

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

"Gila River Strong"

Stephen Roe Lewis
Governor



Monica Lynn Antone
Lieutenant Governor

December 20, 2022

VIA E-MAIL (CRinterimops@usbr.gov)

Bureau of Reclamation
2007 Interim Guidelines SEIS Project Manager
Upper Colorado Basin Region
125 South State Street, Suite 8100
Salt Lake City, Utah 84138

Re: Gila River Indian Community's Comments Regarding the Bureau of Reclamation's
Notice of Intent to Prepare a Supplemental Environmental Impact Statement dated
November 17, 2022

Dear Project Manager,

This letter transmits the Gila River Indian Community's (the "Community's") comments to the Bureau of Reclamation's ("Reclamation's") "Notice of Intent To Prepare a Supplemental Environmental Impact Statement for December 2007 Record of Decision Entitled Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead," 87 Fed. Reg. 69042 (Nov. 17, 2022) ("SEIS"). The Community appreciates the opportunity to provide input at this critical stage of planning to address worsening drought in the Colorado River Basin. The Community has long partnered with Reclamation to address challenges created by drought. The Community hopes to continue working with Reclamation to ensure Reclamation can address drought conditions in a fair and equitable manner, while taking into account Reclamation's statutory trust responsibility to protect, develop, and defend tribal water resources.

The Community agrees that the 2007 Interim Guidelines "are insufficient given current hydrology and reservoir conditions and in light of plausible low runoff conditions in the Colorado River Basin over the next four years." 87 Fed. Reg. 69042. New or amended operating guidelines are necessary and urgent. The Community acknowledges that a consensus alternative would be ideal, but given the urgent need to act, and the lack of progress made among Basin States to reach consensus thus far, the Community firmly believes that only Reclamation has the ability and necessary authority to take the timely, decisive measures required in the face of the drought crisis to equitably protect the health, welfare, and safety of those who rely on the River, including federally recognized tribal nations, like the Community, with statutory trust entitlements to River water for their tribal homelands.

1. Only one of Reclamation's three preliminary alternatives offers a practicable solution to the ongoing drought crisis.

Reclamation's proposed third alternative, the "Reservoir Operations Modification Alternative," is the only practicable alternative to managing the current drought. The current crisis requires decisive federal action in 2023, building on and going *beyond* whatever level of consensus can be achieved in the short term. And, as Reclamation has already implicitly recognized, the "No Action" alternative is not acceptable. The need for action in 2023 is unmistakable.

While a "No Action" alternative is required to be analyzed, the Community firmly believes that "no action" threatens the health, welfare, and safety of River water entitlement holders for at least two reasons. First, the current guidelines have failed to adequately protect critical elevations at Lake Powell and Lake Mead. Reclamation's August 2022 24-Month Study projects that Lake Mead's 2023 operating elevation will be 1,047.61 feet, and thus, for the first time, Lake Mead will operate in a Level 2a Shortage Condition.¹ And the Study projects Lake Powell's 2023 elevation to be less than 3,525 feet. *Id.* Second, if the 2007 Interim Guidelines remain as the only tool to address the crisis, reservoir elevations will continue to drop. Reclamation recently announced that, unless new action is taken, Lake Mead's elevation is projected to be below 1,000 feet (minimum power pool) by September 2024, and below 950 feet as early as 2025. Lake Powell is estimated to drop below 3,490 feet (minimum power pool) as early as Spring or Summer 2023, and to be as low as 3,425 feet by the middle of 2024. *See* Bureau of Reclamation, Public Information Webinars per 87 Fed. Reg. 69042.² Further federal action is required.

While the Community agrees that consensus is desirable to the extent it can reasonably be achieved, the "Framework Agreement Alternative" is unlikely to successfully address the current crisis given where those discussions now stand. Since June 14, 2022, when Commissioner Touton testified before the Senate Committee on Energy and Natural Resources that 2 to 4 million acre-feet of additional conservation was needed starting in 2023, it has become clear that a plan to rely on consensus alone is unrealistic and unacceptable given the need for urgent action in 2023.

It is the Community's understanding that the Basin States intend to meet through the end of January 2023 to see if a consensus framework agreement can be developed in time for it to be incorporated into the SEIS. The Community supports all efforts to reach consensus, but past efforts that resulted in consensus took months or even years. Reclamation and the Basin States worked "for a period of *years* on DCPs." 84 Fed. Reg. 2245 (emphasis added). If Reclamation relies too much on consensus, it will take unacceptable risks of deepening the deficit at the reservoirs because sufficient water will not be voluntarily saved to offset the need for involuntary reductions. The Community appreciates Reclamation's efforts to find approaches that have broad support among all water users on the River, but nonetheless urges Reclamation to exercise federal leadership without limiting itself to the measures that garner elusive consensus.

2. Tribes must have a formal seat at the table.

¹ Available at https://www.usbr.gov/uc/water/crsp/studies/24Month_08.pdf.

² Available at <https://www.usbr.gov/ColoradoRiverBasin/SEIS.html>.

Tribes with statutorily created trust entitlements to water from the Colorado River are important stakeholders in the Colorado River Basin. Reclamation should therefore continue seeking and considering their input through both formal consultation and broader engagement efforts. Reclamation has recognized that, “[i]n addition to currently unquantified rights . . . tribes hold quantified rights to a significant amount of water from the Colorado River and its tributaries (approximately 3.4 [million acre-feet (“maf”)] of annual diversion rights) that often are senior in priority to those held by other users. The United States has a trust responsibility to protect federal Indian reserved water rights.” Bureau of Reclamation, “Review of the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead” at 14 (Dec. 18, 2020). “And as Secretary Bernhardt noted at the Colorado River Water Users Association 2019 conference, the engagement and support of both Tribes and non-governmental entities (NGOs) was an essential element in passage of the Drought Contingency Plans (DCPs) by Congress in record time.” *Id.* at ii.

Formal Consultation. Reclamation must engage the Community, and any other Basin Tribes that have requested formal consultation, in meaningful and robust Nation-to-Nation consultation throughout the SEIS process. President Biden recently ordered that consultations must ensure all applicable information is readily available to consulting parties and that Federal and Tribal officials have adequate time to communicate. White House, Memorandum on Uniform Standards for Tribal Consultation (“WH Memo”) at § 2 (Nov. 30, 2022); *see also* 512 Department of the Interior, Departmental Manual (“DM”) at § 5.5(B). Reclamation must then take the Tribal input it receives into account; and provide an explanation of how Tribal input was received, how that Tribal input was addressed, and the reasoning for any instance in which Tribal suggestions were not incorporated into the Departmental action or any instance where consensus could not be obtained. 512 DM § 5.5(C). Reclamation must also timely disclose to affected Basin Tribes the outcome of consultation and decisions made as a result of consultations. WH Memo at § 7(b).

To satisfy these consultation requirements, Reclamation must consult the Community and other requesting Basin Tribes before and after each of its decision points. Reclamation must consider the particular concerns of Basin Tribes, and provide information based on the differentiated impacts they may feel from federal action. While time is of the essence, Reclamation should provide sufficient time for Tribes such as the Community to meaningfully respond to information provided before and after the draft SEIS is released in Spring 2023 *and* before and after the final SEIS is released later that summer. Reclamation should also create and share a model with Tribes such as the Community who have requested it to illustrate for decision-makers how proposed cuts may affect Tribal water supplies. And, if there is a consensus alternative being discussed, the Community and other requesting Basin Tribes need to know what is under discussion.

Sovereign Panel. In addition to its consultation obligations, Reclamation should consider gathering a “sovereign panel” (consisting of Federal, State, and Tribal representatives) to discuss federal action before the final SEIS is released, so all sovereigns are informed of Reclamation’s proposed final action at the same time. During the development of the DCPs and 2022 Lake Powell Operations, Reclamation provided separate briefings, with Basin States getting earlier notice than Basin Tribes. But “American Indian and Alaska Native Tribal Nations are sovereign governments recognized under the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions.” White House, Memorandum on Tribal Consultation and Strengthening Nation-

to-Nation Relationships (Jan. 26, 2021). Basin Tribes are entitled to receive information at the same time as other Basin sovereigns.

The “sovereign panel” is a concept under consideration for the Post-2026 Colorado River Reservoir Operational Strategies for Lake Powell and Lake Mead under Historically Low Reservoir Conditions, *see* 87 Fed. Reg. 37884 (June 24, 2022), still being developed. We recognize that incorporation of the “sovereign panel” in the expedited SEIS process may be cumbersome, but Reclamation should be able to bring together sovereign stakeholders in a group setting prior to the final issuance of the SEIS. The Community believes this would be an important symbolic gesture of equal treatment, especially for those Tribes that have been heavily engaged in the SEIS process, such as the Community.

3. *Reclamation should evaluate and explain the relationship between the forthcoming SEIS and the 2007 Interim Guidelines.*

Reclamation has a responsibility to clearly describe how the SEIS will be implemented, and whether it is only a supplement to the 2007 Interim Guidelines – to be used on a limited basis – or whether it will effectively replace the 2007 Interim Guidelines operational regime. There is no debate that large-scale changes to the 2007 Interim Guidelines are necessary. The 2007 Interim Guidelines are structured around elevation tiers. The lowest tier for Lake Mead is tied to an elevation of 1,025 feet. *See* 2007 Interim Guidelines § 2.D.1.c. Yet Lake Mead is expected to drop below 1,000 feet as early as 2024. And the Guidelines do not provide for releases less than 7.0 maf from Lake Powell, which is triggered by a Lake Powell elevation of 3,525 feet. *Id.* § 6.D. Lake Powell could be as low as 3,490 feet early next year.

For Lower Basin operations, Reclamation should re-examine each elevation tier, and consider implementing new tiers and delivery reductions at each tier. To that end, Reclamation should evaluate whether reductions in intentionally created surplus (“ICS”) deliveries can be limited above a tier 3 shortage condition, and/or whether tier determination accounting should be revised to limit the use of ICS. Further, Reclamation should determine whether it can limit the use of ICS to meet DCP obligations – *i.e.*, conversion of ICS to DCP ICS to meet DCP reductions – and, if so, what would be an appropriate limit on the use of ICS to meet DCP reductions. Reclamation should evaluate and explain under what conditions the SEIS will not apply, *i.e.*, it should identify what elevations or hydrological conditions will trigger the SEIS, and under what elevations or hydrological conditions (if any) would the SEIS no longer apply.

For Upper Basin operations, Reclamation should also consider and evaluate in the SEIS whether the Guidelines protect the correct elevation levels. While the Community recognizes the need to establish a protective “buffer” to protect minimum power pool at Glen Canyon Dam, Reclamation should consider whether an elevation below 3,525’ would protect Glen Canyon Dam operations while also lessening the burden on Colorado River users. Small, incremental changes in the elevation protection level could have a huge impact on the amount of water that is successfully reduced. Each foot matters. In Reclamation’s presentations, the specific elevations identified appear to be selected on 5- or 10-foot increments, which are easier to describe for illustrative purposes but may not be the most accurate elevations in determining the right amount of buffer to protect minimum power pool. The Community believes that Reclamation should provide detailed analysis of what the correct “buffer” elevation should be. Moreover, Reclamation

should provide detailed analysis of how reduced releases from Glen Canyon Dam and increased releases from the Colorado, New Mexico and Utah Initial Units will achieve the correct “buffer” elevation.

Another key component of the SEIS is timing of implementation. Basin reservoirs are expected to reach critical elevations as early as next year. Reclamation’s proposed decision-making schedule shows it appreciates the need for timely action. But to ensure stability in the Basin, Reclamation should provide as much information to users as possible regarding when any changes will go into effect, and evaluate how the timing of reductions will affect water users – both in 2023 and beyond. Going forward, Reclamation should consider and evaluate whether it is possible to reduce deliveries mid-year, and what impact such a determination would have on local economies, the environment or otherwise.

Reclamation should evaluate and explain whether the necessary and urgent changes to the 2007 Interim Guidelines require additional environmental assessment or mitigation. For example, Reclamation should evaluate and consider in the SEIS whether additional delivery reductions will result in increased groundwater pumping. Groundwater savings facilities, irrigation districts that previously relied heavily on groundwater pumping, currently rely on substantial amounts of Central Arizona Project (“CAP”) water in lieu of pumped water. If CAP water is going to be substantially reduced, these irrigation districts will rely on more groundwater pumping. Increased groundwater pumping will have environmental effects. Negative effects of excessive pumping include drying up of wells, reduction of water in streams and lakes, deterioration of water quality, increased pumping costs, and land subsidence. See Laura E. Condon and Reed M. Maxwell, *Simulating the sensitivity of evapotranspiration and streamflow to large-scale groundwater depletion*, 5 Science Advances 6 (June 19, 2019). Relatedly, Reclamation should explain whether changes will require Endangered Species Act compliance beyond the Lower Colorado River Multi-Species Conservation Plan and existing mitigation activities. To the extent additional mitigation is necessary, Reclamation should evaluate whether shovel-ready water augmentation projects could mitigate the impact of reductions. It should ensure any projects are timely completed and give special consideration and priority to projects that protect public health and safety and tribal trust water entitlements.

4. Reclamation should exercise its full authority to manage the Upper Basin.

The unprecedented risks facing the entire Colorado River Basin necessitate immediate action beyond the Lower Basin; the Upper Basin must also do all it can to protect the River and the SEIS should address all available federal actions and management tools that can be used to reduce demand in the Upper Basin. The Drought Response Operations Agreement (“DROA”) has been a step in the right direction, but more can be done. Reclamation should maximize DROA releases, and evaluate ways to improve the efficiency of DROA releases. For example, Reclamation should evaluate transportation losses between the Colorado, New Mexico and Utah Initial Units and Lake Powell and investigate causes of diminished runoff in the Upper Basin. The Community acknowledges that much of this diminished runoff is due to higher temperatures and arid soils, but the SEIS should look at all potential causes and ways to mitigate those causes.

The SEIS should also explore how to accelerate demand management in the Upper Basin. Voluntary demand management will result in additional conservation efforts in the Upper Basin,

but efforts to establish voluntary demand management in the Upper Basin have been too slow. Accordingly, the SEIS should also evaluate whether compulsory demand management is feasible perhaps using denial of federal financial resources as a means of enforcement. Under the SEIS Reclamation should consider its full regulatory authority to do all it can to reduce demand in the entire Basin, not just the Lower Basin. The Community acknowledges that Reclamation might only be able to effectively implement demand management indirectly with financial incentives or disincentives connecting infrastructure funding to a certain volume of reductions. But under the SEIS, Reclamation should consider all possible tools and, at the very least, explain why regulatory actions that are available, and being considered in the Lower Basin, are unavailable in the Upper Basin.

5. *The need for fair, equitable, and efficient management of the Lower Basin has never been greater.*

It is critical that Reclamation manage the Lower Basin not only in an efficient manner, but also in a fair and equitable one. Reclamation should: (i) treat fairly and equitably all River water entitlement holders, especially those to whom Reclamation owes a statutorily created trust responsibility, who have already contributed to drought mitigation through conservation; (ii) adequately account for *all* Tribal trust resources, including Tribal statutory entitlements to Colorado River water through the CAP; (iii) protect fairness by ensuring public health and safety needs are met; (iv) equitably distribute losses throughout the Basin; and (v) ensure Mexico's participation is sufficient such that there is not otherwise an outsized burden placed on other Lower Basin users.

Reclamation should treat River water entitlement holders who contribute to drought mitigation through conservation fairly and equitably. Voluntary system conservation has been a hallmark of drought mitigation to this point. Numerous parties in the Lower Basin, and particularly the Community, have partnered with Reclamation in the past to conserve hundreds of thousands of acre-feet of Colorado River water to protect Lake Mead. For example, the Community has already contributed almost 600,000 acre-feet of its Colorado River entitlement to bolster elevation levels at Lake Mead, resulting in over 10 feet of additional elevation. Reclamation should consider and explain the relationship between these ongoing voluntary system conservation efforts and involuntary reductions imposed by the SEIS. River users will voluntarily conserve more water under the new guidelines if there is confirmation that conserved water will be credited towards upcoming cuts; that is, that conserving users will not face "double cuts" as a result of their conservation efforts. Predictability encourages conservation.

At the same time, Reclamation should prioritize wet water conservation efforts. The Colorado River is in dire need of wet water; not previously stored water. Accordingly, Reclamation should consider and evaluate in the SEIS limiting ICS deliveries, including a moratorium on ICS deliveries or, alternatively, establishing new volume and timing limits on ICS deliveries based on new tiers. And Reclamation should consider and evaluate in the SEIS excluding ICS from elevation calculations. Relatedly, Reclamation must eliminate operational neutrality.

Reclamation should adequately account for all Tribal trust resources in the SEIS, especially Tribal statutory entitlements to Colorado River water through the CAP. While Reclamation should consider the ways Basin Tribes differ from other water users and the ways in

which Basin Tribes differ from each other, Reclamation should not imbue certain Basin Tribes with more protection than others. Reclamation has a statutory trust responsibility to Tribes, like the Community, that have accepted statutory trust entitlements to Colorado River water delivered through CAP. This responsibility requires a high degree of care and protection and which creates a trust claim for the affected tribe in a manner different than others with contractual entitlements to River water. *See* Arizona Water Settlements Act, Pub. L. 108-451, 118 Stat. 3499 (2004); *see also, e.g.*, Ak Chin Water Rights Act of 1984, Pub. L. 98-530, 98 Stat. 2698 § 2a (“[T]he Secretary shall deliver annually a permanent water supply from the main project works of the Central Arizona Project to the southeast corner of the Ak-Chin Indian Reservation of . . . surface water.”); Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. 100-512, 102 Stat. 2549 (1988). Moreover, these Tribal trust entitlements to Colorado River water through CAP are no less important than other Basin Tribes’ rights to divert directly from the River. Reclamation has a money-mandating duty to consider and protect the Community’s statutory entitlement to Colorado River water held in trust by the United States. *See* AWSA § 204(a)(2); *see also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, Contested Case No. W1-207, Judgment and Decree dated Sept. 13, 2007 at ¶ 6 (Ariz. Superior Ct., County of Maricopa) (“The Water Rights described in . . . this Judgment and Decree shall be held in trust by the United States on behalf of the Community and the Allottees as provided in section 204 of the Act.”). At every step, Reclamation must consider and appropriately account for its trust responsibilities, especially protecting statutorily protected tribal trust resources. As part of its trust responsibility, Reclamation must consider whether any reductions in River deliveries to a tribe with a statutory entitlement to such water is likely to be permanent or nearly permanent, thereby necessitating the need to find replacement water for such lost entitlement.

*Reclamation must protect fairness by ensuring public health and safety needs are met.*³ Reclamation must consider and evaluate in the SEIS whether certain deliveries are necessary, regardless of priority, for the protection of the public health and safety of the 35–40 million people who rely on the Colorado River for daily human needs and activity. The volume of water required for public health and safety, and even the definition of public health and safety, could vary according to the jurisdiction and the amount of reduction imposed. In Arizona, CAP water supplies are particularly important. The absolute minimum level of protection needed would be: (1) direct deliveries to municipal water treatment plants and water that replenishes acquirers pumped to provide supplies to municipalities that do not use treatment plants (*e.g.*, Tucson); (2) direct deliveries that a municipality can demonstrate are necessary to meet water requirements now and in the future⁴; and (3) deliveries to tribal homelands for health, safety, cultural needs, and well-being of members.

Reclamation can and should equitably distribute losses throughout the Basin. Reclamation should account for and charge evaporation and system losses against users equitably as part of the modified operating guidelines and development of the SEIS. All Lower Basin users benefit from upstream storage at Lake Powell and Lake Mead, and the Secretary has authority to account for losses against all Lower Basin water users, even those entitled to diversions from the

³ Reclamation should evaluate and protect health and safety requirements in both the Upper and Lower Basins.

⁴ A reduction that may have a permanent or quasi-permanent impact could cause the affected entities to fall into noncompliance with state law requirements and create chaos.

“mainstream.” “Mainstream” water, by definition, includes all water in system reservoirs. *Arizona v. California*, 547 U.S. 150, 153 (2006) (Consolidated Decree at I(B)). Accordingly, a user’s entitlement to divert from the mainstream includes reservoir water. Their diversion can and should be accounted for at Lee Ferry, thus taking into account storage and conveyance losses. Moreover, accounting for diversions for end uses should also be done at Lee Ferry because that is where the Lower Basin 7.5 maf entitlement (or less in times of shortage) is made available. Doing so divides the Lower Basin entitlement equitably, and losses are borne fairly throughout the system. Reclamation should also consider and explain the relationship between the draft SEIS and the informational report it anticipates publishing in 2023 addressing potential methodologies to support assessments for evaporation, seepage, and other system losses in the Lower Basin.

Reclamation should ensure Mexico’s role does not place an outsized burden on Lower Basin users. Reclamation should consider and evaluate in the SEIS the role of Mexico in protecting the River. The burden on Lower Basin users will be larger if Mexico is not engaged and participating. Section 7.B.3 of the 2007 Interim Guidelines provides: “In the event projections included in any monthly 24-Month Study indicate Lake Mead elevations may approach an elevation that would trigger shortages in deliveries of water from Lake Mead in the United States, the Secretary shall consult with the Department of State, the USIBWC and the Basin States on whether and how the United States may reduce the quantity of water allocated to Mexico consistent with the 1944 Treaty.” The new guidelines should reflect that Basin Tribes, as important stakeholders in the Colorado River Basin, must also be consulted regarding the role of Mexico.

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Thank you for considering the Community’s views. We look forward to continuing our work together to address and solve the drought crisis threatening the Colorado River Basin.

Respectfully,



Stephen R. Lewis
Governor