Ute Indian Tribe of the Uintah and Ouray Reservation

Comments on the U.S. Department of Interior's
Request for Comments on the Draft Supplemental Environmental Impact Statement
for Near-Term Colorado River Operations

November 21, 2023

The Ute Tribal Business Committee on behalf of the Ute Indian Tribe of the Uintah & Ouray Reservation (Ute Indian Tribe or Tribe or Reservation) submits these comments in response to the Department of Interior's (Department) request for comments on the Draft Supplemental Environmental Impact Statement (Draft SEIS or SEIS) for the Near-Term Colorado River Operations. According to the U.S. Bureau of Reclamation (Reclamation), the purpose of the SEIS is to revise the 2007 Interim Guidelines for the operation of Glen Canyon and Hoover Dams to address historic drought, historically low reservoirs, and low runoff conditions in the Colorado River Basin, with a potential outcome of critically low elevations at Lake Powell and Lake Mead, impacting operations for the remainder of the interim period (prior to January 1, 2027).

Reclamation concludes that "[t]he Secretary of the Interior (Secretary) is vested with the responsibility to manage the mainstream waters of the Colorado River and operate federal facilities pursuant to federal law. . . . carried out consistent with a body of documents that are commonly referred to as the 'Law of the River.'" Draft SEIS, p. 1-1. Notably, this conclusion excludes tributary water users, such as the Ute Indian Tribe, with superior federal Indian reserved water rights (Indian water rights) on tributaries in the Upper Colorado River Basin (Upper Basin).

A continued, singular federal focus to address the serious water supply problems by only focusing on the mainstream Lower Basin water users is a failure of leadership at the highest levels of the Federal Government. Segregating the Federal Government's responsibilities into a singular focus on the Lower Basin states' water use under the Law of the River from Reclamation's legal obligations to tribal tributary water users in the Upper Basin under Indian reserved water rights law at this critical time in history continues the Federal Government's failures of the past that result in an unequal system and unequal treatment—such unequal treatment of our Tribe's Indian water rights in current policies and actions that are not only unjust, it is illegal.

We will briefly describe who we are as an Indian Tribe with a Reservation homeland. Then, we identify problems with the Federal Government's historical and continued approach to its management responsibilities in the Colorado River Basin that excludes Indian tribes in the Upper Basin on tributary waters. Finally, we discuss the need for clear outcomes to alter the course of history related to the Federal Government's management of the Colorado River to the detriment of our Tribe.

Introduction

The Ute Indian Tribe is a federally recognized Indian tribe composed of three Bands, Uintah, Uncompahgre, and Whiteriver Bands. Our present-day Reservation, originally two separate reservations established in 1861 and 1880 by Treaties, encompasses over 4,000,000 acres in the Uinta Basin at the foot of the Uinta Mountains in northeastern Utah. Nevertheless, our aboriginal lands where we once ranged went from the Wasatch Front all the way to the Colorado Front Range, from present-day Salt Lake City to Denver.[1] Our Treaties and agreements with the United States required significant cessions of our ancestral lands, but they came with a promise—we would have water to establish a self-sufficient and self-sustaining, permanent homeland. Utah is the third most arid State in the country with winter snowmelt the only viable source of water, when coupled with the ability to store it. There is stiff competition with non-Indians over the water supply that flows through, under, and borders our Reservation.

At times during the nineteenth century, we were recorded as being in a state of starvation, destitute and dying of want. In 1906, the Commissioner of Indian Affairs described the conditions on our Reservation, stating that "[t]he future of the [Ute] Indians depends upon a successful irrigation scheme, for without water their lands are valueless, and starvation or extermination will be their fate."[2] Our Tribe is the beneficial owner of the water rights appurtenant to our Reservation lands.[3] Our Indian water rights, present perfected federal rights, have been quantified, both by federal court decrees and contractually, and total about 550,000 acre-feet (acft) per year. They are a trust asset held by the United States as our trustee, which are sourced from the tributaries of the Upper Colorado River. Our position and expectation are that administrative agencies and officials within the Department are obligated to carry out administrative trust functions lawfully, without unreasonable delay, and reasonably for the benefit of our Tribe.

Our goal in submitting these comments is to continue to present our Tribe's position on our most valuable natural resource—water. First, we need the Federal Government to change the course of the United States' dishonorable historical and unequal treatment of Indian tribes relying on the water supply from the Colorado River Basin, facing stiff competition from state-based water users for a diminishing life-supporting natural resource. Second, our Indian Trust Assets must be protected. The Federal Government's silence on the Upper Basin Indian Tribes in this current SEIS is deafening.

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[1] CHARLES WILKINSON, FIRE ON THE PLATEAU, CONFLICT AND ENDURANCE N THE AMERICAN SOUTHWEST (1999).
[2] Rept. of the Comm. of Ind. Aff., 1906.
[3] *Winters v. United States*, 207 U.S. 564 (1908).

Our comments are directed at some of the critical issues identified and relevant to our Tribe after reviewing the Draft SEIS and do not directly address the Alternative Actions presented by Reclamation nor the variables included in its analysis of the affected environment, environmental consequences, and potential impacts on the Colorado River system, for the reasons explained below.

Insufficiency of Reclamation's Draft SEIS: Problems

Scope of Analysis

The scope of Reclamation's Draft SEIS is much too narrow. Our Tribe is completely excluded from any evaluation, analysis, or consideration on the critical issues before Colorado River water users today. There is *no* impact analysis on our Tribe's Indian Trust Assets. The study area did not include our Reservation, people, or environment, nor did it include the counties that have a footprint within our Reservation. We understand that Reclamation is supplementing the 2007 Interim Guidelines for the operation of Glen Canyon and Hoover Dams and, with that focus, maintained the same 2007 study area, which begins at Lake Powell. However, numerous tribes provided comments and input to Reclamation about the problem with the agency's scope of study for the 2007 Interim Guidelines. The limited current scope for the SEIS is unresponsive to prior tribal input.

This historical approach of excluding tribes must change. This year marks the 100th anniversary of the 1922 Colorado River Compact, when the seven southwestern states of the Colorado River System convened to provide for the "equitable division" of the Colorado River. We were not invited—nor wanted—at these critical meetings when the Colorado River water supply was divvied up between the states. Herbert Hoover, Secretary of Commerce and Chairman of the 1922 Compact Commission, coined the term "Wild Indian Article" for what became the sole reference to tribes, at Article VII of the 1922 Compact.[4] It was one short sentence: "Nothing in this compact shall be construed as affecting the obligation of the United States of America to Indian tribes." Some Commissioners questioned its inclusion at all, not wanting to draw attention to the Treaty rights of Indians. The decisions made in 1922 still form the backbone of what is known as the "Law of the Colorado River."[5] We were also not invited to the table of the Upper Basin states when the negotiations of the 1948 Upper Colorado River Basin Compact occurred to provide for the equitable division and apportionment of the use of waters of the Colorado River System.[6]

For the reasons explained below, our Indian water rights are playing a critical role in the Upper Basin states' delivery of water to the Lower Basin states, as required under the 1922 and 1948 Colorado River Compacts. Every effort by the Federal Government now and into the future related to the Colorado River Basin should include consideration, evaluation, analysis, and an explanation of our Tribe's Indian water rights and the effect of the Federal Government's decisions and policies on our development and use of these property rights.

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[4] http://www.riversimulator.org/Resources/LawOfTheRiver/MinutesColoradoRiverCompact.pdf.
[5] https://www.usbr.gov/lc/region/pao/lawofrvr.html.
[6] Act of April 6, 1949, P.L. 37, 63 Stat. 31, Consent of the Congress to the Compact, ratified by the states.

Application of "Settled" Tribal Water Rights Law

The Draft SEIS provides a conclusory statement about Indian reserved water rights: "Tribal water rights are established by settled law." Sec. 2.10, p. 2-35; Sec. 318, p. 3-331, 333. The Draft SEIS acknowledges the Indian water rights of tribes in the Lower Basin under *Arizona v. California* (1963) and recent Congressional settlements of a couple of tribes. But the Department's conclusion regarding any obligation to evaluate the adverse impact of its decisions on tribal water rights remains the same—these rights are established by law.

However, what does this conclusory statement mean for the current decisions, policymaking, and processes facing tribes and other governmental entities and their water users in the Colorado River Basin? The Federal Government declined to describe and explain the "settled law" related to federal, Indian reserved water rights in the context of the current SEIS activities. The Indian water rights law is separate from and unique to the "Law of the River," and is not part of the System water used by the states.

The follow-up explanation provided by Reclamation states that "annual water deliveries may change as a result of shortages." It is axiomatic that there is ambiguity and confusion among tribes, the Department, and the states regarding what the "settled law" means (as evidenced, e.g., in numerous extended litigation engaged in by the Department with particular tribes). The Draft SEIS has an insufficient articulation of Indian water rights, the rights of tribes, and the role of the Federal Government as trustee of these tribal trust assets. Tribes deserve, are legally entitled to, and must receive a more detailed articulation of how the Federal Government is managing the River to their benefit and whether the Federal Government's actions will adversely affect these rights, than such a limited statement from the Federal Government provides related to its obligations and responsibilities in the Colorado River Basin to tribes.

The Department is obligated to address the issues in the Colorado River under two unique bodies of law: (1) Federal Indian reserved water rights law, "Indian Water Rights" Law; and (2) the "Law of the River." We cannot sort out the complexity of these legal requirements in these comments. But, simply stated:

(1) Indian Water Rights Law.[7] Indian water rights are federal rights under the *Winters* Doctrine, reserved by tribes in Treaties and agreements with the United States when Indian reservations were created and tribes ceded millions of acres to the United States. Most tribes have the senior priority date for the use of the Colorado River based on the establishment of their reservations or time immemorial that must be satisfied first before water is apportioned and used by the states; these federal tribal rights preempt state law and tribes are not subject to state law; the quantity is the amount of water necessary to fulfill the purpose of the reservation, a permanent homeland and, frequently, the development of an agricultural economy. (Indian Water Settlements and agreements with the states and Federal Government may result in the voluntary modification of these principles of the settled law).

[7] *See Winters v. United States*, 207 U.S. 564 (1908), *aff'd by Arizona v California*, 373 U.S. 546 (1963), and *Arizona v. Navajo Nation*, No. 21-1484, 2023 WL 4110231 (2023); *see also* Colorado River Basin Ten Tribes Partnership Tribal Water Study, Ch. 2 (2018) [hereinafter "Tribal Water Study"].

(2) The Law of the River. In explaining its authority, Reclamation asserts that "[t]he Secretary is vested with the responsibility to manage the mainstream waters of the Colorado River Basins pursuant to federal law. This responsibility is carried out consistent with a body of documents commonly referred to as the Law of the River." Draft SEIS, App. A.2, Table A-1 provides a selected list of documents included in the Law of the River.

Our Tribe's Treaty-based Indian water rights for our Reservation have been recognized by the United States and the State of Utah.[8] These are natural flow water rights under the *Winters* Doctrine. Our Indian water rights are not subject to the legal authority and requirements under the "Law of the Colorado River." As explained in the Draft SEIS, the Law of the River governs the water deliveries to the seven Basin States and Mexico receiving water from the Colorado River. *Our federal Indian water rights are not part of the "System" water* referred to by the Federal Government and the states. The Department needs to explicitly recognize this characteristic of Indian water rights and address it in their analyses.

Under what is known as the "Rule of Law," a legal principle of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition, is sometimes called "the supremacy of law." It is a "rule" because in doubtful or unforeseen cases it is a guide or norm for decisions that should be made by the application of known principles or law *without the intervention of discretion in their application*.[9] We have a Rule of Law consisting of both the Law of Indian reserved water rights and the Law of the River. The Secretary is vested with the responsibility to enforce Indian Water Rights Law. In the circumstances facing us today, the Department has no discretion to ignore "settled Tribal water law" in its deliberative process and decisions for the Colorado River, even though it may have a preference of focusing only on the Law of the River to study and resolve the serious issues in the Basin.

Unequal and Unfair Treatment of Indian Water

We focus on two critical issues here: (1) the failure of the Federal Government to account for our Tribe's senior, Indian reserved water rights in the evaluation and analysis activities for the Draft SEIS; and (2) the failure to compensate tribes, such as ours, for conserved and unused Indian water that flows downstream and are relied on to fill Lake Powell.

One of the greatest injustices occurring today is the Federal Government's decision not to account for our senior, present perfected rights in the Upper Basin when modeling and analyzing the water supply and use of the River to determine potential shortages for the state water users.[10]

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[8] E.g., 2001 Comments on Upper Basin Replacement Project, DOI Comment response: "the proposed project would not affect any existing water rights including the Tribe's 1861 reserved water rights." 4-81; 1923 decrees; 1965 Deferral Agreement.

[9] Black's Law Dictionary.

[10] We were informed by Reclamation that it did not use our Tribe's study and conclusions of its current and future water use described in the 2018 Tribal Water Study for its CRSS modeling but, instead, adopted the preferred quantification of the State of Utah, the proposed "Revised 1990 Water Compact." This preferred quantification attempts to cut 7% across the board from our Indian water rights quantification the parties reached agreement on in 1965; it includes a 7% cut in our 1923 federally-adjudicated Indian water rights; and, further, this Revised 1990 Water

Article VIII(a) of the 1922 Colorado River Compact provides that the apportioned water to the Upper Basin and to the Lower Basin "*shall include all water necessary for the supply of any rights which may exist now*." This applies, of course, to Indian water rights under the *Winters* Doctrine that are appurtenant to reservations established before 1922. In *Arizona v. California*, the U.S. Supreme Court relied on the conclusion that "consumptive uses of mainstream water by the United States on federal establishments [i.e., reservations] are chargeable to the state within which the use occurs," and further held that the United States' uses in each state are limited by the apportionment of the state in which the uses occur.[11] It is settled law that all current water negotiations proceed with the assumption that *any quantified senior tribal water rights will be deducted from the amount allocated to that state under the River*.

The SEIS should identify the unused tribal reserved water and provide an accounting annually of the quantity of water used by non-Indians in an effort to compensate the tribes for the waters used by others. This is stated with the underlying assumption that tribes have the authority to develop and use all of their reserved water rights, so any tribal participation in a conservation program with compensation for the use of tribal reserved water rights should be voluntary and with the consent of the individual tribes. Tribal governments within the Colorado River Basin with a reservation established with the intent of creating permanent homelands have a right to use their trust assets, Indian water rights, for any purpose that benefits and provides the best return to the tribes' goal of self-sufficiency and wellbeing for the livelihood of its members.[12]

We have presented these fundamental principles under the Rule of Law to the Federal Government in our numerous, prior comments on the use of the tributary waters in the Upper Basin, including concerns with the expansive use of the water within our Reservation by the Central Utah Project that includes water transfers out of our Uinta Basin to the Wasatch Front. We refer the Secretary and Reclamation to those filings for further discussion of this issue. We have received no response and explanation from the Department and Reclamation to our position and concerns with the current Departmental process related to the Upper Colorado River tribal issues.

Failure to account for our senior Indian water rights must not be further delayed, it must be done now, today—if not, it continues and enhances the Federal Government's inequitable system and management program that is facing a calamity of injustice when tribal water rights have not been protected and considered in determining the states' obligations with regard to apportioning shortages on the River.

Additionally, this injustice is magnified by the current conservation programs that pay mostly non-Indian, state water users to fallow their lands to conserve water for the Colorado River System. In the current situation, Reclamation considers the unused tribal water rights as system water available to junior water users without compensating the tribes. And the Federal Government is spending millions of dollars to support state conservation programs, which impose severe limitations on tribes' abilities to participate by prohibiting tribal reliance on currently

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Compact has not been ratified by our Tribal members, as required under federal law in 1992. This "proposed" compact does not exist and cannot be enforced unless the Tribe's members ratify it.

[11] Simon H. Rifkind, Special Master Report 300-301 (U.S. Supreme Court, 1960).

[12] *Arizona*, 373 U.S. at 600 (1963).

unused, conserved tribal water and unresolved Indian water rights.[13] Our Tribal water rights continue to flow downstream, assisting the Federal Government and the states in keeping Lake Powell at required elevation levels, without any financial compensation for the use of our water rights. In fact, impediments abound. Resolution of tribal water rights currently rely on Congressionally-approved Indian water rights settlements.[14] The Department continues to vigorously oppose tribal efforts to seek relief through litigation, using the full force of the Department of Justice against tribes.[15]

The Process is Broken—Consultation is Not Enough

The persistence of our Federal trustee to prioritize the protection and development of state water rights illustrates the importance of establishing tribal representation on the Upper Colorado River Commission (Commission). We have a longstanding request to secure representation on the Commission, and this effort has the support of the Colorado River Basin Tribes Partnership.[16] The Secretary has the authority, consistent with her trust responsibility, to allow the Tribe to participate on the Commission in an *ad hoc* capacity, or as the Federal Commissioner's alternate, in order to give voice to tribal interests and help protect the Indian water rights in the Upper Colorado River Basin. This would also show recognition of our Tribe as a sovereign tribal government with vested Indian water rights, and is consistent with meaningful participation of our Tribe, as an equal sovereign to the states, in the discussions and decisions that affect the management and use of water in the Colorado River Basin. Consultation is not enough.

Hydrology Concerns

Based on Reservoir operational conditions and using 2002-2005 hydrology, the Lake Powell elevation was below 3490 feet, the minimum power pool elevation from the end of April 2023 to the end of the study period, with the end of September 2024 having the lowest vertical deficit of 65 feet below minimum power pool at about the end of April 2024. Even though recent analyses have shown some improvement, this general scenario is expected to cause exceptionally serious extended electrical outage causing human suffering and economic hardship to the region's population and businesses, especially in areas like Indian reservations that are already under economic distress.

We believe it is of great importance for our Tribe, other Tribes, and stakeholders in the region to gain a fairly good understanding of the magnitude of the ensuing prolonged drought resulting in diminishing river flows and the likelihood (probability) that similar hydrology like that of 2002-2003 would be expected to take place in 2023-2024. Providing an estimate of the risk that

[13] *See, e.g.*, Jennifer Yachnin, Interior pays $36 M for Arizona water conservation, E&E News (Nov. 03, 2023).
[14] Since 1978, Congress has only approved 35 Indian Water Rights Settlements. *See* Pam Williams, Director, Secretary's Indian Water Rights Office, Indian Water Rights Settlements, NARF Symposium (Aug. 8, 2023).
[15] *See recent Arizona v. Navajo Nation*, No. 21-1484, 2023 WL 4110231 (2023) (dismissing the Nation's breach of trust claims against the United States for failure to state a viable claim); and *Ute Indian Tribe et al. v. United States et al.*, Case No. 2:21-cv-00573-JNP-DAO (Fed. Dist. Court of Utah, Sept. 26, 2023) (U.S. and Utah Motions to Dismiss granted on nine of eleven claims).
[16] Ten Tribes Partnership Resolution to Secure Tribal Representation on the Upper Colorado River Commission, dated June 21, 2018.

the 2002-2003 hydrology will take place in 2023-2024 is essential for the Colorado River Basin for our Tribe and others in order to gain and appreciate the ensuing magnitude of the problem and, thus, the comments of our Tribe will be based on more realistic information.

Likewise, where Lake Mead elevations are concerned, based on the present reservoir operations and using 2002-2003 hydrology in place of 2023-2024 hydrology, minimum Lake Mead Pool Elevation (950 feet) is far from being impacted by the lowest hydrology on record, which is good news. In fact, the lowest vertical elevation is about 45 feet higher than the minimum power pool occurring about the end of September 2024. The bad news is that level 3 shortage conditions are expected to take place starting at about the end of June 2023 until the end of September 2024, and the trend continues to worsen beyond September 2024 (without consideration of conservation efforts). Again, it is imperative for our Tribe and other stakeholders in general to be informed of the *probability* that the 2023-2024 hydrology would be similar to that of the 2002-2003 hydrology. The comments by stakeholders are expected to be from a position of being relatively more informed as to the risks involved and the resulting comments will be reflective of the depth and magnitude of the projected problem.

We also believe that it would be more informative for our Tribe, and other tribes and stakeholders, to gain a fairly good understanding that the 80% Ensemble Streamflow Prediction (ESP) hydrology of 2002-2005 Traces would likely occur with an estimated probability in 2023-2026. It is, therefore, important that our Tribe and other stakeholders gain an understanding based on the probability of the risks with which a 2002-2005 hydrological condition will occur in 2023-2026.

Modeling Scenarios. Reclamation has stated that a requirement for the operation of the reservoirs is protecting Lake Powell at an elevation of 3,490 feet by reducing Lake Powell releases during months of the Water Year (WY) so that Lake Powell's elevation is at or above minimum power pool. The intent regarding Lake Mead is to protect 950 feet elevation by reducing Lake Mead's releases each month so that Lake Mead's elevation is at or above minimum power pool, i.e., 950 feet elevation. This modeling scenario is the only scenario using 2002-2005 hydrology in place of 2023-2026 that protects the minimum power pool level elevation for both Lake Powell and Lake Mead. So, we recommend that this scenario or other scenarios with similar outcomes should be selected. However, this scenario reduces Lake Mead releases from the baseline by 1.5 million acft in 2024 and 2.3 million acft reduction from the baseline in 2025. These reductions are over and above the present reductions.

Reduction of releases from Lake Mead in the quantity of 1.5 million acft in 2024 and 2.3 million acft in 2025 seems to be quite excessive. Additional reductions as much as 1.5 million acft or 2.3 million acft of water use for historically irrigated acreages or nonagricultural uses is expected to cause serious damage to the region's way of life for the population, businesses, the environment, and national food security. It seems the SEIS should take into consideration the economic hardship expected to impact the farmers and farm workers whose livelihood depends on irrigated farming, the towns and communities that support irrigated farming starting from the mom-and-pop based businesses to the small, medium and large businesses that provide consumer goods and capital goods, etc., and all the support businesses and workers that serve the

nonagricultural water users, including industries and municipalities. Furthermore, if large agricultural areas are converted from lavish agricultural enterprises to open soil fallow lands exposed to wind and rainfall erosion, land degradation of the general ecosystems could take place. In addition, the United States' food security, especially the country's winter produce crops would be in jeopardy since California and Arizona are the bread baskets of the nation's winter produce foods. It seems the above potential damages should be taken into consideration in this SEIS.

Without irrigation water necessary for the production of winter produce foods in California and Arizona, there is a potential for the nation to become dependent on the winter produce of other nations. Also, the Colorado River Basin and adjacent areas presently support $1 trillion in annual economic activities. Among many other impacts, businesses may move from the southwest to other countries or regions of the country where water is amply available. The SEIS should take into consideration the negative impacts that are expected to take place as a result of excessive shortages of water in areas of the country dependent on water from the Colorado River and its tributaries. Furthermore, the magnitude of the prolonged insistent serious drought conditions and the resulting diminished flows and successive mitigation measures since 2007 are not showing any improvement, and it looks like as long as temperatures continue to increase due to global climate change, the dwindling hydrology may continue in the future. It seems, therefore, that the problem we are facing in the Colorado River Basin is not a regional problem, but a national problem. It is important for the SEIS to analyze the long-term insistent drought resulting in diminishing river flows and elevate the Colorado River issues to a national level, rather than just a regional issue.

In as far as power generation is concerned, although the minimum power pool is protected, the amount of power generated with the very low head (mostly at or near the minimum pool elevation) is not nearly sufficient compared to the hydropower generated prior to the advent of prolonged seriously low natural flow, about the beginning of 2000. It would, therefore, be necessary to include in the SEIS the reduced hydropower generation on both Lake Powell and Lake Mead even though the minimum pool is protected, with the hydropower facilities kept from damage by keeping above minimum flow, generating zero or limited electricity.

Another example analyzed by Reclamation is the Individual Streamflow Trace, analyzing 80% ESP, 2000-2003 hydrology to replace 2023-2026. In this example, Reclamation analyzed protecting Lake Powell at 3490 feet elevation of minimum power pool and Lake Powell releases to balance with Lake Mead to protect the minimum power pool elevation of Lake Mead at elevation 950 feet. Although the minimum power pools or higher elevations of the 2 storages are maintained, the cuts of releases from both storages are excessive. In 2025, the difference between the baseline releases and protection of 3490 feet minimum pool of Lake Powell and protection until minimum power pool (950 feet) of Lake Mead, there will be cuts in releases of 3.3 million acft. On the other hand, if protection of 3490 feet minimum pool of Lake Powell and protection of Lake Mead's minimum pool of 950 feet takes place, the expected reduction of releases from Lake Mead compared to baseline would be 4.5 million acft. The 4.5 million acft reduction of releases is over and above the present operation of the reservoirs. In the event the hydrology of 2000-2003 is used to replace the hydrology of 2023-2026, similar SEIS should be undertaken to the proposed analysis mentioned above that represented the hydrology of 2002-2005 replacement of 2023-2026 hydrology.

In the event the new modified Colorado River system operations include a modified operation of the Flaming Gorge Reservoir that could potentially alter the present flow release regime of the Reservoir, one would expect that the flow regime of the Green River between Flaming Gorge Reservoir and Lake Powell would be expected to change. As a result, there could be a possibility of potential negative impact on the flow requirement for endangered species of the 3 river reaches, with different flow requirements to protect the fish habitat in the 3 reaches of the Green River. Hence, the SEIS should take into consideration whether the modified flow is in tandem to protect the instream flow requirements necessary for healthy fish habitat and endangered species in the 3 river reaches.

Conclusion

The Department is failing tribes legally, practically, and morally. We cannot remain invisible to the Federal Government while Reclamation is exercising its authority over significant federal policy and making decisions about who will get to use the diminishing water supply of the Colorado River Basin. If tribal invisibility does not stop here, under the Biden-Haaland Administration, when will it? If not now—when?

The Haaland Administration must alter the Federal Government's history of punitive treatment of tribes and Indian people in the Colorado River Basin. The approach, the strategy, the policy-making, and adverse outcomes need to stop. If it does not, then the system will remain unequal and unjust, and continue to produce illegal outcomes. Secretary Haaland's Administration, including the Bureau of Reclamation, has the opportunity to reaffirm the "historic Federal tribal relations and understandings [that] have benefitted the people of the United States as a whole for centuries and have established enduring and enforceable Federal obligations to which the national honor has been committed."[17]

With tribal involvement at this critical juncture, non-Indian, state water users and the Federal Government will have greater certainty and finality regarding the Colorado River water supply and its use. Do not relegate the Department's evaluation of its decisions about adverse impacts on Indian reserved water rights in the Colorado River to the conclusory statement that "Tribal water rights are established by settled law." This continued approach will not protect our Tribe's Indian reserved water rights in the Upper Colorado River Basin.

[17] Indian Trust Asset Reform Act, Pub. L. No 114-178, 130 Stat. 432 (Jun. 22, 2016) (codified at 25 U.S.C. § 5601).