



COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

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Ms. Genevieve Johnson
Reclamation 2007 Interim Guidelines SEIS Project Manager
Upper Colorado Basin Region,
125 South State Street, Suite 8100,
Salt Lake City, Utah 84138

Via email: CRinterimops@usbr.gov

Subject: The Colorado River Indian Tribes comments on EIS No. 20230146, Near-term Colorado River Operations Revised Draft Supplemental Environmental Impact Statement

Dear Ms. Johnson:

On behalf of the Colorado River Indian Tribes ("CRIT") please accept the following comments on the Bureau of Reclamation's ("Reclamation") Revised Draft Supplemental Environmental Impact Statement ("Revised DSEIS"). CRIT appreciates the leadership of Commissioner Touton and the Reclamation team in working with our technical and legal experts in evaluating different approaches to address the many issues regarding full use and development of our water resources in a manner that preserves our culture while also protecting our future. While many issues remain unresolved, we are confident that through the goodwill of the Commissioner and efforts of both our respective teams, progress will continue to be made.

With respect to the Revised DSEIS, we wish to acknowledge at the outset the decision to eliminate Alternative 2 from further detailed analysis. We very much appreciate Reclamation taking this action. As expressed on several occasions, including direct meetings with Reclamation's regional leadership team, Alternative 2 would have constituted an illegal taking of CRIT's property in violation of the 5th Amendment to the Constitution and a breach of Reclamation's duty to protect our trust assets. This is because Alternative 2 would have unilaterally reduced supplies for all water users, including CRIT, regardless of priority date.

While we are thankful for this decision, we are still concerned that Reclamation has not acknowledged that Alternative 2 is unreasonable under NEPA as it is in violation of the 2006 consolidated decree in *Arizona v California* (“Decree”). As Reclamation is aware, the United States Supreme Court enjoined Reclamation from operating works on the lower Colorado River except as specified in Article II of the Decree. And Article II of the Decree specifies that CRIT, as a holder of Present Perfected Rights, will be among the last users on the entire system to take a shortage. Simply put, Alternative 2, or any other alternative that seeks to unilaterally reduce deliveries to CRIT in violation of the Decree, is neither reasonable nor legally feasible. Yet the Revised DSEIS does not acknowledge this simple fact of law. Instead, Reclamation states that Alternative 2 will “not provide additional risk reduction” when compared with the proposed action and therefore warrants no further consideration. Revised DESIS 2-18.

Our concern over the failure of Reclamation to address this point in clear and unambiguous terms is heightened by language on page 1-1 of the Revised DSEIS, which states:

Reclamation operates Hoover Dam and other major facilities in the Lower Basin pursuant to the Boulder Canyon Project Act (BCPA) and other related federal statutes.

This statement is only partially correct, as it fails to acknowledge the Decree as a foundational document in Reclamation’s operations on the Colorado River. Reclamation should clarify for this and all future actions on the Colorado River that it does not have the legal authority to take actions such as those embodied in Alternative 2 because doing so would be in violation of the clear injunctive language of the Supreme Court in the Decree. It would also be in violation of the requirements of the National Environmental Policy Act regarding the reasonableness of alternatives. Until Reclamation directly, clearly, and publicly acknowledges this fact of law, there will likely be continued confusion and unfounded expectations regarding the range of lawful potential alternatives available to Reclamation. We therefore specifically request that you make this point clear in the final document.

We also ask that the final EIS describe the measures Reclamation anticipates taking to conserve three-million-acre feet of water under the Lower Division Proposal. The environmental impacts of the Lower Division Proposal depend largely on how conservation will be achieved. If conservation will be achieved by fallowing large areas of agricultural land, for example, the EIS must consider the impacts of the fallowing, including air quality impacts from dust, impacts to special status species that rely on irrigated farmland for habitat, etc. The draft EIS provides no information about these impacts, instead noting in a footnote that these measures “would be subject to additional environmental compliance, as appropriate.” RSEIS at 2-7, fn. 4. Deferring this analysis until after Reclamation approves the Lower Division Proposal does not satisfy NEPA’s fundamental informational purpose. *Friends of the Earth, Inc. v. Coleman*, 518 F.2d 323, 327 (9th Cir. 1975) (EIS “should be prepared at the earliest time prior to implementation of the proposed action, so that alternative courses of action with less severe environmental consequences can be considered”), *abrogated on other grounds by Cottonwood Env’tl. Law Center v. U.S. Forest Serv.*, 789 F.3d 1075 (9th Cir. 2015).

We appreciate that Reclamation has identified CRIT as a potential participant for compensated conservation. Revised DSEIS 3-326. As we have stated many times, Tribal Nations with senior rights like CRIT must be part of the solution otherwise it will not be durable. While CRIT will need to consider carefully any proposal for compensated conservation before deciding whether to participate, we look forward to further dialog on this topic.

As noted at the outset, we are thankful for the ongoing discussion between our respective legal and technical teams. We also appreciate that Alternative 2 will no longer be considered, and for Reclamation's desire to increase the participation of Tribal Nations as part of the solution. Until Reclamation acknowledges the legal infirmity underlying Alternative 2, however, its effort to find solutions regarding operations of the Colorado River may head down unproductive, indefensible, and misguided paths.

We therefore ask that Reclamation clearly express that any solution will respect and be consistent with the priority of CRIT's rights as recognized in the Decree, so that we may collectively dedicate our efforts to finding ways for CRIT to fully use its water supplies and be part of the near-term and long-term solution.

Sincerely,

COLORADO RIVER INDIAN TRIBES



Amelia Flores
Chairwoman

cc: Tribal Council