



COLORADO

Colorado Water Conservation Board

Department of Natural Resources
1313 Sherman Street, Room 718
Denver, CO 80203

December 20, 2022

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Upper Colorado Basin Region
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VIA ELECTRONIC MAIL
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RE: State of Colorado's Scoping Comments on the Supplemental Environmental Impact Statement for December 2007 Record of Decision Entitled Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead

Dear Ms. Johnson,

This letter outlines the State of Colorado's recommended scoping issues to be addressed in a future Supplemental Environmental Impact Statement ("SEIS") for the December 2007 Record of Decision entitled Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead ("2007 Interim Guidelines").

COLORADO'S INTERESTS

Because no major rivers flow into Colorado, and we are without the benefit of large reservoirs above our places of use that provide a steady, reliable source of supply even in drought years, Colorado must satisfy all its water demands from sources within the state. The Colorado River and its tributaries supply over forty percent of Colorado's water needs and provide water to the majority of the State's population. In Colorado, we have a long history of administering water rights according to the physical and legal availability of water supply in a particular location at a particular time. We rely on the snowpack and subsequent runoff for our water use, thus our use is subject to available water supplies under hydrologic conditions each year. Colorado's system of administration according to water availability has adapted well to changing circumstances, including a more than twenty-year drought occurring since 2002. Importantly, Colorado has had to cut uses and take shortages nearly every year, including cuts to water rights that are senior to the 1922 Colorado River Compact.



In addition to the State’s administration of water rights based on legal and physical availability, Colorado and the other Upper Division States have contributed over 661,000 acre-feet of water from upstream reservoirs to protect critical elevations in Lake Powell. Colorado has a substantial interest in the efficient management and operation of Lake Powell and Lake Mead, especially in current and ongoing dry conditions. Colorado therefore urges the Bureau of Reclamation (“Reclamation”) to manage these reservoirs within the available supply of the Colorado River while meeting the needs of the Basin States without jeopardizing significant, legally protected rights to the water of the Colorado River or compromising its ability to serve the present uses and future needs of Colorado citizens. In light of these priorities and concerns, Colorado submits these comments.

COMMENTS

A. Legal Framework

The 2007 Interim Guidelines are subject to the Law of the River,¹ and any SEIS must be consistent with that overarching legal framework. Any expansion of authorities or disregard for the Law of the River in such SEIS risks the certainty of process established by the Law of the River. Moreover, the SEIS should remain true to the scope, purpose, and timeline of the existing 2007 Interim Guidelines and modify operations only as to Lake Powell and Lake Mead and as to shortages in the Lower Basin.

1. Relationship with Existing Law

Section IX.E of the 2007 Interim Guidelines describes the relationship of the Guidelines with existing law. Reclamation must develop the SEIS consistent with the provisions of Section IX.E. Specifically, the SEIS should not provide for any operations that guarantee a firm supply of water to any water user, change or expand authorities under applicable federal law with respect to authorities in the Upper Division States, require curtailment of water rights in the Upper Division States, or in any way change the apportionment made for use within each Basin under the 1922 Colorado River Compact, or change the allocations made for use within the individual Upper Division States under the 1948 Upper Colorado River Basin Compact. Importantly, the 1922 Colorado River Compact equitably divides the waters of the Colorado River system between the Upper Basin and the Lower Basin in perpetuity. The SEIS must not conflict with these foundational elements of the 1922 Compact.

2. Secretarial Authority in the Lower Basin

While the 1948 Upper Colorado River Basin Compact allocates water among the Upper Division States, the Secretary delivers water from Lake Mead to users in the Lower Division States under the authorities of federal statutes and the U.S. Supreme Court’s decree in *Arizona v. California*. Thus, the Secretary serves as water master, enjoys broad authority, and plays a unique role in the management of the lower Colorado River system. The Secretary’s role in the lower Colorado River system is recognized in

¹ The “Law of the River” refers to the body of law affecting interstate and international use, management, and allocation of water in the Colorado River system, including the 1922 Colorado River Compact, the 1944 Mexican Water Treaty, the 1948 Upper Colorado River Basin Compact, United States Supreme Court decisions and the United States Supreme Court Decree in *Arizona v. California*, and numerous federal statutes and regulations.



the 2007 Interim Guidelines. The Secretary makes annual determinations regarding the availability of water to be delivered from Lake Mead by considering such factors as the amount of water in system storage and predictions for natural runoff. While the 2007 Interim Guidelines were designed to provide some predictability and certainty, they were also designed to address shortages in the Lower Basin. Given the inadequacy of the Guidelines based on the history of operations, overuse in the Lower Basin, and unprecedented hydrologic conditions, the scope of the SEIS should include modified operations that are rooted in the reality of available supply and depleted storage in the Colorado River system.

3. Consultation

The 2007 Interim Guidelines provide for consultation with the Basin States and a goal to develop and achieve a consensus approach. Colorado supports a collaborative approach, so long as it does not implicate any obligations under the 1922 Colorado River Compact or harm Colorado’s significant rights and interests in the Colorado River. However, regardless of whether a consensus is reached through collaboration, Colorado also recognizes that any actions taken to modify releases at Glen Canyon Dam are under the Secretary’s authority without the consent, endorsement, or acquiescence from the State.

B. Scope

The 2007 Interim Guidelines “are intended to be applied each year during the Interim Period with respect to the operation and management of the waters of the Colorado River stored in Lake Powell and Lake Mead.” Reclamation has stated the purpose of the SEIS is to supplement the 2007 Interim Guidelines “in order to modify operating guidelines of Glen Canyon and Hoover Dam to address historical drought and low runoff conditions in the the Colorado River Basin.” Given the informal initiation of the NEPA process for post-2026 reservoir operations for Lake Powell and Lake Mead in June 2022, and the intent to initiate formal NEPA actions in 2023, Colorado requests that the SEIS be narrow in scope to avoid any duplication, interference, or conflict with the post-2026 reservoir operations process.

1. Temporal Scope

The Interim Period under the 2007 Interim Guidelines runs through December 31, 2025—through the annual operating year of 2026. Colorado recommends the SEIS provide for any modified operations only through the same Interim Period, expiring December 31, 2025.

2. Geographic Scope

The 2007 Interim Guidelines apply to operations in Lake Powell and Lake Mead and to reduced deliveries from Lake Mead to Lower Division States in shortage conditions. Colorado recommends the SEIS limit the geographic scope of any modified operations to be consistent with the Guidelines, and to not conflict with concurrent processes such as actions being taken under the Drought Response Operations Agreement—a critical component of the Upper Basin’s Drought Contingency Plan (“Upper Basin DCP”)—and pursuant to the provisions in that Agreement between Reclamation and the Basin States that serve as an overlay to the 2007 Guidelines but are separate and distinct from the Guidelines and from this SEIS process.



3. Substantive Scope

The 2007 Interim Guidelines provide for the coordinated operation of Lake Powell and Lake Mead in dry and low reservoir conditions, and they establish a shortage sharing strategy in the Lower Division States. Colorado recommends the SEIS limit the scope of any modified operations to Lake Powell and Lake Mead and shortage sharing in the Lower Basin. Colorado urges the Secretary to implement shortage sharing criteria in the Lower Basin that includes increased volumes and triggers at higher elevations than contemplated by the Guidelines, as more fully described below. However, the SEIS should not expand beyond reservoir operations at Lake Powell and Lake Mead and shortage sharing in the Lower Basin. The SEIS should not extend to operations of other Colorado River system reservoirs.

Moreover, any assumption of reductions in use or curtailment in the Upper Basin is beyond the scope of the SEIS. Uses in Colorado are determined by hydrology and the physical and legal availability of water at a particular time and location. The authority to administer and distribute the waters of the State are vested with the Colorado State Engineer.

C. Relation to Upper Basin Drought Contingency Plan

It is unclear how Reclamation intends to distinguish between actions taken pursuant to the Upper Basin DCP and actions developed under the SEIS. Colorado recommends that Reclamation clearly acknowledge the distinction between the 2019 Upper Basin DCP and this SEIS process. Concurrent with and separate from the 2007 Interim Guidelines are actions taken pursuant to the 2019 Upper Basin DCP. The Upper Basin DCP comprises a series of interstate agreements, finalized and codified in 2019, that are currently being implemented. Importantly, these are separate and distinct processes and actions, with separate and distinct scopes. Colorado recognizes that modeling of all DCP actions may inform alternatives analyzed for the SEIS. However, any modified operations under the SEIS should not presume or incorporate actions that have not been agreed upon by the Upper Division States pursuant to the Upper Basin DCP. The SEIS should not duplicate, interfere or conflict with the concurrent actions of the Upper Basin DCP.

D. Operations of Lake Powell and Lake Mead and Shortage Conditions in the Lower Basin

The operating experience under the 2007 Interim Guidelines and the Lower Basin DCP underscores the inadequacy of the shortage triggers imposed at critical reservoir elevations to address the impacts of dry hydrology and depleted storage. That inadequacy has been exacerbated by continued overuse in the Lower Division States triggering excess releases from Lake Powell through balancing despite decreased inflows into Lake Powell. The operations of Lake Powell and Lake Mead must reflect the reality of diminished supplies and depleted storage in the system.

1. System Loss Accounting in the Lower Basin

As a first step to respond to current hydrology and reservoir conditions, it is critical to address evaporation and system loss in the Lower Basin. The SEIS and any proposed



modified operations should include Lower Basin evaporation and system losses in the assessment. Colorado further emphasizes the point made by the Upper Colorado River Commission that failing to fully account for the Lower Basin's actual depletions, evaporation, seepage, and other system losses has also contributed to the declining and current reservoir elevations.

2. Reduced Deliveries from Lake Mead

In addition to accounting for system losses, Colorado urges Reclamation to develop shortage sharing criteria in the Lower Basin that includes increased shortage volumes and triggers at higher elevations in Lake Mead. We believe it is critical to have a meaningful and significant net decrease in deliveries from Lake Mead. The SEIS must, at a minimum, address overuse in the Lower Division States by further reducing deliveries from Lake Mead beyond what is provided for in the 2007 Interim Guidelines and the Lower Basin DCP. The SEIS should prohibit deliveries of ICS when in shortage conditions because any releases from Lake Mead due to ICS deliveries in shortage conditions is contrary to Reclamation's stated purpose and need for the SEIS.

As mentioned above, the Secretary exercises broad authority in the Lower Basin to manage water supplies and determine how much and under what circumstances deliveries of water are made from Lake Mead. While the Secretary is required to base annual operations of Lake Powell and Lake Mead on the Guidelines, the Secretary reserves the authority to take other operational actions if extraordinary circumstances arise, such as "operations that are prudent or necessary for safety of dams, public health and safety, other emergency situations, or other unanticipated or unforeseen activities arising from actual operating experience." This Section 7.D in the Guidelines reserves broad authority of the Secretary to act to protect continued coordinated operations of Lake Powell and Lake Mead and to implement meaningful and significant shortages in the Lower Basin.

3. Balancing Releases

Recent modeling by Reclamation shows a heightened risk of system failure with balancing releases when in the Lower Elevation Balancing Tier. In order to protect critical elevations at Lake Powell, to in turn protect critical infrastructure at Glen Canyon Dam, and to continue to provide a secure source of supply for on-going releases to Lake Mead, all balancing releases made when Lake Powell is in the Lower Elevation Balancing Tier from Glen Canyon Dam should be suspended for the duration of the Interim Period.

E. No Action Alternative

Colorado does not support the No Action Alternative set forth in the NOI as the Preferred Alternative for the SEIS. Due to prolonged drought and low runoff conditions accelerated by climate change and overuse in the Lower Basin, the 2007 Interim Guidelines and the Lower Basin DCP are inadequate to preserve and protect critical elevations at Lake Powell and Lake Mead. Failing to fully account for the Lower Basin's actual depletions, including evaporation and system losses, failing to adequately reduce releases from Lake Mead, and allowing for continued balancing has contributed to the declining and current reservoir elevations. Therefore, any continuation of the current operations or extension of the 2007 Interim Guidelines is unsustainable and contrary to Reclamation's stated purpose and need of the SEIS.



F. Framework Agreement Alternative

Colorado, with the other Upper Division States, has committed to a process with the Lower Division States to develop a consensus Framework Agreement Alternative. The seven Basin States will be working on this process through January 31, 2023. In addition, Colorado is engaging with the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe on this process and along with the other Upper Division States, communicating with other Upper Division Tribes about the process. Given the urgency of completing the SEIS, we appreciate Reclamation's commitment to provide time for the seven Basin States to revise and refine the conceptual Framework Agreement Alternative.

RESERVATION OF RIGHTS

Colorado's comments are intended to highlight overarching issues that will require acknowledgment, specification, or clarification as the SEIS process continues to progress. Colorado's failure to provide specific comments regarding details of the SEIS shall not be construed as an admission with respect to any factual or legal issue or the waiver of rights for the purposes of any future legal, administrative, or other proceeding. Furthermore, Colorado reserves the right to comment further on SEIS documentation as Reclamation proceeds with subsequent phases of the SEIS process.

CONCLUSION

Colorado thanks Reclamation for the opportunity to provide these comments on the NOI for the development of a SEIS for the 2007 Interim Guidelines. We look forward to continuing our partnership with you and our partners across the Colorado River basin as we move forward in protecting and managing this critical resource.



Rebecca Mitchell
Colorado Commissioner
Upper Colorado River Commission

