

>>> "spollack" <spollack@navajo.org> 04/29/07 4:42 PM >>>
Dr. Fulp:

Please consider the attached letter as comments submitted on behalf of the Navajo Nation concerning the Draft Environmental Impact Statement on the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead.

Please do not hesitate to contact me if you have any questions concerning the information provided here. Thank you for your anticipated cooperation.

Stanley M. Pollack, Assistant Attorney General Water Rights Unit Navajo Nation
Department of Justice P.O. Box 2010 Window Rock, AZ 86515

928.871.6192 (P) / 928.871.6200 (F)

This message may contain confidential information. If you are not the intended recipient, please delete the email and inform the sender immediately. Thank you.



NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

LOUIS DENETSOSIE
ATTORNEY GENERAL

HARRISON TSOSIE
DEPUTY ATTORNEY GENERAL

April 29, 2007
via regular mail & email

Terrance J. Fulp, Ph.D., Area Manager
Boulder Canyon Operations
Bureau of Reclamation
Lower Colorado River Region
Attention: BCOO-1000
P.O. Box 61470
Boulder City, NV 89006-1470

tfulp@lc.usbr.gov & strategies@lc.usbr.gov

Re: Comments of the Navajo Nation on Draft Environmental Impact Statement on the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (“DEIS”)

Dear Dr. Fulp:

Please consider this letter as comments submitted on behalf of the Navajo Nation concerning the above-referenced DEIS. The Navajo Nation believes that the Secretary of the Interior has an affirmative obligation to take all necessary action to quantify the Navajo Nation’s water rights and needs from the Colorado River. President Shirley’s letter of August 31, 2005 to then Regional Director Johnson, requested the Department of the Interior to account for the water needs of the Navajo Nation as part of these Interim Guidelines. The DEIS fails to adequately account for or address the needs of the Navajo Nation.

Reclamation asserts one purpose of the proposed federal action is to “provide mainstream United States users of Colorado River water, particularly those in the Lower Division states, a greater degree of predictability with respect to the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions.” DEIS at 1-3. The DEIS is deficient in that it does not fully account for how the Navajo claims would increase the risk of curtailment of water deliveries, particularly to users in the Lower Division states. As a general matter, the DEIS treats the Navajo claims in Arizona as part of that state’s water allocations; however, since these claims are not described in the water balance reporting nor were the impacts analyzed, the DEIS understates the impact of such claims on other water users within the State. Moreover, were the Navajo Nation successful in developing its water rights pursuant to these claims, such development upstream of Lake Mead would displace junior water users below Lake Mead. It appears that the DEIS does not fully examine the impact of exercising these Indian Trust Assets; therefore, the DEIS fails far short of its goal of providing a greater degree of predictability to the water users.

Turning to the specific sections of the DEIS, the Navajo Nation offers the following comments:

ES-2.9 Executive Summary, Indian Trust Assets

The conclusion that “Tribal trust resources identified in the study area would not be adversely affected by any of the anticipated environmental impacts stemming from the proposed federal actions” is unwarranted. The DEIS does not include an analysis of the projected water needs of the Navajo Nation or identify any water sources to satisfy those needs. By letter of August 21, 2006, the Navajo Nation identified a reasonable breakdown of its anticipated demands. None of those demands are reflected in the DEIS analyses, nor are they reflected in Appendices C or D. If the water rights of the Navajo Nation, an Indian Trust Asset, are unknown and unquantified, no conclusion can be reached with respect to impacts on those assets. Moreover, even where Indian Trust Assets are known, such as the Navajo Nation’s dependency on Lake Powell as a source of water for development and for recreational values, the DEIS identifies very clear adverse impacts on water levels in Lake Powell resulting from various alternatives. Alternatives that increase the risk of lower water levels in Lake Powell have adverse impacts on the Navajo Nation because of increased pumping costs for water development or lost economic development opportunities at Navajo marinas.

3.2.1.1 Affected Environment, Lake Powell and Glen Canyon Dam

The DEIS does not analyze potential diversions by the Navajo Nation out of Lake Powell. Moreover, the DEIS does not even recognize current water uses from Lake Powell by the Navajo Nation. The Navajo Nation entered into contract on September 14, 1969, with the Department of the Interior for water from Lake Powell. This allows the City of Page to divert water from Lake Powell for use by the Navajo community of LeChee. An Environmental Assessment is underway for a new intake, and the Navajo Nation is negotiating a new Secretarial contract for an increased water supply for the LeChee area. The DEIS neglects to describe the current and ongoing economic development at Antelope Canyon and marina at Antelope Point. In addition, the Navajo Generating Station obtains its cooling water from Lake Powell. The Navajo Generating Station is located on the Navajo Reservation, employs hundreds of Navajos and burns coal produced from the Navajo Nation. Any adverse impact visited upon the Navajo Generating Station by any federal action should be viewed to have an adverse impact on the Navajo Nation.

These comments are equally applicable to the provisions at 3.3.2 Affected Environment, Lake Powell and Glen Canyon Dam.

3.4.1 Affected Environment, Apportionment to the Upper Division States

Reclamation relies on depletion schedules for the Upper Division states developed by the Upper Colorado River Commission and submitted to Reclamation in December 1999. Revised depletions schedules were provided in 2006.

3.10.6.1 Affected Environment, Navajo Indian Reservation

The DEIS asserts that the “Navajo Nation economy is historically based on livestock herding and dry farming.” This statement is a gross over simplification of the Navajo economy. Royalty and tax revenues from mineral production on the Navajo Nation account for at least 90% of the non-federal portion of the Navajo Nation’s operating budget. With respect to agricultural production, the Navajo Nation has significant resources in addition to the Navajo Indian Irrigation Project. In 1986 the USDA Soil Conservation Service conducted a partial inventory of irrigation projects on the Navajo Reservation. The 1986 SCS inventory identified more than 80 irrigation projects that included more than 40,000 acres. In 1994 in the *Report of Amended Water Claims by the Untied State of America for the Indian Lands in the Little Colorado River Basin*, the U.S. Justice Department reports more than 69,000 acres irrigated with surface water on the Navajo Reservation just within the Little Colorado River Basin.

By letter of August 21, 2006, referenced in this section, the Navajo Nation estimated that it would need at least 76,732 acre-feet per year from the mainstream of the Colorado River in Arizona. That budget does not appear to be included within the depletion schedules at Appendices C or D. In addition to this demand from the mainstream, the Navajo Nation also projected a demand of 63, 000 acre-feet per year from the Little Colorado River, a tributary of the Colorado River. The DEIS does not appear to account for the 139,732 acre-feet of potential Navajo uses from the Colorado River system in Arizona. The DEIS does not attempt to evaluate the impact of the exercise of these water demands as part of any of the alternatives. It is misleading to conclude that this water would simply be deducted from Arizona’s allocation without impact on the overall water balance. The diversion and use of water by the Navajo Nation upstream of Lake Mead and/or Lee Ferry would be to the detriment of junior users downstream of Lake Mead. Since such diversions would be at points different than the junior rights displaced, there could be differential impacts visited upon the various alternatives.

Impacts on the ability of the Navajo Nation to meet the needs of its people are not just related to hydrologic variables such as lower median water levels in Lake Powell, “occasionally” reduced flows below Lake Powell, and altered water quality. These impacts may also involve any number of administrative or operational variables for instance, securing Secretarial water contracts, establishing points of diversion above or below Lee Ferry, and protecting endangered species in the future. The DEIS fails to conduct a thoughtful analysis of all of the variables that need to be considered. Without this analysis it is impossible for the DEIS to unequivocally conclude in this document that there are no impacts on Indian Trust Assets.

3.11.7.2, Affected Environment, City of Page Water Supply Intake

This description is flawed for the reasons stated above concerning section 3.2.1.1. The DEIS does not address Navajo municipal uses from Lake Powell or future impacts on the Navajo Nation’s ability to use the lake as a forebay for additional water projects, including projects

recently evaluated by Reclamation in the *North Central Arizona Water Supply Study Report*, December 2006.

The Navajo Nation's recreational interests at Lake Powell include but are not limited to the Quality Inn Lake Powell, Antelope Canyon, Antelope Point Marina, Navajo Bridge, and Castle Rock. Reservoir elevations that could potentially impact Navajo Nation tourism include Castle Rock Cut, which is closed at 3,620 feet mean storage level, and the Antelope Point Public Launch Ramp, which is closed at 3,588 feet mean storage level. Each of the alternatives predict some impact on the mean storage level, but the DEIS provides no analysis of the impacts on Navajo tourism revenues, including tourist accommodations, park entrance fees, tour guides, etc.

3.15.1 Minority, Low-income Populations, and Indian Tribes

The DEIS relies on county level statistics to describe Minority, Low-income Populations, and Indian Tribes. This recitation of county level statistics obfuscates the desperate socioeconomic conditions of those living on the Navajo Reservation. The U.S. Census Bureau produced ample data that far better reflect these on-reservation conditions than the county level data. The document needs to more accurately address this issue so that the readers will better understand that the high rates of poverty and unemployment, the high number of homes that do not have direct access to safe drinking water, and the need for improved infrastructure are very closely related.

4.10.1 Environmental Consequences, Water Rights and Trust Lands

The DEIS states that to the extent that "additional Tribal water rights are developed, established or quantified, during the interim period of the proposed federal action, the United States will manage Colorado River facilities to deliver water consistent with such additional water rights, if any, pursuant to federal law." This commitment merely to follow federal law, rather than affirmatively manage the Colorado River consistent with the Navajo Nation's trust assets, ensures that other interests will continue to rely on water supplies claimed by, reserved for, and potentially belonging to the Navajo Nation. Reclamation has an affirmative obligation to operate federal water projects, such as Glen Canyon Dam and Hoover Dam, consistent with "vested, fairly implied senior Indian water rights." *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts*, 832 F.2d 1127 (9th Cir. 1987). It is logical to expect that the current water users will have even more incentive to resist the development of Colorado River water by the Navajo Nation in order to minimize their risk of shortage.

Moreover, the DEIS fails to provide any analysis of the impacts on the vested, but unquantified water rights of the Navajo Nation. The U.S. Supreme Court has repeatedly recognized that tribes possess reserved water rights that vest no later than the date their reservations were established. *See: Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). It is not sufficient for the DEIS to evaluate only those water rights presently "developed, established or quantified." As part of the adjudication of its water rights,

the Navajo Nation will have to prove that the water necessary for its permanent homeland can be diverted and used in a practicable manner. The recent decision of the Arizona Supreme Court suggests that tribes must demonstrate the practicability of diversion for beneficial use for all water claimed. *See: In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 80 (Ariz. 2001) (“[P]roposed projects should be scrutinized to insure that they are practical and economical.”) The Navajo Nation’s ability to divert water from Lake Powell in a feasible manner will depend to a large degree on the cost of the energy needed to lift the water. To the extent that any alternative will result in lower water levels at Lake Powell, the costs of diverting water necessarily increase as noted at 3.11.7.2 of the DEIS. (“[D]rops in the elevation of Lake Powell could cause an increase in the cost of power for the City of Page’s intake pump station.”) While the DEIS considered drops in lake elevation to be an environmental consequence that must be evaluated for the City of Page and the Navajo Generating Station, the DEIS completely ignores the potential impact that such changes in elevation would have, not only on the ability of the Navajo Nation to divert water from Lake Powell, but to demonstrate the practicability of such diversions in any future water rights adjudications.

In short, the DEIS fails to provide any meaningful evaluation of impacts on Navajo water rights.

4.15.8 Environmental Consequences, Indian Trusts Assets

The Department of the Interior has made no effort to quantify the Navajo Nation’s water rights. It is unclear how the DEIS can conclude that there are no significant impacts on Indian Trust Assets when the extent of those trust assets are unknown. Even though the water rights of the Navajo Nation are unquantified, the DEIS failed to give meaningful consideration to the water budget proposed in the Navajo Nation’s letter of August 21, 2006 or to account for any impacts on the unquantified water rights for reasons discussed above.

Similarly, the statement at 5.1.29.7 concerning the absence of cumulative effects on Indian Trust Assets is also fundamentally wrong.

* * *

As President Shirley previously advised in his letter of August 31, 2005, the Secretary must account for the needs of the Navajo Nation as he undertakes the difficult task of developing guidelines to deal with Lake Powell and Lake Mead in times of shortage. Moreover, absent forceful action by the Secretary to secure an adequate water supply for the Navajo Nation, the stated objective of providing certainty about the quantities of water available to other users cannot be achieved because those supplies will always be at risk from the outstanding and unquantified Navajo claims.

Terrance J. Fulp, Ph.D., LC, BOR
Re: Comments of the Navajo Nation on DEIS
April 29, 2007
Page 6

Please do not hesitate to contact me if you have any questions concerning the information provided here. Thank you for your anticipated cooperation.

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE

signed on original

Stanley M. Pollack
Assistant Attorney General