August 15, 2023

VIA E-MAIL (crbpost2026@usbr.gov)

Bureau of Reclamation
Attn: Post-2026 (Mail Stop 84-55000)
P.O. Box 25007
Denver, CO 80225

Re: Gila River Indian Community’s Comments Regarding the Bureau of Reclamation’s Notice of Intent To Prepare an Environmental Impact Statement and Notice To Solicit Comments and Hold Public Scoping Meetings on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead

Dear Program Coordinator Erath,

This letter transmits the Gila River Indian Community’s (the “Community’s”) comments to the Bureau of Reclamation’s (“Reclamation’s”) “Notice of Intent To Prepare an Environmental Impact Statement and Notice To Solicit Comments and Hold Public Scoping Meetings on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead,” 88 Fed. Reg. 39455 (June 16, 2023). The Community appreciates the opportunity to provide its comments to Reclamation “concerning the scope of specific operational guidelines, strategies, and any other issues that should be considered on or before August 15, 2023,” id., in the upcoming environmental impact statement (“EIS”) for the Post-2026 Colorado River reservoir operational guidelines and strategies for Lake Powell and Lake Mead (referred to as “Post-2026 Operations”). The Community has demonstrated its repeated commitment to work with Reclamation to address the challenges caused by drought, climate change, and aridification that will almost certainly lead to lower runoff conditions in the Colorado River Basin over the foreseeable future. The Community remains committed to working with Reclamation, Basin States, Basin Tribes, and other stakeholders to develop, under the National Environmental Policy Act (“NEPA”) process, Post-2026 Operations that:

1. Are able to respond to varied hydrologic and storage conditions within the Colorado River System.

2. Adopt flexible tools to encourage conservation, both voluntary and involuntary, to protect critical elevations at Lake Powell and Lake Mead.
3. Stabilize operations by addressing the imbalance between supply and demand within the Colorado River System in a fair and equitable manner that shares the burden of any reductions across all water entitlement holders in the Basin.

4. Take into account Reclamation’s statutory trust responsibility to protect, develop, and defend Tribal water resources.

Moreover, the negotiation process for the development of the Post-2026 Operations should include all sovereigns in the Basin, building upon the substantial progress made in the first meeting of all sovereigns that Reclamation held on August 10, 2023, in Phoenix, Arizona.

The Record of Decision for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead ("2007 Interim Guidelines") was never intended to address the imbalance between supply and demand within the Colorado River System, but was instead “designed to provide a greater degree of certainty to water users about timing and volumes of potential water delivery reductions, and additional operating flexibility to conserve and store water in the system."¹ During the implementation of the 2007 Interim Guidelines, it became clear that additional responsive actions were needed and that “due to the persistence and magnitude of the drought, had Reclamation continued operations solely according to the [2007 Interim Guidelines], the risk of reaching critically low elevations in Lake Powell and Lake Mead by 2026 was projected to increase substantially over what was projected in the Final EIS and at the time of the adoption of the [2007 Interim Guidelines],” and “[i]n light of this increased risk, additional voluntary adaptive management actions were conceptualized and adopted, including through the Upper and Lower Basin DCPs.”²

In 2021, Reclamation and Lower Basin States and parties, including the Community, worked together to supplement system conservation measures to shore up the Drought Contingency Plans (“DCPs”) through the “500+ Plan.” Moreover, in 2022, the Department of the Interior took unprecedented emergency action to protect critical elevation and infrastructure at Lake Powell and initiated a Supplemental Environmental Impact Statement process that contemplated unprecedented curtailment of water deliveries in the Lower Basin.³ Given what we have all learned and experienced since the 2007 Interim Guidelines were adopted, the Community believes that all Colorado River water users must now address the imbalance between supply and demand within the Colorado River System.

1. Purpose and need.

The EIS must seek to stabilize the Colorado River System to ensure that the 40 million people who rely on the Colorado River will have a stable water supply, and, most significant to the Community, allow the United States to continue to meet its obligations to protect water rights held in trust by

² Id. at 41-42.
the United States on behalf of Tribes under Congressionally approved water settlements. Operations of the Colorado River System should be able to respond to varied hydrologic and storage conditions within the system, incorporate flexible tools to protect critical elevations at Lake Powell and Lake Mead, and most importantly, stabilize operations by addressing the imbalance between supply and demand within the Colorado River System in a fair and equitable manner, with all water users having to share fairly in any reductions that might be required.

2. **Scope of specific operational guidelines.**

To the extent feasible, the EIS should address the operations of the entire Colorado River System. Ideally, a global approach addressing the operations of the entire Colorado River System under a single process to coordinate Endangered Species Act issues, natural, recreational, and cultural resources concerns. Upper Basin reservoir operations would be preferable to what currently exists; an assortment of Record of Decisions (“RODs”), programs, and plans that all impact operations but have been developed separately with different scopes and operate on different timelines. The Community acknowledges that it would be impractical to revisit all of these agreements, but to the extent possible, Reclamation should strive to develop an EIS that addresses the operations of Lake Mead and Lake Powell by using all available water supplies in reservoirs operated by Reclamation, including available supplies in the “Initial Units” under the Colorado River Storage Project Act (70 Stat. 105). This would continue the operations that have been incorporated in the DCPs, allowing for releases from the Initial Units when water is available in them and need to shore up critical elevations at Lakes Mead and Powell.

The Community acknowledges that the EIS must be developed within the legal framework of the 1922 Colorado River Compact, the Boulder Canyon Project Act of 1928 (45 Stat. 1057), the Utilization of Waters 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 Colorado River Storage Project Act, the Consolidated Decree entered by the Supreme Court of the United States in *Arizona v. California*, 547 U.S. 150 (2006), and other statutes and minutes that comprise the Law of the River. But the Community also recognizes that the foundations of the Law of the River were largely developed to encourage the development of non-Tribal water projects within the Colorado River Basin with no concern or appreciation of where the Colorado River Basin is today; with demand not in balance with supply, and continued aridification of the region the likely long-term impact of climate change. Long term, the Colorado River Basin faces unprecedented risks and Reclamation should develop an EIS that enables it to exercise its full authority to manage the Colorado River System in a fair and equitable manner that stabilizes operations by addressing the imbalance between supply and demand within the Colorado River System.

More specifically, the scope of the EIS should address the management of Lake Powell and Lake Mead operations to: (1) reduce the risk of reaching critical elevations in either reservoir; (2) address the imbalance between supply and demand within the Colorado River System in a fair and

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4 See, e.g., Record of Decision, Lower Colorado River Multi-Species Conservation Plan (Apr. 2005); Record of Decision, Operation of Flaming Gorge Dam Final Environmental Impact Statement (Feb. 2006); Record of Decision for the Navajo Reservoir, Navajo Unit – San Juan River New Mexico, Colorado, Utah Final Environmental Impact Statement (July 2006); Record of Decision for the Aspinall Unit Operations Final Environmental Impact Statement (Apr. 2012); Record of Decision for the Glen Canyon Dam Long-Term Experimental and Management Plan Final Environmental Impact Statement (Dec. 2016).
equitable manner; (3) build on the success of storage and conservation programs under the 2007 Interim Guidelines, and expand the program to apply to the entire Colorado River System; (4) develop programs for augmentation of Colorado River supplies and of supplies within Lower Basin States like Arizona with a view to replacing on a long-term basis any reduced water supplies held in trust by the United States on behalf of Tribes under Congressionally approved water settlements; (5) adopt a fair, equitable, and stable system for imposing mandatory reductions; and (6) develop surplus criteria.

To begin, Lake Powell and Lake Mead operations should be managed in a manner that will minimize the risk of reaching critical elevations in either reservoir. The EIS must incorporate predictable and comprehensible criteria for releases from Lake Powell to Lake Mead. The criteria should further include provisions that will allow for adapting to unexpected changes in hydrology, as well as updated science and accurate modeling. Achieving this balance will reduce the risk of reaching critical elevations in Lake Powell and Lake Mead, while simultaneously providing Colorado River water users with the certainty required to manage water supplies in the long term.

Next, the EIS should address the existing imbalance between available water supplies and demands in the Colorado River Basin. The heavy demand of the Lower Basin, combined with the multidecadal drought and other effects of climate change that have negatively affected runoff, has drastically reduced storage in Lake Powell and Lake Mead. In the Upper Basin, irregular hydrology affects the availability of water supplies each year on a source-by-source basis. Despite voluntary actions involving significant financial investments to reduce demands over the last twenty (20) years—including crucial actions taken by the Community—the Lower Basin is now implementing weighty mandatory supply reductions. The EIS must identify necessary measures to balance the available water supplies and the uses that rely on the Colorado River. In doing so, the EIS must address this imbalance in a fair and equitable manner, considering all Colorado River water entitlement holders, particularly those to whom Reclamation owes a statutorily created trust responsibility, who have already contributed to drought mitigation through conservation. Numerous parties in the Lower Basin, including the Community, have partnered with Reclamation in the past to conserve hundreds of thousands of acre-feet of Colorado River water to protect Lake Mead. The Community itself has already contributed over 730,000 acre-feet of its Colorado River entitlement to improve elevation levels at Lake Mead, resulting in over ten (10) feet of additional elevation.

Due to the supply imbalance and the United States’ overreliance on at-risk water supplies like Central Arizona Project (“CAP”) water, particularly Non-Indian Agricultural Priority CAP water, to address Indian Tribes water rights claims to senior water rights (e.g., many of the Community’s claims were for time immemorial rights), many federal trust resources established through water settlements are at risk. The EIS must acknowledge this reality and that the United States will not be able to meet its Congressionally mandated obligations to settling Tribes like the Community unless the United States develops programs for augmentation of Colorado River and Lower Basin supplies for these Tribes and/or develops programs to find replacement water of any reduced water supplies held in trust by the United States on behalf of Tribes under Congressionally approved
water settlements.\textsuperscript{5} Further, the EIS should include a framework with incentives for augmenting Colorado River supplies generally. Augmentation can be developed through binational programs, such as desalination, or regional programs within the United States, and the EIS should evaluate how such augmentation projects can help mitigate the impact of reductions. The EIS must support the development of these programs to mitigate the impacts of what will almost certainly be reductions in Colorado River water supplies in the Lower Basin under new Post-2026 Operations.

The EIS should build on the successes of the 2007 Interim Guidelines, especially with respect to conservation programs. The EIS should further develop storage and conservation programs that maximize voluntary reductions in water use throughout the Colorado River Basin, including the aforementioned framework for augmentation of Colorado River water supplies. The EIS should evaluate existing mechanisms, such as intentionally created surplus ("ICS"), for voluntary conservation and storage to provide flexibility to individual contractors and protect the Colorado River System as a whole. Although the Community has voluntarily conserved nearly 320,000 acre-feet through ICS, the program’s parameters should be reevaluated to ensure it properly incentivizes conservation while avoiding negative impacts to Colorado River water users. Furthermore, the EIS should identify sustainable programs that can incentivize voluntary conservation and maximize water efficiencies and technologies across all sectors throughout the Basin. And, to the extent that financial incentives are included in the programs, a sustainable funding source must be identified.

Moreover, Reclamation should enhance the predictability of mandatory reductions for all water users. Colorado River water users will face mandatory reductions to their water supplies given the depleted storage, long-term drought, and other effects of climate change. Water users will benefit from additional certainty regarding how such reductions will be distributed. Accordingly, the EIS should define mandatory reductions and evaluate ways to reduce the risk associated with those mandatory reductions under fluctuating hydrology. In doing so, the EIS should adopt a fair, equitable, and stable mechanism for imposing mandatory reductions.

Lastly, the EIS should consider alternatives that include criteria for distributing surplus in the Lower Basin. While the likelihood of experiencing surplus conditions in the future is unlikely, Reclamation should be prepared for such a possibility and develop clear criteria to appropriately manage the additional water supplies, with a preference for using these supplies to create "buffers" to reduce the impacts of periods of sustained low hydrology.

3. \textit{Strategies.}

The EIS should look at ways in which the Lower Basin can more equitably share reductions in use. Strategies could include:

- Finding replacement water for water users that have junior water rights in the system;

\textsuperscript{5} The EIS should also anticipate the need to request from Congress the resources necessary to establish meaningful long-term voluntary system conservation programs in the Basin, as well as additional infrastructure and water augmentation funding.
• Adopting an evaporation and system loss formula in the Lower Basin; and/or

• Establishing public health and safety, and tribal cultural and homeland protection volumes to ensure that all water users can count on at least a minimum amount of water even during times when large volume cuts may be necessary.

For Lower Basin operations, Reclamation should re-examine how it makes mandatory cuts.

4. Other issues.

In addition to holding the recently established Federal-State-Tribal Group meetings, Tribal Information Exchange meetings and the Post-2026 Integrated Technical Education Workgroup meetings, Reclamation must engage the Community, and any other Basin Tribes that have requested formal consultation, in meaningful and robust Nation-to-Nation consultation throughout the EIS process. President Biden recently ordered that consultations must ensure all applicable information is readily available to consulting parties and that Federal and Tribal officials have adequate time to communicate.\(^6\) Reclamation must then take the Tribal input it receives into account; and provide an explanation of how Tribal input was received, how that Tribal input was addressed, and the reasoning for any instance in which Tribal suggestions were not incorporated into the Departmental action or any instance where consensus could not be obtained.\(^7\) Reclamation must also timely disclose to affected Basin Tribes the outcome of consultation and decisions made because of consultations.\(^8\)

To satisfy these consultation requirements, Reclamation must consult the Community and other requesting Basin Tribes before and after each of its decision points. Reclamation must consider the concerns of Basin Tribes, and provide information based on the differentiated impacts they may feel from federal action. While the EIS will be conducted within a tight timeframe, Reclamation should provide sufficient time for Tribes, such as the Community, to meaningfully respond to information provided before and after the draft EIS is released at the end of 2024, and before and after any key milestones throughout the NEPA process. Reclamation should also create and share a model with Tribes, such as the Community, who have requested it to illustrate for decision-makers how proposed cuts may affect Tribal water supplies. And, if there are consensus alternatives being discussed, the Community and other requesting Basin Tribes need to know what is under discussion. Ideally, the opportunity to discuss the consensus alternatives will be provided in the Federal-State-Tribal Group meetings and in individual consultation sessions.

While Reclamation should consider the ways in which Basin Tribes differ from other water users and the ways in which Basin Tribes differ from each other, Reclamation should not imbue certain Basin Tribes with more protection than others. Reclamation has a statutory trust responsibility to Tribes, like the Community, that have accepted statutory trust entitlements to Colorado River water delivered through CAP. This responsibility requires a high degree of care and protection, and which creates a trust claim for the affected Tribe in a manner different than others with contractual

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\(^6\) White House, Memorandum on Uniform Standards for Tribal Consultation § 2 (Nov. 30, 2022) ("WH Memo"); see also 512 Department of the Interior, Departmental Manual at § 5.5(B) (Nov. 9, 2015) ("DM").

\(^7\) 512 DM § 5.5(C).

\(^8\) WH Memo § 7(b).
entitlements to Colorado River water.\textsuperscript{9} Moreover, these Tribal trust entitlements to Colorado River water through CAP are no less important than other Basin Tribes’ rights to divert directly from the Colorado River. Reclamation has a money-mandating duty to consider and protect the Community’s statutory entitlement to Colorado River water held in trust by the United States.\textsuperscript{10} At every step, Reclamation must consider and appropriately account for its trust responsibilities, especially protecting statutorily protected Tribal trust resources. As part of its trust responsibility, Reclamation must consider whether any reductions in Colorado River deliveries to a Tribe with a statutory entitlement to such water is likely to be permanent or nearly permanent, thereby necessitating the need to find replacement water for such lost entitlement.

Thank you for considering the Community’s views on what the EIS should cover. We look forward to continuing our work together during this process.

Respectfully,

\[Signature\]

Stephen R. Lewis, Governor
Gila River Indian Community

Cc: Senator Kyrsten Sinema
    Senator Mark Kelly
    Lt. Governor Monica Antone
    Gila River Indian Community Litigation Team
    Thomas Murphy, Acting General Counsel
    Don Pongrace
    Jason Hauter


\textsuperscript{10} See AWSA § 204(a)(2); see also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, Contested Case No. W1-207, Judgment and Decree dated Sept. 13, 2007, at ¶ 6 (Ariz. Superior Ct., County of Maricopa) ("The Water Rights described in . . . this Judgment and Decree shall be held in trust by the United States on behalf of the Community and the Allottees as provided in section 204 of the [AWSA].").