

COMMENT LETTER

RESPONSES



Via Fax and Mail

September 8, 2000

Handwritten: BCOO-4600

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.

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 an 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.

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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

6

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.

7

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).

8

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

9

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.

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.

10

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

11

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.

Allowable Uses of Surplus Waters Must Be Limited

12 Although not discussed in the DEIS, the allowable beneficial uses of the surplus waters will, to an extent, dictate the future availability of surplus waters and thus warrant comment. For example, under some circumstances a state may dedicate considerable amounts of surplus water to groundwater banking rather than municipal and industrial (M&I) uses, thus lowering reservoir levels to the point where space-building or flood control releases are not necessary. Any interim surplus criteria must limit the uses of its water to M&I, particularly in California where the aim of the surplus declaration is to keep the Colorado River Aqueduct full. Likewise, any surplus criteria must limit the declaration of available surplus to that necessary to keep the CRA full to meet MWD's 1.212 maf entitlement, and no more. Thus, the 7 States proposal, IV.B.2.a., calling for 1.250 maf for the CRA during a Full Domestic Surplus, must be amended to supply no more than 1.212 maf.²

Affected Environment and Environmental Consequences

Assumptions

Reclamation makes three assumptions relating to the operation of the baseline and the alternatives. These assumptions need elaboration before issuance of the Final EIS. The first, assumption of implementation of the 4.4 Plan, is discussed above.

13 Next, according to the assumptions common to all, Mexico will receive a surplus declaration of 200 kaf only under Lake Mead flood control releases (3.3-9). As stated earlier, the Treaty sets only a minimum delivery requirement, not a maximum. Mexico is eligible to receive surplus waters in years other than flood control releases; to assume otherwise may tie the U.S.'s hands in future negotiations under the Treaty. This DEIS may not *de facto* establish a Mexico surplus declaration trigger.

14 Lastly, at the August 15 Hydrologic Modeling Meeting, Reclamation announced that operation of the Yuma Desalting Plant beginning in 2015 is an assumption common to all alternatives. Yet, it was not included in the DEIS and thus there is no clarification as to why it is an assumption. Its omission is doubly troublesome because operation of the plant will have significant environmental impacts on the delta, particularly the Cienega de Santa Clara. Section 3.16.6.1, POTENTIAL EFFECTS TO HABITAT IN MEXICO, summarily concludes that this action will not affect the Cienega without observing that operation of the plant would cut return flows to the

² In addition, Section IV.B.1.a. should be amended to read "The amount offset under 2.) shall not be less than 100,000 af in 2001 and will be increased by 20,000 af over the Interim Period so as to equal 400,000 af in 2016." When stated this way, it makes more sense, that California will increase the amount of groundwater withdrawals and other options over the 15 years, rather than decrease.

12: Reclamation agrees that the use of surplus water for groundwater recharge when storage in Lake Mead and Lake Powell have been partially depleted increases the risk of subsequent shortages and intensifies the effects on other resources. This is recognized in the derivation of the permitted amounts of surplus water to be made available to the Lower Division states with the lower Lake Mead water level surplus triggers. As can be seen in the surplus water quantities cited in Chapter 2, the surplus water available would be lower at lower Lake Mead water levels. However, such provisions are not included in the Shortage Protection Alternative because that alternative represents an extreme that helps to define the range of options for interim surplus criteria.

13: The purpose of this action, as stated in Section 1.1.1 of this FEIS, is to adopt interim surplus criteria for delivery of surplus water to Arizona, California and Nevada. This proposed action is NOT intended to identify conditions when Mexico may schedule this additional 0.2 maf, as stated in Section 1.1.4 of this FEIS. Delivery of surplus water to Mexico during Lake Mead flood control releases is strictly a modeling assumption as stated in Section 3.3.3.3.

14: Operation of the Yuma desalting plant was strictly a modeling assumption. It should be noted that the U.S. recognizes that it has an obligation to replace, as appropriate, the bypass flows. The assumptions made herein, for modeling purposes, do not necessarily represent the policy that Reclamation will adopt for replacement of bypass flows. The assumptions made with respect to modeling the bypass flows are intended only to provide a thorough and comprehensive accounting of Lower Basin water supply. The U.S. is exploring options for replacement of the bypass flows, including options that would not require operation of the Yuma Desalting Plant.

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Cienega to a third of their current flows, while tripling their salinity.

Scope

15 The potentially affected area should not end at the NIB. NEPA directs federal agencies to analyze the effects of proposed actions to the extent that they are reasonably foreseeable, regardless of where those impacts may occur. The DEIS includes a transboundary impacts analysis, in accordance with CEQ Guidance on NEPA Analyses for Transboundary Impacts, yet limits the affected area to the NIB between the U.S. and Mexico. This is inconsistent with the scope several of the connected and ongoing actions - the Lower Colorado River Multi-Species Conservation Program and Biological and Conference Opinion on Lower Colorado River Operations and Maintenance - and with the scope of the actual impacts.

15: The FEIS includes an analysis of impacts for the Limotrophe Division (from the NIB to the SIB). The area of potential effect described in Section 3.2 is associated with areas in the U.S. The transboundary analysis considers potential effects in Mexico consistent with NEPA and CEQ guidelines. The area considered in Mexico is described fully in Section 3.16.

Water Quality

16 A more liberal declaration of surplus will lower Lake Mead and adversely affect the water quality of the Colorado River. It is a violation of NEPA simply to assume that the Colorado River salinity control program will maintain the Clean Water Act's water quality criteria. NEPA requires that Reclamation take a hard look at the potential impacts of a project and perform a rigorous analysis based on the best available information.

16: The seven state Colorado River Basin Salinity Control Forum, in cooperation with Reclamation, USDA, BLM, the US Fish and Wildlife Service and EPA has, since 1972, been overseeing the plan of implementation to maintain the salinity at or below the adopted criteria. Maintenance of the criteria is the result of rigorous analyses. The plan is reviewed every three years and approved by EPA.

16 One author has theorized that a 9 maf drawdown would permanently increase salinity by 96 mg/L below Hoover Dam and by 72 mg/L at Parker and Imperial Dams. This increase would likely offset the impact from any salinity control projects. In addition, any beneficial impacts from a temporary increase in flows would be minor compared to this permanent increase, and would only benefit flows to Parker because the largest diversions are at Parker and Imperial. TDS levels would fall 6 mg/L for each 1 maf released for each three-year average, which requires a 3 maf release over three years and a permanent increase of 32.1 mg/L at Hoover Dam and 23.7 mg/L at Parker and Imperial Dams with a temporary reduction of 6 mg/L. See *Salinity of Colorado River Water: Causes, Consequences, and Remedies*, "Water Strategist," vol.10, no.1 (Spring 1996). The Mexican section of the IBWC has also cited the increase in downstream salinity as an impact. (Att. Q.) Reclamation cannot in good faith dismiss these, and other, concerns. (3.16-3.)

17 While the effects of interim criteria on water quality among the various alternatives may be accounted for in the modeling, the effects of the surplus declarations themselves are not. As a result, this section requires elucidation. For example, the DEIS estimates that 1,478,000 tons of salt will need to be removed from the Colorado River system, (3.5-6), but provides no source or rationale for that number. Does this estimation take into account a drawdown of Lake Mead, or only current and planned projects?

17: The basis for the 1,478,000 tons of salt control is described in the "1999 Review - Water Quality Standards for Salinity Control Colorado River System" prepared by the Forum.

Transboundary Impacts Analysis is Flawed

18

Existence of a political boundary has provided opportunity to muddy the extent of the Secretary's discretion in managing the Lower Colorado River. Just as in the section dismissing the Pacific Institute proposal, the DEIS contains misleading statements regarding water deliveries to Mexico and flows beyond the border. For example, the DEIS avers that the reductions in Colorado River flows that have adversely affected the delta ecosystem "have been instituted through an international treaty." (3.16-13). As explained above, the Treaty sets *minimum* requirements for deliveries to Mexico; the DEIS should clarify that reductions in historic flow to the delta are the result U.S. actions.

18: Comment noted. Section 3.16.6.1 has been revised to state that "... reductions have been instituted while meeting the requirements of an international treaty and the diversion and use of such Treaty water is solely of Mexico's discretion." At least since execution of the Treaty, it is incorrect to state that responsibility for reductions of flows to the Colorado River delta lies with United States interests alone.

19

Further, the claim that "potential effects on Mexico's resources cannot be specifically determined due to the uncertainty of water use once it flows across the NIB into Mexico," (3.16-1), is simply untrue. Morelos Dam, to which the U.S. is obligated to deliver a portion of Mexico's Treaty waters, is below the NIB. Twenty-three miles from the NIB to the SIB is bordered by the U.S. By managing and bordering the river below the NIB, the U.S. cannot claim ignorance once water crosses the NIB. In fact, Reclamation does possess data concerning the use of water in Mexico:

19: Section 3.16 has been revised to reflect available information at NIB. Mexico retains control at Morelos Dam as to what is done with the water that arrives there. However, excess water diverted may not be consumptively used in Mexico, but released back to the Rio Hardy and Colorado River as waste and/or irrigation drainage. No data is available to Reclamation on the amount of these wasteway and drainage return flows, so final disposition of diverted water is not known by Reclamation.

relatively little of the water in excess of the 1.5 to 1.7 MAFY treaty allocation is diverted for irrigation. Diversions to irrigation canals below Morelos Dam exceeded 1.7 MAFY in only 14 of the 24 years since 1950 in which deliveries to Mexico were greater than 1.7 MAFY. In those 14 years, an average of about 523,000 AFY was diverted to irrigation canals. . . . Therefore, on average, about 10 percent of the flood flows were diverted for irrigation in those 14 years.

20

Salton Sea Restoration Draft EIS/EIR (Reclamation 2000) at 3-23. In other words, in 24 of 48 years excess flows have reached Morelos Dam and in 14 of those 24 years Mexico diverted a small fraction of that water. In all of those 24 years Mexico sent flows to the delta and in the other 24 years no flows reached the delta. Interim surplus criteria will ensure that excess flows reach the delta even more sporadically, if at all.

20: 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 3.3.4.5.4 entitled "River Flows between Imperial Dam and Morelos Dam" of the FEIS.

Sensitive Species

21

We were encouraged that Reclamation included an analysis of transboundary impacts in the DEIS. However, our hopes that Reclamation would initiate research efforts to combat their earlier recognition of the sparse ecological and biological data on the vaquita and totoaba 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). The deficiencies from that analysis have not been remedied and carry the same lack of research and information from 1996 into 2000. This is especially disappointing because Reclamation already knows its ongoing activities in the Lower Colorado River may affect the totoaba and is unsure about their effects on the vaquita, the

21: See response to Comment 10-8.

cont'd | world's rarest marine mammal.

Moreover, there are numerous references in the text for which complete citations are not provided or for which basic information has been overlooked. Standing alone, these omissions are not particularly serious; however, in the context of full disclosure and rigorous investigation, they raise questions about the quality of the workmanship. Omissions coupled with conclusions not supported by existing data raise real concerns about the product. Please amend the following pages:

- 22 | (3.16-16)
 - the vaquita is listed as endangered by the U.S. government, 50 Fed.Reg. 1056 (January 9, 1985); the Mexican government, Normas Oficiales Mexicanas NOM-059-ECOL-1994; and 'critically endangered' by the IUCN;
- 23 |
 - (Taylor and Gerrodette 1993) is not in References Cited;
- 24 |
 - (Barlow et al. in press) should read (Barlow et al. 1997) and the reference should reflect that change. The title should read "First Estimates..." and contain an updated citation;
- 25 | (3.16-17)
 - (Rojas-Bracho) is not in References Cited, and with no title or date, it is hard to determine its relevance;
- 26 |
 - impact analysis for the vaquita does not incorporate more recent research published in volume 15 of Marine Mammal Science;
- 27 |
 - the totoaba is listed as endangered by the U.S. government, 44 Fed.Reg. 29478 (May 21, 1979) and the Mexican government, Normas Oficiales Mexicanas NOM-059-ECOL-1994;
- 28 |
 - the analysis of effects on the totoaba must acknowledge that Reclamation has already found that its operations and activities in the Lower Colorado River may affect the totoaba;
- 29 |
 - the statement that the totoaba "was included in this assessment at the suggestion of the Service and a number of public stakeholders" should be removed. This appears to be taken from the Biological Assessment (1996) and is not applicable here;
- 30 | (3.16-18)
 - status of a recovery plan for the southwestern willow flycatcher should reflect any changes since 1996;

22: This information is included in Reclamation's analysis.

23: This correction has been made.

24: This citation has been corrected.

25. This citation has been added.

26: Recent research for the vaquita has been incorporated in the analysis.

27: The information has been cited in the analysis for the totoaba.

28: The analysis is recognizes effects of past, current and reasonably foreseeable operations on the totoaba as part of the baseline condition.

29: This statement has been removed. Reclamation has received input supporting and opposing analysis of impacts on the totoaba in Mexico.

30: The recent completion of a recovery plan for the southwestern willow flycatcher is noted in the analysis, and is limited to activities in the United States.

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31 (3.16-24)
 • similar to above, status of recovery actions for the Yuma clapper rail should reflect any changes since 1994;

31: The analysis includes an update for the Yuma clapper rail.

32 (3.8-17)
 • the yellow billed cuckoo has been petitioned for listing under the ESA and the FWS has published a 90 day finding that listing may be warranted.

32: This information on the yellow-billed cuckoo is included.

Cumulative Impacts

33 The DEIS states that current circumstances and expected future actions have been "included in system modeling" and thus cumulative impacts have been "incorporated into modeling." (4-1.) Impacts from actions such as the California 4.4 Plan (canal linings, intrastate transfers, groundwater banking, etc.), interstate transfers through off-stream banking, the uses of surplus water and day-to-day operations and maintenance activities along the lower Colorado River are not included in the modeling. Environmental variables – fish and wildlife, endangered species, native vegetation – are not included in the modeling and must be described in the cumulative impacts section of the DEIS.

33: As discussed in the EIS, the potential effects on system conditions (including reservoir elevations and river flows) were determined by modeling potential future conditions under baseline conditions and each of the alternatives. To the extent possible, expected future actions that would affect system conditions were included in system conditions modeling, and the impacts of these actions are therefore accounted for in the resource analyses in Chapter 3 of the EIS. In addition, implementation of the 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.

34 Cumulative impact is the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions . . ." 40 C.F.R. § 1508.7. See also Considering Cumulative Effects Under the National Environmental Policy Act (CEQ 1997). 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. See Description and Assessment of the Operations, Maintenance and Sensitive Species of the Lower Colorado River (Reclamation 1996). 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 (Reclamation 1998) at Table IV-3. There is no attempt to accumulate these environmental effects in the DEIS. Environmental values are not factors in Reclamation's hydrological models, thus this lack of cumulative impacts analysis is pervasive in the DEIS.

Section 4.2 has been modified and Reclamation believes that it has appropriately addressed potential cumulative effects of the proposed action.

34: See response to Comment 10-9.

35 **Mitigation**
 The direct, indirect and cumulative impacts to sensitive species, to native habitat, to water quality, and to the Lower Colorado River ecosystem as a whole is significant. According to CEQ guidance, a proposed action with significant effects must consider all of its effects on the environment, whether or not significant, and mitigation measures covering the range of impacts must be developed. See 40 C.F.R. §§ 1502.14(f), 1502.16(h), 1508.14. Furthermore, all relevant, reasonable mitigation measures that could improve the project are to be identified, even if they are outside the jurisdiction of the lead agency or the cooperating agencies, and thus would

35: No significant impacts have been identified that require specific mitigation. However, Section 3.17 has been added to the FEIS to discuss environmental commitments that Reclamation would undertake upon adoption of interim surplus criteria through the Secretary's Record of Decision.

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cnt'd | not be committed as part of the RODs of these agencies. 40 C.F.R. §§ 1502.16(h), 1505.2(c). There is no discussion of mitigation in the Draft EIS; mitigation measures must be included in the Final EIS.

Compliance with the Endangered Species Act

36 | 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 analysis must include the reach of the river and its floodplain downstream to the Gulf.

37 | 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. Communications with NMFS confirm this. See 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 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.

38 | In conclusion, section 3.16.6.1, POTENTIAL EFFECTS TO HABITAT IN MEXICO, is an argument against, rather than for, the implementation of surplus criteria. The second and fourth full paragraphs at 3.16-13 claim that "the potential magnitude of these excess flows is not affected by interim surplus criteria" because "all alternatives plus baseline indicate a decrease in frequency of flood control releases and flow amounts." However, two paragraphs later the analysis concludes "[s]pecial status species that utilize the riparian habitat along the Mexican reach of the Colorado River could be affected by the decrease in frequency of flood control releases and amounts of flow past Morelos Dam." Since declaration of a surplus is discretionary with the Secretary, he must ensure that the adverse impacts to endangered species from any type of surplus declaration are avoided. When read in conjunction with graphs showing the higher probabilities under the baseline and flood control alternative, this also suggests that the environmental harms of the other alternatives are significant and outweigh the benefits of any

36: The action area extends to the Sea of Cortez. Reclamation is consulting with the U.S. Fish and Wildlife Service and the National Marine Fisheries Service for the delta area of Mexico and effects of the interim surplus criteria on species that occur in both the U. S. and Mexico or only in Mexico are discussed in Section 3.16, Transboundary Impacts.

37: Reclamation is informally consulting with NMFS, as described in Section 5.3.5 of the FEIS. Reclamation's assessment of effects on the vaquita and totoaba in Mexico is also included in Section 3.16.6 of the FEIS. The August 14 memo is included in Attachment S.

38: As indicated by response to Comment 11-36 above, the analysis of effects to special status species in Section 3.16 has been revised. Reclamation has concluded that implementation of interim surplus criteria may affect, but is unlikely to adversely, some species and is consulting with the U.S. Fish and Wildlife Service and NMFS, as required by Section 7 of the ESA.

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cont'd | interim criteria.

Recommendations

39

In sum, the DEIS underestimates the potential environmental impacts of interim surplus criteria. By narrowly defining the scope of the Secretary's discretion in managing the Lower Colorado, Reclamation has effectively diminished the area of potential impacts and the extent of impacts to water quality and sensitive species. Smaller geographic and ecological scope has, in turn, subjugated the significant environmental and social impact of the proposed criteria. As a result, there is no apparent need for environmental mitigation or for an environmental preferable alternative. The quality of the draft EIS suffers as these transgressions accrue; only a draft supplemental EIS can remedy these flaws.

39: A comprehensive discussion of this issue is in the end of the next section. Reclamation does not believe that a Supplemental DEIS is required. We have expanded the area of potential effect and revised analyses of water quality and sensitive species impacts. A preferred alternative and environmental commitments are identified in the FEIS. The ROD will discuss the environmentally preferred alternative.

Sincerely,



Kara Gillon
Associate Counsel

William J. Snap, III
Vice-President for Law and Litigation

Attachment

COMMENT LETTER



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

Sen. 01 2000 11:40AM P2

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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