
APPENDIX B

APPENDIX B

Comment Letters Received During Scoping Period

This appendix contains copies of the letters received from the following parties regarding the scope of the environmental review for the Proposed Action.

- Land and Water Fund of the Rockies
- U.S. Environmental Protection Agency
- Yuma Area Rod and Gun Club
- Mr. George Brenner

Cc (via e-mail):

Timothy Flood
Friends of Arizona Rivers

Kara Gillon
Defenders of Wildlife

Steve Glazer
Sierra Club

David Hogan
Center for Biological Diversity

Pamela Hyde
Southwest Rivers

Jennifer Pitt
Environmental Defense

Please accept the following comments regarding the scope of the Environmental Impact Statement (EIS) for the Wellton-Mohawk Asset Transfer (W-M transfer or transfer). These comments are submitted on behalf of several interested environmental groups, including the Center for Biological Diversity, Defenders of Wildlife, Environmental Defense, Friends of Arizona Rivers, the Sierra Club, Southwest Rivers, and the Land and Water Fund of the Rockies. Individually and collectively, these groups and their members have a substantial interest in environmental protection and restoration of Arizona's waterways, and local, state, and national memberships totaling well over one million people.

Protection and Restoration of Natural Resources, Native Biodiversity, Natural Ecological Processes, and Sensitive, Threatened and Endangered Species of Plants and Animals

The EIS must comply with the requirements of the Endangered Species Act (ESA), the Fish and Wildlife Coordination Act (FWCA), and other federal environmental laws in evaluating the proposed transfer. It is our understanding that post-transfer decisionmaking will be exempt from the terms of NEPA and certain ESA parameters. The EIS must not only clearly articulate the parameters and breadth of this exemption, but also consider foreseeable environmental impacts that may result from removal of the facilities' future management from federal law requirements.

With regard to ESA compliance, the EIS must address the following issues: (1) what kind of ESA compliance would be necessary if the W-M asset transfer were to go forward (not only with regard to national impacts, but also with regard to impacts on the Ciénega de Santa Clara), and (2) how the BOR would comply with the ESA were the W-M asset transfer not to become a reality. Further, the EIS should discuss ESA section 7 consultation, possible impacts of the transfer, and current Bureau of Reclamation (BOR) operations regarding federally listed threatened and endangered species found in the Wellton-Mohawk Irrigation & Drainage District (WMIDD or District) area and downstream. The BOR is responsible for initiating section 7 consultation with regard to the actual transfer of land and facilities. The scope of that consultation must include the following:

1. effects, if any on the Colorado River should there be any change in the amount of water diverted post-transfer;
2. effects on the Gila River and other endangered species' habitats inside the WMIDD boundaries; and
3. any effects of the facilities transfer on the amount and quality of water delivered to the Ciénega de Santa Clara and on dependent endangered species including the Yuma clapper rail and the desert pupfish.

In conjunction with the EIS, any endangered or sensitive species that rely at any point in their life cycle on land being considered for transfer should be thoroughly inventoried.

Similar to the ESA's consultation requirements, FWCA requires the BOR to consult with the FWS and the appropriate state wildlife agency with a view toward conserving all wildlife resources by preventing loss and damage to same, and providing for the development and improvement thereof via the issuance of specific recommendations. Evaluation of various means of mitigating harm that may result from this federal environmental law exemption is also an appropriate topic for the EIS.

Further, the transfer must ensure the maintenance, protection, and restoration of native species, native plant and animal communities and associations in natural patterns of abundance and distribution, and natural ecological processes. As the 80-acre wetland inside the District's boundaries is of particular concern, the EIS should consider the alternative of leaving title to this area in BOR hands, so as to ensure its future preservation in accordance with federal law.

To best protect natural resources, the transfer must prohibit new road construction, new extractive uses (e.g., mineral leasing), vehicular access except on designated routes, and the erection of new structures and improvements on transferred lands. New activities should be limited to already disturbed areas. The beneficial, mitigating role that conservation easements could play in preserving post-transfer resource values in the 80-acre wetland and other areas should also be addressed in the EIS.

Ensuring Future Cooperation with Multi-Species Conservation Plan Concerns

For the past six years, the lower basin states of Arizona, California and Nevada have been working with the federal government and interested members of the public on a multi-species conservation plan (MSCP) that will function, in part, as a "habitat conservation plan" under section 10 of the ESA and work toward the recovery of listed species such as the razorback sucker and the southwestern willow flycatcher. The BOR should also assess whether the W-M transfer legislation appears to exempt the District from requirements of the MSCP as it relates to quantity of river flows, timing of river flows, and even potential conservation mitigation measures. When this "liability" language is read in tandem with the section entitled "Water and Power Contracts," we are concerned that this transfer could be read as relieving the Department of Energy (Western Area Power Administration) from working with the Fish and Wildlife Service on the timing of water flows that might benefit endangered species and their habitats. Memorandum of Agreement ("MOA") (No. 8-AA-34-WA014, July 10, 1998), at 5, ¶2(g). As these terms of the W-M transfer clearly stand to jeopardize implementation of the MSCP, the EIS should address the potential impacts wrought by derailing this cooperative effort mid-stream and outline various means of mitigating such harm.

Preserving Binational Harmony

In the interest of preserving the goals enumerated in the Salinity Control Act, the EIS should consider including terms and conditions in the W-M asset transfer contract to improve water quality in the District. At present, WMIDD's return flows have an average salinity level of between 3,000-3,300 ppm. The EIS should discuss how environmental impacts could be reduced by a reduction in this salinity level.

Ensuring current return flows to the Ciénega de Santa Clara must also be seen as a vital part of the W-M asset transfer EIS. See generally Council on Environmental Quality (CEQ), "Memorandum to the Heads of Agencies on the Application of the National Environmental Policy Act to Proposed Federal Actions in the United States with Transboundary Effects," July 1, 1997, at i, 4 ("advis[ing agencies] that NEPA requires analysis and disclosure of transboundary impacts of proposed federal actions taking place in the United States" and advising federal agencies to "use the scoping process to identify those actions that may have transboundary environmental effects") (emphasis added). To this end, the EIS should include an alternative that would guarantee the continuation of the current water supply and water quality to the Ciénega.

Under such an alternative, the WMIDD would agree to maintain post-transfer flows to the Ciénega by using pumped groundwater as it does now. Further, as a condition on the proposed asset transfer, if the aforementioned groundwater pumping practices were to be altered at any point in the future, this alternative would require the WMIDD to assume responsibility for finding replacement waters for current Ciénega flows.

Further, the BOR is required to submit alternatives to Congress regarding how it intends to meet its salinity-related treaty obligations to Mexico. It is foreseeable that the W-M asset transfer could impede meeting these binational obligations. Since the BOR needs to study alternatives with regard to both this binational agreement and preparation of a W-M asset transfer EIS, we propose that it would be more efficient to do both of these studies at once.

Cumulative Environmental Impacts of Wellton-Mohawk Asset Transfer when Viewed in Conjunction with Other Proposed or Reasonably Foreseeable Future Actions in the Area

The parameters of the National Environmental Policy Act (NEPA) require those persons and entities responsible for preparation of an EIS to recognize that the proposed W-M asset transfer would not take place in a vacuum. Instead, this transfer is merely a part of a long timeline of effects on the interdependent Colorado River, Gila River, and U.S. and Mexican ecosystems. In recognition of this fact, NEPA review documents must analyze the environmental impacts, including the cumulative impacts, of proposed actions. See 40 C.F.R. § 1508.7. Regulations define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* NEPA requires that, where several actions have a cumulative or synergistic environmental effect, this consequence must be considered in an EIS.

In addition to the synergistic effects of several actions, cumulative impacts also include the more remote, indirect effects of the particular action subject to NEPA review. See 40 C.F.R. § 1508.8(b). Indirect effects are those “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” *Id.* Federal courts have consistently reaffirmed that NEPA requires that the more remote impacts of an agency decision be considered at an early stage, as opposed to at a point after resources have been committed.

As this proposed transfer has the potential for significantly impacting three major ecosystems – the Gila River basin, the lower Colorado River, and the associated delta where the Colorado River flows into the Gulf of California at the Ciénega de Santa Clara – the BOR must fully consider the potential impacts, alternatives, and mitigation measures to these ecosystems that would be impacted not only by the W-M transfer, but also potentially impacted by the following reasonably foreseeable projects including, but not limited to, the following projects.

- A. Ensuring Bypass Flow Maintenance: Addressing Potential Alterations to Current Status Quo of the Yuma Desalting Plant (YDP), the Main Outlet Drain Extension (MODE), or Proposed Pumping of Yuma Groundwater

Although the BOR and the District acknowledge that the MODE is not among the facilities proposed for transfer herein, it is reasonably foreseeable that alteration of the MODE’s

current use (providing return flows to the Ciénega de Santa Clara) will indeed occur as the result of future BOR decisions. Similarly, at present, the BOR is considering alternatives to reoperating the currently-defunct YDP. The MOA upon which the W-M transfer legislation is based, acknowledges the flexibility of future BOR decisionmaking, to wit:

The District agrees to accept Reclamation’s goal of delivery of [agricultural return flows] at the Yuma Desalting Plant . . . and that the District water management activities will reflect this goal to the extent that the goal remains relevant regardless of whether the United States operates the YDP or replaces the bypass stream in accordance with [the Salinity Control Act]

MOA, at 5 (emphasis added). Proposals for YDP alternatives include the idea of pumping groundwater from the Yuma area, which could alter return flows through the MODE.

While a handout distributed at the EIS scoping meetings assures that “Agricultural return flows delivered to Reclamation would continue to be regulated according to agreements between Reclamation and the District,” such assurances do not bar BOR from changing the present return flow status quo. In fact, the MOA, which was expressly adopted by the W-M asset transfer implementing legislation, radically changes the legal landscape of water contracts and the existing judicial interpretation of same by demanding “mutual consent of the parties” if a contract is to be modified or terminated. MOA, at 5, ¶2(g). This new standard starkly contrasts the prevailing legal status of water contracts, under which the federal government possesses ultimate discretion to regulate the flow of the lower Colorado River and, by association, the MODE.

The EIS should address how this revision of the legal status quo will impact myriad environmental concerns, including the W-M asset transfer’s failure to secure the District’s wastewater contribution to the Mexican delta wetlands, specifically the Ciénega de Santa Clara, and the endangered Yuma clapper rail and desert pupfish. It is imperative that the EIS consider the alternative of including a contractual provision in the W-M asset transfer contract that would prohibit future alteration of current W-M bypass flow obligations, absent some guarantee that return flow levels to the Ciénega would not be reduced. As changes in the operation of the YDP and the MODE are reasonably foreseeable, the EIS must consider all potential impacts that could result from future alteration of the return flow status quo, together with the proposed W-M asset transfer.

In addition, the EIS should also review the following costs associated with the YDP: costs of idling the YDP, costs of operating YDP at 1/3 capacity, and costs of fully operating the YDP. It is imperative that the EIS consider the foregoing costs in conjunction with the proposed asset transfer because, if WMIDD is to be converted into a private, land and asset-owning entity, WMIDD should be responsible for paying part of the costs of the YDP, as the YDP exists solely to cure a problem created by the poor quality return flow water that WMIDD generates. Asking the federal government, i.e., the taxpayers, to foot the bill for the YDP without such assistance would be unreasonable.

B. Proposed Construction and Operation of Ligurta Power Plant

The BOR and the District are presently considering an additional asset transfer, which could smooth the way for construction of a power plant near Ligurta Wash, at the District’s

southern boundary. Under this proposal, the BOR would transfer lands to the District, upon which the District would work with a private entity to construct a power plant. The District would secure its role as an equity partner in this project by “contributing” use of the aforementioned land and undetermined water rights to its private partner. In return, the District would be entitled to power sale proceeds, which would allow the District to meet its progressively-rising Operation and Maintenance costs, post-transfer. It is unclear whether the District would be entitled to use any of the power generated by the Ligurta plant for pumping its waters up the Gila River.

Despite the integral role that this proposed power plant will play in providing necessary funds for the District’s post-transfer oversight of Wellton-Mohawk lands and facilities, the BOR has decided to review the environmental impacts of the proposed Ligurta Power Plant under a separate EIS. However, the artificial bifurcation of the W-M transfer EIS from the Ligurta power plant land/water transfer does not mean that the Wellton-Mohawk EIS need not consider the cumulative impacts of these TWO proposed transfers in tandem. See 40 C.F.R. § 1508.7 (outlining NEPA requirement that EISs analyze cumulative impacts of proposed actions); 40 C.F.R. § 1508.25(a)(2) (requiring EISs to analyze effects of actions “which when viewed with other proposed actions have cumulatively significant impacts”).

As such, any EIS prepared for the W-M transfer must consider not only the environmental impacts of this actual transfer, but also must consider the cumulative, incremental, and indirect effects of the transfer when viewed in conjunction with the proposed Ligurta power plant transfer and construction. These potential impacts and effects must include those that could result if the power plant were to actually be constructed and those that could result were the power plant not to become a reality (e.g., the potential dearth of District funds to operate and maintain its facilities post-transfer, and supply power for its pumps).

C. The BOR’s Artificial Fragmentation of Related Projects Should Not Change Inclusive Scope of EIS

The EIS should consider not only the interplay between the W-M transfer, together with any potential future alteration of national and bi-national return flows, any changes in the operation of the Yuma Desalting Plant or the MODE, implementation of groundwater pumping in Yuma, and/or construction (or shelving) of the proposed Ligurta power plant, but also should address the preferability of preparing one NEPA document addressing these proposals together. This is particularly true of the Ligurta power plant transfer/construction proposal, which appears to constitute a functionally or economically-related “cumulative action,” which must be considered in the same EIS as the W-M asset transfer. See Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985) (holding that “[i]f proceeding with one project will, because of functional or economic dependence, foreclose options or irretrievably commit resources to future projects, the environmental consequences of the projects should be evaluated together.”) Should the BOR decline to consolidate these NEPA documents, the EIS should explain the BOR’s rationale for subjecting the connected actions described above to separate NEPA review.

EIS Must Address Cumulative Economic Impact of the W-M Transfer and Other Project Alternatives

Appraisal of All Lands to be Transferred to District Should Precede EIS Preparation, with Results of Same to be Addressed in EIS

The currently amorphous parameters of the W-M transfer are simply too vague to merit hasty preparation of an EIS. The BOR proposes to transfer title to approximately 38,000 acres of land and nearly all corresponding irrigation and drainage works and facilities to the WMIDD at no charge. The BOR's reasoning is that the District's payment of an undisclosed, yet undoubtedly minimal percentage of the total cost of these facilities, justifies the transfer of these lands and facilities without any consideration of the District paying costs which would fairly approximate the total, publicly-funded expenditures on capital construction or the present fair market value of these lands and facilities.

Although there is no current plan to appraise these lands and facilities, it is imperative that a fair market valuation be completed before an EIS is drafted. This is the only way that the BOR can comply with its commitment of ensuring that federal treasury and taxpayers' financial interests are protected, and "accomplish[ing] this transfer of title and assignment of interest in the most fiscally responsible manner consistent with proper land and facility title transfer practices." See BOR's "Framework for the Transfer of Title to Bureau of Reclamation Projects" (Framework), at 2 (emphasis added); MOA, at 7, ¶8(a) (emphasis added). It is our understanding that the government has forgiven at least \$28 million of the District's outstanding debt to the BOR (a total that includes the BOR's forgiveness of the District's final \$22 million debt, in return for the water rights acquired in conjunction with Pub.L. 100-512, and BOR's declaration that an additional \$6 million worth of debt incurred for construction of the Gila River channel was non-reimbursable, an agreement received in exchange for an extra vote in favor of the YDP, a non-functioning project which has proven to be a waste of taxpayers' money). Only after the value of these lands and facilities is determined and compared to the amount of money that the District paid the BOR for its construction of the irrigation and drainage facilities will the American public be fully informed regarding just how much the BOR proposes to give away to a private entity.

Identification of Lands Proposed for Purchase by the District

At the EIS scoping meetings, the BOR and the District noted that there are an additional 15,200 acres of land that "may be" purchased by the WMIDD. This evasive language is employed because the BOR lands that the District may purchase have yet to be definitively selected. As the BOR and the District recognize, these lands must be appraised before the District can determine whether it wants to or has sufficient resources to purchase all or some of these lands. Until specific terms and conditions for this portion of the proposed transfer have been developed and thoroughly reviewed by the Bureau, the District, and the public, preparation of an EIS is premature.

While it was clear that 8,600 acres of this 15,200 acre total are comprised of lands that the BOR acquired under the terms of the 1974 Colorado River Basin Salinity Control Act and the Salt Rive Pima Maricopa Indian Community Water Rights Settlement set forth at Pub. L. 100-512, it is not clear where the 6,600 acres of "other federal lands" that were withdrawn but never

used for W-M project purposes lie and/or what the District would be able to do with these lands post-transfer. The EIS should provide greater detail regarding all lands that the District proposes to purchase, the District's planned use of these lands, and the potential impacts that could foreseeably result from the transfer of same.

Preparation of an Environmental Impact Statement as Opposed to an Environmental Assessment

An EIS must be prepared if substantial questions are raised as to whether a project *may* cause significant deterioration of some environmental factor. Further, CEQ guidance implementing NEPA states that “[a]s a general rule . . . agencies should use a broad approach in defining significance and should not rely on the possibility of mitigation as an excuse to avoid the EIS requirement.” CEQ NEPA Guidance, 46 Fed. Reg. 18026, 18038 (1981); see also National Audubon Soc’y v. Hoffman, 132 F.3d 7, 18 (2d Cir. 1997) (“[W]hen it is a close call whether there will be a significant environmental impact from a proposed action, an EIS should be prepared. . . . NEPA’s policy goals require agencies to err in favor of preparation of an EIS.”)

When the foregoing standard is applied to the Wellton-Mohawk asset transfer, a proposed federal action that may cause significant deterioration of a wide array of environmental factors -- including, but not limited to, harm to threatened and endangered species residing both within and outside the boundaries of the District once the post-transfer lands are exempted from the protections of the ESA, and harm to downstream Gila River and Lower Colorado River interests should the District find itself unable to meet costs of power for pumping water and for O&M of the transferred facilities – an EIS is clearly required for this asset transfer project.

The Federal Register scoping meetings notice, at 39535, employed the heading “preferred alternative” to describe the terms of the pre-NEPA parameters of the W-M asset transfer. As this categorization casts some doubt on the legitimacy of the NEPA process which has yet to begin, it is imperative that the W-M EIS consider a no action alternative of “no transfer” in a meaningful way. Similarly, the EIS should also detail both (a) the purpose of and (b) the need for the W-M asset transfer, as distinct questions, going beyond the mere fact that the implementing legislation authorized the BOR to consider pursuing a generally described asset transfer.

Additional Questions/Concerns to be Addressed by EIS

*Does the proposed transfer implicate waters indigenous to the Gila River in any way? Is any Gila River water currently being used within the WMIDD’s boundaries? Does the proposed transfer purport to change the amount of water that the District uses in any way? Is there any additional water available for supplemental use by the WMIDD?

*Is it the BOR and the District’s understanding that lands fallowed in accordance with the terms of the Salinity Control Act and the Pima Maricopa Water Rights settlements may not be irrigated at any future point, so long as these laws continue to be in effect?

*Both the W-M transfer legislation and the MOA recognize that existing water and power contracts may be subject to future amendment, supplementation, extensions and/or termination. See Pub. L. 106-221, section 3; MOA, at 5, ¶2(g). As such, the EIS should evaluate environmental impact that may occur if the terms of current O&M, water and/or power contracts are changed in any way. Further, are there any conditions in the O&M contracts that speak to the District’s continuing obligation to meet power cost obligations?

*What exactly are WMIDD's O&M costs? Post-transfer, will the WMIDD pick up and continue the BOR's program of minimization of return flows and preparation of a water budget, which for FY 2002 the BOR requested \$291,000? How will the District meet O&M and power costs post-transfer?

*Will the asset transfer result in cumulative land use impacts? Post-transfer, will the District continue to be subject to the current ceiling on irrigated acreage and consumptive use? The EIS should also consider effect of a contractual obligation for the District to maintain a uniform level of return flows. Similarly, if the WMIDD's ceiling on irrigated acreage is to stay the same post-transfer, the EIS should evaluate an alternative of transferring some of the BOR's lands to a local land conservation organization (either one that already exists or one that could be formed).

*Does the Salinity Control Act govern any lands outside the WMIDD's current boundaries?

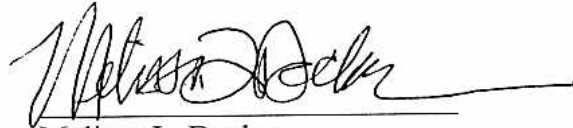
*Would some or all of the District's post-transfer water rights be secured via a non-alienability provision?

*Would the District be able to sell the lands it acquires or purchases as part of this asset transfer? The EIS should consider the effect of including a non-alienability clause in the transfer contract, which would ensure future compliance with provisions of the Salinity Control Act (as required by the M-W transfer implementing legislation), prevent urbanization from encroaching on the District's lands, and facilitate the WMIDD's professed resolve to preserve the agricultural way of life in the valley. In the alternative, the EIS should also address potential impacts to species, habitat, wetlands, and relations with Mexico that could result were the sale of District lands to result in increased urbanization and population growth.

*If groundwater pumping becomes a reality, would water be stored (for agricultural use, to offset Ciénega flows, etc.) or be committed to accommodating an increased urban population?

Bruce Driver
Executive Director

Bart Miller
Water Program Director

A handwritten signature in black ink, appearing to read "Melissa L. Decker", written over a horizontal line.

Melissa L. Decker
Staff Attorney
Land and Water Fund of the Rockies

On behalf of:

Timothy Flood
Friends of Arizona Rivers

Kara Gillon
Defenders of Wildlife

Steve Glazer
Sierra Club

David Hogan
Center for Biological Diversity

Pamela Hyde
Southwest Rivers

Jennifer Pitt
Environmental Defense



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

August 30, 2001

Mr. Richard Strahan
Project Manager
Yuma Area Office
US Bureau of Reclamation
7301 Calle Agua Salada
Yuma, AZ 85364-9763

COPY

Dear Mr. Strahan:

The Environmental Protection Agency (EPA) has reviewed the Notice of Intent to prepare an environmental impact statement for the proposed **Wellton-Mohawk Title Transfer, Yuma County, Arizona**. Our review is pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act.

The Bureau of Reclamation (Reclamation) proposes to prepare an Environmental Impact Statement (EIS) or Environmental Assessment (EA) to evaluate the potential effects of the proposed title transfer of property in Yuma County, Arizona, to the Wellton-Mohawk Irrigation and Drainage District (District), pursuant to the Wellton-Mohawk Transfer Act of June 20, 2000 (P.L. 106-221) (Act). The Act authorized the Secretary of Interior to convey certain works, facilities, and lands of the Gila Project, including the conveyance of designated acquired, public, and withdrawn lands within or adjacent to the Gila Project, to the District.

The District receives irrigation water through facilities constructed by Reclamation as part of the Wellton-Mohawk Division of the Federal Gila Project. Over the years, the District has repaid the costs of construction, and it operates and maintains the works and facilities and administers the distribution of water and collection of revenues from water users. The proposed change in title would not change the purpose, operation, or use of the facilities and works, nor actions and relationships outside of District operations, such as allocation of Colorado River water, conveyance of agricultural return flows from the District, Federal programs related to Colorado River water quality, and power contracts involving the District.

Given the proximity to the US/Mexican border and the significant evolving issues regarding Gila River and Colorado River water supply allocation, reliability, and management; we recommend Reclamation consider proceeding with an environmental impact statement. EPA advocates a water supply management approach which will provide flexibility to accommodate future shifts in water policy and assure a long-term,

sustainable balance between available water supplies, ecosystem health (e.g., in-stream beneficial uses), and water supply commitments.

To minimize conflict and water shortages, we urge Reclamation to explore with the District, as part of the title transfer, implementation of available tools for enhancing water management flexibility, supply reliability, and water quality. These tools could include water transfers and exchanges, conservation, pricing, irrigation efficiencies, operational flexibilities, market-based incentives, water acquisition, conjunctive use, voluntary temporary or permanent land fallowing, and wastewater reclamation and recycling. If applicable, the EIS should address the gap between existing water supplies and current levels of water supply commitments.

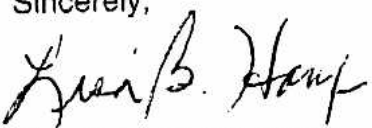
The EIS should include information on potential effects, if any, on the Yuma Desalting Plant; Colorado River flood flows and agricultural drainage to the Hardy River, Cienega de Santa Clara, and Colorado River delta; and potential future US/Mexico water transfers and joint water supply projects (e.g., transboundary water supply canals and pipelines).

A number of Indian Tribes are located in Yuma County and along the Gila River (e.g., Cocopah, Fort Yuma, and Gila Bend Indian Tribes). Thus, we recommend Reclamation consult with tribal governments, on a government-to-government basis, regarding their potential concerns, if any, with the title transfer pursuant to the November 6, 2000 Executive Order on Consultation and Coordination with Indian Tribal Governments (attached, Executive Order (EO) 13175).

In keeping with Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations (EO 12898), the EIS should describe the measures taken by Reclamation to: 1) fully analyze the environmental effects of the proposed Federal action on minority communities, e.g. Indian Tribes, and low-income populations, and 2) present opportunities for affected communities to provide input into the NEPA process. The intent and requirements of EO 12898 are clearly illustrated in the President's February 11, 1994 Memorandum for the Heads of all Departments and Agencies (attached).

We recommend the EIS include a clear description of the basic project purpose and need, project alternatives, potential impacts to the environment, and mitigation for these impacts. Particular attention should focus on an evaluation of the environmental impacts of the proposal and alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options for the decision maker and the public (40 CFR 1502.14). The EIS should clearly describe existing conditions, including information on existing management and water allocation systems, water quality, and biological resources. Full disclosure of indirect and cumulative impacts is of specific concern.

We appreciate the opportunity to review this NOI. Please send two (2) copies of the Draft environmental impact statement to this office at the same time it is officially filed with our HQ Office of Federal Activities. If you have any questions, please call me at 415-744-1584, or Laura Fujii of my staff at 415-744-1601.

Sincerely,

Lisa B. Hanf, Manager
Federal Activities Office
Region 9 US EPA

File: welltonmohawknoi.wpd
MI# 003729

Attachments:
EO on Consultation and Coordination with Indian Tribal Governments
President's February 11, 1994 Memorandum for the Heads of all
Departments and Agencies on the Environmental Justice EO.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release
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November 6, 200

EXECUTIVE ORDER

CONSULTATION AND COORDINATION
WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and

d any alternatives that would limit the scope of Federal
standards or otherwise preserve the prerogatives and authorit
y of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for the agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

- (1) funds necessary to pay the direct costs incurred by the Indian tribal government or the tribe in complying with the regulation are provided by the Federal Government; or
- (2) the agency, prior to the formal promulgation of the regulation
 - (A) consulted with tribal officials early in the process of developing the proposed regulation;
 - (B) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

- (C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

- (1) consulted with tribal officials early in the process of developing the proposed regulation;
- (2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
- (3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

EO 11-6-00.txt

WILLIAM J. CLINTON

THE WHITE HOUSE,
November 6, 2000.

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