

Comments Submitted By State Agencies

This section contains comment letters submitted by the following state agencies:

- S-1 New Mexico Interstate Stream Commission
- S-2 Colorado Water Conservation Board, State of Colorado
- S-3 State of Wyoming, State Engineer's Office
- S-4 Arizona Department of Water Resources
- S-5 Nevada State Clearinghouse
- S-6 State of Utah, Department of Natural Resources
- S-7 Colorado River Board of California
- S-8 Seven Basin States Representatives (Arizona, California, Colorado, Nevada,
New Mexico, Utah, Wyoming)
- S-9 Southern Nevada Water Authority and Colorado River Commission of Nevada

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Page 3-32, lines 1-4. The Upper Basin depletion schedules do include average annual evaporation losses from most reservoirs, including Navajo Reservoir. The depletion schedules shown in Figure 3.4-1, however, may not include Colorado River Storage Project reservoir evaporation at Lake Powell, Flaming Gorge Reservoir and the Aspinall Unit that is shared among the Upper Division states. 10 11

Page 4-8, lines 7-9. The EIS should clarify the physical and operational parameters associated with installation of the Southern Nevada Water Authority’s third intake. 12

Page 4-9, lines 3-4. The EIS should include a disclaimer that while the modeling assumes that the United States will not operate the Yuma Desalting Plant, the use of this modeling assumption does not represent any determination by Reclamation or the United States as to whether the plant will or will not be operated in the future. 13

Page 4-51, line 7, through page 4-52, line 1. The text is not consistent with Figure 4.3-23 and Figure 4.3-24, which both indicate that the Lake Mead water surface drops below 1000 feet elevation in 2025 and 2026 under the Basin States alternative. 14

Page 4-174, lines 2-25. At high storage levels in Lake Powell, water in storage inundates a waterfall on the San Juan River that otherwise provides an effective barrier to fish movement up the river. Also, bluehead sucker and flannelmouth are common in the San Juan River. 15 16

Page A-3, line 2, through page A-4, line 9; and page A-6, lines 5-7. The modeling on which the EIS relies should reflect for Navajo Reservoir operations the preferred alternative in the April 2006 Final Environmental Impact Statement and June 2006 Record of Decision on Navajo Reservoir Operations. Under the Navajo Reservoir Operations ROD, the minimum and maximum releases from Navajo Dam are 250 cfs and 5,000 cfs, respectively, and seasonal Navajo Dam releases to the San Juan River are based on the San Juan River Basin Recovery Implementation Program’s flow recommendations for the San Juan River below Farmington so as to provide for habitat needs of populations of Colorado pikeminnow and razorback sucker. 17 18

Page A-11, lines 1-5. The following opinion is provided should the Secretary in the future conduct a review of the algorithm for determining 602(a) storage requirements for Lake Powell. The active storage in Navajo Reservoir should not be considered in determining whether the 602(a) storage requirement is met. During extended drought, Navajo Reservoir storage is drawn down to meet water use demands of contractors and may not be available for delivery to Lee Ferry either physically or without impairing contract uses in New Mexico. About ¾ of New Mexico’s Upper Basin uses are serviced from the Navajo Reservoir water supply. Using Navajo Reservoir storage for release in the 602(a) storage algorithm does not protect Upper Basin uses in New Mexico. 19 20

Page C-1, Table C-1. The State of New Mexico’s most recent schedule of anticipated Upper Basin depletions is appended to the Bureau of Reclamation’s May 2006 Draft Hydrologic Determination, and indicates depletions of up to about 642,000 acre-feet per year within New Mexico. Upon the Secretary of the Interior’s approval of the Hydrologic Determination, the New Mexico depletions should be revised accordingly. 21 22

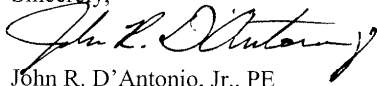
Page N-3, lines 17-29. The EIS should include a brief statement of potential shortcomings of the Direct Paleo technique consistent with such statements included for other techniques. 23

S-1

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Thank you for the opportunity to comment on the DEIS.

Sincerely,



John R. D'Antonio, Jr., PE
Secretary

Copy: Scott Balcomb
Rod Kuharich
Dennis Strong
Patrick Tyrrell
Herb Guenther
Gerry Zimmerman
Richard Bunker
Pat Mulroy

S-1

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Reponses to Comment Letter S-1

S-1-1

Your comment is noted. No change to the Final EIS was necessary.

S-1-2

Your comment is noted. No change to the Final EIS was necessary.

S-1-3

Your comment is noted. Modifications, as appropriate, have been made to the Final EIS.

S-1-4

Your comment is noted. The EIS provides a general description of the Law of the River solely for the purpose of providing background to the readers.

S-1-5

Your comment is noted. No change to the Final EIS was necessary.

S-1-6

See the general response to the comments received from the Government of Mexico and the specific responses to Comment Nos. F-5-17 and F-5-18.

S-1-7

Your comment is noted. No change to the Final EIS was necessary. As noted in Section 2.4.5 of the Draft EIS, the viability of the funding proposal provided in the Conservation Before Shortage proposal is not known at this time. For purposes of environmental impact analysis, and to analyze the full impacts of this alternative, it was assumed that the voluntary conservation targets would be achieved.

S-1-8

Your comment is noted. No change to the Final EIS was necessary. To clarify, the Arizona Water Settlements Act (AWSA) provides that the Secretary shall retain 6,411 af of Central Arizona Project water for use for a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation's claims to water in Arizona. Reference to this water was included in Section 3.10.6 of the Draft and Final EIS.

S-1-9

Your comment is noted. No change in the Final EIS was necessary. To clarify, pursuant to the ASWA, the Secretary shall offer, with appropriate approvals, to contract with users in New Mexico for up to an annual average of 14,000 af from the Gila River, subject to deliveries of Colorado River water to downstream Gila River users in Arizona to replace any diminution in flows. As discussed in Section 4.4.1.1, the Shortage Allocation Model (used to distribute shortages to individual entitlement holders within the CAP) was consistent with the ASWA. However, for the comparative analysis performed for this EIS, not all potential future ASWA water transactions were included in this modeling.

S-1-10 and S-1-11

Your comment is noted. The statement has been clarified in Section 3.4.1 to inform the reader that the Upper Basin depletion schedules as shown in Figure 3.4-1 and detailed in Appendix C do not include evaporation losses only for the CRSPA reservoirs and for the Navajo Reservoir. It should also be noted that although the schedules submitted by New Mexico include the evaporation losses for Navajo Reservoir, those losses are not included as input to the CRSS model since the model computes the evaporation loss for Navajo Reservoir at each time step during the simulation.

S-1-12

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. G-1-31.

S-1-13

Your comment is noted. No change to the Final EIS was necessary. Section 4.2.7 of the Draft EIS and the Final EIS contains language that clarifies the modeling assumptions regarding operation of the Yuma Desalting Plant. Also see response to Comment No. F-4-9.

S-1-14

Reclamation concurs with this comment. Section 4.3.4 in the Final EIS and Figure 4.3-23 and Figure 4.3-24 (re-numbered to Figure 4.3-24 and Figure 4.3-25 respectively in the Final EIS) have been revised.

S-1-15

Reclamation concurs with this comment. The Final EIS (Section 4.8.4) has been modified to include additional discussion and analysis regarding the probability of the waterfall at the San Juan inflow area being exposed, and its potential effects on native fish species.

S-1-16

Your comment is noted. No change to the FEIS was necessary. The geographic scope of the EIS does not include the San Juan River above Lake Powell.

S-1-17 and S-1-18

Your comment is noted. No change to the Final EIS was necessary. The geographic scope of the EIS does not include the San Juan River above Lake Powell. However, the simulation of reservoirs above Lake Powell is necessary to accurately simulate inflow to Lake Powell. The operation of Navajo Reservoir is simulated in the Colorado River Simulation System (CRSS). The CRSS does not include the revised operation of Navajo Reservoir under the 2006 Navajo Reservoir Operations ROD (2006 Navajo ROD). However, in the CRSS, the operation of Navajo Reservoir on an annual time-step closely matches the operation under the 2006 Navajo ROD. A separate model which simulates the San Juan River and Navajo Reservoir which incorporates the 2006 Navajo ROD was used to make this comparison. Incorporation of the 2006 Navajo ROD in CRSS would result in some minor inter-annual changes to Lake Powell storage from those simulated by the CRSS.

S-1-19 and S-1-20

Your comment is noted. No change to the Final EIS was necessary.

S-1-21 and S-1-22

Your comment is noted. As discussed in Section 3.4.1 of the Final EIS, the depletion schedules for the Upper Basin states used in the EIS were developed by each Upper Basin state and approved for transmittal to Reclamation by the Upper Colorado River Commission (Commission). Reclamation will continue to work with the Commission and the Basin States and other stakeholders to update these depletion schedules as appropriate.

S-1-23

Your comment is noted. Additional information has been provided in the Final EIS (Appendix N).

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STATE OF COLORADO

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April 30, 2007

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

Bill Ritter, Jr.
 Governor

Harris D. Sherman
 Executive Director

Rod Kuharich
 CWCB Director

Dan McAuliffe
 Deputy Director

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

Dear Secretary Kempthorne:

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

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

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

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

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

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

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

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

These Comments are as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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- **Definition of Colorado River System.** The Colorado River Compact provides a very specific definition of the Colorado River System. The DEIS appears to be somewhat inconsistent in its use and definition of this term. Specifically, the DEIS sometimes confuses the concepts of the Colorado River System, Colorado River System water, and the Colorado River Mainstem.⁵ Colorado requests that the Bureau attempt to avoid such inconsistencies in its Final Environmental Impact Statement and Record of Decision.

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- **Definition of Consumptive Use.** In summarizing the apportionments of the use of Colorado River water to the Basin States, the DEIS states that “[t]he apportionments of the Basin States are generally presented in terms of consumptive use, which consists of diversions minus return flows.”⁶ The DEIS thus appears to make the legal assertion that the “diversions minus returns flows” definition of consumptive use is applicable to the allocations of all of the Basin States under the Law of the River.

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

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

28

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

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

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

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

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

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

30

- Intentionally Created Surplus.** Colorado fully supports the Intentionally Created Surplus and Developed Shortage Supply programs outlined in the DEIS and more fully described in the Basin States' Comments. Intentionally Created Surplus and Developed Shortage Supply water stored in Lake Mead benefits the Lower Division by providing a storage vessel and mechanism for delivering additional water to the Lower Division States, and benefits the Upper Division by increasing levels in Lake Mead. These increased Lake Mead storage levels reduce the amount of water that must be released from Lake Powell for equalization and balancing purposes. Accordingly, instead of mentioning that ICS will be created "during this NEPA process,"⁸ Colorado recommends, consistent with the Basin States Comments, that the Final Environmental Impact Statement and Record of Decision expressly adopt Guidelines that permit the creation of Intentionally Created Surplus and Developed Shortage Supply, and provide that this water be accounted in Lake Mead for purposes of equalization and balancing from Lake Powell.

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- Status of Existing Interim Surplus Guidelines.** The DEIS states that "[t]he proposed federal action would modify the substance of the existing Interim Surplus Guidelines (ISG), published in the Federal Register on January 25, 2001 (66 Fed. Reg. 7772), and the term of the ISG from 2016 to 2026."⁹ As explained in the Basin States' Comments, the Basin States recommend that the Final Environmental Impact Statement and Record of Decision adopt the Basin States' combined Proposed Guidelines and that the Basin States Proposed Guidelines replace, rather than merely modify and extend, the existing Interim Surplus Guidelines.

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- Disclaimer.** The DEIS identifies and describes numerous elements of the Law of the River. Because the individual Basin States may disagree as to the definitive interpretation of specific aspects of the Law of the River, and the NEPA process is not intended to provide a definitive interpretation of the law, the State of Colorado recommends, consistent with the Basin States' Comments, that the Final Environmental Impact Statement and Record of Decision include appropriate disclaimer language to allow the various interested stakeholders to refrain from disputing or contesting the general characterizations of the Law of the River in the DEIS. Precedent for such disclaimer language can be found in past Annual Operating Plans promulgated by the Bureau of Reclamation and authorized by the Secretary of the Interior. Similar to that language, the disclaimer in the FEIS and ROD should provide:

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

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

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

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

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

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

Rod Kuharich
Director
Colorado Water Conservation Board

cc: Robert W. Johnson, Commissioner, U.S. Bureau of Reclamation
Rick Gold, Regional Director, U.S. Bureau of Reclamation, Upper Colorado
Regional Office
Jayne Harkins, Acting Regional Director, U.S. Bureau of Reclamation, Lower
Colorado Regional Office
Larry Walkoviak, Deputy Regional Director, U.S. Bureau of Reclamation, Lower
Colorado Regional Office
Regional Director, Lower Colorado Region, Bureau of Reclamation, c/o BCOO-
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Scott Balcomb, Esq.
Jim Lochhead, Esq.

S-2

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Water Supply Protection • Conservation Planning

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Reponses to Comment Letter S-2

S-2-1

Your comment is noted. No change to the Final EIS was necessary.

S-2-2

Your comment is noted. No change to the Final EIS was necessary.

S-2-3

Your comment is noted. No change to the Final EIS was necessary.

S-2-4

Your comment is noted. No change to the Final EIS was necessary.

S-2-5

Your comment is noted. No change to the Final EIS was necessary. The proposed federal action would be in effect for an interim period (2008 through 2026). To disclose any potential impacts after the interim period, the resource analyses have been conducted from 2008 through 2060.

S-2-6

Your comment is noted. No change to the Final EIS was necessary.

S-2-7

Your comment is noted. No change to the Final EIS was necessary.

S-2-8

Your comment is noted. No change to the Final EIS was necessary.

S-2-9

See response to Comment No. S-2-5.

S-2-10

Your comment is noted. No change to the Final EIS was necessary.

S-2-11

Your comment is noted. No change to the Final EIS was necessary. The proposed federal action would be in effect for an interim period (2008 through 2026). To disclose any potential impacts after the interim period, the resource analyses have been conducted from 2008 through 2060.

For modeling purposes, it was assumed that the operation under all action alternatives would revert to the modeling assumptions used for the No Action Alternative (Section 4.2.7 of the Draft EIS and the Final EIS). The modeling assumptions used for the No Action Alternative are detailed in Section 2.2.2 and Appendix A of the EIS.

S-2-12

Your comment is noted. No change in the Final EIS was necessary.

S-2-13

Your comment is noted. No change in the Final EIS was necessary.

S-2-14

Your comment is noted. The draft guidelines included in the Final EIS (Appendix S) include a provision for a formal review to evaluate the effectiveness of the guidelines prior to December 31, 2020.

S-2-15

Your comment is noted. No change in the Final EIS was necessary.

S-2-16

Your comment is noted. No change in the Final EIS was necessary.

S-2-17

Your comment is noted. No change in the Final EIS was necessary.

S-2-18

Your comment is noted. No change in the Final EIS was necessary.

S-2-19 through S-2-22

See responses to Comment Nos. F-5-2 and F-5-5.

S-2-23

Your comment is noted. No change in the Final EIS was necessary.

S-2-24

Your comment is noted. No change in the Final EIS was necessary.

S-2-25

Reclamation concurs with this comment. The terms “system water” and “non-system water” have been defined in the glossary and modifications have been made to the Final EIS as appropriate.

S-2-26 through S-2-28

Your comment is noted. The Final EIS was modified (Section 1.7.2 and Section 3.4) to clarify the use of the term “consumptive use” in this EIS.

S-2-29 and S-2-30

Your comment is noted. The Final EIS was modified (Section 1.7.2.2) to clarify the accounting of water stored off-stream in the Lower Basin.

S-2-31

Your comment is noted. No change to the Final EIS was necessary.

S-2-32

Your comment is noted. Reclamation has included draft operational guidelines in the Final EIS (Appendix S) that discuss the administration of Intentionally Created Surplus (ICS).

S-2-33

Your comment is noted. No change to the Final EIS was necessary.

S-2-34

Your comment is noted. Reclamation has included draft operational guidelines in the Final EIS (Appendix S) that includes a section titled “Authority and Disclaimer”.

S-2-35

Your comment is noted. No change to the Final EIS was necessary.

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State Engineer's Office

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April 30, 2007

DAVE FREUDENTHAL
GOVERNOR

PATRICK T. TYRRELL
STATE ENGINEER

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

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

Dear Secretary Kempthorne:

Thank you for the opportunity to comment on the *Draft Environmental Impact Statement for Colorado River Reservoir Operations: Development of Lower Basin Shortage Guidelines and Coordinated Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions* (72 Fed. Reg. 9026-9028) (February 28, 2007) (hereinafter "DEIS"). The Wyoming State Engineer's Office, on behalf of the State of Wyoming, would like to take this opportunity to offer comments on the DEIS. Importantly, Wyoming supports the comments made jointly by the Seven Basin States (hereinafter the Basin States' Comments) that were sent to you under separate cover. 1

We in Wyoming strongly believe the Basin States' Alternative, as described in the February 2007 DEIS (and as further elaborated upon through the recommendations made in the Basin States' Comments) provides the most suitable and acceptable mechanism for interim Colorado River System management through the end of calendar year 2025. The Basin States' Alternative provides the best solutions to the issues raised by the proposed federal action described in the Bureau's March 2006 Scoping Summary Report and February 2007 DEIS. The Basin States' Alternative best meets critical elements of the purpose and need statement set forth in the DEIS. Accordingly, the State of Wyoming joins the other Basin States in requesting that you adopt the Basin States' Alternative, as implemented through the Basin States' Proposed Guidelines, as the preferred alternative in the Final Environmental Impact Statement and Record of Decision. 2 3

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

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

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

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

- Expiration of Interim Shortage Guidelines in 2025.** Expiration of the Guidelines in 2025 is an important aspect of Wyoming's support of any preferred alternative. We believe it will be necessary and desirable to re-examine management of Lakes Powell and Mead. The Basin States' Alternative proposes the initiation of that examination process prior to the end of the Interim Period. The DEIS recognizes that the Guidelines implementing the Action will be interim in nature, and will remain in effect for determinations to be made through 2025 for water supply and reservoir operating decisions through 2026. However, the DEIS does not clearly state what default operating criteria will be relied upon after that date. We urge the Department of the Interior to ensure (consistent with the Basin States' Comments), that the FEIS and particularly the Record of Decision clearly state that at the conclusion of the effective period of the shortage guidelines, the modeled operating criteria are assumed to revert to the operating criteria used to model baseline conditions in the December 2000 Final

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

- **Consultation with Basin States in 2020.** As stated above, the State of Wyoming strongly advocates that the Record of Decision specify default criteria for operating Lakes Mead and Powell after 2026. This should be done to assure that in the absence of a satisfactory agreement to do otherwise that the Upper Division States’ interests are protected. The Basin States’ Alternative specifies that the Bureau of Reclamation and the Basin States collectively identify and develop new Guidelines for the management of Lake Powell and Lake Mead prior to the expiration of the interim shortage guidelines. Accordingly, we request that the Final EIS and Record of Decision specify that the Bureau will initiate future consultation with the Basin States and other interested parties no later than December 31, 2020 to identify and implement appropriate management mechanisms for the Colorado River System following the Interim Period. The Basin States’ Comments include language that would require the Bureau to initiate such consultation – and we urge the adoption of the Basin States’ Proposed Guidelines. 10

- **Mexican Treaty Shortage Issues.** Colorado River shortages will be shared with Mexico, but how, when and to what extent are critically important and sensitive issues that must be addressed for the Bureau of Reclamation to develop a comprehensive program for administering the shortage guidelines during the Interim Period. There is unanimous consensus among the Basin States that the United States should reduce the quantity of water allotted to Mexico under Article 10(a) of the 1944 Treaty in any year the Secretary reduces the water available for consumptive use pursuant to Art. II (B)(3) of the Consolidated Decree in *Arizona v. California*. It is also the case that Article II (B)(3) reductions are not the only or sole mechanism to ascertain whether the United States should reduce the amount of water allotted to Mexico under the 1944 Treaty. The matter of equitably computing how much Mexico’s water deliveries would be curtailed has been modeled in the DEIS, however, the DEIS states that this issue will be resolved through discussions with Mexico by the International Boundary Waters Commission in consultation with the Department of State. 11
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We wish to offer two important comments in regards to these important issues. It must be recognized that other conditions (beyond Article II(B)(3) reductions) may arise that are reflective of “extraordinary drought in the Colorado River System” under Article 10(a) of the Treaty. Secondly, for the reason that resolution of the issues associated with imposition of water delivery shortages upon the Republic of Mexico has the potential to affect interests in both the Upper and Lower Colorado River Basins, it is critically important that all the Basin States be consulted in these discussions. 14
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- **Definition of “Colorado River System” and “consumptive use.”** The Colorado River Compact provides a very specific definition of the “Colorado River System.” The DEIS appears to be somewhat inconsistent in its use and definition of this term. Specifically, the DEIS sometimes confuses the concepts of the “Colorado River System,” “Colorado River System water,” and the “Colorado River Mainstem.” We urge you to direct the Bureau of 17

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

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

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

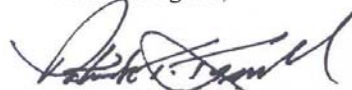
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purpose for the Final EIS and Record of Decision to include an appropriate disclaimer akin to the language included in the Annual Operating Plans for the Colorado River System that are promulgated by the Bureau of Reclamation and authorized by the Secretary of the Interior. 23

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

With best regards,



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

PTT:js

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

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

Page 1-13, lines 8-9: "Documents which are generally considered as part of the Law of the River include, but are not limited to ..." It may be useful for the DEIS to state the basis for making this statement, e.g., in whose judgment is the list of documents included in Table 1.7-1 considered to be inclusive of the elements of the Law of the River? 24

Page 1-15, lines 29-31: "Consumptive use by a Lower Division state includes delivered water that is stored off-stream for future use by that state or another state." The DEIS needs to be more careful in distinguishing between Secretarial decisions (or proposals for how water would be accounted for once interim shortage guidelines have been proposed and promulgated) to account for water as opposed to making statements that are based on judicial determinations in *Arizona v. California* or make Compact interpretations on matters where there are differences of opinion among the Basin States. This sentence is one example of a number of instances where imprecise wording has been used, as pointed out in our comment letter. 25

Page 3-31, lines 28-31: The depletion projects for the Upper Basin States were actually developed by each of the Upper Basin States and were considered and approved for transmittal to other entities by the Upper Colorado River Commission. Updating or modification of those depletion projections was made in consultation with the Upper Basin States by Reclamation and the States. 26

Page 3-35, line 8: There is a word missing before the parenthetical phrase "(consumptive use)" in this line. 27

Page 3-43, line 26: It is not clear why the DEIS is relying upon a 2002 report by the Colorado River Basin Salinity Control Forum when the 2005 edition of the subject report is available and could have been used for this purpose and referenced. The references section (see page Ref-4) lists only the 2005 report though the text on this page reflects the 2002 publication date. 28

Page 3-44, lines 11-13: The distinction is not altogether clearly made that the salinity criteria are average annual flow-weighted values, whereas the comparison being made in this sentence is to a daily value that is not reflective of either the annual-averaging or flow-weighting procedures that would be needed for a valid comparison. Daily observed salinity concentration values are being compared in Figure 3.5-1 to a flow-weighted average annual salinity criteria figure of 723 mg/l. 29

Page 3-98, lines 3-4: The correct name of the program being referenced at this place in the text is the "Upper Colorado River Endangered Fish Recovery Program." 30

Page 3-100, line 32: There is a typo in this line where the sentence begins: "Changes in drops in the elevation ...". 31

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- Page 3-101, lines 26-27: The cost of power would be for the water pumps that are components within the intakes operated by the SNWA. 32
- Page 4-3, lines 31-32: The DEIS could be made clearer here noting that the period 2008 to 2026 includes the year 2026. 33
- Page 4-6, line 23: The words “possible sequences” should be changed to read “observed sequences” to more accurately communicate the statement that is being made. The historic record is indicative of what has been observed as opposed to what has been possible during the period during which records have been collected. 34
- Pages 4-8 and 4-9, lines 31 through 37 and lines 1-2 on the next page: These statements with regard to replacement of the bypassed water should be clarified to more explicitly state what is being done and the timeline for accomplishing definite action. As written, the statements are vague and do not help to educate the reader. 35
- Page 4-9, lines 30-33: The sentence found here concerning consultation with Mexico is completely lacking in stating when the subject consultation will or would occur. 36
- Page 4-17, line 9: A typo is found in this line where the intent is to state “90th” rather than “90^h.” 37
- Page 4-231, line 18: Lake “Powell” is misspelled in this line. 38
- Page 5-7, line 34: The agreement referenced in this sentence was struck early in 2006 as opposed to “early in 2007.” 39

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Reponses to Comment Letter S-3

S-3-1

Your comment is noted. No change to the Final EIS was necessary.

S-3-2

Your comment is noted. No change to the Final EIS was necessary.

S-3-3

Your comment is noted. No change to the Final EIS was necessary.

S-3-4

Your comment is noted. No change to the Final EIS was necessary.

S-3-5

Your comment is noted. No change to the Final EIS was necessary.

S-3-6

Your comment is noted. No change to the Final EIS was necessary.

S-3-7

See response to Comment No. S-2-11.

S-3-8 and S-3-9

See response to Comment No. S-2-11.

S-3-10

See response to Comment No. S-2-14.

S-3-11 through S-3-15

See responses to Comment Nos. F-5-2 and F-5-5.

S-3-16

Your comment is noted. No change to the Final EIS was necessary.

S-3-17

See response to Comment No. S-2-25.

S-3-18 and S-3-19

See responses to Comment Nos. S-2-26 through S-2-28.

S-3-20

Your comment is noted. No change to the Final EIS was necessary.

S-3-21

Your comment is noted. No change to the Final EIS was necessary.

S-3-22

Your comment is noted. No change to the Final EIS necessary.

S-3-23

See response to Comment No. S-2-34.

S-3-24

See response to Comment No. S-1-4.

S-3-25

See response to Comment No. S-2-29.

S-3-26

Reclamation concurs with this comment. The text in Section 3.4.1 has been revised accordingly.

S-3-27

Reclamation concurs with this comment. The text in Section 3.4.4 has been revised accordingly.

S-3-28

Reclamation concurs with this comment. The text in Section 3.5.1 has been revised accordingly.

S-3-29

Reclamation concurs with this comment. The text in Section 3.5.1 has been revised accordingly.

S-3-30

Reclamation concurs with this comment. The text in Section 3.11.6.1 has been revised accordingly.

S-3-31

Reclamation concurs with this comment. The text in Section 3.11.7.1 has been revised accordingly.

S-3-32

Reclamation concurs with this comment. The text in Section 3.11.7.3 has been revised accordingly.

S-3-33

Reclamation concurs with this comment. The text in Section 4.2.2 has been revised accordingly.

S-3-34

Your comment is noted. Section 4.2 was modified to include additional information and provide additional clarity. The referenced sentence does not exist in the Final EIS.

S-3-35

See response to Comment No. F-4-9.

S-3-36

Your comment is noted. No change to the Final EIS was necessary.

S-3-37

Reclamation concurs with this comment. The text in Section 4.3.2 has been revised accordingly.

S-3-38

Reclamation concurs with this comment. The text in Section 4.11.2.5 has been revised accordingly.

S-3-39

Your comment is noted. Section 5.1 was modified and the referenced sentence does not exist in the Final EIS.

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