

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-751
WTR-4.10

APR 16 2014

VIA FACSIMILE, E-MAIL, AND OVERNIGHT MAIL

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

Subject: Request for Reconsideration of the March 27, 2014, Order of the State Engineer for Change Application No. a38730 (49-258) – Colorado River Storage Project

Dear Mr. Jones:

On February 13, 2013, Deseret Generation & Transmission Co-Operative filed Change Application No. a38730 to modify Water Right No. 49-258 which heretofore allowed for a 15 cfs diversion from the White River for steam generation, mining, and other industrial purposes. The subject change application expands where the industrial uses can occur and adds the Green River as an approved water source (at diversion points 45 miles upstream from its confluence with the White River). On April 22, 2013, the Bureau of Reclamation protested this application stating that, "without a water service contract for water stored in Flaming Gorge, the Green River points of diversion under Change Application No. a38730 would only be entitled to accretion flows below Flaming Gorge Dam that are available under a 2013 priority date." This change was approved by a March 27, 2014, Order of the State Engineer (Order).

Reclamation requests reconsideration of the Order because the language in this document does not accurately reflect the operations and the Federal statutes surrounding Flaming Gorge Reservoir. Reclamation has met with the State on several occasions to discuss the many complex and interrelated issues surrounding the operations of this reservoir. However, there is still much work to be done before consensus can be reached and we are concerned with codifying an opinion about these operations in this Order.

The Order misstates and omits several crucial points which are essential to understanding the correct legal framework for the operation of Flaming Gorge Reservoir and the use of the water released from storage in that reservoir. First, the operation of Flaming Gorge Reservoir is controlled by Federal law, as is the use of water released from storage in that reservoir. Those Federal statutes control the purposes for which water released from the reservoir may be used and

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further require a contract for the use of federally stored water. Second, the water rights obtained by Reclamation from the State of Utah, pursuant to the federal authorizing statutes for Flaming Gorge Reservoir, confirm that Reclamation has the right to provide water, not only for power generation and regulation of flows, but also for any and all consumptive uses at any place of use authorized by Federal law. This is simply to say that the ability for Reclamation to authorize consumptive use of water is not limited to the place of use of the Ultimate Phase, but applies to any use of federally stored water. Third, to the extent that any water user makes use of the storage and re-regulation of water provided by Flaming Gorge, that water user becomes subject to the transfer of water right executed by the State of Utah and Reclamation both because of the terms of the water right transfer agreement as well as pursuant to the federal laws mentioned above particularly if the unauthorized use interferes with the use of Flaming Gorge water for federally authorized purposes. For the reasons explained below, we urge the reconsideration of the Order.

Flaming Gorge Reservoir and powerplant were authorized by Congress in 1956 the Act of April 11, 1956, 70 Statute 105, 43 U.S.C. §620. The authorized purpose for the Flaming Gorge facility and the water released therefrom is:

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,

Those federal purposes will control the use of water stored and released from the federal facility see *Arizona v. California*, 344 U.S. 919 (1953); *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977); *Strawberry Water Users Ass'n. v. United States*, 576 F.3d 1133 (10th Cir. 2009).

In pursuance of the federal authorization, in 1958, Application to Appropriate No. A30414 (Water Right No. 41-2963) was filed to cover the water storage in Flaming Gorge Reservoir. The application states that Reclamation was appropriating water for the purposes of the Colorado River Storage Project (CRSP) including irrigation, municipal, domestic, and industrial uses and that a place of use for water for those purposes was the Ultimate Phase of the Central Utah Project. The proper function of Flaming Gorge Reservoir and use of Water Right No. 41-2963 is often complicated by the place of use designated in the original application to appropriate. While the Ultimate Phase was certainly a place of use for Flaming Gorge water it is certainly not the only place of use where consumptive use of stored water can be made.

The Ultimate Phase was eventually de-authorized by the Central Utah Project Completion Act (Public Law 102-575, 106 Statute 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

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numbers. Nevertheless, the segregated water rights remain attached to Flaming Gorge stored water. 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. Because these Ultimate Phase water rights were based on the consumptive uses of Flaming Gorge stored water, these rights must stay attached to this stored water through CRSP Water Service Contracts. This 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 Colorado River Storage Project Facilities, the State of Utah will enter into a water service contract with the United States.”

(Emphasis added.) Since the execution of this Assignment agreement, Reclamation and the Utah Board of Water Resources have agreed to enter into Water Service Contracts for the undeveloped portion of this water right which Utah holds for the Lake Powell Pipeline Project.

Thus, due to both the CRSP authorization and the federal appropriation in Utah and the terms of its partial assignment, the operations of Flaming Gorge Reservoir are controlled by Federal statutes and not the remaining beneficial uses listed in Water Right No. 41-2963.

It is worth re-iterating that these CRSP purposes are cited 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 Colorado River Storage Project Act (Chapter 203, 70 Statute 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 . . .’”

In order to accomplish the CRSP authorization to facilitate consumptive water use in the Upper Basin States, Flaming Gorge Reservoir releases stored water to meet instream flow requirements set by the Upper Colorado Endangered Fish Recovery Program and the Endangered Species Act (ESA). By meeting Compact, Recovery Program, and ESA obligations, Flaming Gorge Reservoir serves a vital role in protecting all of Utah’s water rights that are tributary to the Green and Colorado Rivers, even for those water users who never receive stored water from this reservoir. These storage releases are protected by Federal law and, therefore, must be protected

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by the Utah State Engineer. Water released from Flaming Gorge for ESA purposes cannot legally be diverted for other purposes.

Additionally, water is released from Flaming Gorge Reservoir to meet the CRSP purpose of meeting the Upper Basin Compact delivery requirement to the Lower Basin by making deliveries into Lake Powell. Each year, Reclamation makes its releases for Compact deliveries pursuant to the Annual Operating Plan. Utah benefits from those releases and deliveries of stored water because the ability of Utah to deplete its allocated water is dependent upon the Upper Basin making the required compact deliveries from water stored or re-stored in Lake Powell. Water released for Compact deliveries as set out in the Annual Operating Plan may also not be legally diverted for other purposes.

As stated in its authorization, Flaming Gorge Reservoir may also store water for "beneficial consumptive use." Because of the Assignment agreement, this occurs by combining the federally stored water with a consumptive Utah water right through a CRSP Water Service Contract. 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. 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 and, consequently, directly benefits Utah. However, such unambiguous utilization of stored water brings with it the necessity of complying with federal statutory conditions for the use of project water.

Reclamation is concerned that there is not a clear consensus in Utah water rights administration as to when a CRSP water service contract should be tied to a water right. At the very least, water uses 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 the use of CRSP water. Additionally, any water use that utilizes water that would not be in the river absent the storage of earlier natural flow for later release, that is to say, water use that utilizes storage should also be the subject of a contract. Federal law, and past court cases set a clear precedent defining when a CRSP Water Service Contract is needed.

Reclamation desires to work with your office to develop an understanding about when and how Flaming Gorge stored water will be paired to Utah water rights. Guidelines could be established that would make it clear when a change application filed on water rights in the Green River Basin would require a Water Service Contract.

Flaming Gorge Reservoir only has a finite storage pool that can be used to supplement consumptive water rights in Utah, Wyoming, and Colorado. After this storage pool is fully subscribed to, the remaining Flaming Gorge Reservoir water releases will be those required to satisfy senior water rights, meet fish flow, and meet obligations to the Lower Basin. Reclamation believes that developing clear guidelines for Water Service Contracts will ultimately benefit Utah

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by providing opportunities to commit Flaming Gorge stored water to consumptive water uses within the state.

Reclamation respectfully requests that you reissue the March 27, 2014, Order of the State Engineer either without the language describing Flaming Gorge Operations or with modified language that more accurately reflects the CRSP purposes of this reservoir. Reclamation believes the Order should also caution the applicant, that depending on future operations of Flaming Gorge Reservoir, their water rights may be curtailed.

Please contact Mr. Justin Record at 801-379-1072 if you have any questions regarding this letter or would like to schedule a meeting with Reclamation to discuss this issue.

Sincerely,


ACTING
Wayne G. Pullan
Area Manager

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