

MUNGER, TOLLES & OLSON LLP

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

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Writer's Direct Contact
(415) 512-4066
(415) 644-6966 FAX
Ben.Horwich@mto.com

VIA ELECTRONIC MAIL

United States Bureau of Reclamation
Attn: Reclamation 2007 Interim
Guidelines SEIS Project Manager
CRinterimops@usbr.gov

Re: Comment of Yuma-Area Irrigation Districts on Revised Draft
Supplemental Environmental Impact Statement for Near-term
Colorado River Operations

Yuma County, Arizona is an agricultural community at the far southern end of the Colorado River that provides the majority of the Nation's winter vegetables and a wide variety of other agricultural products. Because Yuma farmers use exclusively Colorado River water to sustain this economy—and do so with unusual water efficiency—they have a deep interest in the near-term management of the River. I therefore write on behalf of several Yuma-area irrigation districts to comment on the United States Bureau of Reclamation's (the "Bureau") revised draft Supplemental Environmental Impact Statement for Near-term Colorado River Operations ("RDSEIS").

I represent four of Yuma's irrigation districts: Wellton-Mohawk Irrigation and Drainage District, Yuma Mesa Irrigation and Drainage District, Yuma Irrigation District, and North Gila Valley Irrigation and Drainage District (collectively, the "Districts"). The Districts receive Colorado River water almost entirely under third-priority contacts with the Bureau and supply it to agricultural users and a small number of domestic users within their service areas. Despite the tenure and legal clarity of those water rights, these deliveries have in the past been threatened by alternatives the Bureau has evaluated for near-term operations and by wider negotiations over the River's water.

Yuma has outsized importance to the Nation's food supply. No agricultural region within the United States can replace the produce grown in Yuma, especially in the winter, when much of the Nation is subject to freezing, frost, mildew, extreme weather events, or other unsuitable conditions. Replacement of Yuma vegetables with imported products would have untold consequences for the Nation's trade balances, employment rates, carbon emissions, and food security and safety.

Moreover, Yuma farmers use Colorado River water extremely efficiently to grow this produce. Water-use efficiency operates at every level of the system. An

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up-to-date study by the Yuma Center of Excellence for Desert Agriculture (YCEDA), the U.S. Arid Land Agricultural Research Center (USDA-ARS), and the University of Arizona, supported by the Bureau, among others, has shown that seasonal irrigation application efficiencies are 80-90% for most Yuma-area vegetable cropping systems. In other words, 80-90% of the water applied to a field and not returned to the River is used by the plants, a staggeringly high figure.

Yuma farmers accomplish this efficiency through a wide variety of advanced technologies and recurring investment. Yuma-area farmers can order water in increments down to the minute via electronic metering devices and gate control, which prevents water waste. The vast majority of canals, laterals, and on-farm ditches are cement-lined, and irrigation runs have been shortened. Fields are dead-leveled using GPS and lasers so that water can be applied as efficiently as possible. Some Yuma farmers use high-flow turnouts, sprinklers for germination, and drip irrigation. And Yuma farmers use steel press wheels to even furrows for even application of water. Clean cultivation practices that avoid disking fields result in faster water advance times. Yuma farmers use tractors precision-guided by GPS, automated thinners, and laser weeders. They operate complex modeling systems that track all farm inputs and run continuous seed-breeding programs to improve area crop varieties. And innovation and investment continue: High-speed broadband internet is in the process of being installed throughout Yuma agricultural areas to support ever-more complex systems operating in real time—systems that use drones, satellites, and mobile phone apps. Yuma farmers invest in technology that increases efficiency at each point of the water-use system.

We offer the following comments on the Proposed Alternative.

1. In part because of the Districts' and their growers' costly investments in water conservation technology, the Districts support alternatives based on voluntary compensation, including most aspects of the Proposed Alternative described in the RDSEIS. Where the Districts, Arizona, and Lower Basin States bear the burden of conservation to stabilize the Colorado River system, compensation is both just and necessary. Compensation is fairly offered where entitlement holders forgo their contractual right to divert Colorado River water and implement voluntary conservation instead. Compensation for these voluntary reductions incentivizes conservation and spurs efficient allocation of water usage by all users.

The Districts also support flexibility in how voluntary reductions are achieved. Efforts by the Bureau to micromanage acreage, crops, growing seasons, or specific reductions to entitlements would be detrimental to the Nation's food

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supply. The Districts and their growers are best positioned to make these types of on-the-ground judgments. With the benefit of their experience and knowledge of local agriculture, the Districts can best manage crop selection, rotation, and allocation of available water supplies for their own fields. Conservation cannot be efficiently achieved through mandated cuts to entitlements or rigid agreements to remove irrigable land from production.

Voluntary reductions also allow Colorado River water to be most efficiently allocated among conservation options that support regional agriculture to feed the Nation. Individual growers are best positioned to decide when forgoing their contractual entitlement in favor of compensation is advisable, as well as which crops to grow when and where. Local growers know the value of their crops, and whether the market signals a greater need for conservation than vegetables, or the inverse. Non-voluntary, federal conservation fiats lack the flexibility to achieve this efficient allocation. The value of local decision-making is particularly great for the Districts in Yuma that take advantage of multiple growing seasons, where water deliveries and produce values vary significantly throughout the calendar year. Compensation for conservation needs to play a proper role in the market determination that balances crops against conservation.

2. Although the Districts support the voluntary, compensated conservation underpinning the Proposed Alternative, the Districts have a significant interest in how the Bureau would implement certain aspects of the Proposed Alternative under near-term dry hydrologies. The primary subject of concern is the expedited decision-making process that the Proposed Alternative would authorize the Bureau to implement when the April 24-month study's minimum probable elevation projected for Lake Mead is below 1025 feet. *See, e.g.*, RDSEIS at 2-8 (Lower Basin States, in consultation with Upper Basin States, will have 45 days calendar days to propose a plan to prevent Lake Mead from reaching 1000 feet; if such plan "is not acceptable to" the Bureau, then the Bureau may take "additional action" to protect 1000 feet).

The Districts emphasize that, if the expedited process is triggered, the Bureau must abide by all federal laws, notwithstanding the exigency of that situation. Those laws include the federal laws that comprise portions of the Law of the River; the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*; and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.* This portion of the Proposed Alternative, although it envisions swift action under critical conditions, cannot be a license to disregard the priority system, the analysis and notice requirements of NEPA, or any other legal requirement.

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a. The Bureau must at all times allocate water deliveries and reductions according to the priority system encoded in the Law of the River, which operates as follows. The Bureau, on behalf of the Secretary of the Interior, first satisfies present perfected rights (“PPRs”) without regard to state lines. *Arizona v. California*, 376 U.S. 340, 342 (1964); 43 U.S.C. § 1521; *Arizona v. California*, 547 U.S. 150, 155 (2006). The Bureau then satisfies non-PPR users with contract dates prior to 1968 (“middle-priority users”) before satisfying post-1968 users, as stated in the Colorado River Basin Project Act (“CRBPA”). 43 U.S.C. § 1521(b). The CRBPA makes clear that the Bureau has a mandatory duty to satisfy the Districts’ entitlements—which date prior to 1968—before it can deliver water to any users with post-1968 contract dates. All parties have long recognized that water is allocated in this way. *See, e.g.*, Director’s Shortage Sharing Workgroup Recommendation, October 24, 2006 at 2 (prepared by Arizona Department of Water Resources workgroup and recognizing that users at Arizona Priority 4 and lower are reduced before reducing users at Arizona Priority 3).

One area in which the Bureau may have some limited discretion is in apportioning water to middle-priority users when insufficient water is available to fill all water orders, even after reducing junior-priority users’ deliveries to zero. The Bureau must apportion that water equitably and consistently with the larger legal framework. That act of apportionment is a federal function, and is not subject to approval by State legislatures. *See* 43 U.S.C. § 617c (providing for contracts directly between the Bureau and water users).

In delivering water according to this priority system, the Bureau must engage in the suite of processes under 43 C.F.R. Part 417, which requires it to ascertain every year that each delivery of Colorado River water to “every public or private organization ... in Arizona, California, or Nevada which ... has a valid contract for the delivery of Colorado River water” “will not exceed those reasonably required for beneficial use,” according to a number of factors. *Id.* §§ 417.1-417.3; *see also id.* § 417.5 (governing deliveries to Tribes). Part 417 applies to agricultural and municipal areas alike. To the extent the Bureau has exempted municipal and industrial users pursuant to 43 C.F.R. § 417.1(b), those exemptions can no longer be justified given the scale of municipal and industrial water use and the challenges facing the River. Moreover, the Bureau has long recognized that Part 417 applies to both PPRs and junior-priority users. *See, e.g.*, Federal Defendants’ Brief Regarding Remedy for 43 C.F.R. Part 417 Breach Found by Court on Motion for Preliminary Injunction at 1, *Imperial Irrigation District v. United States*, No. 03-cv-00069 (S.D. Cal. 2003) (agreeing with court’s finding that Part 417 applied to Imperial Irrigation District’s PPR entitlements). Part 417 uses mandatory language: The

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Bureau must determine that deliveries “*will* not exceed those reasonably required for beneficial use.” 43 C.F.R. § 417.2 (emphasis added).

b. The APA imposes additional requirements on the Bureau. The Bureau may not unlawfully withhold or unreasonably delay mandatory acts; cannot act in a manner contrary to law; must not be arbitrary or capricious in making discretionary decisions; and must have substantial evidence for any fact-based decisions. 5 U.S.C. § 706. Those principles require the Bureau to abide by the Law of the River, including by implementing the priority system upon which multi-billion dollar economies have long relied. Indeed, even if the priority system were purely a creature of the Bureau’s administrative powers, the Bureau would need exceedingly persuasive justifications for departing from that system. *See, e.g., Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 742 (1996) (citing *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 670–675 (1973); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974)).

c. Finally, the Bureau must comply with NEPA. NEPA requires the Bureau to analyze the direct and indirect effects of a decision of the magnitude of the present proceedings—or proceedings in the event of a projected low elevation of Lake Mead—in an environmental impact statement (“EIS”) or supplemental environmental impact statement (“SEIS”) with reasonable specificity. *See* 40 C.F.R. § 1508.1(g) (discussing direct and indirect effects). The Ninth Circuit has repeatedly insisted that “general statements” about future impacts do not satisfy NEPA. *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007). Thus, an EIS for an oil development project that failed to analyze the carbon consequences of increasing foreign oil consumption by depressing oil prices did not satisfy NEPA. *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020). The governing regulations specifically require that changes to land use be considered among other indirect effects: “Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” 40 C.F.R. § 1508.1(g)(2).

Thus, any EIS or SEIS concerning restrictions on Colorado River water usage must analyze environmental impacts *at the level of the specific users denied water*, which the RDSEIS does not do. Under present circumstances, it will not suffice to note, as the agency erroneously did in *Center for Biological Diversity*, that usage of a resource might generally increase or decrease. 982 F.3d at 722. Rather, the agency must determine the impacts of that increase or decrease, including how people who depend directly or indirectly on water from the Colorado River will

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foreseeably substitute for its loss—especially where changes in land use will result. That analysis must start with clearly identifying where, precisely, reductions in water usage will occur. The Bureau must be candid about those reductions to allow the public and the Bureau itself to meaningfully evaluate their impacts. Such specificity is critical because those impacts vary across different users, both in Arizona and across the Lower Basin. The environmental impacts of sustaining or ending Yuma’s high-efficiency, high-value agricultural production differ markedly from, for example, the environmental impacts of altering water usage in high-carbon-usage suburbs or water-inefficient low-value agriculture elsewhere in the Basin.

Of particular significance, absent some future analysis, imposing water delivery reductions that the final DSEIS does not model would violate NEPA. The RDSEIS neither contemplates nor analyzes shortages in the water deliveries to Arizona Priority 3, and thus does not itself provide sufficient support under NEPA to effect reductions to that group. *See* RDSEIS at 3-81, E-10. Additionally, the RDSEIS analyzes reducing deliveries in the Lower Basin by at most 2.083 million acre-feet; shortages greater than that amount must be modeled and analyzed before they can be implemented. *See id.* at 3-60. Modeling any reduction before it is imposed is especially important for environmental justice communities like Yuma County. *See id.* at 3-321, 3-329 (discussing impact of hydropower on environmental justice communities). A final DSEIS that repeats these omissions will not provide sufficient analysis under NEPA for involuntarily reducing the Districts’ water deliveries, even under drought conditions that trigger the expedited decision-making process described above.

3. The Districts urge the Bureau to correct errors in how the RDSEIS analyzes impacts of particular concern to the Yuma area. *First*, in its analysis of impacts to air quality, the RDSEIS models only fugitive shoreline dust near the reservoirs. RDSEIS at 2-27, 3-126. But it also recognizes, correctly, that imposing fallowing programs upon agricultural areas impacts air quality. *See id.* at 3-147. Thus, prior to taking any action that would result in involuntary fallowing in an agricultural community, the Bureau must satisfy NEPA by undertaking an analysis of the air quality impacts of such a program. *See* 40 C.F.R. § 1508.1(g)(2) (an EIS or SEIS must discuss any reasonably foreseeable “effects related to induced changes in the pattern of land use . . . and related effects on air . . .”). This analysis is especially important for Yuma County because much of the area is already a designated PM-10 non-attainment area. *See* <https://azdeq.gov/yuma-particulate-matter-pm-10-nonattainment-area> (accessed December 4, 2023).

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Second, the RDSEIS analyzes the impact of seasonal fallowing through a model that assumes that the least profitable crop would be fallowed first. *See* RDSEIS at 3-294. That model does not approximate real-world conditions because less-profitable crops are used in some areas as rotation crops to promote soil health necessary to support more valuable crops in other growing seasons. In such areas, it would be more accurate to assume that crops of average value are lost (corresponding to an arrangement where some land is taken out of production entirely). The existing analysis does not satisfy NEPA and does not support imposing any involuntary fallowing program upon these areas.

* * *

It is currently the middle of winter vegetable season in Yuma. Laser-leveled, precision-furrowed fields of broccoli, melons, and leafy greens stretch across the valleys. This bounty will feed the Nation affordably, efficiently, and safely for years into the future—if Yuma continues to receive its share of the Colorado River. To that end, the Districts applaud the work of the Bureau and the Lower Basin States to develop the Proposed Alternative for operation of the River system. And, in large part, as discussed above, the Districts support the Bureau’s adoption of that Alternative.

Yours truly,

A handwritten signature in black ink, appearing to be 'B. Horwich', followed by a horizontal line extending to the right.

Benjamin J. Horwich

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cc: The Honorable Kyrsten Sinema
3333 East Camelback Road, Suite 200
Phoenix, AZ 85018-2324

The Honorable Mark Kelly
2201 East Camelback Road, Suite 115
Phoenix, AZ 85016-3446

The Honorable Camille Calimlim Touton
Commissioner
Bureau of Reclamation
1849 C Street, N.W.
Washington, D.C. 20240-0001

Michael Brain
Principal Deputy Assistant Secretary for Water and Science
Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240-0001

Wayne Pullan, Upper Colorado Basin Regional Director
Marcie Bainsan, Special Assistant to UCB Regional Director
Genevieve Johnson, Reclamation 2007 Interim Guidelines SEIS Project
Manager
Upper Colorado Basin Regional Office
Bureau of Reclamation
125 South State Street, Room 8100
Salt Lake City, UT 84138-1147

Jacklynn Gould, Lower Colorado Basin Regional Director
Fernando Castro-Alvarez, Regional Liaison
Lower Colorado Basin Regional Office
United States Bureau of Reclamation
P.O. Box 61470
Boulder City, NV 89006-1470

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Michael Norris, Area Manager
Yuma Area Office
United States Bureau of Reclamation
7301 Calle Agua Salada
Yuma, AZ 85364-9763

Tom Buschatzke, Director
Arizona Department of Water Resources
1110 W Washington St, Ste 310
Phoenix, AZ 85007

Wellton-Mohawk Irrigation and Drainage District
Robbie Woodhouse, Board President, *hrking00@aol.com*
Elston Grubaugh, Manager, *egrubaugh@wmidd.org*

Yuma Mesa Irrigation and Drainage District
James Weddle, Board President, *hayonewf@gmail.com*
Ronald D. Turner, Manager, *rturner@ymidd.org*

Yuma Irrigation District
Mark Smith, Board President, *msmith@smithfarmsyuma.com*
Rex Green, Manager, *yid@mindspring.com*

North Gila Valley Irrigation and Drainage District
Larry Ott, Board President, *larry@gilavalleyfarms.com*

Wade Noble
Meghan Scott
Noble Law Office
1405 W. 16th St. Ste. A
Yuma, AZ 85364

Jason Moyes
Moyes Sellers & Hendricks Ltd.
1850 North Central Ave. Ste 1100
Phoenix, AZ 85004

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Ronald L. Olson
Munger, Tolles & Olson LLP
350 South Grand Ave., Fiftieth Floor
Los Angeles, CA 90071-3426

Patrick J. Cafferty
Clare Kane
Munger, Tolles & Olson LLP
560 Mission St., Twenty-Seventh Floor
San Francisco, CA 94105-3089