

Ute Mountain Ute Tribe
Office of the Chairman

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Via Electronic Mail
(crbpost2026@usbr.gov)

Wayne Pullan
Bureau of Reclamation
Regional Director, Interior Region 7
Upper Colorado Basin

RE: Ute Mountain Ute Tribe Comments on Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead Draft Environmental Impact Statement

Dear Director Pullan,

These comments are submitted on behalf of the Ute Mountain Ute Tribe ("Tribe" or "UMUT"), a federally recognized and sovereign Indian Nation, regarding the Draft Environmental Impact Statement for the Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead ("DEIS"). The Tribe appreciates the Bureau of Reclamation's ("Reclamation") outreach opportunities, consultation efforts, and consideration of alternatives supporting the development of tribal water rights in the Colorado River Basin and the development of flexible tools that provide new opportunities and predictability for UMUT and other Tribal Nations. The Tribe reserves the right to provide additional comments on the development of the preferred alternative as the process progresses.

When considering the DEIS alternatives, several points are clear: 1) today's River conditions differ significantly from the past, making reliance on historical hydrology unsustainable; 2) the drought is worsening across the Colorado River Basin; and 3) adaptability, flexibility, and predictability are essential to manage this increasingly scarce resource.

As an initial note, the DEIS is, unfortunately, lacking in several respects. First, the DEIS fails to identify a preferred alternative, making it difficult to provide comprehensive comments. Additionally, the DEIS fails to analyze effects of the alternatives on the Upper Basin despite the reality that all proposed alternatives will impact water users above Lake Powell. Finally, there are considerable legal issues with the DEIS, raising concerns that the alternatives may conflict with the Law of the River. For all these reasons, it is imperative that Reclamation consider a preferred alternative that addresses the concerns herein and those submitted by other stakeholders in the Colorado River Basin.

I. Introduction

The Colorado River Basin is the ancestral home of 30 federally recognized and sovereign Indian Nations (“Basin Tribes”). Historically, the operations at Lake Powell and Lake Mead failed to consider quantified and unquantified Tribal water rights, in addition to unused Tribal water and the benefits received by all water users specifically and the Colorado River system generally. This must change, and we explain why below.

A. Tribal Sovereignty

The sovereign status of federally recognized tribes predates the sovereignty of the United States, making tribes “extra-constitutional,” meaning they do not derive their sovereign authority from the U.S. Constitution, but rather, because of their inherent sovereignty as Tribal governments. As the Supreme Court made clear in *Worcester v. Georgia* (1832), “[t]he Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial... The very term ‘nation,’ so generally applied to them, means ‘a people distinct from others.’”¹ In *Santa Clara Pueblo*,² the Court confirmed that Indian tribes are “distinct, independent political communities, retaining their original natural rights” in matters of local self-government. Although no longer “possessed of the full attributes of sovereignty,” they remain a “separate people, with the power of regulating their internal and social relations.” They have power to make their own substantive law in internal matters...³

Tribal sovereignty is both personal and territorial, and it is a fundamental Federal Indian law principle that tribes retain authority over their members and their territory.⁴ Only executive, legislative, or judicial action limiting tribal self-government powers can work as an express divestiture of inherent Tribal sovereignty. These fundamental Federal Indian law tenets demonstrate that Tribal governments are simply different than other stakeholders in the operations of the Colorado River water system, meaning Reclamation must consider Tribal sovereignty and its trust responsibility to UMUT and all federally recognized tribes when making decisions on the future operations at Lake Powell and Lake Mead.

Tribal governments and citizens who rely on Lakes Powell and Mead have historically been excluded from operational decisions, such as the 2007 Interim Guidelines, which did not incorporate tribal perspectives or consider the unique needs of and responsibilities to Basin Tribes. Honoring and supporting Tribal Sovereignty requires choosing a preferred alternative that safeguards the seniority of Tribal water rights and acknowledges Basin Tribes’ inherent authority by providing flexible tools, enabling tribes to adapt their water rights to fit their communities’ needs. The federal trust responsibility owed to the 30

¹ *Worcester v. Georgia*, 31 U.S. 515, 559 (1832).

² *Santa Clara Pueblo*, 436 U.S. 49 (1978).

³ *Santa Clara Pueblo*, 436 U.S. at 55-56 (internal citations omitted).

⁴ *White Mountain Apache v. Bracker*, 488 U.S. 136, 142 (1980).

Basin Tribes affected by the DEIS and the final guidelines and strategies adopted for post-2026 operations at Lakes Powell and Mead likewise demand this outcome.

B. Trust Responsibility

The Supreme Court, since 1831 in *Cherokee Nation v. Georgia*,⁵ has recognized a unique relationship between Indian tribes and the Federal government, coining the term “domestic dependent nations,” the first iteration of what would become the federal “trust doctrine” or “trust responsibility” to sovereign Tribal governments. This unique relationship is a legally enforceable legal, moral, and fiduciary obligation on the part of the United States to protect tribal treaty rights, lands, assets, and resources—which includes federally reserved Tribal water rights.

Reclamation owes UMUT (and the other Basin Tribes) a fiduciary duty that it owes no other water user in the Colorado River Basin. This responsibility requires Reclamation to protect the seniority of Tribal water rights in considering which alternative to select as the preferred alternative.

C. Tribal Principles

There are 30 tribes in the Colorado River Basin, and each has their own unique concerns and water resource priorities and needs. However, many of the tribes have worked hard since 2021 to identify common principles and priorities for the stewardship of the Basin’s precious and increasingly scarce water resources that protect Tribal water rights, many of which are senior to other water users.

For UMUT, its priority date for water rights in both Colorado and New Mexico is 1868, the date of its Treaty with the United States. In Utah, that right is “time immemorial”—which in UMUT’s case, is approximately 1,200-1,300 YBP, so more than 600 years before the 1922 Colorado River Compact.

The Ten Tribes Partnership (“TTP”) was formed in 1992 and is a coalition of ten federally recognized Upper and Lower Basin Tribes that hold senior water rights in the Colorado River Basin. The member Tribes are Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, Jicarilla Apache Nation, Navajo Nation, Quechan Indian Tribe, Southern Ute Indian Tribe, Ute Indian Tribe, and UMUT.

TTP’s goal is to increase the influence of Tribes in Colorado River management and provide support for the protection and use of Tribal water resources. TTP is committed to developing a new management framework for the Basin that advocates for and protects Tribal priorities **while promoting long-term system sustainability, flexibility, and predictability** ahead of the 2026 expiration of the 2007 Interim Guidelines.

As a member of TTP, UMUT underscores these key principles regarding the development of post-2026 Guidelines and future management of the Colorado River.

⁵ *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

1. To meet its trust responsibility to Basin Tribes, the United States must take affirmative actions to actively protect the seniority of Tribal water rights, **whether quantified or unquantified**.
2. Pro rata distribution of shortage reductions is both inconsistent with, and an affront to, the seniority of Tribal water rights.
3. The United States must **ensure** Tribes' ability to determine how and when to use their water rights through a portfolio of flexible tools for the storage, delivery, and accounting of conserved system and non-system water. These tools should include opportunities for voluntary, **compensated** participation by Tribes in conservation activities and in any savings or storage pools established in Lake Powell and/or Lake Mead. Conservation activities undertaken by Tribes contribute to system stability and the full range of benefits that are provided by stable reservoir and river levels, and that are listed in the DEIS, including but not limited to: preserving cultural resources and practices, protecting native fish populations, sustaining riparian and riverine habitats, and supporting recreational and angling activities.
4. Provide for a permanent, formalized structure for government-to-government Tribal participation in implementing Post-2026 Guidelines, and in any future Colorado River governance and policy-making processes.

In addition to those priorities identified by TTP, on November 15, 2021, 20 Basin Tribes⁶ submitted principles to the Department of Interior that they demanded Reclamation consider in developing and implementing post-2026 guidelines and strategies, many of which are like those of TTP. Those principles mirror 1, 3, and 4, above.

II. Ute Mountain Ute Priorities

In addition to those common principles and priorities shared by Basin Tribes, UMUT has its own specific priorities for its federally reserved water rights in the Colorado Basin, which includes the states of Colorado, New Mexico, and Utah. This is not an exhaustive list as the Tribe's needs may change in the future and the Tribe reserves the right to identify additional priorities during the development of the preferred alternative as well as its implementation.

No single alternative described in the DEIS comprehensively addresses all UMUT's priorities; therefore, the Tribe outlines its priorities below and recommends a preferred alternative that aligns with these objectives.

⁶ Ak Chin Indian Community, Chemehuevi Tribe, Fort Yuma Quechan Indian Tribe, Gila River Indian Community, Hualapai Tribe, Jicarilla Apache Nation, Las Vegas Tribe of Paiute, Paiute Indian Tribe of Utah, Pueblo of Zuni Tribe, Pasqua Yaqui Tribe, Salt-River Pima-Maricopa Indian Community, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Southern Ute Indian Tribe, Tonto Apache Tribe, Ute Indian Tribe, Ute Mountain Ute Tribe, Yavapai-Apache Nation, Yavapai-Prescott Indian Tribe, and White Mountain Apache Tribe.

A. Trust Protections from Mismanagement and Waste

When UMUT agreed by treaty to limit their activities over most of their homeland and reside permanently on a reservation, they did so with the United States' promise that it would pass laws to promote their "happiness and prosperity."⁷ This explicit treaty promise requires Reclamation to consider the preferred alternative's impacts on UMUT's federally reserved water rights, regardless of their quantification status.

Recommendation: The preferred alternative and associated final guidelines and strategies must implement policies and programs that promote the Tribe's prosperous use of its federally reserved water. The Tribe must be able to develop its water and should not be subject to development caps or curtailment of its water rights. The dire situation in the Colorado River Basin⁸ requires all parties to consider new approaches to water delivery and conservation, even if those discussions are difficult (i.e., interstate transfers and leases). Barriers to development must be mitigated or removed, and negative impacts to the Tribe's use must be compensated. Reclamation must fully analyze the impacts of programs and policies to UMUT's water, both used and unused, quantified and unquantified, to ensure it adequately protects the Tribe's resource and not implement a rule that would impair UMUT's "happiness and prosperity." Reclamation must consider the various tools that can be implemented to accommodate the Tribe's participation in programs and policies developed under the final guidelines.

Recommendation: If Reclamation possesses adequate authority to protect the Tribe's federally reserved water rights, then the final guidelines must include the protections necessary, but if Reclamation does not have adequate authority to protect the Tribe's federally reserved water rights, then it must identify where the authority is needed and model the relative impacts to the Tribe.

B. Unsettled Federally Reserved Rights

The Ute Mountain Ute Reservation encompasses lands within the states of Colorado, New Mexico, and Utah. The Tribe settled its federally reserved water rights claims in Colorado and is currently adjudicating its federally reserved water rights claims in New Mexico (*San Juan General Stream Adjudication, Ute Mountain Ute Subproceeding*, New Mexico Eleventh Judicial District Case No. D-116-CV-75-184) and Utah (Adjudication Area 09-2).

As acknowledged in Chapter 1, Purpose and Need, the final guidelines must not negatively impact water rights negotiations. The quantities of water involved in the Tribe's claims are reasonably foreseeable and not extraordinary. As such, in identifying the

⁷ See, 9 Stat 984, Treaty with the Utah (Ute) Indians, also known as the Treaty of Abiquiu (December 30, 1849).

⁸ On February 20, 2026, while preparing these comments, Reclamation notified the Tribe it is probable that Lake Powell will fall below 3525 in June 2026, hitting the power pool in December, with decreasing levels through March 2027.

preferred alternative and associated guidelines and strategies, Reclamation must consider impacts to UMUT's federally reserved water rights.

Recommendation: Reclamation should ensure that the final guidelines and strategies do not affect ongoing Tribal water rights negotiations or established quantities, and further, that Colorado River operations must incorporate the Tribe's federally reserved water rights once settled.

C. Structured and Meaningful Involvement in Decision-Making

The Basin Tribes have proven to be invaluable in discussions concerning management of their water rights within the Colorado River Basin and the Tribes' continued participation is essential. The final guidelines and strategies must, as a structural component of the preferred alternative, incorporate robust tribal consultation and collaborative decision-making processes involving all Basin Tribes.

Recommendation: Reclamation must consult with all Basin Tribes prior to publication of the Final Environmental Impact Statement ("FEIS") concerning the preferred alternative's impacts on the Tribes' water rights, programs, and uses.

Recommendation: Final guidelines and strategies must include protocols for consultation with relevant Basin Tribes regarding all decisions that affect the Tribe's water rights, cultural resources, Tribal assets, economy, and environmental health, including when the guidelines require consultation with the Basin States. This is an opportunity to redress the failure of all prior operating guidelines to meaningfully involve and consider the unique status of federally recognized tribes in the Basin, while fulfilling the Federal government's trust and, where applicable, treaty responsibilities.

D. Prior Perfected Water Rights

By the terms of the Colorado River Compact, the Tribe's federally reserved water rights may not be impaired by Compact operations and, therefore, are not subject to a "Compact call" at any time, including after participation in a conservation program, contribution to a pool, or compensation for non-use. Additionally, water rights preceding the Compact may be useful in protecting the power pools in Lake Powell and Lake Mead in case of a Compact call.

Recommendation: The Final guidelines and strategies must protect prior perfected rights from diminishment for participating in a pool, a conservation program, or after purchase or lease.

E. Flexible Tools in Purpose and Need

As stated in Chapter 1, Purpose and Need of the DEIS, guidelines for management of the Colorado River must 1) include expanded opportunities for Upper Basin Tribes to conserve and store water in Lake Powell, integrating future efficiency improvements and opportunities for augmentation, and 2) provide flexibility and predictability for Upper Basin Tribes to benefit from new or enhanced opportunities to utilize their water rights and have opportunities to participate in voluntary conservation programs.

1. *Pools*

Recommendation: 1) Tribes must be able to contribute unused Tribal water to pools; 2) the quantity of water contributed to a pool must be as measured at the point of depletion minus evaporation and transportation losses and contributions must not be limited by natural flow as indicated in Table H-5; 3) water contributed to a pool should not be subject to a Compact call; 4) the Tribe must be adequately compensated for its contribution; 5) water contained in pools must be operationally neutral; and 6) Tribes must be included in negotiations of transfer agreements and development of shepherding protocols.

2. *Conservation Programs*

Recommendation: 1) Basin Tribes must be eligible for all relevant conservation programs; 2) Tribal participation in a program must not trigger any Tribal financial obligation, including but not limited to, charges related to operation, maintenance, and replacement; 3) Tribal water rights may not be impaired by river operations, policy, or applicable laws; and 4) Reclamation implement pilot programs to provide information about the elements of successful strategies to manage the River while protecting tribal priorities and resources.

F. Funding

No alternative is reasonably capable of successful implementation without the infusion of federal funds for projects and programs envisioned in the alternative.

Recommendation: The United States provide funding for the following Tribal priorities:

1. *Infrastructure*

The Tribe has secured funding for several current projects and is awaiting distribution of these funds. The Tribe is also developing new projects that will require additional infrastructure to benefit from its federally reserved water rights. These projects are intended to use water for energy, health and safety, economic development, food security, agricultural efficiency, and cultural protection; all values intertwined in the alternatives. These projects will all require significant financial resources.

2. *Conservation Programs*

Tribes should be timely and adequately compensated for participation in conservation programs implementing the flexible tools developed by the Basin Tribes, such as, but not limited to; contributing to conservation pools wherever located in the Upper Basin, forbearing development of currently unused water rights, and limiting use of currently consumed water rights.

G. No Curbs on Tribal Development

UMUT's current and future federally reserved water rights are intended to be in quantities sufficient to meet the Tribe's needs over time with an implicit recognition that the needs change and uses of water and quantities will vary over time. It would be inconsistent to implement a policy that inhibits the Tribe's ability to develop and use its water according to principles of inherent sovereignty and UMUT's treaty rights.

Recommendation: The final guidelines and strategies must not limit an Upper Basin Tribe's ability to develop its federally reserved water rights. Furthermore, the preferred alternative must acknowledge Tribal unused water contributes to the health of the Colorado River and is worthy of compensation until the Tribe removes it from the system and puts it to use for its benefit.

H. Leasing

Not all Tribal reservations in the Basin are restricted to one state and not all beneficial uses of Tribal federally reserved water rights are contained within the Tribe's reservation or state. Given the reality of drought and the Basin's consistent annual hydrologic deficit, effective management of the Colorado River must allow Basin Tribes to utilize their federally reserved water rights in any way fulfills the community's needs.

Recommendation: Final guidelines must allow and accommodate off-reservation and out-of-state leasing of Tribal federally reserved water rights. The guidelines must include development of agreements that would accommodate shepherding and interstate transfers and leasing for protection of in-stream flows, wildlife, and the environment. The dire situation and reality of our contemporary Colorado River demand creative thinking and a revision of policies restricting more adaptable and innovative methods of delivery and uses, both consumptive and via conservation.

I. Tribal Projects Eligible to Utilize the CRSP Upper Initial Units

As stated in the Purpose and Need, guidelines must allow flexibility in Basin Tribes' ability to utilize their federally reserved water rights to benefit the Tribe. Utilization of the Colorado River Storage Project ("CRSP") Upper Initial Units could assist Upper Basin Tribes in developing their federally reserved water rights through leasing arrangements with other tribes, for example, and must be available as a flexible tool within the limits of applicable laws and regulations to allow the Tribe to fulfill the purposes of its reservation lands (to serve as a homeland for all Ute Mountain Ute). Relying on the Upper Basin to make up for overuse in the Lower Basin through depletion of the CRSP Upper Initial Units and the impacts flowing from that depletion were not addressed in the DEIS alternatives.

Recommendation: The final guidelines and strategies must reject any policy or program that would hinder the ability of any Upper Basin Tribe to fully utilize the CRSP Upper Initial Units consistent with applicable laws and regulations. Reclamation cannot adopt guidelines that utilize the CRSP Upper Initial Units to the detriment of Upper Basin water users, particularly those with senior rights. If Reclamation intends to rely on the CRSP Upper Initial Units to cover deliveries to the Lower Basin, it must analyze the impact of those actions on the ability of the

Tribe, for example, to utilize its reserved water rights in Colorado, New Mexico, and Utah.

J. Compact Call

As stated in Article VII of the 1922 Colorado River Compact, nothing in the Compact may be construed as affecting the obligations of the United States to Indian Tribes, and Article VIII recognizes that prior perfected rights to the beneficial use of the Colorado River System, such as UMUT's federally reserved water rights in Colorado, remain unimpaired by the Compact.

Recommendation: Reclamation must model the various scenarios if the Lower Basin states make a call under the Colorado River Compact and create guidelines that establish protocols to be implemented in case of a Compact call and describe how Tribal federally reserved water rights will be protected. This would be developed in consultation and collaboration with the Basin Tribes.

K. Properly Calculate and Document Upper Basin Shortages

During drought, the Tribe and other Upper Basin water users cannot utilize their full allocations and are forced to involuntarily reduce water uses, causing severe impacts to local economies, including UMUT's. The Upper Basin must survive with the quantities of water provided by nature and as a result, routinely involuntarily reduces consumption. The DEIS does not adequately describe or analyze the impacts of these hydrologic shortages to the Upper Basin economy, the health of the environment, or the trust responsibility to Tribes.

Recommendation: Reclamation must properly model and describe Upper Basin shortages, such as including a chart showing Upper Basin demands and supply over time and analyzing the impacts to Tribes and Tribal economic development. Reclamation must identify and analyze the effectiveness of Upper Basin conservation efforts and implement guidelines that promote the most effective conservation measures and acknowledge the quantities of water involved and the impacts of reductions.

L. Properly Model Lower Basin shortages

Historically, the Lower Basin has consumed greater quantities of water than the Colorado River Compact presumed. We now understand that Reclamation did not properly include the structural deficit (evaporation and transit losses, for example) in its calculations of deliveries to the Lower Basin. This results in disparate management regimes in the two basins and an unsettling reliance on "gap" water to relieve Reclamation of its responsibility to properly account for its failure to adequately regulate deliveries to the Lower Basin.

Recommendation: Reclamation must identify and define the structural deficit in the Lower Basin and not include "gap" water to ignore the reality of Lower Basin shortages. Reclamation fails to explain where "gap" water comes from and if Reclamation expects such "gap" water to come from the Upper Basin, it must

identify that in the FEIS and the preferred alternative. Reclamation has failed to take a “hard look” or analyze at all the impacts on the Tribe and other Upper Basin water users in relying on “gap” water to address shortages.

M. No Additional Depletions in the Upper Basin

When the Colorado River Basin suffers poor hydrology and low natural flow, each basin experiences shortages: the Upper Basin experiences a lack of adequate supply due to environmental causes, and the Lower Basin experiences a lack of adequate supply due to reduced releases from Lake Powell. Each basin will experience shortages, and it is not appropriate to demand the Upper Basin take further reductions in use to prevent the Lower Basin from having to do the same. Once the Lower Basin experiences shortages, the Upper Basin has already been experiencing shortages and cannot be asked to suffer even greater reductions and their associated harms due to poor hydrology.

Recommendation: Reclamation must implement guidelines that acknowledge and define shortages experienced in the Upper Basin due to low natural flow and must include these calculations when determining whether and how to balance shortage-sharing among the basins. The FEIS and preferred alternative must take these concerns into account and impacts to the Upper Basin be properly analyzed.

N. Supply Driven Alternative Must Analyze a Broader Range of Percentages

The Tribe believes that science and the Law of the River require Reclamation to model deliveries to the Lower Basin based upon 50% of the natural flow at Lees Ferry on average. The Colorado River Compact envisions that the Upper Basin and the Lower Basin receive the same amount of water each year (with additional deliveries for Mexico) and the Tribe believes that deliveries greater than 55% will negatively impact Lake Powell. Modeling only 65% convinces no one based on the Basin’s historically low hydrology and recent information indicating severe conditions at Lake Powell.

Recommendation: The Supply Driven Alternative must analyze deliveries to the Lower Basin at 50% and 55% of average natural flow.

O. No New Federal Authorities in the Upper Basin

The Upper Basin Tribes enjoy a trust relationship with the United States; however, historically, the federal government has not done enough to promote and protect this unique relationship with respect to tribal water rights in the Colorado River Basin. Despite Reclamation’s obligation to the Tribe, the Tribe opposes providing greater authority to the Reclamation for the management of the Colorado River in the Upper Basin. Rather, the preferred alternative must provide for better participation of Upper Basin Tribes in the realistic operational management of the Basin, as opposed to giving Reclamation broader powers. Working within the Law of River, meaningfully considering the solutions available using processes that include all stakeholders, including tribes, is the best and most reasonable path forward. While we know the 2007 Interim Guidelines were not robust enough to meet the operational needs of Lakes Powell and Mead, Reclamation can and should reconsider how existing authorities can be used to better and more collectively manage this scarce and vital resource for the benefit of all water users in the Basin.

Recommendation: If necessary for the operations at Lake Powell and Lake Mead, all final guidelines, new regulations, and new laws must acknowledge Reclamation's limited authorities in the Upper Basin and prescribe to operate within those authorities without presuming to acquire any greater or additional authorities in virtue of the guidelines, regulations, or laws.

P. Protect Power Pools

The impact of falling beneath the power pools at Lake Powell and Lake Mead will be permanent and must be avoided. Reclamation's only solution for addressing shortages is utilizing the CRSP Upper Initial Units to mitigate reductions in Lake Powell and is neither a sustainable nor appropriate solution. This sole option will only result in additional involuntary reductions in the Upper Basin, a reality Reclamation failed to analyze in the DEIS. Reclamation does not acknowledge that Upper Basin water users already take a significantly reduced apportionment and releases from the CRSP Upper Initial Units will reduce available resources in the Upper Basin to the sole benefit of the Lower Basin. Reclamation must analyze the impact of reduced deliveries to the Lower Basin instead of draining the CRSP Upper Initial Units.

Recommendation: The preferred alternative and final guidelines must prioritize protecting the power pools in both Lake Powell and Lake Mead, which will require consideration of all options, including reductions in the Lower Basin. Only through proper modelling and analysis can any stakeholders understand the actual impacts of any one alternative and help Reclamation make an informed decision regarding the preferred alternative and operational guidelines and strategies.

Q. Milestones

More than 100 years after the Colorado River Compact, Reclamation faces a dire situation in the Basin. The water that once flowed through the Basin simply does not exist today. Managing the Colorado River in times of severe drought is complex and as the failure of the seven states to agree demonstrates, the solution alludes even the numerous stakeholders, many of which approach management with different capacities and priorities. Understanding the lack of agreement between the Upper and Lower Basin States regarding operations at Lake Powell and Lake Mead, Reclamation must consider guidelines and strategies that are flexible, self-correcting, and responsive to varying priorities.

Recommendation: Reclamation must maintain flexibility in Colorado River management and implement measures with relevant milestones to ensure that policies and programs are effective. Reclamation must remain flexible over time and in the preferred alternative, be prepared to consider a wide range of policies and programs to adapt to an unpredictable future.

The Tribe expressly reserves the right to identify additional priorities as Reclamation proceeds with the review process under the National Environmental Policy Act ("NEPA") and engages in additional Tribal consultation on the preferred alternative.

III. **Comments on Alternatives Analysis under NEPA**

First, the DEIS has a glaring flaw: it simply ignores the impact of the proposed alternatives on the Upper Basin. Rather, the DEIS concludes that there are no impacts to the Upper Basin states and tribes because the DEIS does not apply to operations above Lake Powell. That is incorrect because the DEIS anticipates releases from CRSP Upper Initial Units to safeguard infrastructure in the Lower Basin but does not consider the impact of those proposed releases on the water users in the Upper Basin. The Upper Basin already takes shortages each year based on hydrology. How does Reclamation propose to address the additional impacts on the Tribe, for example, whose Farm and Ranch Enterprise has received as little as 10% of its allocation because of hydrologic shortages in the Upper Basin? These are questions that the DEIS makes no effort to consider. In short, the DEIS fails to take a “hard look” at the impacts from the alternatives on a variety of issues in the Upper Basin as required by NEPA.

In its comments, the State of Colorado raises significant legal concerns with respect to the DEIS and possible conflicts with the Law of the River. Understanding there is a high potential for litigation by one or more parties (since the seven Basin states failed to meet the February 14th deadline to achieve consensus), to the extent the state’s concerns could affect the legitimacy of the alternatives development process, the Tribe encourages Reclamation to seriously consider how the preferred alternative can address the needs of sovereign Indian Nations and water users, balance the hydrologic reality of the Basin, and strive to conserve for more serious future drought conditions within the confines of existing law.

In addition to addressing possible conflicts with existing law, Reclamation must also ensure that the preferred alternative proactively protects the seniority of Tribal water rights, regardless of quantification status and provides tribes with flexible tools to develop, use, and store their federally reserved water rights. With these introductory comments on the alternatives, the Tribe offers the following more specific comments regarding the DEIS.

A. Impacts From the Alternatives on the Upper Basin Must be Analyzed

Reclamation avoids analyzing the alternatives’ impacts on the Upper Basin by simply rejecting the idea that the federal action involves the Upper Basin. However, that conclusion is not supported by the DEIS, which anticipates releases from the CRSP Upper Initial Units but does not even attempt to consider how those releases will impact Upper Basin users. Reclamation did not properly consider these impacts in the DEIS. Reclamation must analyze the impacts on Upper Basin users before selecting a preferred alternative.

B. UMUT’s Unquantified and Unsettled Rights in Utah and New Mexico Must be Considered in Reclamation’s Modelling

UMUT is in the process of settling its federally reserved water rights in New Mexico and Utah. The Tribe is concerned that those unquantified and unsettled rights are not considered in the DEIS and that such failure will impact the Tribe’s ability to use its water rights, whether through consumptive use or conservation, for example. Reclamation must explain how reasonably foreseeable future Tribal water rights and users are considered

in its modelling predictions to properly analyze impacts on UMUT in the future, especially since these guidelines may be in place for twenty years.

C. Compact Compliance must be Modelled as Part of the Preferred Alternative

One point of disagreement between the states is the impact of Compact compliance on the Upper Basin in times of hydrologic shortage. When natural flow is low, Reclamation must model and consider the impact of Compact compliance on the Upper Basin. This is the only way to take a proper “hard look” at the impacts from the proposed operational guidelines and strategies as required by NEPA.

D. Reconsider Reclamation’s Existing Legal Authorities

At least two of the alternatives require additional legal authorities to implement, which the DEIS fails to consider or identify. Not only would adopting a preferred alternative that conflicts with the Law of the River lead to litigation, but it would also force Reclamation into a limbo state until additional laws and legal agreements are passed and executed—if ever. If the Basin states could not reach consensus during an EIS process, when each retains the ability to advocate and accept negotiated compromise, forcing the states to negotiate agreements or support legislation necessary to implement the preferred alternative is just as likely to fail. In that event, it would be impossible for Reclamation to have guidelines and strategies in play after the 2007 Interim Guidelines expire in October 2026.

Reclamation does not address this reality in the DEIS, let alone the additional laws and agreements necessary to implement a preferred alternative. Rather, it would be best for Reclamation to consider what it can do within its existing authority, including enhanced coordination among stakeholders, including tribes, rather than developing a preferred alternative requiring additional laws and legal agreements to implement. Reclamation does not explain in the DEIS what happens if a preferred alternative cannot be implemented based on either a conflict with the Law of the River or the need for new legislation and agreements.

E. Population-Based Priority Would Violate Treaty Rights and Trust Responsibility

Recently, Tribal Leadership attended a meeting where it was suggested future water rights will be prioritized by population, meaning urban centers with higher populations would receive water before areas like UMUT, whose population is considerably less than more urban and populated centers in and around its reservation lands in Colorado, New Mexico, and Utah. Any attempt to prioritize Basin water rights on a population basis would violate both the Tribe’s treaty with the United States and the federal government’s trust responsibility. Reclamation must reject any alternative that would consider such an approach, now or in the future.

F. Identify Additional Legal Authorities Necessary for the Preferred Alternative

If Reclamation continues with a preferred alternative requiring new legal authorities, it must explicitly identify what that authority is, for example, a regulation of the Upper Basin, which is authority that Reclamation currently lacks. As noted above, however, the Tribe

opposes this effort because Reclamation has yet to consider what other solutions and strategies exist within the current Law of the River. In any event, Reclamation must make a better effort at describing the legal framework necessary to implement its preferred alternative. If existing authority supports that alternative, Reclamation must clearly identify the applicable authority.

IV. Solutions if No Consensus

Effective operations of the CRSP Upper Initial Units and the healthy management of the Colorado River System are not dependent on an agreement among the Basin States. If the seven Basin States are unable to provide guidance to Reclamation sufficient to develop a preferred consensus alternative, then the Tribe recommends Reclamation develop a preferred alternative and guidelines that prioritize protecting the power pools in Lake Powell and Mead using existing authorities without hindering the Tribe's ability to utilize its federally reserved water rights in its best interests. Reclamation should acknowledge that the recommendations of States, and to some extent other Basin Tribes, that require additional state legislation and agreements are achievable and can be included in a preferred alternative to the extent the additional state laws and agreements are adequate to implement the alternative. Each state and tribe has a unique view into the circumstances affecting their respective communities and the solutions they offer warrant serious consideration by Reclamation.

The Tribe is eager to participate in drafting agreements and legislation that will accommodate effective management of the Colorado River of today and must be included in such negotiations and discussions involving implementation of the preferred alternative. Such participation must be included as part of the structural consultation folded into the future operational guidelines and strategies at Lake Powell and Lake Mead.

V. Reclamation Must Consult with UMUT for the Duration of this Process

In addition to its obligations under the trust responsibility, Reclamation has additional consultation mandates when it seeks to take actions affecting the interests of Indian tribes. In our homelands, we have waited for the water promised our ancestors more than 158 years ago when it set aside our reservation lands in Colorado. There is no policy decision more vital to UMUT's continued reliance on its reserved homelands for their intended purpose than how Reclamation decides to operate and manage the water resources flowing from the Colorado River Basin.

A. Executive Order Consultation Mandates

Since issuing Executive Order 13175 on November 6, 2000, Presidential administrations have mandated federal agencies consult with Indian tribes regarding "policies that have tribal implications."⁹ This policy was again reaffirmed in the Presidential Memorandum of January 26, 2021, Tribal Consultation and Strengthening Nation-to-Nation Relationships.¹⁰ Further, the Administration adopted Uniform Standards for Tribal

⁹ 65 Fed. Reg. 67249, November 9, 2000. See also, the Presidential Memorandum of November 5, 2009, requiring agencies prepare and update plans to implement E.O. 13175.

¹⁰ 86 Fed. Reg. 7491, January 29, 2021.

Consultation in the Presidential Memorandum of November 30, 2022.¹¹ These authorities mandate consultation with Indian Tribes on policies that implicate tribal interests.

The operations of Lake Powell and Lake Mead, which operations affect the Tribe, is a Reclamation policy decision. Reclamation must consult with UMUT while it prepares the preferred alternative and prior to finalizing the FEIS and the Record of Decision.

B. Department of Interior Department Manual

The Department of Interior adopted a policy on consultation with Indian Tribes on November 30, 2022.¹² That policy defines “Department Action with Tribal Implications” as:

Any Departmental regulation, rulemaking, policy, guidance, legislative proposal, plan, programmatic or operational activity, or grant or funding formula changes that may have substantial direct effect on a Tribe in matters including, but not limited to:

- (1) Tribal cultural practices; lands; *treaty rights*; *resources*; ancestral lands; sacred sites, including sites that are submerged; and lands Tribes were removed from, or access to traditional areas of cultural or religious importance on federally managed lands and waters;
- (2) The ability of a Tribe to govern or provide services to its members;
- (3) A Tribe’s formal relationship with the Department, be it nation-to-nation or beneficiary-to-trustee...¹³

This confirms Reclamation must consult with the Tribe regarding all aspects of its decision-making for the final operational guidelines and strategies for Lake Powell and Lake Mead, including the effects of its decisions on the Tribe and its ability to use and benefit from its federally reserved water rights.

VI. Conclusion

Since well before contact, the Ute Mountain Ute Tribe has safeguarded and protected the Colorado River and its tributaries, understanding the importance of its life-giving water. Our Ancestors lived with the supply these waterways provided, enjoying the bounty it made possible. The Colorado River no longer just benefits the Basin Tribes; the Colorado River makes life in all our communities—tribal and non-Indian—possible. It is then our collective responsibility to ensure this vital and increasingly stressed resource not only survives to meet our water needs, but to begin healing the River, from which we have demanded far too much for far too long.

The Tribe submits these comments with respect and to honor the River and those who strive every day to practice the Tribe’s shared values of respect and conservation. It is with these considerations that I respectfully submit these comments and offer the Tribe’s participation toward finding solutions that benefit all water users, while respecting Ute

¹¹ 87 Fed. Reg. 74479, December 5, 2022.

¹² Part 512, American Indian and Alaska Native Programs, Chapter 4, Department of the Interior Policy on Consultation with Indian Tribes, 512 DM 4.

¹³ *Id.*, at 1-2.

Mountain Ute's inherent tribal sovereignty and upholding the federal government's trust responsibility to UMUT and all Basin Tribes.

On behalf of the Ute Mountain Ute Tribe,



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Tribal Chairman

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