

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 JAN 28 AM 9: 38

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STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Defendant-Intervenors.

D-1116-CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

AB-07-1
Claims of the Navajo Nation

NAME OF PARTY: The United States of America

DESCRIPTIVE SUMMARY: The United States' Reply in Support of Motion for Protective Order. The Community Ditch Defendants' Response to the Motion ignores this Court's Orders on discovery and fails to demonstrate that the discovery those Defendants seek regarding the United States potential exercise of its regulatory authority and/or matters outside the San Juan Basin would be relevant to this proceeding or that it would not be unduly burdensome to respond to.

NUMBER OF PAGES: 8

DATE OF SERVICE: January 25, 2013

**THE UNITED STATES' REPLY IN SUPPORT OF
MOTION FOR PROTECTIVE ORDER.**

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Introduction

This Court has instructed that discovery “must be targeted to that which permits an evaluation of the Settlement Agreement” and has specifically rejected discovery (1) seeking to inquire into the United States’ potential exercise of its regulatory authority; (2) addressed to matters outside the San Juan River Basin in New Mexico; and (3) which seeks speculation on future events “at best only tangentially related to the legal standard in this proceeding.” ORDER CONCERNING THE OBJECTIONS OF THE NAVAJO NATION, THE UNITED STATES AND THE STATE OF NEW MEXICO TO DISCOVERY REQUESTS at 2, 4, 10 (ruling on Horner Int. Nos. 8, 14, 15, 23). (“JULY OBJECTIONS ORDER”).

Despite the Court’s clear guidance, the Community Ditch Defendants served the United States with discovery requests, their *seventh* set of discovery requests, which again seek information from throughout the Colorado River Basin regarding (1) water rights claims the United States has made, or may make, on behalf of federal entities *other than* the Navajo Nation, and (2) the United States’ potential exercise of regulatory “rights or duties or obligations.”

Even though information regarding the United States’ potential water right claims for entities other than the Navajo Nation will not aid this Court’s consideration of the Settlement Motion, in an effort to minimize discovery disputes, the United States provided the Community Ditch Defendants with a summary of potential claims in this adjudication for all federal entities. The United States seeks a Protective Order only on those discovery requests that flatly contradict this Court’s JULY OBJECTIONS ORDER by spanning the entire Colorado River Basin or seeking information regarding the United States’ potential exercise of its regulatory authority.

Despite the obvious conflict between the JULY OBJECTIONS ORDER and the discovery they seek, the Community Ditch Defendants’ *Joint Response to Motion for Protective*

*Order*¹ (“Response”) ignores the Court’s Order entirely. Instead, the Community Ditch Defendants offer a wandering, and often inaccurate diatribe that makes scant references to any issue actually before this Court and fails entirely to demonstrate how the information they seek would be of any aid to this Court’s consideration of the Settlement Motion.

Argument

Contrary to the Community Ditch Defendants suggestion, the question raised by the United States’ *Motion for a Protective Order* is not whether the San Juan River is physically and legally related to the Colorado River, but rather whether the information requested in their discovery would aid in this Court’s evaluation of the settlement agreement, and, if so, whether the likely benefit of the discovery is outweighed by burden or expense of responding to it. JULY OBJECTIONS ORDER at 2; ORDER DENYING THE UNITED STATES’ MOTION FOR RECONSIDERATION . . . at 2 (Dec. 20, 2012). The clear answer to both questions is no.

I. THE INFORMATION THE COMMUNITY DITCH DEFENDANTS SEEK IS IRRELEVANT AND WILL NOT AID IN THIS COURT’S EVALUATION OF THE SETTLEMENT AGREEMENT.

The Community Ditch Defendants’ Response fails to show how the discovery they seek would produce information that would aid this Court’s evaluation of the Settlement Motion. In fact, the bulk of their argument does not even mention the Settlement at all. Instead, it offers irrelevant speculation regarding the future supply of water in the Colorado River Basin, the potential impact of the Colorado River Compacts on future water use in New Mexico, and how the United States’ obligations under the Endangered Species Act (“ESA”) might affect

¹ Although labeled a “joint response,” the Community Ditch Defendants are the only parties identified in the memorandum.

water availability.² Response at 1-11. Indeed, the Community Ditch Defendants effectively concede that their discovery is directed at the United States' implementation of the ESA, not the Settlement.³ See Response at 11 (“this endangered species demand by the U.S. raises some obvious questions for discovery. . .”). But it is the Settlement Motion, and only the Settlement Motion, that is the subject of this proceeding.

Nonetheless, the Community Ditch Defendants claim that the water available for beneficial use in New Mexico under the Colorado River Compacts is a “critical area for discovery” that has “been put it [sic] issue by the settling parties [sic] assertion that the settlement would make calls on the San Juan River a relatively rare occurrence.” *Id.* at 11-12.

² The Community Ditch Defendants attempt to support their speculation with exhibits consisting of pages from the recently released Colorado River Basin Water Supply & Demand Study. That study, done by the Bureau of Reclamation and representatives of all seven Colorado River Basin states, was intended to develop and evaluate strategies to mitigate the effects of potential future water shortages. See Demand Study, Executive Summary at 2 (pertinent pages attached as Exhibit A; the complete Executive Summary and Demand Study are available at <http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>). While not relevant here, the Court should be aware that numerous errors underlie the Community Ditch Defendants' speculation. Perhaps the most egregious is the misrepresentation of their Exhibit 3, a table from the Demand Study. The Community Ditch Defendants claim that Exhibit 3 demonstrates that the Upper Basin states owe the Lower basin state “almost 30 million acre-feet” of water pursuant to the terms of the Colorado River Compact. See Response at 8. Exhibit 3 does not address Compact deficiencies at all. Instead it compares annual mean flows at Lee Ferry to long-term mean flows and teaches that 2000-2008 were years of extended drought. Even in those years, however, the Upper Basin met its Compact obligations as the annual flows at Lee Ferry never dropped below the 7.5 million acre-feet Compact delivery requirement. See Exhibit B, a printout of United States Geological Survey data available at <http://waterdata.usgs.gov/usa/nwis/uv?09380000> and accessible through the “Summary of all available data for this site” link, under “Annual Statistics.”

³ The Community Ditch Defendants' arguments also evidence a fundamental lack of understanding of the ESA. The United States obligations under the ESA are not instituted by “claims” nor are they assigned a “priority.” *Cf.* Response at 16. Rather, ESA obligations attach to certain discretionary actions by federal agencies. See *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1105 (10th Cir. 2010). Those obligations are set, on a case-by-case basis through administrative processes that can be subject to review in federal court. See *id.* at 1105-06.

The settling parties have made no such assertions. What the settling parties have said is that calls *by the Navajo Nation* would be less likely with the settlement, than they would be without it.

The State's TECHNICAL ASSESSMENT OF THE SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT⁴ addresses particular provisions of the Settlement and explains protections provided to other water users under the Settlement and why the Settlement is expected to result in less priority calls by the Navajo Nation than would occur without the Settlement. *See* Technical Assessment at 23-31.

The important point for this Court's purposes is that those Settlement provisions in no way implicate the United States' claims throughout the Colorado River Basin or its obligations under the ESA. Put differently, water rights claims the United States might make, and its potential exercise of regulatory authority have nothing to do with any impact *the Settlement* might have on junior water users or any of the other criteria this Court is applying to its review of the Settlement. *See* AMENDED ORDER ESTABLISHING LEGAL STANDARDS at 3 (April 19, 2012) (identifying criteria).

Only in the last few paragraphs of their lengthy response do the Community Ditch Defendants even attempt to tie their proposed discovery to an issue actually before this Court. The Community Ditch Defendants argue that “[t]o determine the feasibility and the fairness and the legality of the proposed settlement, the court and the other parties need to know *all the demands* on the San Juan River.” Response at 15 (emphasis added). The Community Ditch Defendants fail entirely to explain how knowing those “demands” will shed light on any of the four criteria this Court is applying to its review of the Settlement. In any event, the United States has produced a summary of its potential claims in this adjudication and this Court has already

⁴ The Technical Assessment has been disclosed in this proceeding and is available on the State Engineer's website at http://www.ose.state.nm.us/LAP/NNWRS/legal_nnwrs.html.

ruled that discovery seeking information on the United States' potential water rights claims outside the San Juan Basin and/or its potential exercise of regulatory authority is improper. JULY OBJECTION ORDER at 10 (ruling Horner Int. Nos. 8, 14, 15, 23).

Lacking any substantive legal argument, the Community Ditch Defendants turn to baseless slandering of the United States' motives.⁵ *Cf.* Response at 15-16. Those claims can be readily refuted. The United States is not trying to "hide" the Colorado River Water Supply and Demand Study. To the contrary, the Study was developed through a public process which included numerous public meetings and "webinars" and has been made available to the world through Reclamation's website.⁶ Nor is the United States trying to "stall" and "run out the clock" on discovery. To the contrary, the completion of discovery has been delayed by the Community Ditch Defendants' scattershot approach⁷ and blatant disregard of the guidance provided by this Court's discovery Orders. Finally, the United States is not playing "hide the ball." To the contrary, although in the United States' view *all* of the discovery sought in the Community Ditch Defendants' Other Claims Discovery is irrelevant, the United States provided the Community Ditch Defendants with all readily available material that is responsive to the

⁵ The Community Ditch Defendants' Response also continues their relentless – and irrelevant – attacks on the Bureau of Reclamation's 2007 Hydrologic Determination, a document which is not before this Court for review. *Cf.* Response at 15. The United States recognizes that this Court has held that the Hydrologic Determination may be relevant to its review of the Settlement, but that does not make Hydrologic Determination subject to challenge in this proceeding. *See e.g., In re: the Application for Water Rights of United States of America*, 101 P.3d 1072, 1079-80 (Colo. 2004) ("The McCarran Amendment does not assert or imply that a state court would have jurisdiction to review the decision making process of federal entities.").

⁶ *See* <http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>, which provides both the Demand Study and a record of the public proceedings leading up to it.

⁷ The Community Ditch Defendants' Other Claims Discovery is their *seventh* set of discovery requests served on the United States and does not include a single question which could not have been asked in their initial request.

requests and sought judicial protection only from those requests which would be unduly burdensome to respond to.

II. EVEN IF THE INFORMATION THE COMMUNITY DITCH DEFENDANTS SEEK FROM THROUGHOUT THE COLORADO RIVER BASIN WOULD AID IN THIS COURT'S REVIEW OF THE SETTLEMENT, THE COST OF OBTAINING IT WOULD GREATLY EXCEED ANY BENEFIT IT COULD PROVIDE.

The Community Ditch Defendants disingenuously claim that “it is not too much of a burden to require the United States to state its demands on the Colorado River, because the United States decides what those demands are.” Response at 15. That claim fails because responding to the Community Ditch Defendants’ discovery is unduly burdensome because it would require the United States to “decide” the water needs of thousands of federal interests (something the United States has not done) and produce nothing of aid to this Court's review of the Settlement Motion.

The Colorado River Basin spans 246,000 square miles and contains more than one hundred National Parks, National Forests, and other federal enclaves that may have a basis for either federal reserved water rights or water rights based on state law appropriations.⁸ Each of those enclaves is likely to have multiple claims and many may have a large number of claims.⁹ Further, the Colorado River Basin is home to literally hundreds of federal facilities which could

⁸ The snippet of the Demand Study’s Executive Summary quoted by the Community Ditch Defendants states that “at least 22 federally recognized tribes, 7 National Wildlife Refuges, 4 National Recreation Areas, and 11 National Parks” are located within the Colorado River Basin. See Response at 10. That list omits National Forests, lands and areas administered by the Bureau of Land Management, National Monuments, Wild and Scenic Rivers and numerous other federal enclaves that may have a basis to claim water rights.

⁹ For instance, in this adjudication the BLM may file as many as 1500 claims and the Forest Service more than 500. Almost all of those claims are for small wells, springs or stock tanks, all of which will need to be field verified before claims can be filed. See United States’ Statement of Position at 4-5 (filed Dec. 23, 2002).

have discretionary authority that might be subject to the Endangered Species Act, the Clean Water Act or some other legal authority that could potentially affect the flow of a stream that is tributary to the Colorado River. Finally, the many federally recognized Tribes spread throughout the Colorado River Basin on whose behalf the United States might assert water rights claims represent significant sources of unstudied and unknown potential water rights claims.

Not only is there a huge volume of potential water right claims and possible applications of regulatory authority, but developing an “estimated amount (or estimated range)” of water that could be “demanded” is no simple matter and in fact would be a colossal undertaking. *Cf.* Response at 16. For instance, determining the potential federal reserved rights associated with a unit of the National Park System requires a careful assessment of the establishing authority to determine for what purposes water could be claimed and then scientific analysis that can span years to determine the quantity of water necessary to fulfill those purposes. Determining the flows necessary to sustain an endangered species is equally complex.

Nor would the tremendous outlay of resources necessary to respond to the Community Ditch Defendants’ requests for information throughout the Colorado River Basin produce anything of value to this Court. In fact, the Community Ditch Defendants would have this Court instruct the United States to spend huge sums of the taxpayer’s dollars just to further their ability to speculate on the likelihood of a Colorado River Compact call occurring – a subject that has no relevance to this Court’s review of the Settlement Motion.

Conclusion

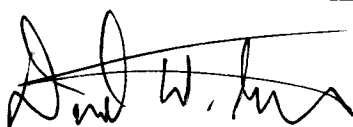
The United States has already identified the claims it will likely pursue in future proceedings of this adjudication. There is no reason for the United States to do more. This Court has already rejected discovery spanning the entire Colorado River Basin and discovery

aimed at speculation regarding future events only tangentially related to these proceedings. The Court should reject the Community Ditch Defendants' requests as well and grant the United States' Motion for Protective Order.

DATED this 25th day of January, 2013.

Respectfully Submitted,

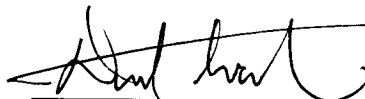
UNITED STATES OF AMERICA



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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2013, a true and correct copy of the forgoing was served on all parties by attaching a copy of said document to an email sent to wnavajointerse@nmcourts.gov.



DAVID W. GEHLERT

EXHIBIT A

RECLAMATION

Managing Water in the West

Colorado River Basin Water Supply and Demand Study

Executive Summary – Pre-Production Copy



U.S. Department of the Interior
Bureau of Reclamation

December 2012

Colorado River Basin Water Supply and Demand Study

Executive Summary – Pre-Production Copy



**U.S. Department of the Interior
Bureau of Reclamation**

December 2012

Executive Summary

Spanning parts of the seven states of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming (Basin States), the Colorado River Basin (Basin) is one of the most critical sources of water in the West. The Colorado River and its tributaries provide water to nearly 40 million people for municipal use, supply water used to irrigate nearly 5.5 million acres of land, and is also the lifeblood for at least 22 federally recognized tribes (tribes), 7 National Wildlife Refuges, 4 National Recreation Areas, and 11 National Parks. Hydropower facilities along the Colorado River provide more than 4,200 megawatts of generating capacity, helping to meet the power needs of the West and offset the use of fossil fuels. The Colorado River is also vital to the United Mexican States (Mexico) to meet both agricultural and municipal water needs.

The Colorado River system is operated in accordance with the Law of the River¹. Apportioned water in the Basin exceeds the approximate 100-year record (1906 through 2011) Basin-wide average long-term historical natural flow² of about 16.4 million acre-feet (maf). However, the Upper Basin States have not fully developed use of their 7.5-maf apportionment, and total consumptive use³ and losses in the Basin has averaged approximately 15.3⁴ maf over the last 10 years. Because of the Colorado River system's ability to store approximately 60 maf, or nearly 4 years of average natural flow of the river, all requested deliveries were met in the Lower Basin despite recently experiencing the worst 11-year drought in the last century. However, there have been periodic shortages throughout the Upper Basin and the adjacent areas of the Basin States that receive Colorado River water.

The challenges and complexities of ensuring a sustainable water supply and meeting future demand in an over-allocated and highly variable system such as the Colorado River have been recognized and documented in several studies conducted by the Bureau of Reclamation (Reclamation) and the Basin States over the past several decades. Looking ahead, concerns regarding the reliability of the Colorado River system to meet future Basin resource⁵ needs are even more apparent, given the likelihood of increasing demand for water throughout the Basin coupled with projections of reduced supply due to climate change.

It was against this backdrop that the Colorado River Basin Water Supply and Demand Study (Study) was conducted. Funded by the Reclamation through the Basin Study Program under

¹ The treaties, compacts, decrees, statutes, regulations, contracts and other legal documents and agreements applicable to the allocation, appropriation, development, exportation and management of the waters of the Colorado River Basin are often collectively referred to as the Law of the River. There is no single, universally agreed upon definition of the Law of the River, but it is useful as a shorthand reference to describe this longstanding and complex body of legal agreements governing the Colorado River.

² Natural flow represents the flow that would have occurred at the location had depletions and reservoir regulation not been present upstream of that location.

³ Consumptive use is defined as water used, diminishing the available supply.

⁴ Basin-wide consumptive use and losses estimated over the period 2002-2011, including the 1944 Treaty delivery to Mexico, reservoir evaporation, and other losses due to native vegetation and operational inefficiencies.

⁵ Resources include water allocations and deliveries for municipal, industrial, and agricultural use; hydroelectric power generation; recreation; fish, wildlife, and their habitats (including candidate, threatened, and endangered species); water quality including salinity; flow- and water-dependent ecological systems; and flood control.

the Department of the Interior's WaterSMART (Sustain and Manage America's Resources for Tomorrow) Program and the agencies⁶ representing the Basin States, the Study was conducted by Reclamation's Upper Colorado and Lower Colorado Regions and the representatives of the Basin States' agencies. The purpose of the Study was to define current and future imbalances in water supply and demand in the Basin and the adjacent areas of the Basin States that receive Colorado River water over the next 50 years (through 2060), and to develop and analyze adaptation and mitigation strategies to resolve those imbalances. The Study did not result in a decision as to how future imbalances should or will be addressed. Rather, the Study provides a common technical foundation that frames the range of potential imbalances that may be faced in the future and the range of solutions that may be considered to resolve those imbalances.

The Study Area is shown in figure 1 and is defined as the hydrologic boundaries of the Basin within the United States, plus the adjacent areas of the Basin States that receive Colorado River water. In many adjacent areas, the Colorado River supply is in addition to other water supply sources used to meet water demands.

⁶ The non-Federal cost-share partners are: Arizona Department of Water Resources, the (California) Six Agency Committee, Colorado Water Conservation Board, the New Mexico Interstate Stream Commission, the Southern Nevada Water Authority, the Utah Division of Water Resources, and the Wyoming State Engineer's Office.

FIGURE 1
The Study Area

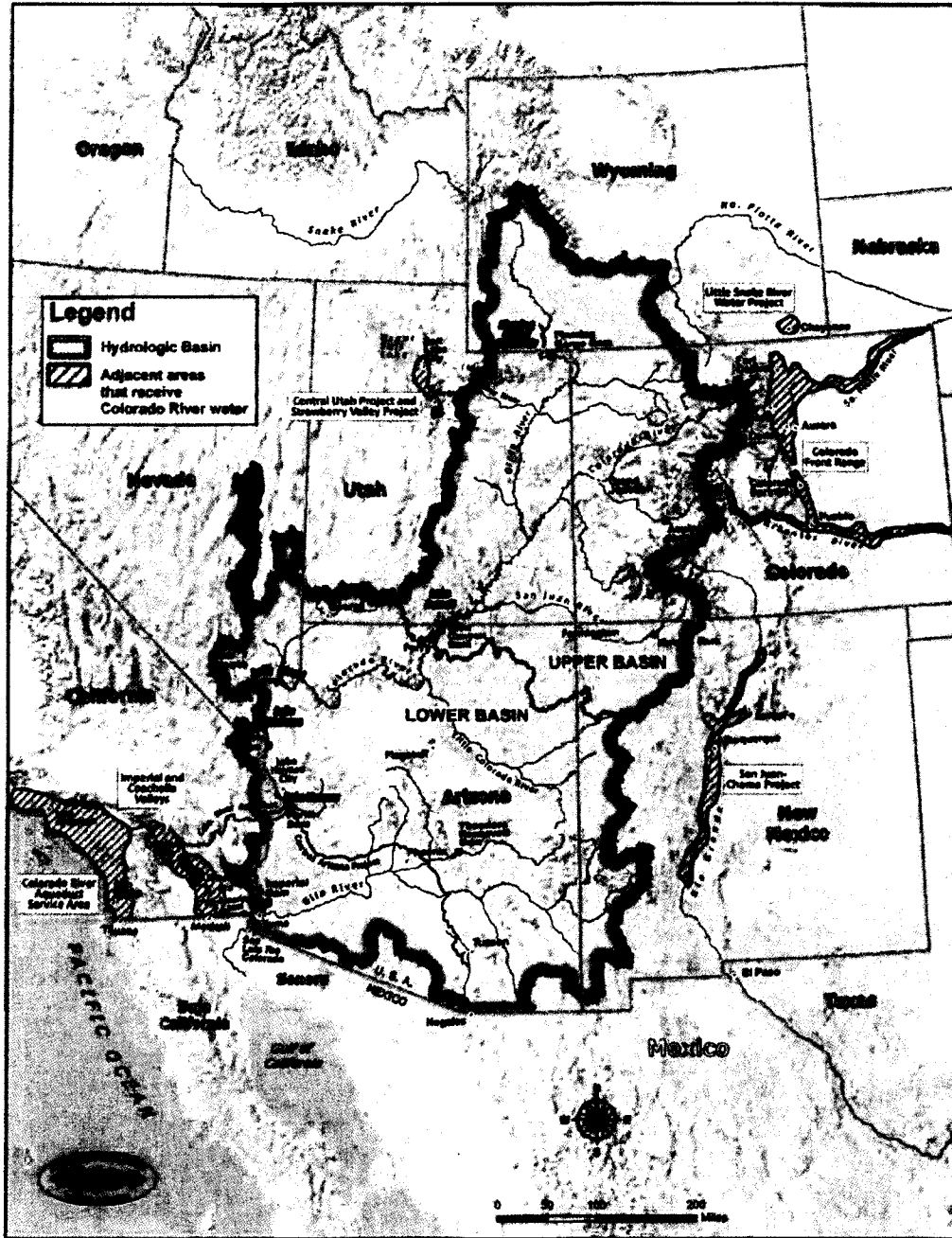


EXHIBIT B



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USGS 09380000 COLORADO RIVER AT LEES FERRY, AZ

Available data for this site Time-series:

Coconino County, Arizona Hydrologic Unit Code 14070006 Latitude 36°51'53", Longitude 111°35'15" NAD27 Drainage area 111,800 square miles Gage datum 3,106.16 feet above NGVD29	Output formats <input type="button" value="HTML table of all data"/> <input type="button" value="Tab-separated data"/> <input type="button" value="Reselect output format"/>
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Water Year	00060, Discharge, cubic feet per second
Period-of-record for statistical calculation restricted by user	
2000	13,120
2001	11,520
2002	11,520
2003	11,550
2004	11,480
2005	11,550
2006	11,730

http://waterdata.usgs.gov/nwis/annual?referred_module=sw&site_no=09380000&por_093... 1/25/2013

Water Year	00060, Discharge, cubic feet per second
2007	11,600
2008	12,620
2009	11,600
2010	11,630
** No Incomplete data have been used for statistical calculation	

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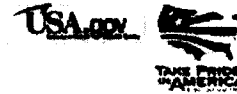
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