Docket No. 14-16864

In the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

NAVAJO NATION,
Plaintiff-Appellant,

v.

DEPARTMENT OF THE INTERIOR, SALLY JEWELL, Secretary of the Interior, BUREAU OF RECLAMATION and BUREAU OF INDIAN AFFAIRS,
Defendants-Appellees,

STATE OF ARIZONA, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, ARIZONA POWER AUTHORITY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SALT RIVER VALLEY WATER USERS' ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, COACHELLA VALLEY WATER DISTRICT, STATE OF NEVADA, COLORADO RIVER COMMISSION OF NEVADA, SOUTHERN NEVADA WATER AUTHORITY and STATE OF COLORADO,
Intervenors-Defendants-Appellees.

Appeal from the United States District Court, District of Arizona
No. 3:03-cv-00507-GMS Honorable G. Murray Snow

RESPONSE BRIEF OF INTERVENORS-DEFENDANTS-APPELLEES COACHELLA VALLEY WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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CORPORATE DISCLOSURE STATEMENT

Coachella Valley Water District, Imperial Irrigation District, and the Metropolitan Water District of Southern California are political subdivisions of the State of California for which corporate disclosure statements are not required pursuant to Federal Rules of Appellate Procedure Rule 26.1.

Dated: March 16, 2015

METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

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I. STATEMENT OF JURISDICTION

In this brief, Coachella Valley Water District, Imperial Irrigation District, and the Metropolitan Water District of Southern California (collectively the "California Parties") contend that the Navajo Nation ("Navajo") have not met the requirements for standing under Article III, § 2 of the United States Constitution as necessary to bring its First and Second Claims for Relief, which allege violations of the National Environmental Quality Act ("NEPA"). Therefore neither the District Court nor this Court has subject matter jurisdiction over these claims.

In this brief, the California Parties also contend that neither the District Court nor this Court has jurisdiction to determine or establish water rights in the Colorado River for the Navajo because the United States Supreme Court has retained exclusive jurisdiction over such matters in *Arizona v. California*[1].

The California Parties also join in the arguments presented by Nevada and the Arizona entities that the District Court properly dismissed the action without leave to amend the Second Amended Complaint.

II. STATEMENT OF THE ISSUES

The Navajo's appeal presents the following issues for review:

[1] The Supreme Court resolved a dispute over the apportionment of Colorado River water in the Lower Basin in *Arizona v. California*, 373 U.S. 546 (1963), and entered decrees in 376 U.S. 340 (1964), 383 U.S. 268 (1966), 439 U.S. 419 (1979), 466 U.S. 144 (1984), 531 U.S. 1 (2000), and 547 U.S. 150 (2006). The 2006 Consolidated Decree summarizes the procedural history of the three phases of the case. See *id.* at 150-152.

1) Whether the District Court properly dismissed, without prejudice, the Navajo's First and Second Claims in its Second Amended Complaint because the Navajo lack standing to assert such claims.

2) Whether the District Court properly dismissed, without prejudice, the Navajo's Seventh Claim in its Second Amended Complaint because that claim is barred by the sovereign immunity of the United States.

3) Whether the District Court properly dismissed the action without leave to amend the Second Amended Complaint.

The California Parties address the first issue above in this Response Brief.

III. ADDENDUM

Pursuant to Circuit Rule 28-2.7, pertinent statutes and regulations are set forth verbatim in the attached addendum.

IV. STATEMENT OF THE CASE

A. Navajo's Challenge to the Surplus and Shortage Guidelines and Other Colorado River Management Actions

Under the Boulder Canyon Project Act, 43 U.S.C. §§ 617 – 617u, and the *Arizona v. California* Consolidated Decree, 547 U.S. 150 (2006), the Secretary of the Interior is responsible for allocating waters of the mainstream of the Colorado River among California, Arizona, and Nevada (the "Lower Basin States") exclusively through contracts with the Secretary and determining deliveries to water users within the Lower Basin States under the complex set of rules referred

to as the "Law of the River." *See* United States Bureau of Reclamation, *Law of the River*, available at http://www.usbr.gov/lc/region/pao/lawofrvr.html (last visited March 13, 2015); *see also*, *Bryant v. Yellen*, 447 U.S. 352 (1980). In order to promote and facilitate greater predictability and efficiency in the management of the Lower Colorado River waters, the Secretary has undertaken a number of Management Actions that the Navajo challenge.

Relevant to this appeal, the Navajo's Second Amended Complaint (Doc. 281) challenges: 1) the Colorado River Interim Surplus Guidelines ("Surplus Guidelines"; 2:ER:141-143 (First Claim for Relief ¶¶ 60-67)) and 2) the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead ("Shortage Guidelines"; 2:ER:143-144 (Second Claim for Relief ¶¶ 68-71)). The Surplus Guidelines guide the Secretary's determination of the conditions under which the Secretary may declare the availability of surplus water for use within the Lower Basin States and, among other things, the extent to which the water requirements of mainstream Colorado River water users in the Lower Basin States can be met in any year. 2:ER:135-136 (¶36). The Shortage Guidelines are used to manage Lake Powell and Lake Mead under low reservoir and drought conditions, so as to provide greater predictability of Colorado River water supplies. 2:ER:138 (¶41).

The Navajo's prayer for relief seeks a declaration that the adoption or implementation of these and other Management Actions failed to comply with NEPA, and/or were arbitrary and capricious in violation of the Administrative Procedures Act ("APA"), and that the actions be set aside or declared unlawful. Supp. Excerpts of Record of Appellees Coachella Valley Water District, Imperial Irrigation District, and the Metropolitan Water District of Southern California ("Cal SER"), Vol. 1, p.3 [Prayer for Relief ¶¶ A-D]. More specifically, the Navajo allege that the challenged Management Actions violate NEPA because the environmental analyses undertaken for each program fail to account for the Navajo's alleged unquantified water rights in the Lower Basin of the Colorado River (2:ER:142-144 (¶¶ 67, 71)), and ask the court to "set[] aside the water from the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members (1:CalSER:5 [Prayer for Relief ¶ L]).

Because of the arid climate in Southern California and limited local water supplies, the California Parties must import water into the region, including water from the Colorado River, to fulfill their water delivery obligations. For this purpose, each of the California Parties holds a contract, under the Boulder Canyon Project Act, with the Secretary for the delivery of Colorado River water. Thus, the California Parties are vitally interested in the Navajo's claims and requested relief. Indeed, the Second Amended Complaint alleges that granting Colorado River

water rights to the Navajo will upset and conflict with water rights of the California Parties and other Colorado River water users: "The failure to confirm, estimate, or otherwise quantify the Navajo Nation's rights to Colorado River water creates a great degree of uncertainty for all Colorado River water users, because the water that these users now rely on under the programs challenged herein might not be available in the future if Navajo Nation rights are recognized." 2:ER:132-133 (¶30).

B. Navajo's Colorado River Water Rights Claim

The heart of the Navajo's case is that the Federal Defendants owe to them, as a trust obligation, water from the mainstream of Colorado River for use on their reservation lands. (Navajo Brief, pp. 4-5.) While the Navajo may have a claim for water generally under *Winters v. United States*, 207 U.S. 564 (1908), the Navajo have not alleged any *existing* rights to Colorado River water. Indeed, no court has ever recognized a Navajo right to Colorado River water. While the Navajo's need for additional water may be genuine, that need does not transform a speculative future claim into a legally cognizable right to water of the Colorado River.

1. The Adjudication of Colorado River Water Rights in the Lower Basin

The 1922 Colorado River Compact apportioned waters of the Colorado River System between the Upper Basin and Lower Basin,[2] but did not further

[2] The Colorado River Compact defined the term "Colorado River System" to mean "that portion of the Colorado River and its tributaries within the United

divide the apportioned waters within each Basin. After a major dispute arose between Arizona and California over their respective apportionments in the Lower Basin, Arizona commenced an action in 1952 within the original jurisdiction of the United States Supreme Court. The case, *Arizona v. California*, United States Supreme Court Case No. 8, Original,[3] spanned fifty-four years between the State of Arizona's motion for leave to file a bill of complaint in 1952, and the entry of the Consolidated Decree in 2006. *Arizona v. California*, *supra*, 547 U.S. 150 (2006). During that fifty-four year period, the Court comprehensively and finally adjudicated many issues regarding the rights and entitlements to waters of the mainstream of the Colorado River in the Lower Basin, and translated those rulings into the injunctions in the Consolidated Decree. What is relevant for this proceeding is that: (1) *Arizona v California* adjudicated rights to the mainstream of the Colorado River in Arizona above Lake Mead and below Lee Ferry, which is where the Navajo now claim to have Colorado River water rights; (2) the final Consolidated Decree did not recognize any Navajo rights in the mainstream of the Colorado River and (3) the Supreme Court's adjudication in *Arizona v. California*

States." 2:ER;154 (Colorado River Compact, Art. II (a)). The "Lower Basin" means "those parts of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry." *Id.*(Art. II (g).)

[3] The docket for the case is available on the U.S. Supreme Court's website by using "22o8" as the case number for the docket search.

was intended to be a complete and final resolution of rights to the mainstream of the Colorado River in the Lower Basin.

2. The 1963 Opinion and 1964 Decree in *Arizona v. California*

The Supreme Court's 1963 decision in *Arizona v. California*, 373 U.S. 546, held that the apportionment of the Colorado River water under the Boulder Canyon Project Act included not just the mainstream of the Colorado River below Lake Mead, but extended to the entire mainstream of the Colorado River in the Lower Basin, including the portion of the river above Lake Mead and below Lee Ferry. *Id.* at 590-591. The Court held that reserved water claims for Indian Reservations on the tributaries should be excluded from the litigation. *Id.* at 595. Thus, any Navajo claims to tributaries were carved out of the litigation, but not any claim the Navajo might have to the Colorado mainstream above Lake Mead and below Lee Ferry. The Court also adopted the "practicably irrigable acreage" standard for measuring the quantum of water rights, and held that "present perfected rights" included federal reserved water rights for Indian Reservations. *Id.* at 595-601.

The 1964 decree in *Arizona v. California*, 376 U.S. 340 (1964), incorporated these rulings and modified the definition of the "mainstream" to refer to "the mainstream of the Colorado River downstream from Lee Ferry." *Id.* at 340. The 1964 Decree also directed the States to submit lists of "present perfected rights" in waters of the Colorado River mainstream, and directed the United States to submit

a similar list with respect to claims for federal reserved rights within each State. *Id.* at 351-352. Article VII of the Decree also provided that the Decree would not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation," *id.* at 352-353, and Article IX of the Decree provided that parties may apply to amend the decree, and that the Court retained jurisdiction of the case for any modification or supplemental decree. *Id.* at 353.

3. Subsequent Determinations of Reservation Water Rights

Pursuant to Article VI of the 1964 Decree, the United States and the State parties reached agreement on the present perfected rights for federal reservations and filed a joint motion asking the Supreme Court to enter a supplemental decree confirming the present perfected rights submitted by the parties. The Court granted the motion, and entered the 1979 Supplemental Decree, *Arizona v. California*, 439 U.S. 419 (1979). The agreement and Supplemental Decree only included water right claims for the Yuma, Fort Mojave, Chemehuevi, Cocopah and Colorado River Indian Reservations. The Supplemental Decree did not recognize or confirm any reserved water rights for the Navajo Reservation even though the scope of the adjudication covered the mainstream of the Colorado River in Arizona below Lee Ferry and above Lake Mead.

While the joint motion for a supplemental decree was under submission, the United States filed a motion to modify the decree to claim additional reserved

water rights in the Colorado River mainstream for various Indian reservations. The Navajo Reservation was not one of these reservations.

The claims for additional Indian reserved rights fell into two categories: (1) water for so-called "omitted lands" which were irrigable lands within the 1964 recognized boundaries of reservations but which had not been asserted in previous proceedings, see *Arizona v. California*, 460 U.S. 605, 612-628 (1983); and (2) water for "boundary lands" which were irrigable lands whose inclusion within reservation boundaries had been disputed or was uncertain in the past, but whose status as part of the reservation had supposedly been resolved. *Id.* at 628-641.

The Court ruled on the "omitted" and "boundary" lands claims in 1983 in *Arizona v. California, supra*, 460 U.S. 605. The Court ruled that notwithstanding the retention of jurisdiction in Article IX to modify the decree, principles of res judicata and finality barred any further claims for additional water for "omitted" Indian reservation lands. *Id.* at 615-628. The Court stressed the importance of having certainty of water rights in the Western United States. *Id.* at 620. The Court also noted that an increase in reserved Indian water rights would necessarily diminish the water rights of other parties, *id.* at 620-621; that advances in irrigation technology making it feasible to irrigate an area that previously was infeasible to irrigate was not a sufficient "change in circumstances" to justify modifying the decree, *id.* at 625 n. 18; and that the Court would not revisit a water right

determination to reconsider a factual determination that had been previously made. *Id.* at 624-625. The Court also held that even though the Tribes were not parties to former proceedings, they had been represented by the United States and were bound by the previous water right determinations. *Id.* at 626-628. Turning to the claims for the "boundary" lands, the Court held that where there had been a final judicial determination of reservation boundaries, claims for such lands were permissible. *Id.* at 628-641. But where the final boundary determinations had been by administrative action which had not yet been subject to judicial review, such claims would not be recognized. *Id.* The Court then entered a supplemental decree incorporating the water rights for certain boundary lands. *Arizona v. California*, 466 U.S. 144 (1984).

The remaining *Arizona v. California* proceedings, which went on for another 20 years, dealt with disputed reservation boundary issues for the Colorado River, Fort Mohave and Fort Yuma Indian Reservations, and water right claims for those disputed boundary lands. When those controversies were finally resolved, the Court issued its 2006 Consolidated Decree. No claims for reserved water rights in the mainstream of the Colorado River for the Navajo Reservation were ever made throughout the 50 year course of the litigation.

V. SUMMARY OF THE ARGUMENT

As the plaintiff invoking federal court jurisdiction, the Navajo have the burden of satisfying the three-pronged test for Article III standing. To discharge that burden, the Navajo must demonstrate: (1) "injury-in-fact" to a legally cognizable Navajo interest; (2) "causation" between the action complained of and the injury to the Navajo, and (3) "redressability;" *viz.*, a showing that the judicial remedy sought by the Navajo is substantially likely to redress the Navajo's alleged injury.

The Navajo's standing argument is that while the Navajo do not currently have any adjudicated or recognized Colorado River water rights, the Colorado River Management Actions have established a "system of reliance" by Colorado River water users on their existing Colorado River water rights which will make it harder for the Navajo to secure any Colorado River water rights in the future. Under this standing theory, the Navajo's alleged injury-in-fact is not to an existing, legally cognizable Navajo interest but instead to an injury to the *possibility of securing* some type of water right in the future. This standing theory fails to satisfy any of the three requirements for constitutional standing.

First, an alleged "injury" to the Navajo's future ability to secure Colorado River water rights in some unidentified, unknown proceeding is precisely the type

of speculative, future injury that has been found by the Supreme Court to be insufficient to support Article III standing.

Second, the Navajo's theory of standing relies upon long chains of causation and future actions by independent third parties, which make the causal link between the Management Actions being challenged, and the "injury" to the Navajo too attenuated and speculative to establish "causation."

Finally, the Navajo Nation has failed to show how this Court can grant relief that would redress any conceivable harm that the Navajo may have suffered. Ordering Reclamation to redo its NEPA compliance also would not provide any additional protection or benefits to the Navajo with regard to Colorado River water. In its Colorado River management actions, Reclamation has already committed to modifying the management actions to accommodate any future Colorado River water rights the Navajo may acquire. The Management Actions, regardless of the form they take, cannot affect the priority of any Navajo *Winters* rights. Nor do the management actions have any other adverse legal impact on whatever rights the Navajo may have to Colorado River water. Thus, forcing Reclamation to redo its NEPA compliance will not result in any greater protection of the Navajo's *Winters* rights in the management actions than there is now.

Moreover, apart from the standing problems facing the Navajo, the Supreme Court has retained jurisdiction in *Arizona v. California*. Consequently, this Court

lacks jurisdiction to decide if the Navajo have any water rights in the Colorado River. Instead, the Supreme Court is the exclusive forum to consider the propriety of any belated assertion of Colorado River water rights by the Navajo.

The requirements of standing and respect for the jurisdiction of the Supreme Court are not subject to "equitable" considerations or "balancing." Instead they are, on the one hand, the unwavering requirements of Article III of the Constitution and, on the other, the fundamental principle that a lower court does not attempt to exercise jurisdiction where jurisdiction has already been asserted by a higher court. Because the Navajo lack constitutional standing and because the Supreme Court has retained jurisdiction over the allocation of the waters of the Colorado River, the Navajo cannot seek as relief in this Court an adjudication of their Colorado River water rights. Instead, the Navajo must pursue that relief in the Supreme Court.

VI. ARGUMENT

A. Legal Standards for Standing

1. Constitutional Standing Requirements in General

Standing has both constitutional, and non-constitutional (or "prudential") dimensions. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The constitutional component of standing derives from Article III of the Constitution which limits the judicial power to "Cases" or "Controversies." "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing

to sue.'" *Clapper v. Amnesty International*, USA, 133 S. Ct. 1138, 1146 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 818 (1997)); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III."); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006) ("Article III standing …enforces the Constitution's case-or-controversy requirement." (Quoting *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 11 (2004))). Constitutional or Article III standing "is built on separation-of-powers principles [and] serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, *supra*, 133 S. Ct. at 1146.

> Three elements are required to establish constitutional standing:
>
> First, the plaintiff must have suffered an *injury in fact* – an invasion of a legally protected interest which is (a) concrete and particularized, or (b) actual and imminent, not conjectural or hypothetical. Second, there must be a *causal connection* between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the *injury will be redressed* by a favorable decision.

Lujan, *supra*, 504 U.S. at 560-561 (citations, quotation marks and ellipses omitted) (emphasis added); see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 103-104 (1998). ("This triad of injury in fact, causation, and redressability comprises the core of Article III's case-or-controversy requirement").

"Injury" for purposes of constitutional standing must be not only to a "judicially cognizable interest," *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663-2664 (2013), but it also must be "concrete, particularized and actual or imminent." *Clapper*, *supra*, 133 S. Ct. at 1147. While "injury" may be threatened, it "must be certainly impending" and "allegations of possible future injury are not sufficient." *Id*. (italics in original; internal quotations omitted). "Injury" also may not be based upon speculation, long chains of inference, and assumptions about how government actors will exercise their discretion in the future. See *Id*. at 1150 ("we have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment"); *DaimlerChrysler Corp.*, *supra*, 547 U.S. at 344-346. "[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute." *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009).

"The 'fairly traceable' and 'redressability' components of the constitutional standing inquiry were initially articulated by [the Supreme] Court as 'two facets of a single causation requirement.'" *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984) (citation omitted). The "fairly traceable" requirement "examines the causal connection between the asserted *unlawful conduct* and the *alleged injury*" and the "redressability" requirement "examines the causal connection between the *alleged injury* and the *judicial relief requested*." *Id.* (Emphasis added.)

2. Constitutional Standing for "Procedural Injury" Claims under NEPA

The "analysis of Article III standing is 'not fundamentally changed' by the fact that a petitioner asserts a 'procedural' rather than a 'substantive' injury." *Nuclear Information and Resource Service v. Nuclear Regulatory Commission*, 457 F. 3d 941, 949 (9th Cir. 2006) (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004). Thus, a plaintiff in a "procedural injury" case alleging non-compliance with NEPA must satisfy the same three constitutional standing requirements of injury-in-fact, causation and redressability.

In the NEPA context, injury in fact can be established using a three part test: a plaintiff must show that: "(1) the [agency] violated certain procedural rules; (2) these rules protect [a plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Nuclear Information and Resource Service*, *supra*, 457 F.3d at 949 (quoting *City of Sausalito*, *supra*, 386 F.3d at 1197); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 n. 2 (9th Cir. 2005) *cert. denied*, 548 U.S.903 (2006).

A plaintiff's "interest" in seeing that NEPA is complied with, and a resultant "injury" if NEPA is violated, does not, by itself, satisfy the "injury-in-fact" requirement for constitutional standing. Such "interest" and "injury" would not distinguish the plaintiff from any other citizen who has the same general interest in

having the government comply with the law and is insufficient to establish standing:

> We have consistently held that a plaintiff raising only a generally available grievance about government – claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large – does not state an Article III case or controversy.

Lujan, *supra*, 504 U.S. at 573-574. Consequently a plaintiff must show not just a procedural violation but that the violation harmed some specific, concrete interest of the particular plaintiff. As explained in *Summers*, *supra*, 555 U.S. at 496:

> Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. *But deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right in vacuo – is insufficient to create Article III standing*.

(Emphasis added.) See also *id*. at 501 (Kennedy, J., concurring) ("The procedural injury must 'impair a separate *concrete* interest,'" quoting *Lujan*, *supra*, 504 U.S. at 572.) (Emphasis added.) Applying this principle in the NEPA context, the Ninth Circuit has said:

> Whether substantive or procedural injury is alleged, a plaintiff must show a 'concrete interest' that is threatened by the challenged action. That is, for Article III purposes, we may recognize a 'procedural injury' when a procedural requirement has not been met, *so long as the plaintiff also asserts a 'concrete interest' that is threatened by the failure to comply with that requirement*.

> For example, a cognizable procedural injury exists when a plaintiff alleges that a proper [Environmental Impact Statement] has not been prepared under the National Environmental Policy Act *when the plaintiff also alleges a 'concrete' interest* – such as an aesthetic or recreational interest – *that is threatened by the proposed action*.

City of Sausalito, supra, 386 F. 3d at 1197. (Emphasis added.) See also *Ashley Creek Phosphate Co., supra*, 420 F.3d at 938 ("A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact.").

3. The Navajo's Discussion of Standing Requirements Is Flawed

The Navajo tries to reconfigure the Article III standing requirements in its discussion of the injury-in-fact requirement. The Navajo contend that NEPA and its regulations require Reclamation to evaluate impacts to tribal interests in trust resources generally, and because Reclamation failed to comply with this procedural requirement, the Navajo have standing to sue Reclamation for that procedural violation. See Navajo Brief, pp. 19-22; 23.

This is simply an argument that the Government's violation of a procedural requirement, by itself, satisfies the injury-in-fact requirement for standing – an argument expressly rejected in numerous Supreme Court and Ninth Circuit decisions. See *Summers, supra*, 555 U.S. at 496 (2009) ("deprivation of a procedural right without some concrete interest that is affected by the deprivation – a procedural right *in vacuo* – is insufficient to create Article III standing."); *Lujan*,

supra, 504 U.S at 571-574 (claim that Government violated procedural requirements, without more, states only a generalized grievance which could be made by any citizen and does not state an Article III case or controversy); *Laub v. United States DOI*, 342 F. 3d 1080, 1086 (2003) ("*Lujan* explicitly rejects procedural injury alone as sufficient to establish injury in fact"); *Wilderness Society v. Rey*, 622 F.3d 1251, 1260 (9th Cir. 2010) (In *Summers*, *supra*, "the Court said that procedural injury, standing on its own, cannot serve as an injury-in-fact."); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1354 (9th Cir. 1994) (stating that *Lujan* "rejected the lower court's holding that plaintiffs had standing merely because they suffered a 'procedural injury'"); *Ashley Creek Phosphate Co.*, *supra*, 420 F.3d at 938. (Emphases added.) The Navajo Nation must show not just a procedural violation, but that the violation adversely affects an identifiable, concrete, legally-cognizble interest of the Navajo which serves as the basis of its injury.

Another way that the Navajo tries to dodge its burden of demonstrating that a concrete, cognizable interest has been harmed by a procedural violation is through its use of the "geographic nexus" concept. According to the Navajo, they can establish that their concrete interests have been harmed based simply on the proximity or "geographic nexus" between its Reservation and the Colorado River, the subject of the management actions. See Navajo Brief, p. 22. This is a

distortion of the "geographic nexus" concept. A "geographic nexus" does not eliminate the Navajo Nation's burden to identify a concrete, legally-cognizable interest that has been harmed by an alleged NEPA procedural violation. See *Ashley Creek Phosphate Co.*, *supra*, 420 F.3d at 938-939; *Citizens for Better Forestry v. Unites States Dep't of Agric.,* 341 F.3d 961, 971 (9th Cir. 2003) (reversed on other grounds).

NEPA standing is not simply granted to those close to a proposed activity having standing, with others located further away deemed to lack standing. The Navajo Reservation may be next to the Colorado River but if the Colorado River management actions do not affect any concrete, cognizable interest of the Navajo, the geographic proximity of the Reservation to the Colorado River is irrelevant.

The Navajo also urge that standing requirements have been relaxed in NEPA cases and thus its burden is minimal. Navajo Brief, pp. 28-29. The Ninth Circuit has consistently required NEPA plaintiffs to prove up the traditional triad of injury-in-fact, causation, and redressability, in addition to the separate statutory standing requirements of the APA. See e.g., *Laub*, *supra*, 342 F.3d at 1085-1088; *Citizens for Better Forestry*, *supra*, 341 F.3d at 969-976; *Nuclear Information and Resource Service*, *supra*, 457 F.3d at 949-955. Indeed, the Ninth Circuit has dismissed NEPA challenges because of a failure to show causation or redressability. See *Bell v. Bonneville Power Administration*, 340 F.3d 945, 951-

952 (9th Cir. 2003); *Nuclear Information and Resource Service*, *supra*, 457 F.3d at 955. In short, these Article III standing requirements have teeth, particularly when, as here, causation and redressability depend upon the actions of third parties not before the court.

B. The Navajo Cannot Establish Injury-in-Fact

The only interest that the Navajo rely upon to establish injury-in-fact is the Navajo's purported "right" to water from the Colorado River in the Lower Basin. But as previously discussed herein (pp.5-10), no court has recognized, confirmed or adjudicated any right of the Navajo to water from the mainstream of the Colorado River in the Lower Basin. This fact is fatal to their constitutional standing.

If a plaintiff claims that government action harms a particular "right" of the plaintiff thereby causing injury-in-fact, but the plaintiff, in fact, does not have such a right, then the plaintiff lacks standing. This simple, logical proposition is recognized in numerous cases. See *State of Utah v. Babbitt*, 137 F.3d 1193, 1207 (10th Cir. 1998) ("We first look to the relevant provisions of FLPMA to determine whether Plaintiffs have a right to participate in the inventory process. If we conclude that Plaintiffs *do not have such a right*, then Plaintiffs' claimed *injury based on the denial of this right is without merit* and they consequently *lack standing*…" (Emphasis added.)); *Arjay Associates, Inc. v. Bush*, 891 F.2d 894,

897-898 (Fed. Cir. 1989). ("[Plaintiffs] argue that the statute results in an economic injury to them (elimination of their opportunity to sell imported TMC products) … We hold that *[plaintiffs] lack standing* because the *injury* they assert is to a *nonexistent right* to continued importation of a congressionally excluded product… Because [plaintiffs] have no right to conduct foreign commerce in products excluded by Congress, they have in this case no right capable of judicial enforcement and *have thus suffered no injury* capable of judicial redress… Thus [plaintiffs] *fail to meet the Constitutional requirements of standing*." (Emphasis added.)).

In *Consejo de Desarrollo Economico de Mexicali, AC v. United States*, 438 F. Supp. 2d 1194 (D. Nev. 2006), vacated and remanded with instructions to dismiss, 482 F.3d 1157 (9th Cir. 2007), the plaintiffs who had Mexican property interests in Baja California challenged the All-American Canal (AAC) Lining Project, contending that lining the All-American Canal with concrete would reduce the flow of seepage water from the AAC into Mexico, thereby harming their alleged "right" to AAC seepage water. The district court held that under the 1944 Water Treaty between the United States and Mexico, the plaintiffs did not have any individual right to seepage water from the AAC, therefore, the plaintiffs had not suffered an injury-in-fact from the AAC lining project, and lacked standing:

> Plaintiff CDEM's Counts 1 through 4 are based on its alleged rights to seepage water derived from the Colorado River. Allocation of

> seepage water from the Colorado River is governed by the 1944 Water Treaty. Because the 1944 Water Treaty provides no individual rights and does not contain provisions which would allow individuals to sue under the Treaty, CDEM cannot assert rights under the Treaty. Accordingly, Plaintiff CDEM has *failed to assert an injury in fact* that this Court may redress and lacks standing under the 1944 Water Treaty.

Id. at 1201 (internal citations omitted; emphasis added).

In *Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 884 (9th Cir. 2001), plaintiff Indian Tribes sued various tobacco companies alleging, among other things, that they had been wrongly excluded from receiving the financial benefits of the Master Settlement Agreement (MSA) between tobacco companies and various States. The Ninth Circuit upheld dismissal of the Tribes' lawsuit for failure to demonstrate injury-in-fact. The Ninth Circuit ruled that the Tribes had failed to establish any right to participate in the settlement funds received through the MSA, therefore, the exclusion of the Tribes from the settlement had not caused them any injury, and they consequently lacked standing:

> The Tribes also claim they were injured by their exclusion from the benefits of the MSA, presumably the billions of dollars to be disbursed to the Settling States. The complaint states that "there is no provision … for providing any benefits, economic or otherwise, to Native American Tribes."… [B]ecause the Tribes do not allege facts showing that they were eligible to be included in the MSA, they have not demonstrated that they were injured because they do not receive payments from the agreement…. The Tribes have failed to show injury in fact by reason of their failure to receive payments under the MSA.

Id. at 884.

In *Fort Mojave Indian Tribe v. Killian*, 2004 U.S. Dist. LEXIS 31215 (D. Ariz. Mar. 30, 2004), the Fort Mojave Indian Tribe sued Arizona taxing agencies and officials challenging Arizona's taxation of a Calpine power plant on the Fort Mojave Reservation. The Tribe's constitutional standing depended upon whether the Tribe had a property interest in the Calpine plant such that Arizona's taxation of the Calpine plant caused injury-in-fact to the Tribe. After reviewing the lease documents between Calpine and the Tribe, the court concluded that the record failed to show that the power plant belonged to the Tribe for purposes of determining whether the Tribe had been injured by the Arizona tax assessment, and that therefore, the Tribe had suffered no injury-in-fact and lacked standing to challenge the Arizona tax. *Id.* at *22-31.

In *Bingham v. Commonwealth of Massachusetts*, 616 F.3d 1 (1st Cir. 2010), the Mashpee Wampanoag Tribe brought a takings claim against Massachusetts and a town, alleging that certain Massachusetts statutes enacted in the 19th Century had taken property given to the Tribe in earlier 17th Century deeds and grants. The First Circuit upheld dismissal of the complaint for lack of constitutional standing because the plaintiffs had not shown a present-day property interest in the land that was taken. Although there had been an earlier grant to the Tribe, there was no showing that the grants were of individual inheritable property interests that had been passed down through the generations, or that these particular plaintiffs held

such interests. Consequently, the plaintiffs lacked a cognizable property interest, and could not show injury to support their standing. See *Id.* at 5-7.

In *Winnemem Wintu Tribe v. U.S. Dept. of the Interior*, 725 F.Supp.2d 1119 (E.D.Cal. 2010), the Winnemem Wintu Tribe alleged that Department of the Interior employees had damaged cultural heritage sites of the Tribe, and violated various laws. One of the interests that the Tribe relied upon to show injury for standing was its sovereign interests as a federally-recognized tribe. The district court, however, found that the Tribe was not currently a federally-recognized Tribe. Consequently, the Tribe could not establish injury-in-fact based on harm to the interests of a federally-recognized Tribe. *Id.* at 1133; see also *Hoopa Valley Tribe v. United States*, 597 F.3d 1278 (Fed. Cir. 2010) (Hoopa Tribe, which was challenging distribution of settlement funds to the Yurok tribe, had received its share of the settlement funds, and retained no entitlement to the remainder of the funds; therefore, the Hoopa Tribe had no legally protected interest in the funds, did not suffer any injury in fact from the Government's distribution of the funds to others, and consequently lacked standing.).

All of these cases stand for the proposition that if a plaintiff is basing his or her standing on harm to a "right" or an "interest" which could turn out to be

ephemeral, or nonexistent, and one which the plaintiff does not actually have, then the plaintiff has not established injury-in-fact, and lacks constitutional standing.[45]

Here, the Navajo do not have any confirmed right to Colorado River water in the Lower Basin. All they have is a potential future claim to Colorado River water. Because the Navajo cannot demonstrate that they presently have a cognizable interest in Colorado River water rights that has been harmed by the challenged Management Actions, the Navajo cannot show "injury in fact," and lack constitutional standing.

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[4] See also *Tarrant Regional Water District v. Herman*, 656 F.3d 1222 (10th Cir. 2011), *affirmed*, 133 S. Ct. 2120, 186 L.ED.2d 153 (2013). While *Tarrant* was decided on ripeness grounds, it is instructive. At issue was whether Tarrant's prospective purchase of water from the Apache Tribe gave rise to a justiciable controversy. In its opinion dismissing Tarrant's claims for lack of ripeness, the district court explained that the Apache Tribe's water rights were too uncertain and too dependent upon future events: "[I]t is very much an open question whether the Tribe has any water rights at all which are pertinent to [Tarrant's] needs and, if so, what those rights are. It is no doubt true, as [Tarrant] argues, that Indian tribes have reserved rights in water in some circumstances, by treaty or otherwise. But recognizing that general principle or possibility does not mean that the Apache Tribe has such rights and any meaningful answer to that question is likely to be the result of major and separate litigation all by itself." *Id.* at *10-12.

[5] In contrast with these cases where the plaintiff lacked a cognizable property interest and consequently could not establish injury-in-fact, is *Churchill County v. Babbitt*, 150 F.3d 1072 (9th Cir. 1998). There, the plaintiffs had standing because they did, in fact, own or manage land that would be affected by the challenged action. See *id.* at 1079 ("County and City have produced affidavits establishing that they possess and/or manage lands that would be adversely affected by the [challenged government action]" and "County and City each own or manage land that is in the same watershed as the lands designated for purchase by the [challenged] Plan.").

Given the undisputed fact that the Navajo do not currently have any Colorado River water rights, the Navajo's injury-in-fact theory is based on an assumption that the challenged Colorado River Management Actions will make it more difficult for the Navajo to establish a Colorado River water right in the future. (Navajo Brief, pp. 26-27.) This "increased-difficulty-of-obtaining-future-water-rights" theory of injury fails for numerous reasons.

First, if the Navajo currently lack a sufficient water right interest for standing—as they most certainly do, for the reasons described above – then the fact that they may be even less likely to obtain such rights in the future hurts rather than helps their standing.

Second, it is well-established that the injury for standing must be "imminent," and not speculative and occurring at some unknown point in the future. As explained in the recent decision in *Clapper*, *supra*, 133 S. Ct. at 1147:

> To establish Article III standing, an injury must be concrete, particularized, and actual or imminent . . . .
>
> . . . .
>
> Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is *certainly impending*. Thus, we have repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible future* injury are not sufficient.

(Citations and quotation marks omitted; emphasis in original.) There is a significant Article III purpose behind the imminence requirement. As explained in

Lujan, *supra*, 504 U.S. at 564 n. 2: "we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all." (Emphasis added.)

The Navajo's "increased-difficulty-of-obtaining-future-water-rights" theory is precisely the type of future, speculative injury that does not support standing. The speculative chain of events that must occur before the Navajo suffer any future injury involves the following: the Colorado River Management Actions lead to increased "reliance" upon Colorado River water by current water right holders; which lead to increased opposition to a Navajo claim for Colorado River water rights; which affects some future unknown judicial or legislative proceeding regarding Navajo water rights; which leads to a Colorado River water right determination for the Navajo that is different from what it otherwise would have been if there had been proper NEPA compliance for the Management Actions. Similar claims of speculative future injury have been rejected in the cases.

In *Glover River Organization v. U. S. Dept. of the Interior*, 675 F.2d 251 (10th Cir. 1982), the plaintiffs contended that the listing of a certain fish species as threatened under the Endangered Species Act, which had been done without proper NEPA compliance, harmed the plaintiffs by making it less likely that Congress would appropriate money for dams and flood control projects on the river that the fish inhabited. The appellate court found that the connection between the listing of

the fish and the injury to the plaintiffs of dissuading Congress from appropriating money for dams was too attenuated for standing. Even if the listing did influence Congress' decisions about dam building, "any effect of the listing on Congress would be *political*, not legal, in nature" and "[t]hat is *not the kind of consequence* flowing from the challenged action that will support standing." *Id*. at 255 (emphasis added).

In *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912 (D.C. Cir. 2003), the plaintiff Tribe contended that the transfer of land from the Corps of Engineers to the State of South Dakota would make it less likely that the land would receive protection of Native American cultural resources under federal statutes, thereby harming the Tribe. The D.C. Circuit found that the Tribe's claim that federal protection of cultural resources would diminish in the future was pure speculation. *Id*. at 917. The court noted that "[t]he Tribe presents no reason to believe that enforcement will diminish; it simply asserts the possibility that the Secretary will be less willing or less able to enforce federal law if the Corps no longer has title to the property," and that this "unsupported conjecture" in the factual circumstances of the case "does not constitute injury in fact." *Id.*

In *St. Croix Chippewa Indians of Wisconsin v. Salazar*, 384 Fed. Appx. 7; 2010 U.S.App. LEXIS 13864 (D.C. Cir. July 6, 2010), the St. Croix Chippewa Band alleged that the Department of the Interior had taken certain procedural

actions which made it "less likely that its pending casino application would be approved." *Id.* at 8. The district court found that this alleged injury was "too speculative to confer standing." *Id.* The D.C. Circuit affirmed dismissal of the lawsuit for lack of standing after the Tribe abandoned on appeal its claim of injury based on the reduced likelihood of approving the casino. *Id.*

In *Prestage Farms, Inc. v. Board of Supervisors*, 205 F.3d 265 (5th Cir. 2000), the plaintiff hog producer contended that a local county zoning ordinance restricting hog farm activities would harm its ability in the future to purchase hogs from small hog farms that were affected by the restrictive ordinance. The Fifth Circuit ruled that the injury to the plaintiff from the challenged ordinance "depends on the occurrence of a number of uncertain events" and that the "[plaintiff's] future injury under these circumstances is too conjectural and hypothetical to provide Article III standing." *Id.* at 268.

In *United Transportation Union v. Interstate Commerce Commission*, 891 F.2d 908 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990), petitioner labor union challenged an Interstate Commerce Commission order making it easier to establish "interlocking directorates" where an officer or director of one rail carrier holds a similar position with another rail carrier. The union contended that relaxing restrictions on interlocking directorates would lead to financial manipulation, and the financial wrecking of rail carriers that would harm labor interests. The D.C.

Circuit explained the chain of speculation behind the plaintiff's future injury, and why it was insufficient to support standing:

> [The labor union] is asserting that the ICC's new rule will lead to the creation of at least one interlocking directorate that would not have been created but for the [new rule], that one of those additional interlocking directorates will result in some anti-competitive behavior or a railroad bankruptcy that would not have occurred but for the interlocking directorate; and that a member of the [labor union] will thereby suffer an injury. We believe that this chain of allegations – no link of which is of the type that we must "accept as true" – is fatally speculative and therefore does not suffice to confer standing.

Id. at 913.

Even with the relaxation of the "imminence" of the injury requirement for procedural violation claims, the Navajo still cannot establish injury-in-fact. The example of the relaxed "imminence" of injury in footnote 7 of the *Lujan* decision was the construction of a dam which would take years to complete, and which would cause injury to the plaintiff only when construction was completed. Thus, the types of "future injury" permissible under *Lujan* are situations where there is certainty (or reasonable certainty) that the injury will occur, but instead of occurring now it will occur in the future, at the conclusion of some presently-known and identified process. A dam, a large housing project, an office building all take years to plan and construct, and the adverse environmental effects of a dam diverting water, or a housing project generating increased traffic, or an office building blocking views are all cognizable "future injuries" because they

necessarily follow from the activity being undertaken, and will cause specific, concrete injury when an identified construction process is complete. This type of future injury is different from the Navajo's future injury.

Here the injury to the Navajo not only lies in the future, but whether the injury will even occur is uncertain, and dependent upon future unknown events. The Navajo have no Colorado River water rights at present and whether they will obtain such rights in the future so as to be able then to suffer an "injury" is unknown. Similarly, whether the Navajo will face any increased opposition in pursuing a claim for Colorado River water rights in some unknown future judicial, legislative or administrative proceeding not only lies in the future, but whether it will even occur is unknown. And whether any opposition to the Navajo's pursuit of water rights will be due to the Management Actions or other completely unrelated factors is also unknown. *Lujan* recognizes standing based on "future injury" where the injury is reasonably certain to occur. But here, the Navajo's future injury is not only uncertain; it may never occur. The type of "future injury" asserted by the Navajo thus fails to satisfy the injury-in-fact requirement which is a "hard floor of Article III jurisdiction." *Summers*, *supra*, 555 U.S. at 497.

C. The Navajo Cannot Establish the Causation or "Fairly Traceable" Requirement for Standing

The Navajo's standing theory of an "increased-difficulty-of-obtaining-future-water-rights" is not just a future speculative injury insufficient for standing,

but the theory also fails to satisfy the causation and redressability requirements for standing. More specifically, the Navajo rely upon both (1) long chains of causation which are little more than speculation and surmise, and which in places fail to identify any causal mechanism for the effect postulated; and (2) highly speculative motivations, actions, and responses of independent third parties.

The Navajo's "increased-difficulty-of-obtaining-future-water-rights" theory can be broken down into a three-part causal chain, namely: 1) that alleged non-compliance with NEPA led to a series of Colorado River Management Actions that otherwise would not have been adopted if NEPA had been complied with; 2) that these Management Actions led to a "system of reliance" by Colorado River water users on their water rights that would not otherwise have occurred; and 3) that this "system of reliance" has made it more difficult for the Navajo to obtain Colorado River water rights in some future proceeding or process. Assuming, arguendo, that the first link in the Navajo chain of causation exists, i.e., that but for noncompliance with NEPA, the challenged Management Actions would not have been adopted. Our focus will be on the other two links in the causal chain.

1. The Linkage Between Colorado River Management Actions and the "System of Reliance" on Colorado River Water Rights

The Navajo do not explain the specific causal mechanism whereby the Management Actions have led to the "system of reliance" by other Colorado River water users on their existing Colorado River water rights. Nor is there any

explanation why other obvious factors that might be driving the reliance of water users on their water rights, such as increased population growth in the Southwest, climate change and increased likelihood of drought, changes in river hydrology, and reliance on the legal decrees recognizing those water rights, are not the main drivers of "reliance" on one's water rights instead of the Management Actions.

Numerous cases have found that a causal chain is too speculative when, as here, there are other factors that may be causing a plaintiff's injury other than the action being challenged in the litigation. For example, in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976) plaintiff advocacy groups for indigents challenged a tax revenue ruling allowing favorable tax treatment to hospitals that only provided limited services to indigents. The plaintiffs contended that the favorable tax treatment being given to hospitals that did little for indigents was encouraging hospitals to deny access to indigents, thereby harming the plaintiff's interest in ensuring such access. The Supreme Court noted that there might be other factors besides tax considerations that motivate hospitals to refuse to accept indigent patients. *Id.* at 42-43. For example, a hospital still might deny access to indigents regardless of the tax consequences to avoid "the undetermined financial drain of an increase in the level of uncompensated services." *Id.* at 43. The response of hospitals to changes in tax treatment might also vary widely depending upon the financial condition of the

hospital, and how important tax considerations were. *Id.* at 43-44. These other factors made it too speculative to conclude that the tax policy being challenged had "caused" a reduction in indigent access to hospitals that harmed the plaintiffs, and that invalidating the tax policy would lead to any significant improvement in that access thereby redressing the plaintiffs' injury. *Id.* at 43-45.

In *Allen v. Wright*, *supra*, 468 U.S. 737, parents of black children attending public schools in a school district being desegregated, alleged that tax exemption status for private schools that were racially discriminatory helped support racially discriminatory schools and harmed their right to receive an education in a desegregated school. The Court found that causation was not satisfied because whether or not private schools would go out of business or change their racially discriminatory policy if they lost their tax exemption was too speculative. *Id.* at 757-758. Moreover, whether parents would withdraw their children from private school and switch to a public school if they lost their tax exemption was unknown, and whether enough private schools would be affected to make any noticeable change in the racial composition of schools in the district was also highly speculative. *Id.* The Court concluded: "[t]he links in the chain of causation between the challenged Government conduct and the asserted injury are far too weak for the chain as a whole to sustain respondents' standing." *Id.* at 759.

In *Warth*, *supra*, 422 U.S. 490, persons of low and moderate income who wanted to live in a particular town alleged that the town's zoning laws used minimum property size, minimum setbacks and other devices to exclude persons of low and moderate income from living in the town. The Supreme Court found however, that the record indicated that the plaintiffs' inability to reside in the town could have been the result of factors other than the zoning, like the unsuitability of the low and moderate housing projects being built there, and the nature of the local housing market. *Id.* at 505-507. The chain of causation between the zoning being challenged and the inability to buy a home in the town was too uncertain and tenuous given other possible causal factors in play.

In *Bell*, *supra*, 340 F.3d 945 (9th Cir. 2003), a ratepayer utility advocacy group and its members challenged curtailment amendments in power contracts between the Bonneville Power Administration (BPA) and its Direct Service Industry (DSI) customers. The curtailment amendments allowed BPA to be excused from selling power to the DSIs under older contracts. The plaintiffs alleged that the curtailment amendments caused environmental damage because environmentally-damaging DSIs would likely have gone out of business but for the curtailment amendment program. The plaintiffs also alleged that BPA's payment of funds to the DSIs in the curtailment amendment program depleted money from BPA's budget making it more difficult for BPA to meet its environmental

responsibilities. The Ninth Circuit found that even with the relaxed causation standards in NEPA cases, the plaintiffs had failed to establish causation for standing. *Id.* at 950-952. It was too speculative to conclude that the DSIs would have shut down but for the curtailment amendment program, or that DSIs would not have been able to find power from some other provider. *Id.* Moreover, rather than depleting the BPA's environmental services budget, it was just as plausible that the curtailment amendments enabled BPA to save money, thereby furthering BPA's environmental efforts. *Id.* at 951. See also *Glover River Organization*, *supra*, 675 F.2d at 254-255 (in challenge to Endangered Species Act listing of species for failure to comply with NEPA, plaintiffs who were interested in having flood control projects built on the river and who alleged that the listing made it less likely that Congress would fund such projects in the future failed to establish causation for standing because the chain of causation was too attenuated).

Here, the alleged causal connection between the challenged Management Actions and the "reliance" of Colorado River water users on their water rights is particularly weak. In 1983, long before any of the Management Actions had been adopted, the Supreme Court recognized that Colorado River water users had developed a heavy reliance on their water rights. See *Arizona v. California*, *supra*, 460 U.S. at 621, 626. Thus, it is implausible that later Management Actions can be the "cause" of a reliance on water rights that pre-dated and pre-existed those

Management Actions. See *Clapper*, *supra*, 113 S. Ct. at 1152 (noting that because the Government was conducting surveillance before the challenged statute was adopted, it is difficult to see how certain injuries complained of could be traceable to adoption of the statute). Instead, the more logical inference is that the "reliance" of Colorado River users on their water rights stems not from later Management Actions but from the judicial confirmation of legal rights to use Colorado River water, and is thus attributable to an entirely different causal factor than the one alleged in the Navajo Nation's complaint.

Moreover, the assumption that Management Actions increase "reliance" on consumption of water, and increase resistance to new water claimants is counter-intuitive. The purpose of the Management Actions is to increase the efficiency, predictability, and reliability of Colorado River supply through storage options, water banking, water transfers, and surplus and shortage criteria. Thus, Management Actions would tend to reduce competition and antagonism among water users, not increase it. Yet, there is no explanation in the Complaint how and by what mechanism measures such as improved storage, banking and transfer options will increase resistance to Navajo claims for Colorado River water that is not already present wholly apart from whatever Management Actions are in place.

Take for example, the Shortage Guidelines. These are alleged to establish a "system of reliance" and make it "increasingly difficult" for the Navajo to obtain

future Colorado River water rights. (2:ER:140 (Second Amended Complaint, ¶45); Navajo Brief, p. 27.) The Shortage Guidelines identify the amount of water that will be available to Colorado River water right holders as the level of Lake Mead drops lower during a drought or shortage condition. See 73 Fed Reg. 19873, 19886 (April 11, 2008). (Notice of Availability of Record of Decision for the adoption of the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead). Before the Shortage Guidelines were adopted, there were no criteria that provided this information to Colorado River water right holders who consequently did not know the "particular reservoir conditions under which the Secretary would reduce the annual amount of water available for consumptive use from Lake Mead to the Lower Division states" and "the frequency or magnitude of any potential future annual reductions in their water deliveries." *Id.* at 19875. The Shortage Guidelines were intended to remedy this, and provide Colorado River water rights holders "a greater degree of predictability with respect to the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions." *Id.* at 19876.

In addition to providing greater predictability, the Shortage Guidelines also create a framework whereby Colorado River water right holders can create additional water supply, called Developed Shortage Supply ("DSS"), to help weather droughts and shortages. *Id.* at 19888-19889. DSS can be created either by

purchasing water rights on Colorado River Tributaries and adding that water to the Colorado River system, or adding other non-Colorado River water to the Colorado River system. *Id.* at 19888.

The Shortage Guidelines also set up a program for Intentionally Created Surplus ("ICS") whereby Colorado River water right holders, through extraordinary water conservation measures, improvements in water system efficiency, purchases of Tributary water, or addition of non-Colorado River water to the Colorado River system, can build up an account of stored water to draw upon in later years. *Id.* at 19886-19888. The purposes of the ICS program, among others, are to "increase the water supply in Colorado River system reservoirs, through the creation, delivery and use of ICS," to "help minimize or avoid shortages to water users in the Lower Basin," and to "increase the surface elevations of both Lake Powell and Lake Mead to higher levels than would have otherwise occurred." *Id.* at 19883. In administering these programs, the Secretary of the Interior sought to ensure that there be no adverse impacts to third parties. *Id.* at 19882 ("the Secretary will only approve the creation, delivery and use of ICS in a manner that is fully consistent with the provisions of the [*Arizona v. California*] Consolidated Decree"), 19883 ("the Secretary will ensure that implementation of the ICS mechanism does not infringe on the rights of any third party who is a Contractor"); *Id.* ("the Secretary anticipates entering into delivery contracts with

any person or persons intending to create ICS or DSS" and such contracts must meet all the Guideline requirements for such plans), 19884 (Shortage Guidelines are not intended to and do not "[a]ffect the rights of any holder of present perfected rights or reserved rights").

There is no apparent explanation how or why the Shortage Guidelines would cause Colorado River water rights holders to rely more on their water rights than before adoption of the Guidelines, or to oppose a Navajo water right claim more vigorously than before. By providing a means to augment Colorado River mainstream water supply, by increasing predictability of reservoir operations, and by improving the reliability of water supply, the Shortage Guidelines would tend to reduce competition and antagonism among Colorado River water users and claimants, rather than exacerbate it.

2. The Linkage Between the "System of Reliance" and the Increased Difficulty of Obtaining Navajo Water Rights

The causal connection between the "system of reliance" supposedly created by the Management Actions, and the Navajo's ultimate injury, namely, the increased difficulty of obtaining Navajo water rights in the future, has an even murkier causal architecture. There are no specific allegations of how or why the likelihood of the Navajo obtaining water rights will vary depending upon what type of shortage or surplus criteria, or banking and storage rules there are for the Colorado River, other than the wholly conclusory, boilerplate allegation, repeated

for all of the Management Actions, that the "system of reliance" will "make allocation of Colorado River water to the Navajo Nation … increasingly difficult." No specifics are alleged explaining what is meant by "increasingly difficult" or how and why it is caused. Such an opaque allegation is insufficient to allege any causal connection. See generally *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333 (D.C. Cir. 1999) (plaintiffs, who relied on their interest in hunting and fishing for standing, and who alleged that as a result of the actions being challenged they were "deprived of their ability to hunt and fish" and that their "ability to enjoy the full abundance of wildlife will be diminished if a remedy is not provided" made only vague, nonspecific allegations that could not support standing).

Importantly, the supposed causal connection between the "system of reliance" generated by the Management Actions, and the Navajo's alleged injury of increased opposition to its water right claim, involve the discretionary actions of two separate sets of third party actors. The first set are existing Colorado River water right holders who supposedly would be less motivated to oppose the Navajo's future water right claims if different "Management Actions" had been adopted. The second set of third party actors are the presently unknown, unnamed judicial, executive, and legislative bodies or officials who, in some future proceeding, will be taking into account the Management Actions and the "system of reliance" that exists, and will be more disposed to recognize the Navajo's water

rights if certain Management Actions had been adopted rather than others. Overall, the burden that the Navajo have of establishing causation is to show that absent the current Management Actions, it will be substantially more likely that they will face less opposition from existing water right holders in their quest for water rights, and a greater likelihood of having their water rights recognized in some future judicial, executive or legislative proceeding or process.

The courts have repeatedly held that chains of causation like those advanced here by the Navajo that depend upon speculation and surmise about the actions and motivations of independent third parties fail to satisfy the causation requirement. See *Clapper*, *supra*, 133 S. Ct. at 1150 (noting reluctance of courts "to endorse standing theories that rest on speculation about the decisions of independent actors"); *DaimlerChrysler Corp.*, *supra*, 547 U.S. at 344-346 (where establishing injury depends on speculation how legislators respond to the government action being challenged, then such speculation cannot support standing); *Simon*, *supra*, 426 U.S. at 41-42 (Under Article III, a federal court can only redress an injury "that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.").

Not only does the causation alleged here rely on independent, intervening third party actions, but it is unknown who the third parties might be who would be entertaining the Navajo's future water rights claim. *A fortiori*, when the third

parties upon which causation depends have not even been identified and will not be known until some point in the future, it is impossible for the Navajo to establish causation for standing. See *Levine v. Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009) ("any pleading directed at the likely actions of third parties or of parties under separate and independent statutory obligations would almost necessarily be conclusory and speculative").

In *DaimlerChrysler Corp.*, *supra*, 547 U.S. 332, taxpayers challenged local tax credits for a car manufacturer, alleging that the tax credits would deplete funds in the state treasury for other beneficial programs, and would lead to increased taxes upon them to make up for the tax credits given to the car manufacturer. The Supreme Court found that this was too speculative a chain of events to support injury in fact because there was no certainty that the Legislature would reallocate budget funds in the way that the plaintiffs predicted, or that the Legislature would reduce the tax burden on plaintiffs if the tax credit was invalidated:

> Plaintiffs' alleged injury is also 'conjectural or hypothetical' in that it depends on how legislators respond to a reduction in revenue, if that is the consequence of the credit. Establishing injury requires speculating that elected officials will increase a taxpayer-plaintiff's tax bill to make up a deficit; establishing redressability requires speculating that abolishing the challenged credit will redound to the benefit of the taxpayer because legislators will pass along the supposed increased revenue in the form of tax reductions. Neither sort of speculation suffices to support standing.

Id. at 344 (internal quotations omitted). The Court went on to conclude that the taxpayers had failed to establish the "imminence" of any injury, and that the taxpayers lacked Article III standing. *Id.* at 345-346.

D. The Navajo Cannot Satisfy the Redressability Requirement For Standing

There is no dispute that redressability requirements are relaxed in NEPA cases. Instead of having to show that a new NEPA analysis would lead to different Colorado River management actions, it is sufficient that a new NEPA analysis could influence the selection of management actions. E.g., *Hall v. Norton*, 266 F.3d 969, 977 (9th Cir. 2001). But that does not solve the redressability problem in this case. That problem is that even if Reclamation conducts a new NEPA analysis that evaluates the Navajo's "needs" for water from the Colorado River, and the impact of possible management actions on the ability of the United States and the Navajo to obtain that water in the future, Reclamation cannot use that information to change the status quo regarding the Navajo's rights to Colorado River water.

Redoing the NEPA analysis also would not increase the protection accorded Navajo *Winters* rights because Reclamation has *already committed* to modifying the management actions to accommodate any new judicially-confirmed Colorado River water rights that the Navajo may obtain in the future. See 2:ER:121 (Final EIS, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, Vol. 1 stating: "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"). As Reclamation correctly noted, the currently-adopted management actions do not prejudice any of the attributes of the *Winters* reserved rights that the Navajo now hold. See 1:CalSER:16 (Final EIS, Colorado River Interim Surplus Criteria, p. 3.14-10); 2:ER:121 (Final EIS, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, Vol. 1, p. 4-249). The challenged management actions have no impact on the priority of the Navajo's *Winters* rights and of course, the mere adoption of the management actions cannot cause a lapse in any Navajo *Winters* rights. So, even if the NEPA analysis is redone and modifications are made to the management actions, that will not result in any greater protection for the Navajo *Winters* rights than they have now. In that regard, this case is unlike an ordinary NEPA case where a judicial order to redo a NEPA analysis can cause the Government to reconfigure a proposed project and provide some tangible benefit to a NEPA plaintiff's concrete interests. Here, the Government has already ensured that the project will not impair any current rights the Navajo may have, and the Government is powerless to redo the project and grant any further Colorado River water rights which the Navajo seek.

It is no answer for the Navajo to say that ordering a new NEPA analysis will obviously "remedy" Reclamation's failure to evaluate the impacts of the management actions on the Navajo's water supply needs, and the ability to satisfy those needs in the future. Just as a procedural violation, by itself, is insufficient to establish injury-in-fact under Article III, so too remedying a procedural violation without showing how the remedy benefits a separate concrete interest of the plaintiff (apart from the plaintiff's "interest" in having procedures followed), is insufficient to establish redressability.

This case has the same redressability problems that were present in *Am. Rivers, Inc. v. United States Army Corp of Eng'rs.*, 421 F.3d 618 (8th Cir. 2005). There, an Indian Tribe alleged that the Corps of Engineers' selection of a reservoir management plan was defective because it failed to select the plan that best furthered Indian interests:

> The [Tribe] claims that the Corps has failed to choose the [Flood Control Act] and [Endangered Species Act]-compliant reservoir management plan that best spurs economic self-sufficiency for the [Tribe's] members and protects the [Tribe's] cultural resources. The [Tribe] seeks a court order to enjoin the Corps to correct these 'deficiencies.'

Id. at 637. The 8th Circuit held that redressability was not shown, and that the Tribe lacked standing because of the vagueness of what was required to remedy the supposed injury:

> [I]f we were to do exactly as the [Tribe] requests in its amended complaint and order the Corps to re-formulate the 2004 Master Manual in a manner that, given the [Flood Control Act] and [Endangered Species Act] constraints, would best 'spur Tribal self sufficiency and economic development and protect Indian trust assets,' *it is not at all clear what outcome could be adjudged to comply with our order*. The [Tribe] simply has not set forth a 'concrete and particularized' injury that is likely to be redressed by such an order. *Lujan*, 504 U.S. at 560-561. Therefore, we affirm the dismissal of this claim for lack of Article III standing.

Id. (Emphasis added.)

The remedy sought by the Navajo here – an order that Reclamation select Colorado River management actions that do not interfere with the Navajo's need for and ability to obtain future water rights in the Colorado River – is strikingly similar to the vague and amorphous relief sought in *Am. Rivers, Inc.* This Court would have the same difficulty the 8th Circuit had in determining whether there had been compliance with its remand order. An order directing Reclamation to evaluate the impacts of proposed management actions on Navajo *Winters* rights when Reclamation does not know whether any Winters water right would attach to the mainstream Colorado River or attach to other sources, what quantity is involved, and what future proceeding it would be sought in, would be an exercise in sheer speculation and conjecture that is unlikely to further any valid NEPA environmental purpose.

A key question the Navajo have avoided in this case is how redoing the NEPA analysis will redress any Navajo injury when that re-analysis 1) would not

increase the protection afforded Navajo *Winters* rights under the current management actions; 2) would not result in any quantification or "improvement" in *Winters* rights that would bring the Navajo closer to being able to divert Colorado River water; 3) when a remand would impose such a vague and amorphous mandate that Reclamation would have difficulty knowing what to do, and the Court would be hard pressed to determine if there had been compliance or not; and 4) when simply claiming to have "remedied" a procedural violation, without more, is insufficient to establish redressability.

There also are major practical difficulties with the NEPA remand sought by the Navajo. Ordering Reclamation to evaluate the impact of the management actions on the "ability" of the Navajo and the United States to obtain *Winters* rights to Colorado River water in some unknown, future judicial or legislative forum is hardly a clearly defined task. Without a defined Navajo water right, Reclamation would have to make predictions about future legal/political scenarios without knowing basic facts such as where the water is coming from and how much water is involved. Nor are there clear criteria by which this Court can judge whether Reclamation complied with a remand order, and adequately evaluated the impact of the Colorado River management actions on the Navajo's ability to obtain an unknown quantity of water from unknown water sources in an unknown future proceeding. And after Reclamation redid the NEPA analysis, the Navajo would be

no closer to securing legal recognition of Colorado River water rights or obtaining Colorado River water than it is today. In these circumstances, the Navajo has entirely failed to carry its burden of showing that the relief sought will redress injury to any concrete, cognizable interest of the Navajo.

E. The Supreme Court Has Retained Jurisdiction in *Arizona v. California* Therefore This Court Lacks Jurisdiction to Determine Whether the Navajo Have Any Colorado River Water Rights

In order for this Court to find that the Navajo have a legally protected interest sufficient to support standing, it would have to find that the Navajo have an actual right to water from the mainstream of the Lower Colorado River. However, this Court lacks jurisdiction to decide if the Navajo have any water rights in the Colorado River.

The Supreme Court's proceeding in *Arizona v. California* lasted more than half a century, involved hundreds of witnesses, thousands of exhibits, tens of thousands of pages of transcript, numerous reports of Special Masters, and multiple Supreme Court decisions.[6] The litigation culminated in the 2006 Consolidated Decree that comprehensively adjudicated the Colorado River water rights of the

[6] In the first phase of the *Arizona v. California* litigation leading up to the 1963 decision, the Special Master "conducted a trial lasting from June 14, 1956 to August 28, 1958, during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled. Following many motions, arguments, and briefs, the Master in a 433-page volume reported his findings, conclusions, and recommended decree." *Arizona v. California*, *supra*, 373 U.S. at 551. After extensive briefing, the case was argued twice in the Supreme Court for a total of more than 22 hours. *Id.* Proceedings continued for another 40 years after that.

Lower Basin States, the United States, Indian Tribes, and private parties. The Navajo were represented in that litigation by the United States, and they are bound by the judgment therein. *Arizona v. California*, *supra*, 460 U.S. at 605, 615, 626-627 (1983). The existence of the *Arizona v. California* proceeding in the Supreme Court presents four major reasons that this Court lacks jurisdiction to determine whether the Navajo have water rights in the mainstream of the Colorado River.

First, the Supreme Court has retained jurisdiction in *Arizona v. California*. This Court should not entertain issues and claims that properly can be addressed by the Supreme Court under its retained jurisdiction. Article IX of the Supreme Court's 2006 Consolidated Decree describes the scope of the retained jurisdiction:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court *retains jurisdiction* of this suit for the purpose of any order, direction, or *modification of the decree*, or any *supplementary decree*, that may at any time be deemed proper *in relation to the subject matter* in controversy.

Arizona v. California, *supra*, 547 U.S. at 166-167.[7] The reservation of jurisdiction is broadly stated, referring to "any order," "direction" or "modification of the decree," as well as "supplemental decree[s]." Rather than being limited to modification of just the terms of the decree, the retention of jurisdiction extends,

[7] The initial 1964 Decree contained the same "reservation of jurisdiction" provision. See *Arizona v. California*, *supra*, 376 U.S. at 353. Other supplemental decrees contained reservations that were worded slightly differently. See *Arizona v. California*, *supra*, 439 U.S. at 421 (stating that Article IX is not affected by the list of present perfected rights); *Arizona v. California*, *supra*, 466 U.S. at 146 (retaining jurisdiction to order further proceedings and enter supplemental decrees as appropriate); *Arizona v. California*, 531 U.S. 1, 3 (2000) (same).

without limitation as to time, to the broader "subject matter in controversy." To be sure, *Arizona v. California, supra*, 460 U.S 605 made clear that Article IX is governed by general principles of finality and repose, *id.* at 619, and does not "permit retrial of factual or legal issues that were fully and fairly litigated" in the proceeding. *Id.* at 621. Instead, the reservation of jurisdiction is intended to accommodate "changed circumstances," *id.* at 619, 622, or "unforeseen issues not previously litigated." *Id.* at 619.

It should be remembered that *Arizona v. California* is a case within the original and *exclusive* jurisdiction of the Supreme Court under 28 U.S.C. section 1251(a). *California v. Arizona*, 440 U.S. 59, 61 (1979). Given these circumstances, the place to resolve whether the Navajo are entitled to assert a claim to the mainstream of the Colorado River, notwithstanding the *Arizona v. California* proceeding and final decree, is the Supreme Court, not this Court.

Second, if this Court were to determine that the Navajo have Colorado River water rights, that determination would undermine the rights that the California Parties and other water right holders have under the existing *Arizona v. California* decree. The Court explained in *Arizona v. California*, *supra*, 460 U.S. at 620-621, how the recognition of additional Indian reserved water rights, which must be satisfied first in a Colorado River shortage, *necessarily* harm and diminish the rights of other holders of Colorado River water rights:

> A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system. "In the arid parts of the West …claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." If there is no surplus of water in the Colorado River, *an increase in federal reserved water rights will require a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators*." As Special Master Tuttle recognized, "[not] a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications." Not only did the Metropolitan Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, *an enlargement of the Tribe's allocation cannot help but exacerbate potential water shortage problems for these projects and their States*.

(Internal quotation omitted; emphasis added.) Thus, if this Court were to adjudicate the Navajo's claim to Colorado River water rights, that could potentially upset the priorities and amount of water available to those with existing rights under the *Arizona v. California* decree. Jurisdiction to modify rights and priorities in the *Arizona v California* decree lies exclusively with the Supreme Court, not this Court. *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("Wyoming's claim derives not from [water] rights under individual contracts but from the decree, *and the decree can be modified only by this Court*." (Emphasis added.)).

Third, leaving aside the fact that the adjudication of Colorado River water rights among the Lower Basin States is, by statute, within the exclusive jurisdiction of the Supreme Court, retention of jurisdiction provisions are generally construed

to preserve exclusive jurisdiction in the court that issued the judgment or decree, or that approved the settlement agreement, over which jurisdiction was retained. See *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-1013 (9th Cir. 1999) ("Not only is the district court's jurisdiction continuing, it is exclusive."); *Flanigan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) ("The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment. Such an arrangement would potentially frustrate the federal court's purpose. [citation omitted] It would also impose an uncomfortable burden on the state judge, to determine what the federal judge meant.").

For one court to adjudicate issues within the retained jurisdiction of another court, let alone the highest court in the land, is inappropriate. See *Lapin v. Shulton, Inc.*, 333 F.2d 169 (9th Cir. 1964), *cert. denied*, 379 U.S. 904 (1964) ("[F]or a nonissuing court to entertain an action for such relief would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court… to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances. We need not go so far as to hold that these considerations … deprive all courts other than the issuing court of

jurisdiction in such a case as this. We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there."); see also *Treadaway v. Academy of Motion Picture Arts and Sciences*, 783 F.2d 1418, 1421-1422 (9th Cir. 1986); *Mann Manufacturing, Inc. v. Hortex, Inc*., 439 F.2d 403, 407-408 (5th Cir. 1971); *McGinley v. Houston*, No. 03-0563-WS-M, 2003 U.S.Dist. LEXIS 14947, at *16-25 (S.D.Ala. August 27, 2003), *affirmed*, 361 F.3d 1328 (11th Cir. 2004).

Fourth, under the "prior exclusive jurisdiction" doctrine, the first court to obtain jurisdiction over a *res* exercises exclusive jurisdiction over actions involving the *res*. *United States v. Alpine Land & Reservoir Co., supra*, 174 F.3d at 1013; *State Engineer v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003). This has been described as a "mandatory jurisdictional limitation." *Id.* at 810. Water adjudications, like that in *Arizona v. California*, are in the nature of an *in rem* proceeding involving a *res*. *Nevada v. United States,* 463 U.S. 110, 143-144 (1983); *United States v. Alpine Land & Reservoir Co., supra*, 174 F.3d at 1014. In water right cases, the "zero-sum nature of the resource," *State Engineer, supra*, 339 F.3d at 811, where an entitlement by one diminishes the amount remaining for others, makes it

particularly important to avoid multiple adjudications by different courts. That is what would happen here if this Court were to entertain the Navajo's claim for Colorado River water rights.

In sum, this Court lacks jurisdiction to consider the Navajo's requested relief of "setting aside the water from the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members. 1:CalSER:5 (Complaint, Prayer for Relief ¶L.) This also further undermines the Navajo's standing because if this Court lacks jurisdiction to grant the relief sought by the plaintiff, then the plaintiff's injury cannot be redressed by the court, and the plaintiff lacks standing. See *Judicial Watch, Inc. v. National Archives and Records Administration*, 845 F.Supp. 2d 288, 305 (D.D.C. 2012) ("[B]ecause the Court is unable to provide the remedy plaintiff seeks … the Court is unable to redress plaintiffs claim. Accordingly, the Court will grant defendant's motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of standing."), *appeal dismissed*, No. 12-5144, 2012 U.S. App. LEXIS 17168 (D.C. Cir. August 1, 2012). See also *Mayfield v. United States*, 599 F.3d 964, 972-973 (9th Cir. 2010) (given the limited remedy available to the plaintiff following a settlement, the court could not order return or destruction of materials seized from the plaintiff, therefore, the plaintiff's injury could not be redressed, and the plaintiff lacked standing), *cert. denied*, 131 S. Ct. 503 (2010).

VII. CONCLUSION

For the foregoing reasons, the California Parties urge this Court to affirm the decision of the District Court to dismiss the First and Second Claims for Relief.

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Dated: March 16, 2015

Respectfully submitted,

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STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

Dated: March 16, 2015

METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA

By: /s/Adam C. Kear
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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. Rule 32(a)(7)(B), this attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,845 words as measured by the word count program on Microsoft Word 2010, which is the word processing program used to prepare this brief.

Dated: March 16, 2015

METROPOLITAN WATER DISTRICT
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ADDENDUM

ADDENDUM

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CONSTITUTION OF THE UNITED STATES OF AMERICA
ARTICLE III. JUDICIAL POWER

Sec. 1. Supreme Court and inferior courts--Judges and compensation.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Sec. 2, Cl 1. Subjects of jurisdiction.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Sec. 2, Cl 2. Jurisdiction of Supreme Court

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Sec. 2, Cl 3. Trial by jury.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Sec. 3, Cl 1. Treason.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Sec. 3, Cl 2. Punishment of Treason

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

*** Current through PL 113-296, approved 12/19/14 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV. JURISDICTION AND VENUE
CHAPTER 81. SUPREME COURT

§ 1251. Original jurisdiction

(a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

(b) The Supreme Court shall have original but not exclusive jurisdiction of:
(1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties;
(2) All controversies between the United States and a State;
(3) All actions or proceedings by a State against the citizens of another State or against aliens.

TITLE 43. PUBLIC LANDS
CHAPTER 12A. BOULDER CANYON PROJECT
BOULDER CANYON PROJECT ACT

§ 617. Colorado River Basin; protection and development; dam, reservoir, and incidental works; water, water power, and electrical energy; eminent domain

For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned [in *43 USCS §§ 617-617t*], is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for sad main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however*, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes.

§ 617a. "Colorado River Dam Fund"

(a) Creation of fund; purpose; receipts and expenditures under control of the Secretary of the Interior. There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) Advancements to fund by the Secretary of the Treasury; allocation; repayment; interest. The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act.[.] Of this amount the sum of $ 25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62 1/2 per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act [*43 USCS § 617c*]. If said sum of $ 25,000,000 is not repaid in full during the period of amortization, then 62 1/2 per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.

(c) Limitation on use made of advancements. Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) Unpaid interest on advancements; charge on fund; rate of interest. The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) Money in fund in excess of amount needed; certification of fact; disposition. The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

§ 617b. Authorization of appropriations

There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $ 242,000,000, of which $ 77,000,000 (October 1983 price levels) shall be adjusted plus or minus such amounts as may be justified by reason of ordinary fluctuations of construction costs as indicated by engineering cost indices applicable to the type of construction involved herein. Said $ 77,000,000 represents the additional amount required for the uprating program and the visitor facilities program.

§ 617c. Condition precedent to taking effect of provisions

(a) Ratification by interested States of Colorado River compact; agreements for apportionment of waters. This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof [*43 USCS § 617l*], and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act [enacted Dec. 21, 1928] then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President of public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada, 300,000 acre-feet and to the State of Arizona 2,800,000

acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Agreements for revenues to meet expenses of construction, operation, and maintenance of works. Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 [*43 USCS § 617a(b)*] for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18 3/4 per centum of such excess revenues and to the State of Nevada 18 3/4 per centum of such excess revenues.

§ 617d. Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4 [*43 USCS § 617c(b)*]. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act [*43 USCS § 617c(a)*]. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) Duration of contracts for electrical energy; price of water and electrical energy to yield reasonable returns; readjustments of prices. No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) Renewal of contracts for electrical energy. The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Applications for purchase of water and electrical energy; preferences. Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided however*, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Transmission lines for electrical energy; use; rights of way over public and reserved lands. Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

§ 617e. Uses to be made of dam and reservoir; title in whom; leases, regulations; limitation on authority

The dam and reservoir provided for by section 1 hereof [*43 USCS § 617*] shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however*, That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act [*43 USCS § 617d*] relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission [Federal Energy Regulatory Commission], which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission [Federal Energy Regulatory Commission] is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona and California until this Act shall become effective as provided in section 4 herein [*43 USCS § 617c*].

§ 617f. Canals and appurtenant structures; transfer of title; power development

The Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof.

§ 617g. Colorado River compact as controlling authority in construction and maintenance of dam, reservoir, canals, and other works

(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof [*43 USCS § 617d*] prior to the date of such approval and consent by Congress.

§ 617h. Lands capable of irrigation and reclamation by irrigation works; public entry; preferences

Lands found to be practicable of irrigation and reclamation by irrigation works and withdrawn under the Act of March 6, 1946 (*43 U.S.C. 617(h)*) shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided*, That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve [Navy Reserve], shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; *43 U.S.C., sec. 433*) [*43 USCS § 433*]; and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this chapter: *Provided further*, That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further*, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided.

§ 617i. Modification of existing compact relating to Laguna Dam

Nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

§ 617j. [Omitted]

§ 617k. Definitions

"Political subdivision" or "political subdivisions" as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands", and the Acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal Water Power Act," as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled "An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes," and the Acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this Act shall include water uses defined as "domestic" in said Colorado River compact.

§ 617l. Colorado River compact approval

(a) Approval by Congress. The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes," [unclassified] is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) Rights in waters of Colorado River and tributaries; Colorado River compact as controlling. The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

(c) Patents, grants, contracts, concessions, etc.; Colorado River compact as controlling. Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this Act, the Federal Water Power Act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) Conditions and covenants referred to herein; nature; how and by whom availed of in litigation. The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

§ 617m. Reclamation law applicable

This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

§ 617n. Projects for irrigation, generation of electric power, and other purposes; investigations and reports

The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $ 250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act [*43 USCS § 617a*], for such purposes.

§ 617o. Officials of ratifying States; authority to act in advisory capacity; access to records

In furtherance of any comprehensive plan formulated hereafter [after December 21, 1928] for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act [*43 USCS §§ 617c, 617d, 617m*], and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

§ 617p. Claims of United States; priority

Except as provided in title 11 of the United States Code [*11 USCS §§ 1* et seq.], claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

§ 617q. Effect on authority of States to control waters within own borders

Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

§ 617r. Consent given States to negotiate supplemental compacts for development of Colorado River

The consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

§ 617s. Recognition of rights of Mexico to Colorado River waters

Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

§ 617t. Short title

The short title of this Act shall be "Boulder Canyon Project Act.".

§ 617u. Lease of reserved lands in Boulder City, Nevada; disposition of revenues

The Secretary of the Interior is hereby authorized and empowered, under such rules and regulations as he may prescribe, to establish rental rates for the lease of reserved lands of the United States situate within the exterior boundaries of Boulder City, Nevada, and, without prior advertising, to enter into leases therefor at not less than rates so established and for periods not exceeding fifty-three years from the date of such leases: *Provided further,* That all revenues which may accrue to the United States under the provisions of such leases shall be deposited in the Treasury and credited to the Colorado River Dam fund established by section 2 of the Boulder Canyon Project Act [*43 USCS § 617a*].

§ 617v. [Repealed]

Washington on the structure and implementation of the Yakima River Basin Water Conservation Program. In consultation with the State, the Yakama Nation, Yakima River basin irrigators, and other interested and related parties, six members are appointed to serve on the CAG.

The basin conservation program is structured to provide economic incentives with cooperative Federal, State, and local funding to stimulate the identification and implementation of structural and nonstructural cost-effective water conservation measures in the Yakima River basin. Improvements in the efficiency of water delivery and use will result in improved streamflows for fish and wildlife and improve the reliability of water supplies for irrigation.

FOR FURTHER INFORMATION CONTACT: Ms. Dawn Wiedmeier, Deputy Area Manager, Yakima River Basin Water Enhancement Program, telephone 509–575–5848, extension 213.

Certification

I hereby certify that Charter renewal of the Yakima River Basin Conservation Advisory Group is in the public interest in connection with the performance of duties imposed on the Department of the Interior.

Dirk Kempthorne,

Secretary of the Interior.

[FR Doc. E8–7728 Filed 4–10–08; 8:45 am]

BILLING CODE 4310–MN–P

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of Availability of the Record of Decision for the adoption of Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead.

SUMMARY: The Department of the Interior, acting through the Bureau of Reclamation, published a **Federal Register** notice on November 2, 2007 (72 FR 62272) which informed the public of the availability of the final environmental impact statement on the proposed adoption of specific Colorado River Lower Basin shortage guidelines and coordinated reservoir management strategies to address the operations of Lake Powell and Lake Mead, particularly under low reservoir conditions, through 2026. We are now notifying the public that the Secretary of the Interior signed the Record of Decision (ROD) on December 13, 2007. The text of the ROD is found below.

FOR FURTHER INFORMATION CONTACT: Terrance J. Fulp, Ph.D., at (702) 293–8500 or e-mail at *strategies@lc.usbr.gov;* and/or Randall Peterson at (801) 524–3633 or e-mail at *strategies@lc.usbr.gov.*

The ROD is electronically available on Reclamation's project Web site at: *http://www.usbr.gov/lc/region/programs/strategies.html.* Alternatively, a compact disc or hard copy is available upon written request to: Regional Director, Lower Colorado Region, Bureau of Reclamation, Attention: BCOO–1005, P.O. Box 61470, Boulder City, Nevada 89006–1470; fax at (702) 293–8156; or e-mail at *strategies@lc.usbr.gov.*

Dated: March 28, 2008.

Dirk Kempthorne,

Secretary, Department of the Interior.

Record of Decision; Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (December 2007)

Recommending Official: Robert Johnson, Commissioner, Bureau of Reclamation, December 13, 2007.

Approved: Dirk Kempthorne, Secretary of the Department of the Interior, December 13, 2007.

Record of Decision; Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead Final Environmental Impact Statement (November 2007)

I. Introduction

The Colorado River Basin (Basin) is in the eighth year of drought—the worst eight-year period in over a century of continuous recordkeeping. Reservoir elevations have declined over this period and the duration of this ongoing, historic drought is unknown. This is the first long-term drought in the modern history of the Colorado River, although climate experts and scientists suggest droughts of this severity have occurred in the past and are likely to occur in the future. The Colorado River provides water to two nations, and to users within seven western states. With over 27 million people relying on the Colorado River for drinking water in the United States, and over 3.5 million acres of farmland in production in the Basin, the Colorado River is the single most important natural resource in the Southwest.

The Secretary of the Interior (Secretary) has a unique role on the Colorado River—charged with management of a vast system of dams and reservoirs that have provided water for the development of the Southwest.

Under these conditions, conflict over water is unsurprising and anticipated. Declining reservoir levels in the Basin led to interstate and inter-basin tensions. As the agency charged with management of the Colorado River, the Department of the Interior (Department) had not yet developed operational rules for the full range of operations at Lake Powell and Lake Mead because these types of low-reservoir conditions had simply not yet occurred.

Against this background, at the direction of the Secretary, the Department initiated a public process in May of 2005 to develop additional operational guidelines and tools to meet the challenges of the drought in the Basin. While water storage in the massive reservoirs afforded great protection against the drought, the Department set a goal to have detailed, objective operational tools in place by the end of 2007 in order to be ready to make informed operational decisions if the reservoirs continued to decline.

During the public process, a unique and remarkable consensus emerged in the basin among stakeholders including the Governor's representatives of the seven Colorado River Basin States (Basin States). This consensus had a number of common themes: encourage conservation, plan for shortages, implement closer coordination of operations of Lake Powell and Lake Mead, preserve flexibility to deal with further challenges such as climate change and deepening drought, implement operational rules for a long—but not permanent—period in order to gain valuable operating experience, and continue to have the federal government facilitate—but not dictate—informed decision-making in the Basin.

Today, this Record of Decision (ROD) constitutes the Department's final decision after facilitating, analyzing, and considering public input over the past two and one-half years, during which the ongoing drought continued to focus nationwide attention on the Basin. A broad range of considerations have been analyzed, involving water supply, environmental protection, hydropower production, and recreation—all benefits that flow from the management of the Colorado River.

This document is the ROD of the Department of the Interior, regarding the Preferred Alternative for Colorado River

Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead (Guidelines). The Secretary is vested with the responsibility of managing the mainstream waters of the lower Colorado River pursuant to federal law. This responsibility is carried out consistent with applicable federal law.

The Bureau of Reclamation (Reclamation), the agency that is designated to act on the Secretary's behalf with respect to these matters, is the lead federal agency for the purposes of the National Environmental Policy Act. The Final Environmental Impact Statement—*Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*, dated October 2007 (FES–07–37) (Final EIS), was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, the Council on Environmental Quality's (CEQ's) Regulations for Implementing the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] parts 1500 through 1508), Department of the Interior Policies, and Reclamation's NEPA Handbook. The Final EIS was filed with the Environmental Protection Agency (EPA) on October 26, 2007 and noticed by EPA (72 FR 62229) and Reclamation (72 FR 62272) in the **Federal Register** on November 2, 2007.

The Final EIS was prepared by Reclamation to address the formulation and evaluation of specific interim guidelines for shortage determinations and coordinated reservoir operations, and to identify the potential environmental effects of implementing such guidelines. The Final EIS addresses the environmental issues associated with, and analyzes the environmental consequences of various alternatives for specific interim guidelines. The alternatives addressed in the Final EIS are those Reclamation determined would meet the purpose of and need for the federal action and represented a broad range of the most reasonable alternatives.

The Bureau of Indian Affairs (BIA), Fish and Wildlife Service (FWS), National Park Service (NPS), Western Area Power Administration (Western) and the United States Section of the International Boundary and Water Commission (USIBWC) are cooperating agencies for purposes of assisting with the environmental analysis in the Final EIS.

The BIA has responsibility for the administration and management of lands held in trust by the United States for American Indians (Indian) and Indian tribes located within the Basin. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure, and economic development are all part of the BIA's responsibility.

FWS manages four national wildlife refuges along the Colorado River. Among its many other key functions, the FWS administers and implements federal wildlife laws, protects endangered species, manages migratory birds, restores nationally significant fisheries, conserves and restores wildlife habitat such as wetlands, and assists foreign governments with international conservation efforts.

The NPS administers areas of national significance along the Colorado River, including Glen Canyon National Recreation Area, Grand Canyon National Park, and Lake Mead National Recreation Area. The NPS conserves natural and cultural resources and administers visitor use, and also grants and administers concessions for the operation of marinas and other recreation facilities at Lake Powell and Lake Mead, as well as concessions' operations along the Colorado River between Glen Canyon Dam and Lake Mead.

Western markets and transmits power generated from the various hydropower plants located within the Basin operated by Reclamation. Western customers include municipalities, cooperatives, public utility and irrigation districts, federal and state agencies, investor-owned utilities, and Indian tribes located throughout the Basin.

The USIBWC is the United States component of a bi-national organization responsible for administration of the provisions of the February 3, 1944 Treaty between the United States and Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande (1944 Treaty), which includes the Colorado River waters allotted to Mexico, protection of lands along the Colorado River from floods by levee and floodway construction projects, resolution of international boundary water sanitation and other water quality problems, and preservation of the Colorado River as the international boundary. The International Boundary and Water Commission (IBWC) consists of the United States Section and the Mexican Section, which have their headquarters in the adjoining cities of El Paso, Texas and Ciudad Juarez, Chihuahua, respectively.

II. Decision

The recommendation is the approval of the following federal action: The adoption of specific interim guidelines for Lower Basin shortages and coordinated operations of Lake Powell and Lake Mead, as provided below in Section XI. These interim Guidelines are based upon the Preferred Alternative analyzed in the Final EIS, and include several operational refinements as a result of public input, described below in Section VII. The interim Guidelines would be used each year by the Department in implementing the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (Long-Range Operating Criteria or Operating Criteria or LROC), through issuance of the Annual Operating Plan for Colorado River Reservoirs (AOP). The Guidelines would remain in effect for determinations to be made through 2025 regarding water supply and reservoir operating decisions through 2026, as provided below in Section 8 of the Guidelines.

The Preferred Alternative proposes:

- Discrete levels of shortage volumes associated with Lake Mead elevations to conserve reservoir storage and provide water users and managers in the Lower Basin with greater certainty to know when, and by how much, water deliveries will be reduced in drought and other low reservoir conditions;
- A coordinated operation of Lake Powell and Lake Mead determined by specified reservoir conditions that would minimize shortages in the Lower Basin and avoid the risk of curtailments in the Upper Basin;
- A mechanism to encourage and account for augmentation and conservation of water supplies, referred to as Intentionally Created Surplus (ICS), that would minimize the likelihood and severity of potential future shortages; and
- The modification and extension of the Interim Surplus Guidelines (66 Fed. Reg. 7772, Jan 25, 2001) (ISG) through 2026.

III. Background

The Secretary, acting through Reclamation, is responsible for water management throughout the western United States. Reclamation's authority is limited throughout the west by the limiting provisions of Reclamation law, beginning with the Reclamation Act of 1902.

The Secretary also has a broader and unique legal role as he manages the lower Colorado River system in

accordance with federal law, including the Boulder Canyon Project Act of 1928, the 1963 Decision of the U.S. Supreme Court in Arizona v. California, the 2006 Consolidated Decree of the U.S. Supreme Court in Arizona v. California (Consolidated Decree), the Colorado River Basin Project Act of 1968 (CRBPA), the LROC, and the Grand Canyon Protection Act of 1992, and other applicable provisions of federal law. Within this legal framework, the Secretary makes annual determinations regarding the availability of water from Lake Mead by considering various factors, including the amount of water in system storage and predictions for natural runoff. The CRBPA directed the Secretary to propose and adopt criteria: ''In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, * * * for the coordinated long-range operation of the reservoir constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act.''

Pursuant to the CRBPA, the narrative provisions of LROC are utilized by the Secretary, on an annual basis, to make determinations with respect to the projected plan of operations of the storage reservoirs in the Basin. The AOP is prepared by Reclamation, acting on behalf of the Secretary, in consultation with representatives of the Basin States and other parties, as required by federal law. In the AOP, with respect to operations of Hoover Dam, the Secretary is required to determine when Normal, Surplus, or Shortage conditions occur in the lower Colorado River, based on various factors including storage and hydrologic conditions in the Basin.

As described in the Final EIS:

- A ''Normal Condition'' exists when the Secretary determines that sufficient mainstream water is available to satisfy 7.5 million acre-feet (maf) of annual consumptive use in the Lower Division states (Arizona, California, and Nevada). If a state will not use all of its apportioned water for the year, the Secretary may allow other states of the Lower Division to use the unused apportionment, provided that the use is authorized by a water delivery contract with the Secretary.
- A ''Surplus Condition'' exists when the Secretary determines that sufficient mainstream water is available for release to satisfy consumptive use in the Lower Division states in excess of 7.5 maf annually. The water available for excess consumptive use is surplus and is distributed for use in Arizona, California, and Nevada pursuant to the terms and conditions provided in the ISG. The current provisions of the ISG are scheduled to terminate in 2016. In general terms, the ISG link the availability of surplus water to the elevation of Lake Mead. When Lake Mead is full and Reclamation is making flood control releases, surplus supplies are unlimited. As Lake Mead's elevation drops, surplus water amounts are reduced, and ultimately eliminated. The ISG also link surplus availability to continued progress by California in reducing its agricultural use of water to benchmarks established in the ISG. If a state does not use all of its apportioned water for the year, the Secretary may allow other Lower Division states to use the unused apportionment, provided that the use is authorized by a water delivery contract with the Secretary.
- A ''Shortage Condition'' exists when the Secretary determines that insufficient mainstream water is available to satisfy 7.5 maf of annual consumptive use in the Lower Division states. To date, the Secretary has never made such a determination, as flow in the Colorado River has been sufficient to meet Normal or Surplus delivery amounts. When making a shortage determination, the Secretary must consult with various parties as set forth in the Consolidated Decree and consider all relevant factors as specified in the LROC, including 1944 Treaty obligations, the priorities set forth in the Consolidated Decree, and the reasonable consumptive use requirements of mainstream water users in the Lower Division states. If a state does not use all of its apportioned water for the year, the Secretary may allow other Lower Division states to use the unused apportionment, provided that the use is authorized by a water delivery contract with the Secretary.

As discussed above, during the period from 2000 to 2007, the Colorado River has experienced the worst drought conditions in approximately one hundred years of recorded history. This drought in the Basin has reduced Colorado River system storage, while demands for Colorado River water supplies have continued to increase. From October 1, 1999 through September 30, 2007, storage in Colorado River reservoirs fell from 55.8 maf (approximately 94 percent of capacity) to 32.1 maf (approximately 54 percent of capacity), and was as low as 29.7 maf (approximately 52 percent of capacity) in 2004. This drought was the first sustained drought experienced in the Basin at a time when all major storage facilities were in place, and when use by the Lower Division states met or exceeded the annual ''normal'' apportionment of 7.5 maf pursuant to Article II(B)(1) of the Consolidated Decree.

Currently, the Department does not have specific operational guidelines in place to address the operations of Lake Powell and Lake Mead during drought and low reservoir conditions. To date, storage of water and flows in the Colorado River have been sufficient so that it has not been necessary to reduce Lake Mead annual releases below 7.5 maf; that is, the Secretary has never reduced deliveries by declaring a ''shortage'' on the lower Colorado River. Without operational guidelines in place, however, water users in the Lower Division states who rely on Colorado River water are not currently able to identify particular reservoir conditions under which the Secretary would reduce the annual amount of water available for consumptive use from Lake Mead to the Lower Division states below 7.5 maf. Nor are these water users able to identify the frequency or magnitude of any potential future annual reductions in their water deliveries.

Accordingly, the Secretary, acting through Reclamation, proposes adoption of specific Colorado River Lower Basin shortage guidelines and coordinated reservoir management strategies to address operations of Lake Powell and Lake Mead, particularly under drought and low reservoir conditions. These Guidelines are found at Section XI of this ROD. This action is proposed in order to provide a greater degree of certainty to United States Colorado River water users and managers of the Basin by providing detailed, and objective guidelines for the operations of Lake Powell and Lake Mead, thereby allowing water users in the Lower Basin to know when, and by how much, water deliveries will be reduced in drought and other low reservoir conditions.

The Secretary has also determined the desirability of developing additional operational guidelines that will provide for releases greater than or less than 8.23 maf from Lake Powell. To further enhance this coordinated reservoir approach, the Secretary has determined a need for guidelines that provide water users in the Lower Division states the opportunity to conserve and take delivery of water in and from Lake Mead for the purposes of enhancing existing water supplies, particularly under low reservoir conditions. In addition, the Secretary has determined the need to modify and extend the ISG to coincide with the duration of the proposed new Guidelines. This will provide an integrated approach for reservoir management and more

predictability for future Lower Division water supplies.

IV. Alternatives Considered

The purpose of the proposed federal action is to:

- Improve Reclamation's management of the Colorado River by considering trade-offs between the frequency and magnitude of reductions of water deliveries, and considering the effects on water storage in Lake Powell and Lake Mead, and on water supply, power production, recreation, and other environmental resources;
- 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; and
- Provide additional mechanisms for the storage and delivery of water supplies in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions.

This proposed federal action considers four operational elements that collectively are designed to address the purpose and need for the proposed federal action. The interim Guidelines would be used by the Secretary to:

- Determine those circumstances under which the Secretary would reduce the annual amount of water available for consumptive use from Lake Mead to the Colorado River Lower Division states below 7.5 maf (a ''Shortage'') pursuant to Article II(B)(3) of the Consolidated Decree;
- Define the coordinated operation of Lake Powell and Lake Mead to provide improved operation of these two reservoirs, particularly under low reservoir conditions;
- Allow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions; and
- Determine those conditions under which the Secretary may declare the availability of surplus water for use within the Lower Division states. The proposed federal action would modify the substance of the existing ISG and the term of the ISG from 2016 through 2026.

Six alternatives are considered and analyzed in the Final EIS. The alternatives consist of a No Action Alternative and five action alternatives. The five action alternatives are: Basin States Alternative, Conservation Before Shortage Alternative, Water Supply Alternative, Reservoir Storage Alternative, and the Preferred Alternative. The action alternatives reflect input from Reclamation staff, the cooperating agencies, stakeholders, and other interested parties.

Reclamation received two written proposals for alternatives that met the purpose and need of the proposed federal action, one from the Basin States and another from a consortium of environmental non-governmental organizations (NGO). These proposals were used by Reclamation to formulate two of the alternatives considered and analyzed in the Final EIS (Basin States Alternative and Conservation Before Shortage Alternative). A third alternative (Water Supply Alternative) was developed by Reclamation, and a fourth alternative (Reservoir Storage Alternative) was developed by Reclamation in coordination with the NPS and Western. The No Action Alternative and the action alternatives analyzed in the Draft EIS were posted on Reclamation's project Web site (*http://www.usbr.gov/lc/region/programs/strategies.html*) on June 30, 2006.

A fifth alternative, the Preferred Alternative, was developed (and included in the Final EIS) after consideration of the comments received on the Draft EIS and further analysis. The Preferred Alternative was posted on Reclamation's project Web site on June 15, 2007 and is composed of operational elements from the action alternatives identified and analyzed in the Draft EIS.

The Preferred Alternative is the most reasonable and feasible alternative; all environmental effects of this alternative, as well as the No Action Alternative and the remaining four action alternatives have been fully analyzed in the Final EIS. The identified environmental effects of the Preferred Alternative are well within the range of anticipated effects of the alternatives presented in the Draft EIS and do not affect the environment in a manner not already considered in the Draft EIS.

Reclamation identified the Preferred Alternative and the Conservation Before Shortage Alternative as the environmentally preferred alternatives, as provided in 50 CFR 1505.2. The combination of the ICS mechanism and the coordinated operations between Lake Powell and Lake Mead maintains and enhances water supply and environmental benefits at both reservoirs. In addition, these alternatives strike an appropriate balance between the storage of water for future deliveries and the lack of disruption of near-term water deliveries.

Reclamation selected from among the four key operational elements disclosed in the Draft EIS to formulate the Preferred Alternative. Reclamation has determined that the four operational elements selected under this alternative best meet all aspects of the purpose and need of the proposed federal action.

A. No Action Alternative

The No Action Alternative represents a projection of future conditions that could occur during the life of the proposed federal action without an action alternative being implemented. It provides a baseline for comparison of each of the action alternatives.

Pursuant to LROC, the Secretary makes a number of determinations at the beginning of each operating year through the development and execution of the AOP, including the water supply available to users in the Lower Basin and the annual release from Lake Powell. However, the LROC currently does not include specific guidelines for such determinations. Furthermore, there is no actual operating experience under low reservoir conditions, i.e., there has never been a shortage determination in the Lower Basin. Therefore, in the absence of specific guidelines, the outcome of the annual determination in any particular year in the future cannot be precisely known. However, a reasonable representation of future conditions under the No Action Alternative is needed for comparison to each action alternative. The modeling assumptions used for this representation are consistent with the assumptions used in previous environmental compliance documents for the ISG, the Colorado River Water Delivery Agreement, and the Lower Colorado River Multi-Species Conservation Program (LCR MSCP). However, the assumptions used in the No Action Alternative are not intended to limit or predetermine these decisions in any future AOP determination.

B. Basin States Alternative

The Basin States Alternative was developed by the Basin States and proposes a coordinated operation of Lake Powell and Lake Mead that would minimize shortages in the Lower Basin and avoid risk of curtailments of Colorado River water use in the Upper Basin. This alternative includes shortages to conserve reservoir storage; coordinated operations of Lake Powell and Lake Mead determined by specified reservoir conditions; a mechanism for the creation, accounting, and delivery of conserved system and non-system water (ICS); and a modification and extension of the ISG through 2026.

C. Conservation Before Shortage Alternative

The Conservation Before Shortage Alternative was developed by a consortium of environmental NGOs, and includes voluntary, compensated reductions (shortages) in water use to minimize involuntary shortages in the Lower Basin and to avoid risk of curtailments of Colorado River water use in the Upper Basin. This alternative includes voluntary shortages prior to involuntary shortages; coordinated operations of Lake Powell and Lake Mead determined by specified reservoir conditions; an expanded ICS mechanism for the creation, accounting, and delivery of conserved system and non-system water, including water for environmental uses; and modification and extension of the ISG through 2026. There are two aspects of the Conservation Before Shortage proposal that are unique to the Conservation Before Shortage Alternative: A funding mechanism for the voluntary conservation program, and a recommendation that a portion of the conserved water be used to benefit the environment. However, as noted in the Final EIS, the viability of the Conservation Before Shortage program funding proposal is not known at this time. The Department currently does not have the authority to implement all facets of this proposal and additional legislation would be necessary to gain such authority.

D. Water Supply Alternative

The Water Supply Alternative maximizes water deliveries at the expense of retaining water in storage in the reservoirs for future use. This alternative would reduce water deliveries only when insufficient water to meet entitlements is available in Lake Mead. When reservoir elevations are relatively low, Lake Powell and Lake Mead would share water (''balance contents''). This alternative does not include a mechanism for the creation, accounting, and delivery of conserved system and non-system water in Lake Mead. The existing ISG would be extended through 2026.

E. Reservoir Storage Alternative

The Reservoir Storage Alternative was developed in coordination with the cooperating agencies and other stakeholders, primarily Western and the NPS. This alternative would keep more water in storage in Lake Powell and Lake Mead by reducing water deliveries and by increasing shortages to retain more water in storage and thereby, benefit power and recreational interests. This alternative includes larger, more frequent shortages that serve to conserve reservoir storage; coordinated operations of Lake Powell and Lake Mead determined by specified reservoir conditions (more water would be held in Lake Powell than under the Basin States Alternative); and an expanded mechanism for the creation, accounting, and delivery of conserved system and non-system water in Lake Mead. The existing ISG would be terminated after 2007.

F. Preferred Alternative

The Preferred Alternative incorporates operational elements identified in the Basin States and Conservation Before Shortage alternatives. This alternative includes shortages to conserve reservoir storage and a coordinated operation of Lake Powell and Lake Mead determined by specified reservoir conditions that would minimize shortages in the Lower Basin and avoid risk of curtailments of use in the Upper Basin; and also adopts the ICS mechanism for promoting water conservation in the Lower Basin. It is anticipated that the maximum cumulative amount of ICS would be 2.1 maf pursuant to Section XI.D. of this ROD; however, the potential effects of a maximum cumulative amount of ICS of up to 4.2 maf have been analyzed in the Final EIS. This alternative also includes modification and extension of the ISG through 2026.[1]

V. Basis for Decision

In 2005, tensions among the Basin States brought the basin closer to multi-state and inter-basin litigation than perhaps any time since the adoption of the Compact. On May 2, 2005, in a decision of the Secretary, the Department outlined a number of fundamental considerations that would guide the NEPA process that concludes with the adoption of this ROD. These considerations include:

- Concern regarding the impacts of drought throughout the Colorado River Basin;
- A recognition of the recent history of close and productive working relationships among the Basin States;
- A belief that discussions among the states could facilitate the development of additional tools to improve coordinated operation of Colorado River reservoirs;
- A preference that operational strategies not be developed in the AOP setting, which is used by the Department to annually implement operational strategies that are developed through separate, public processes;
- An intention to develop operational tools that would avoid unnecessary, protracted or destabilizing litigation; and
- A commitment to continue to consult with and work with all stakeholders in the Basin.

In light of the severity of the drought, the Department announced its intention to complete the development of drought and low-reservoir operational tools by December 2007, and to do so through an open, public process. In closing, the Secretary expressed the opinion that ''all parties must work together to find creative solutions that will conserve reservoir storage and help to minimize the adverse effects of drought in the Colorado River Basin.''

The fundamental basis for this decision is that each of the above foundational considerations have been honored and achieved through the development of a consensus seven-state recommendation that has been incorporated, as appropriate, into the Preferred Alternative adopted herein today.

The Department selected the Preferred Alternative based on the Department's determination that it best meets all aspects of the purpose and need for the federal action, including: The need to remain in place for the extended period of the interim Guidelines; the desirability of the alternative based on the facilitated consensus recommendation from the Basin States; the likely durability of the mechanisms adopted in the Preferred Alternative in light of the extraordinary efforts that the Basin States and water users have undertaken to develop implementing agreements that will facilitate the water management tools (shortage sharing, forbearance, and conservation efforts)

[1] It is anticipated that elements of the decision adopted by this ROD will be implemented through a number of agreements. The following agreements are anticipated to be executed at or about the time of issuance of this ROD:

- Delivery Agreement between the United States and Imperial Irrigation District (IID)
- Delivery Agreement between the United States and The Metropolitan Water District of Southern California (MWD)
- Delivery Agreement between the United States, Southern Nevada Water Authority (SNWA) and the Colorado River Commission of Nevada (CRCN)
- Funding and Construction of the Lower Colorado River Drop 2 Storage Reservoir Project Agreement among the United States, SNWA, and CRCN
- Lower Colorado River Basin Intentionally Created Surplus Forbearance Agreement among the Arizona Department of Water Resources, the Southern Nevada Water Authority, CRCN, the Palo Verde Irrigation District (PVID), IID, Coachella Valley Water District (CVWD), MWD, and the City of Needles
- California Agreement for the Creation and Delivery of Extraordinary Conservation Intentionally Created Surplus among the PVID, IID, CVWD, MWD and the City of Needles.

identified in the Preferred Alternative; and the range of elements in the alternative that will enhance the Secretary's ability to manage the Colorado River reservoirs in a manner that recognizes the inherent tradeoffs between water delivery and water storage.

Importantly for the long-term stable management of the Colorado River, adoption of this decision activates a legal agreement among the Basin States that contains a critically important provision: The Basin States have agreed to mandatory consultation provisions to address future controversies on the Colorado River through consultation and negotiation, as a requirement, before resorting to litigation. With respect to the various interests, positions and views of each of the seven Basin States, this provision adds an important new element to the modern evolution of the legal framework for the prudent management of the Colorado River.

In recent years, in a number of settings, and facing a broad range of water management challenges, the Department has highlighted the important role of the Basin States in the statutory framework for administration of Basin entitlements and the significance that a seven-state consensus represents. Multi-state consensus is a rare and unique achievement that should continue to be recognized and facilitated.

With respect to the information within the scope of the proposed action, Reclamation concluded that the Preferred Alternative is a reasonable alternative and fully analyzed the environmental effects of this alternative in the Final EIS. The identified environmental effects of the Preferred Alternative are well within the range of anticipated effects of the alternatives presented in the Draft EIS and do not affect the environment in a manner not already considered in the Draft EIS. Thus, based on all available information, this alternative is the most reasonable, feasible, implementable, and durable alternative.

Drought is not limited to the Southwest, nor are interstate tensions over water management. As a final basis for this decision, the Department believes that a model for interstate cooperation can be found in the elements of the Preferred Alternative adopted today.

VI. Public Response to the Final Environmental Impact Statement

Following the **Federal Register** Notice of Availability of the Final EIS on November 2, 2007, and as of 8 p.m. (EST), Tuesday, December 11, 2007, Reclamation received six comment letters on the Final EIS and the updated draft Interim Operational Guidelines for Lake Powell and Lake Mead posted November 16, 2007 on Reclamation's project Web site. After appropriate consideration, the Department concludes that the comments received do not identify or raise any significant issues that would require supplementing the Final EIS. The major issues noted in the comment letters are summarized below:

The Basin States submitted a letter expressing their appreciation to Reclamation and Department staff for their diligence in working with the Basin States and others in developing the draft Guidelines for Lake Powell and Lake Mead; and they further stated that the adoption of the Guidelines ''represent a significant and historic milestone, reflecting the continuation of the consultative approach to river management between the federal government and affected states on the Colorado River.''

The San Diego County Water Authority submitted a comment letter fully supporting the statements in the Basin States' letter to the Secretary on the Final EIS. The Authority also noted their concern that the proposed implementation of Guidelines, specifically ICS, should not inadvertently conflict with the implementation of certain terms of October 10, 2003 Allocation Agreement. The Department agrees that the creation, release, or delivery of ICS or the declaration of an ICS Surplus Condition in a calendar year shall not constitute a determination by the Secretary of the existence of surplus Colorado River water in that calendar year for the purposes of Section 9.2.2 of the Allocation Agreement Among the United States of America, The Metropolitan Water District of Southern California, Coachella Valley Water District, Imperial Irrigation District, San Diego County Water Authority, the La Jolla, Pala, Pauma, Rincon and San Pasqual Bands of Mission Indians, the San Luis Rey River Indian Water Authority, the City of Escondido and Vista Irrigation District, dated October 10, 2003. This understanding has also been expressly stated in the proposed Delivery Agreements for IID and MWD (Section V of this ROD).

The EPA submitted a comment letter noting it had no objections to the proposed project and some of the details of the Final EIS pertinent to their views. Further, EPA encouraged Reclamation to ''play an active role in facilitating comprehensive water management among all water sectors in the Basin.'' Reclamation intends to continue to pursue its mission in the 17 western states, and in particular on the Colorado River, to assist in meeting the increasing water demands of the West while protecting the environment and the public's investment in these structures. Reclamation places great emphasis on fulfilling its water delivery obligations, water conservation, water recycling and reuse, and developing partnerships with our customers, states, and Native American Tribes, and in finding ways to bring together the variety of interests to address the competing needs for our limited water resources.

The Colorado River Board of California submitted comments on behalf of its member agencies on the updated draft Guidelines. The majority of the comments were editorial and to the extent the individual comments improved the clarity of the Guidelines they were incorporated into the Guidelines found in Section XI of this ROD.

A comment letter dated November 12, 2007, was received from a single member of the public and noted his concern that the terms of the Biological Opinion (BO) should be met and that impacts due to climate change on ''listed fish and birds'' are addressed. FWS issued the BO on the Preferred Alternative described in this ROD on December 12, 2007. Reclamation has agreed to implement Conservation measures to benefit the listed species addressed in the BO and comply with the terms and conditions of the incidental take statement in the BO. Acknowledging the potential for impacts due to climate change and increased hydrologic variability, the Secretary proposes that the Guidelines be interim in duration and extend through 2026, providing the opportunity to gain valuable operating experience for the management of Lake Powell and Lake Mead, particularly for low reservoir conditions, and improve the basis for making additional future operational decisions, whether during the Interim Period (Section 8 of the Guidelines) or thereafter. In addition, the Preferred Alternative has been crafted to include operational elements that would respond if potential impacts of climate change and increased hydrologic variability are realized. In particular, the Preferred Alternative includes a coordinated operation element that allows for the adjustment of Lake Powell's release to respond to low reservoir storage conditions in Lake Powell or Lake Mead as described in Section 2.7 and Section 2.3 in the Final EIS. In addition, the Preferred

Alternative will enhance conservation opportunities in the Lower Basin and the retention of water in Lake Mead through adoption of the ICS mechanism. Finally, the Preferred Alternative includes a shortage strategy at Lake Mead that would result in additional shortages being considered, after appropriate consultation, if Lake Mead elevations drop below 1,025 feet mean sea level (msl).

The Defenders of Wildlife submitted a comment letter dated December 11, 2007, on behalf of their organization, the National Wildlife Federation, the Pacific Institute, and the Sierra Club regarding the updated draft Guidelines. The comments are limited to information that was published in Appendix S of the Final EIS dated November 2, 2007. The letter offers a number of clarifying comments, raises concerns regarding the appropriate mechanisms for consultation between federal and non-federal parties, and raises detailed comments regarding the implementation of the ICS and Developed Shortage Supply (DSS) components of the Guidelines. Reclamation thoroughly reviewed the comments submitted and concluded that no changes to the Guidelines were necessary. With respect to the issues regarding consultation, Reclamation will continue to meet all legal obligations for appropriate consultation with non-federal parties and believes that the commitments for continued consultation with the Basin States can be implemented in a manner consistent with the provisions of applicable federal law. Moreover, Reclamation believes that some of the concerns identified in this comment letter have been addressed by Section 7.D of the updated draft Guidelines posted on December 10, 2007, which provides that the Lower Colorado Regional Director will establish procedures for the implementation of ICS and DSS after issuance of this ROD. Reclamation will continue to work closely with all stakeholders in the development of ICS and DSS procedures and in the implementation and administration of the Guidelines.

VII. Refinement of Operational Guidelines for the Preferred Alternative in Response to Public Comments

Hydrologic modeling of the Colorado River system was used to determine the potential hydrologic effects of each of the alternatives and also provided the basis for analyzing the potential effects on other environmental resources (such as recreation, biology, and energy, etc.). Nearly all modeling assumptions were common to each alternative; only the assumptions specific to each alternative were different. This approach allowed a relative comparison of the potential effects of each alternative compared to the No Action Alternative and lead to the identification of the Preferred Alternative.

Historically, the determination of the annual release volume for Lake Powell could change on a monthly basis throughout the water year. This approach afforded great flexibility to respond to changing monthly runoff forecasts yet was practical to implement since there were effectively only two operational tiers (a minimum objective release of 8.23 maf per year or releases greater due to equalization or spill avoidance). The annual release volume for Lake Mead, however, was essentially determined on an annual basis primarily to provide a greater degree of certainty to water users with respect to the water supply in the Lower Basin. The modeled operation of Lake Powell and Lake Mead for all alternatives in the Final EIS was consistent with this past operational experience and provided a valid basis for comparison.

However, given the more complicated proposed operation for Lake Powell under all of the action alternatives, Reclamation conducted additional investigations and subsequently refined the operational guidelines to include a combined monthly/annual methodology to determine the annual release volume for Lake Powell. This methodology consists of a January 1 determination of the release volume with appropriate April adjustments to those volumes, and providing the necessary flexibility to respond to changing inflow forecasts while ensuring that the operation does not result in excessive changes in monthly releases from Lake Powell.

In addition, comments were also received in both written and oral form from representatives of the Basin States with respect to the modeling assumptions used for the Basin States Alternative and the Preferred Alternative, reflected in Appendix S of the Final EIS. Specifically, the comments were in regard to the coordinated operation of Lake Powell and Lake Mead when Lake Powell is relatively high and operating near or in the equalization tier. A concern was identified where the proposed operation might not respond effectively when Lake Powell is relatively high, Lake Mead is relatively low, and a reasonably high inflow forecast occurs. Reclamation conducted additional investigations to identify approaches to ensure some additional water is released from Lake Powell when this situation arises.

Reclamation refined the proposed operational guidelines to incorporate these changes (contained in Section 6, 7, and 8 of the Guidelines) and published those refinements on the project Web site on November 16, 2007. An evaluation concluded that these refinements to the proposed Guidelines would not result in substantial changes with regard to the environmental effects and fall within the impacts already analyzed in the Final EIS.

VIII. Environmental Impacts and Implementation of Environmental Commitments

Hydrologic modeling of the Colorado River system was conducted to determine the potential hydrologic effects of the alternatives. Modeling provided projections of potential future Colorado River system conditions (*i.e.*, reservoir elevations, reservoir releases, river flows) for comparison of those conditions under the No Action Alternative to conditions under each action alternative. Due to the uncertainty with regard to future inflows into the system, multiple simulations were performed in order to quantify the uncertainties of future conditions and as such, the modeling results are typically expressed in probabilistic terms.

Hydrologic modeling also provided the basis for the analysis of the potential effects of each alternative on other environmental resources. The Final EIS evaluated 14 resource areas: Hydrologic resources (including reservoir storage and releases, groundwater, and water deliveries), water quality, air quality, visual resources, biological resources (including vegetation and wildlife and special status species), cultural resources, Indian trust assets, electrical power resources, recreation (including shoreline facilities, boating and navigation, and sport fish populations), transportation, socioeconomics (including employment, income and tax revenue, municipal and industrial water users, and recreation economics), environmental justice, indirect effects of the ICS mechanism, and climate change considerations. The potential effects to specific resources were identified and analyzed for each action alternative and compared to the potential effects to that resource under the No Action Alternative. These comparisons are typically expressed in terms of the relative differences in probabilities between the No Action Alternative and the action alternatives.

Based on the analyses in the EIS, Reclamation determined that specific measures to avoid or mitigate environmental harm were not required,

with the exception of conservation measures for listed species as noted below. For other resource areas, the impacts of the Preferred Alternative were well within the range of the alternatives considered, and generally improved conditions compared to the No Action Alternative. For a few resource areas, the Preferred Alternative resulted in minor negative impacts compared to the No Action Alternative, and measures to avoid such impacts were determined to be unnecessary or not feasible.

A. Lower Colorado River Multi-Species Conservation Plan

It is important to note that Reclamation is already undertaking significant environmental mitigation measures on the Colorado River, including the LCR MSCP from Lake Mead to the Southerly International Boundary (SIB) with Mexico, and implementation of activities pursuant to the 1996 Glen Canyon Dam ROD for the reach of the Colorado River from Glen Canyon Dam to Lake Mead.

The LCR MSCP is a 50-year cooperative effort between federal and non-federal entities, approved by the Secretary in April 2005. This program was developed to address potential effects to listed and other selected special status species (covered species) from identified ongoing and future anticipated federal discretionary actions and non-federal activities on the lower Colorado River (covered actions). The development and implementation of shortage criteria on the lower Colorado River was one of the federal covered actions (MSCP Biological Assessment Section 2.2.2.1) included in the LCR MSCP and covered under the LCR MSCP BO (FWS 2005). The LCR MSCP BO provides Endangered Species Act (ESA) compliance for the effects of covered actions for a reduction of Lake Mead reservoir elevations to 950 feet msl and flow reductions of up to 0.845 maf from Hoover Dam to Davis Dam, 0.860 maf from Davis Dam to Parker Dam, and 1.574 maf from Parker Dam to Imperial Dam. The LCR MSCP identified, and it is mitigating for, impacts to the covered species and their habitats from the flow reduction conditions described above. These impacts included the potential loss of up to:

- 2,008 acres of cottonwood-willow habitats;
- 133 acres of marsh habitat; and
- 399 acres of backwater habitat.

To address these impacts, the LCR MSCP will:

- Restore 5,940 acres of cottonwood-willow habitat;
- Restore 512 acres of marsh habitat;
- Restore 360 acres of backwater habitat;
- Stock 660,000 razorback sucker over the term of the LCR MSCP; and
- Stock 620,000 bonytail over the term of the LCR MSCP.

In addition, these habitats will be actively managed to provide habitat values greater than those of the impacted habitats. While the LCR MSCP is geared toward special status species, it is important to understand that all species that use the habitats impacted by the LCR MSCP covered activities benefit by the conservation actions currently being carried out under the LCR MSCP.

Reclamation has reviewed the effects of the Preferred Alternative in this Final EIS and has determined that all potential effects to listed species and their habitats along the Colorado River from the full pool elevation of Lake Mead to the SIB are covered by the LCR MSCP. FWS has concurred with Reclamation's determination in a letter dated November 28, 2007.

B. Glen Canyon Dam Adaptive Management Program

The 1996 Glen Canyon Dam ROD describes detailed criteria and operating plans for Glen Canyon Dam operations and includes other management actions to accomplish this objective; among these are the Glen Canyon Dam Adaptive Management Program (AMP). The AMP provides a process for assessing the effects of Glen Canyon Dam operations on downstream resources and project benefits. The results of that assessment are used to develop recommendations for modifying Glen Canyon Dam operations and other resource management actions. This is accomplished through the Adaptive Management Work Group (AMWG), a federal advisory committee. The AMWG consists of stakeholders that include federal and state agencies, representatives of the Basin States, Indian tribes, hydroelectric power customers, environmental and conservation organizations, and recreational and other interest groups.

C. Endangered Species Act Compliance

In compliance with the ESA, Reclamation submitted a Biological Assessment (BA) to FWS on September 10, 2007 and requested formal consultation on the Preferred Alternative. Reclamation divided the analysis of potential effects on listed species into three geographic areas: Lake Powell to the upper end of Lake Mead, Lake Mead to the SIB with Mexico, and potential interdependent/interrelated effects on the Virgin and Muddy Rivers in southern Nevada. Reclamation determined the effects of the Preferred Alternative within the geographic area of the MSCP (Lake Mead to SIB with Mexico) were covered by the earlier consultation on LCR MSCP, and requested FWS' concurrence on this determination by memo dated October 26, 2007. FWS concurred with this determination by memo dated November 28, 2007. For the remainder of the action area, Reclamation determined the Preferred Alternative may affect, and is likely to adversely affect the southwestern willow flycatcher, humpback chub, and Kanab ambersnail, and that the Preferred Alternative may affect, but would not be likely to adversely affect seven other species.

FWS issued its BO for the Preferred Alternative by memo dated December 12, 2007. The BO concurred with Reclamation's ''not likely to adversely affect'' findings for the seven species addressed in the BA, and found that the adverse effects to southwestern willow flycatcher, humpback chub, and Kanab ambersnail would not jeopardize the continued existence of those species. Reclamation has included the following conservation measures for listed species in the action area as part of its proposed action:

- Nonnative Fish Control—In coordination with other Department of the Interior AMP participants and through the AMP, Reclamation will continue efforts to control both cold- and warm-water nonnative fish species in the mainstem of Marble and Grand canyons, including determining and implementing levels of nonnative fish control as necessary. Control of these species using mechanical removal and other methods will help to reduce this threat.
- Humpback Chub Refuge—Reclamation will assist FWS in development and funding of a broodstock management plan and creation and maintenance of a humpback chub refuge population at a federal hatchery or other appropriate facility by providing expedited advancement of $200,000 in funding to the FWS during calendar year 2008; this amount shall be funded from, and within, the amount identified in the 2005 LCR MSCP BO. Creation of a humpback chub refuge will reduce or eliminate the potential for a catastrophic loss of the Grand Canyon population of humpback chub by providing a permanent source of genetically representative stock for repatriating the species.

• Genetic Biocontrol Symposium—Reclamation will transfer up to $20,000 in fiscal year 2008 to FWS to help fund an international symposium on the use and development of genetic biocontrol of nonnative invasive aquatic species which is tentatively scheduled for January 2009. Although only in its infancy, genetic biocontrol of nonnative species is attracting worldwide attention as a potential method of controlling aquatic invasive species. Helping fund an effort to bring researchers together will further awareness of this potential method of control and help mobilize efforts for its research and development.

• Sediment Research—In coordination with other Department of the Interior AMP participants and through the AMP, Reclamation will monitor the effect of sediment transport on humpback chub habitat and will work with the Grand Canyon Monitoring and Research Center to develop and implement a scientific monitoring plan acceptable to FWS. Although the effects of dam operation-related changes in sediment transport on humpback chub habitat are not well understood, humpback chub are known to utilize backwaters and other habitat features that require fine sediment for their formation and maintenance. Additional research will help clarify this relationship.

• Parasite Monitoring—In coordination with other Department of the Interior AMP participants and through the AMP, Reclamation will continue to support research on the effects of Asian tapeworm on humpback chub and potential methods to control this parasite. Continuing research will help better understand the degree of this threat and the potential for management actions to minimize it.

• Monitoring and Research—Through the AMP, Reclamation will continue to monitor Kanab ambersnail and its habitat in Grand Canyon and the effect of dam releases on the species, and Reclamation will also continue to assist FWS in funding morphometric and genetic research to better determine the taxonomic status of the subspecies.

• Kanab Ambersnail Monitoring and Research—Through the AMP, Reclamation will continue to monitor Kanab ambersnail and its habitat in Grand Canyon and the effect of dam releases on the species, and Reclamation will also continue to assist FWS in funding morphometric and genetic research to better determine the taxonomic status of the subspecies.

• Southwestern Willow Flycatcher Monitoring and Research—Through the AMP, Reclamation will continue to monitor southwestern willow flycatcher and its habitat and the effect of dam releases on the species throughout Grand Canyon and report findings to FWS, and will work with NPS and other AMP participants to identify actions to conserve the flycatcher.

IX. Implementing the Decision

A. Setting

Against the backdrop of prolonged drought, in 2005, with reservoir elevations dropping rapidly, the Department was faced with the challenge of making operational decisions regarding modified operations of Glen Canyon Dam and Hoover Dam. One of the challenges that the Department faced was that there were not detailed, objective guidelines to determine how the operation of the two reservoirs would be modified in drought and other low-reservoir conditions.

After receiving conflicting recommendations from representatives of the four Upper Division and the three Lower Division states, the Secretary issued a decision on May 2, 2005, charging Reclamation with the development of operational tools that can continue to assure productive use of the Colorado River into the future, while avoiding unnecessary, protracted or destabilizing litigation.

More than two years later, the drought conditions have continued and the need for detailed operational guidelines is even more necessary today as compared with mid-2005. Reclamation has conducted an extensive public process, seeking input from state, tribal and local governments, along with input from members of environmental organizations and members of the general public. These Guidelines represent the Department's determination as to the most appropriate set of guidelines to adopt at this stage of the ongoing drought.

B. Scope of Guidelines

These 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. The relevant sections of these Guidelines address the following:

• Determine those circumstances under which the Secretary would reduce the annual amount of water available for consumptive use from Lake Mead to the Colorado River Lower Division states below 7.5 maf (a ''Shortage'') pursuant to Article II(B)(3) of the Consolidated Decree;

• Define the coordinated operation of Lake Powell and Lake Mead to provide improved operation of these two reservoirs, particularly under low reservoir conditions;

• Allow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions; and,

• Determine those conditions under which the Secretary may declare the availability of surplus water for use within the Lower Division states. The proposed federal action would modify the substance of the existing ISG and would change the term of the ISG from 2016 through 2026.

X. Operational Setting

A. Criteria for the Coordinated Long-Range Operation of Colorado River Reservoirs

Section 602 of the CRBPA required the Secretary to propose and adopt criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act of 1956, the Boulder Canyon Project Act of 1928 (BCPA), and the Boulder Canyon Project Adjustment Act. The Secretary adopted such ''Long-Range Operating Criteria'' (LROC) in 1970 and has been operating the Colorado River consistent with the LROC since 1970. In 2005, the Secretary approved minor changes to the text of the LROC. (70 FR 15873, Mar. 29, 2005). The Secretary identified the bases for the limited changes as: (1) Specific change in federal law applicable to the Operating Criteria, (2) language in the current text of the Operating Criteria that was outdated, and (3) specific modifications to Article IV(b) of the Operating Criteria that reflect actual operating experience.

It is the Department's decision that these Guidelines implement the LROC on an annual basis through the Interim Period and that the operation of the relevant Colorado River reservoirs be documented in each year's AOP (Subsection C, below). See also Section 7 of the Guidelines for further description of the relationship between the LROC and these Guidelines.

B. Interim Surplus Guidelines

Beginning in 1999, the Secretary determined that there was a need for detailed, objective guidelines to assist in the determination of availability of water in excess of 7.5 maf per year to water users in the three Lower Division states of Arizona, California, and Nevada. One of the important issues facing the Department at that time was

the question of whether to modify the LROC to address determination of a Surplus Condition or whether to adopt guidelines that would implement the LROC with detailed provisions.

At the time, the Department sought public input on the concept of modifying Article III(3)(b) of the LROC during the process that led to adoption of the ISG. See 64 FR 27010 (May 18, 1999). After reviewing the public comments received, the Department announced its intention to adopt ''interim implementing criteria pursuant to Article III(3) of the Long-Range Operating Criteria'' rather than modifying the actual text of the LROC. See 64 FR 68373 (December 7, 1999). This approach was carried through and set forth in the ROD for the ISG adopted by the Secretary. See 66 FR 7772, 7780 at Section XI(5) (''These Guidelines, which shall implement and be used for determinations made pursuant to Article III(3)(b) of the [Operating Criteria] * * * are hereby adopted * * *''). See also discussion at 70 FR 15878 (March 29, 2005) (review of LROC).

It is the Department's decision in adopting these Guidelines to continue the approach initially adopted in the ISG, and accordingly is not modifying the LROC at this time. Instead, the determinations made under these interim Guidelines will implement the relevant provisions of Article II (Lake Powell) and Article III (Lake Mead) during the Interim Period, as defined in Section 7, herein.

C. Annual Operating Plan for Colorado River Reservoirs

Section 602(b) of the CRBPA of 1968 requires that the Secretary transmit to the Congress and to the Governors of the Basin States, by January 1st of each year, a report describing the actual operation under the LROC for the preceding compact water year and the projected operation for the current year. This report is commonly referred to as the ''Annual Operating Plan'' or the ''AOP.''

In 1992, in the Grand Canyon Protection Act, Congress required that, in preparing the 602(b) AOP, the Secretary shall consult with the Governors of the Basin States and with the general public, including representatives of academic and scientific communities, environmental organizations, the recreation industry; and contractors for the purpose of federal power produced at Glen Canyon Dam.

Each year the Secretary implements the provisions of the 1968 and 1992 statutes regarding the projected operation of Colorado River reservoirs and stakeholder consultation through the Colorado River Management Work Group. This process involves appropriate consultation prior to finalization of the proposed AOP. The AOP is used to memorialize operational decisions that are made pursuant to individual federal actions (e.g., ISG, 1996 Glen Canyon Dam ROD, this ROD). Thus, the AOP serves as a single, integrated reference document required by section 602(b) of the CRBPA of 1968 regarding past and anticipated operations.

It is the Department's decision that these Guidelines be implemented on an annual basis through the Interim Period and documented in each year's AOP. This ROD addresses annual volumes of releases from Glen Canyon Dam and Hoover Dam. Accordingly, this ROD does not modify the authority of the Secretary to determine monthly, daily, hourly, or instantaneous releases from Glen Canyon Dam and Hoover Dam. See Section 7 of the Guidelines for further description of the relationship between the AOP and these Guidelines.

XI. Conditions of Implementation

A. Forbearance

1. Role of Forbearance Agreements Within the Context of the Law of the River and Relationship to Intentionally Created Surplus (ICS)

For the purposes of these Guidelines, the term ''forbearance agreements'' refers to agreements that a party who has a right to surplus Colorado River water could enter into that would provide that party's agreement to forgo (or not exercise) its right to surplus Colorado River water. In any such agreements, the party agrees to ''forbear'' or refrain from exercising its right to surplus Colorado River water under the specified terms and conditions of the applicable agreement. Through such agreements, increased flexibility of Colorado River water management can be achieved—resulting in greater conservation of water than would otherwise be accomplished.

In Years in which the Secretary determines that sufficient Mainstream water is available for delivery to satisfy annual consumptive use in the Lower Division states in excess of 7.5 maf, Article II(B)(2) of the Consolidated Decree directs the Secretary to apportion such surplus Mainstream water 50% for use in California, 46% for use in Arizona, and 4% for use in Nevada. The Boulder Canyon Project Act and Articles II(B)(2) and II(B)(6) of the Consolidated Decree, taken together, authorize the Secretary to apportion surplus water and to deliver one Lower Division state's unused apportionment for use in another Lower Division state. Pursuant to such authority and for the purpose of increasing the efficiency, flexibility, and certainty of Colorado River management and thereby helping satisfy the current and projected regional water demands, the Secretary determined that it is prudent and desirable to promulgate guidelines to establish a procedural framework for facilitating the creation and delivery of ICS within the Lower Basin.

In the absence of forbearance, surplus water is apportioned for use in the Lower Division states according to the specific percentages provided in Article II(B)(2) of the Consolidated Decree discussed above. In order to allow for management flexibility, the seven Colorado River Basin States have recommended an operational program for the creation and delivery of ICS. In furtherance of this recommendation, numerous major water users within the Lower Basin have identified their willingness, under specified circumstances, to participate in such an operational program. These parties have submitted a draft ''Forbearance Agreement,'' as preliminarily approved by the parties, as part of a package of documents (Appendix J) submitted for consideration by the Secretary as a necessary element to enable implementation of the operations contemplated by the Basin States Alternative. The Secretary has developed a Preferred Alternative based on this information, as well as other information submitted during the NEPA process.

The parties to the Forbearance Agreement have indicated that they intend that the Agreement provide the appropriate legal mechanism to achieve successful implementation of this element of the Preferred Alternative. The parties have indicated that among the conditions on their forbearance, they will forbear only with respect to a specified ICS volume and only to ICS created by projects described in exhibits attached to the Forbearance Agreement or added thereto by written consent of all parties. Given the voluntary nature of the forbearance concept, it is appropriate for the parties to clearly identify the limited conditions upon which their forbearance is granted.

Through adoption and implementation of these Guidelines, the Secretary will only approve the creation, delivery and use of ICS in a manner that is fully consistent with the provisions of the Consolidated Decree, including Articles II(B)(2) and II(B)(6) therein. The Secretary will require forbearance by the State of Arizona, the

Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley Water District, The Metropolitan Water District of Southern California, the City of Needles, and other California entities as appropriate, the Southern Nevada Water Authority, and the Colorado River Commission of Nevada for implementation of this element of these Guidelines (regarding ICS). If, in the opinion of the Secretary, the State of Arizona or the Palo Verde Irrigation District, the Imperial Irrigation District, the Coachella Valley Water District, The Metropolitan Water District of Southern California, the City of Needles, or other California entities as appropriate, the Southern Nevada Water Authority, or the Colorado River Commission of Nevada, unreasonably withhold forbearance, the Secretary may, after consultation with the Basin States, modify these Guidelines. Moreover, the Secretary will ensure that implementation of the ICS mechanism does not infringe on the rights of any third party who is a Contractor and who is not a party to the Forbearance Agreement.

2. Monitoring Implementation

Under these Guidelines, Colorado River water will continue to be allocated for use among the Lower Division states in a manner consistent with the provisions of the Consolidated Decree. It is expected that Lower Division states and individual Contractors for Colorado River water have or will adopt arrangements that will affect utilization of Colorado River water during the Interim Period. It is expected that water orders from Colorado River Contractors will be submitted to reflect forbearance arrangements by Lower Division states and individual Contractors. The Secretary will deliver Colorado River water to Contractors in a manner consistent with these arrangements, provided that any such arrangements are consistent with the BCPA, the Consolidated Decree and do not infringe on the rights of third parties. Surplus water will only be delivered to entities with contracts for surplus water. ICS will be delivered pursuant to Section 3.C. of these Guidelines and a Delivery Agreement.

B. Delivery Agreement

Article II(B)(5) of the Consolidated Decree in Arizona v. California states that mainstream Colorado River water shall be released or delivered to water users in Arizona, California, and Nevada ''only pursuant to valid contracts therefore made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.'' Section 5 of the Boulder Canyon Project Act authorizes the Secretary to enter into such contracts.

Numerous Contractors in Arizona, California, and Nevada now hold contracts which entitle them to the delivery of Colorado River water under the circumstances and in the priorities specified in the individual contracts. Contracts entered into prior to the adoption of these Guidelines do not, however, expressly address circumstances in which ICS or DSS might be created or delivered.

To ensure the requirements of Section 5 of the Boulder Canyon Project Act and Article II(B)(5) of the Consolidated Decree are complied with, and to reduce the possibility of ambiguity, the Secretary anticipates entering into delivery contracts with any person or persons intending to create ICS or DSS. Such contracts are expected to address the requirements set forth in the Guidelines for the approval of ICS or DSS plans, the certification and verification of the ICS or DSS created under the plans, the ordering and delivery of ICS or DSS, the accounting for ICS or DSS in the annual report filed with the U.S. Supreme Court in accordance with Article V of the Consolidated Decree, and such other matters as may bear on the delivery of the ICS or DSS, as for example the point of delivery and place of use, if not already provided for under existing contracts.

C. Mexico

The United States delivers an annual allotment of Colorado River water to Mexico pursuant to the treaty between the United States of America and Mexico relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, signed February 3, 1944, and its supplementary protocol signed November 14, 1944. In adopting these Guidelines the Department of the Interior is making a final agency action regarding the operation of Lake Powell and Lake Mead, and the delivery of water to water users in the United States, in response to the worst drought in the Basin in over a century of recordkeeping.

Prior to adopting these Guidelines, the Department provided information on the proposed action to the USIBWC, and met with representatives of the Mexican Section of the IBWC and the Mexican Government. The Department has considered the information provided by the USIBWC prior to adopting these Guidelines, including information representing the views of the Government of Mexico. The USIBWC has advised that the Department may proceed with planning and implementation activities for these Guidelines with the understanding that these Guidelines are not intended to constitute an interpretation or application of the 1944 Treaty or to represent current United States policy or a determination of future United States policy regarding deliveries to Mexico.

The Department notes the intention of the Governments of the United States and Mexico, memorialized in a Joint Statement issued August 13, 2007, to cooperate and collaborate regarding issues related to the lower portion of the Colorado River under the auspices of the IBWC.

D. Intentionally Created Surplus

1. Findings

ICS may be created through projects that create water system efficiency or extraordinary conservation or tributary conservation or the importation of non-Colorado River System water into the Mainstream. ICS is consistent with the concept that entities may take actions to augment storage of water in the lower Colorado River Basin. The ICS shall be delivered to the Contractor that created it pursuant to both Articles II(B)(2) and II(B)(6) of the Consolidated Decree and Forbearance Agreements. Implementation of these Guidelines for ICS is conditioned upon execution of Forbearance Agreements and Delivery Agreements as further provided for in these Guidelines.

2. Purposes

The primary purposes of ICS are to: (a) Encourage the efficient use and management of Colorado River water; and to increase the water supply in Colorado River System reservoirs, through the creation, delivery and use of ICS; (b) help minimize or avoid shortages to water users in the Lower Basin; (c) benefit storage of water in both Lake Powell and Lake Mead; (d) increase the surface elevations of both Lake Powell and Lake Mead to higher levels than would have otherwise occurred; and (f) assure any Contractor that invests in conservation or augmentation to create ICS that no other Contractor will claim the ICS created by the Contractor pursuant to an approved plan by the Secretary.

3. Quantities

The maximum quantities of Extraordinary Conservation ICS that may be accumulated in all ICS Accounts, at any time, upon the effective date of these Guidelines is

limited to the amounts provided in Section 3.B.5. of these Guidelines. The maximum quantities of Extraordinary Conservation ICS that may be created and/or delivered in any given Year are also limited to the amounts provided in Sections 3.B.4. and 3.C.4., respectively. As described in the Final EIS, Reclamation has analyzed ICS amounts in excess of the amounts approved by this Record of Decision and provided in these Guidelines. Any decision by the Secretary to increase the amounts in excess of the amounts provided in these Guidelines would be based on actual operating experience and would require modification of these Guidelines after consultation with the Basin States.

E. Relationship With Existing Law

These Guidelines are not intended to, and do not:

1. Guarantee or assure any water user a firm supply for any specified period;

2. Change or expand existing authorities under applicable federal law, except as specifically provided herein with respect to determinations under the Long-Range Operating Criteria and administration of water supplies during the effective period of these Guidelines;

3. Address intrastate storage or intrastate distribution of water, except as may be specifically provided by Lower Division states and individual Contractors for Colorado River water who may adopt arrangements that will affect utilization of Colorado River water during the effective period of these Guidelines;

4. Change the apportionments made for use within individual States, or in any way impair or impede the right of the Upper Basin to consumptively use water available to that Basin under the Colorado River Compact;

5. Affect any obligation of any Upper Division state under the Colorado River Compact;

6. Affect any right of any State or of the United States under Sec. 14 of the Colorado River Storage Project Act of 1956 (70 Stat. 105); Sec. 601(c) of the Colorado River Basin Project Act of 1968 (82 Stat. 885); the California Limitation Act (Act of March 4, 1929; Ch. 16, 48th Sess.); or any other provision of applicable federal law;

7. Affect the rights of any holder of present perfected rights or reserved rights, which rights shall be satisfied within the apportionment of the State within which the use is made, and in the Lower Basin, in accordance with the Consolidated Decree; or

8. Constitute an interpretation or application of the 1944 Treaty between the United States and Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande (1944 Treaty) or to represent current United States policy or a determination of future United States policy regarding deliveries to Mexico. The United States will conduct all necessary and appropriate discussions regarding the proposed federal action and implementation of the 1944 Treaty with Mexico through the International Boundary and Water Commission (IBWC) in consultation with the Department of State.

F. Definitions

For purposes of these Guidelines, the following definitions apply:

1. ''24-Month Study'' refers to the operational study that reflects the current Annual Operating Plan that is updated each month by Reclamation to project future reservoir contents and releases. The projections are updated each month using the previous month's reservoir contents and the latest inflow and water use forecasts. In these Guidelines, the term ''projected on January 1'' shall mean the projection of the January 1 reservoir contents provided by the 24-Month Study that is conducted in August of the previous Year.

2. ''AOP'' shall mean the Annual Operating Plan for the Colorado River System Reservoirs.

3. ''Active Storage'' shall mean the amount of water in reservoir storage, exclusive of bank storage, which can be released through the existing reservoir outlet works, consistent with the Colorado River Basin Project Act of 1968 (82 Stat. 885).

4. ''BCPA'' shall mean the Boulder Canyon Project Act of 1928 (28 Stat. 1057).

5. ''Basin States'' shall mean the seven Colorado River Basin States of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming.

6. ''Certification Report'' shall mean the written documentation provided by a Contractor that provides the Secretary with sufficient information to allow the Secretary to determine whether the quantity of ICS or DSS approved by the Secretary in an approved plan has been created and whether the creation was consistent with the approved plan.

7. ''Colorado River System'' shall have the same meaning as defined in the 1922 Colorado River Compact.

8. ''Consolidated Decree'' shall mean the Consolidated Decree entered by the United States Supreme Court in *Arizona* v. *California*, 547 U.S. 150 (2006).

9. ''Contractor'' shall mean an entity holding an entitlement to Mainstream water under (a) the Consolidated Decree, (b) a water delivery contract with the United States through the Secretary, or (c) a reservation of water by the Secretary, whether the entitlement is obtained under (a), (b) or (c) before or after the adoption of these Guidelines.

10. ''DSS Account'' shall mean records established by the Secretary regarding DSS.

11. ''Delivery Agreement'' shall mean an agreement consistent with these Guidelines entered into between the Secretary of the Interior and one or more Contractors creating ICS.

12. ''Developed Shortage Supply (''DSS'')'' shall mean water available for use by a Contractor under the terms and conditions of a Delivery Agreement and Section 4 of these Guidelines in a Shortage Condition, under Article III(B)(3) of the Consolidated Decree.

13. ''Direct Delivery Domestic Use'' shall mean direct delivery of water to domestic end users or other municipal and industrial water providers within the Contractor's area of normal service, including incidental regulation of Colorado River water supplies within the Year of operation but not including Off-stream Banking. For the Metropolitan Water District of Southern California (MWD), Direct Delivery Domestic Use shall include delivery of water to end users within its area of normal service, incidental regulation of Colorado River water supplies within the Year of operation, and Off-stream Banking only with water delivered through the Colorado River Aqueduct.

14. ''Domestic Use'' shall have the same meaning as defined in the 1922 Colorado River Compact.

15. ''Forbearance Agreement'' shall mean an agreement under which one or more Contractors agree to forbear a right to ICS, under a water delivery contract or the Consolidated Decree.

16. ''ICS Account'' shall mean records established by the Secretary regarding ICS.

17. ''ICS Determination'' shall mean a determination by the Secretary that ICS is available for delivery.

18. ''Intentionally Created Surplus (''ICS'')'' shall mean surplus Colorado River System water available for use under the terms and conditions of a Delivery Agreement, a Forbearance Agreement, and these Guidelines.

a. ICS created through extraordinary conservation, as provided for in Section 3.A.1., shall be referred to as ''Extraordinary Conservation ICS.''

b. ICS created through tributary conservation, as provided for in Section 3.A.2., shall be referred to as ''Tributary Conservation ICS.''

c. ICS created through system efficiency projects, as provided for in

Section 3.A.3., shall be referred to as ''System Efficiency ICS.''

d. ICS created through the importation of non-Colorado River System Water, as provided for in Section 3.A.4., shall be referred to as ''Imported ICS.''

19. ''Interim Period'' shall mean the effective period as described in Section 8.

20. ''Long-Range Operating Criteria (''LROC'')'' shall mean the Criteria for the Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (Pub. L. 90–537), published at 35 FR 8951 (June 10, 1970), as amended March 21, 2005.

21. ''Lower Division states'' shall mean the Colorado River Basin States of Arizona, California, and Nevada.

22. ''Mainstream'' shall have the same meaning as defined in the Consolidated Decree.

23. ''Off-stream Banking'' shall mean the diversion of Colorado River water to underground storage facilities for use in subsequent Years from the facility used by a Contractor diverting such water.

24. ''ROD'' shall mean the Record of Decision issued by the Secretary for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead.

25. ''Upper Division states'' shall mean the Colorado River Basin States of Colorado, New Mexico, Utah, and Wyoming.

26. ''Water Accounting Report'' shall mean the annual Colorado River Accounting and Water Use Report—Arizona, California, and Nevada that includes, but is not limited to, the compilation of records in accordance with Article V of the Consolidated Decree.

27. ''Water Year'' shall mean October 1 through September 30.

28. ''Year'' shall mean calendar year.

G. Interim Guidelines for the Operation of Lake Powell and Lake Mead

These Guidelines shall include Sections XI.A., B., E., and F. above and this Section XI.G. These Guidelines which shall implement and be used for determinations made pursuant to the Long-Range Operating Criteria during the effective period identified in Section 8, are hereby adopted:

Section 1. Allocation of Unused Basic Apportionment Water Under Article II(B)(6)

A. Introduction

Article II(B)(6) of the Consolidated Decree allows the Secretary to allocate water that is apportioned to one Lower Division state, but is for any reason unused in that State, to another Lower Division state. This determination is made for one Year only and no rights to recurrent use of the water accrue to the state that receives the allocated water.

B. Application to Unused Basic Apportionment

Before making a determination of a Surplus Condition under these Guidelines, the Secretary will determine the quantity of apportioned but unused water excluding ICS created in that Year from the basic apportionments under Article II(B)(6), and will allocate such water in the following order of priority:

1. Meet the Direct Delivery Domestic Use requirements of MWD and Southern Nevada Water Authority (SNWA), allocated as agreed by said agencies;

2. Meet the needs for Off-stream Banking activities for use in California by MWD and for use in Nevada by SNWA, allocated as agreed by said agencies; and

3. Meet the other needs for water in California in accordance with the California Seven-Party Agreement as supplemented by the Quantification Settlement Agreement.

Section 2. Determination of Lake Mead Operation During the Interim Period

In the development of the AOP, the Secretary shall use the August 24-Month Study projections for the following January 1 system storage and reservoir water surface elevations to determine the Lake Mead operation for the following Calendar Year as described in this Section 2.

A. Normal Conditions

1. Lake Mead above elevation 1,075 feet and below elevation 1,145 feet

In years when Lake Mead elevation is projected to be above 1,075 feet and below elevation 1,145 feet on January 1, the Secretary shall determine either a Normal Condition, or, under Section 2.B.5., an ICS Surplus Condition.

B. Surplus Conditions

1. Partial Domestic Surplus

[Adopted January 16, 2001; Deleted December 13, 2007.]

2. Domestic Surplus

(Lake Mead at or above elevation 1,145 feet and below the elevation that triggers a Quantified Surplus (70R Strategy).)

In years when Lake Mead content is projected to be at or above elevation 1,145 feet, but less than the amount which would initiate a Surplus under Section 2.B.3., Quantified Surplus, or Section 2.B.4., Flood Control Surplus, on January 1, the Secretary shall determine a Domestic Surplus Condition. The amount of such Surplus shall equal—

a. From the effective date of these Guidelines through December 31, 2015 (through preparation of the 2016 AOP):

(1) For Direct Delivery Domestic Use by MWD, 1.250 maf reduced by the amount of basic apportionment available to MWD.

(2) For use by SNWA, the Direct Delivery Domestic Use within the SNWA service area in excess of the State of Nevada's basic apportionment.

(3) For use in Arizona, the Direct Delivery Domestic Use in excess of Arizona's basic apportionment.

b. From January 1, 2016 (for preparation of the 2017 AOP) through December 31, 2025 (through preparation of the 2026 AOP):

(1) For use by MWD, 250,000 af per Year in addition to the amount of California's basic apportionment available to MWD.

(2) For use by SNWA, 100,000 af per Year in addition to the amount of Nevada's basic apportionment available to SNWA.

(3) For use in Arizona, 100,000 af per Year in addition to the amount of Arizona's basic apportionment available to Arizona Contractors.

3. Quantified Surplus (70R Strategy) [2]

In years when the Secretary determines that water should be delivered for beneficial consumptive use to reduce the risk of potential reservoir spills based on the 70R Strategy the Secretary shall determine a Quantified Surplus Condition and allocate a Quantified Surplus sequentially as follows:

a. Establish the volume of the Quantified Surplus. For the purpose of determining the existence, and establishing the volume, of Quantified Surplus, the Secretary shall not consider any volume of ICS as defined in these Guidelines.

b. Allocate and distribute the Quantified Surplus 50 percent to California, 46 percent to Arizona, and 4 percent to Nevada, subject to c. through e. that follow.

c. Distribute California's share first to meet basic apportionment demands and MWD's demands, and then to California Priorities 6 and 7 and other surplus

[2] 70R is a spill avoidance strategy that determines a surplus if the January 1 projected system storage space is less than the space required by the flood control criteria, assuming a natural inflow of 17.4 maf (the 70th percentile non-exceedence flow). See ISG Final EIS at Section 2.3.1.2.

contracts. Distribute Nevada's share first to meet basic apportionment demands and then to the remaining demands. Distribute Arizona's share to surplus demands in Arizona including Off-stream Banking and interstate banking demands. Nevada shall receive first priority for interstate banking in Arizona.

d. Distribute any unused share of the Quantified Surplus in accordance with Section 1.

e. Determine whether MWD, SNWA and Arizona have received the amount of water they would have received under Section 2.B.2., if a Quantified Surplus Condition had not been determined. If they have not, then determine and meet all demands provided for in Section 2.B.2.

4. Flood Control Surplus

In years in which the Secretary makes space-building or flood control releases [3] pursuant to the 1984 Field Working Agreement between Reclamation and the Army Corps of Engineers (as may be amended), the Secretary shall determine a Flood Control Surplus for the remainder of that Year or the subsequent Year. In such years, releases will be made to satisfy all beneficial uses within the United States, including unlimited Off-stream Banking.

5. ICS Surplus

a. In years in which Lake Mead's elevation is projected to be above elevation 1,075 feet on January 1, a Flood Control Surplus has not been determined, and delivery of ICS has been requested, the Secretary may determine an ICS Surplus Condition in lieu of a Normal Condition or in addition to other operating conditions that are based solely on the elevation of Lake Mead.

b. In years in which a Quantified Surplus or a Domestic Surplus is available to a Contractor, the Secretary shall first deliver the Quantified Surplus or Domestic Surplus before delivering any requested ICS to that Contractor. If available Quantified Surplus or Domestic Surplus is insufficient to meet a Contractor's demands, the Secretary shall deliver ICS available in that Contractor's ICS Account at the request of the Contractor, subject to the provisions of Section 3.C.

C. Allocation of Colorado River Water and Forbearance and Reparation Arrangements

[Content of 2001 ISG Section 2.C., Allocation of Colorado River Water and Forbearance and Reparation Arrangements, is now found at III.A., as modified.]

D. Shortage Conditions

1. Deliveries to the Lower Division States during Shortage Condition Years shall be implemented in the following manner:

a. In years when Lake Mead content is projected to be at or below elevation 1,075 feet and at or above 1,050 feet on January 1, a quantity of 7.167 maf shall be apportioned for consumptive use in the Lower Division States of which 2.48 maf shall be apportioned for use in Arizona and 287,000 af shall be apportioned for use in Nevada in accordance with the Arizona-Nevada Shortage Sharing Agreement dated February 9, 2007, and 4.4 maf shall be apportioned for use in California.

b. In years when Lake Mead content is projected to be below elevation 1,050 feet and at or above 1,025 feet on January 1, a quantity of 7.083 maf shall be apportioned for consumptive use in the Lower Division States of which 2.4 maf shall be apportioned for use in Arizona and 283,000 af shall be apportioned for use in Nevada in accordance with the Arizona-Nevada Shortage Sharing Agreement dated February 9, 2007, and 4.4 maf shall be apportioned for use in California.

c. In years when Lake Mead content is projected to be below elevation 1,025 feet on January 1, a quantity of 7.0 maf shall be apportioned for consumptive use in the Lower Division States of which 2.32 maf shall be apportioned for use in Arizona and 280,000 af shall be apportioned for use in Nevada in accordance with the Arizona-Nevada Shortage Sharing Agreement dated February 9, 2007, and 4.4 maf shall be apportioned for use in California.

2. During a Year when the Secretary has determined a Shortage Condition, the Secretary shall deliver Developed Shortage Supply available in a Contractor's DSS Account at the request of the Contractor, subject to the provisions of Section 4.C.

Section 3. Implementation of Intentionally Created Surplus

[Content of 2001 ISG Section 3., Implementation of Guidelines, is now found at Section 7., as modified herein.]

A. Categories of ICS

1. Extraordinary Conservation ICS

A Contractor may create Extraordinary Conservation ICS through the following activities:

a. Fallowing of land that currently is, historically was, and otherwise would have been irrigated in the next Year.

b. Canal lining programs.

c. Desalination programs in which the desalinated water is used in lieu of Mainstream water.

d. Extraordinary conservation programs that existed on January 1, 2006.

e. Extraordinary Conservation ICS demonstration programs pursuant to a letter agreement entered into between Reclamation and the Contractor prior to the effective date of these Guidelines.

f. Tributary Conservation ICS created under Section 3.A.2. and not delivered in the Year created.

g. Imported ICS created under Section 3.A.4. and not delivered in the Year created.

h. Other extraordinary conservation measures, including but not limited to, development and acquisition of a non-Colorado River System water supply used in lieu of Mainstream water within the same state, in consultation with the Basin States.

2. Tributary Conservation ICS

A Contractor may create Tributary Conservation ICS by purchasing documented water rights on Colorado River System tributaries within the Contractor's state if there is documentation that the water rights have been used for a significant period of Years and that the water rights were perfected prior to June 25, 1929 (the effective date of the Boulder Canyon Project Act). The actual amount of any Tributary Conservation ICS introduced to the Mainstream shall be subject to verification by the Secretary as provided in Section 3.D. Any Tributary Conservation ICS not delivered pursuant to Section 3.C. or deducted pursuant to Section 3.B.2. in the Year it was created will, at the beginning of the following Year, be converted to Extraordinary Conservation ICS and will thereafter be subject to all provisions applicable to Extraordinary Conservation ICS. Tributary Conservation ICS may be delivered for Domestic Use only.

3. System Efficiency ICS

A Contractor may make contributions of capital [4] to the Secretary for use in

[3] Under current practice, surplus waters are made available to Mexico pursuant to the 1944 Treaty (when Mexico may schedule up to an additional 0.2 maf) when flood control releases are made. These Guidelines are not intended to affect that practice. Any issues relating to the implementation of the 1944 Treaty, including any potential changes in approach relating to surplus declarations under the 1944 Treaty, would be addressed with Mexico as appropriate through the USIBWC.

[4] To the extent permitted by federal law, monies to pay construction, operation, maintenance, repair, and/or replacement costs.

projects designed to realize system efficiencies that save water that would otherwise be lost from the Mainstream in the United States. An amount of water equal to a portion of the water conserved would be made available to contributing Contractor(s) by the Secretary as System Efficiency ICS.[5] System efficiency projects are intended only to provide temporary water supplies. System Efficiency ICS will be delivered to the contributing Contractor(s) on a schedule of annual deliveries as provided in an exhibit to a Forbearance Agreement and Delivery Agreement. The Secretary may identify potential system efficiency projects, terms for capital participation in such projects, and types and amounts of benefits the Secretary could provide in consideration of non-federal capital contributions to system efficiency projects, including identification of a portion of the water saved by such projects.

4. Imported ICS

A Contractor may create Imported ICS by introducing non-Colorado River System water in that Contractor's state into the Mainstream. Contractors proposing to create Imported ICS shall make arrangements with the Secretary, contractual or otherwise, to ensure no interference with the Secretary's management of Colorado River System reservoirs and regulatory structures. Any arrangement shall provide that the Contractor must obtain appropriate permits or other authorizations required by state and federal law. The actual amount of any Imported ICS introduced to the Mainstream shall be subject to verification by the Secretary as provided in Section 3.D. Any Imported ICS not delivered pursuant to Section 3.C. or deducted pursuant to Section 3.B.2. in the Year it was created will be converted, at the beginning of the following Year, to Extraordinary Conservation ICS and thereafter will be subject to all provisions applicable to Extraordinary Conservation ICS.

B. Creation of ICS

A Contractor may only create ICS in accordance with the following conditions:

1. A Contractor shall submit a plan for the creation of ICS to the Secretary demonstrating how all requirements of these Guidelines will be met in the Contractor's creation of ICS. Until such plan is reviewed and approved by the Secretary, subject to such environmental compliance as may be required, such plan or any ICS purportedly created through it shall not be a basis for creation of ICS. An ICS plan will consist of at a minimum the following information:

a. Project description, including what extraordinary measures will be taken to conserve or import water;

b. Term of the activity;

c. Estimate of the amount of water that will be conserved or imported;

d. Proposed methodology for verification of the amount of water conserved or imported; and

e. Documentation regarding any state or federal permits or other regulatory approvals that have already been obtained by the Contractor or that need to be obtained prior to creation of ICS.

A Contractor may modify its approved plan for creation of ICS during any Year, subject to approval by the Secretary. A Contractor with an approved multi-Year plan for System Efficiency ICS is not required to seek further approval by the Secretary in subsequent Years unless the Contractor seeks to modify the plan.

2. There shall be a one-time deduction of five percent (5%) from the amount of ICS in the Year of its creation. This system assessment shall result in additional system water in storage in Lake Mead. This one-time system assessment shall not apply to:

a. System Efficiency ICS created pursuant to Section 3.B. because a large portion of the water conserved by this type of project will increase the quantity of system water in storage over time.

b. Extraordinary Conservation ICS created by conversion of Tributary Conservation ICS that was not delivered in the Year created, pursuant to this Section 3.B. because 5% of the ICS is deducted at the time the Tributary Conservation ICS is created.

c. Extraordinary Conservation ICS created by conversion of Imported ICS that was not delivered in the Year created, pursuant to this Section 3.B. because 5% of the ICS is deducted at the time the Imported ICS is created.

d. ICS created under demonstration programs in 2006 and 2007 which has already been assessed the 5% system assessment.

3. Except as provided in Sections 3.A.2. and 3.A.4., Extraordinary Conservation ICS can only be created if such water would have otherwise been beneficially used.

4. The maximum total amount of Extraordinary Conservation ICS that can be created during any Year is limited to the following:

a. 400,000 af for California Contractors;

b. 125,000 af for Nevada Contractors; and

c. 100,000 af for Arizona Contractors.

5. The maximum quantity of Extraordinary Conservation ICS that may be accumulated in all ICS Accounts, at any time, is limited to the following:

a. 1.5 maf for California Contractors;

b. 300,000 af for Nevada Contractors; and

c. 300,000 af for Arizona Contractors.

6. Except as provided in Sections 3.A.2. and 3.A.4., no category of surplus water can be used to create Extraordinary Conservation ICS.

7. The quantity of Extraordinary Conservation ICS remaining in an ICS Account at the end of each Year shall be diminished by annual evaporation losses of 3%. Losses shall be applied annually to the end-of-the-Year balance of Extraordinary Conservation ICS beginning in the Year after the ICS is created and continuing until no Extraordinary Conservation ICS remains in Lake Mead. No evaporation losses shall be assessed during a Year in which the Secretary has determined a Shortage Condition.

8. Extraordinary Conservation ICS from a project within a state may only be credited to the ICS Account of a Contractor within that state that has funded or implemented the project creating ICS, or to the ICS Account of a Contractor within the same state as the funding entity and project and with written agreement of the funding entity.

9. A Contractor must notify Reclamation of the amount of ICS it wishes to create for the subsequent Year pursuant to an existing, approved plan. A Contractor may request mid-Year modification(s) to reduce the amount of ICS created during that Year, subject to the requirements of this Section 3.B. A Contractor cannot increase the amount of ICS it had previously scheduled to create during the Year.

C. Delivery of ICS

The Secretary shall deliver ICS in accordance with the following conditions:

1. The delivery shall be consistent with the terms of a Delivery Agreement with a Contractor regarding ICS.

2. The Secretary has determined an ICS Surplus Condition.

3. The existence of Forbearance Agreements necessary to bring the delivery of the ICS into compliance with Articles II(B)(2) and II(B)(6) of the Consolidated Decree.

[5] Should other Contractor(s) elect to participate in a system efficiency project following the Secretary making an amount of water available to the contributing Contractor(s), the Secretary shall reduce the amount of water in the contributing Contractor(s)' ICS Account(s) and credit the electing Contractor(s)' ICS Account(s) in an equal amount in accordance with the terms of the Secretary's agreement for the funding of the system efficiency project.

4. A limitation on the total amount of Extraordinary Conservation ICS that may be delivered in any Year is as follows:

a. 400,000 af for California Contractors;

b. 300,000 af for Nevada Contractors; and

c. 300,000 af for Arizona Contractors.

5. If the May 24-Month Study for that Year indicates that a Shortage Condition would be determined in the succeeding Year if the requested amounts for the current Year under Section 3.C. were delivered, the Secretary may deliver less than the amounts of ICS requested to be delivered.

6. If the Secretary releases Flood Control Surplus water, Extraordinary Conservation ICS accumulated in ICS Accounts shall be reduced by the amount of the Flood Control Surplus on an acre-foot for acre-foot basis until no Extraordinary Conservation ICS remains. The reductions to the ICS Accounts shall be shared on a pro-rata basis among all Contractors that have accumulated Extraordinary Conservation ICS.

7. If a Contractor has an overrun payback obligation, as described in the October 10, 2003 Inadvertent Overrun and Payback Policy or Exhibit C to the October 10, 2003 Colorado River Water Delivery Agreement, the Contractor must pay the overrun payback obligation in full before requesting or receiving delivery of ICS. The Contractor's ICS Account shall be reduced by the amount of the overrun payback obligation in order to pay the overrun payback obligation.

8. If more ICS is delivered to a Contractor than is actually available for delivery to the Contractor in that Year, then the excess ICS delivered shall be treated as an inadvertent overrun until it is fully repaid.

9. A Contractor may request mid-Year modification(s) to increase or reduce the amount of ICS to be delivered during that Year because of changed conditions, emergency, or hardship, subject to the requirements of this Section 3.C.

10. The Contractor shall agree in the Delivery Agreement that the records of the Contractor relating to the creation of ICS shall be open to inspection by the Secretary and by any Contractor or Basin State.

D. Accounting for ICS

The Secretary shall develop procedures to account for and verify, on an annual basis, ICS creation and delivery. At a minimum such procedures shall include the following:

1. A Contractor shall submit for the Secretary's review and verification, appropriate information, as determined by the Secretary, contained in a Certification Report, to demonstrate the amount of ICS created and that the method of creation was consistent with the Contractor's approved ICS plan, a Forbearance Agreement, and a Delivery Agreement. Such information shall be submitted in the Year following the creation of the ICS.

2. The Secretary, acting through the Lower Colorado Regional Director, shall verify the information submitted pursuant to this section, and provide a final written decision to the Contractor regarding the amount of ICS created. The results of such final written decisions shall be made available to the public through publication pursuant to Section 3.D.3. and other appropriate means. A Contractor and any party to an applicable Forbearance Agreement may appeal the Regional Director's verification decision first to the Regional Director and then to the Secretary; and through judicial processes.

3. Each Year the Water Accounting Report will be supplemented to include ICS Account balance information for each Contractor and shall address ICS creation, deliveries, amounts no longer available for delivery due to releases for flood control purposes, deductions pursuant to Section 3.B.2., deductions due to annual evaporation losses pursuant to Section 3.B.7., any amounts of ICS converted to Extraordinary Conservation ICS, and ICS remaining available for delivery.

Section 4. Implementation of Developed Shortage Supply

[Content of 2001 ISG Section 4., Effective Period & Termination, is now found at Section 8., as modified herein.]

A. Categories of DSS

1. Tributary Conservation DSS

A Contractor may create Tributary Conservation DSS by purchasing documented water rights on Colorado River System tributaries within the Contractor's state if there is documentation that the water rights have been used for a significant period of Years and that the water rights were perfected prior to June 25, 1929 (the effective date of the Boulder Canyon Project Act). The actual amount of any Tributary Conservation DSS introduced to the Mainstream shall be subject to verification by the Secretary as provided in Section 4.D. Tributary Conservation DSS may be delivered for Domestic Use only.

2. Imported DSS

A Contractor may create Imported DSS by introducing non-Colorado River System water in that Contractor's state into the Mainstream, making sufficient arrangements with the Secretary, contractual or otherwise, to ensure no interference with the Secretary's management of Colorado River System reservoirs and regulatory structures. Any arrangement shall provide that the Contractor must obtain appropriate permits or other authorizations required by state and federal law. The actual amount of any Imported DSS introduced to the Mainstream shall be subject to verification by the Secretary as provided in Section 4.D.

B. Creation of DSS

A Contractor may only create DSS in accordance with the following conditions:

1. A Contractor shall submit a plan for the creation of DSS to the Secretary demonstrating how all requirements of these Guidelines will be met in the Contractor's creation of DSS. Until such plan is reviewed and approved by the Secretary, subject to such environmental compliance as may be required, such plan, or any DSS purportedly created through it, shall not be a basis for creation of DSS. A DSS plan will consist of at a minimum the following information:

a. Project description, including what extraordinary measures will be taken to conserve or import water;

b. Term of the activity;

c. Estimate of the amount of water that will be conserved or imported;

d. Proposed methodology for verification of the amount of water conserved or imported; and

e. Documentation regarding any state or federal permits or other regulatory approvals that have already been obtained by the Contractor or that need to be obtained prior to creation of DSS.

A Contractor may modify its approved plan for creation of DSS during any Year, subject to approval by the Secretary.

2. There shall be a one-time deduction of five percent (5%) from the amount of DSS in the Year of its creation. This system assessment shall result in additional system water in storage in Lake Mead.

3. DSS may only be created during a Year when the Secretary has determined a Shortage Condition.

4. DSS may only be created by a project that is approved by the Secretary for creation prior to the Secretary determining a Shortage Condition.

5. A Contractor must notify Reclamation of the amount of DSS it

wishes to create for the subsequent Year pursuant to an existing, approved plan. A Contractor may request mid-Year modification(s) to reduce the amount of DSS created during that Year, subject to the requirements of this Section 4.B. A Contractor cannot increase the amount of DSS it had previously scheduled to create during the Year.

C. Delivery of DSS

The Secretary shall deliver DSS in accordance with the following conditions:

1. The delivery shall be consistent with the terms of a Delivery Agreement with a Contractor regarding DSS.
2. The Secretary has determined a Shortage Condition.
3. Delivery of DSS shall not cause the total deliveries within the Lower Division states to reach or exceed 7.5 maf in any Year.
4. Delivery of DSS shall be in accordance with Article II(B)(3) of the Consolidated Decree.
5. If a Contractor has an overrun payback obligation, as described in the October 10, 2003 Inadvertent Overrun and Payback Policy or Exhibit C to the October 10, 2003 Colorado River Water Delivery Agreement, the Contractor must pay the overrun payback obligation in full before requesting or receiving delivery of DSS. The Contractor's DSS Account shall be reduced by the amount of the overrun payback obligation in order to pay the overrun payback obligation.
6. If more DSS is delivered to a Contractor than is actually available for delivery to the Contractor in that Year, then the excess DSS delivered shall be treated as an inadvertent overrun until it is fully repaid.
7. A Contractor may request mid-Year modification(s) to increase or reduce the amount of DSS to be delivered during that Year because of changed conditions, emergency, or hardship, subject to the requirements of this Section 4.C.
8. The Contractor shall agree in the Delivery Agreement that the records of the Contractor relating to the creation of DSS shall be open to inspection by the Secretary or by any Contractor or Basin State.
9. DSS may only be delivered in the Year of its creation. Any DSS not delivered pursuant to this Section 4.C. in the Year it is created may not be converted to Extraordinary Conservation ICS.

D. Accounting for DSS

The Secretary shall develop procedures to account for and verify, on an annual basis, DSS creation and delivery. At a minimum such procedures shall include the following:

1. A Contractor shall submit for the Secretary's review and verification appropriate information, as determined by the Secretary, contained in a Certification Report, to demonstrate the amount of DSS created and that the method of creation was consistent with the Contractor's approved DSS plan and a Delivery Agreement. Such information shall be submitted in the Year following the creation of the DSS.
2. The Secretary, acting through the Lower Colorado Regional Director, shall verify the information submitted pursuant to this section, and provide a final written decision to the Contractor regarding the amount of DSS created. The results of such final written decisions shall be made available to the public through publication pursuant to Section 4.D.3. and other appropriate means. The Contractor may appeal the Regional Director's verification decision first to the Regional Director and then to the Secretary; and through judicial processes.
3. Each Year the Water Accounting Report will be supplemented to include DSS information for each Contractor and shall address DSS creation, deliveries, and deductions pursuant to Section 4.B.2.

Section 5. California's Colorado River Water Use Plan Implementation Progress

A. Introduction

[Adopted January 16, 2001; Deleted December 13, 2007.]

B. California's Quantification Settlement Agreement

[Adopted January 16, 2001; Deleted December 13, 2007.]

C. California's Colorado River Water Use Reductions

The California Agricultural (Palo Verde Irrigation District, Yuma Project Reservation Division, Imperial Irrigation District, and Coachella Valley Water District) usage plus 14,500 af of Present Perfected Right (PPR) use would need to be at or below the following amounts at the end of the Year indicated in Years other than Quantified or Flood Control Surplus (for Decree accounting purposes all reductions must be within 25,000 af of the amounts stated):

Benchmark date (calendar year)	Benchmark quantity (California agricultural usage & 14,500 AF of PPR use in MAF)
2003	[6] 3.75
2006	[6] 3.64
2009	[7] 3.60
2012	3.47

In the event that California has not reduced its use in accordance with the limits set forth above in any Year in which the Benchmark Quantity applies, the surplus determination under Section 2.B.2. of these Guidelines will be suspended and will instead be based upon the 70R Strategy, for up to the remainder of the term of these Guidelines. If however, California meets the missed Benchmark Quantity before the next Benchmark Date or the 2012 Benchmark Quantity after 2012, the surplus determination under Section 2.B.2. shall be reinstated as the basis for the surplus determination under the AOP for the next following Year(s).

As part of the AOP process during the Interim Period of these Guidelines, California shall report to the Secretary on its progress in implementing its California Colorado River Water Use Plan.

Section 6. Coordinated Operation of Lake Powell and Lake Mead During the Interim Period

[Content of 2001 ISG Section 6., Authority, is now found at Section 9., as modified herein.]

During the Interim Period, the Secretary shall coordinate the operations of Lake Powell and Lake Mead according to the strategy set forth in this Section 6. The objective of the operation of Lake Powell and Lake Mead as described herein is to avoid curtailment of uses in the Upper Basin, minimize shortages in the Lower Basin and not adversely affect the yield for development available in the Upper Basin.

The August 24-Month Study projections of the January 1 system storage and reservoir water surface elevations, for the following Water Year, shall be used to determine the applicable operational tier for the coordinated operation of Lake Powell and Lake Mead as specified in the table below.

Consistent with the provisions of this Section 6, equalization or balancing of storage in Lake Powell and Lake Mead shall be achieved as nearly as is

[6] The Benchmark Quantities in 2003 and 2006 were met.

[7] The 2009 Benchmark Quantity is modified from 3.53 maf due to construction delays that have been experienced for the All-American Canal Lining Project.

practicable by the end of each Water Year. When equalizing or balancing the contents of the reservoirs, scheduled Water Year releases from Lake Powell will be adjusted each month based on forecasted inflow, and projected September 30 Active Storage at Lake Powell and Lake Mead. In this Section 6, the term ''storage'' shall mean Active Storage.

When determining lake elevations and contents under this Section 6, no adjustment shall be made for ICS.

Coordinated operation of Lake Powell and Lake Mead as described herein will be presumed to be consistent with the Section 602(a) storage requirement contained in the Colorado River Basin Project Act.

Releases from Lake Powell for coordinated operations will be consistent with the parameters of the Record of Decision for the Glen Canyon Dam Final Environmental Impact Statement and the Glen Canyon Dam Operating Criteria (62 Fed. Reg. 9447, March 3, 1997).

Notwithstanding the quantities set forth in this Section 6, the Secretary shall evaluate and take additional necessary actions, as appropriate, at critical elevations in order to avoid Lower Basin shortage determinations as reservoir conditions approach critical thresholds. Any actions shall also be consistent with avoidance of curtailment of consumptive uses in the Upper Basin.

Lake Powell Operational Tiers
(subject to April adjustments or mid-year review modifications)

Lake Powell Elevation (feet)	Lake Powell Operational Tier	Lake Powell Active Storage (maf)
3,700		**24.32**
	Equalization Tier Equalize, avoid spills or release 8.23 maf	
3,636 – 3,666		**15.54 – 19.29**
(see table below)	**Upper Elevation Balancing Tier** release 8.23 maf; if Lake Mead < 1,075 feet, balance contents with a min/max release of 7.0 and 9.0 maf	(2008 – 2026)
3,575		**9.52**
	Mid-Elevation Release Tier release 7.48 maf; if Lake Mead < 1,025 feet, release 8.23 maf	
3,525		**5.93**
	Lower Elevation Balancing Tier balance contents with a min/max release of 7.0 and 9.5 maf	
3,370		**0**

April adjustments to Lake Powell operations in the Upper Elevation Balancing Tier (as specified in Sections 6.B.3. and 6.B.4.) shall be based on the April 24-Month Study projections of the September 30 system storage and reservoir water surface elevations for the current Water Year. Any such adjustments shall not require re-initiation of the AOP consultation process. In making these projections, the Secretary shall utilize the April 1 final forecast of the April through July runoff, currently provided by the National Weather Service's Colorado Basin River Forecast Center.

A. Equalization Tier

In each Water Year, the Lake Powell equalization elevation will be as follows:

LAKE POWELL EQUALIZATION ELEVATION TABLE

Water year	Elevation (feet)
2008	3,636
2009	3,639
2010	3,642
2011	3,643
2012	3,645
2013	3,646
2014	3,648
2015	3,649
2016	3,651
2017	3,652
2018	3,654
2019	3,655
2020	3,657
2021	3,659
2022	3,660
2023	3,662
2024	3,663

LAKE POWELL EQUALIZATION ELEVATION TABLE—Continued

Water year	Elevation (feet)
2025	3,664
2026	3,666

1. In Water Years when Lake Powell elevation is projected on January 1 to be at or above the elevation stated in the Lake Powell Equalization Elevation Table, an amount of water will be released from Lake Powell to Lake Mead at a rate greater than 8.23 maf per Water Year to the extent necessary to avoid spills, or equalize storage in the two reservoirs, or otherwise to release 8.23 maf from Lake Powell. The Secretary shall release at least 8.23 maf per Water

Year and shall release additional water to the extent that the additional releases will not cause Lake Powell content to be below the elevation stated in the Lake Powell Equalization Elevation Table or cause Lake Mead content to exceed that of Lake Powell; provided, however, if Lake Powell reaches the elevation stated in the Lake Powell Equalization Elevation Table for that Water Year and the September 30 projected Lake Mead elevation is below elevation 1,105 feet, the Secretary shall release additional water from Lake Powell to Lake Mead until the first of the following conditions is projected to occur on September 30: (i) The reservoirs fully equalize; (ii) Lake Mead reaches elevation 1,105 feet; or (iii) Lake Powell reaches 20 feet below the elevation in the Lake Powell Equalization Elevation Table for that year.

B. Upper Elevation Balancing Tier

1. In Water Years when the projected January 1 Lake Powell elevation is below the elevation stated in the Lake Powell Equalization Elevation Table and at or above 3,575 feet, the Secretary shall release 8.23 maf from Lake Powell if the projected January 1 Lake Mead elevation is at or above 1,075 feet.

2. If the projected January 1 Lake Powell elevation is below the elevation stated in the Lake Powell Equalization Elevation Table and at or above 3,575 feet and the projected January 1 Lake Mead elevation is below 1,075 feet, the Secretary shall balance the contents of Lake Mead and Lake Powell, but shall release not more than 9.0 maf and not less than 7.0 maf from Lake Powell in the Water Year.

3. When operating in the Upper Elevation Balancing Tier, if the April 24-Month Study projects the September 30 Lake Powell elevation to be greater than the elevation in the Lake Powell Equalization Elevation Table, the Equalization Tier will govern the operation of Lake Powell for the remainder of the Water Year (through September).

4. When operating under Section 6.B.1, if the April 24-Month Study projects the September 30 Lake Mead elevation to be below 1,075 feet and the September 30 Lake Powell elevation to be at or above 3,575 feet, the Secretary shall balance the contents of Lake Mead and Lake Powell, but shall release not more than 9.0 maf and not less than 8.23 maf from Lake Powell in the Water Year.

5. When Lake Powell is projected to be operating under Section 6.B.2. and more than 8.23 maf is projected to be released from Lake Powell during the upcoming Water Year, the Secretary shall recalculate the August 24-Month Study projection of the January 1 Lake Mead elevation to include releases above 8.23 maf that are scheduled to be released from Lake Powell during the months of October, November, and December of the upcoming Water Year, for the purposes of determining Normal or Shortage conditions pursuant to Sections 2.A. or 2.D. of these Guidelines.

C. Mid-Elevation Release Tier

1. In Water Years when the projected January 1 Lake Powell elevation is below 3,575 feet and at or above 3,525 feet, the Secretary shall release 7.48 maf from Lake Powell in the Water Year if the projected January 1 elevation of Lake Mead is at or above 1,025 feet. If the projected January 1 Lake Mead elevation is below 1,025 feet, the Secretary shall release 8.23 maf from Lake Powell in the Water Year.

D. Lower Elevation Balancing Tier

1. In Water Years when the projected January 1 Lake Powell elevation is below 3,525 feet, the Secretary shall balance the contents of Lake Mead and Lake Powell, but shall release not more than 9.5 maf and not less than 7.0 maf from Lake Powell in the Water Year.

Section 7. Implementation of Guidelines

[Content of 2001 ISG Section 7, Modeling and Data Authority, is now found at Section 7.A., as modified herein.]

A. AOP Process

During the Interim Period, the Secretary shall utilize the AOP process to determine operations under these Guidelines concerning the coordinated operations of Lake Powell and Lake Mead pursuant to Section 6 of these Guidelines, and the allocation of apportioned but unused water from Lake Mead and the determinations concerning whether Normal, Surplus or Shortage conditions shall apply for the delivery of water from Lake Mead, pursuant to Section 1 and Section 2 of these Guidelines.

B. Consultation

The Secretary shall consult on the implementation of these Guidelines in circumstances including but not limited to the following:

1. The Secretary shall first consult with all the Basin States before making any substantive modification to these Guidelines.

2. Upon a request for modification of these Guidelines, or upon a request to resolve any claim or controversy arising under these Guidelines or under the operations of Lake Powell and Lake Mead pursuant to these Guidelines or any other applicable provision of federal law, regulation, criteria, policy, rule, or guideline, or regarding application of the 1944 Treaty that has the potential to affect domestic management of Colorado River water, the Secretary shall invite the Governors of all the Basin States, or their designated representatives, and the Department of State and USIBWC as appropriate, to consult with the Secretary in an attempt to resolve such claim or controversy by mutual agreement.

3. In the event projections included in any monthly 24-Month Study indicate Lake Mead elevations may approach an elevation that would trigger shortages in deliveries of water from Lake Mead in the United States, the Secretary shall consult with the Department of State, the USIBWC and the Basin States on whether and how the United States may reduce the quantity of water allotted to Mexico consistent with the 1944 Treaty.[8]

4. Whenever Lake Mead is below elevation 1,025 feet, the Secretary shall consult with the Basin States annually to consider whether Colorado River hydrologic conditions, together with the anticipated delivery of water to the Lower Division States and Mexico, is likely to cause the elevation of Lake Mead to fall below 1,000 feet. Upon such a consideration, the Secretary shall consult with the Basin States to discuss further measures that may be undertaken. The Secretary shall implement any additional measures consistent with applicable federal law.

5. During the Interim Period the Secretary shall consult with the Basin States regarding the administration of ICS.

6. During the Interim Period the Secretary shall consult with the Basin States regarding the creation of ICS through other extraordinary conservation measures pursuant to Section 3.A.1.h.

7. During the Interim Period the Secretary shall consult with the Basin States regarding the creation of System Efficiency ICS pursuant to Section 3.A.3.

8. The Secretary shall consult with the Basin States to evaluate actions at critical elevations that may avoid

[8] These Guidelines are not intended to constitute an interpretation or application of the 1944 Treaty or to represent current United States policy or a determination of future United States policy regarding deliveries to Mexico. The United States will conduct all necessary and appropriate discussions regarding the proposed federal action and implementation of the 1944 Treaty with Mexico through the IBWC in consultation with the Department of State.

shortage determinations as reservoir elevations approach critical thresholds.

C. Mid-Year Review

In order to allow for better overall water management during the Interim Period, the Secretary may undertake a mid-year review to consider revisions to the AOP. The Secretary shall initiate a mid-year review if requested by any Basin State or by the Upper Colorado River Commission. In the mid-year review, the Secretary may modify the AOP to make a determination that a different operational tier (Section 2.A., B., or D., or Section 6.A., B., C., or D.) than that determined in the AOP will apply for the remainder of the Year or Water Year as appropriate, or that an amount of water other than that specified in the applicable operational tier will be released for the remainder of the Year or Water Year as appropriate. The determination of modification of the AOP shall be based upon an evaluation of the objectives to avoid curtailment of uses in the Upper Basin, minimize shortages in the Lower Basin and not adversely affect the yield for development available in the Upper Basin. In undertaking such a mid-year review, the Secretary shall utilize the April 1 final forecast of the April through July runoff, currently provided by the National Weather Service's Colorado Basin River Forecast Center, and other relevant factors such as actual runoff conditions, actual water use, and water use projections. For Lake Mead, the Secretary shall revise the determination in any mid-year review for the current Year only to allow for additional deliveries from Lake Mead pursuant to Section 2 of these Guidelines.

D. Operations During Interim Period

These Guidelines implement the LROC and may be reviewed concurrently with the LROC five-year review. The Secretary will base annual determinations regarding the operations of Lake Powell and Lake Mead on these Guidelines unless extraordinary circumstances arise. Such circumstances could include 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.

Beginning no later than December 31, 2020, the Secretary shall initiate a formal review for purposes of evaluating the effectiveness of these Guidelines. The Secretary shall consult with the Basin States in initiating this review.

Procedures will be established for implementation of ICS and DSS by Reclamation's Lower Colorado Regional Director.

Section 8. Interim Period and Termination

[Adopted January 16, 2001; Deleted and Modified December 13, 2007.]

A. Interim Period

These Guidelines will be effective upon the date of execution of the ROD for Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead and will, unless subsequently modified, remain in effect through December 31, 2025 (through preparation of the 2026 AOP).

The Department promulgated these Guidelines based on consideration of multiple sources of information, including existing applicable guidelines, information submitted by the general public, an Agreement and recommendation submitted by the representatives of the Governors of the seven Colorado Basin States, modeling, and other information contained in environmental compliance documentation. The Secretary recognizes that the Basin States' recommendation was developed with the intent to be consistent with existing law, as addressed by Section 9 of the April 23, 2007, Agreement among the Basin States.

The Secretary recognizes that differences exist with respect to interpretations of certain provisions contained in the Law of the River and the proper application of those provisions, including, for example, Section 602(a) of the Colorado River Basin Project Act of 1968. In lieu of a formal determination regarding such disputes, the Secretary will apply the operational criteria in these Guidelines. By way of further example, positions and rights concerning the calculation of the quantity of Section 602(a) storage and releases of water from Lake Powell are reserved. The Secretary, through the adoption of these Guidelines, makes no determination with respect to the correctness of any interpretation of Section 602(a) storage and release requirements or other positions of the individual Colorado River Basin States.

Actual operations under these Guidelines shall not represent interpretations of existing law by the Secretary, nor predetermine in any manner the means of operation that the Secretary may adopt following the Interim Period. Releases from Lake Powell or Lake Mead pursuant to these Guidelines shall not prejudice the position or interests of either the Upper or Lower Division States, or any Colorado River Basin State, with respect to required storage or deliveries of water pursuant to applicable federal law, either during or after the Interim Period.

B. Effective Period—Special Provisions

1. The provisions for the delivery and accounting of ICS in Section 3 shall remain in effect through December 31, 2036, unless subsequently modified, for any ICS remaining in an ICS Account on December 31, 2026.

2. The provisions for the creation and delivery of Tributary Conservation ICS and Imported ICS in Section 3 shall continue in full force and effect until fifty years from the date of the execution of the ROD.

3. The provisions for the creation and delivery of DSS in Section 4 shall continue in full force and effect until fifty years from the date of the execution of the ROD.

C. Termination of Guidelines

Except as provided in Section 8.B., these Guidelines shall terminate on December 31, 2025 (through preparation of the 2026 AOP). At the conclusion of the effective period of these Guidelines, the operating criteria for Lake Powell and Lake Mead are assumed to revert to the operating criteria used to model baseline conditions in the Final Environmental Impact Statement for the Interim Surplus Guidelines dated December 2000 (i.e., modeling assumptions are based upon a 70R Strategy for the period commencing January 1, 2026 (for preparation of the 2027 AOP)).

Section 9. Authority

These Guidelines are issued pursuant to the authority vested in the Secretary by federal law, including the Boulder Canyon Project Act of 1928 (28 Stat. 1057), the Colorado River Storage Project Act (70 Stat. 105), and the Consolidated Decree issued by the U.S. Supreme Court in Arizona v. California, 547 U.S. 150 (2006) and shall be used to implement Articles II and III of the Criteria for the Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (Pub. L. 90–537), as amended.

[FR Doc. E8–7760 Filed 4–10–08; 8:45 am]

BILLING CODE 4310–MN–P

9th Circuit Case Number(s) 14-16864

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Signature (use "s/" format) /s/Teresa Kirkland

****

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When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)

Docket No. 14-16864

In the
UNITED STATES COURT OF APPEALS
for the
NINTH CIRCUIT

NAVAJO NATION,
Plaintiff-Appellant,

v.

DEPARTMENT OF THE INTERIOR, SALLY JEWELL, Secretary of the Interior, BUREAU OF RECLAMATION and BUREAU OF INDIAN AFFAIRS,
Defendants-Appellees,

STATE OF ARIZONA, CENTRAL ARIZONA WATER CONSERVATION DISTRICT, ARIZONA POWER AUTHORITY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SALT RIVER VALLEY WATER USERS' ASSOCIATION, IMPERIAL IRRIGATION DISTRICT, METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, COACHELLA VALLEY WATER DISTRICT, STATE OF NEVADA, COLORADO RIVER COMMISSION OF NEVADA, SOUTHERN NEVADA WATER AUTHORITY and STATE OF COLORADO,
Intervenors-Defendants-Appellees.

Appeal from the United States District Court, District of Arizona
No. 3:03-cv-00507-GMS Honorable G. Murray Snow

SUPPLEMENTAL EXCERPTS OF RECORD OF APPELLEES COACHELLA VALLEY WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
VOLUME 1 OF 1

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SUPPLEMENTAL EXCERPTS OF RECORD
APPELLEES COACHELLA VALLEY WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, AND THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA
(CalSER)

INDEX

[1] Arizona district court case number 3:03-cv-507-GMS.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE NAVAJO NATION, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, SALLY JEWELL, Secretary of the Interior; BUREAU OF RECLAMATION; and BUREAU OF INDIAN AFFAIRS, Defendants.	CASE NO. CV-03-507 PCT-GMS **SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiff, the Navajo Nation, complains and alleges as follows:

85. The Navajo Nation voluntarily dismissed its sixth claim for relief and it is stricken.

86. Stricken.

87 Stricken.

88. Stricken.

SEVENTH CLAIM FOR RELIEF
BREACH OF FIDUCIARY TRUST RESPONSIBILITY
BY FAILING TO PROVIDE COLORADO RIVER WATER
TO MEET THE NEEDS OF THE NAVAJO PEOPLE

89. Paragraphs 1-88 are incorporated herein by reference.

90. The Navajo Nation requires water from the Colorado River in order to fulfill the purpose of the Navajo Reservation as a permanent homeland for the Navajo people. *Winters v. United States*, 207 U.S. 564.

91. The Department has failed to determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River, or otherwise determine the amount of water which the Navajo Nation requires from the Lower Basin of the Colorado River to meet the needs of the Navajo Nation and its members, thereby breaching the United States' fiduciary obligation to the Navajo Nation.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, the Navajo Nation, respectfully requests that the Court issue an Order:

A. Declaring that the Surplus Guidelines FEIS violates NEPA and the APA by establishing and recommending the implementation of the Surplus Guidelines for the Colorado River, and in so doing failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

B. Holding unlawful and setting aside the Surplus Guidelines FEIS and any decision based on that document, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

C. Declaring that the Shortage Guidelines FEIS violates NEPA and the APA by establishing and recommending the implementation of the Shortage Guidelines for the Colorado River, and in so doing failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

D. Holding unlawful and setting aside the Shortage Guidelines FEIS and any decision based on that document, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

E. Declaring that the Implementation Agreement FEIS violates NEPA and the APA by failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

F. Holding unlawful and setting aside the Implementation Agreement FEIS and any decision based on that document, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

G. Declaring that the adoption of the interstate water banking regulations, 43 C.F.R. pt. 414, violates the APA by failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

H. Holding unlawful and setting aside the interstate water banking regulations, 43 C.F.R. pt. 414, and any decisions based on those regulations, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

I. Declaring that the Storage and Release Agreement FONSI and the resulting Storage and Release Agreement violate NEPA and the APA by failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

J. Holding unlawful and setting aside the Storage and Release Agreement FONSI and the Storage and Release Agreement, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

K. Stricken together with the sixth claim for relief.

L. Enjoining further breaches of the United States' trust responsibility, or providing such other relief as the Court deems appropriate, (1) to protect the Navajo Nation's beneficial rights to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members and (2) to affirmatively protect the Navajo Nation's tribal trust assets and to make those assets productive for the Navajo Nation's benefit by setting aside the water from the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

M. Stricken together with the sixth claim for relief.

Date: November 14, 2013

Respectfully submitted,

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Stanley M. Pollack

Colorado River Interim Surplus Criteria

Final Environmental Impact Statement

Volume I

U.S. Department of the Interior
Bureau of Reclamation
December 2000

3.14 INDIAN TRUST ASSETS

3.14.1 INTRODUCTION

Indian Trust Assets (ITAs) are legal assets associated with rights or property held in trust by the United States for the benefit of federally recognized Indian Tribes or individuals. The United States, as trustee, is responsible for protecting and maintaining rights reserved by, or granted to, Indian Tribes or individuals by treaties, statutes and executive orders. All Federal bureaus and agencies share a duty to act responsibly to protect and maintain ITAs. Reclamation policy, which satisfies the requirement of Interior's Departmental Manual at 512 DM 2, is to protect ITAs from adverse impacts resulting from its programs and activities whenever possible. Reclamation, in cooperation with Tribe(s) potentially impacted by a given project, must inventory and evaluate assets, and then mitigate, or compensate, for adverse impacts to the asset.

While most ITAs are located on a reservation, they can also be located off-reservation. Examples of ITAs include lands, minerals, water rights and hunting and fishing rights. ITAs include property in which a Tribe has legal interest. For example, tribal entitlements to Colorado River water rights established in each of the Basin States pursuant to water rights settlements are considered trust assets, and the reservations of these Tribes may or may not be located along the river. The present perfected federal reserved rights are rights held directly by the tribal entities for the reservations in whose name the rights are listed in the *Decree*. A tribe may also have other off-reservation interests and concerns that must be taken into account.

Reclamation has entered into government-to-government consultations with potentially affected Tribes to identify and address concerns for ITAs. The Tribes include those in the Ten Tribes Partnership whose landholdings are situated along the Colorado River and various tributaries in the Upper and Lower Basins. Additionally, meetings have been held with the central Arizona Tribes served by CAP facilities, the Coachella Valley Consortium of Mission Indians and other interested Tribes within the Lower Colorado Region. Through meetings and discussions among the Tribes, BIA and Reclamation staff (see Chapter 5), the following sections describe ITAs that have been identified to have the potential to be impacted by interim surplus criteria.

3.14.2 TEN TRIBES PARTNERSHIP

The Tribes comprising the Ten Tribes Partnership are listed below together with the states in which their reservations are located:

Northern Ute Tribe	Utah
Jicarilla Apache Tribe	New Mexico
Navajo Nation	Arizona, New Mexico and Utah
Southern Ute Indian Tribe	Colorado
Ute Mountain Ute Tribe	Colorado and New Mexico
Fort Mojave Indian Tribe	Arizona, Nevada and California
Chemehuevi Tribe	California
Colorado River Indian Tribes	Arizona and California
Quechan Indian Tribe	Arizona and California
Cocopah Indian Tribe	Arizona

The CRSS demand database used for the model analysis in this FEIS includes discrete representation of the Ten Tribes' demand schedules through "demand nodes" in the model. The Tribal demands and their respective points of diversion were obtained from the Tribes in the summer of 2000. The schedules and the full quantified entitlements on which they are based are shown in Attachment Q. The following discussion describes the Ten Tribes' water rights by Tribe.

3.14.2.1 NORTHERN UTE INDIAN TRIBE – UINTAH AND OURAY RESERVATION

The Northern Ute Tribe is located in northeastern Utah in the Green River watershed. Quantification of the Tribe's water rights began in 1923 with two federal court Decrees that quantified the water rights for the Uintah Indian Irrigation Project (UIIP). A 1960 report, commonly referred to as the "Decker Report," divided lands on the reservation into seven groups. Those land groups have served as the basis for discussions of settlement of the Tribe's water right claims over the subsequent 40 years. Congress ratified a 1990 tabulation of the Tribe's water rights in 1992 subject to re-ratification by the Tribe and State of Utah. That tabulation utilizes the Decker Report's land groups as follows:

1. UIIP lands with water rights decreed by the federal court in 1923, and certified by the State of Utah on the Lakefork, Yellowstone, Uinta and Whiterock rivers. Priority date - October 3, 1861.

2. UIIP lands with water rights certificated by the State of Utah served from the Duchesne River including the towns of Duchesne, Randlett and Myton. Priority date October 3, 1861.

3. Lands that are or can be served from the Duchesne River through UIIP which are not certificated by the state. Priority date would be October 3, 1861.

4. Lands found to be productive and economically feasible to be irrigated from privately constructed ditch systems on the Duchesne River or its tributaries above Pahcease Canal. Priority date would be October 3, 1861.

5. Lands susceptible to irrigation and proposed to be developed within the Central Utah Project. Priority date would be October 3, 1861.

6. Lands east of the Green River served from the White River for which Applications to Appropriate Water were once filed with the State of Utah.

7. Lands east of the Green River found to be productive and economically feasible to be irrigated from privately constructed ditch systems now in operation or to be constructed along the Green River, White River, Willow Creek, Bitter Creek, Sweet Water Creek and Hill Creek.

Tables quantifying the Tribe's diversion and depletion rights as tabulated in the 1990 Tabulation (but not yet ratified by the Tribe or state) are included in the Ten Tribes Depletion Schedule (Attachment Q). The diversion rights total approximately 480,000 af with depletions of 248,943 af. The water rights appurtenant to the Group 5 Duchesne Basin lands are proposed to be transferred to the Green River with a seven percent reduction explaining the difference in the table totals. Current water diversions by the Northern Ute Tribe are approximately 250,000 afy for irrigation applications and a small amount of M&I use for oil and gas and a small culinary water system.

The Northern Ute Tribe has five demand points modeled in the CRSS: two demand points on the Green River, two demand points on the Duchesne River and one point on the White River.

3.14.2.2 JICARILLA APACHE INDIAN RESERVATION

The Jicarilla Apache Indian Reservation is located in the upper reaches of the San Juan River Basin and the Rio Chama Basin in northwestern New Mexico. The reservation straddles the Continental Divide.

Pursuant to the Jicarilla Apache Tribe Water Rights Settlement Act ("Settlement Act"), the Tribe is authorized to divert 40,000 afy from the San Juan River Basin, 32,000 afy of which may be depleted. The Settlement Act provides the Tribe the right to divert 33,500 afy or deplete 25,500 afy from either the Navajo Reservoir supply or directly from the Navajo River as it crosses the Jicarilla Apache Indian Reservation. The Settlement Act also authorizes the Tribe to divert and deplete 6,500 afy from the San Juan River Basin through the transmountain San Juan-Chama Project. The Jicarilla Apache Tribe agreed to subordinate its 1880 priority date for the 40,000 afy (diversion) of "future use" federal reserved water rights in exchange for the 1955 priority date associated with the two federal projects. The Tribe's agreement to subordinate its 1880 priority date for the 1955 date is discussed in a settlement contract between the Jicarilla Apache Tribe and the Secretary. The settlement contract is ratified by the Settlement Act. These are fully adjudicated rights, which, by virtue of the Settlement Act, the Tribe may market to the full extent that the law allows. The Tribe's long-term plans for this water include both off-reservation leasing and on-reservation development.

In addition to these "future use" water rights adjudicated in accordance with the Settlement Act, the Jicarilla Apache Tribe also has adjudicated rights to divert 5,683.92 afy or to deplete 2,195 afy, whichever is less, for historic and existing water uses. Thus, the Jicarilla Apache Tribe's total water diversion rights from the San Juan River Basin amount to 45,683 afy and the Tribe's overall depletion rights from the San Juan Basin total 34,195 afy.

In the CRSS model, the Jicarilla Apache Tribe is represented by four demand points: There is a single node on the upper San Juan River for the current on-reservation uses of the Tribe and those Reclamation assumed were planned for the future. The Tribe's portion of the San Juan – Chama export diversion is in an existing demand point and does not need to be separated. During 2000, the Jicarilla Apache Tribe anticipates entering into a lease of 16,200 afy through 2025 to Public Service Company of New Mexico for depletion at the San Juan Generating Station. In addition, the Tribe anticipates entering into other short-term off-reservation water leases, ultimately preserving some off-reservation leases in 2060 while allowing the Tribe to use the majority of its San Juan River Basin depletions on-reservation. In order to show the change in water leases, a new demand point has been added to show the Jicarilla water going to the power station and future changes in deliveries. The Tribe is investigating the feasibility of leasing 7,500 afy of water to the City of Gallup via the Gallup-Navajo Municipal Water Supply Project. The Jicarilla lease portion of the project is a new demand point in the CRSS model.

3.14.2.3 NAVAJO INDIAN RESERVATION

The Navajo Nation is located in northeastern Arizona, southeastern Utah and northwestern New Mexico. Navajo reserved water rights to the mainstream Colorado River, the Little Colorado River and the San Juan River basins are not adjudicated. The Navajo Indian Irrigation Project was authorized by P.L. 87-483. When authorized, the project was envisioned as a gravity irrigated system with an average annual diversion of 508,000 afy, and a resulting depletion of 254,000 afy. Since authorization in 1962, the project has been re-designed as a pressurized sprinkler system with an anticipated average annual diversion of 337,500 afy, and a resulting depletion of 270,500 afy. The priority date for this diversion and depletion is not later than October 16, 1957.

The CRSS model includes six demand points for the Navajo Nation. There is a demand point for NIIP on the San Juan River upper reach. Current use and development data listed for the NIIP demand point are from the development schedule in the NIIP Biological Assessment dated June 11, 1999. The Navajo Nation also has a small share in the Animas-La Plata Project (ALP) of 4,680 af of withdrawal and 2,340 af of depletion annually. This future withdrawal and use has been accounted for in the CRSS model by splitting the existing ALP M&I node for New Mexico uses and adding a separate point on the Upper San Juan Reach for the Tribe's ALP water.

Present uses in the San Juan River Basin for project areas other than the NIIP have been quantified in the hydrology models of the basin in the formulation of the Animas-La Plata Project Draft EIS. CRSS demand points exist for the future Gallup-Navajo Project showing 5,000 acre-feet of depletion in Arizona and 17,500 acre-feet of depletion in New Mexico. The existing point was updated to include the Cudei Irrigation Project with the Hogback node, as these projects will soon be combined into a single diversion. A demand point was added to the CRSS to include the existing Fruitland, New Mexico project in the model. Other minor uses on the Navajo Reservation have been included in natural flow calculations and are not included as consumptive demands in the CRSS model.

The Navajo Nation currently operates a marina at Antelope Point on Lake Powell. The boat ramp is not operational when the lake level is below elevation 3,677 feet msl. See Section 3.9.2.3.1, Lake Powell, regarding impacts to Lake Powell elevations.

3.14.2.4 SOUTHERN UTE RESERVATION

The Southern Ute Indian Tribe is located in southwestern Colorado just west of Navajo Reservoir. The Tribe has settled its water rights pursuant to agreement with the State of Colorado and pursuant to 1988 federal legislation effective December 19, 1991. The settlement requires the construction of the Animas-La Plata Project. The Tribe has the right to reopen the adjudication of their water rights on the Animas and La Plata Rivers if certain agreed upon dates are not met regarding project implementation. The agreement provides the Tribe with a variety of direct flow rights with priorities ranging from 1868 to 1976 in streams and rivers passing through the Southern Ute Reservation.

The CRSS model has two demand points for the Southern Ute Tribe. In the model, the Present Level - Colorado Agriculture demand point on the San Juan River has been split to separate Southern Ute Tribal uses from non-reservation uses.

The Tribe also has a right to 39,525 acre-feet of water with 19,762 acre-feet of depletion from the future ALP with a project priority of not later than 1966 for M&I use. To account for the Southern Ute portion of the water use, the demand point in Colorado was split into three to separate Southern Ute, other tribes and non-tribal uses.

3.14.2.5 UTE MOUNTAIN UTE INDIAN RESERVATION

The Ute Mountain Ute Tribe is located in the southwestern corner of Colorado with a small part in northwestern New Mexico. The Tribe has settled its water rights pursuant to agreement with the State of Colorado and pursuant to 1988 federal legislation effective December 19, 1991. The settlement requires the construction of the Animas-La Plata Project. If it should prove impossible to construct this project, the Tribe has the right to reopen the adjudication of their water rights on the Animas and La Plata Rivers. The agreement provides the Tribe with a variety of direct flow rights with priorities

ranging from 1868 to 1985 in three streams, the Mancos River, San Juan River and Navajo Wash, which pass through the Ute Mountain Ute Reservation.

The CRSS model has four demand points for the Ute Mountain Ute Tribe. In the model the Present Level - Colorado Agriculture demand point on the Lower San Juan River was split in two to separate Ute Tribal uses.

The Tribe also possesses 25,180 acre-feet of storage with 19,260 acre-feet of depletion per year from the Dolores Project for agricultural and other uses with a project priority of not later than 1963. The Dolores Project is accounted for in the CRSS model at two points, one of which is for the Ute Mountain Tribal water use.

The Ute Mountain Ute Reservation will have a share of the water in the future ALP. The Tribe will receive 39,525 af of withdrawal and 19,762 af of depletion rights from the ALP as it is now formulated. This water is intended for M&I use on the reservation. To account for the Ute Mountain Ute portion of the water use, the demand point in Colorado was split into three separate parts: Ute Mountain Ute Tribe, other Tribes and non-Tribal uses.

3.14.2.6 FORT MOJAVE INDIAN RESERVATION

The Fort Mojave Indian Reservation is located in the Lower Colorado River Basin where Nevada, Arizona and California meet. The Tribe possesses present perfected federal reserved water rights from the main stem of the Colorado River in all three of the states that contain reservation land, pursuant to the Decree in *Arizona v. California* and supplemental Decrees (1979 and 1984). Since the original Decree was entered, 1,102 acres of land have been added to the reservation along with rights to 6.464 acre-feet per acre of water as specified in the 1979 Decree. The amounts, including added lands, priority dates, and state where the water rights are perfected, are as follows:

Amount (afy)	Acreage	Priority Date	State
27,969	4,327	September 18, 1890	Arizona
75,566	11,691	February 2, 1911	Arizona
103,535	16,018		Arizona subtotal
13,698	2,119	September 18, 1890	California
12,534	1,939	September 18, 1890	Nevada
129,767	**20,076**		**Total**

The Fort Mojave Indian Tribe has exercised its water rights in California in excess of the amounts currently decreed. In it's June 19, 2000 Opinion, the United States

Supreme Court accepted the Special Master's uncontested recommendation and approved the proposed settlement of the dispute respecting the Fort Mojave Indian Reservation. Under the settlement, the Tribe is awarded the lesser of an additional 3,022 af of water or enough water to supply the needs of 468 acres.

The attached tables are estimates of use based upon calculations derived from records of electrical consumption at the various pump stations and are not from measured flows. The CRSS model contains four demand sub points for the Tribe's water diversions, which are divided among three states. The points are on the Lake Mohave reach of the model, and are further divided into sub points by state. A separate sub point is included for Reservation Land development, but has a diversion of zero af at this time. Current depletion amounts for the CRSS model nodes have been updated to reflect the most recent consumptive use numbers provided by the Lower Colorado River Accounting System (LCRAS) report for calendar year 1998. Future depletions at full development are calculated as the greater of 70 percent of diversion rights and the per acre rate of consumptive use from the LCRAS report multiplied by the full right acreage of the Tribe.

3.14.2.7 CHEMEHUEVI INDIAN RESERVATION

The Chemehuevi Indian Reservation is located in southern California near Lake Havasu. The Tribe possesses present perfected federal reserved water rights from the main stem of the Colorado River pursuant to the Decree in *Arizona v. California* and supplemental Decrees (1979 and 1984). The amounts, priority dates, and state where the rights are perfected, are as follows:

Amount (afy)	Acreage	Priority Date	State
11,340	1900	February 2, 1907	California

The lands of the Chemehuevi Tribe are mostly on the plateau above the shoreline of Lake Havasu. Present agricultural water use is limited. Currently, the CRSS model includes a demand point for the Chemehuevi Reservation on the Lake Havasu reach of the model. Current depletion amounts for the CRSS model nodes have been updated to reflect the most recent consumptive use numbers provided by the LCRAS report for calendar year 1998. Future depletions at full development are calculated as the greater of 70 percent of diversion rights and the per acre rate of consumptive use from the LCRAS report multiplied by the full right acreage of the Tribe.

3.14.2.8 COLORADO RIVER INDIAN RESERVATION

The Colorado River Indian Reservation is located in southwestern Arizona and southern California south of Parker, Arizona. The Tribes possess present perfected federal reserved water rights from the main stem of the Colorado River pursuant to the Decree

in *Arizona v. California* and supplemental Decrees (1979 and 1984). The amounts, priority dates, and state where the rights are perfected, are as follows:

Amount (afy)	Acreage	Priority Date	State
358,400	53,768	March 3, 1865	Arizona
252,016	37,808	November 22, 1873	Arizona
51,986	7,799	November 16, 1874	Arizona
662,402	99,375		Arizona subtotal
10,745	1,612	November 22, 1873	California
40,241	6,037	November 16, 1874	California
3,760	564	May 15, 1876	California
54,746	8,213		California subtotal
717,148	**107,588**		**Total**

The CRSS Model presently has three demand sub-nodes listed for the Colorado River Tribe on the reach above Imperial Dam number. The water diversions are split between sub-points for California demands, Arizona demands and a separate sub-node for future pumped diversions in Arizona. Current depletion amounts for the CRSS model nodes have been updated to reflect the most recent consumptive use numbers provided by the LCRAS report for calendar year 1998. Future depletions at full development are calculated as the greater of 70 percent of diversion rights and the per acre rate of consumptive use from the LCRAS report multiplied by the full right acreage of the Tribe.

3.14.2.9 QUECHAN INDIAN RESERVATION (FORT YUMA)

The Fort Yuma Indian Reservation (Quechan Tribe) is located in southwestern Arizona and southern California near Yuma, Arizona. The Tribe possesses present perfected federal reserved water rights from the main stem of the Colorado River pursuant to the Decree in *Arizona v. California* and supplemental Decrees (1979 and 1984). The amounts, priority dates and state where the rights are perfected, are as follows:

Amount (afy)	Acreage	Priority Date	State
51,616	7,743	January 9, 1884	California

A recent Supreme Court decision issued on June 19, 2000 allows the Tribe to proceed with litigation to claim rights to an additional 9,000 acres of irrigable lands. Proving this claim would increase the water rights for the reservation.

Water for the Quechan Tribe is diverted from the Colorado River at Imperial Dam and delivered through the Yuma Project Reservation Division-Indian Unit. The Tribe has other small uses at homestead sites south of Yuma, Arizona. The current water uses shown in the following tables include only Quechan Indian Tribe uses within the Fort Yuma Reservation. These uses are accounted for in the CRSS model with one diversion point on the Imperial Dam Diversions reach. The current withdrawal and depletion values have been updated to reflect the most recent consumptive use numbers provided by the LCRAS report for calendar year 1998. Future depletions at full development are calculated as the greater of 70 percent of diversion rights and the per acre rate of consumptive use from the LCRAS report multiplied by the full right acreage of the Tribe.

3.14.2.10 COCOPAH INDIAN TRIBE

The Cocopah Indian Reservation is located in southwestern Arizona near Yuma, Arizona. The Tribe possesses present perfected federal reserved water rights from the main stem of the Colorado River pursuant to the Decree in *Arizona v. California* and supplemental Decrees (1979 and 1984). The amounts, priority dates, and state where the rights are perfected, are as follows:

Amount (afy)	Acreage	Priority Date	State
7,681	1,206	September 27, 1917	Arizona
2,026	318	June 24, 1974	Arizona
1,140	190	1915	Arizona
10,847	**1,714**		**Total**

The rights listed above and in the attached tables include only that water diverted directly from the Colorado River at Imperial Dam. In addition to these rights, the Tribe has numerous well permits that divert groundwater that may be connected to the Colorado River within the boundaries of the United States (studies are ongoing).

The 1974 present perfected federal reserved right for the Cocopah Indian Reservation is unique because of its more recent priority date. The 1979 supplemental Decree in *Arizona v. California* specifies that in the event of a determination of insufficient mainstream water to satisfy present perfected rights pursuant to Article II (B) (3) of the 1964 Decree, the present perfected rights set forth in paragraphs (1) through (5) of Article II (D) of the Decree must be satisfied first. The 1984 supplemental Decree in *Arizona v. California* recognized the present perfected federal reserved right for the

Cocopah Indian Reservation dated June 24, 1974, and amended paragraph (5) of Article II (D) of the Decree to reflect this 1974 right.

The Tribe is involved in litigation to claim rights to a total of 2,400 acres of irrigable lands. Proving this claim would further increase the water rights for the reservation.

Water diversions for the Cocopah Indian Tribe are listed at two demand nodes in the CRSS model on two of the model reaches. A demand point on the Imperial Dam diversion reach accounts for all of the Tribe's rights and current uses in Arizona. Another node is provided for future pumped diversions below Imperial Dam, but it has a diversion of zero af at the current time. Current depletion amounts for the CRSS model nodes have been updated to reflect the most recent consumptive use numbers provided by the LCRAS report for calendar year 1998. Future depletions at full development are assumed to be 100 percent of the diversions as the location of the reservation prevents a return flow within Arizona.

3.14.2.11 ENVIRONMENTAL CONSEQUENCES

The Ten Tribes have a significant amount of undeveloped water rights. The current availability of surplus water on the Colorado River is primarily a direct result of unused existing entitlements, including those of the Tribes. The Ten Tribes have raised significant concerns that interim surplus criteria could: 1) foster a reliance on surplus water on the part of other entitlement holders; 2) provide a disincentive for those entitlement holders to support future Tribal development; and 3) have the practical effect of diminishing the Tribes' ability to utilize their entitlements.

The interim surplus criteria will not alter the quantity or priority of tribal entitlements. In fact, as noted by the description of the Ten Tribes' water rights above, the Tribes have the highest priority water rights on the Colorado River. Surplus determinations have been made since 1996. The interim surplus criteria would not make any additional surplus water available as compared with current conditions, but rather would provide more objective criteria for surplus determinations. Moreover, the preferred alternative would quantify the amounts of surplus water to be made available. Reclamation does not believe that identifying the limited amounts of surplus water will provide any additional disincentives for Tribal water development. Interim surplus criteria are intended to assist in the effort to reduce the overreliance by California on surplus water. The selection of any of the alternatives of this proposed action does not preclude any entitlement holder from using its water.

3.14.2.11.1 Upper Basin Mainstem Tribes

As expected, the model analyses showed that interim surplus criteria would have no effect on Upper Basin deliveries, including the Tribal demands above Lake Powell. As noted in Section 3.4.4.4, the normal delivery schedules of all Upper Basin diversions would be met under most water supply conditions. Only under periods of low