

The health of our waters is the principle measure of how we live on the land. — Luna Leopold

Flaming Gorge Pipeline: Denver scoping session

April 21, 2009



I attended the Flaming Gorge Pipeline ([Regional Watershed Supply Project](#)) scoping session in Denver tonight. Rena Brand from the U.S. Army Corps of Engineers introduced the project to the group. She explained that their involvement stemmed from their regulatory authority under the Clean Water Act. Aaron Million and the Million Conservation Resources Group (MCRG) have applied for a permit from the Corps and the scoping sessions are the first pass at getting input to design the environmental impact statement for the project.

Ms. Brand stressed that the Corps was, “neither a proponent or opponent of the project.” They are charged with doing a thorough assessment of the project and that a project of this magnitude required their most stringent review — hence the EIS. She says that they hope to have the draft EIS ready by 2012 with a record of decision in 2014. However that is a very preliminary timeline and much could change, she said.

She listed some of the entities that will be involved, including, the Bureau of Land Management, Reclamation, USFS, EPA, USFWS, Colorado, Wyoming, Utah, Moffat County (Colorado), Sweetwater County (Wyoming), and the National Park Service. [AECOM](#) from Fort Collins won the competition for the RFP for the science and engineering for the EIS which will be funded by MCRG.

Our old friend the Colorado River Compact was discussed by Jim Paulson from AECOM. He detailed the division of Colorado River flows between the upper basin and lower basin (7.5 million acre feet each). He also talked about the Upper Colorado River Basin Compact which divvies up the 7.5 million acre feet to the upper basin states by percentage. The Upper Colorado River Compact also allows a state to move its water from another state if need be.

Aaron Million spoke about the project. There was really nothing new from him for Coyote Gulch readers but he did say, after detailing the findings of Reclamation on available water, that, “If the supplies and surplus [are] not there this project will not be built.” Later in the session he was asked about cost projections. He stated that so far they are looking at \$2.2 to \$3.0 billion.

Ms. Brand then invited attendees to comment. I was pretty sure that the crowd would be friendly to the project since Million is targeting the Front Range. I was wrong.

Mark Squillace — Professor of Law and Director, Natural Resources Law Center at the University of Colorado — said that it may be too early for an EIS. He asked, “Does the group have water rights?” He made the point that moving water out of Wyoming requires the approval of the Wyoming legislature. (He was corrected later on by a Denver University law professor who said that the approval is required to move water belonging to the state of Wyoming and that Million would be moving Colorado water.)

Professor Squillace also brought up the anti-speculation doctrine under prior appropriation. He cited the High Plains decision by Division 2 Water Court judge Dennis Maes in 2004 which was upheld by the State Supreme Court in 2006. The test a transfer must pass, according to one of my sources, “is to have an ‘end user’ who ‘can and will’ beneficially use the water. Those are the key legal terms. In the High Plains case, the list of end users was so vague and broad that the judge (and justices) were unable to make either of those decisions.”

From the [paper](#), *The Anti-Speculation Doctrine in Water Law: Ghost-busting, Trust-busting, or Ensuring Reasonable, Beneficial Use?*, written by Sandra Zellmer, University of Nebraska College of Law:

The various anti-speculation provisions are intended to keep the reviled Robber Barons of yesteryear in their place and prevent them from coming back to haunt us as modern-day Water Barons. This talk considers whether restrictions against speculation in water serve a continuing public purpose or, conversely, are an archaic relic of times past. Is there a current need to prevent speculation and monopolistic behavior (trust-busting), or are we merely chasing ghostly apparitions of fictitious Water Barons while discouraging socially beneficial water transfers?

Many scholars of law and economics argue that restraints on water transfers should be removed to allow water marketing to take its place among an array of collaborative, conservation-oriented strategies for water management. Yet because market forces tend to focus only on short planning cycles and fail to prevent the imposition of harmful externalities on non-parties, market transactions have significant potential to compromise the needs of current and future generations of water users and to undermine governmental authority over essential water resources. To the extent that society envisions water marketing as a tool to reallocate water supplies, governments must continue to play a significant role in overseeing water transfers - particularly speculative transactions that fail to put water to reasonable, beneficial uses - to ensure that the interests of affected third parties are protected and that water remains available for the public good.

Million clearly has not identified his customers. Ms. Brand assured Frank Jaeger (Parker Water and Sanitation) later on in the session that the Corps will consider this in the EIS.

Professor Squillace’s third point was the possibility of litigation by the lower basin states if the upper basin states fail to deliver the required 75 million acre feet of water at Lee Ferry over

any 10 year period — as required by the compact. He was reminded later on — again by the DU professor — that the upper basin states have over-delivered every year of the compact.

Bruce Lytle, President of Lytle Water Solutions, LLC, told the Corps that the Flaming Gorge Pipeline is, “Not the right project,” since it is being done, “by a private water speculator.” The Corps needs to identify the, “purpose and need,” for the project and it, “should be based on contractual demand,” he said. He added that, “We don’t know how much water is going where.”

Parker’s Frank Jaeger added, “I have a real concern when it comes to speculation, particularly the costs to end users.” Later on he told me that a, “project for the public good should be controlled by a public entity.”

Afterward I talked briefly with Jim Eddy, one of Million’s partners. Eddy dismissed the idea of collaborating with public entities saying that the project would languish while trying to get different groups to agree. He feels that the only way to get a pipeline built is by a small private group with deep pockets.

We spoke briefly about powering the pipeline. The design right now calls for the firm power to be supplied by natural gas. The corridor they plan to build in has several major natural gas pipelines. He expects to look seriously at wind power and less so at solar. Their engineers are also optimizing the route for the generation of hydroelectric. Eddy feels that in some areas they may generate extra power over the pumping needs.

Make sure that you get your comments to the Corps of Engineers (<https://www.nwo.usace.army.mil/html/od-tl/eis-info.htm>). Comments at this stage of the project are used to set the scope of the EIS. As we’ve seen with the Northern Integrated Supply Project it’s better for the Corps to know up front what the concerns are. Readers may recall that the Corps is going to release a supplemental EIS for NISP sometime next year after receiving scathing comments from the EPA and others on the original EIS.