

Attachment A1 to the Agreement Concerning Colorado River Drought Contingency Management and Operations (“Companion Agreement”)

**AGREEMENT FOR DROUGHT RESPONSE OPERATIONS AT THE INITIAL UNITS OF THE
COLORADO RIVER STORAGE PROJECT ACT**

This Agreement for Drought Response Operations (“Drought Response Operations Agreement”) at the Glen Canyon Dam, Flaming Gorge Dam, Curecanti (the “Aspinall Unit”), and Navajo Dam authorized by the Colorado River Storage Project Act (collectively referred to as the “CRSPA Initial Units” and individually as “CRSPA Initial Unit”), an element of the Upper Colorado River Basin’s Drought Contingency Plan, is hereby made and entered into this 20th day of May, 2019 by and among the Upper Colorado River Division States of Colorado, New Mexico, Utah, and Wyoming (“Upper Division States”), through the Upper Colorado River Commission (“Commission”), and the Secretary of the Interior (“Secretary”) hereinafter collectively referred to as the “Parties.” The Secretary may delegate his or her duties under this Drought Response Operations Agreement to the Bureau of Reclamation (“Reclamation”).

I. INTRODUCTION

A. BACKGROUND/OBJECTIVE

Since 2000, drought conditions in the Colorado River Basin have led to marked fluctuations and decreases in water elevations at key Colorado River reservoirs. The Upper Division States, through the Commission, have developed a Drought Contingency Plan to address the possibility of reservoir storage at Lake Powell declining below a target elevation. This Drought Response Operations Agreement is one element of that Plan. Its primary goals are to minimize the risk of Lake Powell falling below a target elevation and thereby:

1. Help ensure the Upper Division States will continue fulfilling their interstate water compact obligations while exercising their rights to develop and utilize the Upper Colorado River Basin’s (“Upper Basin”) Colorado River System compact apportionment.
2. Maintain the ability to generate hydropower at Glen Canyon Dam so as to protect:
 - a. Continued operation and maintenance of the Initial Units and participating projects authorized under the 1956 Colorado River Storage Project Act, as amended (“CRSPA”);
 - b. Continued funding and implementation of environmental and other programs that are beneficial to the Colorado River System;

- c. Continued electrical service to power customers, including municipalities, cooperatives, irrigation districts, federal and state agencies and Native American Tribes, and the continued functioning of the western Interconnected Bulk Electric System that extends from Mexico to Canada and from California to Kansas and Nebraska; and
 - d. Safety contingencies for nuclear power plant facilities within the Colorado River Basin.
3. Minimize adverse effects to resources and infrastructure in the Upper Basin.

B. INTENT

The Parties intend through this Drought Response Operations Agreement to:

1. Prepare, in advance of drought conditions, drought response operations that will minimize the risk of low water storage conditions at Lake Powell, as well as ensure timely recovery of storage water at the upstream CRSPA Initial Units;
2. Reach consensus on a contingency framework for utilizing the CRSPA Initial Units to respond to drought conditions in the Upper Basin; and
3. Promote communication, coordination, and cooperation among themselves to provide additional certainty in Colorado River water management.

C. FRAMEWORK

The framework for this Drought Response Operations Agreement is developed in recognition of, and consistent with, the law and practice relevant to the Upper Basin as summarized herein:

1. The CRSPA directed and authorized the Secretary to construct and operate the CRSPA Initial Units to, among other things, allow the Upper Division States to utilize their apportionment of the Colorado River consistent with the Colorado River Compact.
2. Project-specific criteria govern the operation of each of the CRSPA Initial Units, including applicable Records of Decision and Biological Opinions to satisfy the requirements of the National Environmental Policy Act and the Endangered Species Act, the authorized purposes for each facility, and state water right systems and decrees.
3. The 1977 Department of Energy Organization Act generally transferred power marketing and transmission (“construction, operation, maintenance, and delivery”) functions, including the responsibility to market and deliver power and energy from the applicable CRSPA Initial Units, from the Department of the Interior to Western Area Power Administration.
4. Articles IV(c) of the Colorado River Compact and XV(b) of the Upper Colorado River Basin Compact (“Upper Basin Compact”) expressly recognize each compacting state’s

rights and powers to regulate within its boundaries the appropriation, use, and control of water apportioned and available to the states by the Colorado River and Upper Basin Compacts.

5. Article VIII(d) of the Upper Basin Compact also establishes the Commission, which is composed of a commissioner representing each of the Upper Division States and a commissioner representing the United States, to perform all functions required by the Upper Basin Compact and do all things necessary, proper, or convenient in the performance of its duties either independently or in cooperation with any state or federal agency.
6. Federal law and practice (including, but not limited to, Section 602(b) of the 1968 Colorado River Basin Project Act, 43 U.S.C. § 1552(b), the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act, and the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead ("2007 Interim Guidelines")) contemplate that in the coordinated operations of Lake Powell and Lake Mead, the Secretary will consult with the Colorado River Basin States through Governors' Representatives, who represent the Governors and their respective state agencies.

II. AGREEMENT

In consideration of the above and the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

A. BASES OF MUTUAL AGREEMENT

1. Best Efforts: The Parties agree to implement their best efforts to coordinate and collaborate on an ongoing basis to achieve the purposes and implement the provisions of this Drought Response Operations Agreement.
2. Target Elevation: For purposes of this Drought Response Operations Agreement only, Lake Powell surface elevation 3,525 feet mean sea level ("msl") will be considered the "Target Elevation" for minimizing the risk of Lake Powell declining below minimum power pool (approximately elevation 3,490 feet msl) and to assist in maintaining Upper Division States' compliance with the Colorado River Compact. The Parties agree that this elevation appropriately balances the need to protect infrastructure, compact obligations, and operations at Glen Canyon Dam, as storage approaches

minimum power pool with the Upper Division States' rights to put Colorado River System water to beneficial use.

3. Principles for Drought Response Operations: The Parties agree to consider the following principles when identifying appropriate drought response operations (see Section II.A.4 "Drought Response Process") at any CRSPA Initial Unit:
 - a. *Definition of Drought Response Operations*: For purposes of this Drought Response Operations Agreement "drought response operations" refers to operational adjustments or releases made at or from the CRSPA Initial Unit(s) to minimize the risk of Lake Powell declining below the Target Elevation, as well as to provide for actions at the CRSPA Initial Unit(s) in subsequent years to recover storage at the same facility/facilities.
 - b. *Scope of Drought Response Operations*: Any drought response operation, including drought response releases and recovery of storage operations, at a CRSPA Initial Unit will be managed with the maximum flexibility practicable consistent with: the Colorado River Compact; the Upper Colorado River Basin Compact; the Colorado River Storage Project Act; the Colorado River Basin Project Act; the San Juan-Chama Project Act (P.L. 87-483); the Northwestern New Mexico Rural Water Projects Act (P.L. 111-11); the project-specific criteria for each CRSPA Initial Unit, including the relevant Records of Decision, Biological Opinions and authorized purposes for each Unit (see Section I.C.2); legal obligations, including existing and future contracts related to water and/or hydropower; states' water right administration requirements and decrees; and all applicable rules and regulations promulgated thereunder.
 - c. *Participation from all CRSPA Initial Units*: Recognizing the shared risk of extended drought and acknowledging the Upper Division States' continuing responsibilities to maintain compact compliance within the Upper Basin, a drought response operation contemplated by this Drought Response Operations Agreement shall ensure that ALL CRSPA Initial Units will be considered for drought response operations. To this end:
 - i. Operational Adjustments at Lake Powell: Operational adjustments in monthly volumes at Glen Canyon Dam will be considered first to minimize the risk of Lake Powell declining below the Target Elevation consistent with the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs, which is currently implemented through the 2007 Interim Guidelines.
 - ii. All Initial Units Considered: If operational adjustments at Glen Canyon Dam would not be sufficient to fully minimize the risk of Lake Powell

declining below the Target Elevation, operations at all other CRSPA Initial Units will be uniformly considered through evaluations that include, but are not limited to water availability, hydrology, resource conditions and operational limitations at each Initial Unit in conjunction with adjustments at Glen Canyon Dam to provide additional drought protection at Lake Powell.

- iii. Multiple Drought Response Releases: If a CRSPA Initial Unit has participated in a drought response release, it will not be considered for another drought response release in subsequent years unless drought response releases from the other CRSPA Initial Units do not fully reduce the risk of Lake Powell declining below the Target Elevation. In such instances, a CRSPA Initial Unit may participate in subsequent drought response releases regardless of whether it has fully recovered storage following a prior drought response release, but only to the extent that a) water is available at that CRSPA Initial Unit for the drought response operation; and, b) contributions from the other CRSPA Initial Units cannot otherwise protect the Target Elevation at Lake Powell.
- d. *Effectiveness*: The Parties agree that a drought response release from a CRSPA Initial Unit may be recommended even if it is determined that such release would not, by itself, fully achieve the intent or goals of this Drought Response Operations Agreement. Such releases, however, may not be recommended if they are ultimately determined to be futile to achieve the goals or intent of this Drought Response Operations Agreement.
- e. *Recovery of Storage at CRSPA Initial Units*: Recovery of storage at the CRSPA Initial Units is essential to any drought response operation. Consistent with Section II.A.3.b-c, the drought response operations process will be completed only after each CRSPA Initial Unit has recovered the storage as defined below. When implementing recovery of storage at the CRSPA Initial Units, the following considerations will apply:
 - i. Recovery of Storage Definition: For purposes of this Drought Response Operations Agreement, storage at a CRSPA Initial Unit is recovered when the first of either of the following occurs:
 - 1. The CRSPA Initial Unit, operating consistent with Section II.A.3.b, has recovered the cumulative volume of water that was released for implementation of drought response operations to minimize the risk of Lake Powell declining below the Target Elevation; or

2. The water elevation at the CRSPA Initial Unit has reached the regular operating target elevation for that facility, for example, deicing target elevation at the Aspinall Unit, the current end-of-water-year storage target at Navajo Reservoir, or the May 1 Upper Level Drawdown Elevation target at Flaming Gorge Reservoir.
- ii. Dual Operations: Hydrologic variability within the Upper Basin may render releases from a CRSPA Initial Unit ineffective in achieving the intent and goal of this Drought Response Operations Agreement, see Section II.A.3.d, to reduce the risk of Lake Powell declining below the Target Elevation. However, such a CRSPA Initial Unit could still recover storage following a prior drought response release. Moreover, drought response releases from any CRSPA Initial Unit do not preclude recovery of storage actions at another Unit simultaneously.
- f. *Natural Resource Considerations*: Drought response operations at the CRSPA Initial Units will consider the timing, duration, and magnitude of water releases to help minimize, to the extent practicable, impacts to natural resources conditions, recognizing the overall purpose of the drought response operations, and within the scope identified in Section II.A.3.b.
- g. *Impacts to Basin Fund and Bulk Electric System*: Drought response operations at CRSPA Initial Units will consider the timing, duration, and magnitude of water releases to help minimize, to the extent practicable, impacts to the Upper Colorado River Basin Fund and impacts to the reliability of the western Interconnected Bulk Electrical System, within the scope identified in Section II.A.3.b.
- h. *Monitoring*: The Parties agree to include monitoring activities as appropriate as part of any drought response operations (release or recovery of storage). The Parties will incorporate the results of such monitoring into consideration of whether to begin, end, or modify drought response operations.
- i. *Forecast Uncertainty*: Because modeling projections that will be considered and relied upon for any drought response operations cannot predict precise conditions at any given time in the Upper Basin, plans for drought response operations developed in accordance with Section II.A.4.b shall provide sufficient flexibility to begin, end, or adjust operations as needed based on actual hydrologic conditions.

- j. Emergency¹ Action:* In light of the potential uncertainty associated with modeling projections, the Parties agree that notwithstanding the principles for implementing a drought response operation set forth in this subsection 3, the Secretary retains all applicable authority to make releases from the CRSPA Initial Units and perform subsequent recovery of storage operations if actual hydrology or actual operating experience demonstrate an imminent need to protect the Target Elevation at Lake Powell. Such action shall be performed, to the greatest extent practicable, with advance consultation and coordination with the Upper Division States, through the Commission, and following consultation with the Governors' Representatives of the Colorado River Basin States consistent with the Agreement Concerning Colorado River Drought Contingency Management and Operations ("Companion Agreement").
- 4. Drought Response Process: In an effort to achieve the primary goals of this Drought Response Operations Agreement, and to implement the "Principles" outlined in Section II.A.3, the Parties agree that, subject to Section II.A.3.j "Emergency Action", they will work to minimize the risk of Lake Powell declining below the Target Elevation by:
 - a. *Initiating drought response process:* The Parties will initiate a drought response process, which will include at a minimum:
 - i. Notice: The Secretary will notify the Commission and the Lower Division States when Reclamation's 24-Month Study model, using Minimum Probable hydrology based upon the inflow forecast provided by the Colorado Basin River Forecast Center, projects Lake Powell's elevation at or below the Target Elevation at any time during the subsequent 24-month period, or when emergency action becomes necessary as set forth in Section II.A.3.j.
 - ii. Modeling: The Secretary will commence monthly modeling of Minimum Probable, Maximum Probable and Most Probable hydrology for the subsequent 24-month period until the Minimum Probable 24-Month Study projects that Lake Powell will consistently remain above the Target Elevation for a 24-month period. Reclamation will report such modeling results to the Upper Division States and the Commission during monthly calls, see Section II.A.4.a.iii.

¹ The term "emergency" as used in this Drought Response Operations Agreement does not identify, describe or otherwise define what constitutes a general emergency under federal or state laws or other emergency situation at a Reclamation reservoir, a deficiency in the system under the Colorado River Compact, or an extraordinary drought under the 1944 Water Treaty between the United States and Mexico regarding the Colorado River.

- iii. Monthly Calls/Meetings: The Secretary will commence monthly drought operations planning and coordination calls or meetings with the Upper Division States and the Commission to discuss monthly modeling and tracking of hydrology forecasts, system conditions, and status of CRSPA Initial Units; each Party may, in its sole discretion, choose the individuals or entities that will attend.
- iv. Duration: The Secretary will continue the initiation of the drought response process under this subsection (a) until either:
 - 1. The 24-Month Study Minimum Probable hydrology projects Lake Powell elevations to be above the Target Elevation at all times during the subsequent 24-month period, at which time the drought response process may be suspended; or
 - 2. The 24-Month Study Most Probable hydrology projects Lake Powell elevations to be at or below the Target Elevation at any time during the subsequent 24-month period, at which time the Parties will begin developing a Draft Drought Response Operations Plan as set forth below in Section II.A.4.b.
- b. *Developing Draft Drought Response Operations Plan*: The Parties agree to develop a Draft Drought Response Operations Plan by:
 - i. Continuing the Monthly Calls/Meetings described in Section II.A.4.a.iii.
 - ii. Considering the Drought Response Principles set forth in Section II.A.3, including: *Definition of Drought Response Operations; Scope of Drought Response Operations, Participation from all CRSPA Initial Units; Effectiveness, Recovery of Storage; Natural Resource Considerations; Effects to Basin Fund and Bulk Electric System; Monitoring: Forecast Uncertainty; and Emergency Operations*. In doing so, the Draft Plan will, to the greatest extent practicable, identify how to: (1) Minimize the risk of Lake Powell declining below the Target Elevation; (2) Provide for timely adjustments in drought response operations based upon actual monthly hydrology to achieve the purpose and intent of this Drought Response Operations Agreement; and (3) Allow for subsequent recovery of storage at the CRSPA Initial Units, consistent with water contract obligations, relevant Records of Decision and Biological Opinions, and other state or federal legal requirements relevant to each facility.
 - iii. Providing the terms of a Draft Drought Response Operations Plan as contemplated by the Parties to the Lower Division States for review, and consulting with the Governors' Representatives of the Lower Division States consistent with the Companion Agreement to consider and

address, as appropriate, any questions or concerns regarding the terms of the Draft Drought Response Operations Plan as contemplated by the Parties.

- iv. Continuing the process described in Section II.A.4.b.i-iii until either:
 - 1. The 24-Month Study Most Probable hydrology projects Lake Powell to remain above the Target Elevation at all times during the subsequent 24-month period, at which time the Parties will revert to the drought response process described in Section II.A.4.a; or
 - 2. The April 24-Month Most Probable hydrology projects Lake Powell to be at or below the Target Elevation at any time in the next 12-month period, at which time the Parties will finalize the Draft Drought Response Operations Plan as described in Section II.A.4.c.
- c. *Finalize Drought Response Operations Plan:* The Parties will finalize the Drought Response Operations Plan as follows:
 - i. The Commission will review and consider a Final Drought Response Operations Plan after consultation with the Governors' Representatives of the Lower Division States as provided in Section II.A.4.b.iii.
 - ii. Upon approval of the Final Drought Response Operations Plan by both the Upper Division State Commissioners and the Commission, the Commission will forward that Final Drought Response Operations Plan to the Secretary for consideration and approval.
 - iii. In the event of any dispute or disagreement arising from development of the Plan, or if the Secretary wishes to modify or reject the Plan, the Secretary and Commission agree to meet to jointly assess what other drought contingency options may be available.
- d. *Implement Drought Response Operations Plan:* Upon the Secretary's approval of the Drought Response Operations Plan, the Parties agree to:
 - i. Implement drought response operations at the agreed-upon CRSPA Initial Unit(s) in accordance with the Drought Response Operations Plan, and coordinate weekly, or at such other intervals as otherwise agreed to, on such operations.
 - ii. Be available to respond to the Lower Division States' questions or concerns, should they arise, regarding ongoing implementation of Drought Response Operations.
 - iii. Conclude the Drought Response Operations only after the CRSPA Initial Units have recovered the storage that would have otherwise been

- available to each Unit but for implementation of Drought Response Operations, as determined in accordance with Section II.A.3.e.
- iv. If the Parties agree that the finalized Drought Response Operations Plan needs to be modified, amended, or supplemented for the purpose of more specifically clarifying the scope and detail of recovery of storage, they will consult with the Lower Division States consistent with Section II.A.4.b.iii.
 - v. In the event of any dispute or disagreement regarding implementation of the Drought Response Operations Plan, the Parties agree to meet to jointly assess what other drought contingency options may be available.
- e. *Emergency Action:* Notwithstanding efforts to develop and implement a Drought Response Operations Plan as outlined above, in the event that actual hydrology or actual operating experience demonstrate an imminent need to protect the Target Elevation as set forth in Section II.A.3.j, the Secretary retains all applicable authority to make releases from the CRSPA Initial Units and perform subsequent recovery of storage operations. Such action shall be performed, to the greatest extent practicable, with advance consultation and coordination with the Upper Division States, through the Commission, and following consultation with the Governors' Representatives of the Colorado River Basin States consistent with the Companion Agreement.
5. Public Outreach: The Parties will coordinate on any public outreach for drought response operations at the CRSPA Initial Units. Such coordination will begin prior to outreach activities with the goal of streamlining discussions and avoiding or resolving differences. Except when an imminent need does not permit sufficient time, public outreach regarding drought response operations will include, but may not be limited to, notifying Native American Tribes, local governments, interested stakeholders, and operational and technical workgroups relevant to the respective CRSPA Initial Units of plans and concepts for drought response operations as they become available.
6. Term for Drought Response Operations: Drought response operations as contemplated through this Drought Response Operations Agreement will not extend beyond the term for operations as set forth in the Record of Decision for the 2007 Interim Guidelines (December 31, 2025 but after finalization of the 2026 Annual Operating Plan, unless terminated sooner). Operations to recover storage after a drought response operation has been implemented will continue as long as necessary to recover from any drought response operations taken before October 1, 2026.

7. Voluntary Efforts: Drought response operations agreed to pursuant to this Drought Response Operations Agreement are voluntary and in the interest of comity. Nothing in this Drought Response Operations Agreement shall be construed to diminish or modify the rights of any Party under existing law.
8. Consistency with Existing Law and Compliance: For the purposes of this Drought Response Operations Agreement, storage of water in and release of water from the CRSPA Initial Units to accomplish a drought response operation does not, and shall not be construed to, violate the Colorado River Compact, Upper Colorado River Basin Compact, Colorado River Storage Project Act, Colorado River Basin Project Act, the San Juan-Chama Project Act (P.L. 87-483), the Northwestern New Mexico Rural Water Projects Act (P.L. 111-11), Records of Decision for each facility, Biological Opinions for each facility, or contracts for water or power, states' water right systems and decrees and all applicable rules and regulations promulgated thereunder.

B. ADDITIONAL PROVISIONS

1. Participation in Similar Activities: This Drought Response Operations Agreement in no way restricts the Parties from participating in similar activities with other public or private agencies, organizations and individuals, as state and federal law may allow.
2. Term: This Drought Response Operations Agreement shall be effective as of the date all Parties provide their written approval and shall be effective as to any additional Party as of the date of execution by such Party. This Drought Response Operations Agreement will not extend beyond the term for operations as set forth in the Record of Decision for the 2007 Interim Guidelines (December 31, 2025 but after finalization of the 2026 Annual Operating Plan, unless terminated sooner) without the written consent of all the Parties.
3. Amendments and Modifications: This Drought Response Operations Agreement may be amended or modified, but only by the written agreement of the Parties after consultation as set forth in Paragraph I of the Companion Agreement.
4. Resolution of Claims or Controversies: The Parties recognize that judicial or administrative proceedings are not the preferred alternatives to the resolution of claims or controversies regarding this Drought Response Operations Agreement. In furtherance of this Drought Response Operations Agreement, the Parties desire to avoid judicial and administrative proceedings, and agree to pursue a consultative approach to the resolution of any claim or controversy triggered by this Drought

Response Operations Agreement. If any Party becomes concerned that there may be a claim or controversy under this Drought Response Operations Agreement, or as a result of implementing this Drought Response Operations Agreement, such Party shall notify all other Parties via electronic mail or other writing and the Parties shall in good faith meet in order to resolve such claim or controversy by mutual agreement prior to initiating any judicial or administrative proceeding. No Party shall initiate any judicial or administrative proceeding against any other Party under this Drought Response Operations Agreement, or as a result of implementing this Drought Response Operations Agreement until such consultation has been completed. Notwithstanding any other provision of this Drought Response Operations Agreement, this Paragraph shall survive the termination or expiration of this Drought Response Operations Agreement.

5. Reservation of Rights and Authorities: Nothing in this Drought Response Operations Agreement alters the rights, obligations and authorities of the respective Parties. Moreover, nothing in this Drought Response Operations Agreement affects or shall be interpreted to affect the obligations that each Party may have related to natural resources at or around the CRSPA Initial Units under applicable law. Nor have the Parties waived any rights, claims, or defenses now or in the future under any applicable federal or state law or administrative rule, regulation or guideline.
6. No Waiver: The failure of any Party to enforce a provision of this Drought Response Operations Agreement shall not be deemed to constitute a waiver of that provision.
7. No Precedent: The Parties represent and agree that nothing in this Drought Response Operations Agreement, nor the execution of this Drought Response Operations Agreement, establishes or acts as any precedent for managing or operating the CRSPA Initial Units or administering water from the Colorado River System in the Upper Colorado River Basin. This Drought Response Operations Agreement also shall not be interpreted or construed as establishing a precedent for employing the plans or operational tools contemplated by this Drought Response Operations Agreement. The Parties hereby affirm the entitlement and right of each State under such existing law to use and develop the water of the Colorado River System. Notwithstanding anything in this Drought Response Operations Agreement to the contrary, this provision shall survive termination of this Drought Response Operations Agreement.

8. Actual Operating Experience: Adoption of this Drought Response Operations Agreement does not preclude exploration of additional approaches for operational flexibility in light of actual operating experience.
9. Uncontrollable Forces: No Party shall be considered to be in default in the performance of any of its obligations under this Drought Response Operations Agreement when a failure of performance shall be due to any cause beyond the control of the Party affected, including but not limited to, facilities failure, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, and restraint by court or public authority which by exercise of due diligence and foresight such Party could not have reasonably expected to avoid. A Party rendered unable to fulfill any of its obligations under this Drought Response Operations Agreement by reason of an Uncontrollable Force shall give prompt written notice of such Uncontrollable Force to the other Parties and shall exercise due diligence to remove such inability with all reasonable dispatch.
10. Governing Law: This Drought Response Operations Agreement shall be interpreted, governed by, and construed under applicable Federal law. To the extent permissible under the Federal Rules of Civil Procedure and other applicable Federal authority, venue for adjudication of any disputes under this Drought Response Operations Agreement shall be in an appropriate Federal court within the Upper Basin.
11. Successors and Assigns: The provisions of this Drought Response Operations Agreement shall apply to and bind the successors and assigns of the Parties, but no assignment or transfer of this Drought Response Operations Agreement or any right or interest herein shall be valid until consented to in writing by all Parties, which consent shall not be unreasonably withheld.
12. Drafting Considerations: Each Party and its counsel have participated fully in the drafting, review, and revision of this Drought Response Operations Agreement, each of whom is sophisticated in the matters to which Drought Response Operations Agreement pertains, and no one Party shall be considered to have drafted this Drought Response Operations Agreement.
13. Notices: All notices and requests required or allowed under the terms of this Drought Response Operations Agreement shall be in writing and shall be sent via electronic mail and mailed first class postage paid to the following entities at the following addresses:

Bureau of Reclamation:

125 South State Street, Room 6107
Salt Lake City, UT 84138-1147
Attn: Regional Director

State of Colorado:

Colorado Commissioner to the Upper Colorado River Commission
c/o Colorado Water Conservation Board
1313 Sherman Street, Room 718
Denver, CO 80203
Attn: Director

State of New Mexico:

New Mexico Interstate Stream Commission
P.O. Box 25102
Santa Fe, NM 87504-5102
Attn: Colorado River Bureau

State of Utah:

Utah Division of Water Resources
1594 West North Temple, Suite 310
P.O. Box 146201
Salt Lake City, UT 84114-6201
Attn: Director

State of Wyoming:

Wyoming State Engineer's Office
122 West 25th Street
Herschler Building, 1st Floor East
Cheyenne, WY 82002
Attn: Wyoming State Engineer

A Party may change its contact information by giving the other Parties notice of the change in writing.

14. No Third-Party Beneficiaries: This Drought Response Operations Agreement is made for the benefit of the Parties. No Party to this Drought Response Operations Agreement intends for this Drought Response Operations Agreement to confer any

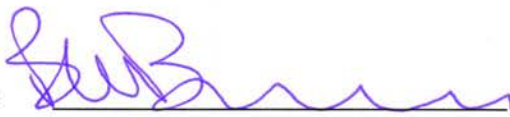
benefit upon any person or entity not a signatory to this Drought Response Operations Agreement upon a theory of third-party beneficiary or otherwise.

15. Authority for Signing: The persons and entities executing this Drought Response Operations Agreement on behalf of the Parties are recognized by the Parties as representing the respective Upper Division States and the Commission and the Department of the Interior in matters concerning the Colorado River and operation of the CRSPA Initial Units, and as those persons authorized to bind the respective Parties to the terms hereof. Each person executing this Drought Response Operations Agreement represents that he or she has the full power and authority to bind the respective Party to the terms of this Drought Response Operations Agreement. This Drought Response Operations Agreement constitutes a valid and binding agreement of each Party, enforceable against each Party in accordance with its terms. No Party shall challenge the authority of any person or Party to execute this Drought Response Operations Agreement and bind such Party to the terms hereof, and the Parties waive the right to challenge such authority.
16. Joint Defense Against Third-Party Claims: The Parties have certain common, closely parallel, or identical interests in supporting, preserving, and defending this Drought Response Operations Agreement. The nature of this interest and the relationship among the Parties present common legal and factual issues and a mutuality of interests. Because of these common interests, the Parties will mutually benefit from an exchange of information relating to the support, preservation, and defense of this Drought Response Operations Agreement, as well as from the coordinated investigation and preparation for discussion of such interests. In furtherance thereof, in the event of any challenge by a third party to this Drought Response Operations Agreement, the Parties will proceed with reasonable diligence and use best efforts to support and defend the Drought Response Operations Agreement in any lawsuit or administrative proceeding challenging the legality, validity or enforceability of any term of this Drought Response Operations Agreement, and will, to the extent appropriate, enter into joint defense or common interest agreements. Each Party will bear its own costs of participating in the defense of this Drought Response Operations Agreement under this Paragraph.
17. Counterparts: This Drought Response Operations Agreement may be executed in counterparts, each of which shall be an original and all of which, together, shall constitute only one Drought Response Operations Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Drought Response Operations Agreement on the day and year written above.

[SIGNATURES START NEXT PAGE]

THE UNITED STATES OF AMERICA

By: 
Brenda W. Burman
Commissioner
Bureau of Reclamation

By: 
Dr. Timothy R. Petty
Assistant Secretary
U.S. Department of the Interior

Date: May 20, 2019

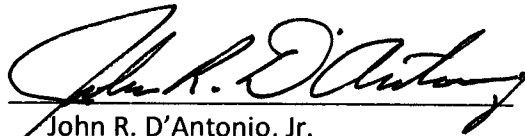
Date: May 20, 2019

THE STATE OF COLORADO


By: 

L. James Eklund
Colorado Commissioner, Upper
Colorado River Commission
Governor's Representative

THE STATE OF NEW MEXICO

By: 
John R. D'Antonio, Jr.
New Mexico State Engineer
Secretary, New Mexico Interstate
Stream Commission

THE STATE OF UTAH

By: 
Eric L. Millis
Director, Utah Division of Water
Resources
Interstate Stream Commissioner

THE STATE OF WYOMING

By: 
Patrick T. Tyrrell
State of Wyoming Commissioner,
Upper Colorado River Commission

ENVIRONMENTAL DEFENSE FUND, INC., Trout Unlimited, The Wilderness Society, Appellants,

v.

R. Keith HIGGINSON, Commissioner, Bureau of Reclamation, U. S. Department of the Interior, et al.

ENVIRONMENTAL DEFENSE FUND, INC., et al.

v.

R. Keith HIGGINSON, Commissioner, Bureau of Reclamation, U. S. Department of the Interior, et al.

and

Utah Power & Light Company (Intervenor-Defendant), Appellant.

ENVIRONMENTAL DEFENSE FUND, INC., et al.

v.

R. Keith HIGGINSON, Commissioner, Bureau of Reclamation, U. S. Department of the Interior, et al.

and

State of Arizona, State of Nevada, State of Wyoming, and State of Colorado (Intervenor-Defendants), Appellants.

Nos. 80-1123, 80-1242 and 80-1255.

**United States Court of Appeals,
District of Columbia Circuit.**

Argued April 3, 1981.

Decided May 15, 1981.

Dissenting Opinion June 30, 1981.

Environmental groups brought action seeking declaratory and injunctive relief to compel Department of Interior to prepare basin-wide or comprehensive environmental impact statement covering proposed federal water projects in Colorado River Basin. The District Court for the District of Columbia, Thomas A. Flannery, J., granted summary judgment, holding that the defendant could delay preparation of a com-

prehensive environmental impact statement, and cross appeals were taken. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that absent trial record dealing with specifics of defendant's new policy to prepare site-specific environmental impact statements for proposed water projects and not basin-wide environmental impact statement, Court of Appeals was in no position to determine whether plaintiffs had met their burden of showing that defendant's new policy was arbitrary, capricious, or contrary to law, and therefore remand was required.

Vacated and remanded.

MacKinnon, Circuit Judge, filed dissenting opinion.

1. Health and Environment ⇐25.10(3)

If agency has adopted a region-wide plan that can be characterized as a major federal action, National Environmental Policy Act requires agency to prepare environmental impact statement covering entire "region." National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

2. Health and Environment ⇐25.15(6)

Agency's decision on scope of environmental impact statement to be prepared, based upon factual determinations with respect to whether a regional plan exists and size of region affected by proposed plan, is subject to judicial review under arbitrary and capricious standard. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332.

3. Health and Environment ⇐25.15(6)

Department of Interior's ultimate decision to prepare site-specific environmental impact statements and not basin-wide environmental impact statements for proposed federal water projects in Colorado River Basin was subject to review under the arbitrary and capricious standard. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 5 U.S.C.A. § 706 (2)(A).

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4. Federal Courts — 942

Absent trial record dealing with specifics of Department of Interior's new policy to prepare site-specific environmental impact statements and not basin-wide environmental impact statement for proposed federal water projects in Colorado River Basin, Court of Appeals was in no position to determine whether environmental groups had met their burden of showing that Department's new policy was arbitrary, capricious or contrary to law and therefore remand was required. National Environmental Policy Act of 1969, § 102, 42 U.S.C.A. § 4332; 5 U.S.C.A. § 706(2)(A).

5. Health and Environment — 25.15(6)

Whether synergistic and cumulative effect of proposed federal water projects in Colorado River Basin would be properly evaluated in site-specific environmental impact statements would be left to discretion of Department of Interior, subject to arbitrary and capricious scope of review. National Environmental Policy Act of 1969, §§ 2-209, 42 U.S.C.A. §§ 4321-4369.

Appeals from the United States District Court for the District of Columbia (D.C. Civil Action No. 78-1185).

Paula C. Phillips, Denver, Colo., with whom George W. Pring, Denver, Colo., and William A. Butler, Washington, D. C., were on the brief, for appellants in Nos. 80-1123 and cross/appellees in Nos. 80-1242 and 80-1255.

William Cohen, Atty. Dept. of Interior, Washington, D. C., for Federal appellees.

1. The plaintiffs sought an environmental impact statement (EIS) pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321-4369 (1976 & Supp. III 1979). Section 102(2)(C) of the Act, 42 U.S.C. § 4332(2)(C) (1976), provides that:
all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

Sanford Sagalkin, Deputy Asst. Atty. Gen., Robert L. Klarquist and Joshua I. Schwartz, Attys., Dept. of Justice, Washington, D. C., were on the brief, for Federal appellees.

Jerome Muys, Denver, Colo., with whom Jack D. Palma, II, Dennis M. Montgomery, Denver, Colo., and James V. Lavelle for States of Arizona, et al. appellees in Nos. 80-1123 and 80-1242 and cross/appellants in No. 80-1255.

Gerry Levenberg, Washington, D. C., with whom R. Keith Guthrie and Jeffrey S. Christie, Washington, D. C., were on the brief, for Utah Power & Light Company, appellee in Nos. 80-1123 and 80-1255 and cross/appellant in No. 80-1242.

Before MacKINNON, MIKVA and EDWARDS, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

Dissenting opinion filed by Circuit Judge MacKINNON.

HARRY T. EDWARDS, Circuit Judge:

Before this court are cross-appeals from a summary judgment of the District Court holding that the defendant, the Department of the Interior, may delay preparation of a comprehensive environmental impact statement (CEIS) covering all proposed federal water projects in the Colorado River Basin. *Environmental Defense Fund, Inc. v. Higginson*, [1980] 14 Env.Rep.Cas. (BNA) 1008 (D.D.C. Jan. 3, 1980). The plaintiffs, the Environmental Defense Fund (EDF) and

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between the local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

two other environmental groups,² sought declaratory and injunctive relief compelling the Department of the Interior to prepare a basin-wide or comprehensive EIS, and enjoining construction of federal water projects in the basin pending completion of that study. Because congressional action foreclosed the possibility of an injunction halting construction of the projects,³ the plaintiffs now seek only an order compelling completion of the study.⁴ For the reasons set forth below, we vacate the District Court's opinion and remand this case for further proceedings.

Before initiation of this lawsuit, and while it was before the District Court, the Department of the Interior had recognized the desirability and necessity of completing a CEIS for the entire Colorado River Basin. The Department had refrained from completing such a study because Congress had not expressly allocated funds for the project.⁵ During the pendency of this appeal, however, the Department of the Interior changed its position regarding the necessity for the basin-wide study. Shortly before oral argument, the Department delivered to this court an affidavit from the Department's Deputy Assistant Secretary

for Land and Water Resources informing the court that the Department will no longer seek funding for a Colorado River Basin CEIS. The Department stated that it would meet NEPA requirements in the Colorado River Basin through project or site-specific environmental impact statements in which the Department will "discuss[] and evaluat[e] any cumulative and synergistic environmental impacts." At oral argument counsel for the Department contended that this approach is consistent with both NEPA and the Supreme Court's decision in *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

[1,2] In *Kleppe*, environmental organizations sought to compel the Department of the Interior to prepare a comprehensive environmental impact statement covering the development of coal reserves in the Northern Great Plains region. The Court identified two circumstances in which the preparation of a CEIS may be required under NEPA. First, the Court made clear that an agency must prepare a CEIS with respect to any major federal action that is intended to be "regional" in scope. See *id.* at 398-402, 96 S.Ct. at 2724-2726.⁶ Second, the

2. Although collectively labeled "EDF" for the purpose of this opinion, the plaintiffs also include Trout Unlimited and the Wilderness Society.

3. In a rider to an appropriations bill for the Department of the Interior, Congress specified that, "[n]otwithstanding any provisions of" NEPA, "construction of any feature" of certain water projects in the Colorado River Basin "shall proceed if a final Environmental Impact Statement has been filed on such feature." Pub.L.No. 95-465, § 110(a)-(c), 92 Stat. 1279, 1291 (1978). In other words, Congress decided that construction of these water projects should not be halted in the absence of a comprehensive (i. e., basin-wide) environmental impact statement, so long as a site-specific EIS had been prepared for each proposed project. This anti-injunction rider was added in direct response to the possibility that the present lawsuit might result in an injunction. See Remarks of Rep. Forsythe, 124 Cong. Rec. H11,685-86 (daily ed. Oct. 5, 1978). Of course, this rider does not, by its terms, prohibit the Department of the Interior from preparing a CEIS for the entire Colorado River Basin. See Remarks of Rep. Udall, 124 Cong. Rec. H11,686 (daily ed. Oct. 5, 1978) (supporting the anti-in-

junction rider, but still expressing the hope that a basin-wide EIS would be prepared).

4. Also parties to this suit are five intervenor-cross appellants—the Utah Power & Light Co. and the states of Arizona, Colorado, Nevada, and Wyoming. The intervenors contend that the District Court erred in holding that the Department of the Interior has the discretion to complete a basin-wide or comprehensive EIS. Because of our disposition of this case, we do not reach that issue.

5. All parties recognize that until this litigation, Congress has never required express funding for a CEIS in the budget of the Department of the Interior. The Department sought funding, however, after individual members of Congress contacted the Department about their concern that the Department's budget did not specifically provide for completion of a CEIS in the Colorado River Basin.

6. There is no doubt that if an agency has adopted a region-wide plan that can be characterized as a "major federal action," § 102(2)(C) of NEPA requires the agency to prepare an EIS covering the entire "region." See note 1, *supra*. Issues

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Court noted that, even absent such a regional plan, a

comprehensive impact statement may be necessary in some cases for an agency to meet [its duty under NEPA]. Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.

Id. at 409-10, 96 S.Ct. at 2729-30 (footnotes omitted). "Cumulative environmental impacts are, indeed, what require a comprehensive impact statement." *Id.* at 413, 96 S.Ct. at 2732. The Supreme Court found, on the record before it, that the Department had not abused its discretion in deciding not to prepare a region-wide CEIS.

[3] We can find nothing in NEPA, or in the judicial opinions construing it, prevent-

may arise, however, over the agency's determination of whether a regional plan exists, or with respect to the size of the region affected by the proposed plan. The agency's decision on the scope of the EIS to be prepared, based upon these factual determinations, is subject to judicial review under the arbitrary and capricious standard. See note 8, *infra*.

7. In the affidavit submitted to this court, the Deputy Assistant Secretary noted that the Department had requested "specific funding to do a comprehensive environmental impact statement" and that Congress had denied the requested funding. In light of the failure to obtain funding and "current budgetary restraints" the Department decided no longer to seek funding for the preparation of this particular CEIS. The affidavit also recited the Department's intent to comply fully with NEPA "by discussing and evaluating any cumulative and synergistic environmental impacts in site-specific environmental impact statements prepared for individual projects."

8. In order "to prevail [the environmental groups] must show that [the Department has] acted arbitrarily in refusing to prepare one comprehensive statement on this entire region." *Kleppe v. Sierra Club*, 427 U.S. 390, 412, 96 S.Ct. 2718, 2731, 49 L.Ed.2d 576 (1976). As this court recently noted, "the arbitrary and capricious standard also applies to segmentation of environmental review that avoids overall, programmatic evaluation." *National Wild-*

ing the Department of the Interior from changing its position regarding the necessity for a CEIS in order to reflect a new departmental policy, a new evaluation of facts, or changed circumstances.⁷ However, as *Kleppe* makes clear, the Department's ultimate decision—to prepare site-specific EISs and not a basin-wide EIS—is subject to review under the arbitrary and capricious standard.⁸ Accordingly, we remand this case to the District Court to enable the plaintiffs to challenge the Department's decision.

[4] We believe that a remand is required because this court is in no position to determine whether plaintiffs have met their burden of showing that the Department's new policy is arbitrary, capricious, or contrary to law, absent a trial record dealing with the specifics of the new policy.⁹ We have no doubt that the Government may have a change of position in a case of this sort; however, we are equally clear that

life Federation v. Appalachian Regional Comm'n., 79-2349, slip op. at 16 (D.C. Cir. Mar. 19, 1981). See the Administrative Procedure Act, § 10(e)(2)(A), 5 U.S.C. § 706(2)(A) (1976).

9. Because the Department of the Interior did not submit its affidavit informing this court of its new position until after all briefs had been filed, EDF had no opportunity to prepare a challenge. Consequently, the best course for this court is to remand the case to the District Court, where the plaintiffs will have ample opportunity to test the Department's decision.

We note that *Kleppe* is instructive in determining whether the Department's decision is arbitrary, capricious, or contrary to law.

The determination of the region, if any, with respect to which a comprehensive statement is necessary requires the weighing of a number of relevant factors, including the extent of the interrelationship among proposed actions and practical considerations of feasibility. Resolving these issues requires a high level of technical expertise and is properly left to the informed discretion of the responsible federal agencies. Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.

⁴²⁷ U.S. at 412, 96 S.Ct. at 2731 (citation omitted).

plaintiffs are entitled to challenge the new position.

[5] Insofar as the applicable law is concerned, we would emphasize that, even should the District Court conclude that the Department has not abused its discretion in deciding that a basin-wide EIS is not necessary, all parties to this action agree that NEPA nevertheless requires the Department to prepare environmental impact statements that evaluate the synergistic and cumulative effects of the proposed federal projects.¹⁰ Whether these effects can be properly evaluated in site-specific EISs is left to the Department's discretion, subject to the scope of review specified in *Kleppe*.¹¹

The opinion of the District Court is hereby vacated and this case is remanded for further proceedings consistent with this opinion.

So ordered.

MacKINNON, Circuit Judge, dissenting and files a statement of separate views.

MacKINNON, Circuit Judge (dissenting):

1. *The Origin and Development of the Water Resources of the Colorado River Basin.*

The Colorado River * Basin covers 2,242,000 square miles of 7 states and embraces the fourth longest river in the world. Its area is equal to 1/5th of the total area of the contiguous 48 states and includes numerous territories, regions and sub-basins of widely varied environmental characteristics. Its "Upper Basin" includes substantial areas in

Colorado and Wyoming (where most of the water originates) and Utah and New Mexico. Its "Lower Basin" includes portions of Arizona, Nevada and California, as well as portions of Utah and New Mexico. In this large arid area water is the equivalent of gold. Water in this area has been used to irrigate crops from pre-historic times, and modern government has greatly aided the development and utilization of the available water resources.

Governmental assistance for water projects in the Colorado River Basin began in 1900-1901 when the Director of the U. S. Geological Survey, acting on local suggestions, authorized a preliminary examination to determine the feasibility of diverting the water of the tributary Gunnison River to the adjacent Uncompahgre Valley on the Western Slope of Colorado. S.Rep.No.1281, 61st Cong., 3d Sess. 623 (1911). In 1902 Congress passed the Reclamation Act¹ directing the construction and maintenance of irrigation works for the storage, diversion and development of waters for the reclamation of the arid and semi-arid lands in 16 designated states in the great plains and far western regions of the nation. The Uncompahgre Valley Project was the first under that memorable law.

Subsequently a great many other reclamation projects were authorized by Congress to develop the water resources of the Colorado River and its tributaries and other resources throughout the West. These typically involved government financing to construct dams and distribution systems to

tial deference. The Council was created by NEPA, and charged in that statute with the responsibility "to review federal programs in light of the statute. *Andrus v. Sierra Club*, 442 U.S. 347, 358, 99 S.Ct. 2335, 2341, 60 L.Ed.2d 943 (1979) (citation omitted).

* Within the boundaries of the State of Colorado, what is presently called the Colorado River was originally known as the Grand River. In earlier times it was not called the Colorado River until it emerged from the territory or State of Colorado.

1. Pub.L.No.57-161, 43 U.S.C. § 372 et seq.

10. The parties recognized this duty in oral argument, and the Department of the Interior acknowledged its duty explicitly in the affidavit submitted to this court. See note 7, *supra*.

11. The Council on Environmental Quality has stated in its NEPA regulations that:

Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. . . . Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

40 C.F.R. § 1502.4(a) (1980). See *id.* § 1508.25. The Supreme Court has stated that "CEQ's interpretation of NEPA is entitled to substan-

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store and deliver water. The original purpose was to encourage irrigational agriculture with farmers repaying a part of the cost as they used the water. In subsequent years the nature of the reclamation projects changed from single-purpose dams for the storage and delivery of irrigation water to multi-purpose projects to provide irrigation, electrical power, flood control, domestic water, recreation, fish and wildlife and other benefits. In 1928 Congress adopted the act calling for the construction of the Hoover Dam to protect and develop one segment of the Colorado River Basin. Pub.L. No.70-642, 45 Stat. 1057, 43 U.S.C. § 617 et seq. Congress subsequently passed numerous other acts providing for the protection and development of the water resources of the Colorado River Basin. These included the Boulder Canyon Project Adjustment Act of 1940, Pub.L.No.76-756, 54 Stat. 774, 43 U.S.C. § 618; Colorado River Basin Salinity Control Act of 1974, Pub.L.No.93-320, 88 Stat. 266, 43 U.S.C. § 1571 et seq.; Colorado River Basin Storage Project Act of 1956, Pub.L.No.84-485, 70 Stat. 105, 43 U.S.C. § 620 et seq.; and Colorado River Basin Project Act of 1968, Pub.L.No.90-537, 82 Stat. 885, 43 U.S.C. § 1501 et seq. In 1949 Congress approved the Upper Colorado River Compact of 1948 which distributed the water that was apportioned to the various states by the Colorado River Compact of 1922. These acts authorized construction

of a number of storage reservoirs on the mainstream and river tributaries in the Upper and Lower Basins.

Before Congress approved any of these projects there were extensive studies by the Bureau of Reclamation which resulted in a recommendation, with extensive congressional hearings being held thereafter.

2. *The National Environmental Policy Act of 1969.*

On January 1, 1970, Congress enacted the National Environmental Policy Act of 1969 (NEPA). Pub.L.No.91-190, 83 Stat. 852, 42 U.S.C. § 4321 et seq.²

Insofar as this case is concerned, the principal provision of NEPA requires federal agencies to prepare and file an environmental impact statement (EIS) covering all "proposals for legislation and other major federal actions significantly affecting the quality of the human environment." Since the enactment of this law the Department of the Interior has prepared an EIS for each "proposal" for the development of the water resources of the Colorado River Basin. The EIS's that were filed included analysis of the cumulative and synergistic effects of each project upon the basin and have not been found to be in violation of any requirements of the National Environmental Policy Act.³

2. 42 U.S.C. § 4332 provides:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the Federal Government shall—

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved

in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code [5 U.S.C. § 552], and shall accompany the proposal through the existing agency review processes.

3. During a period of time while the Secretary was indicating that a comprehensive EIS was going to be prepared for the basin, EIS's for several projects stated that the cumulative and

Recently, in *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), the Supreme Court held that the Secretary of the Interior was not required to prepare a "comprehensive environmental impact statement" on the "entire region" identified as the Northern Great Plains Region because of an alleged threat to the region's environment from coal mining operations on public lands that were involved in the issuance of mining leases in several scattered sections of the region in Wyoming and Montana. The principal rationale of the decision is that a comprehensive EIS was not required for the entire Northern Great Plains Region because the Department of the Interior had not presented any "proposal for major federal action with respect to the Northern Great Plains Region." 427 U.S. at 399, 96 S.Ct. at 2725 (emphasis added). There was "no evidence in the record of an action or a proposal for an action of regional scope." 427 U.S. at 400, 96 S.Ct. at 2726 (emphasis added). The Court also remarked that "[i]n the absence of a proposal for a regional plan of development, there is nothing that could be the subject of the analysis envisioned by the statute for a [environmental] impact statement." *Id.* at 401, 96 S.Ct. at 2726 (emphasis added).

Where no such plan exists, any attempt to produce an impact statement would be little more than a study along the lines of the NGPRP [Northern Great Plains Resources Program], containing estimates of potential development and attendant environmental consequences. There would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA.

427 U.S. at 402, 96 S.Ct. at 2726 (emphasis added).

In the course of its opinion the Court also made an observation that has some relevance to the issues here.

[W]hen several proposals for coal-related actions that will have cumulative or syn-

nergistic effects of the project would be covered by the comprehensive EIS. But such EIS's have not been attacked. If they were

ergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action.

427 U.S. at 410, 96 S.Ct. at 2730 (emphasis added) (footnotes omitted). The Court recognized, however, that the conclusion that all proposed coal-related actions in the Northern Great Plains Region are so "related" did not require their analysis in a single comprehensive environmental impact statement (CEIS). 427 U.S. at 410, 96 S.Ct. at 2730. The Court explained:

Even if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements.

In sum, respondents' contention as to the relationships between all proposed coal-related projects in the Northern Great Plains region does not require that petitioners prepare one comprehensive impact statement covering all before proceeding to approve specific pending applications. As we already have determined that there exists no proposal for region-wide action that could require a regional impact statement, the judgment of the Court of Appeals must be reversed, and the judgment of the District Court reinstated and affirmed. The case is remanded for proceedings consistent with this opinion.

427 U.S. at 414-15, 96 S.Ct. at 2732-33 (footnote omitted). The Supreme Court thus upheld the agency practice of issuing site-specific environmental impact statements for sub-regions or sections of the Northern Great Plains Region and observed that "the relationships between all proposed coal-related projects in the Northern Great Plains Region does not require that petitioners prepare one comprehensive impact

deficient, proper complaint should have been made.

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statement covering all before proceeding to approve specific pending applications." *Id.* (emphasis added).

3. *Current Development of the Colorado River Basin and Resulting Issues.*

Pursuant to Congressional enactments since 1902, all of which followed extensive study by the agency, the Government has constructed and is presently operating in the Colorado River Basin 65 or more storage and diversion dams, hundreds of miles of aqueducts and canals, power plant units, thousands of miles of electric transmission lines, and numerous related structures and facilities. JA 102, para. 12. These are located in widespread areas, regions and sub-basins that have many varying environmental characteristics. The Federal Government is presently constructing in scattered areas throughout the Basin approximately 16 additional projects or major components thereof. JA 102-03, para. 13, 14; 152-55. EIS's have been filed on all such projects. In addition there are in various stages of planning 30 additional water development projects for scattered areas in the Basin. When these plans become definite enough to constitute a proposal an EIS will be filed for each proposal. Also in various stages of planning are numerous state, local and privately financed projects. Some of these developmental projects "will include changes in the operations of existing and future projects."

Because of these facts the Secretary of the Interior at one time construed the statute as requiring a comprehensive environmental impact statement (CEIS) for the entire Colorado River Basin, but the present Secretary has since indicated he does not so interpret the statute. On this point he has indicated that environmental impact statements covering the cumulative and synergistic effect of each individual project on the Basin will be filed as each project reaches the "proposal" stage and that he considers such compliance to satisfy the NEPA. The agency will thus continue the same practice of filing "site specific EIS's" that it previously followed.

~~The Supreme Court's decision on the con-~~ tentions of the Sierra Club with respect to coal mining leases in the Northern Great Plains Region disposes of the contention of appellants here that NEPA must be construed to require a CEIS for the entire Colorado River Basin because of the existence of the "existing and future water resource projects." The principal reason that a CEIS for the entire Colorado River Basin is not required is because there is no "evidence of an action or a proposal for an action of regional scope." 427 U.S. at 400, 96 S.Ct. at 2726. The proposals embodied in the projects that are relevant here do not involve "major federal action with respect to the . . . Region [of the entire Colorado River Basin]." As the Supreme Court pointed out in *Kleppe*: "where no such plan exists, any attempt to produce an impact statement would be little more than a study along the lines of the [Northern Great Plains Resources Program], containing estimates of potential development and attendant environmental studies." 427 U.S. at 402, 96 S.Ct. at 2726. The Supreme Court held that a "study" is not a "proposal." Where such a "study" was being considered or undertaken, broad as it might be, the Supreme Court clearly stated that an EIS was not required because, "[t]here would be no factual predicate for the production of an environmental impact statement of the type envisioned by NEPA." 427 U.S. at 402, 96 S.Ct. at 2726. On reflection, it should have been clear to the Secretary in 1977 when his briefing induced him to comment that a CEIS would be prepared for the Colorado River Basin, that he was in reality talking about a "study" and that NEPA did not require a CEIS therefor. It may have been within his power to prepare such a comprehensive EIS, if he had the money, but he was not required by the NEPA to do so.

It is clear from appellant's complaint here that, in reality, they are referring to a "study" since they seek a "statement (EIS) analyzing existing and future water resource projects and operations in the Colorado River Basin." See p. 1253, *infra*. This omits any reference to presently exist-

ing "proposals" which is the only basis for requiring an EIS. 427 U.S. at 414-15, 96 S.Ct. at 2732-33.

Moreover, the magnitude and variation of the environmental factors in the entire Colorado River Basin, the degree that the water resources have been developed by the 65 "existing" projects that have been completed since 1901, and the decision of the agency to interpret the statute in a "practical" manner as permitting site-specific EIS's that include consideration of the cumulative and synergistic effects of each specific project on the entire basin, should be dispositive of this case. The Supreme Court in *Kleppe* contemplated a practically identical factual situation when it remarked that "[e]ven if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." 427 U.S. at 414, 96 S.Ct. at 2732.

Therefore, even if the "study" were to achieve "proposal" status, "practical considerations of feasibility" here would call for affirming the statutory interpretation of the Secretary that site-specific EIS's covering a project's cumulative and synergistic effects on the entire basin would constitute adequate compliance with the NEPA. This conclusion should dispose of the case but appellants raise other issues.

4. *Instigation of the Present Litigation.*

On June 21, 1978, appellants filed the complaint in the instant case, the object of which was to require the Department of the Interior to prepare a CEIS for the entire Colorado River Basin. The core demand of the complaint was set forth in paragraph 1 as follows:

1. This is a civil suit for declaratory, injunctive and mandatory relief: (a) to require the Department of the Interior and its Bureau of Reclamation to prepare a comprehensive environmental impact statement (EIS) analyzing existing and future water resource projects and operations in the Colorado River Basin, and (b)

to enjoin construction of new federal water resource projects in the basin until the EIS analysis is completed.

JA at 15.

All parties agree that such CEIS would take several years to prepare and cost several million dollars. The parties are in dispute as to the exact length of time required and the exact total cost but there can be no dispute, if appellants obtained the injunctions they originally requested, that the resulting delay in the completion of "new" projects might not be limited to the time required to prepare the CEIS. In such event, substantial additional delay might have resulted from lawsuits that would attack the sufficiency of the CEIS—at least that has been the experience this Court has observed in other similar cases. See *Wilderness Society v. Morton*, 479 F.2d 842, 887-91, 905-06, cert. denied, 411 U.S. 917, 93 S.Ct. 1550, 36 L.Ed.2d 309 (1973); cf. Pub.L.No.93-153, § 203(d), 87 Stat. 585. Such delay could be very costly to "new" projects because construction costs on projects relevant to this case are presently estimated to be increasing at a rate of 12% per cent per year.

5. *Congress' Response to Appellants' Lawsuit.*

The attempt by environmental interests "to enjoin construction of all new water resource projects in the basin," excluding units of the Salinity Control Project, until the Secretary complied with appellants' construction of NEPA, came to the attention of Congress in due course. Congress responded quickly within four months on October 17, 1978 by amending the NEPA insofar as its EIS requirements would apply to features (projects) in the Colorado River Basin. The amendment provides:

Sec. 110. (a) Notwithstanding any provisions of the National Environmental Policy Act of 1969 ... construction of any feature of the Upper Colorado River Storage Project, ... the Colorado River Basin Salinity Control Projects, ... the Central Arizona Project, ... [or] the Southern Nevada Water Project ... shall

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proceed if a final Environmental Impact Statement has been filed on any such feature.⁴

Pub.L.No.95-465, 92 Stat. 1291 (1978). The intent and effect of this statute is two fold. In providing that the "construction of any feature of the [specified] Project[s] . . . shall proceed" Congress deprived any court of jurisdiction to delay or stop any further construction in any of the designated projects pending completion of a CEIS. And, in requiring such projects to "proceed if a final Environmental Impact Statement has been filed on any such feature," the Congress indicated that the filing of *site-specific EIS's* would be a full compliance with NEPA with respect to the "construction of [all] features" of all projects in the Colorado River Basin that are involved in this litigation. Thus, faced with appellants' lawsuit, Congress removed any *effective requirement* for a *comprehensive EIS* covering the entire Colorado River Basin that appellant's lawsuit sought to compel.⁵ This action is similar to the action of Congress when this court refused to pass on the validity of the EIS for the Alaska Pipe Line. Pub.L.No.93-153, § 203(d), 87 Stat. 585; *Wilderness Society v. Morton*, *supra*.

The amendment of the Act recognizes and requires that *site-specific EIS's* will be filed for all projects in the Basin and that a CEIS is *not* required. Thus, since there is no *effective requirement* in the statute for a *comprehensive EIS* the only practical ac-

tion to take with respect to this case is to dismiss appellants' complaint. The *site-specific EIS's* that the Department of the Interior files include consideration of the cumulative and synergistic effect of each project on the entire Basin. With the statutory law in this clear state this case resolves itself into a pure question of statutory interpretation and there is no need for a remand to the District Court for additional hearing. The facts have not changed since the case was argued in the District Court and this Court is as able to interpret the statute as the District Court. The reversion of the agency to its prior position on *site-specific EIS's* does not involve any *factual* change in any of the projects. It should also be pointed out that the return to *site-specific EIS's* is justified by the change in the law which came *after* the Secretary indicated before October 17, 1978 that he intended to file a CEIS.

I would accordingly affirm the judgment of the District Court for the reasons stated herein. To that extent I respectfully dissent from the majority opinion.



4. The complete enactment provides:

Sec. 110. (a) Notwithstanding any provisions of the National Environmental Policy Act of 1969, Public Law 91-190 (42 U.S.C. 4321 et seq.), construction of any feature of the Upper Colorado River Storage Project as authorized by the Act of April 11, 1956, as amended, shall proceed if a final Environmental Impact Statement has been filed on such feature.

(b) Notwithstanding any provisions of the National Environmental Policy Act of 1969, Public Law 91-190 (42 U.S.C. 4321 et seq.), the Colorado River Basin Salinity Control Projects, as authorized by Public Law 83-320, and construction of any feature of the Central Arizona Project as authorized by Public Law 90-537, September 30, 1968 (43 U.S.C. 1501 et seq.), shall proceed if a final

Environmental Impact Statement has been filed on such feature.

(c) Notwithstanding any provisions of the National Environmental Policy Act of 1969, Public Law 91-190 (42 U.S.C. 4321 et seq.), construction of any feature of the Southern Nevada Water Project as authorized by Public Law 89-292 (43 U.S.C. 616ggg), as amended, shall proceed if a final Environmental Impact Statement has been filed on any such feature.

5. In floor debate several members of Congress stated that they strongly doubted that Congress, when it passed NEPA, ever intended to require a *comprehensive environmental impact statement* for an entire river basin. 124 Cong. Rec. S12829, H11668, H11689; see generally 124 Cong. Rec. S12806-S12812; S12825-S12832; H11594-H11599; H11684-H11692.