



## **Ute Indian Tribe of the Uintah and Ouray Reservation**

### **Comments on the U.S. Department of Interior, Bureau of Reclamation, Request for Input on the Development of Post-2026 Colorado River Reservoir Operational Strategies for Lake Mead and Lake Powell August 30, 2022**

The Ute Tribal Business Committee of the Ute Indian Tribe of the Uintah & Ouray Reservation (“Ute Indian Tribe” or “Tribe”) submits these comments in response to the Bureau of Reclamation’s (“Reclamation”) pre-scoping Notice for input on the proposed development of Post-2026 Colorado River Operational Strategies, prior to the formal initiation of the National Environmental Policy Act (“NEPA”) process in early 2023.<sup>1</sup> Reclamation is specifically requesting input for the anticipated upcoming NEPA process on the following two issues: (a) processes that can be employed to encourage and facilitate meaningful participation of Colorado River Basin partners, stake holders, and the general public; and (b) potential substantive elements and strategies for post-2026 operations.

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 (summarized in the Federal Register pre-scoping Notice). Our comments focus on the process for the Ute Indian Tribe’s meaningful participation in the discussions, negotiations, and decisions that will be made for the Post-2026 Colorado River Management and on substantive strategies for addressing the crisis facing millions of people relying on the water supplies of the Colorado River and, in particular, the Tribal members of the Ute Indian Tribe.

#### **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,

---

<sup>1</sup> 87 FR 37884 (June 24, 2022).

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.

This is a historical moment for the Biden Administration and, under the discerning eye of Secretary Deb Haaland (“Secretary”), it presents a rare opportunity to create a new chapter in the history of the Federal Government’s position on its fiduciary duty and other trust responsibilities to tribes related to supporting tribal efforts to secure, preserve, protect, develop, and use the waters required to establish permanent homelands on our reservations. In the 1800s, tribes lost over 75% of their land base to the colonization of America in the search for the most valuable agricultural lands. Now, history is poised to repeat itself, to the detriment of tribes and Indian people, by the silence and inaction from the federal leadership to recognize, secure, and protect Indian reserved water rights for reservation life. We ask that the Department of Interior (“Department”) take action immediately to prevent this from happening.

### **THE PROCESS TO ENSURE THE UTE INDIAN TRIBE’S PARTICIPATION**

We agree with the recent remarks of Raúl Grijalva, Natural Resources Committee Chair of the U.S. House of Representatives, that the Department “needs to act more aggressively” to establish a process “that gives the most impacted communities—like tribes across the Colorado River Basin—a bigger seat at the table...”<sup>2</sup> We strongly request that (1) the Ute Indian Tribe be seated as a participant on the Upper Colorado River Commission; and (2) the Bureau of Indian Affairs have visible and active representation as a federal partner in Reclamation’s leadership role in working to develop strategies for the post-2026 management of the Colorado River.

### **Tribal Participation on the Upper Colorado River Commission**

We have one, very specific priority with regard to the Department’s process for ensuring our Tribe’s participation: Put us in the room and at the table of the Upper Colorado River Commission (“Commission”). The Ute Indian Tribe has a substantial apportionment of federal, Indian reserved water rights (“Indian water rights”) in the Upper Colorado River Basin. That is, we are not just another state water user seeking state permits to use Colorado River water. We must be included in the meetings, discussions, and negotiations conducted by the Commission.

Our Uintah and Ouray Reservation was first established in 1861, creating our senior reserved water rights under the *Winters* doctrine. The Ute Indian Tribe owns the most senior priority rights to the natural flows of the tributaries from the Colorado River within the exterior boundaries of our Reservation. We have a binding quantification of our Indian water rights, based on our Reservation’s practicably irrigable acreage, in what is known as the 1965 Deferral Agreement in which Utah and the United States agreed to acknowledge and recognize, without resorting to litigation, our agreement to temporarily defer the development and use of a portion of our Indian water rights. Relying on this 1965 Agreement recognizing our Tribe’s Indian water rights, Utah has since received billions of federal dollars to construct its Central Utah Project.

---

<sup>2</sup> Jennifer Yachnin, Ariz. Lawmakers want other states to share Colorado River cuts, Greenwire, Water Rights and Water Quantities.

Because we satisfied our end of this contractual agreement, the 1965 quantification remains a binding agreement between the Tribal, State, and Federal governments of our Tribe's Indian water rights.

In a 1988 Solicitor's memorandum opinion to the Bureau of Indian Affairs ("BIA"), dated September 9, 1988, Lynn R. Collins explained that the Tribe's deferment of its Indian reserved water rights through the 1965 Deferral Agreement was conditioned upon "full and complete recognition of all tribal water rights . . . ." This Solicitor's opinion, as with all such Solicitor Opinions, establishes a binding legal position for the Department. Yet, our experience to date supports our conclusion that the historical bias of the Federal Government in supporting Utah's Colorado River water development over more than a century has resulted in the Department's refusal to acknowledge and enforce our rights articulated in the legal conclusion of Solicitor Collin's opinion.

The 1965 Agreement established our quantified *Winters* reserved water rights at just under 550,000 acre-feet per year by diversion in the Upper Colorado River Basin. Most of the water in the Uinta Basin within our Reservation is used for irrigated agriculture, a primary economic activity and Tribal enterprise. This is consistent with the expectation and purpose of the Federal Government's policy towards Indians in the 1800s, including with our Treaties, that required us to become productive farmers with the creation of our Reservation. This, in turn, was intended to promote our Tribal self-sufficiency and establish our homeland.

A portion of our Tribe's Indian water rights were adjudicated through two federal judicial decisions and decrees in 1923. These decrees affirm our Tribe's Indian water rights for irrigation of close to 60,000 acres on Tribal lands from the Lake Fork and Uinta Rivers, and for other purposes, including domestic, culinary, and livestock raising, for a total annual diversion right of about 180,000 acre-feet per year. These adjudicated, federal, Indian reserved water rights still exist, in spite of a century-long effort by the State to significantly reduce the quantification of our Indian water rights, including the portion of our federally decreed rights, while inhibiting our efforts to develop our water rights.

Our Tribe cannot rely on the Federal Government to protect and preserve our Indian water rights. The historical bias and disparate treatment involving Indian water rights is not an issue of the past. Currently, our Tribe is being actively excluded from water planning efforts, in particular, from the Commission, as a sovereign government with our own water rights. We have a quantified apportionment of the Colorado River; we are not just another state-based water user relying on permits being granted from the state for our water use. Our Tribal apportionment is to be subtracted from the total water apportioned to and established for the State of Utah under the 1948 Upper Colorado River Compact.<sup>3</sup> We must become an equal partner with the states in determining the future of the Colorado River. Through the Commission, the Upper Basin states negotiate with Reclamation and each other on the policies and management of the Upper Basin of the Colorado River, including the obligation to deliver water to the Lower Basin states. Our Tribe's own Colorado River apportionment has not been considered during the discussions and negotiations to

---

<sup>3</sup> Act of April 6, 1949, P.L. 37, 63 Stat. 31, Consent of the Congress to the Compact, subsequently ratified by the legislatures of each of the States.

date. Utah has used this to their advantage and is rushing to develop and use all of Utah's Colorado River apportionment.

And now, we have the frightening—and unbelievable—prospect that state-based water users could be paid to discontinue some of their water use, which includes the use and reliance on our Indian water rights that have flowed downstream to other users because of the Federal Government's failure to secure these rights for use on our Reservation (discussed further below).

The Department must step up and acknowledge tribal sovereignty and support tribal self-determination, which includes not only the critical issues of ownership and self-governance, but also the critical role of participating in the multi-party discussions that will determine the future management and operation of the Colorado River. The Secretary can actively support our Tribe's participation on the Commission (e.g., establish an "Ex Officio" position), and this is not the first time we have urged this position.<sup>4</sup> We must be able to protect and preserve our Indian water rights for future development and use.

The current exclusion of our Tribe from the Commission is unacceptable. History has shown that neither the state nor federal representatives will protect our Indian water rights. Utah has no authority to negotiate the development, protection, and use of our Tribe's Indian water rights. And we object to the Upper Basin states' and Federal Government's reliance on negotiating solely with Utah in this regard, while sitting passively at the table while Utah is aggressively developing Utah's Colorado River apportionment under the 1948 Upper Colorado River Compact.<sup>5</sup> The failure to acknowledge our quantified rights and deduct them from Utah's Colorado River apportionment, as required under *Arizona v. California* (1963), leaves a cloud over the upcoming review of the 2007 Interim Guidelines for the Operation of Lake Powell and Lake Mead and the pending development of the post-2026 reservoir operational strategies.

Failure to include a representative from our Tribe in the deliberations of the Commission not only continues the cloud that hangs over both the Upper Basin States' negotiations and preservation efforts, but also, in particular, Utah's effort to preserve its own water rights in the Upper Colorado Basin. In a recently published article, U.S. Senator Mitt Romney of Utah is quoted as heralding the settlement of the Navajo Nation's water rights in Utah because it "settle[d] concerns that the Navajo Nation's water rights could affect Utah's own share of the river's dwindling resources."<sup>6</sup> Romney further explained that "the Navajo Nation had claims to the Colorado River that would impair Utah's water rights." It is equally true that without the State and Federal Governments acknowledging the Ute Indian Tribe's Indian water rights, and including our right to develop and use these water rights in the Upper Basin, the future negotiations,

---

<sup>4</sup> See, e.g., Colorado River Basin Tribes Partnership, Resolution, "To Secure Tribal Representation on the Upper Colorado River Commission," adopted June 21, 2018 (supporting the Ute Indian Tribe's efforts to secure Tribal Representation on the Upper Colorado River Commission); Shaun Champoos, Chairman, Ute Indian Tribe, Letter to President Joseph R. Biden, Jr., regarding "Ute Indian Tribe Representation on the Upper Colorado River Commission," dated July 15, 2021.

<sup>5</sup> Act of April 6, 1949, P.L. 37, 63 Stat. 31, Consent of the Congress to the Compact, subsequently ratified by the legislatures of each of the States.

<sup>6</sup> J. Yachnin, Interior, Utah ink water rights settlement with Navajo Nation, Greenwire, Social Equity and Access (05.31.22).

planning, and management of the Colorado River for the junior water users in the Upper Basin states will be impaired.

Secretary Haaland said, on her first day on the job at the Department of Interior,

I want the era where tribes have been on the back burner to be over, and I want to make sure that they have real opportunities to have a seat at the table.<sup>7</sup>

Now is the time to act. Secretary Haaland, give our Tribe a seat at the Commission and show your commitment to support the tribal exercise of self-determination and self-governance over Indian reserved water rights. This, and only this, will provide our Tribe meaningful engagement and participation in the development of the post-2026 management strategies for the Colorado River.

### **Participation of the Bureau of Indian Affairs—Trustee of Tribal Trust Lands and Water**

Participation must also include representation from the BIA. They have been inexplicitly absent from the Tribal Information Exchange meetings conducted by Reclamation and from other forums developed for tribal information and input. The BIA holds millions of acres of tribal lands in trust for the benefit of tribes and allottees, recognized as the trustee of our reservation trust lands. It must become an active participant in the meetings, discussion, and negotiations now occurring between the Bureau of Reclamation and the states—and tribes.

The BIA operates the Uintah Indian Irrigation Project (“UIIP”), authorized by Congress in 1906, that serves most current Tribal agricultural operations on the Reservation. The UIIP currently serves the lands under the 1923 federally-decreed Indian water rights, as well as lands irrigated from the Duchesne River. These rights are part of the quantified apportionment of our Tribe’s Indian water rights in the Upper Colorado River Basin. There are other federal Indian Irrigation Projects in the Colorado River Basin. The BIA has concurrent jurisdiction with us over trust lands and Indian water rights, and issues federal regulations establishing rules related to the use of natural resource issues on reservations, such as land leasing. The BIA is a necessary participant to the pending proceedings led by Reclamation, and must be present as a trustee of the most important trust asset tribes have—water—both as a watchdog and a collaborator with tribes to ensure that tribes can protect and benefit from the development and use of our Indian water rights.

### **SUBSTANTIVE ELEMENTS AND STRATEGIES FOR POST-2026 OPERATIONS**

The development of post-2026 Colorado River strategies must look beyond the operational strategies for Lake Powell and Lake Mead and consider alternative strategies to resolve the future problems of over-reliance on the waters of the Colorado River. There will be no long-term certainty for the Colorado River water users if the current effort does not look beyond simply managing the dwindling water supplies in the reservoirs.

---

<sup>7</sup> S.M. Bryan and F. Fonseca (AP), Tribes seek more inclusion, action from US Officials, Washington Post (April 2, 2022).

### **Evaluate the Impact on Tribal Trust Assets—Water**

Reclamation’s policy for conducting the 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 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.”<sup>8</sup>

While the impact on all tribal trust assets must be 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. 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.

Reclamation must take this very seriously. To be clear, Reclamation cannot discuss the impacts on Indian water rights during its upcoming NEPA process unless it (1) acknowledges the binding quantification of our Tribe’s Indian water rights 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 (explained above) that, to date, has been ignored by Reclamation and the Department. Reclamation’s NEPA policy, consistent with 42 U.S.C. § 4332(C), 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 the NEPA process.

Remarkably, Reclamation has chosen to adopt a quantification volume for modeling the impact of our Tribe’s Indian water rights that was proposed by the State in 1990, and that we rejected. The State’s “proposed Revised 1990 Water Compact” attempted to make significant cuts in our 1965 binding quantification of Indian water rights,<sup>9</sup> with a 7% across the board cut in our quantified water rights, determined by using the practicably irrigable acreage standard adopted by the U.S. Supreme Court in *Arizona v. California*.<sup>10</sup> The Upper Colorado River Commission has relied on this false quantification volume for our Indian water rights, and transmitted depletion schedules to Reclamation for previous NEPA studies since 1999, based on this flawed data.<sup>11</sup>

---

<sup>8</sup> Bureau of Reclamation NEPA Handbook, 512 DM 2, chapter 3.15.7, Indian Trust Assets, pgs. 3-29 (February 2012).

<sup>9</sup> Central Utah Project Completion Act of 1992, Title V, Section 503(a) [1992 Act].

<sup>10</sup> 373 U.S. 546 (1963).

<sup>11</sup> Bureau of Reclamation, 2016 UCRC Schedule UD State Tribes Notes (explanation for differences between Tribal schedules in the Tribal Water Study and those included in the updated 2016 Upper Colorado River Commission Depletion Demand Schedule with the revised CRSSv6 model. (Provided by Reclamation to the Upper Basin tribes).

Reclamation has relied on these lower quantification volumes for our Tribe for updating its Colorado River System hydrology projections using its Colorado River Simulation System (“CRSS”),<sup>12</sup> even though we participated for over four years in the development and publication of the Tribal Water Study, conducted in cooperation with Reclamation.<sup>13</sup> We analyzed and reported our Tribal current and future Indian water rights with a demand schedule based on our binding quantification with the United States. Reclamation did not consult with us prior to its decision to use the State’s preferred quantification, nor change its reliance on the State’s and Upper Colorado River Commission’s preferred (i.e., reduced) quantification for our Indian water rights when we discovered and challenged this decision in 2020.

These significant cuts to our Indian water rights that Reclamation is relying on has no legal effect because the State’s proposed Revised 1990 Water Compact has not been approved by the Ute Indian Tribe, as required by Congress.<sup>14</sup> It is time to right a wrong: the quantification for our Tribe’s Indian water rights that Reclamation is relying on to guide the development of a new post-2026 management framework for the Colorado River Basin is unenforceable—nonexistent. It will underestimate our senior priority, present perfected water rights in this current review and analysis and continue the cloud over the entire proceedings in the Upper Colorado River Basin. And 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.<sup>15</sup> 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.”

Do not make this mistake twice. Take action to correct this error. The Department is obligated to protect and preserve our Indian water rights. Remove the cloud over Reclamation’s NEPA process and development of new management guidelines for the Colorado River. Acknowledge our Tribe’s quantified Indian water rights, and analyze the impact on these trust assets before selecting the post-2026 management framework for the Colorado River. This is the position the United States Department of Justice took when litigating in the 1950s-60s in *Arizona v. California*, when it intervened on behalf of tribes in the Lower Basin and insisted that Indian water rights must be quantified before the respective rights of the states could be determined.

---

<sup>12</sup> See <https://www.usbr.gov/lc/region/g4000/riverops/model-info.html#:~:text=For%20outlooks%20beyond%20five%20years.comparisons%2C%20and%20supplementary%20resource%20analyses>. (Last visited August 19, 2022).

<sup>13</sup> U.S. Department of the Interior, Bureau of Reclamation, and Ten Tribes Partnership, Colorado River Basin Ten Tribes Partnership Tribal Water Study Report (Dec. 2018).

<sup>14</sup> 1992 Act.

<sup>15</sup> 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).

### **Adopt Strategies to Compensate Tribes for the Use and Conservation of Our Indian Reserved Water Rights**

Indian people have been conserving water in the southwest for millennia, a basic necessity for our survival. We have effectively managed our natural resources to sustain human existence in harmony with the natural environment. But for the past two centuries, we have watched the non-Indians misuse, abuse, and—yes, sometimes—steal our water. Not only were non-Indian people encouraged to and assisted with settling on our Indian lands, but the Federal Government has provided them with billions of dollars for infrastructure to take water from the streams, including those that feed our reservations that were imposed on us by the United States.

The Federal Government now faces the specter of watching state-based water users benefit once again from their expansive use of water, including the unimpeded and uncompensated use of Indian reserved water rights that has continued to flow downstream for others to use because the Federal Government has ignored its trust responsibilities as our trustee and mismanaged Indian water resources. If the Biden Administration does not alter the course of the misappropriation of Indian water rights by the states for the benefit and use of non-Indians, it will, shamefully, see Indian water rights go the way of Indian lands from the prior centuries—only this time Indian people may not survive. After surrendering millions of acres of land to the United States, we cannot accomplish the promise of our treaties—a permanent homeland—without water for our reservations.

The uncompensated downstream use by states and state-water users of the undeveloped and conserved, federal water rights of tribes is well-known, and tribal voices continue to be raised beseeching the United States to action on behalf of tribes to assist us in the development and use of our Indian water rights. And now, there are new, developing methods that are being adopted by states for state water-users to continue to benefit, at least in part, from Indian water. A couple, brief examples will illustrate the importance of federal leadership at this time to adopt policies for the monetary compensation of the non-Indian use of federal, Indian water rights.

In 2003, the Upper Colorado River Commission adopted a resolution that challenged a common understanding between the seven basin states regarding use of the Colorado River and put a crack in the Law of the River.<sup>16</sup> Part of Utah is within the Upper Basin and part is within the Lower Basin of the Colorado River system, and Utah wants to divert water from its Upper Basin apportionment to deliver to Utah communities located within the Lower Basin, including at St George, Utah. This is known as the Lake Powell Pipeline Supply Project and has become a very controversial water supply project diverting water out of the Upper Basin. Because of some uncertainty among the Upper Basin states related to the legality of using Upper Basin state apportionments in the Lower Basin under the 1922 Colorado River Compact and 1948 Upper Colorado River Basin Compact, the Commission adopted a resolution consenting to Utah's use of a portion of its Upper Basin apportionment in the Lower Basin. This opened the door for Utah to move Upper Basin water out of eastern Utah to western Utah, and provided an opportunity for

---

<sup>16</sup> Resolution of the Upper Colorado River Commission, "Regarding the Use and Accounting of Upper Basin Water Supplied to the Lower Basin in Utah by the Proposed Lake Powell Pipeline Project" (June 19, 2003), *citing* the 1922 Colorado River Compact (45 Stat. 1057), and the 1948 Upper Colorado River Basin Compact.

Utah to continue its water transfers, including out of the Colorado River Basin, in order to fully develop its Colorado River apportionment. Tribal attempts, however, to market and use our Indian water rights through transbasin diversions have not been permitted; in fact, based on our own Tribe's experience (and that of other tribes), they have been prohibited by the Federal Government.

Then, in 2015, the Commission supported pilot programs to inform the development of its demand management program for reducing consumptive uses by serving as the contracting entity for the Colorado River System Conservation Pilot Program in the Upper Basin ("Conservation Pilot Program").<sup>17</sup> Our Tribe spent extensive time and financial resources in an attempt to participate in this Conservation Pilot Program. However, we discovered two significant flaws in the states' program that either prohibited tribes' participation or disincentivized our participation.

First, the Conservation Pilot Programs require that only water that has been previously used, i.e., irrigation water, can be identified for monetary compensation through the conservation of water from fallowed agricultural lands. This immediately prohibited many tribes, including us, from receiving compensation for our current, undeveloped and conserved Indian water rights. Second, the Commission adopted an agreement template that could not be altered and required tribes grant oversight by the state to enter our Reservation lands to confirm that the participant was following the rules in order to receive the promised monetary compensation for conservation of our water. However, our Tribe has federal Indian water rights that are regulated, managed, and administered by the BIA and, as such, our agricultural water use through our BIA Uintah Indian Irrigation Project is under federal jurisdiction. The State has no jurisdictional authority on our Tribal trust lands. This created a significant barrier to our participation in the Conservation Pilot Program because the Commission would not allow the Federal Government to provide the oversight of conserved water on our Reservation under their program. Once again, the Federal Government did not step in to establish a federal program that would benefit tribes by providing monetary compensation for our conserved water.

Now, as a very recent example of the "relaxation" of the Law of the River, governing the seven states of the Colorado River, and state water-use schemes that benefit non-Indian water users, Governor Spencer Cox announced that Utah adopted a new law this year, HB33, that "changed an old 'use it or lose it' law so farmers could leave some of their water in streams without losing their allotted amount."<sup>18</sup> That is, they can participate in conservation programs for compensation and retain the right to use their water rights after any period of non-use due to a contribution to the instream flow.

To put a pin in our key issue to be addressed by the Federal Government at this important point in history, this new law presents the absurdity that non-Indian water users, relying, at least in part, on undeveloped and conserved Indian water rights that continue to flow downstream, can now be compensated for not using our Indian water rights! And yet, we have no federal policies

---

<sup>17</sup> See Resolution of the Upper Colorado River Commission "Regarding the Emergency Upper Basin Drought Contingency Plan Demand Management" (June 20, 2018).

<sup>18</sup> Utah Governor Spencer J. Cox's Newsletter, "Addressing Drought in the West," dated July 22, 2022, at [https://mailchi.mp/utah.gov/updates-on-gas-prices-homelessness-and-more?e=\[UNIQUID\]](https://mailchi.mp/utah.gov/updates-on-gas-prices-homelessness-and-more?e=[UNIQUID]) (last visited Aug. 20, 2022).

and resources that will compensate us for the continued use of our Indian water rights by others, while our water remains undeveloped and conserved because of the failure of the Federal Government to develop policies and provide monetary incentives for tribes.

It is clear that the state-based water users expect compensation for any agreement to conserve, i.e., “not use,” their water rights from the Colorado River. For example, the guiding principles articulated by California for the development of the next set of Colorado River operating guidelines.<sup>19</sup> Three principles, in particular, caught our attention:

- (1) *Incentivize* water conservation, storage, recovery, and sharing activities that benefit the Colorado River System and *provide flexibility* for water users;
- (2) Advocate for *increased federal resources*....; and
- (3) *Recognize the interests and priorities* of water right holders, [including] *Tribes*....” (emphasis added).

As the Yuma County Farm Bureau members asserted in their recent proposed “Save the River” policy, commenting on the recent federal announcement that an additional two to four million acre feet of stored Colorado River water is necessary to protect the system, “Farmers will need funds to manage production with less water. To cope with the reduced production impact to our national food supply resulting from less water, farming will need about \$1500 per acre foot.”<sup>20</sup> Not surprisingly, non-Indian, state water users expect to be fairly compensated for the non-use of their water rights.

We ask that the Federal Government adopt policies for and contribute financial resources to tribes with undeveloped, federal, Indian water rights in order to put our Indian water rights to use for our tribal members and Reservation homelands, to contribute to solutions that address the crisis engulfing the Colorado River, and to financially benefit from the conserved instream flows that our Indian water rights are currently providing. Expand tribal water marketing opportunities and flexibility by recognizing current Congressional authority that authorizes tribes to engage in the development of our natural resources on our trust lands, including through business agreements, such as water leasing and forbearance agreements, and make beneficial and compensated use of Indian trust property.

### **Develop Alternative Energy and Water Sources**

Evidence of the critically-low water elevations and conditions at Lake Powell and Lake Mead are replete in the press, from stakeholder groups, and from Reclamation’s own reports; they will not be repeated here. There are currently no reports that can support a conclusion that focusing only on the management of the reservoirs and adaptive management strategies in response to the drought will change the trajectory of the dwindling and receding water supply in the Colorado River Basin. The Federal Government has articulated the priority of preserving hydropower

---

<sup>19</sup> Proposed California Guiding Principles Associated with Development of the Next Set of Colorado River System Operating Guidelines, Draft (July 8, 2021).

<sup>20</sup> See Yuma County Farm Bureau Policy, Drought, Proposed “Save the River”—Colorado River Crash Avoidance, a four-year “save the river” program proposing the reduction of crop production and water orders for monetary compensation.

production at the reservoirs, relied on by millions of people. Although Reclamation has begun to show a commitment to increased transparency and participation, identified as important considerations in the 2020 7.D. Review document,<sup>21</sup> this will not resolve the very real problems facing the diminishing water supply volume in the Colorado River. It is time to reduce the reliance on hydropower production at the two biggest reservoirs and to identify alternative water sources.

The water supply of the Colorado River is producing a tremendous amount of agricultural production, providing food security to the nation, especially during the winter, when fruits, nuts, and vegetables from the area provide more than 70% of the country's needs. It seems the reservoirs are operated to protect hydropower generation at the expense of food production. How is this justified? The government should begin to immediately plan for alternative sources of power, such as solar power and gas-fired power plants, to make up for the power loss due to the low level of storages in Lake Powell and Lake Mead.

Also, the current strategies for responding to the Colorado River water supply crisis, and presumably the future proposals that will guide the post-2026 guidelines for managing the river, seem to be more related to a reduction of water uses primarily from conservation strategies. It is time to take into consideration the need to supply water to the Colorado River Basin from other regions in the United States that have ample water supplies (also suggested in comments solicited during the preparation of Reclamation's 2012 Colorado River Basin Water Supply and Demand Study). And in cities like Los Angeles and San Diego, desalination should be planned.

Even if there were no recorded mega drought, similar to the severe drought that started in 2000, the supply of water in the Colorado River has been surpassed, or nearly surpassed, by the demand of water. In addition, normal flows with wet- and dry-year cycles do not seem to recover as long as climate change continues to take place. It is not clear why Reclamation continues to mitigate with short-term bandage solutions as opposed to sustainable long-term solutions. If the short-term mitigation of the problem continues, chances are that the \$1 trillion in economic activity in the region will start to evaporate and businesses will leave the region and transplant themselves in other areas of the country or overseas. The dwindling of water in the Colorado River is the nation's national security issue—and it should be dealt with a sense of urgency.

### **CONCLUSION**

This time, our Tribal input must be taken most seriously as Reclamation prepares to initiate its development of post-2026 Colorado River Reservoir Operational Strategies for Lake Mead and Lake Powell. This Administration has an opportunity to correct past wrongs by supporting tribal authority through self-governance and self-determination over our Indian water rights by sitting in partnership with the States of the Upper Colorado River Commission as they negotiate and deliberate on the future management of the Colorado River system. And the outcome of this impending, important process will only produce future certainty for the water users if the analysis it produces uses the valid, binding quantification of our Tribe's Indian water rights, which, in turn, will support our Tribe's development and use of this trust asset.

---

<sup>21</sup> Fed. Reg., Vol. 87, No. 121, 37886 (June 24, 2022).

Reclamation’s leadership in the impending analysis of the scope of strategies that should be considered in the development of the post-2026 management of the Colorado River must be bold, it must be innovative, and it must be futuristic or its desire to provide some certainty to the water users will fail. We are encouraged by the leadership that Secretary Deb Haaland and Reclamation Commissioner Camille Touton have shown in stepping forward to take direct federal action to save the Colorado River. We now look for bold action from the Department leadership on behalf of tribes—use your federal authority as the trustee of our most valuable trust asset, Indian water rights, and enact policies that will benefit the life and survival of Indian people on our reservation homelands. Do not let the lessons from our history go unnoticed, unattended to—protect Indian people and preserve our Indian water rights.

Over a century ago, “tribal water rights were largely ignored during the basin’s early development, [but] *Winters* left an indelible mark on the basin rooted in Supreme Court jurisprudence that we today cannot ignore.”<sup>22</sup> We, the Ute Indian Tribe of the Uintah and Ouray Reservation, cannot survive another century of looking the other way, ignoring our most precious natural resource that is needed to establish the homeland we were promised and ensure our survival as a people in the 21st Century and beyond—our water.

---

<sup>22</sup> Amy Cordalis and Daniel Cordalis, Indian Water Rights: How *Arizona v California* Left an Unwanted Cloud Over the Colorado River Basin, ARIZONA JOURNAL OF ENVIRONMENTAL LAW & POLICY, Vol. 5:333 at 341.