

## COMMENT LETTER

## RESPONSES

Center for Biological Diversity  
Defenders of Wildlife  
Environmental Defense  
El Centro de Derecho Ambiental e Integración Económica del Sur, A.C.  
Friends of Arizona Rivers  
Glen Canyon Action Network  
Glen Canyon Institute  
Pacific Institute for Studies in Development, Environment and Security  
Sierra Club  
Fred Cagle  
Jaqueline Garcia-Hernandez

SEP 14 2000

Via Fax and Mail

September 8, 2000

Regional Director  
Lower Colorado Region  
Attention: Ms. Jayne Harkins (BCOO-4600)  
Bureau of Reclamation  
PO Box 61470  
Boulder City, NV 89006-1470

BCOO-4600  
4600

**Re: Draft Environmental Impact Statement on Interim Surplus Criteria**

Dear Ms. Harkins:

Thank you for the opportunity to review and to comment on the Draft Environmental Impact Statement ("DEIS") on Colorado River Interim Surplus Criteria. We are supportive of the overall goal of returning California to its 4.4 maf share of the Colorado River, yet we do not believe that such an achievement should come at the expense of downstream riparian and aquatic habitats. The diversion of millions of acre-feet of water and the impoundment of millions more have eroded and desiccated the Colorado River delta in Mexico. Fortunately, since the 1980s flood flows have revegetated the delta which has grown to 150,000 acres, though still a mere 5% of its historic size. As the Department of Interior has recognized, 80 percent of the best Lower Colorado River habitat is in Mexico, yet serious environmental harms are occurring there. The interim surplus criteria provide an opportunity to avoid and mitigate these harms, yet Interior fails to take advantage of this opportunity.

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1 Therefore, we are disappointed that the Bureau of Reclamation ("Reclamation") rejected consideration of the Pacific Institute alternative that would have provided a reliable measure of freshwater flows. We also have several procedural and substantive concerns with the new Seven States proposal, as well as with the DEIS itself. For several reasons, we recommend that a Supplemental DEIS precede the Final EIS: the DEIS omits a reasonable alternative; the uncertain status of the Seven States information precludes effective public comment; the California Colorado River Water Use Plan is not officially available for comment; the transboundary and cumulative impacts analyses are flawed; and endangered species impacts merit more research and evaluation.

***A Supplemental DEIS Should Include An "Environmental" Alternative***

2 The range of alternatives is an important piece of NEPA – "This section is the heart of the environmental impact statement." 40 C.F.R. § 1502.14. Contrary to Reclamation's conclusion in the DEIS, the Pacific Institute proposal is not within the range of alternatives in the document (2-3). That proposal, supported by 9 other groups, was submitted specifically to dedicate perennial flows through the river to the delta before declaration of a partial surplus and flood waters to the delta before declaration of a full surplus. No other alternative contains these or any other environmental protection or restoration provisions.

Colorado River flows that reach the Delta are the result of flood control releases in the U.S. Deliveries to Mexico were greater than 1.7 maf in only 24 of the years between 1950 and 1998. The alternatives will again halve these odds by 2015 (see Table 3.16-1), as well as reduce the quantities released. The Pacific Institute proposal provides a more reliable source of water to the delta while also providing the Basin states with predictability and California with a supply of water over its apportionment. As a reasonable alternative that satisfies the purpose and need of the surplus criteria, the Pacific Institute proposal and its impacts should be studied.

***The California Colorado River Water Use Plan Must Be Included***

3 Regarding the purpose and need of Interim Surplus Criteria, it is well known that the driving force behind their development has been the need to reduce California's reliance on Colorado River water above and beyond its apportionment; the 4.4 Plan is California's plan for doing so. See 1-22. The Six State, California and Shortage Protection Alternatives all include implementation of the 4.4 Plan in their modeling assumptions (3.3-9-10). Without the 4.4 Plan it is impossible to measure the quantities of water involved and impossible to gauge California's compliance. However, no version of the 4.4 Plan has been included in the DEIS. The California 4.4 Plan must be made publicly available, as quickly as possible, for public review and comment before the FEIS is released.

***Seven States Alternative May Not Appear in the FEIS as the Preferred Alternative***

4 On August 8, 2000, Reclamation published a notice of availability of information – the

1: See response to Comment 11-2 and 11-6.

2: See the response to Comment 11-2 and 11-6.

3: The 4.4 Plan has been superseded by California's draft Colorado River Water Use Plan (CA Plan), which has been publically available from the Colorado River Board of California. For more information see response to Comment 11-11.

4: Based on experience gained in modeling the operation of the alternatives in the DEIS, it was apparent to Reclamation that the shortage triggers proposed by the Seven States would place the effects of operating with those triggers and their related provisions in the midst of the range of the alternatives presented in the DEIS. It was also apparent that the effects of the Seven States Proposal would relate to those of other alternatives as a matter of degree rather than as new and different kinds of impacts. The preferred alternative in this FEIS derived from the Seven States Proposal has been subjected to the same analysis as the other alternatives in the FEIS.

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Seven States proposal – related to this DEIS. 65 Fed.Reg. 48531. While it appears in substance to be another alternative, Reclamation has stated that it will analyze the issues and information in it along with all other public comments on the DEIS, and will not extend the comment period, *id.*, despite the fact that it is modeling the proposal. Even though the ‘information’ is the “product of significant effort” by the States, Reclamation may not view this new information as an alternative until the proposal’s modeling runs and impacts have been subject to the NEPA processes of public notice and comment.

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Furthermore, the proposal in its current form is not within the purpose and need of the interim criteria and is therefore an inadequate proposal. The impetus behind the interim criteria has been increased predictability of availability of surplus waters that California deems necessary to meet its needs until conservation measures are in place that have reduced consumption to 4.4 maf. The Seven States proposal does not provide a starting line by which to measure California’s consumption, but given that the state has diverted up to 5.2 maf in recent years and that it expects to conserve a maximum of 490,000 af by 2016, California will not reach the 4.4 maf goal. Section VIII affirms this position by setting standards for enforcement that are even lower than its expected goals. Only when the surplus criteria is based on California reducing its take of the Colorado River to its 4.4 maf share should the criteria be implemented.

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Lastly, the Seven States proposal, in sections IV.B.3.d. & f., excessively constrains the Secretary’s discretion, which is simply unacceptable. Allocation of unused apportionment and of surplus has always been entirely within the Secretary’s discretion but this proposal attempts to restrict it further than surplus criteria require.

***Compliance with the Endangered Species Act***

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The scope of the ESA Section 7 consultation on the Interim Surplus Criteria is of enormous importance yet contains several flaws. First, section 5.3.3 must be amended to read that the action area “will be within the 100-year floodplain and Lakes Mead, Mohave and Havasu to full pool elevations of the Colorado River *and downstream to the Gulf of California*” (5-2) (emphasized text added). In this DEIS Reclamation identifies the potential for impacts to the vaquita, totoaba, southwestern willow flycatcher and Yuma clapper rail from the decrease in frequency and amount of freshwater flows to the delta. Therefore, in an ESA consultation where the ‘action area’ includes “*all areas* to be affected directly or indirectly by the Federal action and not merely in the immediate area involved in the action,” 50 C.F.R. § 402.02 (emphasis added), and the Colorado River delta is clearly affected by the proposed action, the scope of the analysis must include the reach of the river and its floodplain down to the Gulf.

In addition, section 5.3.3 on ESA compliance refers *only* to the U.S. Fish and Wildlife Service in caption and text, implying that the National Marine Fisheries Service, the agency with jurisdiction over the vaquita and totoaba, have not been contacted regarding this consultation. See also Letter from Rodney R. McInnis, Acting Regional Administrator, NMFS to David Hogan, Center for Biological Diversity, of July 13, 2000 (“the Bureau of Reclamation has not

5: Reclamation did not structure the preferred alternative precisely as described in that draft proposal, but made some changes for consistency with the purpose and need for the proposed action, Reclamation policy and operational procedures.

6: The preferred alternative in this FEIS would not change the Secretary’s discretion regarding the regulation of Colorado river flows, which stems from the Law of the River. Clause IV.B.3.f contained in the Draft Seven States Proposal is not included in the preferred alternative.

7: Reclamation is consulting with the Service for the delta area of Mexico, as discussed in Section 5.3.4 of the FEIS. The action area extends to the Sea of Cortez.

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contacted NMFS regarding informal or formal ESA consultation on the Department of Interior's Colorado River Interim Surplus Criteria") (Attached). This is in violation of the ESA and contrary to a memo indicated that this consultation has occurred and should continue. See Memorandum from John Leshy, Solicitor to Eluid Martinez, Commissioner, of August 14, 2000. We hope that the August 14 memo is more indicative of the consultation that is occurring on the proposed action and that consultation with both FWS and NMFS continues.

*Transboundary & Cumulative Environmental Impact Analysis is Inadequate*

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We were encouraged that Reclamation included an analysis of transboundary impacts in the DEIS. However, our hopes that past recognition of the sparse ecological and biological data on the vaquita and totoaba and their effects of modified river flows and water quality would have spurred additional research were dashed when we saw that the most of the analysis of the vaquita and totoaba were taken straight from the Description and Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River (Reclamation 1996). This is especially disappointing because Reclamation already knows its ongoing activities in the Lower Colorado River may affect the totoaba and that the vaquita is the world's rarest cetacean.

9

The DEIS omits any discussion of cumulative impacts resulting from the actions in the above Biological Assessment, as well as impacts from the California 4.4 Plan (not referenced in the DEIS) and off-stream banking regulations. For example, Reclamation has found that current operations along the LCR may affect the endangered totoaba, citing the lack of freshwater flows to the delta as a factor. Offstream banking, as well as the interim criteria, will reduce the amount of and probability of freshwater flows to the delta. See Biological Assessment for Proposed Rule for Offstream Storage of Colorado River Water and Delivery of Intentionally Created Unused Apportionment in the Lower Division States (1998) at Table IV-3. There is no attempt to accumulate or mitigate for these impacts. Environmental values and protections are not factors in Reclamation's hydrological models, thus this lack of cumulative impacts analysis is pervasive in the DEIS.

*Recommendations*

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Overall, we recommend that this DEIS expand its scope, taking into account impacts not only downstream of the NIB, but downstream of the SIB into Mexico and the Colorado River delta. Without discussion or analysis of the impacts, mitigation is impossible. We hope that expansion of the NEPA analysis will result in an expanded ESA consultation and protection and recovery of the critically endangered ecosystem that has been divided by an arbitrary line. A Supplemental DEIS must also include the Pacific Institute proposal, as well as Reclamation's models and impacts analysis for the Seven States submission.

8: Regarding the effects on species found in both Mexico and the United States (such as the southwestern willow flycatcher), Reclamation is consulting with the U.S. Fish and Wildlife Service. For potentially affected species found only in Mexico, Reclamation is consulting with the National Marine Fisheries Service. Concurrent with these consultations, Reclamation is also continuing its dialog with Mexico to reach mutually agreeable solutions.

9: Cumulative transboundary impacts are discussed in Section 4.2. Implementation of the Lower Colorado River Multi-Species Conservation Program (LCRMSCP) is expected to prevent adverse cumulative effects to the biological resources of the lower Colorado River. The LCRMSCP is being developed to mitigate the adverse effects on resources from current and future water diversions and power production with the cooperation of federal, state, Tribal and other public and private stakeholders. The LCRMSCP will include the creation and enhancement of habitat and augmentation of native fish species populations from Lake Mead to the SIB. The LCRMSCP is evaluating the appropriate amount of acreage for restoration. Currently, acreage estimates range from a low of 3,000 acres to a high of 80,000 acres of riparian woodland, marsh, open water and mesquite habitat.

10: Comment noted. Reclamation believes that the level of analysis for energy resources presented in the EIS appropriately identifies the potential effects of interim surplus criteria.

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Sincerely,

David Hogan  
Desert Rivers Coordinator  
Center for Biological Diversity

Kara Gillon  
Associate Counsel  
Defenders of Wildlife

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Jaqueline Garcia-Hernandez  
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Sep. 01 2000 11:48AM P2

UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE

Southwest Region  
501 West Ocean Boulevard, Suite 4200  
Long Beach, California 90802-4213

July 13, 2000

Mr. David Hogan  
Center for Biological Diversity  
P.O. Box 628  
Santa Ysabel, California 92070

Dear Mr. Hogan:

This letter is in response to the Center for Biological Diversity request under the Freedom of Information Act (FOIA), dated June 5, 2000, for documents relating to an informal or formal Endangered Species Act (ESA) consultation which may have occurred between the Bureau of Reclamation and the National Marine Fisheries Service (NMFS) with regard to the Department of the Interior's Colorado River Interim Surplus Criteria.

I understand that you spoke with Ms. Deanna Harwood, staff attorney in the Office of General Counsel, National Oceanic and Atmospheric Administration (NOAA) on July 7, 2000. Ms. Harwood and I appreciate your acceptance of our request for additional time in responding to your request. It is our understanding from that conversation that your interest is limited to whether the Bureau of Reclamation had initiated informal or formal ESA consultation with NMFS. As the Bureau of Reclamation has not contacted NMFS regarding informal or formal ESA consultation on the Department of Interior's Colorado River Interim Surplus Criteria, we have no documents responsive to your request.

Although this does not constitute a denial of your request because there were no records available or withheld, you may appeal this determination within 30 days of receipt of this letter. Appeals shall be addressed to the Office of the General Counsel, Room 5882, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230, and prominently mark your letter and the outside envelope, "FOIA Appeal." Your appeal should state the reasons why you believe this determination was in error. Attach a copy of your original request and a copy of this letter to your appeal.

Sincerely,

Rodney R. McInnis  
Acting Regional Administrator

cc: Deanna Harwood



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