

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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April 30, 2007

Honorable Dirk Kempthorne, Secretary
Department of the Interior
1849 C. Street, NW
Washington, D.C. 20240

Bill Ritter, Jr.
Governor

Harris D. Sherman
Executive Director

Rod Kuharich
CWCB Director

Dan McAuliffe
Deputy Director

Re: State of Colorado Comments on *Draft Environmental Impact Statement Regarding Colorado River Reservoir Operations: Development of Lower Basin Shortage Guidelines and Coordinated Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions.*

Dear Secretary Kempthorne:

The State of Colorado thanks you for the opportunity to comment on the *Draft Environmental Impact Statement for Colorado River Reservoir Operations: Development of Lower Basin Shortage Guidelines and Coordinated Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions* (the "DEIS") released by the Bureau of Reclamation (the "Bureau") on February 28, 2007.¹

The importance to Colorado of its namesake river cannot be overstated. The Colorado River and its tributaries supply over a third of Colorado's water needs and provide water to nearly 60 percent of the States' population. Originating as snowfall high in the Colorado mountains, Colorado River water is put to agricultural use on Colorado's eastern plains, central valleys, and western mesas; municipal use in cities from Fort Collins to Denver to Colorado Springs to Durango to Grand Junction; and industrial use at manufacturing facilities, mines, ski resorts, and oil and gas production facilities across the State. Moreover, because no major rivers flow into Colorado, Colorado must satisfy all its water demands from sources within the State. The Colorado River is simply an irreplaceable resource for Colorado. The State's past, present, and future are directly tied to the Colorado River.

The significance of the Colorado River to Colorado is reflected in the Colorado River and Upper Colorado River Basin Compacts, which grant Colorado the largest allocation of Colorado River System water of all the Upper Division States and the second largest allocation of Colorado River Water of all the Basin States. Due to its location at the headwaters of the Colorado River, Colorado must depend upon this allocation not only to meet its present needs, but also to provide for its future development. Indeed, it was precisely for the purpose of preserving its right to

¹ Publication of the Draft EIS, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (hereinafter "DEIS") was announced at 72 Fed. Reg. 9026 (February 28, 2007).

future development of Colorado River water that Colorado entered into the Colorado River and Upper Colorado River Basin Compacts.

Given this relationship with the Colorado River, Colorado clearly has a substantial interest in the efficient management and wise administration of the Colorado River System and System reservoirs. The Colorado River System and its reservoirs must be administered and managed in a manner that meets the needs of the Colorado River basin states without jeopardizing Colorado's significant, legally protected rights to the waters of the Colorado River, or compromising its ability to serve the present uses and future needs of Colorado citizens. It is in the interest of protecting the rights and needs of its citizens that Colorado submits these Comments.

The State of Colorado's Comments consist of two parts. First, Colorado joins in the Basin States' Combined Comments, Recommendations, and Proposed Guidelines (the "Basin States' Comments"), submitted under separate cover. Colorado strongly believes that the Basin States' Alternative, as described in the DEIS and clarified and implemented by the Basin States' Comments, sets forth the appropriate mechanism for interim management of the Colorado River System through 2025. As is more fully explained in the Basin States' Comments, the Basin States' Alternative best addresses the issues raised by the proposed federal action (the "Action"), as described in the DEIS and the Bureau's March 2006 Scoping Summary Report. Accordingly, Colorado joins the Basin States in requesting that you adopt the Basin States' Alternative, as implemented through the Basin States' Proposed Guidelines, as the preferred alternative in the Final Environmental Impact Statement and Record of Decision.

Second, the State of Colorado submits the following general Comments to the DEIS to address concerns specific to Colorado. These individual State Comments are not intended to suggest any disagreement with the Basin States' Comments, or to call into question Colorado's support for the Basin States' Alternative. Rather, they are intended to identify and suggest means of addressing issues of unique interest to Colorado.

These Comments are as follows:

- **Affected Geographic Region.** The DEIS defines the geographic region affected by the Action as Lake Powell and the River below Lake Powell. The DEIS analyzes the effects of the Action only within this geographic region.² However, decisions made regarding management of Lakes Mead and Powell also could potentially affect the geographic region upstream of Lake Powell after 2025. Decreased or increased storage in Lake Powell could affect storage levels in other Upper Basin reservoirs, and thus increase or decrease the risk that Upper Division States would have to curtail their uses of Colorado River water in order to satisfy the Upper Basin's obligations under Article III(d) of the Colorado River Compact. In addition, curtailment in the Upper Division or shortages in the Lower Division could potentially impose cumulative impacts on other geographic regions.

Notwithstanding these facts, because Colorado believes it unlikely that Upper Division curtailment will be necessary during the interim period of 2008 through 2025, Colorado does not, at this time, object to the limited description of the affected geographic region set forth in the DEIS; provided, however, that said description is understood to be applicable only to

² For example, the DEIS describes the affected geographic region as Lake Powell and the Lower Basin at pages including, but not necessarily limited to: p. 1-7, lines 5-7; p. 3-3, lines 1-24; p. 4-81, lines 37-39.

the interim period. Beginning in 2026, the potential risk of Upper Division curtailment will increase substantially due to increased development in the Upper Basin. Accordingly, Colorado believes the description in the DEIS of the geographic region affected by the Action will be invalid by the expiration of the interim period, and that it will be necessary at that time to reexamine management of Lakes Powell and Lakes Mead.

- **Expiration of Guidelines.** Expiration of the Guidelines in 2025 is critical toward Colorado's support of any preferred alternative. Continued operation of Lake Powell in a manner consistent with the proposed Action after 2025 may prove highly disadvantageous to Colorado. Moreover, as noted above, the assumptions upon which any proposed Action is chosen will no longer be valid after 2025.

The DEIS correctly recognizes that the Guidelines implementing the Action will be interim in nature, and will remain in effect for determinations to be made through 2025 regarding water supply and reservoir operating decisions through 2026. However, the DEIS does not clearly state what default operating criteria will be relied upon after that date.³ As stated in the Basin States' Comments, the DEIS should explain that at the conclusion of the effective period of the Guidelines, the modeled operating criteria are assumed to revert to the operating criteria used to model baseline conditions in the final EIS for the Interim Surplus Guidelines dated December 15, 2000 (i.e., modeling assumptions are based upon a 70R strategy for the period commencing January 1, 2026 (for preparation of the 2027 AOP)). These operating criteria would utilize the present 602(a) algorithm for calculating 602(a) storage requirements for releases from Lake Powell. As is more fully explained below, it is extremely important to Colorado that the Bureau continue to operate Lake Powell in a manner that serves the interests of the Upper Division States, and that sufficient storage be maintained in Lake Powell to protect Colorado's and the other Upper Division States' current and projected future uses. Accordingly, Colorado would object to any operating criteria that would alter any of the assumptions in the present 602(a) algorithm, and specifically objects to the proposed review of the 602(a) algorithm proposed in Arizona's DEIS comments and scoping comments.

- **Consultation with Basin States in 2020.** As mentioned above, Colorado believes it important that the DEIS identify default criteria for operating Lakes Mead and Powell after 2025. However, because of the importance of the management of Lakes Mead and Powell to the overall operation of the Colorado River System, Colorado believes it preferable for the Bureau to identify and develop new Guidelines for the management of Lakes Mead and Powell and the administration of the Colorado River System before the interim Guidelines developed through this process have expired. To ensure such action is taken, Colorado recommends that the Final Environmental Impact Statement and Record of Decision require the Bureau to initiate future consultation with the Basin States and other interested parties no later than 2020 to identify and implement appropriate management mechanisms for the Colorado River System following expiration of the proposed Action and implementing Guidelines. The Basin States Proposed Guidelines includes language that would require the Bureau to initiate such consultation.

³ For example, the DEIS omits identification of what will happen after expiration of the proposed interim action in 2025 at pages, including but necessarily not limited to pp. ES-2, lines 6-13 and 1-1, lines 21-26.

- **Coordinated Operations of Lakes Powell and Mead.** Several of the proposed alternatives in the DEIS, including the Basin States Alternative, call for a more coordinated operation of Lakes Powell and Mead in hopes of more efficiently managing the Colorado River System during the interim period. Under this coordinated operation, releases from Lake Powell may vary based upon levels in both Lake Powell and Lake Mead, in the interest of limiting shortages in the Lower Division, as well as reducing the risks of Upper Division curtailment. Colorado has agreed to this approach toward reservoir management during the interim period as described in the Basin States' Alternative and implemented through the Basin States' Proposed Guidelines.

However, in adopting a preferred alternative for managing Lower Basin shortages as a result of this or any future process, the Department of Interior and Bureau of Reclamation must not lose sight of the primary purpose for which Lake Powell was originally constructed: "to initiate the comprehensive development of the water resources of the Upper Colorado River Basin . . . making it possible for the States of the Upper Basin to utilize, consistently with provisions of the Colorado River Compact, the apportionment made to and among them in the Colorado River Compact and the Upper Colorado River Compact, respectively. . . ." Colorado River Storage Project Act of 1956 (43 U.S.C. § 620). Accordingly, pursuant to the Colorado River Storage Project Act, any system for coordinated operations of Lakes Mead and Powell must not subordinate the need for Upper Basin storage to the interest of limiting Lower Division shortages.

The Basin States Alternative maintains consistency with the Colorado River Storage Project Act by imposing a minimum 602(a) storage level in Lake Powell of 14.85 million acre-feet, which amount is then adjusted upwards annually. Colorado would strongly object to any proposed alternative that does not similarly protect Upper Basin storage. Specifically, Colorado would strongly object to any action, such as the proposed "Water Supply Alternative," which violates the statutorily mandated requirement that sufficient storage be maintained in Lake Powell to protect future Upper Division development, or that otherwise ignores, alters or amends the current mechanisms used to determine sufficient storage in Lake Powell.

- **Mexican Treaty Shortage Issues.** Colorado agrees with the other Basin States that the issue of how and under what circumstances the United States will reduce the water allotted to Mexico under Article 10(a) of the Mexican Water Treaty of 1944 must be addressed in order for the Bureau to develop a comprehensive program for administering the Colorado River System and managing the Colorado River System reservoirs. Colorado believes that the United States should reduce the quantity of water allotted to Mexico in any year the Secretary reduces the water available for consumptive use pursuant to Art. II(B)(3) of the Consolidated Decree.

However, Article III(B)(3) reductions are not the exclusive circumstances determining whether the United States should reduce the amount of water allotted to Mexico under the 1944 Treaty. Other conditions may also arise that are reflective of extraordinary drought in the Colorado River System under Article 10 of the Treaty. Resolution of the timing and extent of reductions in the water allotted to Mexico has the potential to affect interests in both the Upper and Lower Colorado River Basin.

The DEIS states that this issue will be resolved through discussions with Mexico by the International Boundary Waters Commission in consultation with the Department of State.⁴ Because of the importance of this issue to both the Upper and Lower Division States, Colorado believes that all the Basin States must be consulted on and included in these discussions.

- **Definition of Colorado River System.** The Colorado River Compact provides a very specific definition of the Colorado River System. The DEIS appears to be somewhat inconsistent in its use and definition of this term. Specifically, the DEIS sometimes confuses the concepts of the Colorado River System, Colorado River System water, and the Colorado River Mainstem.⁵ Colorado requests that the Bureau attempt to avoid such inconsistencies in its Final Environmental Impact Statement and Record of Decision.
- **Definition of Consumptive Use.** In summarizing the apportionments of the use of Colorado River water to the Basin States, the DEIS states that “[t]he apportionments of the Basin States are generally presented in terms of consumptive use, which consists of diversions minus return flows.”⁶ The DEIS thus appears to make the legal assertion that the “diversions minus returns flows” definition of consumptive use is applicable to the allocations of all of the Basin States under the Law of the River.

Such a legal assertion would be incorrect. Although the Supreme Court relied upon this “diversions minus return flows” definition in portions of *Arizona v. California*, the Supreme Court stressed that in so doing it was not interpreting the Colorado River Compact. Moreover, the “diversions minus return flows” definition of consumptive use is not present in the Colorado River Compact. Pursuant to Article VI of the Upper Colorado River Basin Compact, “consumptive use” in the Upper Basin is defined as “man-made depletions of virgin flow at Lee Ferry.”

The State of Colorado would accept the DEIS' general definition of “consumptive use” for the limited purpose of analyzing impacts of the proposed federal action within the identified geographic scope. However, the limited purpose of this definition should be made clear. The DEIS should not include statements that could be misinterpreted as interpretations of the Law of the River.

- **Off-stream Storage as Beneficial Use.** The DEIS affirmatively states that “consumptive use by a Lower Division state includes delivered water that is stored off-stream for future use by that state or another state.”⁷ The accuracy of this sentence has not been established as a matter of law, and is potentially contrary to or inconsistent with the Colorado River Compact and other elements of the Law of the River. The support for this statement is likely derived from the 1999 Offstream Storage Rules, which states that “[t]he Secretary will account for the water that is diverted and stored by a storing entity as consumptive use in the Storing State for the year in which it is stored.” (A “Storing State” is defined as a Lower Division

⁴ For example, the DEIS explains that all necessary action will be conducted through the IBWC and the Department of State at pages including, but not necessarily limited to, p. 1-18, lines 9-11.

⁵ For example, the DEIS confusingly interchanges the identification and description of mainstem activities and facilities with the phrase “Colorado River System” at pages including, but not necessarily limited to, pp. 1-9, lines 33-35; 1-18, lines 12, 29-38; and title of Appendix B.

⁶ See e.g., DEIS at p. 1-11, lines 5-7.

⁷ See e.g., DEIS at p. 1-15, lines 29-31.

State in which water is stored off the mainstream.") However, a decision by the Secretary to account for water in some fashion is not a judicial determination that offstream storage is a consumptive use. Because this sentence raises questions of Compact interpretation among the Basin States, and is unnecessary to the DEIS analysis, Colorado recommends that it be deleted.

- **Intentionally Created Surplus.** Colorado fully supports the Intentionally Created Surplus and Developed Shortage Supply programs outlined in the DEIS and more fully described in the Basin States' Comments. Intentionally Created Surplus and Developed Shortage Supply water stored in Lake Mead benefits the Lower Division by providing a storage vessel and mechanism for delivering additional water to the Lower Division States, and benefits the Upper Division by increasing levels in Lake Mead. These increased Lake Mead storage levels reduce the amount of water that must be released from Lake Powell for equalization and balancing purposes. Accordingly, instead of mentioning that ICS will be created "during this NEPA process,"⁸ Colorado recommends, consistent with the Basin States Comments, that the Final Environmental Impact Statement and Record of Decision expressly adopt Guidelines that permit the creation of Intentionally Created Surplus and Developed Shortage Supply, and provide that this water be accounted in Lake Mead for purposes of equalization and balancing from Lake Powell.
- **Status of Existing Interim Surplus Guidelines.** The DEIS states that "[t]he proposed federal action would modify the substance of the existing Interim Surplus Guidelines (ISG), published in the Federal Register on January 25, 2001 (66 Fed. Reg. 7772), and the term of the ISG from 2016 to 2026."⁹ As explained in the Basin States' Comments, the Basin States recommend that the Final Environmental Impact Statement and Record of Decision adopt the Basin States' combined Proposed Guidelines and that the Basin States Proposed Guidelines replace, rather than merely modify and extend, the existing Interim Surplus Guidelines.
- **Disclaimer.** The DEIS identifies and describes numerous elements of the Law of the River. Because the individual Basin States may disagree as to the definitive interpretation of specific aspects of the Law of the River, and the NEPA process is not intended to provide a definitive interpretation of the law, the State of Colorado recommends, consistent with the Basin States' Comments, that the Final Environmental Impact Statement and Record of Decision include appropriate disclaimer language to allow the various interested stakeholders to refrain from disputing or contesting the general characterizations of the Law of the River in the DEIS. Precedent for such disclaimer language can be found in past Annual Operating Plans promulgated by the Bureau of Reclamation and authorized by the Secretary of the Interior. Similar to that language, the disclaimer in the FEIS and ROD should provide:

Nothing in this (insert "FEIS" or "ROD" as appropriate) is intended to interpret specific provisions of the Law of the River, including, but not limited to: the provisions of the Colorado River Compact (45 Stat. 1057), The Upper Colorado River Basin Compact (63 Stat. 31), The Utilization of Water of the Colorado and Tijuana Rivers and of the Rio Grande, Treaty Between the United States of America and Mexico (Treaty Series 994, 59 Stat. 1219), the United States/Mexico agreement in Minute 242 of August 30, 1973,

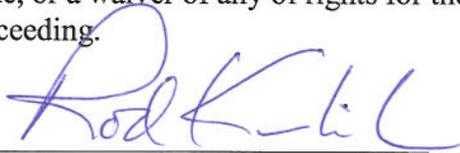
⁸ See e.g. DEIS at p. 2-2, lines 20-24.

⁹ See e.g., DEIS at p. ES-2, lines 27-31. See also, DEIS at pages including, but not necessarily limited to: ES-6, line 28; 2-2, lines 27-28; 2-11, line 3; 3-31, line 10; 4-94, line 12; Glo.6 (ISG).

(Treaty Series 7708; 24 UST 1968), the Decree entered by the Supreme Court of the United States *Arizona v. California, et. al.* (376 U.S. 340), as amended and supplemented, The Boulder Canyon Project Act (45 Stat. 1057), the Boulder Canyon Adjustment Act (54 Stat. 774; 43 U.S.C. 618a), The Colorado River Storage Project Act (70 Stat. 105; 43 U.S.C. 620), The Colorado River Basin Project Act (82 Stat. 885; 43 U.S.C. 1501), The Colorado River Basin Salinity Control Act (88 Stat. 266; 43 U.S.C. 1951), The Hoover Power Plant Act of 1984 (98 Stat. 1333), The Colorado River Floodway Protection Act (100 Stat. 1129; 43 U.S.C. 1600), or The Grand Canyon Protection Act of 1992 (Title XVIII of Public Law 102-575, 106 Stat. 4669).

- **Reservation of Rights.** The Basin States' Comments include as attachments several agreements to which Colorado is not a party. Colorado supports the submission of these attachments as necessary and important to the implementation of the Basin States' Alternative. However, Colorado was not a party to many of these agreements, and does not necessarily agree with all legal and factual recitations made therein. By supporting the Basin States' Comments and attachments, and by agreeing to the submission of these documents as necessary to the implementation of the Basin States' Alternative, Colorado does not intend to waive any disagreements it may have with legal and factual recitations made without its participation or approval.

Finally, Colorado may have other concerns with specific factual and/or legal assertions in the DEIS. However, these assertions do not appear to materially alter the analysis in the DEIS. In addition, in the course of reviewing the voluminous amount of material included within the DEIS, Colorado may have overlooked other inaccurate factual and/or legal assertions. Colorado's failure to raise such concerns in these Comments, or to correct what it believes to be inaccurate assertions, shall not be construed as an admission with respect to any factual or legal issue, or a waiver of any of rights for the purposes of any future legal, administrative, or other proceeding.



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cc: Robert W. Johnson, Commissioner, U.S. Bureau of Reclamation
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