

December 1, 2009

Kent L. Jones, P.E., State Engineer
Utah Department of Natural Resources, Division of Water Rights
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PO Box 146300
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RE: Proposed Endangered Fish Flow Protection Policy for the Green River

Dear Mr. Jones:

Western Resource Advocates and The Nature Conservancy appreciate the Utah Division of Water Rights' ("DWR") taking on the challenge of initiating a policy discussion aimed at protecting river flows on the Green River necessary for recovery of endangered fishes.

Achieving the objectives of the Upper Basin Recovery Program ("Program") will require well-articulated flow protections to provide the multiple benefits recently recognized in Governor Herbert's letter of support for the Program. The letter highlighted these benefits, which prominently included securing Endangered Species Act ("ESA") compliance for water use in the Upper Colorado River Basin. Because we share common ground and place the same high priority on the Program—one that enjoys broad-based and bi-partisan support—we are responding to DWR's request for comments on draft policy shared at public meetings over this past summer and fall. Our comments here are brief; due to the complexity of the issue we also provide an appendix ("Appendix A - Supporting Detail") which includes significantly more information.

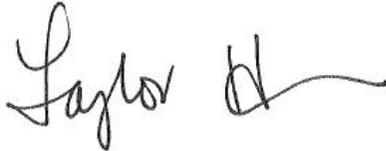
Our review and consideration of the DWR's proposed flow protection policy, follow up discussions with DWR, and the importance of the Program's September 2000 *Flow and Temperature Recommendations for Endangered Fish in the Green River Downstream of Flaming Gorge Dam* ("recovery flows"), lead us to the following observations:

- Due to significant uncertainty in the administration of existing and future water rights, as they pertain to the required protection of recovery flows, tools must first be put in place to evaluate the use of these scarce water resources. River modeling is critical prior to making these important policy decisions.
- Protecting only minimum flows will be insufficient to recover the endangered fish and is not supported by the current science in aquatic biodiversity conservation. The proposed policy should not put off protecting the full suite of flows necessary to create and maintain the critical habitats these species depend on. A precautionary approach – beginning with full protection— is needed instead of leaving most of the recovery flows unprotected while more and more water may be allocated for depletion.

- The proposed policy should condition approval of all permanent water right change applications within the Green River Basin upon subordination of the changed water right to the recovery flows, unless the DWR can show that the exercise of the right will not reduce those flows.
- The proposed policy should provide for additional and equivalent releases from Flaming Gorge whenever the perfection of approved water rights will reduce the recovery flows. This might be accomplished through a single water service contract with the U.S. Bureau of Reclamation that provides for offsetting the potential depletion of the recovery flows by such water rights.

Protection of these fish recovery flows contributes to the conservation of some of the most scenic, traveled, and valued reaches of our western rivers for generations to come. Such flow protection also helps ensure that the communities and economies dependent on ESA compliant water projects continue to thrive. Please feel free to contact us for any questions and we look forward to working with the DWR to develop solutions in partnership to the challenges above.

Sincerely,



Taylor Hawes
Colorado River Program Director
The Nature Conservancy



Bart Miller
Water Program Director
Western Resource Advocates

The Nature Conservancy is a leading international, nonprofit organization that preserves plants, animals and natural communities representing the diversity of life on Earth by protecting the lands and waters they need to survive. To date, the Conservancy and its more than one million members have been responsible for the protection of more than 14 million acres in the United States and have helped preserve more than 83 million acres in Latin America, the Caribbean, Asia and the Pacific.

Western Resource Advocates is a nonprofit conservation organization dedicated to protecting the Interior West's land, air, and water. With more than 29 employees and offices in Colorado, Utah, Arizona, and Nevada, we promote river restoration and water conservation, advocate for a clean and sustainable energy future, and protect public lands for future generations. We meet our goals in collaboration with other environmental and community groups, and by developing solutions appropriate to the environmental, economic and cultural framework of this region.

Appendix A: Supporting Detail for WRA/TNC Letter to DWR

As DWR moves forward, we suggest it is more important to craft an effective policy that offers true protection of the full suite of flows necessary for recovery of the endangered fish than it is to meet an end of year deadline. On October 14, the Program's Management Committee agreed. We are encouraged that your office has since convened a technical advisory team to assist policy development and has begun discussing modeling with the U.S. Bureau of Reclamation ("USBR").

These detailed comments address the Proposed 2009 Water Rights Policy Regarding Applications to Appropriate Water and Change Applications which Divert Water from the Green River between Flaming Gorge Dam and the Duchesne River ("proposed policy") shared at the Vernal public meeting in August. We are concerned that this proposed policy and possible revisions shared in recent public presentations would only provide limited, piecemeal protection of the full range of flows necessary for recovery and would therefore fall short of providing compliance with the ESA. We specify our concerns below.

I. A precautionary approach is needed instead of the proposed focus on minimum flows, which would leave most of the flows needed for recovery unprotected.

In recent discussion at the public meetings and on the calls and in handouts for the Program's Water Acquisition Committee, DWR has indicate that its initial policy may only protect a "dry" year, minimum, year-round baseflow target in the approval of new rights and changes of existing rights. Such a dry year, minimum trigger, however, would leave most of the flows needed for recovery unprotected while more and more water may be allocated for depletion. There also appears to be a high degree of uncertainty in the timeline and public process for development of this flow protection policy, which has included references to incremental and unspecified terms for limiting movement of water rights upstream, for limiting storage during the spring season, for reviewing releases from Flaming Gorge and making changes in the RIPRAP, and for adaptive management.

A more precautionary approach is needed that broadly protects the full suite of recovery flows from the outset and then considers more narrow protections based on additional analysis and modeling of both the potential impacts of any group of water depletions on the recovery flows and the capability of mechanisms to avoid or offset depletion impacts to these flows.

As we discussed at length with Matt Lindon, the additional analysis and modeling could be based on the integration of the DWR's MODSIM model that accounts for all potential depletions of the recovery flows and the USBR's most recent update of its RiverWare model that accounts for all Flaming Gorge operations. Such integrated modeling could clarify the extent to which Green River flows might be depleted and still meet the full range of the recovery flows. Any remaining flows might then be available for development under approved but unperfected water rights without impacting the recovery flows. To the extent that development of these rights would deplete the recovery flows, however, it would be essential that USBR make additional releases from Flaming Gorge to offset such depletions. Theoretically no additional releases would be needed to offset depletions where DWR has authority to condition the approval of new appropriations or changes of water rights.

As we also discussed with Matt Lindon, additional releases from Flaming Gorge to offset the depletion the recovery flows by approved but unperfected water rights would, of course, be limited by the operational parameters and authorized purposes for Flaming Gorge and by a water service contract with the USBR. Like the water service contracts for Ruedi or Green Mountain reservoirs to help provide the recovery flows for the 15 Mile Reach of the Colorado River, Flaming Gorge releases should be able to protect recovery flows without the need for a change in water right or multiple water service contracts with individual water users.

A single water service contract may suffice between USBR and the state agency most responsible for protecting both Utah's compact entitlement and the recovery flows. That single contract could simply provide for the delivery of Flaming Gorge releases on top of (i.e., in addition to) the full suite of recovery flows down to any point of depletion. Theoretically, no water service contract would be needed for any depletion that did not take water away from the recovery flows, as confirmed by the integrated modeling.

II. Current water rights administration is not yet reconciled with adequate protection of the recovery flows.

A. The proposed policy appears to enable large reductions in the recovery flows.

Numbered paragraph two of the proposed policy would apply a bypass requirement to “applications to appropriate water” or “change application which transfer water rights into the affected reach.” We are concerned that neither of these categories of applications is the key issue to resolve in the State of Utah's efforts to protect the flows needed for recovery. As the DWR stated in the public meetings, the surface waters in the affected reaches of the Green River are in essence “fully appropriated” and generally not subject to additional appropriation. New groundwater appropriations are limited to “small . . . applications for 1 family, 1/4 acre of irrigation and up to 10 livestock units.” DWR's existing policy is to deny any significant new applications to appropriate water from these reaches.

Consequently, we believe that the large “approved” but not yet “perfected” water rights are a much greater challenge for DWR in protecting the recovery flows. The potential reduction in recovery flows resulting from the exemption of approved, but unperfected water rights, needs to be fully addressed by the proposed policy. Additionally, the proposed policy does not account for “approvals” upstream of Reaches 1 and 2. One way to address depletions by approved but unperfected water rights may be to provide for an additional and equivalent increase in releases from Flaming Gorge whenever the perfection of approved water rights will reduce the recovery flows, as discussed above.

B. The proposed 25 c.f.s. set-aside would increase the challenge of protecting the recovery flows.

It is not clear how numbered paragraph two of the proposed policy – --- the set-aside of 25 c.f.s for “future critical water needs in the area” --- complies with DWR's broader moratorium on additional surface appropriations. If this set-aside is not exempt from that moratorium, then it applies to water that does not exist. In the alternative, if DWR proposes to open up 25 c.f.s. to new appropriations, the set-aside can only increase the likelihood that the recovery flows will not be fully protected.

The proposed set-aside appears to be inconsistent with the chief purpose of the draft policy—protecting flows needed for endangered fish recovery. It also appears inconsistent with the DWR’s broader moratorium on new appropriations. Such a set-aside —i.e., the entirety of numbered paragraph two --- should therefore be deleted from the proposed policy and other mechanisms developed to meet future critical water needs, as discussed above.

III. The proposed policy should apply to all permanent water right change applications within the Green River Basin.

Numbered paragraph one of the proposed policy should be refined to condition approval of all permanent change applications within the Green River Basin upon subordination of the changed water right to the recovery flows, unless the DWR can show that the exercise of the changed water right will not reduce those flows. An application to permanently change a water right is not a vested water right and may only be approved by the state engineer if the change will not “prove detrimental to the public welfare” or “unreasonably affect public recreation or the natural stream environment.”

In the proposed policy, the DWR states that “the public interest will be best served by adopting a policy to protect flows recommended for recovery of endangered fish species in the Green River from Flaming Gorge Dam . . . downstream to the Duchesne River confluence.” We concur, and expect that the state engineer would exercise the ample authority to act on this public interest determination by conditioning all permanent change approvals in the Green River Basin so that the changed water right will not reduce the recovery flows. Such subordination would be grounded in modeling and analysis by the DWR that clearly establishes whether the changed water right would or would not reduce the recovery flows.

Numbered paragraph one of the proposed policy only applies to change applications “*which transfer water rights into the affected reach.*” This phrase is ambiguous and we recommend its deletion. If it means a change in point of diversion into the affected reach, it is too narrow and fails to address other change applications upstream that could adversely affect the recovery flows below Flaming Gorge Dam. By contrast, proposals such as the Regional Watershed Supply Project (a/k/a Million Pipeline) illustrate that there is intense development pressure to move water *out* of the Green River and to increase depletions that would affect the reaches below Flaming Gorge Dam. We urge a plain standard for approval of any change application—that the changed water right has been shown not to reduce the full range of the recovery flows.

IV. The proposed policy should incorporate the 2000 Flow and Temperature Recommendations.

The explanatory material references the 2000 Flow and Temperature Recommendations, but the proposed policy does not specifically incorporate them. Instead, the operative text of the proposed policy only mentions the 1992 Biological Opinion on the Operation of Flaming Gorge Dam. It is important that the policy adopted by DWR directly incorporate the 2000 Flow Recommendations and the broad protection of all elements of the Flow Recommendations, including base flows and peak flows for five year types. These recommended flows were supported by the Program and passed the rigor of a multi-year National Environmental Policy Act review process.