

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Utah Board of Water Resources

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Project No. 12966-005

**REPLY OF THE UTAH BOARD OF WATER RESOURCES AND
WASHINGTON COUNTY WATER CONSERVANCY DISTRICT TO
COMMENTS, RECOMMENDATIONS, AND PRELIMINARY TERMS AND
CONDITIONS**

January 18, 2019

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GLOSSARY OF TERMS

Defined Term	Definition
1922 Compact	Colorado River Compact of 1922
ACEC	Area of Critical Environmental Concern
AF	acre-feet
BIA	U.S. Department of the Interior, Bureau of Indian Affairs
BLM	U.S. Department of the Interior, Bureau of Land Management
BOR	U.S. Department of the Interior, Bureau of Reclamation
CEQ	Council on Environmental Quality
Coalition	Lake Powell Pipeline Coalition
Commission	Federal Energy Regulatory Commission
CUP	Central Utah Project
CWA	Clean Water Act
DCP	Drought Contingency Plan
DOI	U.S. Department of the Interior
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act of 1973
FERC	Federal Energy Regulatory Commission
FLPMA	Federal Land Policy and Management Act
FPA	Federal Power Act
FWS	U.S. Department of the Interior, Fish and Wildlife Service
GBWN	Great Basin Water Network
GCNRA	Glen Canyon National Recreation Area
GW	Gigawatt
ILP	Integrated Licensing Process
KCWCD	Kane County Water Conservancy District
Kaibab Tribe	Kaibab Band of Paiute Indians

Defined Term	Definition
LPP	Lake Powell Pipeline Project
MFP	Management Framework Plan
MW	Megawatt
NEPA	National Environmental Policy Act of 1969
NGOs	Non-Governmental Organizations
NHPA	National Historic Preservation Act
NPS	U.S. Department of the Interior, National Park Service
NRHP	National Register of Historic Places
Project	Lake Powell Pipeline Project
REA Notice	December 11, 2017 Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendation, Preliminary Terms and Conditions, and Prescription
RMP	Resource Management Plan
RMPA	Resource Management Plan Amendment
ROD	Record of Decision
ROW	Right-of-Way
SHRP	Sand Hollow Regional Pipeline
SNWA	Southern Nevada Water Authority
SPAC	Southern Paiute Advisory Committee
SPAC Report	Southern Paiute Advisory Committee's Avoidance and Mitigation Report
TCP	Traditional Cultural Property
UBWR	Utah Board of Water Resources
Upper Basin Compact	Upper Colorado River Compact of 1948
USACE	U.S. Army Corps of Engineers
URC	Utah Rivers Council
WCWCD	Washington County Water Conservancy District
WRA	Western Resource Advocates

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Pursuant to Section 5.23(a) of the regulations of the Federal Energy Regulatory Commission (“Commission” or “FERC”),¹ and in accordance with the Commission’s December 11, 2017, Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Preliminary Terms and Conditions, and Prescriptions (“REA Notice”),² the Utah Board of Water Resources (“UBWR”), applicant for the license for the Lake Powell Pipeline Project No. 12966 (“LPP” or “Project”) and related federal and state authorizations, and the Washington County Water Conservancy District (“WCWCD”), the principal beneficiary of the Project, hereby respond to the comments and recommendations filed in response to the Commission’s REA Notice.

¹ 18 C.F.R. § 5.23(a) (2018).

² Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions, Project No. 12966-004 (issued Dec. 11, 2017) (“REA Notice”).

I. INTRODUCTION

A. Background

1. Project History and Description

On May 2, 2016, UBWR filed an application³ for an original license for the hydroelectric facilities elements of the Project, as supplemented.⁴ The license application was the culmination of a multi-year process pursuant to the Commission’s Integrated Licensing Process (“ILP”) regulations⁵ in which all interested federal and state agencies, Indian tribes, and members of the public were encouraged to participate. In that context, the Commission approved, and UBWR carried out, a comprehensive and exhaustive study plan⁶ developed with agency, tribe, and public input. It required UBWR to conduct investigations and prepare 23 study reports on every aspect of the proposed Project in order to provide a complete and thorough application. When it issued the REA Notice, the Commission concluded the study phase of the Project application.

UBWR and WCWCD are developing the Project pursuant to the State of Utah Lake Powell Pipeline Development Act of 2006,⁷ which authorized UBWR to plan for and construct the Project as funded by the Legislature. The proposed Project will be

³ Utah Board of Water Resources, Application for Original License, Project No. 12966-000 (filed May 2, 2016) (“License Application”).

⁴ Supplemental Information for Lake Powell Pipeline Project, Project No. 12966-004 (filed June 1, 2016); Responses to Request for Clarification and Additional Information, Schedules A and B, Project No. 12966-004 (filed Oct. 24, 2016); Response to Request for Additional Information, Schedule B, Project No. 12966-004 (filed Jan. 31, 2017); Submission of Responses to Department of the Interior Agency Comments, Project No. 12966-004 (filed Mar. 31, 2017); Submission of Revised Draft Study Report 23, Ethnographic Report, Project No. 12966-004 (filed June 30, 2017); Response to FERC August 11, 2017, Additional Information Request Schedule A, Project No. 12966-004 (filed Oct. 10, 2017); Response to FERC August 11, 2017 Additional Information Request, Schedule A, Project No. 12966-004 (filed Oct. 19, 2017).

⁵ 18 C.F.R. Part 5.

⁶ Study Plan Determination for the Lake Powell Pipeline Project No. 12966-001 (issued Jan. 21, 2009); Clarification of the Study Plan Determination, Project No. 12966-001 (issued Feb. 23, 2009).

⁷ Utah Code Ann. §§ 73-28-101 et seq. (2018).

located in Washington and Kane Counties in Utah and in Mohave and Coconino Counties in Arizona. The Project will divert water from Lake Powell on the Colorado River, using a portion of Utah’s Colorado River allocation established in the Colorado River Compact of 1922 (“1922 Compact”)⁸ and water rights held or to be acquired by the State and water conservancy districts. Project water will meet projected water demand through 2060. Water delivered through the Project will serve a rapidly growing population in southwest Utah. WCWCD will be the principal recipient of the water supplied by the Project. The Kane County Water Conservancy District (“KCWCD”) will also receive some of the Project water.

The Project will consist of approximately 140 miles of large diameter pipeline to divert and convey up to 86,249 acre-feet (“AF”) of water per year. As water demand increases, WCWCD will annually receive up to 82,249 AF and KCWCD will receive annually up to 4,000 AF.

The water will be diverted from Lake Powell at an intake near Glen Canyon Dam. It will be pumped uphill approximately 50 miles to the Project pipeline’s highest point, east of Kanab, Utah, after which it will flow downhill approximately 89 miles to the termination at Sand Hollow Reservoir near St. George, in Washington County. The downhill portion of the pipeline will initially include four in-line hydroelectric generating stations totaling 4.2 megawatts (“MW”), a 35-MW peaking hydropower generation facility at Hurricane Cliffs in Utah, and a 4.2-MW generating station at the terminus at Sand Hollow Reservoir. A future phase of the Project will be a 300-MW pumped storage

⁸ Colorado River Compact of 1922, *available at* <https://www.usbr.gov/lc/region/g1000/pdfiles/crcompact.pdf> (“1922 Compact”). The 1922 Compact and related documents, collectively known as “the Law of the River,” are available at <https://www.usbr.gov/lc/region/g1000/lawofrvr.html>.

hydroelectric generating station at Hurricane Cliffs.⁹ The electricity generated by the Project will be sold to help offset Project costs.¹⁰ As proposed, the Project will avoid encroaching on the reservation of the Kaibab Band of Paiute Indians (“Kaibab Tribe”) in Arizona by going around the reservation to the south (“South Alternative”).¹¹

2. Other Necessary Approvals

In addition to the FERC hydroelectric license application, UBWR has applied for appropriate land use authorizations from the U.S. Department of the Interior’s (“DOI”) Bureau of Land Management (“BLM”),¹² Bureau of Reclamation (“BOR”)¹³ and National Park Service (“NPS”)¹⁴ for portions of the Project that will occupy lands administered by those agencies.¹⁵ UBWR has also applied to the U.S. Army Corps of Engineers (“USACE”) for a Clean Water Act (“CWA”) Section 404¹⁶ dredge and fill permit¹⁷ and to the Utah and Arizona Departments of Environmental Quality for CWA Section 401¹⁸ state water quality certification.¹⁹

⁹ See License Application, Ex. A at A-21.

¹⁰ See *id.*, Ex. E at 2-1.

¹¹ See *id.*, Ex. E at 3-2 (Figure 3-1).

¹² See *id.*, Att. 2; November 2018 Application Supplement, Att. 4 – Lake Powell Pipeline Revised Bureau of Land Management Draft Plan of Development.

¹³ See Supplemental Information for Lake Powell Pipeline Project, Att. 6 – Lake Powell Pipeline Revised Bureau of Reclamation Draft Right-of-Way License Application, Project No. 12966-004 (filed Nov. 16, 2018) (“November 2018 Application Supplement”).

¹⁴ See *id.*, Att. 5 – Lake Powell Pipeline Revised National Park Service Draft Right-of-Way Permit Application.

¹⁵ A Draft Biological Assessment has been filed with FERC for FWS Section 7 consultation and its subsequent issuance of a biological opinion.

¹⁶ 33 U.S.C. § 1344 (2012).

¹⁷ November 2018 Application Supplement, Att. 3 – Lake Powell Pipeline Section 404 Individual Permit Application.

¹⁸ 33 U.S.C. § 1341.

¹⁹ License Application, Att. 3. Water quality certification was received from Arizona on July 8, 2016 (attached hereto as Attachment A).

Further, in connection with the Project, BLM initiated an amendment (“RMPA”) to BLM’s Arizona Strip Field Office Resource Management Plan (“RMP”) related to the Kanab Creek Area of Critical Environmental Concern (“ACEC”). BLM issued a notice of intent to amend the RMP in June 2018²⁰ and held public scoping meetings in July 2018.²¹ BLM’s notice of intent stated two purposes for the amendment: first, to resolve the conflict between the ACEC designation and an existing utility corridor and second, to determine whether to allow the Project pipeline outside of the utility corridor.²² After BLM finalizes scoping reports, the agency will draft alternatives for public review and prepare information to be incorporated into the Environmental Impact Statement (“EIS”) to be prepared by the Commission.

The Commission is preparing the EIS with the Bureau of Indian Affairs (“BIA”), BLM, BOR, NPS, USACE, and the Kaibab Tribe as Cooperating Agencies. The EIS will serve as the National Environmental Policy Act of 1969 (“NEPA”)²³ mandated review for all federal permits and licenses required for the Project.

3. Procedural Determinations

On December 11, 2017, the Commission issued the REA Notice. In response to the REA Notice, UBWR and WCWCD filed a petition for declaratory order on jurisdiction and motion to suspend the procedural schedule pending action on the petition

²⁰ Notice of Intent to Amend a Portion of the Arizona Strip Field Office Resource Management Plan Related to the Kanab Creek Area of Critical Environmental Concern, Arizona, 83 Fed. Reg. 29,134 (June 22, 2018).

²¹ See BLM, Public Scoping Meetings, available at https://eplanning.blm.gov/epl-front-office/projects/lup/91318/149056/183078/508_half_page_ad_2.pdf.

²² 83 Fed. Reg. at 29,134.

²³ 42 U.S.C. §§ 4321 et seq. (2012). See also 18 C.F.R. Part 380 (Commission’s regulations implementing NEPA).

(“Petition”).²⁴ The Petition sought a determination that the Commission’s licensing jurisdiction under the Federal Power Act (“FPA”)²⁵ includes all of the Project facilities identified in the License Application as the “Hydro System,” in particular, the portions of the pipeline which are the penstock alignments. The Commission suspended the procedural schedule and extended the deadline for filing responses to the REA Notice to 60 days after issuance of a Commission decision on the Petition, and the deadline for reply comments to 105 days after issuance of the decision.²⁶ On September 20, 2018, the Commission denied UBWR’s and WCWCD’s Petition and stated that the Commission will license only the hydroelectric power generating facilities of the Project, not any part of the water supply pipeline.²⁷

Under the reactivated REA Notice, responses were due no later than November 19, 2018, and replies to the responses were due no later than January 3, 2019. On December 19, 2018, the Commission granted a two-week extension on the response filing deadline, creating a January 18, 2019 deadline.²⁸

B. Overview of NEPA Requirements

Several commenters have raised issues regarding the need for the Commission, the DOI agencies, and USACE to comply with NEPA. Because many of these issues are

²⁴ UBWR and WCWCD Petition for Declaratory Order on Jurisdiction, Motion for Expedited Action, and Motion for Suspension of Procedural Schedule, Project No. 12966-005 and Docket No. EL18-56-000 (filed Dec. 27, 2017) (“Petition”).

²⁵ 16 U.S.C. §§ 791-823d (2012).

²⁶ Notice Suspending Procedural Schedule, Project No. 12966-005 and Docket No. EL18-56-000 (issued Jan. 11, 2018).

²⁷ *Utah Bd. of Water Res.*, 164 FERC ¶ 61,203 (2018).

²⁸ Letter to Michael Swiger, Van Ness Feldman, LLP, from Vince Yearick, Director, Division of Hydropower Licensing, Project No. 12966-004 (issued Dec. 19, 2018).

based on a flawed understanding of NEPA’s requirements, our response begins with an overview of what NEPA requires of federal agencies.

NEPA²⁹ requires federal agencies to take a “hard look” at the significant environmental consequences of a proposed action and alternatives to the proposed action.³⁰ The Council on Environmental Quality’s (“CEQ”) regulations require federal agencies to consider direct, indirect, and cumulative impacts of a proposed action.³¹ “Direct effects” of a proposed action are “caused by the action and occur at the same time and place.”³² “Indirect effects” are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”³³ The courts have held that when attempting to define indirect impacts, “[t]he agency need not speculate about all conceivable impacts, but it must evaluate the reasonably foreseeable effects of the proposed action.”³⁴ “Cumulative impacts” are defined as the “impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.”³⁵ An indirect or cumulative impact is “reasonably foreseeable” if it is “sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision.”³⁶

²⁹ See *supra* note 23.

³⁰ See, e.g., *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

³¹ 40 C.F.R. § 1508.25 (2018).

³² *Id.* § 1508.8(a).

³³ *Id.* § 1508.8(b).

³⁴ See *Dubois v U.S. Dep’t of Agric.*, 102 F.3d 1273, 1286 (1st Cir. 1996) (citing *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992)).

³⁵ 40 C.F.R. § 1508.7.

³⁶ *Sierra Club v. Marsh*, 976 F.2d at 767.

CEQ's regulations require the lead agency to consider a range of actions, including "connected actions," "cumulative actions," and potentially, "similar actions" in its NEPA analyses.³⁷ "Connected actions" include actions that: (a) automatically trigger other actions, which may require an EIS; (b) cannot or will not proceed without previous or simultaneous actions; or (c) are interdependent parts of a larger action and depend on the larger action for their justification.³⁸ Furthermore, connected actions must be reviewed concurrently.³⁹ CEQ's requirement that an agency consider connected actions in a single environmental document is "to prevent the government from 'segment[ing]' its *own* 'federal actions into separate projects and thereby fail[ing] to address the true scope and impact of the activities that should be under consideration.'"⁴⁰

NEPA requires federal agencies to rigorously explore and evaluate a "range of alternatives," including all reasonable alternatives to the proposed action. NEPA does not define "reasonable alternatives." CEQ's guidance, however, provides that "a reasonable range of alternatives depends on the nature of the proposal and the facts in each case."⁴¹ "Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense."⁴² An agency need only consider alternatives that will bring about the ends of the proposed action, and the

³⁷ 40 C.F.R. § 1508.25(a)(1)-(3).

³⁸ *Id.* § 1508.25(a)(1)(i)-(iii).

³⁹ *Minisink Residents for Env'tl. Pres. & Safety v. FERC*, 762 F.3d 97, 113 n.11 (D.C. Cir. 2014); *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1317-18 (D.C. Cir. 2014) (citing *Weinberger v. Catholic Action of Haw./Peace Educ. Project*, 454 U.S. 139, 146 (1981)).

⁴⁰ *Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31, 49-50 (D.C. Cir. 2015) (emphasis added) (quoting *Delaware Riverkeeper Network*, 753 F.3d at 1313).

⁴¹ Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

⁴² *Id.*

evaluation is shaped by the application at issue and by the function that the agency plays in the decisional process.⁴³ Alternatives that are remote, conjectural, or do not meet the purpose or need of the proposed action may be eliminated so long as the agency briefly discusses the reasons for the elimination.⁴⁴ An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.⁴⁵

CEQ's regulations make clear that the purpose and need must be identified so that reasonable alternatives can be identified.⁴⁶ Courts evaluate a statement of purpose and need under a reasonableness standard.⁴⁷

C. Summary of Responses to REA Notice

Commenters who oppose the LPP do so based on several broad themes. Principally, they allege that the Project is unnecessary because population growth estimates are too high, that water conservation measures can meet future needs, that climate change and the exercise of senior water rights are likely to reduce the available water supply from the Colorado River, and that the Project will be too expensive. Some commenters also claim that the license application fails to identify an adequate range of alternatives. For the reasons explained in detail below, none of these objections has merit.

DOI's Office of Environmental Policy and Compliance filed comments on the Commission-jurisdictional components of the Project on behalf of all DOI agencies with statutory authority relevant to the Project. The U.S. Fish and Wildlife Service ("FWS")

⁴³ *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 195, 199 (D.C. Cir. 1991).

⁴⁴ 40 C.F.R. § 1502.14(a).

⁴⁵ *Id.* § 1506.2(d).

⁴⁶ *See id.* § 1502.13.

⁴⁷ *Friends of Se.'s Future v. Morrison*, 153 F.3d 1059, 1066-67 (9th Cir. 1998).

made recommendations pursuant to the Endangered Species Act of 1973 (“ESA”), the Fish and Wildlife Coordination Act, NEPA, and the FPA. NPS recommended specific impact analyses and ROW permit conditions to cross the Glen Canyon National Recreation Area (“GCNRA”). BLM did not file any FPA Section 4(e) mandatory terms and conditions.⁴⁸

The Kaibab Tribe favors the Existing Highway Alternative, which would cross the Tribe’s reservation. Its comments include draft ROW conditions the Tribe would impose for its tribal lands along the Existing Highway Alternative, and additional conditions it would request for BLM lands for all alternatives. The Kaibab Tribe’s comments also addressed RMPA concerns. UBWR and WCWCD disagree with the Tribe’s proposed alternative and its comments and recommended conditions for the reasons explained below.

II. LPP PURPOSE AND NEED

UBWR’s purpose of this action is to bring a needed second source of water to Washington and Kane Counties in order to meet future water demands, diversify the regional water supply portfolio and enhance its reliability, and develop a clean, renewable source of energy to meet area peaking power demands.⁴⁹ The proposed Project will meet the following UBWR needs:

- Develop additional water supplies legally available from the Colorado River System to meet the water demands of the existing and projected future population of Washington and Kane Counties through 2060, with a necessary margin of

⁴⁸ Licenses for hydroelectric projects which occupy federal reservations must include any conditions submitted by the relevant federal land managing agency pursuant to FPA Section 4(e). *See* 16 U.S.C. § 797(e). Several of the hydropower facilities subject to FERC licensing will also occupy a federal reservation (defined in FPA Section 3(2)) managed by BLM. *See id.* § 796(2).

⁴⁹ November 2018 Application Supplement, Att. 1 – Purpose and Need Statement at 1.

safety, while maximizing the use of existing available and identified water supplies.

- Diversify the primary municipal and industrial water sources for the counties.
- Add resiliency and reliability to the water delivery system to address the risk of variability associated with water supplies and the water delivery system.
- Develop clean, renewable energy sources.⁵⁰

Washington County currently obtains all of its water supplies locally from Virgin River surface and groundwater.⁵¹ Conservation efforts have significantly reduced per capita water use in the region and are expected to further reduce per capita use between now and 2060.⁵² However, population growth projections show that water demand will exceed local supplies, resulting in shortages.⁵³ Conservation alone will not be adequate to meet existing and future demands and mitigate supply risks.⁵⁴ Growth is also projected in Kane County.⁵⁵ Because the LPP route crosses Kane County, sound planning calls for KCWCD to take advantage of the LPP by acquiring capacity in the Project to meet future water demands.

Due to the limited number of surface and groundwater sources available in Washington and Kane Counties, Utah's Colorado River allocation delivered by the Project is the best source to meet rising water demands while diversifying the regional

⁵⁰ *Id.* at 2-3.

⁵¹ *Id.* at 3.

⁵² *See* Maddaus Water Management Inc., Washington County Water Conservancy District, Water Conservation Programs: A Comparative Evaluation (Dec. 17, 2018) ("Maddaus Report") (attached hereto as Attachment D).

⁵³ November 2018 Application Supplement, Att. 2 – Water Needs Assessment: Demand and Supply Update.

⁵⁴ *See* Section IV.F., *infra*.

⁵⁵ November 2018 Application Supplement, Att. 2 – Water Needs Assessment: Demand and Supply Update.

water supply portfolio to address the risks of infrastructure failure, drought and climate variability. Water utilities plan and manage resources based on long-term demand forecasts that cover periods of 30-50 years because of the time and resources required to bring new supplies into service. Mirroring short-term volatility in these projections is unnecessary and does not serve the interests of water utilities or end users. In addition, for long term water supply planning, demand alone is not the sole issue for Project planning and development purposes. As is the case for the LPP, large water projects typically serve additional inter-related purposes which are integral to the overall proposed action and are not segregable. In addition to serving demand, the Project is vitally important to diversify the regional water supply portfolio, enhance its reliability, and add a source of renewable energy for peaking demands. These purposes are all connected to each other and cannot be satisfied independently, especially due to the lack of viable alternatives and the current reliance solely on the Virgin River as the primary source of water.

The power to be generated by the in-line hydroelectric facilities and the peaking (initial phase) and pumped storage (future phase) facilities will help to offset the operational costs of the Project and serve a projected increased need for peaking power in the region overseen by the Western Electricity Coordinating Council.⁵⁶

III. PROPOSED ACTION AND ALTERNATIVES

A. The Proposed Action

When filed, the final license application proposed the South Alternative. However, certain parties have commented about impacts of pipeline construction on

⁵⁶ *Id.*, Att. 1 – Purpose and Need Statement at 3.

cultural resources near Kanab, Utah. The draft study reports in the Preliminary License Proposal examined an alignment (“South Variant Alternative”) that avoids certain cultural resources in this area.

The South Variant Alternative generally follows the same alignment and includes the same major components as the South Alternative. However, a portion of the pipeline east of Kanab approximately four miles long would deviate from the South Alternative alignment to avoid certain cultural resources.⁵⁷ This pipeline alignment would be approximately 136 miles long, slightly shorter than the 140-mile length of the South Alternative. UBWR believes that the South Variant Alternative is a reasonable response to the Kaibab Tribe’s concerns and therefore proposes that the South Variant Alternative be the proposed action. The South Variant Alternative description and environmental effects have been added to revised Exhibit E.⁵⁸ If the South Variant Alternative is not selected, the South Alternative remains UBWR’s proposed action.

B. Alternatives Included in the Application

Exhibit E to the May 2016 final license application includes, in addition to UBWR’s proposed South Variant Alternative, several other alternatives:

- The Existing Highway Alternative generally follows the same alignment and includes the same major components as the South Alternative. However, a portion of the pipeline would be constructed across the Kaibab Paiute Indian Reservation following Highway 389. This pipeline alignment would be approximately 133 miles long.⁵⁹
- The Southeast Corner Alternative generally follows the same alignment and includes the same major components as the South Alternative. However, a portion of the pipeline would be constructed parallel to the Navajo-McCullough

⁵⁷ The exact location of such resources is non-public information. The Kaibab Tribe has requested avoidance of these areas.

⁵⁸ See Exhibit E Revisions at 21-25 (attached hereto as Attachment B).

⁵⁹ License Application, Ex. E at 3-101 to 3-110 (Section. 3.3).

Transmission Line across the southeast corner of the Kaibab Paiute Indian Reservation. This pipeline alignment would be approximately 137 miles long.⁶⁰

- The No Lake Powell Water Alternative was developed by UBWR at the request of FERC and is intended to serve the same population as the proposed action without the LPP by using only Virgin River basin supply and extreme conservation measures. WCWCD and KCWCD would develop the limited remaining surface and groundwater supplies in the basin, including aggressively converting agricultural water in the Washington County to municipal use. WCWCD would construct a reverse osmosis treatment plants and additional surface water storage to use these remaining low-quality water supplies. Additional pump stations, water distribution pipelines, and a pipeline to Apple Valley would be constructed. Residential outdoor culinary water use in the WCWCD service area would be prohibited.⁶¹
- Under the No Action Alternative, which describes a future where none of the action alternatives are implemented, WCWCD would seek to satisfy its water demand by completing the Ash Creek Project,⁶² expanding groundwater development, and continuing to implement planned conservation programs, including maximized wastewater reuse. Aggressive conversion of remaining agricultural water supply to municipal use and construction of reverse osmosis treatment plants are not proposed under the No Action Alternative. No additional source would be available to meet growing indoor or outdoor water demands, and water shortages would start to occur in the late 2020s.⁶³

As discussed below, UBWR and WCWCD submit that alternatives other than the South Variant Alternative or South Alternative should not be selected as the preferred alternative because they will not serve the Project purpose and need or are otherwise defective.

C. Expansion of the Temporary Construction ROW

Exhibit E contains UBWR's draft environmental analysis for construction and operation of the proposed Project based on the pre-existing information and information developed under the approved study plan. During 2018, UBWR worked with BLM and

⁶⁰ *Id.*, Ex. E at 3-110 to 3-113 (Section 3.4, including Figure 3-41 at 3-112).

⁶¹ *Id.*, Ex. E at 3-113 to 3-120 (Section 3.5).

⁶² The Ash Creek Project is a groundwater development project which would provide an additional 2,840 AF of water per year.

⁶³ License Application, Ex. E at 3-101 (Section 3.2.1).

NPS to reexamine the required temporary construction ROW to allow necessary width for construction activities and to increase efficiencies and potentially minimize some site-specific impacts. As a result of this reevaluation, UBWR expanded the width of the temporary construction ROW from 20 feet to 50 feet, for a total pipeline ROW of 150 feet (100 feet permanent ROW and 50 feet temporary construction ROW). The ROW change was made in the Revised BLM Plan of Development, Draft NPS Permit Application, Draft Reclamation License Application, and Section 404 Individual Permit Application filed with the USACE on November 16, 2018. The ROW change has been included in the attached Revised Exhibit E.⁶⁴

D. Local Waters Proposal

Non-Governmental Organizations (“NGOs”) have devised a combination of water conservation and agricultural water conversion that differs from the No Lake Powell Water Alternative developed by UBWR (“local waters proposal”). Under this proposal, the Project would not be constructed. The local waters proposal includes extreme conservation measures to reduce both indoor and outdoor municipal water use, elimination of most or all agriculture production in Washington County, and reuse and treatment of brackish surface water.⁶⁵ This proposal is unacceptable as explained in detail below.

⁶⁴ See Attachment B, Exhibit E Revisions at 59-60.

⁶⁵ Lake Powell Pipeline Coalition’s Amended Comments on the Notice that the Project Is Ready for Environmental Analysis at 10, Project No. 12966-004 (filed Nov. 20, 2018) (“Coalition Comments”).

IV. UBWR REPLY TO COMMENTS, RECOMMENDATIONS, AND PRELIMINARY TERMS AND CONDITIONS

A. DOI Agency Comments

1. FWS Comments

FWS recommends that the Commission license require pre-construction surveys and measures to protect the desert tortoise; a determination whether suitable soils are present in the Project area for certain federally listed plant species and, if so, plant surveys and conditions to protect any such plants that may be present; and additional pre-construction migratory bird surveys and protection measures.⁶⁶ UBWR, as the designated non-federal representative, is discussing the Project's potential impacts to the desert tortoise⁶⁷ with FWS. It is also preparing an updated Preliminary Draft Biological Assessment to be filed later to include potential measures to reduce or mitigate for impacts to the species. UBWR has already conducted extensive federally listed plant species surveys along the proposed alignments. No federally listed plants were found in the disturbance area of the proposed Project alignment. UBWR will conduct pre-construction surveys for listed plant species.

2. NPS Comments Regarding Glen Canyon National Recreation Area

The proposed Project will require NPS to permit a ROW across the GCNRA. NPS states that its goal is to ensure that any part of the Project which falls within the boundaries of the GCNRA, or is outside the GCNRA but which may have direct or indirect impacts on National Park System unit resources, are properly evaluated under

⁶⁶ Department of the Interior Comments for the Ready for Environmental Analysis for the Lake Powell Pipeline Project at 3-6, Project No. 12966-005 (filed Dec. 20, 2018) ("DOI Comments").

⁶⁷ UBWR will conduct new Mojave desert tortoise surveys using current protocols prior to formal Section 7 consultation with the FWS.

applicable laws and that impacts to the park system are minimized.⁶⁸ With regard to GCNRA, NPS

requests that the impact analyses in the EIS specifically address recreational, operational, and economic impacts to the park as a result of potential reservoir drawdown, especially under the climate change scenario, to include any potential changes to or relocations of water-based infrastructure, extension of ramps, access roads, parking areas, utilities, etc. associated with the potential for lowering lake elevations.⁶⁹

The applicable study reports provide the necessary information for the EIS analysis. NPS also states that selection of either the proposed South Alternative or the Existing Highway Alternative⁷⁰ will affect the historic viewshed from the Pipe Springs National Monument due to suspended dust. NPS indicates that in either case, periodic wetting of the pipeline access road would be acceptable mitigation.⁷¹ UBWR will work with NPS to resolve its concerns.

B. Appropriate Lead Agency

Certain commenters⁷² suggest that the Commission is not the appropriate lead federal agency for review of the Project pursuant to NEPA, citing the fact that the Project is primarily for water supply rather than the generation of electricity, and alleging that the DOI agencies which must issue ROWs for the pipeline on federal lands have greater knowledge of environmental issues associated with pipelines. These commenters are mistaken.

⁶⁸ DOI Comments at 6.

⁶⁹ *Id.* at 7.

⁷⁰ *See* License Application, Ex. E at 3-102 (Figure 3-39).

⁷¹ DOI Comments at 7.

⁷² Motion to Intervene by Save the Colorado at 14-16, Project No. 12966-004 (filed Feb. 7, 2018) (“Save the Colorado Comments”); Comment of Utah Rivers Council at 16, Project Nos. 12966-000 et al. (filed Nov. 20, 2018) (“URC Comments”); Western Resource Advocates’ Comments on the Original Licensing Proceeding for the Lake Powell Pipeline Project at 1-2, Project Nos. 12966-000 et al. (filed Nov. 16, 2018) (“WRA Comments”).

CEQ regulations implementing NEPA⁷³ allow any involved federal agency to be the lead agency when federal permits are required from more than one agency. CEQ's regulations identify several factors to be considered if there is a disagreement among the agencies in this regard, but the choice of lead agency is to be determined by the agencies themselves.⁷⁴ Moreover, the suggestion that the Commission has less expertise with regard to the environmental issues associated with pipelines is inaccurate. The Commission has since 1938 certificated natural gas pipelines in every part of the country and has issued hundreds of pipeline EISs and environmental assessments ("EAs") since NEPA was enacted. Those pipelines raise many of the same kinds of environmental issues as water pipelines. The Commission has also prepared EISs or EAs for many water supply pipelines, several of which were discussed in UBWR and WCWCD's Petition.⁷⁵ The DOI agencies which are processing applications for ROWs for the Project were full participants in the study plan development process and will be full partners in preparing the EIS.

C. Flawed Alternatives

The Existing Highway Alternative and variations on aggressive conservation and agricultural conversion do not meet the requirements necessary to be selected as the preferred alternative, as described in Table 1 and the sections below.

⁷³ 40 C.F.R. Parts 1500-1508.

⁷⁴ *Id.* § 1501.5(c).

⁷⁵ Petition at 10-14.

Table 1. Comparison of Alternatives

Factor	South Alternative	South Variant Alternative	Existing Highway Alternative	Southeast Corner Alternative	No Lake Powell Water Alternative	Local Waters Proposal	No Action Alternative
Meets Projected Water Demands	✓	✓	✓	✓	1	1	
Provides Second Source of Water	✓	✓	✓	✓			
Implements Conservation Measures	✓	✓	✓	✓	✓	✓	✓
Provides Margin of Safety or Planning Reserve	✓	✓	✓	✓			
Addresses Risk of Virgin River Basin Supply Variability	✓	✓	✓	✓			
Provides a Source or Renewable Energy Peaking Capacity	✓	✓	✓	✓			
Provides Financial/Operational Certainty	✓	✓					
Avoids Legal Impediments to Construction	✓	✓			✓	✓	✓
¹ Implements extreme conservation measures and meets resulting reduced demand with between 35,000 and 40,000 AF of agricultural water acquisitions. However, recent analysis has shown that only 23,000 AF of additional agricultural acquisitions may be reliably available for municipal use. See Attachment E.							

1. The Existing Highway Alternative and the Southeast Corner Alternative Have Insurmountable Legal Barriers.

Contrary to the insistence of the Kaibab Tribe, the authorizing federal agencies should not select the Existing Highway Alternative due to significant legal impediments.⁷⁶

The only practical legal mechanism under existing law for authorization for the Project across the reservation would be to obtain BIA and Kaibab Tribe approval for an ROW under BIA's regulations at 25 C.F.R. Part 169.⁷⁷ BIA's Part 169 regulations were amended in 2015 expressly to require that the ROW applicant and any facilities or persons on the ROW be made subject to tribal law and jurisdiction. Specifically, the Part 169 regulations now provide that BIA ROWs:

- Are subject to tribal laws.⁷⁸
- Are subject to tribal jurisdiction over the ROW and subject any person or activity within the ROW to tribal jurisdiction.⁷⁹
- Are subject to tribal taxation of the land and any improvements on the land or any person or activity within the ROW.⁸⁰
- Subject non-members on the ROW to tribal civil jurisdiction. This includes both civil adjudicatory and civil regulatory authority.⁸¹

There is no provision in the Part 169 regulations allowing BIA or a tribe to waive this tribal jurisdiction and authority. However, as set forth below, under relevant federal

⁷⁶ The portion of the Southeast Corner Alternative which crosses the Kaibab Tribe Reservation suffers from the same legal impediments as the Existing Highway Alternative.

⁷⁷ Because FERC has disclaimed jurisdiction over Project facilities that would be located on the Kaibab Tribe Reservation under the Existing Highway Alternative, the FPA does not apply to any part of the Project that might be located within the reservation. Thus, the Commission license will not include any authorization to use reservation lands or conditions pertaining to the Kaibab Tribe reservation pursuant to FPA Section 4(e).

⁷⁸ 25 C.F.R. § 169.9(b) (2018).

⁷⁹ *Id.* § 169.10(a).

⁸⁰ *Id.* § 169.10(b).

⁸¹ *Id.* § 169.10(d).

constitutional and Utah state law, the State of Utah and its subordinate agencies, including UBWR, cannot be made subject to a tribe's jurisdiction by any act of a tribe, federal agency, or even by act of Congress.⁸²

Federal courts have held that states cannot be sued in tribal court⁸³ without their consent.⁸⁴ This principle is based on “the inherent sovereign powers of the States,”⁸⁵ and means that “[i]n relation to Indian tribes, then, the original sovereign immunity of the States stands undiminished.”⁸⁶ Further, while the State of Utah has waived its immunity from suit under certain circumstances, it has only consented to be sued in Utah State courts.⁸⁷ Because the Tribe may not consent to Utah State courts,⁸⁸ and UBWR cannot

⁸² Indeed, only in “very rare circumstances” must an agency consider alternatives requiring congressional action. *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (quoting *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 n.2 (9th Cir. 1986)).

⁸³ *Montana v. Gilham*, 133 F.3d 1133, 1137 (9th Cir. 1998) (“*Gilham*”); *Montana v. Bremner*, 152 F.3d 929 (9th Cir. 1998) (unpublished) (“*Bremner*”).

⁸⁴ *Montana v. United States*, 450 U.S. 544 (1981), established that the adjudicatory power of tribes is no greater than their regulatory authority. We are unaware of any instance of an Indian tribe asserting the power to regulate or tax a state, but the rationale of *Gilham* and *Bremner* applies equally to a tribe’s regulatory and taxing authority.

⁸⁵ *Gilham*, 133 F.3d at 1136.

⁸⁶ *MacArthur v. San Juan Cty.*, 391 F. Supp. 2d 895, 1036 (D. Utah 2005), *rev’d on other grounds*, 497 F.3d 1057 (10th Cir. 2007). This immunity also applies to counties and other political subdivisions of Utah. *See MacArthur v. San Juan Cty.*, No. 2:00CV584K, 2000 WL 35439198, at *5 (D. Utah Oct. 30, 2000) (“political subdivisions of the State of Utah, as defined by Utah law, are immune from suit in tribal courts because the State of Utah has not waived the common law immunity of its political subdivisions from suit in tribal courts”).

⁸⁷ The Governmental Immunity Act of Utah, Utah Code § 63G-7-101 et seq., waives Utah’s sovereign immunity only to actions brought in Utah courts, and is not a waiver of Utah’s Eleventh Amendment immunity from suit in federal court. *See* Utah Code § 63G-7-501(1) (2018) (“The district courts have exclusive, original jurisdiction over any action brought under this chapter.”); *see also Shutlz v. Dixie State Univ.*, No. 2:16-CV-830, 2017 WL 1968651, at *4 (D. Utah 2017) (“the State of Utah has . . . not elected to waive its Eleventh Amendment immunity in regards to contract claims”) (citation omitted).

⁸⁸ A recent U.S. Court of Appeals for the Tenth Circuit case has held that a tribe cannot consent to state court jurisdiction without congressional consent. *Navajo Nation v. Dalley*, 896 F.3d 1196, 1204 (10th Cir. 2018), *petition for cert. filed sub nom. MacNeal v. Navajo Nation*, No. 18-894 (U.S. Jan. 10, 2019) (“It is axiomatic that absent clear congressional authorization, state courts lack jurisdiction to hear cases against Native Americans arising from conduct in Indian country.”); *id.* (“There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. . . . If this power [of

be sued in tribal or federal court,⁸⁹ there is no forum that could adjudicate disputes or enforce remedies for disagreements between the Kaibab Tribe and UBWR over the Part 169 ROW if the Existing Highway Alternative is chosen.

The federal government is without power to require submission to tribal law and jurisdiction as required by the BIA Part 169 regulations without the consent of the State of Utah. Under Utah law, consenting to the regulatory and adjudicatory jurisdiction of an Indian tribe would require an act of its legislature.⁹⁰

In addition to facing significant legal impediments, the Existing Highway Alternative is not in the public interest of the State of Utah. UBWR is seeking to use federal, state, and private lands and ROWs for a non-reservation alignment and has not applied for any authorization to use lands within the Kaibab Tribe Reservation. A BIA Part 169 ROW would require submission to the Tribe's economic, regulatory, environmental, and adjudicatory jurisdiction with concomitant risks to the State as outlined below.

The Kaibab Tribe's current Ecology Code provides the Tribe with the authority to shut down any project the Tribe deems harmful to the environment. The length of a shutdown is solely within the Tribe's discretion. Such a shutdown could occur years into the future. The Kaibab Tribe has sought to include its Ecology Code as an applicable

Indian governments over their territory] is to be taken away from them, it is for Congress to do it." (citing *Williams v. Lee*, 358 U.S. 217, 223 (1959)).

⁸⁹ Although states can be sued by other states in federal court, *see* Const. Art. III, § 2, tribes cannot sue states in federal court because of the states' sovereign immunity. Pursuant to this doctrine, a state is not "subject to suit in federal court unless it has consented to suit." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991) (citation omitted).

⁹⁰ In the past, to obtain a federal benefit sought by the State of Utah, the Utah legislature has passed legislation to submit to suit in federal court. However, it has never consented to suit in the courts of a sovereign other than the federal government.

local law in the ILP and NEPA analysis, indicating its intent to enforce this law if the Existing Highway Alignment was to be selected by the permitting agencies.⁹¹ Also, the Tribe's constitution empowers the Tribal Council to levy taxes on nonmember business activities on the reservation,⁹² placing project ratepayers at additional risk.

The Kaibab Tribe has signaled its intent to aggressively assert authority over the State regarding the Existing Highway Alignment by submitting to FERC its *initial minimum* ROW conditions, under which it reserves the right to supplement and amend in the future.⁹³ For example, the Tribe reserves the right to require excessive excavation and monitoring of pueblo/habitation sites. The excavation could be as deep and as far outside the construction corridor as the Kaibab Tribe deems warranted.⁹⁴ This level of excavation and monitoring exceeds what is generally required. The Tribe's ROW conditions also require the UBWR to construct a cultural interpretive center for the Kaibab Tribe and fund training and cultural activities, and to restore disturbed areas to tribal standards using tribal traditional management practices.⁹⁵

Should a project of this importance be subjected to tribal law, and should new regulations and taxes be imposed thereunder,⁹⁶ the State would be powerless to influence or dispute those decisions. Neither the State nor the decisional agencies in this matter are

⁹¹ See Comments of the Kaibab Band of Paiute Indians Regarding the Pre-Application Document Filed by Utah Board of Water Resources, for Lake Powell Hydroelectric Project No. 12966 and Comments of the Kaibab Band of Paiute Indians Regarding the Scoping of Environmental Issues for the Proposed Lake Powell Pipeline Project at 8, Project No. 12966-000 (filed July 8, 2008).

⁹² Constitution of the Kaibab Band of Paiute Indians of the Kaibab Indian Reservation, Arizona, available at <https://www.kaibabpaiute-nsn.gov/KPTConstitution.pdf>.

⁹³ The Kaibab Band of Paiute Indians' Comments and Proposed Right-of-Way Conditions at 21-27, Project No. 12966-000 (filed Nov. 19, 2018) ("Kaibab Tribe Comments").

⁹⁴ *Id.* at 25.

⁹⁵ *Id.* at 25-26.

⁹⁶ 25 C.F.R. Part 169 expressly acknowledge this tribal authority.

able to mitigate the risks of these foreseeable actions.⁹⁷ The parameters of tribal jurisdiction under the BIA ROW rules are untested. This lack of precedent leads to significant uncertainty, the distinct possibility of litigation, and unacceptable interruptions in water deliveries to the local communities.

Any service interruptions and consequent health and safety risks would be borne by the people of Washington and Kane Counties. These risks and burdens make this alternative unreasonable.

Finally, no federal agency decision should cause the UBWR and WCWCD, and the citizens they serve, to choose between accepting this risk or giving up this critical project. No state or local government would reasonably believe that this level of uncertainty is in keeping with its duties to guard the public interest, especially in regard to a resource as essential as the provision of water to its citizens.

2. The “Local Waters Proposal” Is Flawed

UBWR and WCWCD do not oppose review of the local waters proposal as an alternative in the EIS for NEPA review purposes. However, it should not be selected as the preferred alternative, as demonstrated in the attached water needs assessment.⁹⁸

Using the remaining Virgin River agricultural supply and enforcing extreme conservation

⁹⁷ It is acknowledged that changes in the law occur over time in all jurisdictions. However, should federal laws affecting the proposed action be considered, or other states’ laws be deemed applicable, the federal government and the states have constitutional and judicial mechanisms, as well as political forums in which concerns about proposed new laws or regulations could be resolved. As noted above, if the Existing Highway Alternative were to be selected, there is no automatic (and due to recent case law—perhaps not even available) judicial forum to settle such disputes, and UBWR and WCWCD do not have access to or a viable way to participate in the internal political processes of the Kaibab Tribe. Further, any potentially applicable laws enacted by the State of Arizona (for the South or South Variant Alternatives) would be laws of general applicability and any interest in over-regulating the LPP in specific would be constrained by the statewide effects on other similar projects. Projects of the size and importance to the citizens of southwest Utah are not reasonably foreseeable on the Kaibab Tribe’s reservation, and therefore many laws of purported general applicability could be imposed that only affect the LPP.

⁹⁸ See Water Needs Assessment: Water Use and Conservation Update, Comment Response at 10-11 (Jan. 17, 2019) (“Conservation Update”) (attached hereto as Attachment C).

measures fails to secure a firm and reliable second source of water through 2060 and beyond. The proposal does not provide an additional planning reserve or margin of safety in supply, and thus would force the WCWCD to operate without a required component in the provision of any essential utility service. The community would face the real prospect of water shortages should the objectives identified in the commenters' speculative proposals not be achieved or if there is unexpected system infrastructure failure. Negative environmental and socioeconomic consequences of such a proposal include the loss of green space, loss of return flow to the river, loss or impairment of the agricultural economy, and loss of local custom and culture. Costs of implementing extreme conservation measures are also higher than more balanced approaches to meeting water demand. For the same reasons, the No Lake Powell Water Alternative should not be selected as the preferred alternative.

D. Connected and Cumulative Actions

A “connected action” is one which: (1) automatically triggers other actions which may require an EIS; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification.⁹⁹

1. BOR Will Give Appropriate Consideration to the UBWR/BOR Exchange Contracts.

Utah and BOR have negotiated two separate contracts for the use of Utah's water right of 158,890 AF per year as assigned to the State under a 1996 Assignment

⁹⁹ 40 C.F.R. § 1508.25(a)(1)(i)-(iii).

Agreement between BOR and the State. These contracts are referred to herein as the draft “Exchange Contract”¹⁰⁰ and the draft “Green River Contract.”¹⁰¹

The Exchange Contract addresses the use of 86,249 AF for the Project. Under this contract, BOR will continue to release water from Flaming Gorge Reservoir pursuant to its annual operations plan. Utah agrees to forbear the diversion of a portion of the natural flows below Flaming Gorge Dam and allow these releases to flow downstream. This will contribute to meeting the goals of the existing ESA Recovery Program on the Green River as originally established in 1988, the current obligations of which are set forth in the 2006 Record of Decision (“ROD”) on the Operation of Flaming Gorge Dam Final Environmental Impact Statement.¹⁰² The State, in turn, will be able to divert from Lake Powell, on an annual basis, an equal amount of water as is released from Flaming Gorge up to the 86,249 AF cap. The exact molecules of water need not be “shepherded”¹⁰³ between the two buckets, it is a contract exchange.

The separate Green River Contract addresses the use of the remaining amount of the assigned water right (72,641 AF depletion). The water available under this contract is to be used by agricultural interests along the Green River. Under the Green River Contract, the State will forbear development of a portion of the high spring flows on the Green River and its tributaries, to which the State is entitled under the 1922 Compact and

¹⁰⁰ BOR, Contract for Exchange of Water, Lake Powell Pipeline, Between the United States of America and the State of Utah, Contract No. 17-WC-40-656, Technical Draft (Oct. 2017), *available at* https://www.usbr.gov/uc/provo/pdf/DRAFT_LPP_ExchangeContract_Oct2017.pdf (“Exchange Contract”).

¹⁰¹ BOR, Contract for Exchange of Water, Green River Block, Between the United States of America and the State of Utah, Contract No. 17-WC-40-655, Technical Draft (Oct. 2017), *available at* https://www.usbr.gov/uc/provo/pdf/DRAFT_GR_ExchangeContract.pdf.

¹⁰² BOR, Record of Decision, Operation of Flaming Gorge Dam, Final Environmental Impact Statement (Feb. 2006), *available at* <https://www.usbr.gov/uc/envdocs/rod/fgFEIS/final-ROD-15feb06.pdf>.

¹⁰³ American Rivers’ Comments and Requests for Additional Information for the Proposed Lake Powell Pipeline Project at 10, Project No. 12966-004 (filed Nov. 19, 2018) (“American Rivers Comments”).

state law, and allow these flows to also contribute to meeting BOR's Upper Colorado River Endangered Fish Recovery Program obligations as previously referenced. BOR issued a draft EA for the Green River Contract in September 2018.¹⁰⁴

The Utah Rivers Council ("URC") contends¹⁰⁵ that the EIS should consider the implications of the Green River Contract upon the Project. American Rivers¹⁰⁶ argues that the Project description should include the diversion and delivery of water from Flaming Gorge Reservoir to Lake Powell pursuant to the Exchange Contract. American Rivers also asserts that the exchange is part of the Project because the permitting agencies must address any potential physical or legal constraints arising from the Exchange Contract on the actual availability of water for the Project.¹⁰⁷ Other commenters have raised similar issues regarding the impacts of the Exchange Contract and the Green River Contract.¹⁰⁸

These commenters do not fully understand how the two contracts will operate, nor do they recognize the totally independent nature of, and separate purposes they serve. The EIS in this proceeding will provide the necessary analysis which is a condition precedent to BOR's execution of the Exchange Contract.¹⁰⁹

¹⁰⁴ BOR, Green River Block Water Exchange Contract Draft Environmental Assessment (Sept. 2018), available at <https://www.usbr.gov/uc/envdocs/ea/GreenRiverBlockWaterExchangeContract-DraftEA.pdf> ("Draft Green River Contract EA").

¹⁰⁵ URC Comments at 10.

¹⁰⁶ American Rivers mischaracterizes the nature of the Green River exchange. See American Rivers Comments at 10.

¹⁰⁷ *Id.* at 10-11.

¹⁰⁸ *E.g.*, Coalition Comments at 27; Conserve Southwest Utah Motion to Intervene in the Original Licensing for the Lake Powell Pipeline Project at 3-4, Project Nos. 12966-000 and -004 (filed Nov. 13, 2018) ("Conserve Southwest Utah Comments"); Comment of Living Rivers at 5, 7, 14-15, Project No. 12966-004 (filed Nov. 20, 2018) ("Living Rivers Comments").

¹⁰⁹ The Coalition argues that BOR's Exchange Contract EA is flawed regarding the amount of water available for release from Flaming Gorge Reservoir because its model uses outdated information and that

Diversions undertaken pursuant to the terms of the Green River Contract are completely independent of Project withdrawals under the Exchange Contract. The amount of water available to various water interests under the Green River Contract will not impact Project water availability at Lake Powell. In fact, in September 2018, as part of a separate NEPA process, BOR issued a draft EA (“Draft Green River Contract EA”) for the Green River Contract.¹¹⁰ The Draft Green River Contract EA concludes that the Green River Contract will have multiple benefits for both Utah and BOR,¹¹¹ and will have no effect, cumulative or otherwise, on environmental resources or water rights.¹¹²

Finally, even if the Green River Contract is not executed, UBWR will proceed, upon completion of the NEPA process, with the execution and implementation of the Exchange Contract.

2. RMPA for Kanab Creek ACEC

URC contends that in order to prevent improper segmenting of environmental review, the EIS should consider as cumulative or connected to the LPP the amendment to the RMP for BLM’s Kanab Creek ACEC.¹¹³ The Kaibab Tribe argues that the EIS “must analyze the South Alternative both with and without the [RMPA] and compare the effects of each possibility against the Existing Highway Alternative,” and “should divide the South Alternative into two separate alternatives to account for the possibility that the

BOR should use a modelling approach that uses more recent data and includes the current drought conditions. Coalition Comments at 18-19. BOR will presumably respond to this comment in its final EA.

¹¹⁰ UBWR anticipates BOR’s final EA will be issued in time for the EIS in this proceeding to incorporate any relevant information, along with its independent review of the LPP Exchange Contract, thus ensuring that NEPA’s disclosure requirements are met.

¹¹¹ Draft Green River Contract EA at 49-50 (Section 3.3.8.2).

¹¹² *See id.* at 59 (Table 3-3, Summary of Environmental Effects).

¹¹³ URC Comments at 10.

RMP amendment is ultimately rejected.”¹¹⁴ Yet the Tribe also argues that without an RMPA, BLM cannot legally issue an ROW through the Kanab Creek ACEC, either inside or outside the existing corridor.¹¹⁵ Therefore, analyzing the South Alternative without the RMP amendment would appear to serve no purpose under the Tribe’s reasoning.

As noted above, the RMPA will be addressed in the EIS to be prepared by the Commission and cooperating agencies. The purpose of the BLM’s amendment to the RMP for the Kanab Creek ACEC is to resolve what it considers to be an internal management conflict between the ACEC and pre-existing utility corridors, including an Energy Policy Act of 2005 Section 368¹¹⁶ energy corridor that overlaps it. BLM also identified, in its Notice of Intent,¹¹⁷ the need to determine whether the Project should be allowed to move outside the utility corridor yet inside the same ACEC, and what changes to visual resources management would be required. UBWR’s proposed South Variant Alternative and South Alternative follow the Section 368 corridor through the area managed by the BLM Arizona Strip Field Office except for a short stretch where the pipeline is proposed to move north of the designated corridor for approximately one-half mile to avoid steep topography and visual and other impacts.

UBWR and WCWCD agree that the RMPA is a connected action and should be included in the EIS, allowing a full analysis of the RMPA’s effects in the context of each relevant alternative. Thus, if the Kaibab Tribe is suggesting that the RMPA is necessary

¹¹⁴ Kaibab Tribe Comments at 8.

¹¹⁵ *Id.* at 9.

¹¹⁶ 42 U.S.C. § 15926.

¹¹⁷ *See supra* note 20.

to issue a ROW through the Kanab Creek ACEC, the RMPA's purpose as stated in the Notice of Intent addresses that concern. If the Kaibab Tribe is suggesting that the EIS should address the possibility that the RMPA will not result in any changes to management of the ACEC, its concerns will be addressed by inclusion of the "No Action Alternative" in the EIS.

3. Sand Hollow Regional Pipeline and Cove Reservoir Are Not Connected Actions.

URC contends that in order to prevent improper segmenting of environmental review, the EIS should consider as cumulative or connected actions several other federal and non-federal actions, including WCWCD's proposed Sand Hollow Regional Pipeline ("SHRP") and the Cove Reservoir proposed by KCWCD.

The SHRP consists of a proposed 11.5-mile pipeline and associated facilities operated by WCWCD to bring water from the existing Sand Hollow Reservoir well field through existing water supply lines to existing municipal customers. It will not add a new water source to the WCWCD system nor will it change the amount of water that can already be pushed through the existing system. It will simply provide additional security and efficiency with a redundant water connection from the Sand Hollow Reservoir well field, which is already connected to the existing regional pipeline servicing the same areas. The pipeline will occupy BLM, state, and private lands. The BLM completed an EA¹¹⁸ for the SHRP and in 2018 issued a Finding of No Significant Impact and Decision

¹¹⁸ BLM, Sand Hollow Regional Pipeline Project Environmental Assessment (May 2018), *available at* https://eplanning.blm.gov/epl-front-office/projects/nepa/106110/162716/198492/DOI-BLM-UT-C030-2018-0046-EA_SHRPP_FINAL_EA.pdf.

Record for the project.¹¹⁹ It will be built whether or not the LPP is built. There is simply no need for any further analysis.

Cove Reservoir is a proposed reservoir sponsored by KCWCD¹²⁰ that will be connected to existing irrigation supply pipelines to serve existing KCWCD irrigation customers. If constructed, it will be located on the East Fork Virgin River upstream from WCWCD's diversion point on the mainstem Virgin River. LPP will not provide any water to Cove Reservoir. The Natural Resources Conservation Service, as the lead federal agency for NEPA review, is conducting a Watershed Plan and EA for which environmental scoping was conducted in June 2018. Cove Reservoir meets none of the definitions of a connected action within the scope of the Project EIS. It is a local irrigation project which will not automatically trigger any other action that may require an EIS. Its development has been under consideration by KCWCD completely independent of the Lake Powell Project and KCWCD intends to construct it whether or not the Lake Powell Project is constructed.

E. Requests to Delay the EIS or to Address Otherwise Irrelevant Issues Should Be Rejected.

1. Litigation Regarding the Boundaries of Grand Staircase Escalante National Monument Does Not Render the EIS Premature.

The current litigation involving the Grand Staircase Escalante National Monument boundary reduction will not interfere with or otherwise preclude NEPA

¹¹⁹ BLM, Sand Hollow Regional Pipeline Project Finding of No Significant Impact Environmental Assessment (Oct. 2018), available at https://eplanning.blm.gov/epl-front-office/projects/nepa/106110/162718/198494/Signed_BLM_FONSI_Sand_Hollow_Regional_Pipeline_11_14_2018.pdf.

¹²⁰ See U.S. Department of Agriculture, Natural Resources Conservation Service Utah, Cover Reservoir Watershed (Sponsor = Kane Co. Water Conservancy District), <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/ut/programs/planning/wpfp/?cid=nrcseprd1403022> (last visited Jan. 15, 2019).

analysis of the proposed Project. The proposed pipeline alignment does not intersect or traverse the Monument boundaries, as modified by Presidential Proclamation 9682 of December 4, 2017. Although the alignment transects the Monument's original boundaries established in Proclamation No. 6920,¹²¹ its course generally remains within a utility corridor created by Congress two years following establishment of the Monument.¹²² As such, the NEPA analysis for the Project will focus on the Project's impacts within the utility corridor largely independent of the land status surrounding the corridor. Whether the utility corridor and pipeline are within the Monument or without should not materially change the NEPA analysis.

The South Variant Alternative alignment leaves the utility corridor and traverses south approximately 1/3 of a mile within the former boundaries of the Monument. This alternative alignment is not within the current boundaries of the Monument. Although the Monument litigation could potentially modify the current Monument boundaries in some fashion, years could pass before the matter is ultimately resolved and no one can accurately predict whether or how the boundaries might be changed. The Project and its NEPA analysis can neither wait for an event that may never happen nor address impacts associated with unknown circumstances. The NEPA analysis can only assess impacts under the legal parameters currently in existence. As such, the Monument litigation does not preclude NEPA analysis for the alternative pipeline alignment proposed by UBWR.

¹²¹ 61 Fed. Reg. 50,223 (Sept. 18, 1996).

¹²² *See* Automobile National Heritage Area Act, Pub. L. No. 105-355, § 202, 112 Stat. 3247, 3253 (1998).

2. Requests for Additional Information Gathering Should Be Rejected.

The Commission's REA Notice is the culmination of a decade long application development process under the ILP in which all interested entities had ample opportunity to identify issues and information requirements, participate in NEPA scoping, and comment on UBWR's draft study plan, the Commission's Study Plan Determination, the initial study reports, the preliminary licensing proposal, the final license application and the supplemental materials filed in 2018. All of these entities, directly or through other entities, participated in the ILP process. The Commission has reviewed the license application, requested additional information it believes to be necessary after inviting and receiving comments on the final license application, and has received from UBWR the requested additional information. The generalized and unsupported allegation that the extensive record in this proceeding is deficient to evaluate the proposed Project and reasonable alternatives is nothing more than an attempt to delay action on UBWR's license and related applications and is without merit.

3. A Completed ROW Application Is Not Required to Evaluate the Existing Highway Alternative.

Neither the South Variant Alternative nor the South Alternative would cross Kaibab Tribe tribal trust lands. Therefore, UBWR has not applied for a BIA ROW under 25 C.F.R. Part 169. The Kaibab Tribe claims the Existing Highway Alternative cannot be properly be evaluated until UBWR files a complete ROW application for that alternative with BIA.¹²³ However, BIA states that the submission of an ROW application

¹²³ Kaibab Tribe Comments at 5-6.

to it is only required if the Existing Highway Alternative is selected.¹²⁴ Likewise, neither the FPA nor the Commission's regulations require a license applicant to submit complete applications for all permits or entitlements that may be required under all potential project alternatives. Such a requirement would not make sense because most permit applications require extensive work and it would be inefficient and a waste of applicant and agency resources for the applicant to prepare multiple applications that may never be submitted or reviewed. The study reports supporting the license application include surveys of cultural, endangered species and other resources that may be affected by the Existing Highway Alternative, which is sufficient for NEPA review.

For NEPA purposes, the agencies should evaluate the Existing Highway Alternative where it crosses the Kaibab Tribe reservation subject to the draft conditions submitted by the Kaibab Tribe for any BIA ROW that would be necessary under this alternative. Because it is UBWR and WCWCD's position that this alternative is precluded by law as explained in Section IV.C.1., above, UBWR is not addressing each of the Kaibab Tribe's draft conditions at this time.

4. The Southern Nevada Water Authority's Groundwater Development Proposal Is Not a Connected Action.

The Great Basin Water Network ("GBWN") alleges that the Project, by diverting water from Lake Powell, will decrease the amount of water delivered to Lake Mead, the major source of water for Las Vegas and Clark County, Nevada, pursuant to BOR's annual operating plan for Lake Mead. This would, in turn, allegedly make it more likely that the Southern Nevada Water Authority ("SNWA") would proceed with a proposed groundwater development project in Nevada to the detriment of GBWN's members.

¹²⁴ DOI Comments at 2.

Any connection between SNWA’s proposal and the proposed Project is far too tenuous to warrant any consideration in this proceeding. GBWN’s scenario is totally speculative and unsupported by any facts developed to date. In fact, BOR Colorado River modelling, which assumes Project diversions, does not incorporate or anticipate any change in Lake Powell operational releases. Hence, changes in Lake Mead levels downstream are speculative at best and would be unrelated to the Project. Further, SNWA recently completed a new and much deeper Lake Mead intake.¹²⁵ That will buffer it from impacts associated with any future further drops in Lake Mead elevation. Finally, in August 2018, the Nevada Division of Water Resources denied SNWA’s water rights applications needed to support the groundwater project.¹²⁶ Although SNWA has appealed the ruling, if and when it will ever be able to undertake that project remain highly uncertain.

5. Development of Utah’s Ultimate Phase Central Utah Project Is Not a Purpose of the Action.

The Lake Powell Pipeline Coalition (“Coalition”)¹²⁷ claims that UBWR’s purpose and need statement is inaccurate because it does not state that it includes development of Utah’s water rights under the 1922 Compact via the Central Utah Project (“CUP”).¹²⁸ The Coalition appears to think that doing so will better explain how the contracts between

¹²⁵ See Southern Nevada Water Authority, Intake No. 3, <https://www.snwa.com/our-regional-water-system/intake-3/index.html> (last visited Jan. 15, 2019).

¹²⁶ In the Office of the State Engineer of the State of Nevada, In the Matter of Applications 53987 through 53992, Inclusive, and Applications 54003 through 54015, Inclusive, and Applications 54019 and 54020, Filed to Appropriate the Underground Waters of the Cave Valley, Delamar Valley, Dry Lake Valley, and Spring Valley (Hydrographic Basins 180, 181, 182 and 184), Lincoln County and White County, Nevada, Ruling No. #6446 (Aug. 17, 2018), available at <http://images.water.nv.gov/images/rulings/6446r.pdf>.

¹²⁷ Coalition Comments at 3-4.

¹²⁸ *Id.* at 4.

UBWR and BOR to exercise those rights “will really work.”¹²⁹ The Coalition misunderstands the relationship between the development of the Ultimate Phase CUP and the water now dedicated to the Project. Simply stated, development of the CUP is not a purpose or need for the proposed action because the water right associated with the CUP has been assigned to the state and will not be developed as originally contemplated. That said, and as the Coalition does not appear to dispute, UBWR has clearly indicated in its Purpose and Need statement that it will be developing water supplies legally available to the State from the Colorado River system.

As stated in Recital (f) of the above described Exchange Contract:

. . . The “Initial Phase” of the CUP included four units, of which three have been fully constructed, with the remaining unit nearing completion. The “Ultimate Phase” of the CUP consisted of the Uintah and Ute Units with only the Uintah Unit being partially developed. In 1992, in the Central Utah Project Completion Act (CUPCA) (Pub. L. 102-575), Section 501(a)(3) Congress stated that there is no present intent to proceed with Ultimate Phase construction.¹³⁰

Recital (g) of the draft Exchange Contract continues:

In 1996, [when CUP funding was modified,] Reclamation assigned the water right associated with the Ultimate Phase portion of the CUP to the State of Utah through the Board of Water Resources (Assigned Water Right), when funding was curtailed. The Board desires to put the Assigned Water Right to beneficial use.¹³¹

It is portion of the above-referenced Assigned Water Right which will now be put to such beneficial use through the development of the LPP.

¹²⁹ *Id.*

¹³⁰ Exchange Contract at 2.

¹³¹ *Id.*

F. Water Conservation Measures Alone Cannot Meet the Projected Demand.

A number of commenters, including Living Rivers, Save the Colorado, American Rivers, the Coalition, and URC, dispute the efficacy of the WCWCD conservation program, often times citing outdated or inaccurate facts and figures. For example, URC claims that Washington County can “reduce [its] water use by 50% without negative impacts to the economy,”¹³² while Living Rivers states data that “[w]ater conservation and development of local water sources can likely fulfill the water needs of the growing Washington and Kane Counties.”¹³³ Western Resource Advocates (“WRA”) makes its own conservation-based local waters proposal.¹³⁴

Contrary to these assertions, the water supply needs of the WCWCD service area cannot be met through either conservation combined with the development of other local water sources, or conservation alone. As discussed in the attached Water Use and Conservation Update (“Conservation Update”)¹³⁵ a singular focus on conservation as the water supply solution fails not only to present a complete and accurate factual case, but ignores the “big picture” associated with the development of a comprehensive, long-term water supply plan which accommodates other extremely important planning objectives, including:

- The provision of system diversity and reliability through the development of a second source of supply;
- The provision of system redundancy as a barrier against single system failure;

¹³² URC Comments at 2.

¹³³ Living Rivers Comments at 13.

¹³⁴ See WRA Comments at 7-9. An earlier version of the Local Waters Alternative was submitted by WRA in 2013. See Letter to Kimberly D. Bose, FERC, from Amelia Nuding, Western Resource Advocates, Project Nos. 12966-000 et al. (filed Mar. 14, 2013).

¹³⁵ See Attachment C, Conservation Update.

- The need to adequately account for climate variability;
- The need for a supply buffer to account for long-term uncertainty associated with variables such as water supply, water demand, water quality, a changing regulatory environment; and
- The desire to utilize the source of supply which, on balance, best protects environmental values.¹³⁶

As described in the Conservation Update,¹³⁷ and further described in WCWCD's comprehensive 2015 Water Conservation Plan, WCWCD has accomplished much to date in its efforts to conserve, and has assumed, for purposes of its current supply/demand analysis, that there will be an additional 20% reduction in per capita use by 2060 from a 2015 baseline.¹³⁸

Commenters have also alleged that WCWCD's conservation program is inadequate by comparison to those of other communities. Although such direct comparisons are challenging because of significant differences in temperature, elevation, precipitation patterns, population density, data analysis methods and a host of other factors, the attached comparative analysis of WCWCD's program by Maddaus Water Management, Inc. ("Maddaus Report")¹³⁹ shows that it compares favorably with WCWCD's peers. Maddaus Water Management, Inc., is recognized as a national expert in water demand forecasting and analysis of water efficiency programs and is intimately familiar with WCWCD's system and conservation measures. The Maddaus Report compares the WCWCD conservation program to that of 10 other similarly situated western water agencies with vigorous conservation programs. WCWCD's program

¹³⁶ *Id.* at 1-3.

¹³⁷ *Id.* at 4-5.

¹³⁸ WCWCD is primarily a wholesale water provider and thus cannot control all conservation actions taken at the retail level. The State of Utah has recently published 2016 and 2017 water use numbers, but these numbers do not affect the revised WCWCD conservation goal.

¹³⁹ *See* Attachment D, Maddaus Report.

budget, spending and staffing efforts equal or exceed those of several other similarly situated agencies.¹⁴⁰ WCWCD, like its peer agencies, uses the four most common efficiency programs, i.e., leakage management, toilet rebates, free irrigation system evaluations, and free showerhead and faucet aerator dissemination. Also, the report finds that WCWCD employs 24 of the 36 most common practices among the peer agencies.¹⁴¹ The report concludes that WCWCD’s program is “on par with other notable programs in the western United States and exceeds those of other entities of a similar size and customer base.”¹⁴²

The drastic conservation program advocated by Project opponents would also be extremely costly. Unlike the NGOs opposing the Project, WCWCD conducted a comprehensive cost analysis of such a program showing that it would require an investment of over \$1.5 billion (\$2015),¹⁴³ which would have to be borne by ratepayers. Further, implementing such a program would likely result in adverse socioeconomic and environmental consequences and negative environmental impacts.¹⁴⁴

Finally, advocates of extreme conservation programs and aggressive agricultural transfers ignore the many challenges and shortcomings of such an alternative. These include poor water quality and associated high treatment costs, significant adverse socioeconomic impacts, such as the loss of local agricultural production, and reliance on

¹⁴⁰ *See id.* at 5 (Table 2).

¹⁴¹ *Id.* at 6.

¹⁴² *Id.* at 7.

¹⁴³ *See* Attachment C, Conservation Update at 10 (Table 3).

¹⁴⁴ These impacts would include the creation of heat islands, restrictions on recreational facilities, loss of aesthetics, an increase in energy use, an increase in monthly water costs, and a loss of tourism. *See id.* at 9.

non-renewable groundwater resources.¹⁴⁵ These advocates also make unsupported assumptions regarding the potential for additional transfer of agricultural water rights to municipal and industrial use. The attached evaluation of potential conversion of irrigation water to municipal use in the Virgin River Basin (“Olds Report”)¹⁴⁶ by Jerry Olds, P.E., a former Utah State Engineer, shows that the amount of additional reliable agricultural water available for conversion to municipal use is about 23,000 AF,¹⁴⁷ far lower than the 35,000 to 40,000 AF assumed by the Project opponents to be available.¹⁴⁸

In sum, WCWCD has a robust water conservation program that compares very favorably with similarly situated water agencies, but it is not enough to meet projected demand. A radical, costly, extreme conservation plan based on flawed assumptions is no substitute for the additional water, diversification of supply sources, and system resilience and reliability provided by the Project. Neither the Commission nor the other permitting agencies should second guess the decision of the entities responsible for securing Washington County’s future water supply that the Project is needed to meet the purpose and need.¹⁴⁹

¹⁴⁵ *See id.* at 11-12.

¹⁴⁶ Jerry D. Olds, P.E., Evaluation of the Potential Conversion of Irrigation Water to Municipal Use in the Virgin River Basin, Washington County, Utah (Dec. 2018) (“Olds Report”) (attached hereto as Attachment E).

¹⁴⁷ *Id.* at 16.

¹⁴⁸ *See* WRA Comments at 8 (Figure 1).

¹⁴⁹ *See Audubon Soc’y of Greater Denver v. U.S. Army Corps of Eng’rs*, 908 F.3d 593, 604 (10th Cir. 2018) (affirming USACE finding that water conservation was not an equivalent alternative to the proposed project because conservation measures alone could not resolve shortages of sustainable water supplies).

G. Water Supply

1. Physical Water Availability

a. Effects of Climate Change on Water Availability Are Adequately Addressed in the License Application.

Several commenters claim that the data and analysis provided by UBWR do not adequately account for the impacts of climate change on availability of Colorado River water for the Project.¹⁵⁰ American Rivers asks UBWR to predict and then address how voluntary or regulatory restrictions on diversions in the future under the 1922 Compact and the Upper Basin and Lower Basin Drought Contingency Plans (“DCP”)¹⁵¹ being developed by the seven Colorado River Basin states might affect Project feasibility over the long term and Project diversions at various lake levels might affect other local and regional water supplies.¹⁵²

The Coalition states that the most recent data sets and modeling in the application are from 2012 and that the models should be updated to include more recent years.¹⁵³ It further states that the climate change studies in the application do not relate climate change to water availability for the Project¹⁵⁴ and should be changed to include a range of drought contingency measures and take a system-wide approach which assumes all Upper Basin water rights will be developed.¹⁵⁵ Living Rivers recommends that the EIS

¹⁵⁰ American Rivers Comments at 20-24; Coalition Comments at 36-39. *See generally* Living Rivers Comments. Living Rivers Comments was also signed by the Colorado Riverkeeper, Center for Biological Diversity, Waterkeeper Alliance, Save the Colorado, Las Vegas Water Defender, Green River Action Network, and Upper Green River Network.

¹⁵¹ *See* Section IV.G.1.b., *infra*.

¹⁵² American Rivers Comments at 23.

¹⁵³ Coalition Comments at 36-38.

¹⁵⁴ *Id.* at 37.

¹⁵⁵ *Id.* at 39.

include an in-depth look at tributary flows on the Green River to determine how they may be impacted by climate change and over-appropriation, with modeling based on current and predicted future conditions.¹⁵⁶

These requests, which call for the examination of “what if” scenarios, depend on many assumptions, including: the impacts of climate variability on the amount and timing of Colorado River flows; the timing and extent of additional future water development within the basin; the impacts of the as yet incomplete DCPs on development; the impact of any other risk mitigation measures adopted by the basin states and individual water users; and the 1922 Compact related decisions of the Upper Colorado River Commission and the upper basin states relative to the apportionment and allocation of any shortage repayment obligations.

Each of these variables will continue to be examined by BOR, the states, and local water providers as they carry out their responsibilities, taking into account the Law of the River and state water allocation and administration principles. Moreover, it is beyond the purview of the permitting agencies to attempt to resolve such issues in the context of a NEPA process for a single basin project, especially where the record shows that the Project will use water allocated to Utah under the 1922 Compact.¹⁵⁷

As discussed above,¹⁵⁸ there have been no significant changes to the current and anticipated future local water supplies in southwest Utah since the submission of Study Report 19 (Climate Change Report and Water Needs Assessment). The Virgin River

¹⁵⁶ Living Rivers Comments at 7.

¹⁵⁷ Using NEPA or the FPA to limit UBWR’s use of its water rights under the 1922 Compact, in the absence of a ruling or other determination under the Law of the River, would be outside the scope of NEPA’s review of environmental impacts.

¹⁵⁸ See Section IV.F., *supra*.

Basin remains the sole source of water supply for southwest Utah’s rapidly growing population. Sole source dependence carries with it significant risk to the population of the area. Climate change impacts are likely to elevate the risks associated with such sole source reliance. These risks are substantially mitigated by the development of a second source of water supply. Accordingly, the development of a portion of Utah’s Colorado River allocation as a second source of supply for southwest Utah remains essential. The benefit of a second source of supply for the population of southwest Utah far outweighs the potential limitation of the Colorado River as a source of supply.

BOR’s benchmark 2012 Colorado River Basin Study (“Basin Study”)¹⁵⁹ and associated climate model projections indicate a potential decrease in mean natural flow of the Colorado River of approximately 9% over the next 50 years. Research¹⁶⁰ published subsequent to the Basin Study suggests that continued warming in the Colorado River Basin could cause Colorado River flows to decrease by 35% or more by century-end. Future decreases in Colorado River flows could reduce Utah’s yield under its 1922 Compact allocation.

However, modeling conducted by BOR¹⁶¹ in August 2018, taking into account future water uses in the Upper Basin including the LPP, indicates a near 0% chance of a declared 1922 Compact shortage for the Upper Basin through the year 2050 presuming hydrology remains similar to what the Basin has experienced over the last 100 years. If, however, the future hydrology of the Basin more closely resembles that of the last 30

¹⁵⁹ BOR, Colorado River Basin Water Supply and Demand Study (Dec. 2012), <https://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>.

¹⁶⁰ Bradley Udall & Jonathan Overpeck. 2017. The twenty-first century Colorado River hot drought and implications for the future. *Water Resources Research*, 53.

¹⁶¹ BOR, Colorado River System 5-Year Projected Future Conditions, <https://www.usbr.gov/lc/region/g4000/riverops/crss-5year-projections.html> (last visited Jan. 17, 2019).

years, including the recent period of historic drought, which is similar to drier, hotter climate change predictions, the risk of a declared 1922 Compact shortage rises to approximately 13% through the year 2050.

All Colorado River water users, including the State of Utah, understand the level of uncertainty associated with the use of Colorado River water. But the greater risk to southwest Utah lies in continuing to rely solely upon the Virgin River Basin, which faces the same or greater level of uncertainty as a source of water supply. To mitigate the risks and uncertainties associated with these water supplies, the State of Utah is actively participating in regional water supply strategies including the development of drought contingency plans. Local project beneficiaries are also pursuing water supply augmentation strategies such as aquifer storage and recovery, enhanced groundwater pumping, and other measures to offset potential, temporary shortages in the LPP supply.

Should there not be enough water in the system to meet all allocated uses, the 1922 Compact and Upper Colorado River Compact of 1948 (“Upper Basin Compact”)¹⁶² together establish a formula for sharing any shortages among the individual Upper Basin states. Commenters apparently fail to either understand or acknowledge that the administration of the 1922 Compact is not based on prior appropriation principles. Regardless of when LPP becomes operational, it is entitled to divert on an equal basis with all prior completed projects within the Upper Colorado River Basin so long as water is available under Utah’s 1922 Compact allocation and Utah state administrative principles.

¹⁶² BOR, Upper Colorado River Basin Compact (1948), *available at* <https://www.usbr.gov/lc/region/g1000/pdfiles/ucbsnact.pdf> (“Upper Basin Compact”).

In addition, the Upper Division States cannot “cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years.”¹⁶³ In the history of the administration of the system there has never been a time when the 10-year rolling average was not met. The Upper Basin Compact indicates that if such a situation were to occur, the Upper Division States would have to curtail their depletions to correct the problem. It goes on to say that the Upper Colorado River Commission will decide when and how much curtailment each Upper Division State will be required to take.¹⁶⁴ Because the likelihood of a 1922 Compact shortage is low, the timing and amount of any hypothetical shortages are unknowable, and the responses of DOI, the seven basin states, and the courts to any shortage declaration are unknown, American Rivers’ request for an evaluation in the EIS of how they might affect the feasibility of the Project in the near and long term is unwarranted and speculative.

b. Effect of the Upper Basin DCP on Water Availability

In 2007, BOR adopted Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lakes Powell and Mead.¹⁶⁵ Because of extended drought conditions in the basin, the seven Colorado River Basin states are developing Upper Basin and Lower Basin DCPs to reduce the likelihood of Colorado River reservoirs,

¹⁶³ 1922 Compact at Art. III(d). See note 169, *infra*, explaining the difference between Upper Basin and Upper Division.

¹⁶⁴ Upper Basin Compact at Art. IV.

¹⁶⁵ See BOR, Lower Colorado Region, Programs and Activities, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, <https://www.usbr.gov/lc/region/programs/strategies.html> (last visited Jan. 16, 2019).

particularly Lake Powell and Lake Mead, further declining to critical levels. Draft DCPs were issued in October 2018.¹⁶⁶

Several commenters assert that the license application does not adequately address the DCPs.¹⁶⁷ American Rivers states that the Upper Basin DCP may affect operation of the Project during years of water shortage and the license application should be supplemented to describe its effects on the Project.¹⁶⁸ Living Rivers similarly states that the DCPs should be the subject of a programmatic EIS which should be completed before an EIS is prepared for the proposed Project, because a complete understanding of the Upper Basin DCP is needed in order to model likely future scenarios for operation of Flaming Gorge Reservoir and Lake Powell.¹⁶⁹

Such a delay is unwarranted. Although much progress has been made on the DCPs, they have not been executed. BOR has stated that if the Lower Division¹⁷⁰ DCPs are not completed by the end of January 2019, BOR will initiate its own process for the

¹⁶⁶ See BOR, Colorado River Basin Drought Contingency Plans, <https://www.usbr.gov/dcp/> (last visited Jan. 16, 2019); BOR, Agreement Concerning Colorado River Drought Contingency Management and Operations (Oct. 5, 2018), available at https://www.usbr.gov/dcp/docs/DCP_Agreements_Final_Review_Draft.pdf (“Draft Operations Agreement”) (Upper and Lower Basins DCPs).

¹⁶⁷ American Rivers Comments at 28-29; Coalition Comments at 34-36, 44; Living Rivers Comments at 7, 12-13; URC Comments at 12-14.

¹⁶⁸ American Rivers Comments at 28-29.

¹⁶⁹ Living Rivers Comments at 12-13.

¹⁷⁰ The term Upper or Lower Basin refers to those states or parts thereof that naturally drain into the system above (Upper) or below (Lower) Lee Ferry. The Division refers to specific states (states of the Upper Division and states of the Lower Division), i.e., entire states and not any parts thereof. Under the 1922 Compact, the Upper Basin and the Lower Basin are each apportioned 7.5 million AF a year, and the states of the Upper Division have the 75 million AF over 10 year obligation not to deplete the flow at Lee Ferry. 1922 Compact at Art. III(d). Under the 1948 Upper Basin Compact, a portion of the water apportioned in total to the Upper Basin under the 1922 Compact (7.5 million AF per year) is allocated to each Upper Division state (Utah gets 23%). Upper Basin Compact at Art. III(a)(2).

development of Lower Division drought contingency plans.¹⁷¹ There is no certainty surrounding how long BOR would take to establish its own plan, a plan which would then potentially face legal challenges. Further, the current draft of the Upper Basin Demand Management Storage Agreement acknowledges that Congressional approval is necessary to authorize the use of available storage capacity in Colorado River Storage Project reservoirs for such demand management purposes. No such legislation has been introduced, let alone passed.

Also, as discussed above, the existing record is replete with information regarding the availability of water for the Project under a wide range of scenarios. Waiting, possibly several years, merely in order to have a more finely tuned set of drought operation scenarios for Flaming Gorge Reservoir and Lake Powell under a regime as yet uncertain is not necessary for the federal agencies to move forward with the EIS.

The Coalition states that the DCPs are regional plans involving state, tribal, and local laws and that the CEQ's regulations require a NEPA document to examine possible conflicts between the proposed action and the objectives of such plans.¹⁷² There is no conflict between the Project proposal and DCPs. In fact, the draft Drought Response Operations Agreement,¹⁷³ one of the interconnected DCP implementing agreements, expressly provides that drought response operations at Colorado River Storage Project¹⁷⁴ facilities must be consistent with "project-specific criteria for each CSRPA Initial Unit,

¹⁷¹ See, e.g., L. William Staudenmaier, "Colorado River Basin States Inch Closer to Agreements on Drought Contingency Plan as Bureau of Reclamation Sets Deadline" (Dec. 18, 2018), <http://www.swlaw.com/blog/environmental-and-natural-resources/2018/12/18/colorado-river-basin-states-inch-closer-to-agreements-on-drought-contingency-plan-as-bureau-of-reclamation-sets-deadline/>.

¹⁷² Coalition Comments at 35-36 (citing 40 C.F.R. § 1502.16(c)).

¹⁷³ See Draft Operations Agreement, *supra* note 166.

¹⁷⁴ See Bureau of Reclamation, Upper Colorado Region, Colorado River Storage Project, <https://www.usbr.gov/uc/rm/crsp/index.html> (last visited Jan. 15, 2019).

including relevant Records of Decision” and “existing and future contracts related to water and/or hydropower.”¹⁷⁵ Further, all of the related DCP agreements identify as a goal the reduction of risk associated with a 1922 Compact shortage, while allowing each basin state to develop and use its apportionment. These provisions support the completion of the Project. If the DCPs are finalized and implemented, Utah will be a signatory to the Upper Division DCP and the Project will be operated in a manner consistent with that DCP.

c. The Impact of Potential Future Curtailment of Water to the Lower Basin Is Too Speculative to Consider in this Proceeding.

Pinal County, Arizona¹⁷⁶ states that diversion of water from the Colorado River for the Project could contribute to potential future drought related curtailments of Colorado River water to the Central Arizona Project, which would result in curtailment of deliveries to Arizona farmers. URC similarly suggests that the Project withdrawals will exacerbate Lower Basin shortage declarations and threaten hydropower generation at Lake Powell.¹⁷⁷

These assertions conflict with applicable law. UBWR is entitled to develop a portion of Utah’s Colorado River entitlement in a manner consistent with the Law of the River. Utah’s right to develop the LPP water is equal to, not inferior to, the rights of all other 1922 Compact signatories.

Moreover, in the absence of any evidentiary support, these assertions are mere speculation. Further, it is incorrect to suggest that any potential future shortage of water

¹⁷⁵ Draft Operations Agreement at 4 (Section II.A.3.b.).

¹⁷⁶ Motion to Intervene of Pinal County, Project Nos. 12966-004 and -005 (filed Aug. 30, 2018).

¹⁷⁷ URC Comments at 12-13.

in the Lower Basin could be attributed to the Project's withdrawals. Any future shortages in the Lower Basin would be the result of a complex combination of factors, including the amount, timing, and location of precipitation; the cumulative result of all withdrawals from the River under the 1922 Compact and Upper River Compact, related statutes, regulations, and management plans; the amount and location of future population growth; and the success or failure of demand management measures.

2. Legal Water Availability

a. UBWR's Water Rights Are Not the Proper Subject of NEPA.

Living Rivers contends that the EIS should be placed on hold until there is proof Utah has water rights sufficient to effect the Exchange Contract.¹⁷⁸ For purposes of the Commission license, there is no reason to do that. State water rights are outside the Commission's licensing authority and as such must ultimately be resolved by the licensee and the state regulatory agency responsible for issuing a water appropriation permit.¹⁷⁹ Moreover, a license applicant need not demonstrate that it has all the necessary property rights to develop the project at the time of licensing.¹⁸⁰ The Commission license will include Standard Article 5, which requires the licensee, within five years of license issuance, to acquire all property rights necessary to construct, operate and maintain the hydroelectric facilities, including water rights.

Nor is there any reason to delay the EIS in connection with the DOI and USACE permit applications. The purpose of the EIS is to evaluate environmental impacts of the proposed Project and reasonable alternatives, which is driven by the purpose and need,

¹⁷⁸ Living Rivers Comments at 6, 7, 14-15.

¹⁷⁹ *Don W. Gilbert Hydro Power, LLC*, 147 FERC ¶ 62,106 at P 32 (2014).

¹⁸⁰ *See, e.g., Andrew Peklo III*, 149 FERC ¶ 61,037 at P 54 (2014).

not by whether the applicant currently has all the rights necessary to carry out its proposal, once permitted. UBWR will continue to pursue all actions necessary to develop its water rights necessary for the Project.

b. There Is No Reason to Conclude Senior Water Rights Will Materially Affect the Availability of Water for the Project.

Several entities suggest that senior water rights of Indian tribes and Utah Counties could call into question the availability of water for the Project or that the Project will prevent senior water rights holders from exercising their rights.¹⁸¹ Such assertions lack any factual foundation and ignore the basic tenets of the prior appropriation doctrine as followed in Utah.

As a matter of state law, diversions by the Project cannot impair senior water rights.¹⁸² In fact, one of the requirements that must be met before a water rights application is even approved by the State Engineer is a demonstration that the proposed use will not impair existing water rights.¹⁸³ UBWR will abide by all such requirements.

The State does not have a River Commissioner for the Green River, as there has been no need to impose water rights curtailments which would have prompted such regulation; but a commissioner could be appointed if the need arises. According to the Utah Division of Water Rights (State Engineer), a review of the specific water rights¹⁸⁴ identified by commenters, to the extent such rights are currently quantified, are compatible with the Project. This is the case even if these competing rights are perfected

¹⁸¹ American Rivers Comments at 12-14; Conserve Southwest Utah Comments at 4; Coalition Comments at 2, 20-24; Living Rivers Comments at 2, 6-7, 15, 20-21.

¹⁸² See Utah Code Ann. § 73-3-21.

¹⁸³ *Id.* § 73-3-8.

¹⁸⁴ Northern Ute, Navajo, Ouray, Central Utah, Uintah, and Duchesne Counties.

and placed to beneficial use. Thus the Project will be a reliable water supply for WCWCD.

c. Colorado River Compact Interpretations and Applications Are Outside the Purview of NEPA.

Some commenters have raised questions about the interpretation of the 1922 Compact as it applies to this project.¹⁸⁵ While UBWR and WCWCD believe and maintain that the Project is consistent with the terms of the 1922 Compact and the Law of the River, these Compact-related issues need not and should not be addressed in this proceeding. They will be resolved in the context of discussions and other appropriate actions undertaken by and between the State of Utah and the other basin states, along with the Secretary of the Interior insofar as it relates to his authority. These matters lie outside the purview of NEPA and the FERC licensing process.

d. A Permit to Export Water from Arizona Is Not Required.

American Rivers and others request that UBWR be required to address compliance with an Arizona statute which requires a permit to export water from the State. However, the statute is plainly inapplicable by its own terms. It provides, “[a] person shall not transport water from this state unless approved by the director [of the Arizona Department of Water Resources], *but this article does not apply to or prohibit transporting water from this state as required by interstate compact, federal law or international treaty.*”¹⁸⁶ Thus, this argument has no merit.

¹⁸⁵ American Rivers Comments at 19-20; Coalition Comments at 45; Living Rivers Comments at 7; Save the Colorado Comments at 12-13; Notice of Intervention, or, in the Alternative, Motion to Intervene, of the Colorado River Water Conservation District at 3-4, Project Nos. 12966-000 and -004 (filed Nov. 14, 2018).

¹⁸⁶ Ariz. Rev. Stat. Ann. § 45-292(A) (2018) (emphasis added).

H. Environmental Effects of the Project

Various NGOs and public commenters question whether the record is sufficient with regard to the effects of climate change on recreation and infrastructure and the Lake Powell ecosystem, water temperature, listed species, and various impacts of the Project itself on certain. These matters are fully addressed in the documents referenced below.

1. Climate Impacts on Recreation and Infrastructure

Cumulative impacts associated with climate change on recreation and associated infrastructure are described in *Section 5.3.3.4.4, Chapter 5, Exhibit E of the License Application*, as amended (Attachment B).¹⁸⁷

2. Climate Impacts on Lake Powell Ecosystems

Cumulative impacts associated with climate change on Lake Powell ecosystems are described in *Section 5.3.4, Section 5.3.6, and Section 5.3.7 in Chapter 5, Exhibit E of the License Application*, as amended.

3. Water Temperature Impacts

Cumulative impacts associated with climate change on Lake Powell ecosystems are described in Chapter 5, Exhibit E of the License Application, as amended.

4. Impacts to Listed Species

Impacts to listed species, including Virgin River fishes, are summarized in a revised *LPP Preliminary Draft Biological Assessment*, which will be filed separately.

5. Impacts of the Project on Power Generation

Impacts of the Project on power generation at Glen Canyon Dam are accounted for in Chapter 5 of *Final Study Report 10, Socioeconomics and Water Resources*

¹⁸⁷ See UBWR Revised Responses to Comments of the U.S. Bureau of Land Management and National Park Service on the Lake Powell Pipeline Final License Application Documents (Jan. 17, 2019) (attached hereto as Attachment F).

Economics (April 2016). Impacts are included in Tables 5-1 through 5.4 as “foregone power.”

6. Sand Hollow to Dixie Springs Transmission Line Route

Dixie Springs community residents and property owners have raised issues such as visual impacts, changes to neighborhood aesthetics, and safety concerns regarding the overhead electric transmission line (often referred to as the “Sand Hollow to Dixie Springs” line) proposed near Sand Hollow Reservoir and extending along 3400 West in Hurricane, Utah.¹⁸⁸ UBWR and WCWCD will seek to identify potential solutions to these issues taking into account information anticipated to become available over time.

The preliminary design and proposed alignment of the “Sand Hollow to Dixie Springs” transmission line were based on existing electric system infrastructure and established easements. They were selected as a viable solution for connecting power generated at the Sand Hollow Hydroelectric facility to the nearest electric substation. Considering growing electric demand in the area and electric system reliability, additional electric infrastructure near Sand Hollow Reservoir may be developed prior to the beginning of project construction, which may not start for several years. Those additions would be independent of the Project. However, their availability could make other “Sand Hollow to Dixie Springs” transmission options feasible. As a result, the final design and alignment for establishing a connection between the Sand Hollow Hydroelectric facility and the electric transmission system will be reviewed over time commensurate with planning for the Project construction phase. In the interim, UBWR

¹⁸⁸ See, e.g., Comments of Nancy Russell, Project Nos. 12966-000 and -004 (filed Nov. 19, 2018).

and WCWCD will continue to evaluate opportunities to address concerns of the residents of the neighborhoods and are committed to keep the community apprised of those efforts.

7. Impacts to Cultural Resources and Traditional Cultural Properties

Both NEPA and the National Historic Preservation Act (“NHPA”) “[r]equire agencies to gather information on the potential effects of the proposed action on historic properties and consider alternatives that may avoid or minimize the potential for adverse effects.”¹⁸⁹ Some Tribes commenting on documents or plans in this docket have asserted that the Project will cause unspecified harm to places of importance to them.¹⁹⁰ To date, UBWR has simply summarized the tribal assertions of eligibility of many of these resources for the purpose of continuing consultation and compliance with the NHPA, NEPA, and the FERC process. The Tribes have recommended that each of the sites discussed in their respective ethnographic reports be considered eligible for the National Register of Historic Places (“NRHP”). None of the Tribes, however, has provided sufficient information (with limited exceptions) to evaluate whether most of these proposed sites and landscapes meet the NRHP eligibility requirements. Nor have the Tribes, beyond mere assertions that there would be impacts or effects, described the exact nature of those impacts or effects.

Unlike archaeological resources, information about traditional cultural places cannot be surveyed—instead the Tribes must provide this information to evaluate

¹⁸⁹ CEQ and Advisory Council on Historic Preservation, NEPA and NHPA, A Handbook for Integrating NEPA and Section 106 at 10 (Mar. 2013), available at https://www.energy.gov/sites/prod/files/G-CEQ-NEPA_NHPA_Section_106_Handbook_Mar2013.pdf (“CEQ/ACHP Handbook”).

¹⁹⁰ See, e.g., Kaibab Tribe Comments at 7, 30; Motion to Intervene of the San Juan Southern Paiute Tribe at 3, Project Nos. 12966-000 et al. (filed Nov. 19, 2018).

eligibility, assess effects, and resolve those effects determined to be adverse.¹⁹¹ The information provided by the Tribes is either insufficient¹⁹² or not related to the eligibility criteria or the additional factors normally required to qualify as a traditional cultural property (“TCP”), or both.¹⁹³ Because the Tribes have neither demonstrated the eligibility of their identified resources nor provided information about project-specific impacts to such resources, there are no eligible TCPs that would preclude UBWR’s proposed South Variant Alternative or South Alternative or require measures “that may avoid or minimize the potential for adverse effects”¹⁹⁴ to such resources along the South or South Variant Alternatives. To the extent any eligible TCPs or other cultural resources are identified in the future, the Applicant’s proposed Historic Properties Management Plan includes provisions for how such resources will be addressed.

I. Project Cost and Repayment

American Rivers contends that the record lacks adequate information regarding the economic feasibility of the Project. Specifically, it alleges that the license application does not meet the content requirements of Exhibits D (Statement of Project Costs and

¹⁹¹ An “adverse effect” under the NHPA is “found when [a project] may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association.” 36 C.F.R. § 800.5(a)(1) (2018).

¹⁹² For example, in numerous instances, tribes have stated that a certain place is the type of place their ancestors or elders “would have” collected plants or other resources or held ceremonies, but no information was provided that they actually did or do so. Similarly, many places identified by the tribes do not have identified boundaries, and most, if not all, identified boundaries are not explained or sufficiently supported. These types of statements, without more, do not provide the information necessary for analyzing eligibility as a traditional cultural property under the statutory and regulatory requirements of the NHPA.

¹⁹³ See NPS, National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties (1998), available at <https://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf>.

¹⁹⁴ CEQ/ACHP Handbook at 10.

Financing) or E (Environmental Report).¹⁹⁵ American Rivers also asserts that UBWR's response to the Commission's additional information requests¹⁹⁶ following the license application was incomplete.¹⁹⁷ However, the Commission reviewed UBWR's response to the additional information requests and determined that record is sufficiently developed to proceed with the EIS when it issued the REA Notice.

American Rivers and URC appear to believe that federal agencies are required to determine that a proposed project is "economically feasible" before it may be permitted.¹⁹⁸ However, the Commission has long recognized the speculative nature of long-term predictions concerning project economics. They are based on many assumptions about factors that are subject to variation over time and, under the best of circumstances, long-term "forecasts could never be more than a general guide."¹⁹⁹ For that reason, project economics are but "one of the many public interest factors the Commission considers"²⁰⁰ and "by no means the determinative consideration." In sum, the Commission wisely does not purport to decide whether a licensed project is economically or financially feasible.²⁰¹ Rather, it determines whether, all things considered, the public interest will be served by the proposed project. Likewise, neither

¹⁹⁵ American Rivers Comments at 29-33. The Coalition makes substantially the same argument. *See* Coalition Comments at 40-42. Living Rivers also argues that the cost and repayment information in the record is insufficient to examine the "social justice implications of the project as a whole because the residents of Washington and Kane Count[ies], including minority and low income populations, are expected to foot the bill." Living Rivers Comments at 17.

¹⁹⁶ *See* Response to FERC August 11, 2017 Additional Information Request, *supra* note 4.

¹⁹⁷ American Rivers Comments at 31-32.

¹⁹⁸ URC Comments at 14-15; American Rivers Comments at 33-35.

¹⁹⁹ *See Mead Corp.*, 72 FERC ¶ 61,027 at p. 61,068 (1995) ("*Mead Corp.*"), *reh'g denied*, 76 FERC ¶ 61,352 (1996).

²⁰⁰ *Id.* at pp. 61,068-69.

²⁰¹ *Id.* at pp. 61,068-71. The policy established in *Mead Corp.* was affirmed on judicial review in *City of Tacoma v. FERC*, 460 F.3d 53, 72-74 (D.C. Cir. 2006).

NEPA nor the statutes pursuant to which the DOI agencies issue ROWs require those agencies to determine that a proposed project will be economically feasible.²⁰² However, UBWR has prepared an Economic Analysis in response to the commenters which demonstrates sufficient local repayment capacity for the project.²⁰³

American Rivers also asserts that UBWR has not responded to a 2013 submittal by URC that questioned the population growth estimates underlying UBWR's water demand projections, made various assumptions regarding many cost variables (concerning, e.g., project construction and operation costs; interest rates; revenues from power sales; population increase, potential changes in property tax rates, water rates and impact fees; and water demand elasticity relative to cost), and speculated that water rate and impact fee increases needed to repay borrowed funds would sufficiently reduce the demand for water so as to make the Project unnecessary.²⁰⁴ URC's assumptions and speculations as to all of these factors and the relationship between the cost of and demand for Project water are entitled to no special weight. The agencies must do their own independent analysis incorporating the most current projections of water demand, which are found in the supplement to the Water Needs Assessment filed by UBWR on November 16, 2018.²⁰⁵ The supplement reinforces a fundamental fact: under even the

²⁰² *E.g.*, BLM's Federal Land Policy and Management Act regulations provide that the objective of its ROW program is to issue grants in a manner that: Protects public land natural resources; prevents undue degradation of public lands; promotes the use of ROWs in common considering various factors which do not include economic feasibility, and coordinate BLM actions with state and local governments, interested individuals, and appropriate quasi-public entities. 43 C.F.R. § 2801.2 (2018).

²⁰³ *See* Lake Powell Pipeline Costs and Revenues, Response to Comment, Applied Analysis (Jan. 2019) (attached hereto as Attachment G).

²⁰⁴ American Rivers Comments at 34-35.

²⁰⁵ *See supra* note 13.

most conservative estimates the population of southwest Utah will continue to grow substantially and the demand for water will continue to rise in the decades to come.

J. The Need for Project Power Has Been Adequately Demonstrated.

Various commenters assert that UBWR has not shown a need for the power to be generated by the Hurricane Cliffs Pumped Storage development (“PSP”). Conserve Southwest Utah and the Coalition conjecture that the cost of PSP power will exceed its value in the regional bulk power market,²⁰⁶ which the Coalition charges undermines UBWR’s revenue estimates for the Project.²⁰⁷ Save the Colorado claims that UBWR has not shown that the regional demand for power will exceed its supply or that regional power needs will not be met if the Project is not constructed.²⁰⁸

These commenters do not understand the Commission’s approach to evaluating the need for power in a hydroelectric project license application. When examining whether a project will provide power needed under the FPA’s comprehensive development/public interest standard,²⁰⁹ the Commission looks to more than the power produced by the individual project, but also to such factors as whether there is a regional need for power, and whether the project will provide diversification of the region’s generation.²¹⁰ Even when there is no immediate need for additional power to meet

²⁰⁶ Conserve Southwest Utah Comments at 4.

²⁰⁷ Coalition Comments at 26.

²⁰⁸ Save the Colorado Comments at 6-7.

²⁰⁹ Under FPA Sections 10(a)(1) and 4(e), FERC must balance all public interest considerations relative to the comprehensive development of the waterway when determining whether and, if so, under what conditions to issue a license. This is known as the comprehensive development, or comprehensive development/public interest standard. *See* 16 U.S.C. §§ 803(a)(1), 797(e).

²¹⁰ *City of Spearfish*, 136 FERC ¶ 61,042 at P 4 (2011) (citing *Boise Cascade Corp.*, 36 FERC ¶ 61,135 at p. 61,331 (1986) and *Niagara Mohawk Power Corp.*, 89 FERC ¶ 61,207 at p. 61,633 (1999)). *See, e.g.*, Environmental Assessment for Hydropower License, Gordon Butte Pumped Storage Project at 3-4, Project No. 13642-003 (issued Sept. 27, 2016); *GB Energy Park, LLC*, 157 FERC ¶ 62,196 at P 110 (2016).

projected load requirements (i.e., no deficits), the Commission may conclude that it is in the public interest to develop environmentally acceptable hydroelectric projects which, over the long term, are in the public interest.²¹¹

As demonstrated in Exhibit B to the License Application,²¹² and as described in the refined purpose and need statement filed on November 11, 2018,²¹³ the Project, including the peaking and pumped storage elements, will help to serve a projected regional demand for peaking capacity in addition to helping to offset the water pumping load of the Project. Specifically, Project power would help meet summer peaking demands and maintain reliable operation of the transmission grid to balance supply and demand.

The Basin subregion demand for coal-fired, gas-fired, and hydroelectric generation is forecast to increase during the period from 2020 and 2060. In particular, peak summer load within the Western Electricity Coordinating Council area is projected to increase from 170 gigawatts (“GW”) in 2020 to 347 GW in 2060. Operation of the LPP would provide environmentally acceptable hydroelectric peaking capacity.²¹⁴

K. The Kaibab Tribe’s Legal Issues Regarding BLM Legal Compliance Are Misdirected, Premature, and Speculative.

The Kaibab Tribe raises various issues in connection with BLM’s proposed RMPA for the Kanab Creek ACEC. These include allegations or suggestions that BLM

²¹¹ *Boise Cascade Corp.*, 36 FERC ¶ 61,135 (1986), *reh’g denied sub nom. Horseshoe Bend Hydroelectric Co.*, 42 FERC ¶ 61,072 at p. 61,323 (1988), *aff’d sub nom. Idaho Power Co. v. FERC*, 865 F.2d 1313 (D.C. Cir. 1989); *JDJ Energy Co.*, 55 FERC ¶ 61,183 (1991). *See also South Fork II, Inc.*, 31 FERC ¶ 61,097 (1985); H.R. Rep. No. 934, 99th Cong., 2nd Sess. 27 (1986) (conference report on the Electric Consumers Protection Act).

²¹² License Application, Ex. B at B-23.

²¹³ *See* November 2018 Application Supplement, Att. 1 – Purpose and Need Statement at 1-2.

²¹⁴ *Id.* at 3.

has not satisfied its trust responsibility to the Tribe,²¹⁵ not adequately consulted with the Kaibab Tribe pursuant to NEPA,²¹⁶ not complied with its own management directives by proposing to amend the ACEC,²¹⁷ and failed to comply with various federal laws, including the Federal Land Policy and Management Act (“FLPMA”),²¹⁸ NHPA, and American Indian Religious Freedom Act,²¹⁹ and with various Executive Orders.²²⁰

Initially, we note that these issues will not be decided by the Commission, but rather in BLM’s RMPA proceeding. They are therefore misdirected in this proceeding. In any event, we submit that the Kaibab Tribe’s allegations are incorrect.

1. Trust Responsibility Generally

Because the lands subject to the RMPA do not include any lands, minerals, or other resources held in trust by the federal government for the Kaibab Tribe, the BLM satisfies its federal trust responsibility by compliance with general regulations and statutes.²²¹ BLM’s compliance with applicable laws is ongoing in its analysis of the RMPA. The RMPA *proposal* cannot violate FLPMA. Under FLPMA, the BLM may make, amend and alter its land use decisions at any time. This has been proposed and the BLM is undertaking the regulatory process to consider this amendment. The Kaibab Tribe is a cooperating agency in the RMPA amendment and is extensively involved in

²¹⁵ Kaibab Tribe Comments at 9-21.

²¹⁶ *Id.* at 14-15.

²¹⁷ *Id.* at 9-13.

²¹⁸ 43 U.S.C. §§ 1701 et seq. (2012).

²¹⁹ Kaibab Tribe Comments at 15-18.

²²⁰ *Id.* at 18-21. E.O. 13007, 61 Fed. Reg. 26,771 (May 29, 1996); E.O. 13175, 65 Fed. Reg. 67,249 (Nov. 6, 2000); E.O. 12898, 59 Fed. Reg. 7629 (Feb. 16, 1994).

²²¹ *See, e.g., Skokomish Indian Tribe v. FERC*, 121 F.3d 1303, 1308-09 (9th Cir. 1997); *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006); *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 574 (9th Cir. 1998).

that process. Consideration of the proposed amendment is not a violation of FLPMA, rather it is *required* by FLPMA. Further, because BLM has made no decision on the RMPA proposal, the content of that decision is not known, and it is premature and speculative for the Kaibab Tribe to allege, without any facts, that a future RMPA decision violates FLPMA.

The Kaibab Tribe's comments regarding the RMPA further fail to acknowledge the utility corridor designated prior to the creation of the Kanab Creek ACEC, which is reflected in the fact that the utility corridor through the ACEC retains a Class IV Visual Resource Management classification that allows for major visual changes, such as those from a pipeline or transmission line. The amendment proposed to the RMP is to clarify management prescriptions in the area where the utility corridor passes through the ACEC, and also because the Project is proposed to pass slightly north of this utility corridor for a short distance in order to *minimize* physical and visual impacts due to specific topography of the utility corridor where it crosses Kanab Creek. To stay within the utility corridor at the Kanab Creek crossing would require extensive physical disturbance of the canyon walls and likely a permanent access road along the creek from the existing unpaved road down to the crossing. The RMPA would allow for construction at a point where the topography is less steep and is not anticipated to require permanent access. It is therefore *more* protective of the values of the Kanab Creek ACEC than the existing utility corridor within the ACEC.

2. BLM Consultation with the Kaibab Tribe Has Been and Continues to Be More than Sufficient.

The Kaibab Tribe charges that BLM is ignoring its trust responsibility because it is processing the RMPA in defiance of the Kaibab Tribe's wishes.²²² To the contrary, preliminary plans for the Project were shared with the Kaibab Tribe as far back as 2001, and the most current plans shared by UBWR twelve years ago in 2007, prior to any formal submissions to the Commission or BLM. The Kaibab Tribe has been an intervenor in the licensing docket and received every public document filed with the Commission since January 2008. The Kaibab Tribe was formally invited by the Commission to participate in the LPP licensing process in April 2008. Formal government-to-government consultations between the Commission and the Kaibab Tribe began on May 2008. BLM requested cooperating agency status in the FERC NEPA process in June 2008. FERC and the Kaibab Tribe executed a memorandum of understanding for the Kaibab Tribe to become a cooperating agency for the NEPA process in January 2009.²²³

Between 2009 and 2018, the Commission, BLM, and UBWR have worked with the Kaibab Tribe to incorporate appropriate input from the Kaibab Tribe in all study plans and reports. The reports demonstrate the extensive influence of the Kaibab Tribe on the studies and evaluation of the Project. The Kaibab Tribe also participated extensively in regular interagency cultural resources working group meetings beginning in 2009. In August 2009 the Kaibab Tribe, BLM, and other federal agencies began discussions on the conduct of NHPA Section 106 consultation. Since 2014, BLM has held monthly

²²² Kaibab Tribe Comments at 9-21.

²²³ Memorandum of Understanding Between the Federal Energy Regulatory Commission and the Kaibab Tribe Band of Paiute Indians of Arizona, Project No. 12966-001 (filed Jan. 7, 2008).

coordination calls or meetings with the Kaibab Tribe. Specifically as to the RMPA, the notice of intent to review the RMPA under NEPA was published on June 22, 2018. Two meetings were held on the reservation during RMPA scoping. The Kaibab Tribe is a cooperating agency in this effort, even though it does not involve tribal lands. In sum, consultation by the BLM has been robust for every aspect of the Project.

3. Legislation and Executive Orders

The Kaibab Tribe's contention that BLM is failing to comply with various federal statutes and executive orders in BLM's RMPA process is meritless. As the Kaibab Tribe is well aware—because it is a cooperating agency and active participant in the RMPA NEPA process—BLM is still developing alternatives for the NEPA document. Likewise, the referenced executive orders require a process to consult with tribes on a government-to-government basis and, where practicable and not inconsistent with applicable law, to accommodate access to and usage of sacred sites on federal lands. That process is ongoing. To allege that a potential future BLM decision does not comply with federal laws to consult with the Kaibab Tribe while that consultation and the review process is ongoing is premature and speculative.

4. The Kaibab Tribe Misunderstands the Reasons for the RMPA.

The Kaibab Tribe asserts that BLM is wrong to conclude that the RMPA is needed to resolve inconsistencies in the current RMP regarding the Kanab Creek ACEC and the designated utility corridor.²²⁴ As an initial matter, the Kaibab Tribe's position is based on a fundamental misunderstanding of the designated utility corridor and its history, and particularly how it relates to the Kanab Creek ACEC. The essence of the

²²⁴ Kaibab Tribe Comments at 9-13.

Kaibab Tribe's position is that the ACEC was created before the utility corridor was designated, and therefore the ACEC and its management prescriptions apply to and take precedence over the utility corridor, effectively prohibiting use of the corridor for utilities like the Project.²²⁵

To the contrary, BLM's management plans for the area have continuously included a designated utility corridor along its current alignment, which brackets the Navajo-McCullough transmission line, since the original management framework plan ("MFP") was adopted in 1979. More specifically, as noted in the 1992 Arizona Strip District RMP, BLM had designated a 2,000-foot wide utility corridor in the original MFP that followed the route of the Navajo-McCullough transmission line,²²⁶ which was built in the early 1970s. The 1992 RMP, which replaced the original MFP, retained the existing corridor and widened it to one mile wide through most of the eastern portion of the planning area, including the area in which the Kanab Creek ACEC was later created.²²⁷

²²⁵ See *id.*, Att. A at 3-5 (ACEC created a year before the corridor was designated, proposed RMP amendment would result in "removing all development restrictions within the affected portions of the Kanab Creek ACEC"); *id.*, Att. A at 10 ("The BLM designated the Kanab Creek ACEC in 2008, and one year later the Energy Corridor ROD amended the AZ Strip FO RMP to incorporate the designation of the Corridor 113-116 without even mentioning, let alone assessing potential impacts to, the Kanab Creek ACEC."); *id.* at 12 ("[R]ather than amend the RMP, the BLM should interpret the Arizona Strip RMP's management directives in a manner that maintains the protections in place for the ACEC.").

²²⁶ See Proposed Arizona Strip District Resource Management Plan and Final Environmental Impact Statement at III-2 (BLM 1990) ("1990 Proposed RMP") ("Existing management framework plans (MFPs) designated one R/W corridor traversing the district east to west along the present route of the Navajo-McCullough 500 kV powerline. The corridor is . . . 2,000 feet wide on the Vermillion Resource Area. The corridor provides a single route capable of accommodating multiple transmission facilities, minimizing adverse environmental impacts and reducing the need for many separate R/Ws. It also provides a specific location and planning base for companies considering R/W projects.").

²²⁷ See *id.* at IV-2 ("The corridor in the Vermillion Resource Area would be increased from 2,000 feet to one mile, except in Ferry Swale where it would be 1/2-mile wide."). The 1990 Proposed RMP, including the corridor designations, was approved by BLM in a January 1992 ROD. See Record of Decision for the Approval of the Arizona Strip District Resource Management Plan (BLM 1992) at 1 (approving corridor provisions of proposed RMP).

When BLM revised the RMP in early 2008, that revision included creation of the Kanab Creek ACEC, but it also specifically preserved the existing designated corridor, including in the area where the newly created Kanab Creek ACEC bracketed the pre-existing corridor.²²⁸ Indeed, the approved 2008 RMP specified a Class IV VRM classification for the entire utility corridor, including where it crossed the Kanab Creek ACEC, which was otherwise designated as VRM Class II.²²⁹ That VRM classification is a clear indication that under the 2008 RMP, the new ACEC was subject to the management prescriptions of the existing utility corridor and not the other way around.

This was the existing management situation in 2009 when the ROD for the Section 368 Energy Corridor EIS was signed, which further reinforced and enhanced the existing designated corridor. Nothing in that ROD or the resulting RMP amendments modified the corridor in a way that somehow made it subject to, or inferior to, the Kanab Creek ACEC. In addition, under the 2008 RMP there are no limitations on the type of linear utilities that can be approved in the designated corridor, and the subsequent enhancement of that corridor as also being a Section 368 corridor certainly did nothing to impose such a limitation.

In sum, contrary to the Tribe's position, the utility corridor did not post-date the creation of the Kanab Creek ACEC, nor did the ACEC's creation implicitly "trump" the pre-existing corridor by making it subject to ACEC management prescriptions, with the

²²⁸ 2008 RMP at 2-123 ("The existing utility corridor beginning at the Glen Canyon Dam and ending at the Arizona/Nevada border as shown on the Western Utility Group priority corridor map would be designated one mile wide."); *see also id.* at 2-124 ("The use of designated ROW corridors/sites and existing ROW use areas would be encouraged to the extent possible but, depending on site specific needs, actual locations may vary. Such variances should be considered consistent with other plan provisions, provided such locations and uses are consistent with the selection criteria, and goals and objectives for ROW corridors and ROW use areas.").

²²⁹ *See id.* at Map 2.45.

result of making BLM's long-time designated corridor unusable by virtually any linear utility facility. An unusable utility corridor is the natural outgrowth of the Kaibab Tribe's position.²³⁰ Instead, under the current RMP the designated corridor, including in the area of the ACEC, remains the preferred location for BLM to approve such facilities, subject to BLM's compliance with NEPA, NHPA, ESA, and other applicable laws, and in consultation with the Kaibab Tribe as appropriate, as part of its normal consideration of a proposed ROW application. It should be no different for the Project.

Despite this conclusion, the UBWR is in favor of the BLM making a clarifying amendment to the RMP. Clarification is appropriate in light of the likelihood that the Kaibab Tribe will continue to argue for a different interpretation. An amendment would remove all uncertainty for the LPP, other potential utility projects in the corridor, and also for the BLM as the land manager and authorizing agency.

L. The Kaibab Tribe ROW Conditions for Reservation Lands

The Kaibab Tribe asserts that it has authority under BIA regulations to impose mandatory conditions on a BIA ROW within the boundary of the Kaibab Tribe Reservation, and to determine the ROW duration and whether it is renewable.²³¹ It further states that ROWs on tribal lands approved by BIA and an Indian tribe are subject to tribal law and applicable federal laws, but not state law.²³²

²³⁰ See Kaibab Tribe Comments, Att. A at 6-7 (making clear that under the Tribe's interpretation, no utility crossing of the ACEC in the designated corridor would be permissible by the BLM: "It will be impossible to mitigate adverse effects on cultural resources with the Kanab Creek ACEC that are essential to the practice of Paiute religion—such as, among others, the ceremonial sites, the funeral songs emanating from the canyon, and the landscape itself Because of its cultural centrality, no portion of the Kanab River Canyon can be crossed by the LPP without resulting in severe and immitigable cultural damages to current and future generations of Paiute people.") (citation omitted).

²³¹ *Id.* at 21-22 (citing 25 C.F.R. §§ 169.107(a), 169.125(a), 169.201(b), 169.202, 169.203).

²³² *Id.* at 22 (citing 25 C.F.R. § 169.90).

Based on this asserted authority, the Kaibab Tribe submitted as mandatory conditions for any BIA ROW within the Kaibab Tribe reservation various conditions set forth in BIA’s regulations²³³ and its own mandatory conditions²³⁴ based on the recommendations of the Southern Paiute Advisory Committee (“SPAC”) contained in SPAC’s Avoidance and Mitigation Report (“SPAC Report”).²³⁵ These include measures for ground disturbing actions generally²³⁶ and pertaining to particular areas. The Kaibab Tribe also asserts rights to amend, supplement, or impose additional ROW conditions in the future.²³⁷

Although BIA’s regulations provide the Kaibab Tribe with authority to negotiate ROW conditions and require compliance with tribal laws, the Existing Highway Alternative, as shown above, is not practicable and has impediments under existing federal and state law. The proposed mandatory ROW conditions prove this point, as they would make implementation of that alternative extremely risky, uncertain, and likely expensive for ratepayers. The conditions undermine the Kaibab Tribe’s insistence on selection of the Existing Highway Alternative.

M. The Kaibab Tribe Recommended Conditions for BLM Lands Outside the Kaibab Tribe Reservation.

The Kaibab Tribe also submitted recommended avoidance and mitigation conditions for a ROW for the Project to occupy BLM lands outside the boundaries of the

²³³ *Id.* at 23-24 (citing 25 C.F.R. § 125(c)).

²³⁴ *Id.* at 24-26.

²³⁵ Southern Paiute Advisory Committee, Lake Powell Pipeline EIS Avoidance and Mitigation Report (Nov. 12, 2012) (“SPAC Report”). The SPAC Report was filed in the non-public docket for this proceeding on November 26, 2012, December 11, 2017, and again on November 19, 2018—attached to the Kaibab Tribe Comments.

²³⁶ *See* Kaibab Tribe Comments at 24-26.

²³⁷ *Id.* at 22.

Kaibab Tribe reservation and within Southern Paiute aboriginal territory²³⁸ based on the SPAC Report. These measures are essentially the same as many of the ROW conditions the Kaibab Tribe would impose on its reservation. The measures address ground disturbing actions generally and require avoidance of particular BLM lands, such as the Kanab Creek Canyon within the ACEC and beyond. These measures are also unacceptable for the same reasons stated above.

V. CONCLUSION

For all of the above reasons, the Commission and the other federal permitting agencies should reject the unfounded comments challenging the completeness of the record in this proceeding, proceed to complete the EIS, choose the proposed South Variant Alternative or South Alternative as the preferred alternative in the EIS, and issue the Commission license and other requested federal authorizations as proposed.

Respectfully submitted,

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Dated: January 18, 2019

²³⁸ *Id.* at 30-32.

ATTACHMENTS

- Attachment A Arizona Department of Environmental Quality, Clean Water Act Section 401 Water Quality Certification (July 8, 2016)
- Attachment B Exhibit E Revisions (January 17, 2019)
- Attachment C Water Needs Assessment: Water Use and Conservation Update, Comment Response (January 17, 2019)
- Attachment D Washington County Water Conservancy District, Water Conservation Programs: A Comparative Evaluation (Maddaus Water Management, Inc., December 17, 2018)
- Attachment E Evaluation of the Potential Conversion of Irrigation Water to Municipal Use in the Virgin River Basin, Washington County, Utah, Jerry D. Olds, P.E. (December 2018)
- Attachment F UBWR Revised Responses to Comments of the U.S. Bureau of Land Management and National Park Service on the Lake Powell Pipeline Final License Application Documents (January 17, 2019)
- Attachment G Economic Analysis (Applied Analysis, January 16, 2019)

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 18th day of January, 2019.

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