



Ute Indian Tribe of the Uintah and Ouray Reservation

Comments on the U.S. Department of Interior's Request for Input on the Scope of Analysis, Potential Alternatives, and Identification of Relevant Information and Studies to Prepare a Supplemental Environmental Impact Statement ("SEIS") for the December 2007 Record of Decision Entitled Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead December 20, 2022

The Ute Tribal Business Committee on behalf of the Ute Indian Tribe of the Uintah & Ouray Reservation ("Ute Indian Tribe" or "Tribe") submits these comments in response to the Department of Interior's ("Department") request for input on the scope of analysis, potential alternatives, and identification of relevant information and studies for the preparation of a SEIS in order to develop revised operating guidelines for Lake Powell and Lake Mead.¹ The critical circumstances in the Colorado River Basin are well-known, including the fact that we are in the driest 23-year period on the Colorado River in more than a century, with low runoff conditions and reservoirs within the basin at historic low levels. We understand and agree that difficult decisions must be made regarding the 2023-2024 operating plans for Lake Powell and Lake Mead in order to supplement the Environmental Impact Statement prepared when establishing the 2007 Interim Guidelines for Lower Basin shortages and the coordinated operations of these two Lakes.

We continue to express our grave concern regarding the management and use of the Colorado River and urge that the Department, through the Bureau of Reclamation ("Reclamation"), elevate its inclusion of tribal interests, including those of the Ute Indian Tribe, by not only the Department's efforts to improve tribal consultation and by establishing clear policy that the Department has trust and treaty responsibilities to Tribal Nations,² but, also, it is time to

¹ 87 FR 69042 (November 17, 2022).

² See, e.g., Presidential Documents, Memorandum of January 26, 2021, Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 FR 7491-92 (January 29, 2021); A Detailed Plan for Improving Interior's Implementation of E.O. 13175 (April 23, 2021), <https://www.doi.gov/sites/doi.gov/files/detailed-plan-for-improving-interiors-implementation-of-e.o.-13175-omb-submission.pdf> (last visited December 13, 2022) [hereafter 2021 Interior Detailed Plan]; White House Memorandum on Uniform Standards for Tribal Consultation, (November 30, 2022),

take express and explicit actions to protect tribal trust property related to Indian reserved water rights in any and all decisions generated by the studies, information, and planning for the management and use of the Colorado River. As the Department’s Detailed Plan for Improving Interior’s Implementation of E.O. 13175 states, “Tribes are not interest groups. Tribes are sovereign entities”³

Involving the Ute Indian Tribe as an equal sovereign of the Upper Basin States during the deliberations that are and will occur over the pursuing years is more than “ripe for consideration”—it must be done now. It is crucial that the Department forge the path to tribal involvement beyond consultation and take affirmative steps to ensure that the Ute Indian Tribe is actively included—in the same room—for the decision-making process with the States and Federal Government in order to include consideration and adoption of actions that protect and preserve Indian reserved water rights in the Colorado River. In partnership with tribes, in this manner, the Department can begin to satisfy its policy promise of supporting tribal self-determination with efforts to secure, preserve, protect, develop, and use the waters required to establish sustainable and permanent homelands, including for the Uintah and Ouray Reservation.

INTRODUCTION

The Ute Indian Tribe is located on the Uintah and Ouray Reservation (“Reservation”) in northeastern Utah, approximately 150 miles east of Salt Lake City, Utah. All of our Reservation land lies within the drainage of the Colorado River Basin. Our Uintah and Ouray Reservation was first established in 1861, after surrendering millions of acres of land to the United States. Today, our Reservation is the second largest Indian reservation in the United States covering more than 4.5 million acres. The Ute Indian Tribe has a Tribal membership of almost four thousand individuals, a majority of whom live within the exterior boundaries of the Reservation. The Tribe has Indian reserved water rights apportioned in the Colorado River, totaling 550,000 acre-feet of adjudicated rights and future irrigable lands, including rights in the Green River and its tributaries that run through the Reservation.

SCOPING PROCESS: EVALUATE THE IMPACT ON TRIBAL TRUST ASSETS

The study and analysis of the alternatives that will be considered for this SEIS *cannot be done* without Reclamation’s inclusion of the analysis of each alternative in terms of its impact on our Indian trust assets and resources, in particular, our Tribe’s Indian reserved water rights in the Colorado River Basin. Reclamation’s policy for conducting the National Environmental Policy Act (“NEPA”) process is articulated in the Department’s Reclamation NEPA Handbook. The policy addresses Reclamation’s obligation to evaluate the impact of proposed actions on tribal trust assets.

Indian Trust Assets (“ITA”) are legal interests in property held in trust by the United States for Indian tribes or individuals. Interior’s policy is to recognize and

<https://www.whitehouse.gov/briefing-room/presidential-actions/2022/11/30/memorandum-on-uniform-standards-for-tribal-consultation/> (last visited December 13, 2022).

³ 2021 Interior Detailed Plan at 1.

fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and individual Indians. . . . All impacts to trust assets, even those considered nonsignificant, must be discussed in the trust analyses in NEPA documents and appropriate compensation or mitigation implemented.”⁴

While the impact on all tribal trust assets (e.g., cultural resources, fisheries, habitats) are required to be considered and analyzed by Reclamation during its NEPA process, we focus our comments on the requirement that the impact on tribal Indian reserved water rights, a tribal trust asset, *must* be analyzed to develop and sustain support for our sustainable homeland. It is axiomatic that Indian reserved water rights are tribal trust assets titled in the United States for the benefit of the Tribe—in perpetuity, and recognized as present perfected rights under federal law.

To date, Reclamation has not taken this seriously. To be clear, Reclamation cannot discuss the impacts on Indian water rights during its upcoming NEPA process unless it (1) acknowledges our Indian reserved water rights’ apportionment of the Colorado River as the baseline from which adverse impacts are measured, and (2) analyzes and compares the impacts from proposed actions against the known quantified Tribal water rights. Our Tribe has a binding quantification of 549,686 acre-feet per year by diversion of Indian water rights that, to date, has been ignored by Reclamation and the Department in its decision-making process and outcomes.

Any tribal government within the Colorado River Basin establishing a permanent homeland has the right to use its trust asset, Indian reserved water rights, in any manner that benefits and provides the best return for the tribe’s goal of self-sufficiency, wellbeing, and livelihood of its members. Under the current circumstances, Reclamation considers the unused Tribal water rights as “System” water—available to junior water users without compensating the Tribes. The SEIS process must identify the unused tribal Indian reserved water and provide an annual accounting of the quantity of water used by non-Indians, and we urge the Federal Government to develop a program that compensates tribes for their Indian waters used by others.

Reclamation’s NEPA policy, consistent with 42 U.S.C. § 4332, requires Reclamation to recognize our quantified Indian water rights in the Colorado River Basin in order to satisfy federal law to determine any impact on our trust assets under any NEPA process. If Reclamation fails to do this, it will repeat a concern raised by tribes when commenting on Reclamation’s review of the 2007 Interim Guidelines Record of Decision (Section XI.G.7.D.) (referred to as the “7.D. Review”) in October 2020.⁵ Reclamation was put on notice two years ago that its “modeling assumptions regarding water deliveries in the Guidelines’ Final EIS failed to account for the Tribe’s full water rights”; and that “Reclamation should follow through on model development to better account for present and future tribal water use, as discussed in the Tribal Water Study.”

Take action to correct this error. The Department is obligated to protect and preserve our Indian, reserved water rights—a Tribal trust asset held by the United States as our trustee. Remove

⁴ Bureau of Reclamation NEPA Handbook, 512 DM 2, chapter 3.15.7, Indian Trust Assets, pgs. 3-29 (February 2012).

⁵ U.S. Department of Interior, Bureau of Reclamation, Draft Report, Review of the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, Upper and Lower Colorado Basin Regions (October 2020).

the cloud over Reclamation's NEPA process. Acknowledge all of our Tribe's apportioned Indian water rights in the Colorado River, and analyze the impact on these (and other) trust assets during the current development of a SEIS, in particular here, in the Green River.

OTHER CONSIDERATIONS FOR ANALYZING SEIS ALTERNATIVES

Reclamation is proceeding with the study and analysis of near-term alternatives to identify additional operational measures for the coordinated operation of Lake Powell and Lake Mead in 2023 and 2024 operating years, and to inform operations in 2025 and 2026, in order to stabilize the decline in reservoir storage and prevent system collapse. The following comments have been developed utilizing information, in part, from Reclamation's Public Informational Webinars about the preparation of a SEIS (November 29 and December 2, 2022). This included information from the Lake Powell and Lake Mead End-of-Month Elevations, Colorado River Mid-Term Modeling System ("CRMMS"), projections from October 2022, and low-flow hydrology and operational scenarios and trade-offs related to protecting various elevations at Lake Powell and Lake Mead to be considered for the SEIS analysis.

First, we believe it is of great importance for the Ute Indian Tribe, other tribes, and stakeholders in the region to gain a better understanding of the magnitude of the ensuing prolonged drought resulting in diminishing river flows and the likelihood, that is, the probability, that the 2002-2003 hydrology used for Reclamation's comparison modeling would be expected to take place in 2023-2024. Providing an estimate of the risk and probability that the 2002-2003 hydrology, the lowest hydrology on record, will take place in 2023-2024 is essential for the Colorado River Basin, for our Tribe, and for others to gain confidence in and appreciation for the ensuing magnitude of the problem. This would also allow our Tribe to review Reclamation's modeling comparisons using more quantifiable information. If the probability is high that the 2002-2003 hydrology will occur in 2023-2024, then the modeling results will provide better confidence in Reclamation's decisions. If the probability is low that the 2002-2003 hydrology will occur, Reclamation should consider using the 24-Month Study "Probable Minimum" projection for modeling the alternatives.

Based on the present reservoir operating conditions and using 2002-2003 hydrology, Lake Powell's elevation is below 3,490 feet, the minimum power pool elevation, from the end of mid-July 2023 to the end of the study period, September 2024, with the lowest vertical deficit of 65 feet below minimum power pool at about the end of April 2024. This scenario is expected to result in exceptionally serious, extended electrical outages causing human suffering and economic hardships to the region's population and businesses, especially in areas, such as Indian Reservations, that are already under economic distress.

Likewise, considering Lake Mead elevations, based on the present reservoir operation and using 2002-2003 hydrology for Reclamation's comparison modeling instead of the projected 2023-2024 hydrology, a Lake Mead minimum power pool elevation of 950 feet is far from the impact of the lowest hydrology on record used in Reclamation's modeling—which is good news. In fact, the lowest vertical elevation of Lake Mead using the 2002-2003 hydrology is about 45 feet higher than its minimum power pool.

The bad news is that the Level 3 shortage conditions for Lake Mead 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. This represents a significant impact on the water users. Again, it is imperative for our Tribe and other stakeholders, in general, to be better informed of the probability that the 2023-2024 hydrology in Lake Mead is likely to be similar to that of the 2002-2003 hydrology. Therefore, the comments that Reclamation receives from stakeholders are expected to be from a position of their relatively more informed knowledge about the risks involved, and the resulting comments will be reflective of the depth and magnitude of the projected problem.

Additionally, Reclamation has provided information on another analysis that expands the period of time for analysis to 2023-2026, using 80% of the 2002-2005 ensemble streamflow. We believe that it would be more informative for our Tribe, other tribes, and stakeholders to gain a better understanding of the probability of the risks that an 80%, 2002-2005 hydrology will occur in 2023-2026.

Low Flow Hydrology and Operational Scenarios

Considering Reclamation's four modeling scenarios, one scenario describes protecting Lake Powell's minimum pool elevation of 3,490 feet by reducing Lake Powell releases during months of the Water Year ("WY") so that its elevation is at or above minimum power pool, and protecting Lake Mead's 950 feet elevation by reducing Lake Mead's releases each month so that its elevation is at or above minimum power pool. This modeling scenario is the only scenario using 2002-2005 hydrology in place of the 2023-2026 projected hydrology that protects the minimum power pool elevation levels for both Lake Powell and Lake Mead. We recommend that this scenario or other scenarios with similar outcomes protecting the minimum power pool of the two reservoirs should be selected for analysis.

However, this scenario reduces Lake Mead releases from the baseline by 1.5 million acre-feet ("acft") in 2024 and a 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, environment, and national food security.

The analysis for 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 the Colorado River water and its tributaries. We recommend that the SEIS take into consideration the economic hardship expected to impact the farmers and farm workers whose livelihoods depend on irrigated farming, and 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 lush 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. We recommend that the above potential damages should be taken into consideration in this SEIS process.

Without irrigation water necessary for the production of winter produce foods in California and Arizona, there is the potential for the nation to become dependent on winter produce imported from other nations. Also, the Colorado River Basin and adjacent areas presently support \$1 trillion in annual economic activities. Among many others impacted from the drought, businesses may move from the Southwest to other countries or regions of the country where water is amply available. Furthermore, with the magnitude of the prolonged, persistent serious drought conditions and the resulting diminished flows, successive mitigation measures since 2007 are not showing any improvement and it appears that as long as temperatures continue to increase due to global climate change, the dwindling hydrology may continue in the future. The problem we are facing in the Colorado River Basin is not a regional problem, but a national problem. It is, therefore, important for the SEIS process analyzing the long-term, persistent drought resulting in diminishing river flows be elevated to a national issue, rather than 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 generated electricity, compared to the hydropower generated prior to the advent of prolonged, seriously low natural flow from about the beginning of 2000. It would, therefore, be necessary to include in the SEIS analysis the reduced hydropower generation on both Lake Powell and Lake Mead, even though the minimum power pool is protected and the two hydropower facilities are kept from physical damage by keeping above minimum power pool elevations and both dams generating zero or limited electricity.

Another set of scenarios described by Reclamation uses the Individual Streamflow Traces analyzing 80% ESP, with 2000-2003 hydrology for the period of 2023-2026 projected hydrology. For our discussion, we focus on two scenarios of importance described by Reclamation: (a) protect levels of 3,490 feet in Lake Powell and 950 feet in Lake Mead; and (b) protect 3,490 feet in Lake Powell until Lake Mead reaches 950 feet.

Considering our (a) scenario, in 2025, if protection of 3,490 feet minimum power pool for Lake Powell takes place with protection of a minimum power pool of 950 feet for Lake Mead, the expected reduction of releases from Lake Mead compared to the baseline releases would be 4.5 million acft. The 4.5 million acft reduction of releases is over and above the present baseline operation of the reservoirs. On the other hand, also in 2025, the difference between the baseline releases and protection provided under our scenario (b), here, will be a reduction from the baseline releases of 3.3 million acft. In the event the hydrology of 2000-2003 is used instead of the hydrology for the 2023-2026 projections, similar SEIS studies should be undertaken for the

proposed analysis mentioned above that represented the hydrology of 2002-2005 replacement of 2023-2026 projected hydrology.

Finally, 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 the flow regime of the Green River between Flaming Gorge Reservoir and Lake Powell to change. As a result, there could be the possibility of a negative impact on the flow requirement for endangered species of the 3 river reaches with different flow requirements and a need to protect the fish habitat in the Green River, including on and through our Reservation. Hence, the SEIS process should take into consideration whether the modified flow is in tandem with the protection of the instream flow requirements necessary for healthy fish habitat and endangered species in the 3 reaches of the Green River reaches.

CONCLUSION

We urge the Department to ensure that the SEIS process considers and includes a substantial analysis of all impacts to tribal trust assets as required under the NEPA and, in particular, (1) account for our Tribe's apportionment of the Colorado River, and (2) study the impacts of the operations and management of the Colorado River on our Tribal Indian reserved water rights, currently used by other water users without appropriate compensation. Failing to do so at this critical point in time will lead to the cruel result that will parallel the Federal Government's "land grab" of Indian lands in the 18th Century—a "water grab" that will dispossess tribes and Indian people of their native waters and permanent homelands.

Additionally, we challenge the Bureau of Reclamation to consider the impact that reductions in storage releases will have on a wide-ranging number of areas, including farmers and the agricultural economies of communities in the southwest, national food security, and availability of electricity, by expanding its studies to address the risk and probability of various scenarios, as described in these comments, when analyzing and selecting alternatives for modifying the operation of the two large storage facilities on the Colorado River.