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9 **IN THE UNITED STATES DISTRICT COURT FOR THE**
10 **DISTRICT OF ARIZONA**

11 GRAND CANYON TRUST,)

12 Plaintiffs,)

13 v.)

14 U.S. BUREAU OF RECLAMATION, and)
15 ROBERT W. JOHNSON, Commissioner)
16 U.S. Bureau of Reclamation)

17 Defendants)
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Case No: 3:07-CV-8164-DGC

COLORADO RIVER ENERGY
DISTRIBUTORS ASSOCIATION'S
SUPPLEMENTAL REPLY IN SUPPORT
OF FEDERAL DEFENDANTS' CROSS-
MOTION FOR SUMMARY JUDGMENT
ON CLAIMS 6-8

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TABLE OF AUTHORITIES

Cases

Matter of Sinclair, 870 F.2d 1340, 1343 (7th Cir. 1989)6

Statutes

43 U.S.C. § 485h(c)8

Colorado River Storage Project Act of 1956 (43 U.S.C. § 620-620o) (“CRSP Act”)2, 3, 4, 5, 6, 7

Grand Canyon Protection Act (Pub. L. No. 102-575, 106, Stat. 4600 (1992) (“GCPA”).....2, 3, 4, 5, 6

1 CREDA joins in the "Federal Defendants' Reply Memorandum In Support
2 Of Cross-Motion For Summary Judgment On Claims 6-8," and also files this
3 Supplemental Reply for the purpose of correcting Plaintiff's misquotes and
4 misstatements regarding the role of hydropower production from Glen Canyon
5 Dam under the Colorado River Storage Project Act of 1956 (43 U.S.C. § 620-
6 620o) ("CRSP Act) and the Grand Canyon Protection Act (Pub. L. No. 102-575,
7 106 Stat. 4600 (1992) ("GCPA").

11 Plaintiff's "Third" GCPA argument essentially argues that hydropower
12 production at Glen Canyon Dam is unimportant and subordinate in all respects to
13 the objectives of the GCPA. Plaintiff's Reply In Support of Motion for Summary
14 Judgment On Claims 6-8, Dkt. 144 ("Pl. Reply") at p. 38. In support of its theory,
15 Plaintiff asserts that "[h]ydropower is an incidental benefit of every other stated
16 purpose of the dam," citing 43 U.S.C. § 620. Pl. Reply at p. 39. This is not a
17 correct statement of the law. The relevant portion of 43 U.S.C. § 620 provides "for
18 the generation of hydroelectric power, as an incident of the foregoing purposes."
19 Congress did not provide that hydropower is "incidental to" or "an incidental
20 benefit of" the Colorado River Storage Project. Hydropower is an "incident of"
21 the other Congressionally defined purposes. Used in this manner and in this
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1 context, the word “incident” means “related to,”¹ or “resulting from,”² and does not
2 mean that hydropower resources are an “incidental” or minor authorized purpose
3 of the Colorado River Storage Project.
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5 Plaintiff first argues that hydropower resources are not protected under the
6 GCPA, and that Reclamation illegally considered hydropower resources in the
7 2008 Experimental Plan. To be specific, Plaintiff argues that “Reclamation
8 considered a factor [hydropower] that Congress did not intend the agency to
9 consider.” Pl. Reply at p. 38. This argument fails for two reasons. Although §
10 1802(b) of the GCPA does not explicitly mention hydropower, it explicitly
11 requires that the Secretary implement the GCPA in a manner that is “fully
12 consistent with and subject to” preexisting laws, including the CRSP Act. Section
13 620 of the CRSP Act includes two separate references to and authorizations of
14 hydropower facilities at Glen Canyon Dam – the authorization of hydropower as
15 an “incident of” other authorized purposes, and the authorization to “construct,
16 operate, and maintain ... dams, reservoirs, powerplants, transmission facilities and
17 appurtenant works” at Glen Canyon [Dam]. However, the Congressional
18 authorization and protection of hydropower resources in the CRSP Act is not
19 limited to these two references to hydropower in 43 U.S.C. § 620.
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27 ¹[http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1](http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861620634)
28 [861620634](http://encarta.msn.com/encnet/features/dictionary/DictionaryResults.aspx?refid=1861620634)

² http://www.askoxford.com/concise_oed/incident?

1 Plaintiff's argument that Reclamation is not authorized to consider and
2 protect hydropower resources in its operation of Glen Canyon Dam only considers
3 3 U.S.C. § 620, and completely fails to address the explicit requirements of 43
4 U.S.C. § 620f. Section 620f requires that the Glen Canyon Dam hydroelectric
5 power plants be "operated in conjunction with other Federal powerplants, present
6 and potential, so as to produce the greatest practicable amount of power and energy
7 that can be sold at firm power and energy rates." (emphasis added). Section 620f
8 represents a second, and far more explicit, direction to the Secretary regarding the
9 protection of hydropower resources at Glen Canyon Dam, which is protected and
10 preserved by § 1802(b) of the GCPA.

11 Plaintiff attempts to evade the application of § 1802(b) of the GCPA by
12 arguing that this section only "seeks to ensure ... compliance with the laws
13 applicable to Colorado River water management" Pl. Reply at p. 38. Section
14 1802 (b) is not that narrow, as it requires that "[t]he Secretary shall implement this
15 section in a manner fully consistent with and subject to ... the provisions of the
16 Colorado River Storage Project Act of 1956 and the Colorado River Basin Project
17 Act of 1968 that govern allocation, appropriation, development, and exportation of
18 the waters of the Colorado River basin." Sections 620 and 620f of the CRSP Act
19 authorize hydropower as an incident of the other purposes of the Colorado River
20 Storage Project, direct the Secretary to construct, operate and maintain hydropower

1 facilities, and direct the Secretary to operate Glen Canyon Dam to produce the
2 “greatest practicable amount of power and energy... .” These provisions provide
3 explicit direction regarding the development of water for hydropower purposes.
4 Section 620f also addresses the allocation of water for and between hydropower
5 and other purposes in a manner that both confirms that it does not affect the
6 allocation of water between the Upper and Lower Basins and resolves and avoids
7 any possible conflict between the use of water for hydropower purposes and the
8 other uses of water.³ Hydropower resources are therefore inextricably related to
9 and explicitly included within the scope of § 1802(b) of the GCPA.⁴ Plaintiff’s
10 assertion that “Reclamation considered a factor that Congress did not intend that
11 the agency to consider” is simply wrong. Pl. Reply at 38.

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17 Plaintiff also argues that “compliance with section 1802(a)'s mandate to
18 protect Grand Canyon National Park resources does not interfere with Colorado
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21 ³ “... [N]either the impounding nor the use of water for the generation of power
22 and energy at the plants of the Colorado River storage project shall preclude or
23 impair the appropriation of water for domestic or agricultural purposes pursuant to
24 applicable State law.” 43 U.S.C. § 620f.

25 ⁴ The United States has also explained in a prior brief other aspects of the
26 inextricable relationship under the CRSP Act between hydropower and the
27 allocation, appropriation, development and exportation of the waters of the waters
28 of the Colorado River Basin. *See* Federal Defendants’ Memorandum In
Opposition To Plaintiff’s Motion For Summary Judgment On Claims 6-8 And In
Support Of Federal Defendants’ Cross Motion For Summary Judgment, Dkt. 136
at p. 37-38.

1 River water supply and storage.” Pl. Reply at p. 39. Plaintiff has it both
2 backwards and wrong. The implementation of § 1802(a) is subject to the
3 requirements of § 1802(b), which incorporates and protects the hydropower-related
4 provisions of the CRSP Act. The GCPA is subject to the CRSP Act, and not the
5 reverse.⁵ In addition, the requirements of the CRSP Act are not limited to
6 “Colorado River water supply and storage” because §§ 620 and 620f of the CRSP
7 Act also contain explicit direction to the Secretary regarding hydropower
8 production at Glen Canyon Dam.
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12 Plaintiff asserts that “[r]egardless of the flow regime (MLFF or SASF), the
13 same amount of water passes through the Dam and the same amount of
14 hydropower is generated.” Pl. Reply at p. 39. This statement misunderstands the
15 applicable law and is wrong as a matter of fact. Congress directed the Secretary to
16 produce the “greatest practical amount of power and energy.” 43 U.S.C. § 620f
17 (emphasis added). Hydropower includes both the amount of energy produced over
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24 ⁵ Congress considered, but ultimately rejected, a version of the GCPA that would
25 have modified the authorized purposes of the Colorado River Storage Project. *See*
26 U.S. Memorandum In Opposition, Dkt. 136 at p. 38, fn. 22. The colloquy between
27 Senators McCain and Bradley cited by Plaintiffs is, in this context, “losers’
28 history”, as they clearly were unable to persuade the Senate to enact language that
would have achieved their desired result. *See In re Matter of Sinclair*, 870 F.2d
1340, 1343 (7th Cir. 1989).

1 a period of time and the capacity to produce that energy at any point in time.⁶ A
2 SASF regime would result in a reduction of the power available from Glen Canyon
3 Dam, as the capacity would be less than what would be available under a MLFF
4 regime. 2000 EA at p. 37, Dkt. 136 Exhibit 1. Stated another way, the
5 implementation of a SASF regime would have the same affect as a physical
6 reduction in the capacity of the generators at Glen Canyon Dam, and a reduction in
7 capacity is a reduction in the amount of power (but not energy) that is produced
8 from the generators. Plaintiff's attempt to argue that that the adoption of a SASF
9 regime would not affect any resource protected by § 620f of the CRSP Act fails
10 because a reduction in power implicates the Secretary's duty to operate Glen
11 Canyon Dam to produce the "greatest practical amount of power and energy." 43
12 U.S.C. § 620f (emphasis added).
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18 Finally, Plaintiff repeatedly mischaracterizes Reclamation's hydropower
19 operations as an attempt to maximize "revenues". Pl. Reply at p. 4, 36, 38, 39.
20 The Secretary has the obligation to operate Glen Canyon Dam "so as to produce
21 the greatest practicable amount of power and energy that can be sold at firm power
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24 ⁶ A recent Western Area Power Administration Order includes helpful definitions
25 of the relevant terms: "Power: Capacity and energy"; "Capacity: The electric
26 capability of a generator, transformer, transmission circuit, or other equipment. It is
27 expressed in kW"; "Energy: Power produced or delivered over a period of time. It
28 is expressed in kilowatthours." *See*, Western Area Power Administration, Rate
Order No. WAPA-137, 73 Fed. Reg. 52,981 (Sept 12, 2008).

1 and energy rates,” which is not the same as maximizing revenues. 43 U.S.C. §
2 620f. Congress has directed that power produced by Glen Canyon Dam be sold at
3 cost-based rates to non-profit entities and tribes. *See* 43 U.S.C. § 485h(c). There
4 are no “profits” involved in the sale of this power from the United States to the
5 non-profit entities and tribes, or in the sale of this power by the non-profit entities
6 and tribes to their customers.
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10 RESPECTFULLY SUBMITTED February 20, 2009.
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I hereby certify that on February 20, 2009, I filed a true and exact copy of SUPPLEMENTAL REPLY with the Court's CM/ECF system, which will generate a Notice of Filing and Service on the following:

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