

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

Sent via email to: CRinterimops@usbr.gov

Re: Scoping Comments on SEIS



December 29, 2022

The Colorado River Indian Tribes are aware of and have studied the current crisis on the Colorado River. The Mohave and Chemehuevi people have always lived along the banks of the River in what is now the Lower Basin. Our ancestors lived through previous droughts and floods.

We thank Reclamation for conducting this Supplemental Environmental Impact Study that is necessary to understand the impacts of less water in the River. We expect that Reclamation will prepare its alternatives with the full knowledge of the unique aspects of each tribe's water rights including the unique nature of the decreed water rights of the Colorado River Indian Tribes. We do not have a Reclamation contract, our water is not delivered through a Reclamation facility, and we are not part of a state water rights system. Reclamation, as part of the United States government, has a trust obligation to protect our first-priority decreed water rights for our present and future use.

We incorporate in these comments the letter from Attorney General Rebecca Loudbear to Secretary Haaland, et al dated October 26, 2022, regarding the potential assessment of system losses against the CRIT.

Considerations for the SEIS

Mechanisms need to be developed and in place as soon as possible for all water users in the Basin to voluntarily contribute some of their water to the system.

A flowing River is very important and religiously and culturally significant to our community and to many tribes along the River and its tributaries. Because of this fact CRIT has been voluntarily leaving water in Lake Mead as part of the Pilot System Conservation Program and the Arizona DCP Agreements. The CRIT submitted a proposal to continue leaving its water in the system in 2023 through 2025. All water users must be included in these types of programs.

The protection of Glen Canyon Dam is important to everyone in the basin. However, we, as Lower Basin water users should not be the only entities sacrificing for this objective. Our water cannot go into Lake Powell. The NOI and the information in the public webinars indicate that

the primary mechanism for protecting Glenn Canyon Dam is to deliver less water to Lake Mead. This puts the burden of protecting Glenn Canyon Dam on us as a lower basin water user. Other mechanisms for broader participation should be included in the alternatives.

The Colorado River is a living River with fish, animals, plants, and people who depend on it to continue. All potential action alternatives should include a component for water to continue to flow from Lake Powell through the Grand Canyon, through Black Canyon, through Lake Havasu, through the wildlife refuges, the tribal Reservations and on to Mexico. We do not know, and may not be able to know, the full extent of the damage that will be done if operations of the dams prevent the flow of the Colorado River through any part of its course. Reclamation must protect against this catastrophe.

We recommend that Reclamation study an alternative that will include maintaining system conservation water that was created through a compensation program as water in the system. This water may remain in Lake Mead to maintain the minimum pool and may be released to maintain the base flows through the River needed for environmental and habitat protection. System conservation is currently accounted for and delivered as a source of inflow. It is delivered to water users as early as the water year following creation. The Reclamation system conservation program can be modeled after the ICS program by creating a separate account and establishing parameters for delivery or release for the purpose of preserving the system. The parameters would include specified River conditions triggering a release for system preservation and for conditions that permit the water to be delivered to water users.

Climate change has resulted in less water within the Colorado River. But, it is the use of that water that is causing the current crisis. We must all contribute to save the life of the River and our contributions of water should be used to maintain the River's life.

Thank you for consideration of our comments.

Please direct any correspondence regarding these comments to: Rebecca Loudbear, Attorney General, Colorado River Indian Tribes: rloudbear@critdoj.com

CC:

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COLORADO RIVER INDIAN TRIBES

OFFICE OF THE ATTORNEY GENERAL

October 26, 2022

The Honorable Debra Haaland, Secretary of the Interior
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Brian Newland, Assistant Secretary Indian Affairs
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Tanya Trujillo, Assistant Secretary for Water and Science
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Camille CalimlimTouton, Commissioner
Bureau of Reclamation
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Sent via email to all addressees

Re: System losses and the Colorado River Indian Tribes

Dear Secretary Haaland, Assistant Secretary Newland, Assistant Secretary Trujillo and
Commissioner Touton:

Officials within the Department of Interior have announced that Reclamation is developing a process to assess "system losses" in the Lower Basin of the Colorado River. System losses are water lost by the Colorado River and its reservoirs from evaporation, seepage and "other losses."

The water rights allocation of the Colorado River Indian Tribes is not subject to an assessment of system losses.

Background on System Losses

Each year Reclamation estimates that the evaporation from Lake Mead, seepage from the River and water use by phreatophytes results in approximately 1.2 million acre-feet (maf) of system losses each year. This is referred to as the *structural deficit*. Reclamation does not account for these losses as “uses.” This results in reductions in water in Lake Mead that is not attributed to water users.

An example illustrates this situation. If Reclamation releases 7maf from Glen Canyon Dam to Lake Mead and the intervening inflows between Glen Canyon Dam and Lake Mead are 500,000af this provides a potential available new annual supply for delivery from Lake Mead of 7.5maf. To deliver 7.5maf from Lake Mead to points of diversion for water users, Reclamation must include an additional 600,000af release to compensate for seepage and other losses from the River. Depending on the elevation of the surface and the climatic conditions, the evaporation losses from Lake Mead may average an additional 600,000af per year. Completing this example, in a water year in which Lake Mead receives 7.5maf of inflow Reclamation releases 8.1maf to deliver 7.5maf to water users in the Lower Basin results and Lake Mead loses 600,000af to evaporation this results in a water depletion from Lake Mead of 8.7maf. This *structural deficit* of 1.2maf has not been accounted for within the Lower Basin for decades. Reclamation announced recently that they are working on a process to assess this system loss against the water users.

System losses are not assessable against the allocation for the Colorado River Indian Tribes

The Mohave people and the Chemehuevi people of the Colorado River Indian Reservation (CRIR) have been irrigating and farming with the water of the Colorado River from time immemorial. The CRIR was established from Mohave homelands in 1865. Congress appropriated money for irrigation ditches to divert water directly from the mainstream of the Colorado River to the CRIR for use by the Mohave people on the Reservation in 1867. The CRIT have used direct diversions from the mainstream of the Colorado River for farming ever since; first from hand dug ditches, then pumps in the River, and since 1944 through Headgate Rock Dam.

Headgate Rock Dam was funded and constructed by the United States to deliver water to the Reservation through the Colorado River Irrigation Project which is operated by the Bureau of Indian Affairs. The construction of Headgate Rock Dam was funded under the Rivers and Harbors Act. Both Headgate Rock Dam and the Colorado River Irrigation Project are federal projects, but neither are Reclamation projects or facilities.

The CRIT water rights were adjudicated and quantified by the United States Supreme Court in the 1963 case of *Arizona v. California* (373 U.S. 546 (1963)) and included in the 1964 decree.

(*Arizona v. California*, 376 U.S. 340, 344 (1964)) They have been increased since 1964 in subsequent decrees to account for lands that were not included within the original federal assessment of reservation lands.

The CRIT have federal Indian reserved water rights to divert water from the mainstream as they have done throughout millennia. The reservation of water for the CRIR was made at the time the Reservation was created—decades before the formation of the Reclamation Service or the construction of Reclamation projects and facilities on the Colorado River. This is not a water right based on storage in a Reclamation project or delivery through a Reclamation facility. This is a water right for direct diversion from the Colorado River.

The Supreme Court characterizes the CRIT reserved water right as an allocation from the mainstream.

Arizona v. California

The water rights of the CRIT and the attributes of those rights were confirmed by the United States Supreme Court decision in 1963 (*Az v Ca*, 373 U.S. 546 (1963)) and the 1964 Decree. (*Az v Ca*, 376 U.S. 340 (1964)) This has carried forward to the 2006 Consolidated decree without change except to increase in the volume of water available for the CRIT use. (*Arizona v. California*, 547 U.S. 150, 158 (2006))

The United States prepared and presented claims on behalf of the CRIT in the litigation between the states of Arizona and California over the states' apportionment of the Colorado River. The United States claimed the right to **divert water flowing in the mainstream of the Colorado River** sufficient to satisfy the agricultural purpose for which the CRIR was established. This amount of water is quantified as sufficient water to irrigate all the practicably irrigable acreage on the Reservation. The Special Master and the Court agreed. (*Az. V. Ca.* 373 at 595 – 601)

The CRIT water right was quantified for present and future use by the CRIT. The holding of the Court and the Decree make clear that the CRIT water right is a right to directly divert water from the mainstream of the Colorado River, it is not based on storage in Lake Mead. It is different from contractual water rights to storage behind Hoover Dam as authorized in the Boulder Canyon Project Act.

The exact language of the Supreme Court confirming the water delivery to the CRIT from the mainstream is excerpted below.

“The Government, on behalf of five Indian Reservations in Arizona, California, and Nevada, asserted **rights to water in the mainstream of the Colorado River.**” (emphasis added, *Az v Ca*, 373 U.S. at 595)

"The Master found both as a matter of fact and law that when the United States created these reservations [the five Indian reservations in the Lower Basin including the CRIR] or added to them, it reserved not only land but also the use of enough water **from the Colorado** to irrigate the irrigable portions of the reserved lands." (Az v Ca, 373 at 596)

"The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.... We follow [*Winters*] now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are "present perfected rights" and as such are entitled to priority under the Act." (Az v Ca, 373 U.S. 600)

"We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." (Az v Ca, 373 at 600)

The Decree also includes an injunction against the United States from delivering water other than as set forth in the Decree. This includes the CRIT reserved water right.

The United States is enjoined:

"From releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment named in this subdivision (D) except in accordance with the allocations made herein;

.....

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet **of diversions from the mainstream** or (ii) **the quantity of mainstream water necessary to supply the consumptive use** required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less...." (Az v Ca, 376 at 341 and 344-45)

The Court held that the CRIT allocation is a Present Perfected Right and defined of "Perfected Right" as "water rights **created by the reservation of mainstream water for the use of federal establishments** under federal law whether or not the water has been applied to beneficial use...." (Az v Ca, 376 at 340)

The definition of "Present Perfected Rights (PPRs)" is perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." (*Id.*)

Non-Tribal Holders with Present Perfected Rights entered Contracts with the United States

The CRIT do not hold a contract for delivery of water from Hoover Dam. Other holders of PPR's do have Reclamation contracts and those contracts permit the assessment of system losses. Reclamation asserted this authority in the contracts authorized under the Boulder Canyon Project Act and the contractors agreed with it.

At the time of the Boulder Canyon Project Act most water diversions were in California. The holders of PPRs, for the most part, entered contracts with the United States for delivery of water from storage behind Hoover Dam in Lake Mead as authorized in Section 5 of the Boulder Canyon Project Act. These contracts contain uniform terms and requirements in addition to the terms specific to the project repayment obligations.

First, each contract includes the exact language of the 1931 Seven Party Agreement with Reclamation. (Available at: <https://www.usbr.gov/lc/region/pao/lawofrvr.html#7pty>) The 1948 Hoover Dam compilation of laws and regulations notes that Reclamation, by regulation, also required at least two other standard provisions.

Using the Imperial Irrigation District (IID) as an example, Reclamation and IID entered the Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water with the United States on December 1, 1932 (IID 1932 Contract). The IID 1932 Contract includes the following two provisions that are also included in the other contracts with holders of PPRs in California.

The first provision confirms that the water for delivery to IID is water from Lake Mead, not that of a direct diversion from the River:

[T]he United States shall from **storage available in the Boulder Canyon Reservoir [Lake Mead]**, deliver to the District each year at a point in the Colorado River... so much water as may be necessary to supply the District a total quantity" of its water right. (Art. 17 of the IID 1932 Contract)

The second common provision addresses the complete authority of Reclamation to regulate the amount of water delivered, which includes the authority to assess system losses.

Rules and Regulations: There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard....The District hereby agrees that in the operation and maintenance of its diversion works at [the point of diversion], all such rules and regulations will be fully adhered to. (Art. 24 of the IID 1932 Contract)

Other Reclamation Contracts

Reclamation entered a contract with the Metropolitan Water District of Southern California (1930 MWD Contract) in 1930 (amended in 1931) for delivery of water from storage in Lake Mead, referred to at the time as the Boulder Canyon Reservoir. The MWD Contract includes an almost exact version of the Rules and Regulations paragraph quoted above authorizing Reclamation to “prescribe and enforce” rules and regulations and the agreement of the contractor to adhere to them. (See 1930 MWD Contract at Paragraph (15))

In 1944 Reclamation entered a Contract with the State of Arizona for delivery of water from storage in Lake Mead to water users in the State.

The 1944 Contract with the State of Arizona at **Paragraph 7(d)** specifically addresses system losses.

7(d) The obligation to deliver water at or below Boulder Dam...shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

The Reclamation contract for construction and operation of the Central Arizona Project is subject to the terms of the 1944 Contract with the State of Arizona including Paragraph 7(d) quoted above. The original 1972 Reclamation Contract with the Central Arizona Water Conservation District states at Paragraph 8.7(b):

The quantity of Colorado River water available under this contract for project purposes shall not exceed the quantity of water available to Arizona under the aforementioned Supreme Court Decree in Arizona v. California and in **Arizona’s water delivery contract with the United States after first providing for satisfaction of:**

(i) present perfected rights and perfected rights described in Article II(D) of the Decree and the rights of other Federal reservations established prior to September 30, 1968....

This CAP contract provision confirms that the delivery of water to the CAP is subject to “reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.” (See 1944 Contract with Arizona). It is also subordinate to the CRIT water right which is a present perfected right.

Conclusion

The United States does not have the authority to assess system losses against the delivery of water to the Colorado River Indian Reservation. The water right for the Colorado River Indian Tribes is for the diversion of water from the mainstream and dates back to the establishment of the reservation in 1865.

Reclamation by contract has imposed restrictions on water users specifically related to the assessment of system losses as in the Arizona contract and through the requirement to abide

by rules and regulations adopted by Reclamation that is included in Reclamation contracts for delivery of water from Lake Mead.

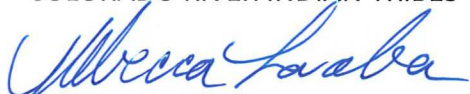
The United States presented a claim on behalf of the CRIT before the Special Master in Arizona v. California for diversion of the water flowing in the mainstream of the Colorado River. This claim was accepted by the Special Master and the Court and the CRIT were allocated 719,248 acre-feet **of diversions from the mainstream** or (ii) **the quantity of mainstream water necessary to supply the consumptive use** required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less. (This total is from *Az v Ca*, 547 U.S. 150, 158 (2006))

Reclamation knows the difference between a right to divert water delivered from storage in Lake Mead and the CRIT right to divert water directly from the mainstream with a measurement of the full water right at the point of diversion.

The CRIT water right is for diversion from the mainstream, it pre-dates any Reclamation projects on the River and the CRIT never entered a contract for delivery of water from storage in Lake Mead. Therefore, Reclamation does not have the authority to assess system losses against the CRIT water right.

Sincerely,

COLORADO RIVER INDIAN TRIBES



Rebecca Loudbear
Attorney General

cc:

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