

FRIDAY, JUNE 2, 2023

PERSPECTIVE

Hurdles remain for Colorado River agreement

By Meredith E. Nikkel
and Samuel E. Bivins

On May 22 Arizona, Nevada, and California sent a letter to the Commissioner of the U.S. Bureau of Reclamation (Reclamation) that announced their agreement to conserve an additional 3 million acre-feet of Colorado River water by the end of 2026 (Lower Basin Plan) and requested that Reclamation analyze the agreement under the National Environmental Policy Act (NEPA). The Lower Basin Plan represents an important compromise for addressing water shortages in the Lower Colorado River Basin with the promise to alleviate the pressure of long-term shortages of Colorado River water. However, the Plan will undergo an environmental review process that will require Reclamation to grapple with the uncertainties of climate change and engage with tribes both with settled rights and unresolved claims to Colorado River water. Thus, while the Lower Basin Plan purports to enhance the near-term viability of limited Colorado River water supplies, it is not yet clear that it represents the final word about how Reclamation will manage the Colorado River over the next three years.

The setting and reclamation's proposed alternatives for near-term operations

The Colorado River and its tributaries originate in the Upper Basin states of Wyoming, Colorado, Utah and New Mexico and flows through the Lower Basin states of Nevada, Arizona and California before crossing the border into



Shutterstock

Mexico and discharging into the Gulf of California. In 1922, the Colorado River Compact apportioned 7,500,000 acre-feet of water each to the States of the Upper Division states and the States of the Lower Division. (Colorado River Compact, at Article III(a).)

Lake Powell is the largest storage reservoir on the Colorado River and its Glen Canyon Dam at the border of Utah and Arizona releases water from the Upper Basin to the Lower Basin. Lake Mead, at the border of Nevada and Arizona, provides Colorado River storage for the Lower Division States. The combined storage volumes at Lake Powell and Lake Mead have fallen

drastically since 1999. After 8 years of drought conditions, the Lower Division States and the Department of Interior approved "Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead" in 2007 to balance releases between Lakes Powell and Mead, storing conserved water in Lake Mead and implementing curtailments for Arizona and Nevada under defined shortage conditions. In 2019, the Lower Division States developed Drought Contingency Plans to avoid triggering the shortage conditions in the 2007 Interim Guidelines. The Colorado River Drought Contingency Plan Authorization Act of

2019 directs the Secretary of the Interior to carry out the Drought Contingency Plans adopted by the states. Drought conditions continued to deepen through 2022 and Reclamation has taken a number of emergency and drought response actions. During this time the Basin experienced historically low inflow from 2020 to 2022 with the combined storage of Lake Powell and Lake Mead falling to 25% of capacity.

In April, Reclamation outlined two alternatives to existing operating guidelines for 2023-2026 after the Upper and Lower Division States missed a deadline to propose voluntary reductions. The first alternative modified reservoir

operations based predominantly on water right priority and the second alternative proposes reductions that are distributed in the same percentage across all Lower Basin states. (Near-term Colorado River Operations, Draft Supplemental Environmental Impact Statement “Draft SEIS,” at 2-7, 2-14.) The Lower Division States took opposite positions on these alternatives, with California preferring a priority-based system and the other states supporting a plan that allowed Reclamation to distribute reductions more evenly.

The Lower Division States reach agreement on a Lower Basin Plan

Instead of unilateral reductions imposed by Reclamation, the Lower Basin Plan proposes conservation of at least 3 million acre feet of water from 2023 through the end 2026, with half to be physically conserved by the end of 2024. The Plan would have tier-based reductions follow existing requirements in the 2007 Interim Guidelines and Lower Basin Drought Contingency Plan, while instead committing to a certain volume of “System Conservation” that was offered by Reclamation in the voluntary Lower Colorado River Basin System Conservation and Efficiency Program announced on Aug. 16, 2022. Up to 2.4 million acre feet of the System Conservation water will be compensated under the Inflation Reduction Act and will be “mandatory, enforceable, measurable, verifiable and non-retrievable.” System Conservation that is not funded may be offset by “intentionally created surplus” or “ICS,” which is a credit system created by the 2007 Interim Guidelines and 2019 Drought Contingency Plan that allows for water to be conserved in one year and used in a future year. However, the

Lower Basin Plan would not allow use of that water until after 2026.

The Lower Basin Plan also includes limited exceptions in the event that minimum elevations at Lake Mead become a possibility under 24-month scenario planning for the reservoirs. In the event that Lake Mead is indicated to fall below 1,025 feet, the Lower Division States must develop a plan to avoid Lake Mead from reaching an elevation of 1,000 feet. If Reclamation determines the plan to be unacceptable, then it may take independent action to maintain 1,000 feet. As for Lake Powell, the Plan would allow for reductions to releases from Lake Powell if there is a possibility of the Lake falling below 3,500 feet without modifying releases.

For its part, California has agreed to develop agreements to conserve up to 1.6 million acre-feet of water through 2026 with funding from the Inflation Reduction Act and through the existing Intentionally Created Surplus program under the 2007 Interim Guidelines.

The Lower Division States asked Reclamation to include the Lower Basin Plan in the Draft SEIS and the Department of Interior agreed to temporarily withdraw the Draft SEIS published in April with plans to finalize the NEPA process later this year. Reclamation is also moving forward with plans to develop new operating guidelines to replace the 2007 Interim Guidelines for operations after 2026.

The Lower Basin Plan Must Face up to Climate Change and Tribal Consultation

Reclamation has agreed to conduct a review of the Lower Basin Plan in accordance with NEPA. Although courts will generally defer to how Reclamation conducts its environmental review, courts will also require Reclamation to ad-

dress comments that raise significant scientific uncertainties and reasonably support that such uncertainties exist. (*Ground Zero Ctr. for Non-Violent Action v. United States Dept. of Navy*, 860 F.3d 1244, 1254 (9th Cir. 2017); *The Lands Council v. McNair*, 537 F.3d 981, 1001 (9th Cir. 2008) overruled on other grounds by *American Trucking Ass’n v. City of Los Angeles*, 559, F.3d 1046, 1052 (9th Cir. 2009).) Reclamation’s Draft SEIS described the persistent drought conditions that have driven significant streamflow deficits in the Colorado River Basin resulting in the driest 23 year period in the last century. (Draft SEIS, at 3-12.) With the basic approach to water management and allocation established a century ago in the 1922 Colorado River Compact, Reclamation must grapple with how those allocations together with the proposed conservation measures in the Lower Basin Plan will perform in the near-term. Reclamation must also contend with tribal use and claims to Colorado River water, some but not all of which have been previously determined by

courts or other agreements. (See generally *Arizona v. California*, 547 U.S. 150 (2006).) The Draft SEIS analyzed the impacts of Reclamation’s proposed alternatives on Indian Trust Assets, and was based in part on consultation with 56 different tribes. (Draft SEIS, at 4-4.) The Lower Basin Plan, however, says nothing about Native American tribes, and only one tribe is formally represented by the signatories to the Plan through California’s Colorado River Board.

The Lower Division States have good reason to support Reclamation’s analysis of the Lower Basin Plan under NEPA and avoid the unilateral imposition of reductions to Colorado River water supplies. Environmental, tribal and other stakeholders are expected to weigh in as the demand for Colorado River water outpaces supplies. A key issue that must be addressed is whether the century old allocation of Colorado River water can withstand emerging climate uncertainties or whether a new approach to allocation is needed to manage the next century of demand and beyond.

Meredith E. Nikkel and Samuel E. Bivins are partners in Downey Brand LLP’s water resources practice.

