

COMMENT LETTER

RESPONSES



Via Fax and Mail

September 8, 2000

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

Dear Ms. Harkins:

These comments are submitted on behalf of Defenders of Wildlife (Defenders). Defenders is a national non-profit, public-interest organization with over 400,000 members and supporters. Defenders works to preserve the integrity and diversity of natural ecosystems, prevent the decline of native species, and restore threatened habitats and wildlife populations.

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 its achievement comes at the expense of riparian and aquatic habitats downstream to the Colorado River delta in Mexico. The diversion of millions of acre-feet of water and the impoundment of millions more has eroded and desiccated the delta. 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 is a chance to avoid and mitigate these harms, yet Interior completely passes up this opportunity.

Therefore, we are disappointed that the Bureau of Reclamation ("Reclamation") rejected consideration of the Pacific Institute alternative that would have provided a reliable and timely delivery of freshwater flows to the Gulf of California. We also have several procedural and substantive concerns with the new Seven States proposal, as well as with the DEIS itself. We recommend that a Supplemental DEIS precede the Final EIS for several reasons: the DEIS omits a reasonable alternative; lack of impacts analysis on the 7 States proposal precludes effective public comment; the California 4.4 Plan is not available for comment; the transboundary and cumulative impacts analyses are flawed; and endangered species impacts merit more research and evaluation.

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1: The overall goal of the interim surplus criteria is not to return California to its 4.4 maf apportionment. As discussed in Section 2.2.3 of the EIS, providing flows to the Gulf of California would not meet the purpose and need for ISC. The status of habitat along the Colorado River in Mexico is discussed in an analysis of impacts of the interim criteria. Reclamation has concluded that the alternatives would not result in a significant additional harm to downstream habitat and is working with Mexico to collaboratively solve problems in Mexico.

2: A discussed in Section 2.2.3, Reclamation considered the Pacific Institute proposal but eliminated it from detailed analysis. It mirrors the Six States Alternative which was analyzed in depth. The portion of the Pacific Institute proposal calling for delivery of water to the Gulf of California is not within the purpose and need for the action and thus not analyzed. A Supplemental DEIS is not required because it did consider a portion of a reasonable alternative as noted above. See Response 13-4. The Seven States draft proposal and Reclamation's Basin States Alternative analyzed in the EIS are within the range of the other alternatives analyzed and their impacts are very similar to the Six States and California Alternatives. The California 4.4 Plan is not an issue in this EIS and a working draft of California's Colorado River Water Use Plan published in May 2000 has been available for public review through the Colorado River Board of California. Endangered species, transboundary, and cumulative impact analyses have been updated as a normal course proceeding from a draft to a final EIS and no supplement is required.

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Exercise of the Secretary's Discretion Would Easily Cure Several of these Flaws

The failure to fully acknowledge the Secretary's discretion in managing the Lower Colorado River, especially when declaring a surplus, is the source of many of the DEIS's deficiencies.

Allocation of surplus water is a discretionary function of the Secretary that can and should be exercised consistent with other responsibilities incumbent upon him for allocating the benefits of the river. Past management decisions and allocations were made before most other responsibilities were articulated in U.S. law and policy. This has resulted in serious environmental harm. The Secretary can and should now use his discretion to ensure that his decisions result in no further harm, and where possible, in an improvement in environmental quality. A myopic characterization of the Secretary's discretion hinders meaningful assessment of the Pacific Institute alternative, transboundary and endangered species impacts, and ESA compliance.

Contrary to Reclamation's present public assertions, there is significant discretion in the Law of the River. The Boulder Canyon Project Act and Supreme Court Decree in Arizona v. California established the priorities for Colorado River waters and set flood control, navigation improvement, and flow regulation as the first priorities. The Decree enjoins the Secretary to release water in accordance with these priorities. The other top priorities, regulating the flow of the river and improving navigation, are purely within the Secretary's discretion. See Laughlin River Tours v. Bureau of Reclamation, 730 F.Supp. 1522, 1524 (D.Nev. 1990). Releases for navigation and regulation of the flow, like flood control releases, are not subject to the injunction for consumptive use amounts in Article II of the Decree. The Secretary has a public trust responsibility to protect resources that belong to the public and are so important to society that private uses cannot be allowed to interfere with public access and uses.

Reclamation asserts that "[w]ater cannot be released from storage unless there is a reasonable beneficial use for the water unless required for flood control or dam safety." (3.3-1). Time and again Reclamation claims that the same 'Law of the River' that grants the Secretary of the Interior broad discretion in managing the Lower Colorado River also curtails his ability to release water and manage the river's flow. This is even more amazing in a discussion of surplus declarations, a completely discretionary task. While in the past Reclamation has narrowly defined its discretion in order to avoid ESA consultation, in this case, Reclamation has done so in order to avoid analyzing an alternative that accounts for the entire Colorado River ecosystem, and to narrow the scope of NEPA and ESA consultation.

When the Secretary announced last December that surplus must be determined and allocated with no net loss of environmental benefits, he set a significant environmental standard. As the Department of Interior has recognized in past statements and in the Joint Declaration to Enhance Cooperation in the Colorado River Delta, the delta is a integral part of the Lower Colorado River ecosystem. No water shall be considered surplus until the Secretary has been

3: See above response. Note that the EIS presents information with regard to Colorado River flows to Mexico under baseline conditions and the alternatives. Note also that additional information has been added to the discussion of these flows in Section 2.16.5 of the FEIS. The allocation of surplus water is not discretionary. The decree issued March 9, 1964 by the United States Supreme Court in Arizona v. California apportioned surplus water for use as follows: 50% for use in California, 46% for use in Arizona and 4% for use in Nevada. However, the Secretary must annually adopt an Annual Operating Plan (AOP) for operation of the Colorado River reservoirs. The AOP establishes the plan of operations for Colorado River reservoirs during the coming year and establishes whether the coming year will be a surplus, normal or shortage year. The Secretary's discretion lies in his determination as to whether sufficient water is available for release to satisfy consumptive use in Arizona, California and Nevada in excess of 7.5 maf. In making this determination, the Secretary considers existing water storage conditions in the Colorado River basin and projected inflows and beneficial consumptive use requirements of Colorado River mainstream use. The respondent commented that releases for navigation and regulation, like flood control releases, are not subject to the injunction for consumptive use amounts set forth in Article II of the Decree. However, in the case cited by the respondent, Laughlin River Tours, Inc. et al. v. Bureau of Reclamation, et al., the United States District Court stated the following: "each of the priorities is interdependent on the other, and the Secretary has broad discretion in meeting the needs of [lower] priorities. . . ." The court found that Section 6 of the Boulder Canyon Project Act does not require the Secretary to maximize first priority purposes before establishing criteria to meet lower priorities. The Secretary must operate the Colorado River System in a manner that complies with the water release requirements set forth in Article II of the Decree, but each priority cannot be looked at individually at the expense of ignoring the others.

4: As discussed above, Reclamation agrees that the Secretary not only has broad discretion in making surplus water available for beneficial use in the Lower Division states while meeting treaty obligations to Mexico, but is responsible for doing so. Reclamation's requirement to release water only for reasonable beneficial use pertains only to use within the Lower Division states; we are not responsible for accounting for use of water delivered to Mexico. Reclamation has not avoided ESA consultation by narrowly defining its discretion; in fact it was the process of consulting on on-going operations that finally resulted in a clear definition of the Secretary's discretionary authority. Reclamation believes the scope of this NEPA analysis and concurrent ESA consultation for proposed interim surplus criteria is consistent with the Secretary's discretion and responsibilities as water master of the lower Colorado River.

5: The Secretary's statements, in his December 1999 address, were not intended to be contrary to federal law or treaty. The Defenders of Wildlife definition of surplus is not contained in the Decree. The Secretary recognized, in his statement, the need for greater cooperation with Mexico and for consultation on delta issues in the Joint Declaration. Other mechanisms that the Department of the Interior, and particularly the Bureau of Reclamation, have been working on include the Joint Declaration and the follow-up conference held October 11, 2000, in Washington, D.C. Reclamation is also actively participating in the Fourth Technical Work Group (Delta Task Force), which is a bi-national group working to conduct a joint baseline study of the water and natural resource conditions in the Cienega de Santa Clara and the adjoining lowermost part of the delta of the Colorado River utilizing the resources of these agencies in monitoring, field work, photography and data exchange.