

## COMMENT LETTER

## RESPONSES



RPM

September 8, 2000

**FAXED & MAILED**

Robert W. Johnson  
Regional Director  
Lower Colorado Region  
Attn: Jayne Harkins (LC-4600)  
Bureau of Reclamation  
P.O. Box 61470  
Boulder City, NV 89006-1470

Dear Mr. Johnson:

**Subject: Comments on Draft Environmental Impact Statement, Colorado River Interim Surplus Criteria**

Imperial Irrigation District (IID) has reviewed and provides the following comments on the United States Bureau of Reclamation's (Reclamation) Draft Environmental Impact Statement (DEIS) regarding Colorado River Interim Surplus Criteria.

- 1 The DEIS has analyzed the following alternatives: no action alternative, Flood Control alternative, Six States alternative, California alternative, and Shortage Protection alternative. The Final Environmental Impact Statement (FEIS) should analyze *Interim Surplus Criteria Guidelines* ("Guidelines") developed by the Colorado River Basin states, as published by Reclamation in Federal Register/Vol 65, No. 153/August 8, 2000. IID has participated in the development of the Guidelines and supports the interim surplus criteria proposed therein.
- 2 From a general perspective, IID offers the following comments on the draft EIS. First, in order to maintain the public record, IID would like to remind Reclamation that compliance with NEPA in this situation is unnecessary. This issue was thoroughly addressed in comments from a variety of the basin states when Reclamation first announced its intention to undertake a NEPA compliance process for the interim criteria. As explained at that time, this interim criteria is well within the Secretary's existing authority to adjust operations at Hoover Dam within the terms of the Long Range Operating Criteria. Accordingly, there is no new "action" here upon which to base the need for NEPA compliance. Engaging in this sort of gratuitous NEPA compliance process is not authorized by NEPA, and therefore Reclamation's decision to undertake NEPA compliance in this situation only serves to confuse and mislead the public, and will also serve to mislead a court should this matter ever become involved in litigation.
- 3 Second, also for the record, IID objects to the decision of Reclamation to extend NEPA analysis into the country of Mexico (see sections 3.2 and 3.16). Although Reclamation relies on an old Executive Order and CEQ guidelines for this action, those authorities predate more recent

1: The preferred alternative in this FEIS is derived from the Seven States Proposal. 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.

2: See response to Comment 43-2.

3: The applicable guidance appears to be contrary to the comment. EO 12114, Environmental Effects Abroad of Major Federal Actions, 44 FR 1957, 1979 WL 25866 (Pres.) requires that Federal agencies "... consider the significant effects of their actions on the environment outside the U.S., its territories and possessions...." The more recent CEQ guidance for transboundary impacts, dated July 1, 1997, appears consistent with the approach in the Executive Order. See response to Comment 22-5.

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judicial decisions on this issue, and the cited authorities do not take into account the Supreme Court-imposed presumption against the extraterritorial application of federal domestic laws. Furthermore, Reclamation's extension of the NEPA analysis into Mexico ignores the dominant role of the 1944 Treaty between the United States and Mexico governing uses from the Colorado River. Both the Executive Order and the CEQ guidelines recognize that a controlling treaty may obviate the need for such NEPA compliance. Again, this sort of action only serves to mislead the public, and in this case, the citizens of Mexico as well.

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Third, although the draft EIS appears to be silent on the matter, IID is concerned that the draft EIS presents a platform for Reclamation to engage in formal consultation under the Endangered Species Act (ESA) in relation to listed species located in Mexico. Because of other documents previously submitted to Reclamation, Reclamation is fully aware of the arguments posed by IID and the other California Colorado River using entities as to why the ESA does not apply in any way to listed species in Mexico. Fundamentally, IID's position rests on the wording of the existing ESA regulations, which are domestically oriented, and also on the Supreme Court-imposed presumption against the extraterritorial application of domestic laws. Since Reclamation has not indicated its intention to engage in formal or informal consultation under the ESA, IID urges Reclamation to maintain that position in future stages of this NEPA compliance process.

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Fourth, IID notes that in section 2.2.3 of the draft EIS Reclamation explains why the proposal submitted by the Pacific Institute and others is not analyzed in this draft EIS. IID agrees with the rationale advanced by Reclamation to support that decision. The recommendations made in the Pacific Institute proposal are expressly contrary to the terms of the 1944 Treaty with Mexico. Any deviation from that treaty, either for water quantity or water quality purposes, must be addressed through the authority of the Secretary of State, the President, and the Congress to control foreign affairs. There should be no attempt to analyze or effectuate such proposed action through the authority of the Department of the Interior or through application of the ESA or NEPA.

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Regarding the technical analysis in general, IID agrees with the framework and the approach for the DEIS. The definition and estimation of the impacts as "incremental differences in probabilities (or projected circumstances associated with a given probability) between baseline conditions and the alternatives" (DEIS, p. 3-14) is appropriate. The application of the hydrologic modeling to quantify the impacts in this manner is also appropriate. However, we have the following concerns:

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The DEIS makes an assumption that the conditions modeled for baseline conditions and Flood Control alternative do not include the implementation of the California 4.4 Plan and water transfers described in *Key Terms for Quantification Settlement Among the State of California, IID, CVWD, and MWD*, dated October 15, 1999 ("Key Terms"). IID recognizes that the adoption of interim surplus criteria acceptable to MWD is one of Conditions Precedent in the Key Terms. However, the purpose of this DEIS is to evaluate the impacts of the interim surplus criteria, not the impacts of the water transfers described in the Key Terms. By modeling the baseline demands without the water transfers and the demands for the action alternatives with the water transfers, the DEIS has effectively evaluated the combined impacts of the interim surplus criteria and the water transfers. IID believes that the impacts of the interim surplus criteria should be isolated by using the same demands for the baseline conditions and for the action alternatives. The demands should include both the interim surplus criteria and water

4: Comment noted.

5: The Pacific Institute Proposal was considered but not analyzed as an alternative in this FEIS. See responses to Comment 11-2 and 11-6.

6: Comment noted.

7: All alternatives analyzed in the FEIS assume implementation of the California Colorado River Water Use Plan and intrastate water transfers. See response to Comment 37-11 for more detail.

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transfers, and should apply to both baseline and action alternatives. The impacts of each of the water transfers described in the Key Terms will be evaluated in separate environmental reviews, as appropriate.

In summary, IID believes that the impacts of the Interim Surplus Criteria should be analyzed using the same demands for both baseline conditions and the action alternatives. This will help ensure that the impacts of the proposed interim surplus criteria are evaluated correctly. In addition, IID urges Reclamation to seriously consider IID's comments as to the applicability of both NEPA and the ESA to this process as it relates to resources or species in Mexico.

IID appreciates the opportunity to comment on the DEIS.

Sincerely,



JOHN R. ECKHARDT, Ph.D., P.E.  
Assistant to the General Manager

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