

COMMENT LETTER

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assured, through a plan of releases of sufficient instream flows, mitigation, and other measures, that additional consumptive use would cause 'no net loss' of the environmental benefits that would result if the potential "surplus" were left in the river. The Secretary clearly has the discretion to meet this challenge and the Mexican section of the IBWC has also requested that the environment be considered a user of Colorado River surplus waters. In the spirit of the Joint Declaration, the Secretary must not renege on this gesture of goodwill.

Range of Alternatives Should Have Included Pacific Institute Proposal

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The range of alternatives is an important piece of the National Environmental Policy Act ("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 has been endorsed by 12 groups, including Defenders of Wildlife, representing millions of citizens. Pacific Institute's proposal was submitted specifically to dedicate perennial flows 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.

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This is one of several instances where Reclamation has improperly stated its authority regarding management of the River. The DEIS states that "the delivery of water to or through Mexico would require modification of the Treaty" (2-3). This is incorrect. The Treaty requires the U.S. to deliver a minimum quantity of flows to Mexico; it does not limit the amount of water the U.S. may deliver. In fact, in 1998, the U.S. delivered more than 3 maf over Treaty obligations; in 1984, the U.S. delivered nearly 14 maf over Treaty obligations. See Figure 3.1-6, Salton Sea Restoration Draft EIS/EIR (2000).

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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 half 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 the predictability of surplus declarations that they seek. As a reasonable alternative that satisfies the purpose and need for surplus criteria as well as the overall purpose of NEPA – "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man" – the Pacific Institute proposal and its impacts should be studied.

New Information From the Seven States Cannot Be an Alternative

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On August 8, 2000, Reclamation published a notice of availability of information – the 7 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

6: An EIS need not consider an infinite range of alternatives, only reasonable and feasible ones and those reasonably related to the purposes of the project that afford a reasoned choice by the decision maker. The rule of reason shall be utilized in development of a range of alternatives. NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences. For these reasons, Reclamation considered the Pacific Institute proposal but eliminated it from further analysis because part of it did not meet the purpose and need of the proposed action and the remainder of the alternative mirrored the Six State's Alternative which was analyzed in depth for the DEIS. Please also refer to the response to Comment 11-2.

7: The determination of guidelines or criteria for the surplus defined in the Treaty is beyond the purpose of and need for interim surplus criteria. Water delivery to Mexico is regulated by the Treaty and various treaty modifications based on consultation between the United States and Mexico. The 1984 and 1998 deliveries were uncontrollable flood flows.

8: Because the domestic elements of the Pacific Institute's proposed interim surplus criteria are similar to, and within the range of, those contained in the alternatives already being analyzed, and because the delivery of additional water to Mexico is beyond the purpose and need for interim surplus criteria, the Pacific Institute's proposal is not analyzed in this FEIS.

9: The stated purpose is to provide greater predictability of when surplus water is and is not available to assist in the Secretary's management of the lower Colorado River for all states and water users. Reclamation has fashioned a new alternative based on the Seven States proposal and believes this alternative does fit within the purpose and need for this action.

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significant effort" by the States, Reclamation may not view this new information as an alternative until the proposal's modeling runs and its environmental impacts have been subject to the NEPA processes of public notice and comment.

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The 7 States proposal as it now reads is not a viable NEPA alternative because it is not within the purpose and need of the interim surplus criteria. The impetus behind the interim criteria has been increased predictability of availability of surplus waters California deems necessary to meet its needs until conservation measures have reduced diversions to 4.4 maf. The 7 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 only 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.¹ Only when the surplus criteria is based on California committing to reduce its take of the Colorado River to its 4.4 maf share should any interim surplus criteria be implemented.

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There are also several aspects of the Guidelines that are simply unacceptable. Section IV, *Determination of Lake Mead Operation During the Interim Period* of the 7 States proposal, in subsections B.3.d. & f., excessively constrains the Secretary's discretion and must be removed. 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 interim criteria require.

The DEIS Contains Numerous Deficiencies Which Only a Supplemental DEIS Can Repair

The California 4.4 Plan Must Be Made Available

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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. Without the 4.4 Plan it is 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.

¹ It bears note that although the chart on 65 Fed. Reg. 48535 expects California will reduce its take by 340,000 af by 2006, 460,000 af by 2011 and 490,000 af by 2016, the chart illustrating the measure of enforcement requires conservation of only 280,000 af by January 1, 2006 and 380,000 af by January 1, 2011, and no goal for 2016.

10: After a review of the criteria in the Working Draft Seven States Proposal, Reclamation formulated the Basin States Alternative to match that proposal as closely as possible while maintaining consistency with the Law of the River and current operating policy. Reclamation considered the informal discussions with the public during the public review period and comments received on the DEIS.

11: The California Colorado Water Use Plan is not part of this federal action (see response 57-15). The quantities of surplus water made available under each surplus alternative are now detailed in Chapter 2. The specific deliveries to California under the preferred alternative (Basin States) are shown in Figure 3.4-2 and detailed in Attachment H. A draft of the Plan was made available on Coachella Valley Water District's website (www.cvwd.org) prior to the release of the DEIS.