

>>> "John Shields" <jshiel@seo.wyo.gov> 04/30/07 3:24 PM >>>

Good afternoon,

Attached are the State of Wyoming's comments on the February 2007 Draft Environmental Impact Statement on "Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead." Please don't hesitate to contact me if I may answer any questions.

With best regards,

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April 30, 2007

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

Re: Wyoming's 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:

Thank 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* (72 Fed. Reg. 9026-9028) (February 28, 2007) (hereinafter "DEIS"). The Wyoming State Engineer's Office, on behalf of the State of Wyoming, would like to take this opportunity to offer comments on the DEIS. Importantly, Wyoming supports the comments made jointly by the Seven Basin States (hereinafter the Basin States' Comments) that were sent to you under separate cover.

We in Wyoming strongly believe the Basin States' Alternative, as described in the February 2007 DEIS (and as further elaborated upon through the recommendations made in the Basin States' Comments) provides the most suitable and acceptable mechanism for interim Colorado River System management through the end of calendar year 2025. The Basin States' Alternative provides the best solutions to the issues raised by the proposed federal action described in the Bureau's March 2006 Scoping Summary Report and February 2007 DEIS. The Basin States' Alternative best meets critical elements of the purpose and need statement set forth in the DEIS. Accordingly, the State of Wyoming joins the other 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.

In addition, the State of Wyoming provides within this letter our individual State comments. We wish to make it clear that these additional comments neither contradict nor

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disagree with the Basin States' Comments or in any manner diminish our support for the Basin States' Alternative. These individual State comments are as follows:

- **Coordinated Operations of Lakes Powell and Mead.** The Basin States' Alternative in the DEIS would modify the operation of both Lake Powell and Lake Mead through instituting a greater level of reservoir coordination during the interim period, effectuating criteria where releases from Lake Powell may vary based upon levels in both Lake Powell and Lake Mead. This would be done to help meet the objective of delaying the onset of water shortages in the Lower Division States and to minimize their extent and duration, while, at the same time, to maximize the Upper Division States' protection provided by having Lake Powell storage available to release so as to meet the Colorado River Compact non-depletion requirement at Lee Ferry. The "Basin States' Alternative" will provide for more efficient and responsive operation of the system reservoirs for the benefit of both the Upper and Lower Basins. For this reason, Wyoming is willing to accept the compromise that allows additional Lake Powell releases to Lake Mead at higher reservoir levels – which are offset by reduced Lake Powell releases at lower levels.

Under the Basin States' Alternative, reservoir storage levels in both Lakes Mead and Powell will serve as trigger points used in calculating annual Lake Powell release amounts. Nonetheless, it is vitally important that the Department of Interior and Bureau of Reclamation not lose sight of the statutory basis for the construction of Glen Canyon Dam and Lake Powell as set forth in the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620) (CRSP Act). This keystone facility 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, consistent 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 ..." The Basin States' Alternative maintains consistency with the CRSP Act by imposing a minimum storage level in Lake Powell of 14.85 million acre-feet, which amount is then adjusted yearly. The State of Wyoming could not accept coordinated Lakes Mead and Powell operations that ignore the CRSP Act's mandates or create undue detriments to or subordination of the need for Upper Basin storage in the interest of limiting Lower Division shortages.

- **Expiration of Interim Shortage Guidelines in 2025.** Expiration of the Guidelines in 2025 is an important aspect of Wyoming's support of any preferred alternative. We believe it will be necessary and desirable to re-examine management of Lakes Powell and Mead. The Basin States' Alternative proposes the initiation of that examination process prior to the end of the Interim Period. The DEIS recognizes that the Guidelines implementing the Action will be interim in nature, and will remain in effect for determinations to be made through 2025 for 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. We urge the Department of the Interior to ensure (consistent with the Basin States' Comments), that the FEIS and particularly the Record of Decision clearly state that at the conclusion of the effective period of the shortage guidelines, the modeled operating criteria are assumed to revert to the operating criteria used to model baseline conditions in the December 2000 Final

EIS for the Interim Surplus Guidelines (i.e., operations are modeled as if system operations revert to a 70R strategy for the period commencing January 1, 2026 (for preparation of the 2027 AOP)).

- **Consultation with Basin States in 2020.** As stated above, the State of Wyoming strongly advocates that the Record of Decision specify default criteria for operating Lakes Mead and Powell after 2026. This should be done to assure that in the absence of a satisfactory agreement to do otherwise that the Upper Division States' interests are protected. The Basin States' Alternative specifies that the Bureau of Reclamation and the Basin States collectively identify and develop new Guidelines for the management of Lake Powell and Lake Mead prior to the expiration of the interim shortage guidelines. Accordingly, we request that the Final EIS and Record of Decision specify that the Bureau will initiate future consultation with the Basin States and other interested parties no later than December 31, 2020 to identify and implement appropriate management mechanisms for the Colorado River System following the Interim Period. The Basin States' Comments include language that would require the Bureau to initiate such consultation – and we urge the adoption of the Basin States' Proposed Guidelines.
- **Mexican Treaty Shortage Issues.** Colorado River shortages will be shared with Mexico, but how, when and to what extent are critically important and sensitive issues that must be addressed for the Bureau of Reclamation to develop a comprehensive program for administering the shortage guidelines during the Interim Period. There is unanimous consensus among the Basin States that the United States should reduce the quantity of water allotted to Mexico under Article 10(a) of the 1944 Treaty in any year the Secretary reduces the water available for consumptive use pursuant to Art. II (B)(3) of the Consolidated Decree in *Arizona v. California*. It is also the case that Article II (B)(3) reductions are not the only or sole mechanism to ascertain whether the United States should reduce the amount of water allotted to Mexico under the 1944 Treaty. The matter of equitably computing how much Mexico's water deliveries would be curtailed has been modeled in the DEIS, however, 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.

We wish to offer two important comments in regards to these important issues. It must be recognized that other conditions (beyond Article II(B)(3) reductions) may arise that are reflective of “extraordinary drought in the Colorado River System” under Article 10(a) of the Treaty. Secondly, for the reason that resolution of the issues associated with imposition of water delivery shortages upon the Republic of Mexico has the potential to affect interests in both the Upper and Lower Colorado River Basins, it is critically important that all the Basin States be consulted in these discussions.

- **Definition of “Colorado River System” and “consumptive use.”** 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.” We urge you to direct the Bureau of

Reclamation to make every attempt to avoid such inconsistencies in the Final EIS and in preparing the Record of Decision for your execution.

Similarly, the DEIS contains language summarizing the apportionments of the use of Colorado River water to the Basin States which states that “[t]he apportionments of the Basin States are generally presented in terms of consumptive use, which consists of diversions minus return flows.” This is an oversimplification and generalization that is inapplicable to apportionments made to the Upper Basin States. Article VI of the Upper Colorado River Basin Compact defines "consumptive use" in the Upper Basin as "man-made depletions of virgin flow at Lee Ferry.” The “diversions minus return flows” definition of consumptive use is not present in the Colorado River Compact. In *Arizona v. California*, the Supreme Court of the United States explicitly noted the definition used therein was not intended to interpret the Colorado River Compact. The Final EIS should be clear in stating it is providing and using a limited purpose definition.

- **Intentionally Created Surplus.** The Intentionally Created Surplus and Developed Shortage Supply programs outlined in the DEIS and more fully described in the Basin States’ Comments are supported by the State of Wyoming. We recognize that Intentionally Created Surplus and Developed Shortage Supply water stored in Lake Mead benefits the Lower Division. The direct benefit to the Upper Division is through increasing the Lake Mead water storage level – which reduces the amount of water that must be released from Lake Powell for equalization and balancing purposes. Wyoming again urges that the Final EIS and Record of Decision expressly adopt shortage guidelines consistent with the Basin States’ Alternative that permit the creation of Intentionally Created Surplus and Developed Shortage Supply.
- **Status of Existing Interim Surplus Guidelines.** 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.
- **Submission of Parties’ Documents.** The Basin States’ Comments have several attachments including side agreements in which the State of Wyoming has had no involvement. We again reiterate our strong support for implementation of the Basin States’ Alternative in the Department of Interior’s forthcoming Record of Decision, but wish to point out that since we are not a party to those side agreements that we are not necessarily in agreement with all of the statements or interpretations of the Law of the River that are found in them. We do agree the side agreements are appropriately part of the Basin States’ Comments and are necessary to the implementation of the Basin States’ Alternative; but we reserve the right to disagree with certain legal and factual recitations made in those side agreements in the future should it be determined to be in our State’s best interest to do so.
- **Disclaimer.** Since the NEPA process is not intended to provide a definitive interpretation of the Law of the River, we suggest it would be entirely appropriate and would serve a useful

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purpose for the Final EIS and Record of Decision to include an appropriate disclaimer akin to the language included in the Annual Operating Plans for the Colorado River System that are promulgated by the Bureau of Reclamation and authorized by the Secretary of the Interior.

Attached to this letter are a few additional specific comments concerning the DEIS document. Thank you for the opportunity to submit, and for your consideration of, these comments. Should I be able to answer any questions, please don't hesitate to contact me.

With best regards,



Patrick T. Tyrrell  
Wyoming State Engineer  
Wyoming Commissioner,  
Upper Colorado River Commission

PTT:js

cc: Seven Colorado River Basin States' Representatives  
Upper Colorado River Commission Executive Director Don Ostler  
USBR Upper Colorado Regional Director Rick Gold

State of Wyoming's Specific Comments on the U.S. Bureau of Reclamation's Draft  
Environmental Impact Statement: *Colorado River Interim Guidelines for Lower Basin  
Shortages and Coordinated Operations for Lake Powell and Lake Mead*

Page 1-13, lines 8-9: "Documents which are generally considered as part of the Law of the River include, but are not limited to ..." It may be useful for the DEIS to state the basis for making this statement, e.g., in whose judgment is the list of documents included in Table 1.7-1 considered to be inclusive of the elements of the Law of the River?

Page 1-15, lines 29-31: "Consumptive use by a Lower Division state includes delivered water that is stored off-stream for future use by that state or another state." The DEIS needs to be more careful in distinguishing between Secretarial decisions (or proposals for how water would be accounted for once interim shortage guidelines have been proposed and promulgated) to account for water as opposed to making statements that are based on judicial determinations in *Arizona v. California* or make Compact interpretations on matters where there are differences of opinion among the Basin States. This sentence is one example of a number of instances where imprecise wording has been used, as pointed out in our comment letter.

Page 3-31, lines 28-31: The depletion projects for the Upper Basin States were actually developed by each of the Upper Basin States and were considered and approved for transmittal to other entities by the Upper Colorado River Commission. Updating or modification of those depletion projections was made in consultation with the Upper Basin States by Reclamation and the States.

Page 3-35, line 8: There is a word missing before the parenthetical phrase "(consumptive use)" in this line.

Page 3-43, line 26: It is not clear why the DEIS is relying upon a 2002 report by the Colorado River Basin Salinity Control Forum when the 2005 edition of the subject report is available and could have been used for this purpose and referenced. The references section (see page Ref-4) lists only the 2005 report though the text on this page reflects the 2002 publication date.

Page 3-44, lines 11-13: The distinction is not altogether clearly made that the salinity criteria are average annual flow-weighted values, whereas the comparison being made in this sentence is to a daily value that is not reflective of either the annual-averaging or flow-weighting procedures that would be needed for a valid comparison. Daily observed salinity concentration values are being compared in Figure 3.5-1 to a flow-weighted average annual salinity criteria figure of 723 mg/l.

Page 3-98, lines 3-4: The correct name of the program being referenced at this place in the text is the "Upper Colorado River Endangered Fish Recovery Program."

Page 3-100, line 32: There is a typo in this line where the sentence begins: "Changes in drops in the elevation ..."

Page 3-101, lines 26-27: The cost of power would be for the water pumps that are components within the intakes operated by the SNWA.

Page 4-3, lines 31-32: The DEIS could be made clearer here noting that the period 2008 to 2026 includes the year 2026.

Page 4-6, line 23: The words “possible sequences” should be changed to read “observed sequences” to more accurately communicate the statement that is being made. The historic record is indicative of what has been observed as opposed to what has been possible during the period during which records have been collected.

Pages 4-8 and 4-9, lines 31 through 37 and lines 1-2 on the next page: These statements with regard to replacement of the bypassed water should be clarified to more explicitly state what is being done and the timeline for accomplishing definite action. As written, the statements are vague and do not help to educate the reader.

Page 4-9, lines 30-33: The sentence found here concerning consultation with Mexico is completely lacking in stating when the subject consultation will or would occur.

Page 4-17, line 9: A typo is found in this line where the intent is to state “90<sup>th</sup>” rather than “90<sup>h</sup>.”

Page 4-231, line 18: Lake “Powell” is misspelled in this line.

Page 5-7, line 34: The agreement referenced in this sentence was struck early in 2006 as opposed to “early in 2007.”