements with a changing climate.[27] The uncertainties around what water rights Utah currently has and may have in the future, due to overallocation, makes it difficult to impossible to determine at this point in time, whether there is sufficient hydrology for releases from the Flaming Gorge Dam to fulfill Utah's Green River Block water rights. Consequently, the DEA for the Green River Block should be





[26]Division of Water Resources. Upper Colorado River Basin, Current Policy and Issues Powerpoint Presentation. 2009. Slide 5. Accessed at https://www.waterrights.utah.gov/meetinfo/m20090930/upper_colorado.ppt.

[27]Division of Water Resources. Upper Colorado River Basin, Current Policy and Issues Powerpoint Presentation. 2009. Slide 4 & 5. Accessed at https://www.waterrights.utah.gov/meetinfo/m20090930/upper_colorado.ppt.

put on hold until it can be determined that Utah has the rights to sufficient water to be the subject of an exchange.

5. A SYSTEM OF ACCOUNTING NEEDS TO BE DETAILED IN THE DEA THAT ENSURES UTAH LEAVES WATER IN TRIBUTARIES FOR EXCHANGED RELEASES

The exchange contract and the DEA must outline and analyze a system set in place to ensure that an exchange of water is actually happening, and Utah isn't also diverting essential tributary flows. Where will tributary flows be measured? What are the target flows for specific tributary drainages? How will water users know how much to deplete in a given year? If it is a drought year and flows are lower than the 72,000 af maximum depletion, what mechanisms will ensure that Utah does not use more than the tributaries contribute and endanger critical habitat in the process? All of these questions need to be answered for water rights holders to know what to expect and for the public to be informed and able to fully participate in this NEPA process.

5. FEDERAL WATER RIGHTS CLAIMS OF TRIBES SHOULD BE SETTLED AND WATER IDENTIFIED BEFORE THIS CONTRACT IS SIGNED

Under the Winter's Doctrine, the Northern Ute and Navajo Tribes have federally reserved water rights, dating back to the creation of the reservations, if not since time immemorial, which have yet to be developed. The particular water rights assigned to the Ultimate Phase were intended to go to the Northern Ute tribe. When that project never materialized, the tribe settled with the federal government for the promise of future water rights. Thus far, a water contact has not been agreed upon and full water rights have not been assigned to the Ute tribe.

Because Utah's approved water rights are over-allocated, as acknowledged by the Utah Division of Water Rights,[28] the State of Utah must demonstrate where the water will come from to fulfill the Ute Water Compact before Reclamation further proceeds with this water rights exchange with the State. The DEA must not only include consideration of these factors in its calculation of available water, but must also incorporate this information in its modeling.

In all likelihood, the water to fulfill the Ute Water Compact will come from the Green River. In order to maintain minimum fish flows, this would require a contract with Reclamation for releases from Flaming Gorge Reservoir. As part of the Department of Interior, the Bureau of Reclamation has an obligation to tribes and native people. Secretarial Order 3335 states that, "The trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights."[29]

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[28] http://www.riversimulator.org/Resources/Pipelines/LLP2018/ProposedUtahWaterRightsPolicy2009.pdf

[29] Secretarial order 3335. August 20, 2014. Reaffirmation of the Federal trust responsibility to federally recognized Indian tribes and individual Indian beneficiaries. Accessed at https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf

Consequently, Reclamation should settle an exchange contract for releases from Flaming Gorge Reservoir with the Northern Ute Tribe before engaging with the State of Utah on an exchange of other, more junior water rights.

We urge Reclamation to put completion of this DEA on hold until the two crucial agreements that will significantly impact the existence and amount of water for the Green River Block water rights exchange are finalized: the Ute Water Compact and the Upper Basin DCP. The exchange contract must also outline an adequate system of accounting for the exchange of water from tributaries for Flaming Gorge water. In addition, we strongly recommend that the modeling for the DEA be expanded so that it does not rely solely on data from the last one hundred years and includes relevant climate forecasts.

Thank you for your consideration of these facts, comments and recommendations.

Sincerely yours,

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