GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

"Gila River Strong"

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March 2, 2026

VIA ELECTRONIC MAIL: crbpost2026@usbr.gov

Bureau of Reclamation
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Re: Gila River Indian Community Comments on the Draft Environmental Impact Statement for Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead

Gila River Indian Community DEIS Comments

This letter transmits the Gila River Indian Community's comments to the Bureau of Reclamation's "Draft Environmental Impact Statement for Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead" dated January 2026 (DEIS). Under its congressionally approved water settlement, the Community has the largest entitlement to Colorado River water delivered through the Central Arizona Project (CAP). The Arizona Water Settlements Act (AWSA) statutorily confirmed the Community's entitlement to 311,800 acre-feet per year (AFY) of Colorado River water. Section 204 of the AWSA establishes that this entitlement is held in trust by the United States, making the United States a trustee of this entitlement and subjecting the United States to a fiduciary duty to protect it. The entitlement is delivered to the Community through the CAP through a permanent service contract with the Secretary of the Interior.

The United States' trust responsibility to the Community, including its statutorily designated fiduciary duties regarding the Community's entitlement, and the Community's extensive, longstanding efforts to cooperate with the United States with respect to management and conservation of the Colorado River, inform and are reflected in these comments to the DEIS.

As Reclamation acknowledges, none of the alternatives in the DEIS represents a realistic, legal, sustainable plan for coordinated operation of federal facilities in the Colorado River watershed in the absence of a consensus among water users in the Colorado River Basin (Basin).

- First, the No-Action Alternative—which is at least an attempt to adhere to the Long-Range Operating Criteria (LROC or Operating Criteria) and the order of priorities in section 602(a) of the Colorado River Basin Project Act (CRBPA)—does not address how to allocate shortages in the Lower Basin in a manner that uses the full

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range of discretionary authorities to protect trust assets, including the Community's entitlement to water from the Colorado River.

- Second, as acknowledged in the DEIS itself, the Basic Coordination Alternative "may not provide adequate protection of critical infrastructure or the system and may be viable only in the short term given current reservoir conditions."[1] Further, while Reclamation acknowledges that any course of action it takes in this proceeding cannot supplant the LROC, the Basic Coordination Alternative nonetheless deviates from the LROC in impermissibly including objectives for releases from Lake Powell of less than 8.23 million acre-feet (MAF).

- Third, the other three alternatives deviate from the Law of the River[2] and cannot be adopted absent consent of the water users in the Basin, as Reclamation candidly acknowledges.[3] These three alternatives have not garnered consensus and have been offered by Reclamation as mere raw material for some future, inchoate, consensus-based approach.

In sum, it is clear from the face of the DEIS that Reclamation has correctly concluded that none of the presented alternatives is feasible. None of the alternatives complies fully with the Law of the River, and none acknowledges or fully exercises the Secretary's authority to protect tribal trust assets.

Thus, despite the National Environmental Policy Act (NEPA)'s requirement that the DEIS give interested parties a chance to comment on the environmental impacts of various viable, legal, alternative courses of action that an agency might take, the DEIS here presents no viable alternatives. It is merely a prelude to the actual decision-making process at Reclamation, which will occur only after comments to the DEIS are received. Reclamation has acknowledged in its consultation with the Community that, absent the unlikely emergence of some new consensus-based alternative, it is planning to devise its own new "preferred alternative" that has not yet been

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[1] DEIS 2-11 to 2-12.

[2] The "Law of the River" as used here is the collection of compacts, federal statutes, court decrees, treaties, and regulatory documents governing allocation and management of the Colorado River, including but not limited to the Colorado River Compact, the Boulder Canyon Project Act, the Mexican Water Treaty, the *Arizona v. California* Consolidated Decree, the Colorado River Basin Project Act, and the LROC. *See generally, e.g.*, Ex. C (select governing legal authorities). In contrast, the DEIS defines the "Law of the River" as a "body" or "collective set of documents" derived from statutes and compacts, rather than including the primary legal authorities themselves. That is error.

[3] Because the Community's entitlement to Colorado River water is delivered through a permanent service contract with the Secretary, the consent required for these or any other alternative that requires consent includes that of the Community. The Secretary's obligation to respect the Community's consent requirement is amplified by the fiduciary duty that the Secretary has to protect the Community's entitlement and by the Secretary's overall trust responsibility to the tribe.

articulated, using bits and pieces from the alternatives in the DEIS.[4] Therefore, these comments address not only the obvious deficiencies in the five alternatives in the DEIS, but also some of the necessary elements of any "preferred alternative" that might emerge from Reclamation after the DEIS comments deadline, in the absence of a consensus-based approach.

In particular, the Community urges Reclamation to comply with federal law in developing a preferred alternative. Both the Law of the River and the United States' trust responsibility to the Community must be expressly addressed. These two sources of law are closely connected here: the Community's reliance on the protections of the Law of the River was a necessary foundation for its water settlement and its acceptance of CAP water in lieu of on-reservation water. For this reason, by requiring that the Community's water rights be held in trust, the AWSA commands the Secretary to protect the Community's rights to the full extent of his discretionary authority, consistent with and under the full protection of the Law of the River, including

- Enforcement by the United States of the Compact requirement in Article III(d) of flows of 75 MAF every ten years at Lees Ferry, to ensure that Lower Basin supplies at Lake Mead do not go below 7.5 MAF per year;

- Making water available for Article III(d) compliance by using all water at all Upper Basin Initial Storage Units (UIUs) as required by CRBPA section 602(a)(2) and the LROC, and by requiring the curtailment of Upper Basin uses if necessary to augment available water at reservoirs;

- Enforcement by the United States of the requirement in Article III(c) and CRBPA section 602(a)(1) that in the absence of surplus, the Upper Basin provide at Lees Ferry, "in addition to" the water due under Article III(d), one-half of the water required to deliver 1.5 MAF to Mexico as described in the LROC, without regard to waters of the Lower Basin tributaries; and

- Adherence to the LROC's requirement that during shortage conditions, in the management of all Upper Basin facilities, the "objective shall be to maintain a minimum release of water from Lake Powell of 8.23 million acre-feet for that year" unless a greater release is "necessary to deliver 75 million acre-feet" in the preceding ten-year period.

The Community's consent to its water settlement was also premised on the Secretary's duty as trustee to exercise his discretionary authority to take reasonable measures to protect the Community from shortage conditions, including, for example,

- Exercising discretionary authority to require the equitable sharing of evaporation and system losses (ESL) by each state or diverter in the Lower Basin in times of shortage before resorting to priority; and

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[4] Reclamation acknowledged well before it published the DEIS that it would not include any actual alternatives that might be adopted, an acknowledgment that may legally nullify the process overall.

- Diligent implementation of authority under the CRBPA to supply water to Mexico from sources other than mainstream water available for use in the United States (such as desalinization).

The comments below are divided into three sections: (1) general comments on the approach in the DEIS, which should inform the future development of a preferred alternative; (2) comments specific to the five alternatives presented in the DEIS; and (3) comments regarding the DEIS process, including consultation required by the United States' trust responsibility to the Community.

1. GENERAL COMMENTS

The DEIS fails to address adequately two related, mandatory bodies of law that constrain the Secretary in managing federal facilities in the Basin—the Law of the River, and the trust responsibility the United States owes to the Community as confirmed by the AWSA. Under these legal commands and restrictions on the Secretary's discretion, Reclamation must ensure that no Upper Basin facility causes any reduction in mainstream flows that would deprive the Lower Basin of the minimum required volumes at Lees Ferry under Articles III(c) and III(d) of the Compact, consistent with section 602(a) of the CRBPA and the LROC. Complying with these duties will help to keep Lower Basin shortages within legal limits. Reclamation must also manage any remaining Lower Basin shortages consistent with the Law of the River and trust law, by exercising its discretionary authority to distribute losses equitably, and by minimizing obligations to Mexico by all available means, such as by using readily available UIU storage or developing alternative sources of water.

I. Reclamation must operate all federal facilities in compliance with the Law of the River.

The DEIS correctly acknowledges that in managing Colorado River operations, the Secretary, acting through Reclamation, must obey federal law and comply with mandatory statutory duties. "[T]he Secretary intends to consider, adopt and implement the proposed federal action consistent with the Law of the River, including the Colorado River Compact of 1922, the Consolidated Decree entered by the U.S. Supreme Court in the case of *Arizona v. California*, and other provisions of applicable federal law."[5] "[T]he Department intends to adopt and implement the guidelines in a manner consistent with the Law of the River. The Department also intends that the guidelines be used to implement the LROC through the issuance of the [Annual Operating Plan]."[6] "Reclamation's operations involve continuous adjustment to variable hydrologic conditions to maintain infrastructure integrity, deliver, and release water to Basin users consistent with the Law of the River."[7]

But the DEIS fails to address the full scope of federal law that directs the Secretary to ensure Compact compliance and distribute shortages equitably among Lower Basin water users.

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[5] DEIS 1-4 (citations omitted).

[6] DEIS 1-5.

[7] DEIS 1-10.

That failure is fatal under both the Administrative Procedure Act (APA) and NEPA. Under the APA, a court "shall … set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[8] Agency action is arbitrary and capricious when it "fail[s] to consider an important aspect of the problem."[9] Under NEPA, as amended by the Fiscal Responsibility Act, an agency's EIS must evaluate "a reasonable range of alternatives to [a] proposed agency action."[10] The alternatives must be "technically and economically feasible," "meet the bureau's purpose and need for action," and be "within the [bureau's] legal authority to implement."[11] The alternatives in the DEIS do not satisfy these requirements.

A. The DEIS fails to ensure the Upper Basin meets its flow obligations at Lees Ferry.

1. *Federal law requires the Secretary to ensure flows at Lees Ferry satisfy Compact requirements, thus avoiding unnecessary shortages.*

Under the Law of the River, the Secretary has the authority and duty to ensure the Upper Basin meets its obligation not to reduce the flow at Lees Ferry below an average of 7.5 MAF annually, as well as half of any deficiency of the United States' obligation to Mexico, without regard to Lower Basin tributaries. This requires releases from the UIUs sufficient to allow the 8.23 MAF minimum release from Lake Powell determined by the LROC to be necessary to ensure Compact compliance. The DEIS's failure to acknowledge this duty or otherwise ensure Upper Basin compliance with its Compact obligations renders the DEIS inadequate under the APA and NEPA.

Compact Article III(d) requires that "[t]he States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years." Compliance with Article III(d) requires that Upper Basin States do nothing—that they not divert, use, or store water, or take any other action—to deplete the flow of the Colorado River below 75 MAF in each ten-year period. This protects the 7.5 MAF apportioned to the Lower Basin annually in Article III(a). In the Boulder Canyon Project Act (BCPA), Congress allocated by statute "the 7,500,000 acre-feet annually apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River compact."[12] The Supreme Court held that Congress, in the BCPA, made a "statutory apportionment" of "the mainstream water to which [the Lower Basin States] *are entitled under the Compact*."[13] Article III(d), as implemented by CRBPA section 602(a)(2) and the LROC, ensures the Lower Basin receives the 7.5 MAF it is entitled to annually, irrespective of the Upper Basin's allocation in Article III(a). The ten-year flow

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[8] 5 U.S.C. § 706(2)(A).

[9] *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

[10] 42 U.S.C. § 4332(C)(iii).

[11] Dep't of Interior, Handbook of NEPA Implementing Procedures (DOI NEPA Handbook), 516 DM 1, § 2.3(a)(3).

[12] Boulder Canyon Project Act (BCPA), Pub. L. No. 70-642, § 4(a), 45 Stat. 1057, 1059 (1928).

[13] *Arizona v. California*, 373 U.S. 546, 565 (1963) (emphasis added).

requirement of 75 MAF at Lees Ferry in Article III(d) does not change the annual apportionment of 7.5 MAF, but rather allows for flexible operation of reservoirs to smooth out any minor variations in flow year-to-year.

Further, when there is insufficient surplus, one-half of the volume of water necessary to deliver 1.5 MAF to Mexico[14] must be supplied at Lees Ferry in addition to the 75 MAF minimum flows every ten years. Article III(c)'s Mexico obligation "shall be supplied first from the waters which are surplus over and above the" 7.5 MAF annually apportioned to each basin under Article III(a), plus the additional 1 MAF annual apportionment to the Lower Basin under Article III(b).[15] But "if such surplus shall prove insufficient," then "the States of the Upper Division *shall deliver at Lee Ferry* water to supply one-half of the deficiency so recognized in addition to" the 7.5 MAF obligation to the Lower Basin "provided in [Article III](d)."[16]

The Upper Basin repeatedly recognized these obligations in its Upper Basin Compact, a "major purpose[]" of which was "to establish the obligations of each State of the Upper Division with respect to the deliveries of water required to be made at Lee Ferry by the Colorado River Compact."[17] Indeed, the Upper Basin Compact establishes guidelines for Upper Basin "curtailment of use of water … in order that the flow at Lee Ferry shall not be depleted below that required by Article III of the Colorado River Compact."[18] It also acknowledges that UIUs may be "used … to assist the States of the Upper Division in meeting their obligations to deliver water at Lee Ferry imposed by Article III of the Colorado River Compact."[19]

In the Colorado River Storage Project Act (CRSPA) and the CRBPA, Congress provided for the development and management of Upper Basin storage as a mechanism of Compact compliance. The CRSPA "initiate[d] the comprehensive development of the water resources of the Upper Colorado River Basin, for the purpose[]" of "making it possible for the States of the Upper Basin to utilize" their apportionment of Colorado River water "*consistently with the provisions of the Colorado River Compact*."[20] And in the CRBPA, Congress required the Secretary to implement a storage program to ensure the Upper Basin meets its obligations. Section 602 instructs the Secretary to "make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell" sufficient to "comply with and carry out the provisions of the Colorado River Compact" requiring Upper Basin States to supply one-half the

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[14] Treaty between the U.S. and Mexico: Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (1944) (Mexican Water Treaty of 1944), art. 10 (providing "[a] guaranteed annual quantity of 1,500,000 acre-feet … to be delivered" to Mexico).

[15] *Id.*

[16] *Id.* (emphasis added).

[17] Upper Colorado River Basin Compact (1948), art. I(a).

[18] *Id.* art. IV.

[19] *Id.* art. V(b)(1).

[20] Colorado River Storage Project Act (CRSPA), Pub. L. No. 84-485, § 1, 70 Stat. 105, 106 (1956) (emphasis added).

deficiency to Mexico and 75 MAF every ten years to the Lower Basin.[21] The Act expressly delineates an "order of priority" for storage and release: First, "releases to supply one-half the deficiency" to Mexico under "article III(c) of the Colorado River Compact"; second, "releases to comply with" the 7.5 MAF average annual obligation to the Lower Basin "to comply with article III(d) of the Colorado River Compact"; and third, (3) storage of any additional water to assure the aforementioned deliveries, if such storage would not impair annual consumptive uses in the Upper Basin, or else release of "water not so required to be stored."[22]

In compliance with CRBPA section 602, the Secretary determined in the LROC that an objective of "a minimum release of water from Lake Powell of 8.23 million acre-feet" annually is required to ensure Compact compliance.[23] The term "objective" in the LROC does not make the 8.23 MAF an optional, aspirational goal; rather, by the terms of the LROC, it is a mandatory goal, which must be met whenever there is water at any Upper Basin location to satisfy sections 602(a)(1) and (2).[24]

2. *Federal law prohibits the Secretary from subjecting Lower Basin tributaries to any Mexico obligation.*

Lower Basin tributaries are not within the scope of the Compact as construed in and adopted by the BCPA, and therefore they cannot be considered as surplus waters that would excuse the Upper Basin's obligation to deliver one-half of the deficiency of the United States' Mexico obligation. The Supreme Court in *Arizona v. California* confirmed "that Congress, in passing the [Boulder Canyon] Project Act," statutorily protected and apportioned "the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries."[25] The Upper Basin thus must deliver 7.5 MAF to the Lower Basin from the mainstream of the Colorado River, without regard to the Lower Basin tributaries.

The Lower Basin tributaries are not within the Compact's annual allocation of 7.5 plus 1.0 MAF to the Lower Basin in Article III(a) or III(b) because only waters subject to competing uses in the Upper and Lower Basins were divided in the allocations. As between the Upper Basin and the Lower Basin, there has never been and could never be any dispute that the Lower Basin States are the only states that can use water from the Lower Basin tributaries. Exclusion of the Lower Basin tributaries is further evidenced by the fact that the Compact did not and could not impair existing rights on Lower Basin tributaries. If the Compact had included Lower Basin tributaries in its allocations, existing rights on the tributaries would have been designated as prior perfected

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[21] Colorado River Basin Project Act (CRBPA), Pub. L. No. 90-537, § 602(a), 82 Stat. 885, 900 (1968); *id.* § 602(a)(1)–(2).

[22] *Id.* § 602(a)(3).

[23] Review of Existing Coordinated Long-Range Operating Criteria for Colorado River Reservoirs (LROC), 70 Fed. Reg. 15873, 15875 (Mar. 29, 2005).

[24] *See id.* (providing that the "objective shall" either "be to maintain a minimum release of water from Lake Powell of 8.23 million acre-feet" or to "release[] [water] annually from Lake Powell at a rate greater than 8.23 million acre-feet").

[25] 373 U.S. at 564–65.

rights (PPRs). But the Compact did not cede priorities on the Lower Basin tributaries because it did not address or include them when allocating water. Rather, the Compact divided only the water that was in dispute—water supplied from points of diversion that could divert flows coming from the Upper Basin and therefore could have a call for Upper Basin water absent the Compact. Lower Basin tributary points of diversion could not call for water from the Upper Basin, and uses from those points of diversion were outside the scope of the interstate dispute and thus the Compact. In this context, the Compact's Article II(a) definition of "Colorado River System" as "that portion of the Colorado River and its tributaries within the United States of America" is ambiguous as to which tributaries are referenced. Read in light of the Compact's purpose and structure, the Lower Basin tributaries are not within the Compact's apportionment scheme.

Congress recognized and resolved this latent ambiguity in 1928 in the BCPA, a clarification without which the Compact would not have been approved. The BCPA expressly provided "that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries" and "that the waters of the Gila River and its tributaries … shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico."[26] Further, "any deficiency which must be supplied to Mexico by the lower basin" "shall" be supplied "out of the main stream of the Colorado River."[27] The Supreme Court confirmed that Congress apportioned "the Lower Basin's share of the mainstream waters of the Colorado River, *leaving each State its tributaries*."[28] Because the BCPA operationalized the Compact, the BCPA's interpretation of the Compact is controlling. The BCPA placed a limiting construction on the Compact, and the Compact became effective only because of the BCPA. There was no effective compact before the BCPA, and the Compact cannot be read separately from the BCPA.

Among other things, this means that there are no surplus waters in the Lower Basin in a given year unless water sufficient for 8.5 MAF (7.5 MAF under Article III(a) and 1.0 MAF under Article III(b)) of consumptive use of mainstream water is available in the Lower Basin without regard to Lower Basin tributaries. Applying Article III(c) to the Gila River would be inconsistent

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[26] BCPA § 4(a), 45 Stat. at 1059.

[27] *Id.*

[28] *Arizona v. California*, 373 U.S. at 565 (emphasis added). The Supreme Court noted that "the negotiations among the States and the congressional debates leading to the passage of the Project Act clearly show that the language used by Congress in the Act was meant to refer to mainstream waters only." *Id.* at 568; *see, e.g.*, *Protection & Development of the Lower Colorado River Basin: Hearings on H.R. 5773 Before the H. Comm. on Irrigation & Reclamation*, 70th Cong., 19–86, 383–407 (1928) (statements of Sen. Winsor, Ariz. & Charles L. Childers, Atty., Imperial Irrigation District) (attached as Ex. B-1); 69 Cong. Rec. 9454, 9988–90 (1928) (attached as Ex. B-2); S. Rep. No. 70-592, at 2 (1928) (attached as Ex. B-3); 70 Cong. Rec. 67, 77, 162, 164–65, 172–73, 232, 237, 277, 324, 333, 382, 384–87, 459, 463–69, 471, 603, 837–838 (1928) (attached as Ex. B-4).

with the BCPA because it would effectively require Arizona to provide Gila River water to Mexico—precisely what Congress prohibited in the BCPA.[29]

3. *The DEIS wrongly implies that post-2026 guidelines could effectively modify the LROC's minimum Lake Powell release objective.*

The DEIS fails to acknowledge the Secretary's obligation under the CRBPA and the LROC to maintain an objective *every year* to release a minimum of 8.23 MAF from Lake Powell using all federal facilities upstream of Lees Ferry. In fulfillment of the CRBPA's requirement that the Secretary "make provision for … releases of water from Lake Powell" sufficient to "comply with and carry out the provisions of the Colorado River Compact,"[30] the Secretary determined that "a minimum release of water from Lake Powell of 8.23 million acre-feet" annually is required.[31] Reclamation's authority in this post-2026 process is constrained by the existing LROC—including its minimum 8.23 MAF per year release from Lake Powell.

As Reclamation has acknowledged in consultation with the Community, it is not seeking to modify the LROC in this proceeding. That is the correct approach because any proposed action that would effectively modify the LROC would be procedurally improper.

The LROC may be modified only through APA notice-and-comment rulemaking, and the scope of the post-2026 NEPA process does not purport to include such a modification. Under the APA, the notice-and-comment procedures required for agency "rule making" apply to "formulating, *amending*, or repealing a rule."[32] By 1990, Reclamation acknowledged and formally adopted a requirement of public notice-and-comment procedures for modifying the Operating Criteria. Reclamation cannot "depart from [that] prior policy *sub silentio* or simply disregard rules that are still on the books."[33] The 1970 criteria initially required a "formal review" every five years to include participation of Basin States and "other [appropriate] parties."[34] Recognizing that "the long-range operation of Colorado River reservoirs is important to many agencies and individuals," the 1990 and 1995 reviews were conducted "through an active public involvement process."[35] The minor 2005 amendment to the operating criteria clarified that the regular review process would be

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[29] Further, the Mexican Water Treaty of 1944 does not alter the BCPA. To the extent it provides that "[o]f the waters of the Colorado River, from any and all sources, there are allotted to Mexico … [a] guaranteed annual quantity of 1,500,000 acre-feet" (art. 10), that merely makes clear that all claims Mexico might assert to Colorado River water "from any and all sources" are satisfied by treaty compliance. It does not create any new Lower Basin obligation inconsistent with the BCPA.

[30] CRBPA § 602(a), 82 Stat. at 900.

[31] LROC, 70 Fed. Reg. at 15875.

[32] 5 U.S.C. §§ 553, 551(5) (emphasis added).

[33] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

[34] Colorado River Reservoirs: Coordinated Long-Range Operation, 35 Fed. Reg. 8951, 8951 (June 10, 1970).

[35] LROC, 70 Fed. Reg. at 15874.

a "formal public review."[36] In response to comments on the 2005 amendment, Reclamation stated: "[T]he review of the Operating Criteria should be categorized as informal rulemaking" and that, "[c]onsistent with the APA, Reclamation has provided for public participation and review of the Operating Criteria."[37] The "public review process" leading to the 2005 amendment "includ[ed] consultation with the seven Colorado River Basin States, tribal representatives, and interested parties and stakeholders."[38] (Reclamation has not conducted a five-year review since the 2005 amendment was promulgated.)

This post-2026 NEPA process does not modify the LROC. As with the interim guidelines issued in 2007 and 2024, the scope of this federal action is limited to issuing guidelines for implementing the LROC. The 2007 guidelines were to be "used each year by the Department in implementing the [LROC], through issuance of the [AOP]."[39] The "scope of" the 2024 guidelines was to "make[] limited adjustments to the 2007 Interim Guidelines [Record of decision (ROD)]."[40] Reclamation provided that "[t]he 2007 Interim Guidelines, as revised by [the 2024] ROD, … shall implement and be used for determinations made pursuant to the Long-Range Operating Criteria during the effective period."[41] Likewise, "[t]he proposed federal action" for post-2026 operations "will be implemented through the adoption of interim guidelines that would be used each year by the Department in implementing the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968; Colorado River Basin Project Act of 1968 through issuance of the Annual Operating Plan for Colorado River Reservoirs."[42]

The DEIS for post-2026 guidelines thus cannot alter the Secretary's determination under the LROC that the minimum objective for releases from Lake Powell in times of shortage must be 8.23 MAF, to "comply with and carry out the provisions of the Colorado River Compact."[43] The

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[36] *Id.* at 15874.

[37] *Id.* at 15877.

[38] *Id.* at 15873.

[39] Bureau of Reclamation, Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 ROD) at 4 (Dec. 2007); *see* DEIS 1-25 ("Per Section 7.D. of the ROD, the 2007 Interim Guidelines were considered an implementation of the LROC.").

[40] Bureau of Reclamation, Record of Decision, Supplement to the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2024 ROD) at 13 (May 2024).

[41] *Id.* at 15.

[42] DEIS 1-4 (citations omitted); *see also* Bureau of Reclamation, Scoping Report for Post-2026 Colorado River Reservoir Operations at 60 (Oct. 2023) (attached as Ex. A-8) ("It is also the intent of the Department that the guidelines be used to implement the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (LROC).").

[43] CRBPA § 602(a), 82 Stat. at 900.

DEIS proposes objectives for release that are in many instances impermissibly lower than this minimum, effectively shifting water from the Lower Basin to the Upper Basin in violation of the Law of the River.

4. *The DEIS fails to analyze the full range of actions necessary to ensure Upper Basin compliance with its Compact obligations.*

Although the DEIS states an intent to act "consistent with the Law of the River," it does not analyze the full scope of federal law directing the Secretary's management of the Colorado River. When formulating the post-2026 guidelines for Colorado River operations, Reclamation must follow the Compact as approved by Congress in the BCPA, and the BCPA as interpreted by *Arizona v. California*. Reclamation is also bound to follow the CRBPA, LROC, and all other governing statutes and authorities under federal law.

For Reclamation to "consider, adopt and implement the proposed federal action consistent with the Law of the River,"[44] it must operate all Upper Basin reservoirs so as to ensure flows of 75 MAF in every ten-year period at Lees Ferry, plus the Upper Basin's obligation to bear half the burden of deliveries to Mexico. This means that Reclamation must manage all Upper Basin reservoirs—not just Lake Powell—to ensure that each year's flow at Lees Ferry is at least enough to reach a total of 75 MAF for the preceding ten-year period. Reclamation must also release enough water from Upper Basin reservoirs to ensure that one-half of the burden of deliveries to Mexico is borne by the Upper Basin. The obligation for deliveries to Mexico is a national, federal obligation that must be supplied through the management of all federal reservoirs in compliance with the Law of the River.[45] Reclamation must make available, from Lower Basin sources and from releases at Lake Mead, the volume of water required to deliver 1.5 MAF to Mexico.

The DEIS fails to adequately consider operations of UIUs to ensure Compact compliance. The DEIS states: "The 602(a) storage quantity is the storage in the Upper Basin necessary to assure Lower Basin delivery obligations without impairing consumptive use requirements in the Upper Basin."[46] This ignores that the CRBPA requires the Secretary to assure that the Lower Basin's Compact obligations are met through coordinated storage and releases, *full stop*: the Secretary must "make provision for the storage … and releases of water" first "to supply one-half the deficiency" to Mexico; and second "to comply with" the 7.5 MAF average annual flow obligation to the Lower Basin,[47] whether or not there is any impairment of Upper Basin uses. Only after the section 602(a)(1) and (2) priorities are met through storage and releases may the Secretary store additional water for future Upper Basin deliveries, "taking into consideration all relevant factors"

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[44] DEIS 1-4.

[45] *See* CRBPA § 202 ("The Congress declares that the satisfaction of the requirements of the Mexican Water Treaty from the Colorado River constitutes a national obligation which shall be the first obligation of any water augmentation project[.]"); *id.* § 602(a) (first prioritizing the "provision for the storage of water in the storage units of the Colorado River storage project and releases of water from Lake Powell … to supply one-half the deficiency" to Mexico).

[46] DEIS 1-26.

[47] CRBPA § 602(a)(1)-(2), 82 Stat. at 900.

and "without impairment of annual consumptive uses."[48] Avoiding impairment of Upper Basin consumptive use is entirely subordinate and subsequent to assuring Upper Basin deliveries under section 602(a)(1) and (2) and Article III(c) and III(d).

The DEIS also improperly emphasizes the existing RODs for the CRSPA storage units. Those RODs each concern use of Upper Basin Compact apportionments to protect endangered fish populations, in recognition that compliance with the Endangered Species Act is a necessary prerequisite to Upper Basin use and development of the Upper Basin Colorado River apportionments.[49] Reclamation states that "[r]eleases from the CRSP Upper Initial Units implemented to date pursuant to the" "specific operational mechanism" later established by the Drought Contingency Plan (DCP) and Drought Response Operations Agreement (DROA) "have occurred within the scope of the existing RODs for the respective facilities."[50] But to comply with the Law of the River, the range of Secretarial action cannot be confined to "within-ROD releases from CRSP Upper Initial Units."[51]

The Community agrees that "the Secretary retains the authority to operate outside [the UIU] RODs if necessary."[52] The Secretary has the authority and **duty** to operate the UIUs—whether within or outside of existing RODs—to ensure Upper Basin compliance with the Article III flow obligations.

The DEIS is less clear on this point than it should be. The DEIS considers "operations at the CRSP Upper Initial Units" only "if warranted to protect critical reservoir elevations."[53] Reclamation's alternatives "address[] additional activities above Lake Powell including the use of the CRSP Upper Initial Units … to support critical elevations at Lake Powell and other important system goals."[54] This framework appears to allow Reclamation to order releases at Lake Powell sufficient to meet the Upper Basin flow obligations at Lees Ferry, and then order releases of the UIUs sufficient to protect infrastructure at Lake Powell.

The Community concurs with CAP's comments that Congress mandated that the Secretary operate UIUs and all federal infrastructure to comply with the Compact, which necessarily requires use of UIUs to meet Upper Basin Compact obligations. The DEIS's failure to expressly

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[48] *Id.* § 602(a)(3).

[49] *See* Bureau of Reclamation, Record of Decision, Operation of Flaming Gorge Dam at 1 (Feb. 2006); Bureau of Reclamation, Record of Decision, Aspinall Unit Operations at 1–2 (Apr. 2012); Bureau of Reclamation, Record of Decision, Navajo Reservoir Operations at 8 (July 2006).

[50] DEIS 1-30, 2-5; *see* DEIS 2-16 (considering, for the Basic Coordination Alternative and Supply Driven Alternative, an "increase [of UIU] releases within their RODs").

[51] *See* sources cited *supra* n.50.

[52] DEIS 1-30.

[53] DEIS 1-9; *see also* DEIS 1-5.

[54] DEIS 2-5.

acknowledge and model such Upper Basin activities renders the DEIS inadequate under the APA and NEPA.

By failing to ensure required flows at Lees Ferry, the DEIS allows for unlawful shortages in the Lower Basin. Shortage determinations in the Lower Basin are downstream of (and dependent on) Compact-compliant flows at Lees Ferry. Under the Law of the River, the Upper Basin's Article III(d) obligation requires that flows at Lees Ferry in each ten-year period average at least 7.5 MAF (not including the Upper Basin share of the Mexico obligation). When Reclamation manages all federal facilities in compliance with that requirement, annual variability in the available Lower Basin supply at Lake Mead can be smoothed out to a minimum of 7.5 MAF every year.

With proper Compact enforcement, shortages in the Lower Basin are limited in scope: shortages will almost always be limited to the gap between 7.5 MAF supply per year (plus inflows below Lees Ferry, minus ESL below Lees Ferry) and 8.5 MAF of consumptive use plus the water to supply 0.75 MAF to Mexico. But if the Secretary fails to enforce Compact obligations, he allows for unlawful shortages. For example, if Reclamation under-releases from Lake Powell, or fails to use UIU releases for Compact compliance, then Lower Basin shortages will be larger than the Law of the River permits.

B. Shortages within the Lower Basin must be managed consistent with the Law of River.

So long as the Secretary operates all federal facilities in compliance with the Law of the River, the Lower Basin will have available in Lake Mead 7.5 MAF nearly every year, and shortages will be limited. The Secretary must in turn operate federal facilities in the Lower Basin so as to ensure that any shortages are shared equitably, consistent with the Law of the River. Reclamation has acknowledged its broad discretion under *Arizona v. California* and the Consolidated Decree, but the DEIS does not fully describe or address the range of potential discretionary action.

> Pursuant to the Consolidated Decree, the Secretary is required to first provide for the satisfaction of the PPRs in the order of their priorities without regard to state lines. Pursuant to the CRBPA, water contract holders in Arizona with contracts dated September 30, 1968 (when the CAP was authorized) or later, have a lower priority than California's 4.4 MAF apportionment. Beyond these two requirements, the Department does not have detailed guidelines in place that define the circumstances under which the Secretary would reduce the annual amount of water available for consumptive use from Lake Mead, i.e., when water supplies would be reduced, by how much, or who would experience specified reductions.[55]

Discretionary action should include accounting for ESL attributable to Lower Basin users and distributing these losses pro rata to users. In calculating the amount that must be released from Hoover Dam "to satisfy 7,500,000 acre-feet of annual consumptive use" under Consolidated

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[55] DEIS 1-27.

Decree section II.B, the Secretary has the authority to distribute ESL pro rata.[56] The Decree does not specify how to make that calculation.[57]

The United States must also take all available measures to deliver water to Mexico without reducing deliveries to Colorado River users in the United States. The obligation to Mexico is a national obligation under the CRBPA. The Secretary has a duty to meet the obligation without resort to Article III(c) of the Compact if at all possible. The DEIS does not comply with this duty. The trust duty to exercise these discretionary powers to minimize losses of the Community's water is discussed in the next section.

II. The DEIS fails to address the United States' trust responsibility to the Community.

The DEIS fails to adequately consider the United States' trust responsibility to the Community and fails to exercise authorities the United States is duty-bound to use to protect trust resources. This failure to "consider an important aspect of the problem"—the trust responsibility—is also arbitrary and capricious under the APA, and renders the proposed alternatives unlawful and thus inadequate to support Reclamation's duty to consider "reasonable" alternatives under NEPA.[58]

A. The United States has a trust responsibility to protect the Community's CAP water entitlement.

The Secretary 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 creates a trust claim for the affected tribe in a manner different from others with contractual entitlements to Colorado River water.

"The Federal Government owes judicially enforceable duties to a tribe" where it "has expressly accepted such obligations … in a treaty, statute, or regulation."[59] Once "Congress has created a conventional trust relationship with a tribe as to a particular trust asset," courts "apply common-law trust principles" to determine the government's trust responsibilities.[60] And common-law trust principles require the Secretary "to assert his statutory and contractual authority to the fullest extent possible to" "preserve" the trust asset.[61]

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[56] *Arizona v. California*, 547 U.S. 150, 155 (2006).

[57] *See Arizona v. California*, 373 U.S. at 593 ("[N]either the [Boulder Canyon] Project Act nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own.").

[58] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43; 42 U.S.C. § 4332(C)(iii); DOI NEPA Handbook, 516 DM 1, § 2.3(a)(3).

[59] *Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023).

[60] *Id.* at 566 (citation omitted).

[61] *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256 (D.D.C. 1972).

The Supreme Court has long held that fiduciary duties arise where federal law couples trust language with respect to a given asset and meaningful federal control over that asset. For example, the government had a fiduciary duty to manage land and improvements on a reservation where it held the land "in trust" and had "discretionary authority" over the use of the land.[62] By contrast, the government had no fiduciary duty where it held land "in trust" under the General Allotment Act but it was the allottees, not the government, that had actual control of the land.[63]

Here, the United States holds the Community's reserved water rights, as settled by the AWSA, in trust for the benefit of the Community. Under *Winters v. United States*, the United States' establishment of the Community's reservation implicitly reserved for the Community enough water to fulfill the purposes of the reservation.[64] In 2004, the United States finally settled the quantification of the Community's water rights in the AWSA. And the AWSA confirms that "[t]he water rights and resources described in the Gila River agreement shall be held in trust by the United States on behalf of the Community and the allottees as described in this section."[65]

Further, the United States has extensive "discretionary authority" to protect the Community's water entitlement.[66] The Secretary, acting through Reclamation, has broad discretion over Colorado River operations. The Secretary is authorized to "construct, operate, and maintain" the dams and related waterworks for the Colorado River.[67] The Secretary has exclusive authority, "under such general regulations as he may prescribe, to contract for the storage of water in [Lake Mead] and for the delivery thereof."[68] And the Secretary "coordinate[s]" the operations of the reservoirs in the Colorado River Basin, including by "mak[ing] provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell."[69] In sum, the federal government controls the storage and delivery of water from the Colorado River. That control over Colorado River operations includes control over the Community's trust asset. As the DEIS recognizes, "tribal entitlements to CAP water or Colorado River water delivered through the CAP in central Arizona are administered pursuant to settlements and water delivery contracts between tribes and the Secretary of the Interior."[70]

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[62] *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 469, 475 (2003).

[63] *United States v. Mitchell (Mitchell I)*, 445 U.S. 535, 544 (1980).

[64] 207 U.S. 564 (1908).

[65] Arizona Watter Settlements Act (AWSA), Pub. L. No. 108-451, § 204(a)(2), 118 Stat. 3478, 3502 (2004).

[66] *White Mountain Apache Tribe*, 537 U.S. at 475.

[67] *See, e.g.*, BCPA § 1, 45 Stat. at 1057; CRSPA § 1, 70 Stat. at 106; Colorado River Basin Salinity Control Act (CRBSCA), Pub. L. No. 93-320, §§ 101(b)(1), 103(a)(1), 202, 88 Stat. 266, 266, 269, 271 (1974).

[68] BCPA § 5, 45 Stat. at 1060; *id.* ("No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.").

[69] CRBPA § 602(a), 82 Stat. at 900.

[70] DEIS TA 18-6.

Therefore, common-law trust principles apply to the Secretary's management of the Community's water rights.[71] In this EIS process, Reclamation has a duty to consider and protect the Community's statutory entitlement to Colorado River water held in trust by the United States. At every step, Reclamation must consider and appropriately account for its trust responsibilities, especially protecting statutorily protected tribal trust resources. "The United States, acting through the Secretary of Interior, 'has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.'"[72] "In order to fulfill his fiduciary duty," to the Community, "the Secretary must [e]nsure, to the extent of his power," that the Community's right to its settlement water is protected.[73] The Secretary is "obliged to formulate" a plan for managing the Colorado River "that would preserve water for the Tribe" and must "assert his statutory and contractual authority to the fullest extent possible to accomplish this result."[74] And "[t]he burden rest[s] on the Secretary to justify any diversion of water [away] from the Tribe with precision."[75] It would be "an abuse of discretion and not in accordance with law" for the Secretary's action to "fail[] to demonstrate an adequate recognition of his fiduciary duty to the Tribe."[76]

B. The DEIS fails to address the Secretary's obligation to manage the Colorado River according to the United States' fiduciary duty to the Community.

Despite the United States' trust obligation to protect the Community's trust assets, the DEIS does not articulate or exercise the Secretary's broad discretion over Colorado River operations in a way that is consistent with protecting CAP water entitlements. The DEIS does not acknowledge the United States' obligation under its fiduciary trust duties to avoid disproportionate, uncompensated cuts to a congressionally ratified tribal trust entitlement like the Community's. Indeed, the DEIS fails to articulate and utilize the numerous tools at the Secretary's disposal to protect tribal trust assets. This is a violation of the United States' fiduciary duty to the

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[71] *See Navajo Nation*, 599 U.S. at 564.

[72] *Pyramid Lake*, 354 F. Supp. at 256 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* at 257.

Community, which requires the United States to adequately consider such tools and "justify" any failure to adopt them "with precision."[77]

The Secretary, acting through Reclamation, has a wide range of discretion over Colorado River operations that must be used in any post-2026 guidelines to protect the Community's water entitlement. For example,

- The Secretary must "assert his statutory and contractual authority" to reduce the likelihood of a shortage that would put the Community's water deliveries at risk.[78] To start, the Secretary must prevent excessive deliveries to other water users. Pursuant to his exclusive contracting authority, the Secretary annually ensures that contractors' "estimated water requirements for the ensuing calendar year … will not exceed those reasonably required for beneficial use," and may reduce unreasonable orders and direct conservation measures.[79] Under the trust responsibility, where the Secretary "has the right to require [contractors] to conduct [their] affairs in a non-wasteful manner," he must "exercise his authority to prevent unnecessary waste" rather than "acquiesce[] in excessive water deliveries."[80]

- As discussed above, to reduce the likelihood of shortages, the Secretary also must exercise his authority to move water downstream to Lake Powell. Formulating a plan for operations of Lake Mead and Lake Powell "that would preserve water for the Tribe" requires using all available water supplies in reservoirs operated by Reclamation, including available supplies in the UIUs.[81]

- The United States must take action to fix Glen Canyon Dam, as CAP has noted. Under the trust responsibility, the Secretary cannot merely accept constrained operations at Glen Canyon Dam by shifting the operational risk and shortage burden onto tribal water entitlements. Rather, the Secretary must exercise his authority "to the fullest extent possible" to "preserve water for the Tribe,"[82] including by repairing, modifying, and otherwise maintaining Glen Canyon Dam to address infrastructure limitations currently constraining storage capacity.

- In the event of shortage, the Secretary is "obliged to formulate" an allocation method "that would preserve water for the Tribe."[83] Because no congressional act dictates apportionment in a shortage year, "the Secretary … is free to choose among the recognized methods of apportionment or to devise reasonable methods of his

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[77] *Id.* at 256.

[78] *Id.*

[79] 43 C.F.R. §§ 417.2, 417.3.

[80] *Pyramid Lake*, 354 F. Supp. at 257–58.

[81] *Id.* at 256.

[82] *Id.*

[83] *Id.*

own."[84] The Secretary must exercise that considerable discretion consistent with his trust obligations, such as by adopting equitable apportionment.

- Similarly, because no congressional act dictates the allocation of evaporation system losses (ESL), the Secretary is "obliged" to "assert his statutory and contractual authority" over Colorado River operations to allocate ESL in a way that prevents disproportionate charging to CAP deliveries, thereby protecting tribal trust assets.[85]

- It is further incumbent on the Secretary to "assert his statutory and contractual authority" to reduce the burden of the Mexico obligation on tribal water entitlements.[86] The Secretary has authority to pursue programs for improving irrigation efficiency or reducing irrigable acreage, install improved salinity-control infrastructure, and construct storage facilities to capture mismatch flows before delivery to Mexico.[87] Under the trust responsibility, the Secretary must "exercise his authority to prevent unnecessary waste" rather than "acquiesce[] in excessive water deliveries."[88]

- The Secretary must consider whether any unavoidable reductions in Colorado River deliveries to a tribe with a statutory entitlement to such water are likely to persist, thereby triggering the need to find replacement water. Under his exclusive operational and contractual authority, the Secretary can modify his accounting and delivery rules to implement Intentionally Created Surplus (ICS) programs and create storage set-asides. The Secretary has before, in the 2007 ROD and 2019 DCP, exercised his authority to implement ICS accounting and elevation-based delivery limits. In the upcoming EIS, the Secretary must use this authority "to the fullest extent possible" to establish tribal ICS, firming pathways, and new mitigation pools to offset reductions to tribal water entitlements.[89]

These examples demonstrate the wide range of tools available to the Secretary under his broad discretion to manage Colorado River operations. The Secretary must also refrain from taking actions that place the Community's water entitlement at risk.[90] But, as discussed in more detail

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[84] *Arizona v. California*, 373 U.S. at 593.

[85] *Pyramid Lake*, 354 F. Supp. at 256.

[86] *Id.*

[87] *See* CRBSCA §§ 101(f)–(h), 203(b)(1); *id.* §§ 104, 208; Reclamation Act § 2, ch. 1093, 32 Stat. 388 (1902).

[88] *Pyramid Lake*, 354 F. Supp. at 257–58.

[89] *Id.* at 256.

[90] *Accord Arizona v. Navajo*, 599 U.S. at 558–59, 563 (acknowledging a claim that "the United States has interfered with [tribal] water access").

below, the Secretary's proposed alternatives for post-2026 Colorado River operations each impermissibly endanger the Community's water entitlement.

III. Other problems in the DEIS should be addressed in a new "preferred alternative."

The DEIS cannot support a proposed federal action because it fails to consider the full scope of the problem before the agency. NEPA requires Reclamation to identify "reasonably foreseeable environmental effects of the proposed agency action."[91] The APA further requires Reclamation to "consider … important aspect[s] of the problem."[92]

By ignoring the full range of impacts from dead-pool conditions, the DEIS fails to address a significant aspect of the problem. Although the DEIS treats dead pool as a circumstance to be avoided and evaluates each alternative for the avoidance of dead pool, the varying scope and cumulative consequences of each alternative's various failures to avoid dead pool are not considered.

Additionally, the DEIS embeds impermissible assumptions in its various models. For example, the Colorado River Simulation System (CRSS) incorporates the Upper Basin theory of "hydrologic shortage," which structurally produces persistent unmet demand in the Upper Basin, and anticipates a growing depletion demand beyond actual consumptive use and independent of future hydrologic conditions.[93] But the DEIS does not explain the factual or legal bases for treating projected Upper Basin demand growth as a baseline condition, and forcing the consequences on the Lower Basin. Moreover, the Shortage Allocation Model (SAM) assumes that all Lower Basin users are using their full entitlement, despite contrary evidence.[94] Consequently, SAM artificially reduces the volume of water otherwise available to junior priority users, including the Community's CAP entitlement, and exaggerates shortage impacts. And Reclamation's modeling of dead pool-related reductions "are assumed to use the Lower Basin-wide priority scheme," without any explanation or consideration of the impact on tribal water supplies.[95] The DEIS fails to consider the consequences of these assumptions, or the Secretary's trust duty to ensure that its accounting tools do not artificially inflate or disproportionately allocate shortage and dead-pool reductions.

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[91] 42 U.S.C. § 4332(C)(i).

[92] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

[93] DEIS A-1 (describing revision of CRSS to include "not pre-shorted" Upper Basin demands rather than "pre-shorted" demands); DEIS I-6, fig. I-2 (showing that Upper Basin water supply is never adequate, even in a year when an average of 16-31 MAF is passing Lees Ferry); DEIS J-3, fig. J-1 (showing an anticipated depletion demand of 5.5 MAF in 2027 that grows to 6.0 MAF by 2060); Reclamation, *Upper Colorado River Basin Consumptive Use and Losses 2021-2025* ii (Nov. 2025) (provisional) (showing actual consumptive use in the Upper Basin from 2020-2024 averages 4.291 MAF/year).

[94] *See* DEIS C-6 ("Each state is assumed to be using its entire apportionment each year, and each entitlement holder is assumed to be using its entire entitlement each year."); DEIS N-1 (assessing "initial demands [that] are then linearly increased to full entitlement levels by 2040").

[95] DEIS A-35.

The DEIS also does not adequately model conservation and curtailment actions in the Upper Basin. Given current hydrologic conditions, it is reasonably foreseeable that flows at Lees Ferry will fall below the levels required under Articles III(c) and (d) of the Compact without intervention of the Secretary, who is required under the BCPA, the CRBPA, and the LROC to manage storage and deliveries consistent with the Compact. Conservation or curtailment actions in the Upper Basin to ensure Lees Ferry flows required by the Compact or to generate water for any proposed conservation pools are therefore reasonably foreseeable measures that must be included in the alternatives analysis. By excluding such actions from consideration, the DEIS fails to evaluate an important aspect of the problem.

Additionally, the DEIS limits the study area for cultural resources and tribal resources to exclude the Community's MAR 5 Interpretive Trail riparian and cultural area (MAR 5 Riparian Area) that is totally reliant on the Community's CAP water. The Community's MAR 5 Riparian Area and other managed aquifer recharges/riparian sites are culturally important to the Community because they are restoring the riparian environment of the Gila River so that Community members may reconnect with their heritage and culture, including collecting medicinal plants and materials for traditional baskets and other culturally important items.[96] The MAR 5 Riparian Area and other riparian areas are all located within the Gila River's riverbed, which holds historical significance to the Community as its namesake and source of historic and cultural identity.[97] The MAR 5 Riparian Area and other riparian sites are excluded from the DEIS study area despite being within the geographic scope analyzed under the interim guidelines issued in 2007.[98] By excluding these culturally important sites with the Community's Reservation that are totally dependent on Colorado River water delivered through the CAP, the DEIS fails to consider the consequences of shortages that would negatively impact CAP water supplies and damage these culturally important riparian areas.[99]

Finally, the DEIS fails to adequately disclose and analyze the environmental, economic and socioeconomic impacts of imposing deep reductions on the CAP service area. For example, the DEIS does not address reasonably foreseeable damage to the critical water supply infrastructure that relies on CAP supplies, nor does it address disruptions to biological conditions affecting water quality and public health. In addition, the DEIS does not analyze whether the economic cost of

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[96] *See, e.g.*, Presentation from Gila River Indian Cmty. re: Gila River Interpretive Trail (MAR-5): Where Culture, Economics, Education, and Environmental Science Converge (attached as Ex. B-11).

[97] *See* DEIS TA 11-1 ("Cultural resources are the physical manifestations of the activities of past or present cultures, including archaeological sites, historic-era buildings and structures, objects, trails, landforms, and other places of traditional, cultural, or religious importance. Cultural resources can be human-made or natural features and are, for the most part, unique, finite, and nonrenewable.").

[98] DEIS 3-4.

[99] The exclusion of these sites is particularly troubling to the Community given the numerous visits Department and Reclamation officials and staff have made to the MAR 5 Riparian Area over the last 10 years to not only understand the cultural importance of these sites but also how these sites have enabled the Community to conserve large amounts of CAP water to help prop up reservoir elevations in Lake Mead.

reduced economic output due to lost water supply can exceed the cost of mitigation measures that would avoid or lessen those impacts. Reclamation's failure to address these "important" and "foreseeable" effects of the proposed action violates NEPA, the APA, and the United States' trust responsibility to the Community.

2. COMMENTS ON THE ALTERNATIVES

I. Interior has correctly ruled out the No Action Alternative.

The No Action Alternative has one major advantage over all other alternatives—it nominally complies with the LROC. The DEIS states that the No Action Alternative follows, and goes no further than, the LROC. "Reclamation based the No Action Alternative in this Draft EIS on the operating guidance that was in place before the adoption of the 2007 Interim Guidelines ROD (2007 ROD) to provide a reasonable representation of how the system would continue to operate if no additional operating guidelines were adopted."[100]

However, in other respects, the No Action Alternative does not comply with federal law. The Secretary must manage federal facilities to address shortages in accordance with federal law—including the United States' trust duty to exercise its discretionary authority in a manner that protects the Community's trust assets—which the No Action Alternative fails to do. "Before the 2007 Interim Guidelines were in place, the basis for operations was the LROC, under which the Secretary made a number of determinations at the beginning of each operating year through the development and execution of the AOP, including the water supply available to users in the Lower Basin and the annual release from Lake Powell. The LROC does not include specific guidelines for such determinations, so the outcome of the annual determination in any particular year in the future could not be precisely known."[101] Indeed, the 2007 guidelines noted: "Currently, the Department does not have specific operational guidelines in place to address the operations of Lake Powell and Lake Mead during drought and low reservoir conditions."[102] And "[w]ithout operational guidelines in place, water users [are not] able to identify the frequency or magnitude of any potential future annual reductions in their water deliveries." This inherent uncertainty created by relying solely on the LROC, coupled with its failure to specifically address shortage conditions, ultimately fails to meet the Secretary's obligations.

And, as Reclamation correctly recognizes, this alternative does not comply with the United States' trust duties. Compliance with the LROC is necessary but not sufficient to comply with trust duties. Section 602(b) of the CRBPA mandated both that the Secretary propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the CRSPA, the BCPA, and the Boulder Canyon Project Adjustment Act *and* that the proposed long-range operating criteria be submitted to the Governors of the seven Basin States and to such other parties and agencies as the Secretary deems appropriate, for review and comment.[103] Yet

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[100] DEIS 2-6.

[101] *Id.*

[102] 2007 ROD at 6.

[103] CRBPA § 602(a), 82 Stat. at 900.

there is no indication that the Secretary submitted the LROC for review and comment to the Community, let alone any party other than the Basin States.[104] This is evident in the LROC itself which fails to address or account for tribal water rights and the tribal trust responsibility in any way. Trust compliance therefore requires additional action by the Secretary.

Accordingly, the Community agrees with the DEIS that the LROC does not satisfy the Secretary's obligations, and the No Action Alternative is not a viable alternative. Reclamation is correct that "[a]ddressing tribal concerns regarding Basin management is needed: Basin Tribes have expressed concern that the current approach to Colorado River water management is insufficient to address the range of interests, needs, and fundamental rights of the Basin Tribes."[105] The guidelines must provide "flexibility and predictability for Basin Tribes to remain able to benefit from their water rights and have opportunities to participate in voluntary conservation programs."[106]

II. The Basic Coordination Alternative is not a lawful alternative.

Although Reclamation claims the Basic Coordination Alternative is "a compliance option for a set of operations that could be implemented in 2027 if no new agreements among Basin water users are adopted,"[107] the Basic Coordination Alternative is not a lawful alternative. It both ignores legal limits on the Secretary's authority and fails to account for the full scope of his lawful duties, particularly the obligation to protect tribal trust assets. Reclamation recognizes the inadequacy of this alternative, suggesting it is not based on a full analysis of the Secretary's duties absent consensus.[108]

The Basic Coordination Alternative is not a reasonable alternative because its four operational elements do not comply with the Law of the River, NEPA, the APA, or the United States' trust obligation.

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[104] *See* Letter from Sec'y Walter Hickel, Dep't of Interior, to Gov. Stanley Hathaway, Wyo. (June 8, 1970) (attached as Ex. B-5) ("The adopted criteria represent largely the contributions of a task group of State and Federal representatives which held five meetings from July through November 1969."); *see also* Letter from Ellis Armstrong, Comm'r, Bureau of Reclamation, to Roy Peck, Exec. Dir., Wyo. State Dep't of Econ. Planning & Dev. (June 9, 1970) (attached as Ex. B-6) (enclosing "Departmental actions on comments from Upper and Lower Division States on proposed criteria for coordinated long-range operation of Colorado River Reservoirs pursuant to the Colorado River Basin Project Act of September 30, 1968 (P.L. 90-537).").

[105] DEIS 1-6.

[106] DEIS 1-6 to 1-7.

[107] DEIS ES-8.

[108] *See* DEIS 2-11 to 2-12 ("Reclamation acknowledges that the operations under this alternative may not provide adequate protection of critical infrastructure or the system and may be viable only in the short term given current reservoir conditions. If this alternative were selected in the ROD, Reclamation would identify the conditions under which further action would be required, including adjustment of operations and prompt action to seek additional authorities, if needed.").

A. Guidelines to Reduce or Increase Deliveries from Lake Mead.

The "Guidelines to Reduce or Increase Deliveries from Lake Mead" element allows for Lower Basin shortages up to 1.48 MAF, triggered by Lake Mead elevation and distributed based on priority. This fails to address the United States' trust duties.[109] To start, although the Lower Basin's alternative proposal included a potential 1.5 MAF reduction, the Community did not consent to that figure, which overshoots the mark for ESL (1.3 MAF).[110] As discussed below, *see infra* Part 2.III, any consensus-based approach necessarily requires the consent of the Community, because the Community has a statutory entitlement to water delivered through a permanent service contract with the Secretary, which contract the Secretary holds in trust for the benefit of the Community.[111]

Moreover, a priority distribution without consideration of tribal trust assets violates the United States' trust responsibility. The "maximum policy shortage" under the Basic Coordination Alternative—along with the Maximum Operational Flexibility Alternative, the Supply Driven (priority) Alternative, and any other proposal adopting priority distribution—disproportionately burdens CAP water supplies, and thus tribal water entitlements like the Community's. The disproportionate effect on the Community's water entitlement is shown clearly in the DEIS.[112] Similarly, across all alternatives, Reclamation does not address the DEIS's assumption that "[d]ead pool-related reductions … [will] use the Lower Basin-wide priority scheme."[113] Reclamation cannot implement a simple priority cut, which, for example, ignores that tribal trust entitlements to CAP NIA water are different than other claims of rights to CAP NIA water.

And Reclamation cannot model such extreme shortages to the Community while refusing to address the legal implications of shortage. It is not sufficient to admit that the models do not

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[109] *See* DEIS 2-12 to 2-13.

[110] *See* Bureau of Reclamation, Lower Colorado River Mainstream Evaporation and Riparian Evapotranspiration Losses Report (Dec. 2023) (attached as Ex. B-7).

Despite the Lower Basin's proposal of 1.5 MAF reductions without the Community's consent, the Community has consistently worked with Reclamation and the Lower Basin states in an effort to come to an agreement on such static cuts. *See, e.g.*, Proposal from Gila River Indian Cmty. to Bureau of Reclamation re: Basin-wide Cut Math (Apr. 10, 2024) (attached as Ex. B-8); Presentation from Gila River Indian Cmty. to Basin States re: Post-2026 NEPA Approach (Feb. 24, 2025) (attached as Ex. B-9); Letter from Gov. Stephen R. Lewis, Gila River Indian Cmty., to Gov. Katie Hobbs, Ariz. (Apr. 18, 2025) (attached as Ex. B-10); Presentation from Gila River Indian Cmty. to Bureau of Reclamation re: Community P26 Proposal (Oct. 17, 2025) (attached as Ex. A-20).

[111] *See* Amended Cent. Ariz. Project Water Delivery Contract Between the U.S. & the Gila River Indian Cmty. at ¶ 5.2 (Amended CAP Delivery Contract), Ex. 8.2 to Gila River Indian Cmty. Water Rights Settlement Agreement (Oct. 21, 2005) (attached as Ex. C-16) ("This Amended Contract is for permanent service, as that term is used in section 5 of the Boulder Canyon Project Act of 1928, 43. U.S.C. § 617d, and is without limit as to term.").

[112] *See* DEIS C, tbls. C-16, C-21, and C-26.

[113] DEIS A-35.

include additional agreements or offsets, without actually addressing and modeling the required agreements and offsets. Moreover, the Basic Coordination Alternative's static 1.48 MAF reduction also does not acknowledge that the Secretary must evaluate and use all available tools to reduce any Lower Basin shortage. *See supra* Part 1.II.B. In this way, the Basic Coordination Alternative has failed to consider the Secretary's statutory trust responsibility to protect water supplies of tribes, like the Community, that have been granted statutory trust entitlements to Colorado River water delivered through CAP in settlement of their immemorial and aboriginal claims to water.

B. Coordinated Reservoir Operations

The "Coordinated Reservoir Operations" element provides for Lake Powell releases primarily at 8.23 MAF, with releases ranging from 9.5 and 7.0 MAF based on Lake Powell elevation and equalization requirements.[114] This element fails to acknowledge that the Secretary must obey federal law governing shortages on the Colorado River, including the restrictions of the Compact as approved by the BCPA, the decision in *Arizona v. California*, and the CRBPA, as implemented in the LROC.

As already discussed, *see supra* Part 1.I.A, this means releases from the Upper Basin reservoirs must be sufficient to supply 75 MAF every ten years at Lees Ferry, plus the Upper Basin's half of the water to supply the Mexico obligation, without regard to the Lower Basin tributaries. This means annual releases from Lake Powell of at least 8.23 MAF; as acknowledged by the LROC, in absence of surplus, a minimum release of 8.23 MAF is required to satisfy the Compact and section 602(a) of the CRBPA, which prioritizes Lake Powell releases to comply with Articles III(c) and III(d) of the Compact.

The Community entered into its water settlement and accepted Colorado River water in exchange for its water rights claims to the Gila River system and source based on the Law of the River as recognized and administered by the United States in 2004 under the Compact, the BCPA, the CRBPA, and the LROC—all of which protect a Lower Basin entitlement to 7.5 MAF each year. The Basic Coordination Alternative fails to acknowledge or adhere to these restrictions.

It also fails to address the Secretary's responsibilities during any year in which less than 8.23 MAF is released from Lake Powell. For example, mitigation of tribal water assets is necessary in the event of prolonged periods of lower volume releases, unless all Upper Basin uses are curtailed to satisfy Article III(d) of the Compact. No matter what course of action Reclamation ultimately takes here, to the extent that the Secretary fails to take all available actions within his authority to minimize reductions of water deliveries under tribal statutory water entitlements, Reclamation must ensure that such reductions are either compensated or replaced.

C. Storage and Delivery of Conserved System and Non-System Water

The "Storage and Delivery of Conserved System and Non-System Water" element provides that, although existing ICS would be delivered in accordance with existing agreements, there

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[114] *See* DEIS 2-14 to 2-15.

would be no new delivery and storage mechanisms.[115] The Community agrees that an effective ICS program requires voluntary forbearance agreements with major delivery contractors—PPRs, Basin States, and tribes with congressionally approved trust entitlements. However, the Secretary's authority to operate and manage project purposes and responsibilities, including his exclusive contracting power, inherently includes the authority to implement accounting and delivery rules to create ICS programs and new storage supplies. The trust responsibility compels the Secretary to exercise his authority to implement programs, such as conservation incentives and mitigation pools, to reduce the burden of shortages on tribal trust entitlements.

D. Additional Activities Above Lake Powell

The "Additional Activities Above Lake Powell" element provides for releases from UIUs according to existing agreements or to protect infrastructure.[116] But the focus on existing agreements and protecting infrastructure ignores that the Secretary has the authority and duty, *see supra* Part 1.I.A.4, to operate all Upper Basin reservoirs as necessary to ensure Compact-compliant flows at Lees Ferry.

Reclamation has avoided full application of the Law of the River to address shortages thus far only because prior federal actions in 2007 and 2019 were based on consensus. On January 9, 2025, the Community concurred with the Lower Basin States' request that Reclamation analyze whether each proposed alternative complies with the Compact. The Community maintains that modeling Compact compliance requires consideration of "required deliveries pursuant to Article III of the Compact," as well as "actions by the United States in management of federal reservoirs," including "anticipatory measures taken by the United States to manage Upper Basin federal reservoirs."[117] The DEIS's failure to do so is both contrary to law and arbitrary and capricious, having failed to consider an important aspect of the problem.[118]

* * *

In sum, the Basic Coordination Alternative is not a reasonable or viable alternative because it does not address the many legal constraints on the Secretary's authority, particularly his duty to obey legal obligations under the Compact and relevant federal statutes; his duty to follow prior agency decisions absent sufficient legal justification; and his trust duties to Indian tribes generally, and to the Community specifically.

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[115] *See* DEIS 2-15.

[116] *See* DEIS 2-16.

[117] Letter from Gila River Indian Cmty. to Bureau of Reclamation re: Request to Model Compact Compliance (Jan. 9, 2025) (attached as Ex. A-15).

[118] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

III. As Interior also recognizes, none of the three consensus-based approaches satisfy federal law because they deviate from federal law in a manner that requires the consent of those whose water supplies would be diminished.

The Community agrees with Reclamation that a consensus-based approach is essential to long-term system stability. As the DEIS itself recognizes, "[a]chieving a consensus-based approach to Basin reservoir operations has proved critical to the long-term operating success of the Basin."[119] Consistent with that understanding, the Community remains fully committed to working with Reclamation, the Basin States, Basin Tribes, and other stakeholders to develop a lawful and durable consensus-based management strategy.

The Community's commitment to consensus-based solutions is evidenced by the Community's long partnership with the United States and other stakeholders to protect critical reservoir elevations. Since 2016, the Community has played a pivotal role in developing and implementing the Lower Basin Drought Contingency Plan (LBDCP), even after first learning that it would bear the largest reductions under the proposal without prior consultation. Working collaboratively with federal and state partners, the Community helped shape Arizona's LBDCP Implementation Plan and supported congressional approval of the Drought Contingency Plan Authorization Act. It later helped catalyze the 500+ Plan by leveraging its own water resources and storage credits, ultimately contributing more than 200,000 acre-feet toward the Plan's conservation goals. Overall, through cooperative agreements and innovative arrangements with the United States and Arizona, the Community has conserved more than 600,000 acre-feet to Lake Mead and continues to advance major system-efficiency projects that support long-term river sustainability.[120]

Despite this longstanding partnership and the federal government's trust and statutory responsibilities to the Community, the DEIS effectively replaces the Community's essential participation in identifying and adopting a consensus-based solution with Arizona's involvement. But a consensus-based approach cannot be achieved without the Community's express consent.

A. The DEIS reflects Reclamation's focus on the Basin States to achieve consensus to the detriment of tribal input, contrary to federal law.

Throughout the DEIS, Reclamation frames "consensus" almost exclusively in terms of agreement among the seven Basin States, repeatedly describing state-to-state negotiations as the principal—and often sole—pathway to achieving a long-term, consensus-based solution to reservoir management. For example, the DEIS notes that "Reclamation and the Department have engaged extensively with the *Basin States* to facilitate an agreement among the seven *Basin States* and the Secretary on various aspects of post-2026 operations for consideration in this NEPA

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[119] DEIS 2-3.

[120] The Community has entered into numerous system-efficiency contracts with the United States for the lining of canals on Reservation, improvement to on-farm efficiency, use of reclaimed water in lieu of Colorado River water, improvements to diversion dam facilities, solar-covered irrigation delivery facilities, among others.

process."[121] Reclamation's hyper-focus on the Basin States does not properly account for the Secretary's full array of responsibilities in the Basin. And this framing in the DEIS reflects—and perpetuates—the same structural exclusion that characterized the post-2026 negotiation process itself, in which the Community and other major Basin Tribes were not meaningfully included in federal-state negotiations.

The focus on Basin States to the exclusion of Basin Tribes is not new. It reflects a historical pattern in Reclamation's management of the Colorado River that elevates agreements among the Basin States above tribal input: "Since 1970, the *Basin States* have supported operations and reached agreements among themselves and with the Secretary on various aspects of Colorado River reservoir operations."[122] For example, and as discussed in Part 2.I, *supra*, the LROC was developed without meaningful participation by Basin Tribes, including the Community. The DEIS perpetuates this same error by treating state-to-state consensus as synonymous with systemwide agreement, even where federal trust obligations and tribal entitlements are directly affected.

Indeed, even where the DEIS acknowledges that achieving consensus requires the participation of major water users beyond the Basin States, it fails to identify who those users are, effectively ensuring their continued exclusion. The DEIS instead relies on vague references to pursuing agreements among "various Basin entities,"[123] "stakeholder[s]"[124] and "Basin water users,"[125] without ever specifying whose participation and consent are legally and practically necessary. This omission is fatal to all three consensus-based alternatives. By declining to identify the entities whose agreement is required, the DEIS offers no clear pathway to securing the "new authorities and/or new agreements among Basin water users" Reclamation itself acknowledges are essential to "fully implement" a consensus-based approach.[126]

B. Any consensus-based approach impacting the Community's statutory, trust entitlement to Colorado River water requires its express consent, which the DEIS consensus-based alternatives fail to obtain or acknowledge.

Critically, the DEIS's focus on consensus almost exclusively in terms of agreement among the seven Basin States is legally insufficient where the Community's water rights are concerned. Any consensus-based approach that would affect the Community's statutory entitlement to Colorado River water requires the Community's affirmative consent, and the DEIS's three

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[121] DEIS 2-1.

[122] DEIS 2-3 (emphasis added).

[123] *Id.*

[124] DEIS 2-11.

[125] DEIS 2-6, 2-11, 2-15.

[126] DEIS 2-6; *see also* DEIS 2-16 n.18 ("Additional agreements and other legal authorities would be needed to implement any pro rata operations").

consensus-based alternatives fail as a matter of law because they neither secure nor recognize that requirement.

The Community is not merely a stakeholder in Colorado River operations; it holds a congressionally approved, quantified entitlement to Colorado River water that the United States holds in trust.[127] That legal status carries concrete and binding consequences. The United States' trust obligations to the Community began no later than the establishment of the reservation and predate—and are wholly independent of—its relationships with the Basin States. The Community's permanent service contract for the delivery of water with the United States likewise confirms that the United States' contractual obligations run directly to the Community.[128] Taken together, the United States' trust, statutory, and contractual obligations are owed to the Community, not to Arizona acting on its behalf. Any alternative that would diminish, reallocate, condition, or place at risk the Community's entitlement therefore cannot be compromised through state-to-state agreement, and cannot be implemented without the Community's affirmative consent.

Federal law reinforces this principle at every turn. The Law of the River expressly preserves the United States' obligations to tribes, and nothing in the Compact, the BCPA, or subsequent statutes authorizes the United States to diminish those obligations. The Compact itself provides "[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."[129] This provision reflects a basic premise: all rights, allocations, and operational authorities under the Law of the River co-exist with the United States' obligations to Indian tribes.

The BCPA carries the provision forward by providing that the Secretary's management of the Colorado River is "subject to the terms of the Colorado River compact."[130] Subsequent statutes continue to adopt the terms of the Compact[131] and must be strictly construed in the light most favorable to Indian tribes.[132] It would be a fundamental error to read any statute in the Law of the

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[127] AWSA § 204(a)(2), 118 Stat. at 3502.

[128] *See* Amended CAP Delivery Contract at ¶ 5.1 ("Subject to the terms, conditions, and provisions set forth in this Amended Contract . . . the United States will deliver up to 311,800 acre-feet of Community CAP Water each Year to the Community.").

[129] Compact, art. VII.

[130] BCPA § 1, 45 Stat. at 1057.

[131] CRSPA § 9, 70 Stat. at 110 ("Nothing contained in this Act shall be construed to alter, amend, repeal, construe, interpret, modify, or be in conflict with the provisions of … the Colorado River Compact[.]"); CRBPA § 601(a), 88 Stat at 899 ("Nothing in this Act shall be construed to alter, amend, repeal, modify, or be in conflict with the provisions of the Colorado River Compact . . ."); LROC, 70 Fed. Reg. at 15874 ("The Operating Criteria will be administered consistent with … interstate compacts[.]"); CRBSCA § 207, 88 Stat. at 274 ("[N]othing in this title shall be construed to alter, amend, repeal, modify, interpret, or be in conflict with the provisions of the Colorado River Compact … .").

[132] *Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992) ("When we are faced with these two possible constructions [of a statute], our

River as authorizing the United States to impair or burden protected tribal entitlements absent tribal consent.

C. Arizona cannot consent on behalf of the Community.

To the extent DEIS might be read to suggest that Arizona's participation in Basin-State negotiations can supply the consent necessary to implement consensus-based alternatives that would reduce or condition deliveries of the Community's water, the Community rejects any such suggestion. Arizona may enter into agreements binding itself, but it lacks any authority to exercise the Community's sovereign powers or to consent to agreements on the Community's behalf. Tribes are "separate sovereigns" that "retain their historic sovereign authority" "subject [only] to congressional action."[133] Entering into an agreement affecting water rights is an exercise of sovereign authority, and there has been no congressional action delegating the exercise of sovereign authority over water rights to the States. The McCarran Amendment is the only generally applicable federal statute addressing state authority over tribal water rights, and it does only one thing: it waives the United States' sovereign immunity with respect to comprehensive state-court adjudications of water rights.[134] That narrow jurisdictional waiver is not a delegation of substantive power to the states.

And no agreement with Arizona could diminish the Secretary's obligation to protect the Community's statutory entitlement to Colorado River water. Like the Compact itself, Arizona's 1944 Contract for Delivery of Water with the United States explicitly affirms that "nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes[.]"[135] This principle is further underscored by tribes' recognized ability to protect their own interests in compact-dispute litigation and litigation governing river management.[136] Consistent with that framework, the Supreme Court recently reaffirmed that tribes may "interven[e] in cases that affect their claimed interests."[137] The ability of tribes to intervene to protect their interests confirms what

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choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." (citation omitted)).

[133] *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014).

[134] *See* 43 U.S.C. § 666.

[135] Act of Feb. 24, 1944, ch. 4, 1944 Ariz. Sess. Laws 419 (Arizona 1944 Water Contract) at ¶ 5 (attached as Ex. C-4).

[136] In litigation over the Rio Grande Compact, the Supreme Court permitted the United States—though neither a signatory nor a party to the compact—to intervene to protect its interests, and it rejected a consent decree negotiated by the States without the intervenor's approval. *Texas v. New Mexico (I)*, 583 U.S. 407 (2018); *Texas v. New Mexico (II)*, 602 U.S. 943 (2024). As commentators have observed, the same logic applies to tribes, which likewise may intervene to prevent settlement of compact disputes that fail to recognize or protect tribal interests. *See* Logan Buzzell Graham, *A Seat at the Table*, 52 Ecology L.Q. 291 (2025).

[137] *Arizona v. Navajo Nation*, 599 U.S. 555, 568–69 (2023); *see id.* at 599 (Gorsuch, J., dissenting) ("After today, it is hard to see how this Court (or any court) could ever again fairly

federal law already requires: state-to-state agreements affecting water rights cannot bind tribes or supply the consent necessary to diminish tribal rights.

For these reasons, the DEIS's reliance on Basin State consensus cannot substitute for what the law unequivocally requires—**the Community's affirmative consent to any approach that would diminish, reallocate, or condition its water rights**. Each of the three consensus-based alternatives therefore fails as a matter of law. All three contemplate new operational rules, reductions, or reallocations that would affect deliveries of water held in trust for the Community, yet none acknowledges that the Community's consent is a legal prerequisite to implementation, and none provides any mechanism for obtaining that consent. By omitting the Community and other Basin Tribes entirely from the consent analysis, the DEIS fails to consider an essential legal constraint on the proposed action.

A "consensus-based" alternative that cannot be implemented without violating tribal sovereignty and the United States' trust obligations is not a reasonable alternative under NEPA and is not lawful under the APA. The Community nevertheless looks forward to continuing to work with Reclamation, the Basin States, Basin Tribes, and other stakeholders to develop a lawful, durable, and truly consensus-based approach to post-2026 operations.

3. COMMENTS ON FURTHER CONSULTATION

The Community appreciates the steps Reclamation has taken in recognition of the need for tribal consultation throughout the post-2026 process. These include development of the Federal-Tribes-States Group, an important step toward ensuring tribal leaders are provided critical information at the same time and in the same manner as has traditionally been afforded to the governors' representatives from the Basin States.

However, the post-2026 DEIS process has not allowed for proper consultation because it has failed to provide the requisite notice of Reclamation's proposed federal action. The Secretary requires that Reclamation "will provide notice to Tribes inviting them to consult as early as possible" and that notification "include[s] sufficient detail of the topic to be discussed to … provide an opportunity to fully engage in consultation."[138] But Reclamation's post-2026 process so far has not notified the Community of any action Reclamation actually intends to take. Indeed, "Reclamation has not identified a Preferred Alternative in this Draft EIS."[139]

Instead, Reclamation says that "components" of the various alternatives "may eventually make up the Preferred Alternative in the Final EIS."[140] The problem is that, for this proposed federal action, the various components work together as an integrated package. No individual component can be meaningfully evaluated—or consulted upon—in isolation. And although

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deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim.").

[138] Dep't of Interior, Departmental Manual (DOI Manual), 512 DM 5, § 5.5.

[139] DEIS 2-3.

[140] DEIS 2-1; *see also* DEIS ES-9 ("Reclamation may refine these Draf EIS alternatives or develop additional alternatives for the Final EIS.").

Reclamation says it "developed the Basic Coordination Alternative to provide a compliance option" that could be implemented absent a consensus-based approach, Reclamation also recognizes that the Basic Coordination Alternative is not a "viable" alternative.[141]

Meetings with Reclamation reveal that the Basic Coordination and other proposed alternatives exist to provide a range of legal "cover" for environmental compliance; not that Reclamation seriously intends to pursue action under any particular alternative. This failure to identify a "preferred alternative"—or even any alternative that could actually be implemented at the close of the post-2026 EIS process—means the Community is deprived the opportunity of notice and genuine engagement on the proposed federal action.

Further, Reclamation's failure to fully consider the Community's Alternative[142] also renders the DEIS inadequate under the tribal consultation obligation, NEPA, the APA, and the United States' trust responsibility. Reclamation's duty to consult with tribes requires "*meaningful consultation* [] involving Tribal consent or consensus."[143] The purpose of consultation is not just to "exchange views" and "share information" but also to "seek consensus."[144] For federal action with "[i]mpacts to … on-reservation land, activities, treaty, or other rights"—such as this DEIS, which impacts tribal water entitlements—the "great[est] degree of consensus is" required.[145] As part of the government-to-government consultation process, the Community proposed a "Community Alternative" that respects tribal water rights, stabilizes the entire system, and fairly shares the burden of having to rely on less water in the Colorado River system. In derogation of the duty to seek consensus, Reclamation refused, without adequate explanation, to model the Community's proposed alternative.

Reclamation's failure "to make any real attempt to comply with its own policy of consultation not only violates those general principles which govern administrative decisionmaking, but also violates the distinctive obligation of trust incumbent upon the Government in its dealings with" tribes.[146] Reclamation must "justify" its actions affecting tribal trust assets "with precision."[147] And the DEIS is arbitrary and capricious under the APA because it

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[141] DEIS 2-2, 2-11, 2-12.

[142] On March 29, 2024, the Community submitted its comments on the Lower Basin Alternative and Upper Basin Alternative and requested that Reclamation model the Community Alternative, which uses assumptions that differ from the two Basin States' proposals. *See* Letter from Gila River Indian Cmty. to Bureau of Reclamation re: Comments on Lower Basin Alternative and Request to Model Community Alternative (Mar. 29, 2024) (attached as Ex. A-11).

[143] Dep't of Interior, *A Detailed Plan for Improving Interior's Implementation of E.O. 13175* at 14 (Apr. 23, 2021) (emphasis added); DOI Manual, 512 DM 5, § 5.4(G) (2022).

[144] DOI Manual, 512 DM 4.7 § (2022).

[145] *Id.* at fig. 1.

[146] *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 721 (8th Cir. 1979) (citations omitted); *see also Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (an agency must comply with its own internal procedures "[w]here the rights of individuals are affected").

[147] *Pyramid Lake*, 354 F. Supp. at 256.

fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[148]

When Reclamation chose "not [to] carry[] forward" the Community's proposal, it claimed it "has integrated the majority of the concepts embodied in the Community's submission within the range of alternatives, primarily the Enhanced Coordination Alternative."[149] The Community disagrees with this characterization. None of Reclamation's alternatives model replacement or mitigation of tribal water reductions. None model a total system contents approach for determining reductions and reservoir operations. And none specifically address pro rata sharing of ESL. Reclamation gives no explanation for its implicit rejection of these concepts, which are fundamental to the Community's proposal and to the ability to reach consensus.

Failure to consider the Community's Alternative also renders the DEIS inadequate under NEPA, which requires consideration of reasonable alternatives that "meet the [action's] purpose and need."[150] Here, "[t]he proposed federal action is needed for … addressing tribal concerns regarding Basin management," including remedying the fact that "the current approach to Colorado River water management is insufficient to address the range of interests, needs, and fundamental rights of the Basin Tribes."[151] In sum, Reclamation's failure to fully consider concepts the Community identified as central to its ability to consent constitutes a failure to meaningfully consult with the Community in violation of the Reclamation's own policy, the United States' trust obligation, the APA, and NEPA.

The faults in the DEIS are remediable through the development of a better alternative. The Community appreciates Reclamation's commitment to continue to consult with the Community, both formally and informally, in the development of a preferred alternative. The Community will continue to insist on such consultation. And the Community remains committed, as always, to a constructive, cooperative dialogue. There are lawful, rational, creative ways to manage the current difficult circumstances in the Basin, even absent consensus. The Community is ready to continue to make meaningful contributions to this process, and asks only that Reclamation carefully comply with its legal duties and trust duties in the exercise of its authority. Further, the Community will continue to seek consensus-based approaches, either in the Lower Basin or in the Basin as a whole, that equitably distribute unavoidable shortages in the water supply, so long as others in the Basin are likewise willing to engage in good-faith compromise.

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[148] *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

[149] DEIS 2-2 to 2-3.

[150] DOI NEPA Handbook, 516 DM 1, § 2.3(a)(3).

[151] DEIS 1-6.

Respectfully,

Stephen Roe Lewis
Governor

Cc: Regina Antone, Lieutenant Governor
Gila River Indian Community Council
Javier Ramos, General Counsel
Thomas Buschatzke, Director, Arizona Department of Water Resources

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5. Treaty between the U.S. and Mexico: Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande (1944) (Mexican Water Treaty of 1944)

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12. International Boundary and Water Commission, U.S. and Mexico, Minute No. 242 (Aug. 30, 1973)

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<u>Governance</u>

29. Dep't of Interior, A Detailed Plan for Improving Interior's Implementation of E.O. 13175 (Apr. 23, 2021)

30. Dep't of Interior Policy on Consultation with Indian Tribes: American Indian and Alaska Native Programs, 512 DM 4 (Nov. 30, 2022)

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