APPENDIX I

Reclamation, acting on behalf of the Secretary, published a Notice of Availability of the DEIS and a schedule of public hearings in the *Federal Register* (Vol. 68, No. 171) on September 4, 2003. Approximately 170 copies of the DEIS were distributed to interested federal, tribal, state, and local entities and members of the general public for review, along with nearly 300 individual letters to persons notifying them of the availability of the document. The DEIS also was posted on the Internet for public viewing.

Reclamation facilitated two public hearings to receive oral and written comments on the DEIS. Public hearings were held at:

- Antelope Union High School in Wellton, Arizona, on October 1, 2003, and
- Ramada Inn Chilton and Conference Center in Yuma, Arizona, on October 2, 2003.

In addition to one oral comment made at these hearings, Reclamation received eight letters with comments pertaining to the DEIS. Reclamation has reviewed the comments received during the Wellton-Mohawk Title Transfer public comment period.

Reclamation has reviewed the transcripts of oral testimony and the written comments and determined that the written comments discuss each of the issues that were raised in the oral comment, which was not substantively different from the written comments. Because responses have been provided for each of the specific issues raised in the written comments, Reclamation has determined that a response to the oral comment is not necessary. The table below denotes the oral commenter and the associated comment letter.

Name	Organization	Associated Comment Letter
Yuma – October 2, 2003		
Cary Meister, Conservation Chairman	Yuma Audubon Society	Letter 8

Copies of written comment letters are included in this Chapter. Specific issues are indicated with vertical black lines marked within the left margin of each letter with sequential numbering. Responses to each issue are numbered according to its complement, and are presented to the right of each letter.

As a result of the comments review, and pursuant to the requirements of NEPA, Reclamation has prepared this FEIS.

--This page left intentionally blank--

List of Comments

--This page left intentionally blank--

D PASTOR
DISTRICT, ARIZONA

E ON APPROPRIATIONS

BCOMMITTEE ON
TATION, TREASURY, AND
PENDENT AGENCIES

BCOMMITTEE ON
RGY AND WATER

BCOMMITTEE ON
RICT OF COLUMBIA

ITY DEMOCRATIC WHIP

Congress of the United States
House of Representatives

PLEASE REPLY TO
☐ 2465 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-0302
(202) 225-4065
☒ 411 NORTH CENTRAL AVENUE, SUITE 16
PHOENIX, AZ 85004
(602) 256-7851

August 28, 2003

Mr. Jim Cherry
Area Manager
Bureau of Reclamation
7301 Calle Agua Salada
Yuma, AZ 85364

Dear Mr. Cherry:

Thank you for contacting my office regarding the Wellton-Mohawk Title Transfer.

1-1 Unfortunately, you reside outside the district I represent, Congressional District Four. Congressional courtesy dictates that your request be referred to Congressman Raul Grijalva, who represents you in the U.S. House of Representatives and the district in which you live. This is in keeping with longstanding Congressional custom that each Member of Congress be given an opportunity to be of service to their respective constituents.

You should be hearing from Congressman Raul Grijalva's office soon.

Sincerely,

Ed Pastor

Ed Pastor
Member of Congress

EP/phx l

1-1 Thank you for your referral. Congressman Raul Grijalva was also notified of the project and the public release of the Draft EIS.

Colorado Interstate Gas
an El Paso company

August 29, 2003

United States Department of the Interior
Bureau of Reclamation
Yuma Area Office
7301 Calle Agua Salada
Yuma, Arizona 85364

To Whom It May Concern:

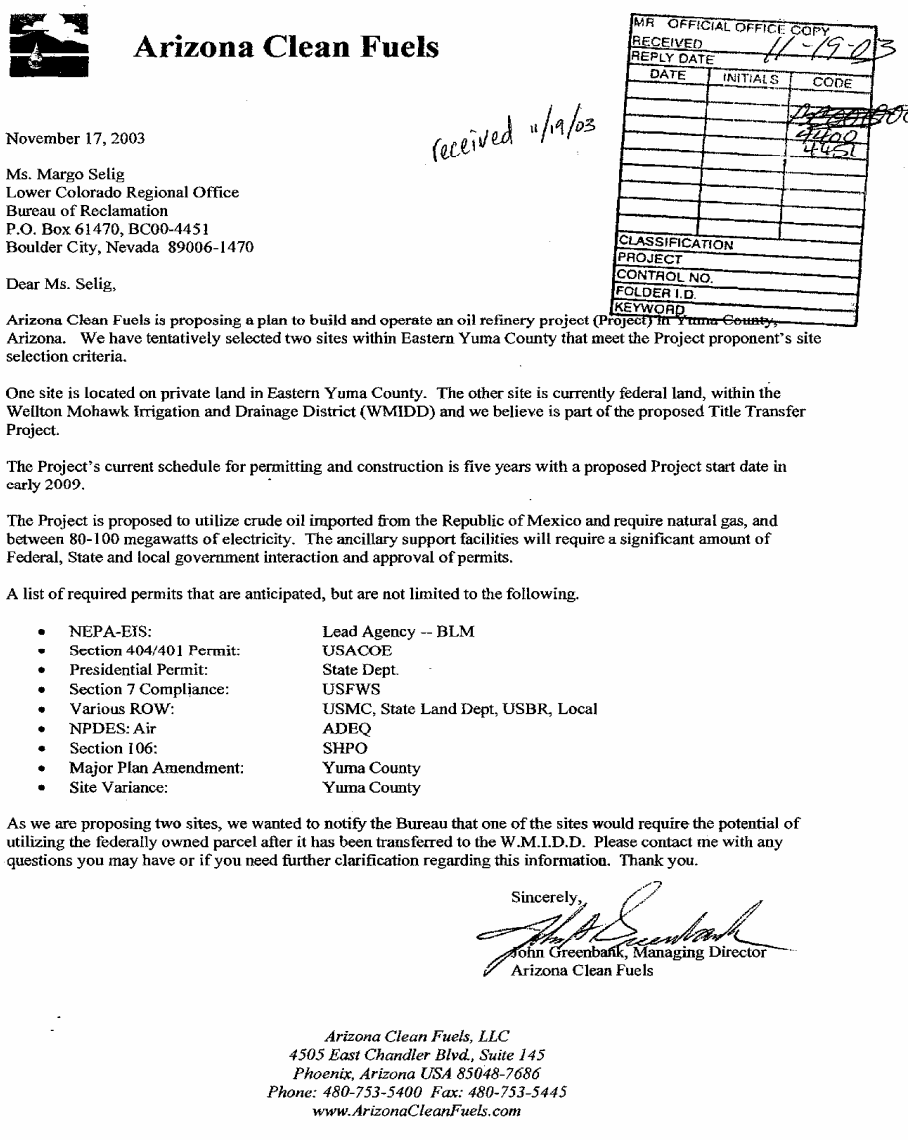
2-1 We are recently in receipt of a mailing from your department concerning "Draft Environmental Impact Statement for the Wellton-Mohawk Title Transfer." This document was sent to an "out-of-service" mailbox as we have since moved. However, in discussing this mailing with my department, it was concluded that we no longer need to be on the mailing list for this type of mailing. So, please remove us from your mailing list. The address in your databanks is: El Paso Natural Gas Company, P.O. Box 1492, El Paso, Texas 79978. As I mentioned, this mailbox no longer exists for our company. The environmental services department as moved to Colorado Springs at 2 North Nevada, 13th Floor, Colorado Springs, Colorado 80903.

Thank you for your attention to this matter.

Sincerely,

Kaelan Shannon
Administrative Assistant/Environmental Services

2-1 Thank you for your letter. Reclamation has removed the El Paso Natural Gas Company from the mailing list for this project.



Arizona Clean Fuels

MR OFFICIAL OFFICE COPY
RECEIVED 11-19-03
REPLY DATE
DATE | INITIALS | CODE
4400
4451
CLASSIFICATION
PROJECT
CONTROL NO.
FOLDER I.D.
KEYWORD

received 11/19/03

November 17, 2003

Ms. Margo Selig
Lower Colorado Regional Office
Bureau of Reclamation
P.O. Box 61470, BC00-4451
Boulder City, Nevada 89006-1470

Dear Ms. Selig,

Arizona Clean Fuels is proposing a plan to build and operate an oil refinery project (Project) in Yuma County, Arizona. We have tentatively selected two sites within Eastern Yuma County that meet the Project proponent's site selection criteria.

3-1

One site is located on private land in Eastern Yuma County. The other site is currently federal land, within the Wellton Mohawk Irrigation and Drainage District (WMIDD) and we believe is part of the proposed Title Transfer Project.

The Project's current schedule for permitting and construction is five years with a proposed Project start date in early 2009.

The Project is proposed to utilize crude oil imported from the Republic of Mexico and require natural gas, and between 80-100 megawatts of electricity. The ancillary support facilities will require a significant amount of Federal, State and local government interaction and approval of permits.

A list of required permits that are anticipated, but are not limited to the following.

- NEPA-EIS: Lead Agency -- BLM
- Section 404/401 Permit: USACOE
- Presidential Permit: State Dept.
- Section 7 Compliance: USFWS
- Various ROW: USMC, State Land Dept, USBR, Local
- NPDES: Air ADEQ
- Section 106: SHPO
- Major Plan Amendment: Yuma County
- Site Variance: Yuma County

As we are proposing two sites, we wanted to notify the Bureau that one of the sites would require the potential of utilizing the federally owned parcel after it has been transferred to the W.M.I.D.D. Please contact me with any questions you may have or if you need further clarification regarding this information. Thank you.

Sincerely,

John Greenbank, Managing Director
Arizona Clean Fuels

Arizona Clean Fuels, LLC
4505 East Chandler Blvd., Suite 145
Phoenix, Arizona USA 85048-7686
Phone: 480-753-5400 Fax: 480-753-5445
www.ArizonaCleanFuels.com

3-1 Thank you for notifying Reclamation of Arizona Clean Fuels' potential project on lands proposed for transfer in this project. Reclamation has added a new Section 1.6.6 to the FEIS as a subchapter to Section 1.6, Ongoing Activities and Related Actions, to inform the reader of this potential project. The potential environmental impacts associated with the proposed project will be addressed under a separate EIS.

"Managing and conserving natural, cultural, and recreational resources"

General comments

#1
rcvd as fax 9/29
Hardcopy rcvd 10/2
Letter sent to Linda Lugar

September 29, 2003

FAXED 9/29/03

Margo Selig
Lower Colorado Regional Office
Bureau of Reclamation
P. O. Box 61470
BCOO-451
Boulder City, NV 89006-1470

Re: Draft Environmental Impact Statement, Wellton-Mohawk Title Transfer; BR **SHPO-2002-402** (17048)

Dear Ms. Selig:

Thank you for providing a copy of the Draft Environmental Impact Statement (DEIS) for the Wellton-Mohawk Title Transfer. We have reviewed the document and offer the following comments:

4-1 We do not agree with the statement (page 3-38) "Following the inventory of cultural sites and the formulation of plans to ensure their preservation, the District would enter into a PA with the SHPO addressing the oversight to be accorded to the cultural resources." The Programmatic Agreement will be among Bureau of Reclamation, SHPO and other consulting parties pursuant to Section 106 of the National Historic Preservation Act as implemented at 36 CFR 800. The statement must be corrected.

We appreciate your continuing cooperation with our office in complying with the requirements of historic preservation. We look forward to continuing to consult on this undertaking. Please contact me at (602) 542-7142 or by email at jmedley@pr.state.az.us if you have any questions or concerns.

Sincerely,

Jo Anne Medley
Compliance Specialist/Archaeologist
State Historic Preservation Office

Cc: Jim Cherry, BR Acting Area Manager, Yuma, AZ
Patricia Hicks, BR Regional Archaeologist, Boulder City, NV

Arizona State Parks
1300 W. Washington
Phoenix, AZ 85007

Tel & TTY: 602.542.4174
www.azstateparks.com

800.285.3703 from (520 & 928) area codes

General Fax: 602.542.4180

ector's Office Fax: 602.542.4188

4-1 Reclamation has made the suggested correction to the FEIS text. Further, Reclamation agrees that parties to the MOA may include the District, SHPO, Reclamation and other consulting parties pursuant to Section 106 of the NHPA. Since the publication of the DEIS, an extensive fieldwork program has been completed which identified eligible cultural resources. Currently, a MOA is being developed for consideration by concurring and consulting parties.

THE STATE OF ARIZONA
GAME AND FISH DEPARTMENT
2221 WEST GREENWAY ROAD, PHOENIX, AZ 85023-4399
(602) 942-3000 • AZGFD.COM

GOVERNOR
JANET NAPOLITANO
COMMISSIONERS
CHAIRMAN, JOE CARTER, SAFFORD
SUSAN E. CHILTON, ARIVACA
W. HAYS GILSTRAP, PHOENIX
JOE MELTON, YUMA
MICHAEL M. GOLIGHTLY, FLAGSTAFF
DIRECTOR
DUANE L. SHROUFE
DEPUTY DIRECTOR
STEVE K. FERRELL

October 23, 2003

#2
Received 10/27/03

Margot Selig
Lower Colorado Regional Office
Bureau of Reclamation
P.O. Box 61470
BCOO-4451
Boulder City, Nevada 89006-1470

Re: Draft Environmental Impact Statement – Transfer of Title to Facilities, Works and Lands of the Gila Project, Wellton-Mohawk Division to Wellton-Mohawk Irrigation and Drainage District, Yuma County

Dear Ms. Selig:

The Arizona Game and Fish Department (Department) has reviewed the draft Environmental Impact Statement (DEIS) for the above-referenced Wellton-Mohawk Irrigation and Drainage District (WMIDD) lands and facilities title transfer. The Department understands that this proposed action would transfer ownership and title of the WMIDD's irrigation, drainage and flood control facilities and selected lands from Bureau of Reclamation (BOR) to WMIDD. The proposed action also includes BOR making available to WMIDD selected lands for purchase at fair market value. We offer the following comments for your consideration.

5-1

The Department notes that the proposed action does not include any changes in current uses of identified facilities and lands or in WMIDD's power and water contracts. However, the DEIS identifies a portion of the transferred lands that have the potential to be developed in the future. The Department hopes to continue our cooperative working relationship with WMIDD and BOR and have the opportunity, when appropriate, to evaluate and, if necessary, propose mitigation for impacts to fish, wildlife and wildlife-related recreation that may result from future changes in land use.

Thank you for the opportunity to review and comment on the DEIS. If you have any questions, please contact me at 928-342-0091.

Sincerely,

William C Knowles

William C. Knowles
Habitat Specialist
Region IV, Yuma

5-1 Thank you for your comment. When appropriate, the District will continue to consult with the Arizona Game and Fish Department. Transferring lands out of federal ownership would remove the federal compliance requirements with Section 7(a)(2) of the ESA, except for the Gila River Flood Channel lands, to which the ESA will apply for the life of the flood channel project.

Margot Selig
October 23, 2003
2

cc: Russell Engel, Habitat Program Manager, Region IV
Larry Voyles, Regional Supervisor, Region IV
Bob Broscheid, Proj. Eval. Prog. Supervisor, Habitat Branch

AGFD # 09-03-03 (2)

United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Yuma Field Office
2555 East Gila Ridge Road
Yuma, AZ 85365-2240

In reply refer to:

NOV 10 2003

#5 received w/13/03

2000 (050)

To: Bureau of Reclamation, Lower Colorado Regional Office
Attn: Ms. Margot Selig

From: Field Manager, Yuma

Subject: Comments on the Wellton-Mohawk Title Transfer Draft Environmental Impact Statement (EIS) LC-03-0

6-1

Thank you for the opportunity to review and comment on the Wellton-Mohawk Title Transfer Draft Environmental Impact Statement (EIS) LC-03-045. The Bureau of Land Management (BLM) Yuma Field Office (YFO) staff has reviewed the draft. The EIS lacks sufficient details on natural resources on a parcel-by-parcel basis for us to adequately review the proposal. A complete cultural report is unavailable for our archaeologist to review. Moreover, the draft does not indicate to what extent parcels are encumbered by project works and facilities. Based on our review of available information, the public might best be served if vacant Bureau of Reclamation withdrawn lands, those without project works or facilities that are situated adjacent to existing public land, remain in federal ownership. If the District does not foresee using these parcels for project works and facilities, strong consideration should be given to management by BLM. Values worth keeping in the public domain are:

- Access to public land such as wilderness and hunting areas,
- Cultural and historic resources,
- Opportunities for recreation such as camping, hunting, and off highway vehicle use,
- Management of lands with commercial value bringing revenue to the federal government, such as minerals, sand and gravel, geothermal, or oil.

Detailed comments and a list of the township, range, and section of potential lands we propose be retained in federal ownership are enclosed. If you have questions regarding this letter, please contact Karen Reichhardt or Thomas Zale at (928) 317-3245 or (928) 317-3318 respectively.

MR OFFICIAL OFFICE COPY		
RECEIVED 11/13/03		
REPLY DATE		
DATE	INITIALS	CODE
		4400
CLASSIFICATION		
PROJECT		
CONTROL NO.		
FOLDER I.D.		
KEYWORD		

Thomas P. Zale
for Gail Acheson

6-1 Please refer to responses for comments 6-2 through 6-25

6-2 **Page 1-3, Section 1.3.2, Lines 13**
The statement "federal lands owned by Reclamation" is inaccurate. Does it refer to lands acquired by Reclamation for the project and withdrawn lands? Does Reclamation "own" the land or does the federal government own the land with Reclamation having ultimate management responsibility for it?

6-3 **Page 1-8, Section 1.6.4, Lines 25-26**
"Yuma District resource Management Plan and its Record of Decision, as amended (BLM 1985)." Change to: Yuma District Resource Management Plan and its Record of Decision, as amended (May 1986 and Feb 1987). All other citations in the document need to be changed from 1985 to 1986 and 1987.

6-4 **Page 1-10, Section 1.7.1, Lines 10-12**
See comments on Page 1-8, Section 1.6.4, Lines 25-26.

6-5 **Page 2-5, Section 2.2.2.3, Line 12 and table.**
The proposed action identifies 9,925 acres of lands that were not used as rights-of-way or for development of farm units. These lands may have value for recreation, wildlife, or cultural resources protection. Some of these should be retained in federal ownership.

6-6 **Page 2-10, Recreation section of table.**
Land suitable for development would better serve the public if left undeveloped as federal land.

6-7 **Page 3-3, Lines 9, 10, 27, and 28**
Values for recreation, commercial mineral and oil potential, and cultural resources would be better protected under federal ownership.

6-8 **Page 3-6, Section 3.2.1.2.2, Lines 23-25**
Though some lands in this area are designated for disposal they are not really "surplus lands" in the legal sense. The BLM does not designate land as surplus. This sentence needs to be changed to "A few parcels of BLM land in the project area are currently designated as available for disposal by sale or exchange; there are no pending proposals for such disposal. Any future proposals for disposal of these lands would be evaluated on a case by case basis and would undergo a thorough NEPA analysis."

6-9 **Page 3-8, Section 3.2.3.2, Lines 16-20**
The numbers here do not seem to me to correspond to other numbers regarding the land used in the document. Possibly this needs to be re written to better explain where these numbers came from or what they cover, or they need to be corrected.

6-10 **Page 3-8, Section 3.2.3.2, Lines 32-34**
If the land is to be left in its natural habitat then there needs to be a better explanation of why it should leave federal ownership since the federal government can give it better protection.

6-11 **Page 3-10**
In section 3.3.1, Affected Environment, mention should be made of the oil and gas potential in the affected lands. Some parcels to be included in the title transfer are in an area known to be prospectively valuable for oil and gas, according to the following reference:

6-2 The statement "federal lands owned by Reclamation" has been edited to state "federally owned lands managed by Reclamation".

6-3 The citation adequately encompasses the dates of the amendments to the Yuma District Resources Management Plan and its Record of Decision by stating "as amended" and is consistent with other references in the document.

6-4 See response to 6-3.

6-5 The recreational, wildlife and cultural resources on the withdrawn lands proposed for transfer are included in the analyses presented in the EIS. Further, the total area of withdrawn lands included in the transfer has been reduced from approximately 9,925 acres to approximately 5,781 acres. The federal government will be compensated for the fair market value of these lands. Protection of cultural resources will be addressed in a MOA with SHPO, Reclamation and other consulting parties to address oversight to be afforded to cultural resources pursuant to Section 106 of the NHPA. See also response to comment 4-1.

6-6 Comment noted.

6-7 Through the NEPA process, recreational, cultural and geologic aspects of the proposed title transfer have been evaluated in the FEIS.

6-8 The text has been modified.

6-9 A reference to the acreages detailed in Table 2-2 will be added to the text.

6-10 Refer to the statement of Purpose and Need in Section 1-2.

6-11 The potential for oil and gas was considered in the property appraisal.

6-11 (cont') Stipp, T. F., and Dockter, R., 1987, Lands classified known to be valuable and prospectively valuable for oil and gas: U.S. Department of the Interior, Bureau of Land Management unpublished map, Arizona State Office, Phoenix, AZ, scale 1:500,000.

6-12 **Page 3-12, Lines 18 – 20.**
In section 3.3.3.2, Proposed Action/Preferred Alternative, mention should be made of the loss of revenue to the federal government upon the transfer of lands currently being mined for sand and gravel. For example, the Rinker USA operation in sec. 9, T. 8 S., R. 21 W., GandSR, annually purchases roughly $300,000 worth of sand and gravel produced from Withdrawn lands there. Rinker has identified on the order of 20 years of reserves on Withdrawn lands adjacent to their operation, so the potential loss to the federal government is roughly $6,000,000 in 2003 dollars. Has this been factored into the appraisal of all lands proposed for transfer that are prospectively valuable for sand and gravel? If not, then the appraised value of the lands would be less than the true fair market value. BLM is not aware of a Mineral Potential Report having been completed for the parcels in question; such a report would be necessary to conduct a proper appraisal.

Also, the north end of the Gila Mountains is in the old Gila City dry placer gold mining district. There are active mining claims on lands adjacent to Withdrawn lands there, so it is reasonable to assume that the Withdrawn lands themselves are prospectively valuable for gold in addition to sand and gravel. Has this been considered?

As mention in section 3.3.3.2, Proposed Action/Preferred Alternative, transferred lands would no longer be subject to NEPA compliance. A cultural resources survey of a proposed 120-acre expansion area on Withdrawn lands adjacent to the Rinker USA pit mentioned in 2) above found several significant cultural resource sites eligible for inclusion in the National Register of Historic Places. A more thorough review of the cultural resources on lands prospectively valuable for sand and gravel should be conducted, as compared to that presented in the Draft EIS.

6-13 **Page 3-20, Line 15. Section 3.6.1.1.**
Change the title of section 3.6.1.1 to Vegetation and Wildlife or put wildlife in a separate section.

6-14 **Page 3-21, line 4. Section 3.6.1.1.**
Fallow lands are valuable wildlife habitat. Some of the former agricultural lands are occupied by LeConte's Thrasher in the Tacna area. Disturbed fallow agricultural lands are habitat for migratory raptors which can be observed in winter on telephone poles in the Tacna and Roll area.

6-15 **Page 3-23, line 16**
Mountain Plover is no longer proposed for listing and could be removed from this section and Table 3-2.

6-16 **Page 3-23, line 27**
What is the potential for occurrence of Perrson's Milkvetch in the project area? It has not been documented in Yuma County.

6-17 **Page 3-27, line 15**
There is no section 3.6.1.3.

6-12 This comment was revised by BLM and resubmitted. See response to comment 6-26.

6-13 The section has been split into 2 sections: 3.6.1.1 – Vegetation and Land Cover, and 3.6.1.2 – Wildlife.

6-14 Comment noted.

6-15 Comment noted.

6-16 Pierson's Milkvetch is not known to occur in the project area. In the United States, the plant is known only from the Algodones Dunes (Imperial Sand Dunes) and in nearby Mexico from a limited area of dunes within the Gran Desierto, in the northwestern portion of the state of Sonora.

6-17 The reference has been modified appropriately.

6-18 **Page 3-29, lines 28-35 and Page 3-30, lines 1-2**
These sections do not give any details of the potential impacts. How is it that the proposed action may affect these species?

6-19 **Page 3-30 thru 3-38, Section 3.7**
The project area is rich in cultural resources, some of which are significant resources. Significant cultural resources would be better protected if they remained in federal ownership. Many of these sites are on upland, and are not necessary to the District to maintain agricultural irrigation.

The survey methodology is not adequate for this action. A Class III survey for all transferred lands would seem more appropriate. However, since our archaeologist has not received the cultural report prepared for this action, it is impossible for to properly review the affected environment and environmental consequences for cultural resources in the EIS.

6-20 The text states that under the No Action Alternative, "The withdrawn lands would return to BLM's administration, under which it is assumed that tracts of land within the district could be declared as surplus to BLM needs and be offered for exchange or sale" (p.3-36). This statement is misleading. BLM would not offer lands for exchange or sale if they contain significant cultural resources.

6-21 **Pages 3-44 thru 3-46, Section 3.9.1.1 thru 3.9.1.1.2**
Even though the USTs/ASTs are exempt under State regulations, they should still be considered recognized environmental conditions (RECs). If only a small percentage of the 400 – 250-gallon USTs/ASTs have had releases, there could still be a significant contamination of soil and groundwater gasoline range organics. Excavating around two tank pads is not a representative sample of possible USTs/ASTs that could have had major releases, nor is this a sound approach. One leaking tank or a major spill could have an adverse impact on the groundwater. We suggest that existing water wells within ¼ mile of affected parcels have groundwater samples collected and analyzed for benzene/toluene/ethylbenzene/xylene (BTEX). This is especially important for any BLM parcels that may be within ¼ mile of affected parcels, as far as BLM decision making goes.

6-22 Also, the consultant needs to review BLM records, and BOR records if they haven't already. There are BLM memoranda from 1989-90 indicating RECs associated with the District.

6-23 From the summary of what was done in this section the Environmental Site Assessment is inadequate for the transfer of land out of federal ownership. There are too many potential hazardous material problems that could come back against the federal government for an inadequate document to be used for this transfer. Some of these are the large number of ASTs and USTs that were not tested. Also there is no mention of any Phase II work done on landfill sites and the BLM office has documentation of at least two landfills authorized to the County by Reclamation in 1956.

6-24 **Page E-2, Appendix, Lines 10-12,**
This is making assumptions about the BLM selling the land. The BLM normally does not declare land "surplus," although certain lands are identified for disposal in the land use plan. These lands are managed under federal law until such time as they are disposed. In response to specific requests, the BLM sometimes sells or exchanges land if it is available for disposal. This statement should be revised to say that if the land is returned to BLM management the

6-18 Additional discussion of the potential effects has been added to Section 3.6.3.2.3. See also response to comment 8-25.

6-19 A comprehensive program to identify cultural resource sites has been completed. Cultural resources, including currently undiscovered sites, located on the transferred lands would pass from federal management and protection. Arizona Antiquity laws may provide some protection for cultural resources discovered after transfer. National Register eligible cultural resources would be protected through a binding Memorandum of Agreement (MOA) and a Treatment Plan. Certain lands with cultural resources not transferred may be considered for cooperative management arrangements between tribes and Reclamation. See also response to comment 4-1.

6-20 Comment noted.

6-21 See response to comment 7-2.

6-22 BLM records were reviewed as a part of the Phase I Environmental Site Assessment.

6-23 A discussion has been added to Section 3.9.1.1 regarding the former North Gila Valley Landfill site. One former landfill is located on lands proposed for transfer.

6-24 The text has been revised.

6-24 (cont')

BLM might at some point in the future entertain proposals for disposal of specific parcels. Any such proposal would be evaluated on a case by case basis after a thorough NEPA evaluation.

6-25

The document continually references that rights-of-way will be transferred from the Bureau of Reclamation (Reclamation) to the District. Our office sees the potential for at least four types of authorizations to be affected. Those are: Bureau of Reclamation authorizations issued to private or public entities, private easements issued to Reclamation; BLM authorizations issued to Reclamation; and BLM authorizations issued to other individuals or entities. All affected authorizations in the subject area need to be identified in an example. Our recommendation is that this example be set up as a table, listing at a minimum: the issuing agency, the agency's reference number, the legal description covered by the authorization, and the acreage covered by the authorization. Where there is an easement issued by an individual any similar information that is available should to be listed in the table. This information is important because any title documents will need to be issued, subject to, such authorizations and where appropriate assigned from Reclamation to the District by the issuing entity.

Subject Lands Suitable for Retention
Portions or all of the following sections meet criteria for public land values.

Gila and Salt River Meridian

T. 7 N., R. 14 W.,
secs. 15, 19
T. 7 S., R. 15 W.
secs. 2, 26, 27, 28
T. 7 S., R. 16 W.,
secs. 22, 23, 31
T. 7 S., R. 17 W.,
secs. 21, 22
T. 8 S., R. 18 W.,
secs. 10,11,12,13,17,18,19
T. 8 S., R. 19 W.,
secs. 24, 25, 26, 28, 30, 31, 33, 34
T. 9 S., R. 19 W.,
secs. 6, 7, 18
T. 9 S., R. 20 W.,
secs. 1, 2, 12
T. 8 S., R. 20 W.,
secs 5, 6, 7, 17, 18, 20, 27, 28, 34, 35
T. 7 S., R. 21 W.,
sec. 35
T. 8 S., R. 22 W.,
secs. 2, 11, 12

6-25 Title documents and related documentation has been reviewed to adequately determine ownership of ROWs or other easements and allow Reclamation to properly arrange a title transfer. Further detail is not warranted in the scope of the FEIS.

From: <Matthew_Plis@blm.gov>
To: <mselig@lc.usbr.gov>
Date: 11/14/03 11:29AM
Subject: Wellton-Mohawk draft EIS comment - revised

Margo,

Please change the Wellton-Mohawk draft EIS comment we discussed on the phone this morning to read as follows:

6-26

"In section 3.3.3.2, Proposed Action/Preferred Alternative, mention should be made of the loss of revenue to the Federal government upon the transfer of lands having the potential of being mined for sand & gravel. For example, the Rinker USA (Rinker) operation in sec. 9, T. 8 S., R. 21 W., G&SR, has produced about 400,000 cubic yards of sand & gravel annually for the last several years, from Withdrawn lands there. That sand & gravel had an appraised unit value of $0.83 per cubic yard when Rinker's current contract (AZA 32391) was issued by BLM earlier this year, meaning that Rinker currently pays the Federal government roughly $320,000 per year for the sand & gravel they produce from Withdrawn lands in sec. 9.

BLM periodically reappraises mineral materials located on lands it administers, and in fact this was done most recently in July 2003. So, if the Rinker contract were issued now (November 2003), the sand & gravel they produce from Withdrawn lands in sec. 9 would have an appraised unit value of $0.90 per cubic yard, generating an annual payment to the Federal government of about $360,000. The appraised value of sand & gravel can reasonably be expected to continue to increase in the coming years, for a variety of reasons, though the magnitude of the increase is very difficult to predict accurately.

In any case, Rinker has identified on the order of 20 years of reserves on Withdrawn lands adjacent to their current operation. Assuming a constant rate of production, those reserves would have a net present value of roughly $6,400,000 ($320,000 in constant dollars* 20 years) to the Federal government.

Has the potential loss of payments to the Federal government for sand & gravel production been factored into the appraisal of all lands proposed for transfer that are prospectively valuable for sand & gravel? If not, then the appraised value of the lands would be less than the true fair market value.

I'm not aware of a Mineral Potential Report having been completed for the parcels in question; such a report would be necessary to conduct a proper appraisal."

Thanks for calling yesterday. Let me know if I could more clearly describe my concern.

6-26 A proprietary appraisal has been prepared to establish the fair market value of the lands to be purchased in accordance with the *Valuation Policy and Framework for the Sale and Transfer of Project Facilities and Related Assets* attachment to the *Framework for the Transfer of Title for Bureau of Reclamation Projects*, dated August 7, 1995.

Margot Selig - Wellton-Mohawk draft EIS comment - revised

Matt Plis
Geologist
Bureau of Land Management
Yuma Field Office
2555 E. Gila Ridge Road
Yuma, AZ 85365
(928) 317-3218
Matthew_Plis@blm.gov

CC: <Karen_Reichhardt@blm.gov>, <Stephen_Fusilier@blm.gov>, <Paul_Buff@blm.gov>

11/19/03 WED 13:28 FAX 415 947 3562 U.S.EPA (CMD) 002

#6 received 11/

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

November 19, 2003

Margo Selig
Lower Colorado Regional Office
Bureau of Reclamation
PO Box 61470, BCOO-4451
Boulder City, NV 89006-1470

Subject: Draft Environmental Impact Statement (DEIS) for the Transfer of Title to Facilities, Works, and Lands of the Gila Project, Wellton-Mohawk Division to Wellton-Mohawk Irrigation and Drainage District, Yuma County, Arizona (CEQ #030402)

Dear Ms. Selig:

The U.S. Environmental Protection Agency (EPA) has reviewed the above-referenced document 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.

7-1

The DEIS analyses alternatives for the proposed title transfer of federal facilities and lands to the Wellton-Mohawk Irrigation and Drainage District. Based on our review, we have rated the DEIS as Environmental Concerns - Insufficient Information (EC-2). We have concerns about potential hazardous waste associated with underground and above ground storage tanks, and whether environmental justice impacts have been sufficiently addressed. Since the transfer anticipates changes in existing land use, we also have concerns about indirect air quality impacts pursuant to 40 CFR 1508.8(b). Finally, since future power plant development including a new transmission pipeline are mentioned, we urge a comprehensive evaluation of connected actions (40 CFR 1508.25(a)) in future NEPA documents. Please see the enclosed Detailed Comments for a description of these concerns and our recommendations.

EPA's rating and a summary of our comments will be published in the Federal Register. The enclosed *Summary of EPA Rating Definitions* describes EPA's rating system.

We appreciate the opportunity to review this DEIS. When the Final EIS is released for public review, please send two copies to the address above (mail code: CMD-2). If you have any

7-1 Please see responses to comments 7-2 through 7-6.

questions, please contact me or David P. Schmidt, the lead reviewer for this project. David can be reached at 415-972-3792 or schmidt.davidp@epa.gov.

Sincerely,

Lisa B. Hanf, Manager
Federal Activities Office
Cross Media Division

Enclosures:
EPA's Detailed Comments
Summary of EPA Rating Definitions

cc: John Holt, Western Area Power Administration

11/19/03 WED 13:29 FAX 415 947 3562 U.S.EPA (CMD)

EPA DETAILED COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (DEIS) FOR THE TRANSFER OF TITLE TO FACILITIES, WORKS, AND LANDS OF THE GILA PROJECT, WELLTON-MOHAWK DIVISION TO WELLTON-MOHAWK IRRIGATION AND DRAINAGE DISTRICT, NOVEMBER 19, 2003

Hazardous Wastes

7-2 Based on Phase I and Phase II Environmental Site Assessments, the DEIS states there are an estimated 200 to 400 underground storage tanks (USTs) and above ground storage tanks (ASTs) in former citrus fields within the project area (Section 3.9.1.1, p. 3-45). The 250-gallon storage tanks contained diesel fuel that powered wind machines used to prevent frost on crops. Because of their size and agricultural use, these tanks are exempt from the requirement to remove abandoned fuel tanks according to state regulations. Although two tanks were excavated and inspected, the DEIS does not identify the locations of the hundreds of other tanks or the possibility of diesel fuel remaining in those tanks. If fuel does remain in the tanks, the potential for surface and groundwater contamination could be high due to the flooding and high groundwater levels that can occur in the project area.

Recommendation:

EPA recommends that a plan be developed to inventory and document all known USTs and ASTs. The tanks should be inspected and, if petroleum product is still present, it should be drained and properly disposed.

7-3 The Environmental Site Assessments also identified several "environmental conditions" in the District headquarters compound machine shops and storage yards. These conditions include three 15,000-gallon ASTs for gasoline and diesel fuel, other ASTs for antifreeze and oil storage, a wash rack and evidence of soil staining. The DEIS indicates the District will develop an Operation and Maintenance (O&M) Plan for the proper storage and handling of hazardous materials.

Recommendation:

EPA suggests that a comprehensive O&M Plan be developed by the District that identifies equipment, requires the use of proper release detection equipment, assures spill and overflow protection, provides corrosion protection, and assures frequent walk-through inspections. EPA can provide technical guidance that can assist in developing such a plan.

7-4 Environmental Justice and Public Outreach

The socioeconomic analysis in the DEIS (Section 3.8, pp. 3-38 - 3-44) provides information on the racial composition of Yuma County and several towns within the County. Table 3-6 (p. 3-40) indicates that 50.5 percent of the population of Yuma County is of Hispanic heritage, yet the DEIS does not disclose whether Hispanics (as a minority population) will experience disproportionate or adverse consequence from this action. In addition, the

7-2 The USTs/ASTs were abandoned in the early 1970s, the depth to groundwater is approximately 60 feet, and the citrus fields are located on the mesa, above the 100-year flood plain of the Gila River. Given the time elapsed, the relatively small capacity of the tanks, the hot and arid climate of the project area, which is conducive to evaporation and/or natural attenuation, and the fact that the tanks are exempt from regulations, no further sampling or investigation was warranted. However, to confirm the status of the soils in the vicinity of the tanks, Reclamation and the District embarked on a program to systematically sample the former field areas and ultimately removed the ASTs and USTs. Approximately 91 USTs and 36 ASTs were excavated and samples were collected at more than 10% of the UST locations in January 2004 (CMX 2004). No detections of total petroleum hydrocarbons were reported in any of the samples collected. Following this confirmation, the tanks were removed from the site and properly disposed.

7-3 A Spill Prevention, Control and Countermeasures Plan has been developed for the District to identify:

- Potential sources of oil that would be of concern if discharged into the environment.
- Actions or measures needed to prevent discharges.
- Actions to be taken by site and/or emergency personnel if a discharge occurs.
- Personnel responsible for preventing, responding to and reporting a discharge.

socioeconomic analysis does not address whether there are low-income communities within the project area.

7-4 (cont')

Recommendation:

The FEIS should address whether the proposed action will cause disproportionate or adverse effects to low-income or minority populations, consistent with Executive Order 12898. EPA also recommends that the environmental justice analysis of the FEIS consider impacts to migrant workers who are dependent on the agricultural communities in the project area, if applicable.

Indirect Air Quality Impacts

7-5

The DEIS indicates that although the Yuma Area has been designated as a non-attainment area for particulate matter with a diameter of 10 microns or less (PM_{10}), the development and implementation of the State Implementation Plan (SIP) has resulted in no PM_{10} violations since 1991. The DEIS states that there will be no changes in the District's air quality from the proposed transfer (Section 3.10.3.2, p. 3-48). However, the proposed transfer may indirectly result in 9,800 acres of future development and 1,400 acres of enhanced farming operations.

Recommendation:

The FEIS should address the indirect impacts of the proposed action, including changes in land use, increased traffic, construction and other activities that may increase particulate matter emissions in this non-attainment area.

Proposed Wellton-Mohawk Generating Facility

7-6

Dome Valley Energy Partners, Wellton-Mohawk Irrigation and Drainage District, and the Yuma County Water Users' Association are partners in the planned construction of the Wellton-Mohawk Generating Facility on a parcel of land included in this title transfer. Construction will consist of a natural gas-fired combined-cycle electricity generating facility, a new natural gas pipeline, high-voltage transmission line upgrades, and other additions necessary to support the facility. The Western Area Power Administration (Western) issued a notice in the *Federal Register* on May 19, 2003, of its intent to prepare a separate EIS for this Generating Facility. In that notice, Western also indicated that an independent NEPA review of the proposed natural gas transmission pipeline would be performed by the Federal Energy Regulatory Commission (FERC) as part of its licensing process. EPA will review the DEIS and provide written comments to Western when it is released for pubic review.

Recommendation:

EPA's comments (dated July 3, 2002) to Western's notice of intent on the Generating Facility recommended that the EIS address air quality, water quality, and environmental justice and public outreach. We recommend a comprehensive evaluation of environmental impacts in that document, including the transmission pipeline if it is an interdependent part of the Generating Facility.

2

7-4 Low-income and/or minority populations will not experience a disproportionate or adverse consequence from this action. Section 3-8 has been edited to reflect this determination.

7-5 The potential indirect impacts on air quality of the proposed action are not considered notable because this action is not anticipated to change the rate at which economic development in the project area would occur. In addition, changes in land use and construction activities would still be governed by reasonably available control measures, the State Implementation plan (SIP), state and federal laws, county and city ordinances and other measures to minimize particulates.

During the development of the Draft EIS, the Yuma area did record an exceedance of the PM_{10} 24-hour standard; the August 12, 2002, violation was mainly from high winds. The meteorological conditions on and preceding this day were examined to determine if the date qualified as a "natural event" under the Arizona Department of Environmental Quality's exceptional and natural event provisions. Consequently, a Natural Events Action Plan (NEAP) was developed using the Yuma Metropolitan Planning Organization process and was submitted to EPA in early 2004. The text has been corrected to reflect the latest monitoring data.

7-6 Comment noted.

SUMMARY OF EPA RATING DEFINITIONS

This rating system was developed as a means to summarize EPA's level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the EIS.

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the CEQ.

ADEQUACY OF THE IMPACT STATEMENT

Category 1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

"Category 2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analysed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

"Category 3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analysed in the draft EIS, which should be analysed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

***From EPA Manual 1640, "Policy and Procedures for the Review of Federal Actions Impacting the Environment."**

DEFENDERS OF WILDLIFE • ENVIRONMENTAL DEFENSE •
NATIONAL WILDLIFE FEDERATION • PACIFIC INSTITUTE • SIERRA CLUB
WESTERN RESOURCE ADVOCATES • YUMA AUDUBON SOCIETY

#4 Faxrcvd on 11/4 hard copy 11/7

November 4, 2003

Ms. Margot Selig
Lower Colorado Regional Office
Bureau of Reclamation
P.O. Box 61470
BCOO-4451
Boulder City, NV 89006-1470

Via Mail and Facsimile (702-293-8042)

Dear Ms. Selig:

Please accept the following comments on the Draft Environmental Impact Statement (Draft EIS) for the Transfer of Title to Facilities, Works, and Lands of the Gila Project, Wellton-Mohawk Division to Wellton-Mohawk Irrigation and Drainage District (WMIDD transfer or transfer). These comments are submitted on behalf of several interested environmental groups, including Defenders of Wildlife, Environmental Defense, National Wildlife Federation, Pacific Institute, Sierra Club, Western Resource Advocates, and Yuma Audubon Society. Individually and collectively these groups and their members have a substantial interest in environmental protection and restoration of the Colorado River basin and local, state, and national memberships totaling over 2 ½ million people.

In its present form, the Draft EIS is inadequate. It fails to satisfy the requirements of the National Environmental Policy Act (NEPA), Endangered Species Act (ESA), the Fish and Wildlife Coordination Act (FWCA), and other federal law and policy. Information and analysis in the current Draft EIS are insufficient to enable the U.S. Bureau of Reclamation (Bureau or BOR) to reach a well-reasoned conclusion about impacts of the proposed action.

8-1 Of primary concern is that the actual lands to be transferred have not yet been identified, making it impossible to fully analyze the potential extent and effect of any proposed transfer. The MOA between the BOR and the District states they "shall jointly identify" lands to be transferred. MOA at 4. The transfer legislation authorizes the Secretary of the Interior to "carry out the terms of the [MOA]." Pub. L. No. 106-221, 114 Stat. 351, §2. Failing to carry out the cornerstone of the proposed transfer—i.e., identifying lands proposed for transfer—prior to NEPA analysis prevents public review.

8-2 In addition, there is no plan of operation and management for the lands and facilities proposed for transfer. Until specific terms and conditions for the transfer have been developed and thoroughly reviewed by the Bureau and the public through the NEPA process, transfer is pre-

8-1 Reclamation and the District made preliminary identification of lands to be transferred, as represented in Table 2-2 and detailed in Appendix C of the DEIS. While some lands have been removed from the transfer, parcels that were not identified for transfer in the DEIS have not be added to the lands considered in the FEIS, nor will lands be added prior to implementation of the ROD.

8-2 See response to comment 7-3.

8-3 mature. The Draft EIS also neglects to include any analysis of ongoing impacts of the facilities proposed for transfer and fails to propose any mitigation for the dramatic change in federal protection and oversight that would result from transfer. Several other shortcomings are listed in greater detail in the comments that follow.

8-3 Comment noted.

8-4 Several of the Draft EIS's shortcomings may be remedied through the creation of one or more additional alternatives that include appropriate mitigation for the transfer and ongoing impacts of this part of the Gila Project. Specific mitigation measures, suggested in greater detail below, could take the form of on-the-ground improvements to the affected environment and/or an operating plan with mechanisms for continued federal and public involvement in facility management after the transfer.

8-4 Reclamation believes that the alternatives as presented are adequate given the speculative nature of future impacts related to the title transfer. Specific mitigation measures may be addressed through agreements or other methods, as required.

Background

Since the 1940s, the operation of the Wellton-Mohawk Irrigation and Drainage District (WMIDD or District) has had major environmental impacts. The District also has been maintained historically by controversial taxpayer subsidies. These subsidies have included an expensive drainage system to collect sumpwater and carry it away, artificially low electricity rates, commodity price supports, extensive debt forgiveness, and a controversial $258 million desalinization plant.

As noted in the Draft EIS, the Gila Project has visited a dramatic impact on the area's native species. Native fish populations in the project area declined as a result of flow regulation and non-native fish introductions, resulting in extirpation of native fish from the project area. DEIS at 3-21. *See* W.L. Minckley & Michael E. Douglas, *Discovery and Extinction of Western Fishes*, *in* Battle Against Extinction: Native Fish Management in the American West, 7-17 (W. Minckley and J. Deacon eds., 1991). *See also* National Research Council, *Water Transfers in the West: Efficiency, Equity, and the Environment* (1992) and U.S. Fish and Wildlife Service, *Biological and Conference Opinion on Lower Colorado River Operations and Maintenance -- Lake Mead to Southerly International Boundary* (1997). Habitat disruption caused by agriculture and urbanization in the project area has reduced amphibian and reptile populations. DEIS at 3-22. And the project area remains an important flyway for migratory waterfowl. *Id.*

Facilities proposed for transfer include many miles of ditches and canals that, collectively, have a large impact on the quantity and timing of flows in Gila River and the Ciénega de Santa Clara, which receives the return flows from the Main Outlet Drain (and its extension (MODE)). This system of artificial waterways, in conjunction with the farm lands they supply and drain, contribute to a dramatic change in the natural flow regime, altered riparian and aquatic habitat, and increased salinity.

8-5 As a result of these major impacts, any transfer of lands to the District should be counter-balanced by terms and conditions in the transfer that protect and improve the local river and wetland environments and benefit endangered, threatened, and sensitive species.

8-5 Comment noted.

Our more specific comments below are based on several general principles that should guide the any proposed transfer of lands and facilities to the District:

8-6

- Protect Natural Resources. Human activities in the project area have had one clear result: a large impact to the Gila and Colorado Rivers' natural resources inside the project area and downstream. These impacts must be acknowledged, limited, and (where appropriate) curtailed to restore the integrity of the natural community. A transfer, if one occurs, should improve the natural environment pursuant to several provisions of federal law.

8-7

- Protect and Restore Native Biodiversity, Natural Ecological Processes, and Sensitive, Threatened & Endangered Species. The transfer, if one occurs, should be guided by the findings of conservation biology and requirements of the ESA, FWCA, and other federal law. The transfer must ensure the maintenance, protection, and restoration of native species and communities and associations in natural patterns of abundance and distribution.

8-8

- Define Project Purposes Broadly. The MOA referenced in the authorizing legislation anticipates that the lands transferred will continue to be used for authorized project purposes. Under Bureau of Reclamation law, these authorized purposes include conservation measures that protect and enhance fish, wildlife, and the environment. For example, the Federal Water Project Recreation Act, applicable to all Bureau facilities, provides that "full consideration shall be given to the opportunities, if any, which the project affords for outdoor recreation and for fish and wildlife enhancement." 16 U.S.C. § 460l-12. The Act also states:

> The Secretary is authorized, in conjunction with any reservoir heretofore constructed by him pursuant to Federal reclamation laws or any reservoir which is otherwise under his control . . . to investigate, plan, construct, operate and maintain, or otherwise provide for public outdoor recreation and fish and wildlife enhancement facilities, to acquire or otherwise make available such adjacent lands or interest therein as are necessary for public outdoor recreation or fish and wildlife use.

16 U.S.C. § 460l-18. The FWCA also has many applicable provisions that authorize improving conditions for fish and wildlife. *See* section on Fish and Wildlife Coordination Act, below. Before approving a transfer, the BOR must exercise its authorities under these and other federal laws.

A transfer that incorporates the foregoing general principles will provide the Bureau with the best avenue to comply with federal law and to preserve and restore the health of the ecological communities in the project area.

The Authorizing Legislation

8-6 The proposed title transfer will not impact the operation of the Division facilities. Potential impacts to the Gila and Colorado Rivers due to the Gila Project are outside the scope of this EIS.

8-7 Dissemination of this FEIS demonstrates that NEPA requirements, including applicable laws, have been satisfied.

8-8 Comment noted.

The federal statute authorizing the transfer does not require transfer. Instead, it states:

> The Secretary of the Interior . . . is authorized to carry out the terms of the Memorandum of Agreement . . . providing for the transfer of works, facilities, and lands to the District, including conveyance of Acquired Lands, Public Lands, and Withdrawn Lands, as defined in the Agreement.

Pub. L. No. 106-221, 114 Stat. 351, §2 (emphasis added). The statute's language does not give away the Department's decision-making power. Instead, it merely allows the transfer. After review under NEPA, ESA, FWCA, other federal law and policy or due to other considerations, the Bureau may decide that all or part of the proposed transfer is not prudent at this time. The Bureau continues to have the power and authority to determine that the transfer should not go forward, *i.e.*, choose the "no action" alternative and/or to attach terms and conditions to the transfer in a new alternative to mitigate for concerns raised by the transfer's potential environmental impacts. For reasons articulated in greater detail elsewhere in these comments, the Bureau should choose the "no action" alternative, or attach terms and conditions to the preferred alternative so that the Bureau protects the federal treasury and the public interest.

8-9

8-9 Comment noted.

It is likely that, after close review of the many specific comments noted below, the Bureau will find the most prudent and legally defensible course of action to be the "no action" alternative. In many respects, retaining federal ownership of the lands and facilities proposed for transfer is the best and perhaps only way of protecting these valuable public resources. If the Bureau chooses to carry out the proposed transfer, it should be under a new alternative, one that incorporates the specific comments below.

8-10

8-10 Comment noted.

A. National Environmental Policy Act

The National Environmental Policy Act "establishes 'action-forcing' procedures that require agencies to take a 'hard look' at environmental consequences." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). "Statements [EISs] . . . shall be supported by evidence that the agency has made the necessary environmental analyses." 40 C.F.R. § 1502.1. Under NEPA, "conclusory remarks [and] statements that do not equip a decisionmaker to make an informed decision about alternative courses of action, or a court to review the Secretary's reasoning" is insufficient. *Natural Resources Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988). As explained in detail below, the Bureau has failed to make the required environmental analyses in the current Draft EIS.

8-11

8-11 Comment noted.

The Draft EIS fails to comply fully with NEPA due to: (1) an artificially limited range of alternatives; (2) lack of in-depth analysis; (3) lack of mitigation for removal of the facilities' future management from federal law requirements; and (4) failure to address the "significance" of the action. The absence of critical information from this Draft EIS precludes meaningful analysis, and BOR must revise and reissue this Draft EIS before choosing an alternative. *See* 40 C.F.R. § 1502.9(a).

8-12

8-12 See responses to comments 8-13 to 8-27.

1. The Range and Definition of Alternatives Is Inadequate

8-13

Development of alternatives is the heart of the EIS. 40 C.F.R. §1502.14. CEQ regulations call on BOR to "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated," "[d]evote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits," "[i]nclude the alternative of no action," and "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives." *Id.* §1502.14 (emphasis added). The Bureau has failed on 3 of these 4 counts.

First, the Draft EIS presently includes only an artificially limited range of alternatives. The Draft EIS contains only a single action alternative and the "no action" alternative. *See* DEIS at 2-1. The NEPA process developed for agency decision-making contemplates that an EIS contain a range of action alternatives. *See* 40 C.F.R. § 1508.9 and 42 U.S.C. § 4332(2)(E). Narrowing the Bureau's choice to a single action alternative forecloses the opportunity for a reasoned analysis of options.

This deficiency could be remedied in a revised DEIS by creating at least one, and perhaps several, additional alternatives to the proposed action. These alternatives would address the conflicts and questions raised in scoping, noted in the Draft EIS, and identified below. Alternatives to the proposed action could include, for example, a partial transfer (*e.g.*, transfer of all lands except for "Additional Lands Acquired or Withdrawn by Reclamation" and/or the wetlands in the Gila River), a transfer with the power of termination retained by the Bureau (to be exercised if the transferee breaches or fails to satisfy certain conditions), a transfer with a post-transfer operating plan, and/or a transfer implemented over time as certain mitigation measures are satisfied.

2. Alternatives have not been rigorously explored

8-14

The preferred alternative has not been "rigorously explored," "considered in detail," nor "devoted substantial treatment to." "The 'touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.'" *City of Angoon v. Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986). Issues surrounding identification, valuation and potential purchase of "Additional Lands Acquired or Withdrawn by Reclamation" were raised in scoping and remain completely un-addressed in the Draft EIS. This is a key piece of the proposed action/preferred alternative, yet the BOR still has failed to appraise the lands, provide these appraisals to the public, set the purchase price, or ascertain the fate of these lands.

A new alternative which separates out "Additional Lands Acquired or Withdrawn by Reclamation" and/or keeps wetlands in the Gila River corridor under BOR ownership would go a long way toward providing clear alternatives and giving BOR flexibility in pursuing this transfer. First, BOR must be explicit and consistent when describing the "Additional Lands Acquired or

5

8-13 The proposed action considered in the FEIS meets the purpose and need stated in the FEIS and is considered with the no action alternative. Reclamation believes that the alternatives presented are adequate.

8-14 Approximately 14,885 acres of land are to be purchased by the District, as identified in the maps in Appendix C. These lands are within or adjacent to the Division and per the MOA as amended, the District and Reclamation have jointly identified the lands to be purchased, exchanged or otherwise transferred by and between the District and Reclamation. Acquired lands, public lands and withdrawn lands have been appraised in accordance with practices approved by the Secretary to ensure that the United States receives fair market value for these lands. See response to comment 6-26.

Reclamation has made edits to the text to consistently refer to the "additional lands acquired or withdrawn by reclamation" as "to be purchased".

8-14 (cont')

Withdrawn by Reclamation". Currently, the Draft EIS alternately refers to them as "available" for purchase (*see* DEIS at 2-5, D-2) or "to be" purchased, acquired or transferred (*see* DEIS 3-3, 3-8). Is purchase by WMIDD an offer or a foregone conclusion?

8-15

The fate of these lands is entirely unknown, yet is necessary for analyzing the proposed action's impacts. Will WMIDD purchase some, none, or all of these lands? Will the purchase take place immediately, or over time?

8-16

Second, BOR has not included the fair market value of these lands in this Draft, despite recognizing the need for this information. During scoping (in August 2001), BOR said the appraisals were to be done by now, yet they are still being prepared. *See* DEIS at 1-6; *see also* MOA at 4. Without the appraisal information, neither BOR, WMIDD nor the public can determine the socioeconomic impacts of the transfer. BOR has also omitted the initial purchase price for these lands. As a result, impacts on the public interest and treasury, two of six public interest criteria BOR must consider pursuant to the 1995 Framework document (*see* DEIS at 1-3), have not been made public. Clearly, BOR should reissue a Draft EIS when the appraisals are complete, and include all of this financial information for public review.

8-17

Third, there is no information regarding the fair market value of the lands in the Barry M. Goldwater Range. *See* DEIS at 3-10. If no lands are purchased, how would that credit be applied? What is the size of the credit? The transfer of these lands is loaded with uncertainties, including if it will happen, for what price, and at what impact to fiscal and public interests.

8-18

The Bureau cannot transfer "Additional Lands Acquired or Withdrawn by Reclamation" based on the current Draft EIS, due to its complete failure to value these lands and identify precisely which parcels would be transferred. *See* Appendix A, letter from Eluid Martinez, Commissioner, to Frank Murkowski, Chairman of the U.S. Senate Committee on Energy and Natural Resources (7/20/00) (stating that identification and appraisal of lands to be transferred, and implementation of a public participation process, be completed before transfer). The Bureau first must complete the appraisals and include that information in a revised Draft EIS. In that revised Draft, the Bureau must offer the reasonable alternatives of transfers both with and without these lands.

8-19

The Draft EIS should contain a draft of the transfer agreement/contract and plan of operation, in order that the public may fully understand the terms of the transfer. The BOR has provided such documents in previous transfer proposals. *See, e.g.,* Appendix I of the Draft EA for the Carlsbad Irrigation District Land Transfer Project (including a Draft Quitclaim Deed) (Attachment A). The BOR also must identify specific property proposed for transfer. *See* MOA at 4. The BOR must supplement this Draft EIS to include the identified lands and their price, draft transfer agreement/contract, and plan of operation.

3. Mitigation Measures have not been considered

The Bureau must, but has not, included appropriate mitigation measures for potential

6

8-15 Under the proposed action, the District would purchase the lands identified in Appendix C at the time of ROD implementation.

8-16 An appraisal of the lands proposed for purchase by the District has been completed.

8-17 The lands with the Barry M. Goldwater Range have been appraised at fair market value and in accordance with the Valuation *Policy and Framework for the Sale and Transfer of Project Facilities and Related Assets* attachment to the *Framework for the Transfer of Title for Bureau of Reclamation Projects*, dated August 7, 1995. If the no action alternative is implemented, and thus no lands are purchased, no credit would be given to the District.

8-18 In compliance with NEPA and other federal laws, the identification and appraisal of lands to be transferred, and the implementation of a public participation process have been completed prior to the implementation of any ROD.

8-19 The quit claim deed and terms for the transfer of lands will be identified in the ROD. The specific property proposed for transfer is identified in Appendix C.

impacts of the proposed action. *See* 40 C.F.R. §1502.14(f). As outlined under NEPA regulations, possible mitigation measures include:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action;
- Compensating for the impact by replacing or providing substitute resources or environments

Id. §1508.20.

The Draft EIS fails to present an alternative that contains any mitigation for adverse impacts from the proposed action and ongoing project operations. Mitigation could take the form of continued federal and public involvement in management and oversight and/or include actual improvements to the affected environment. Mitigation might include alternatives to the proposed action with attached terms and conditions or an operating plan for post-transfer operations. The District does not operate in a vacuum and the Bureau must protect public and national interests such as protection of fish and wildlife and salinity control.

Specifically, an operating plan would include:

8-20 · the agreement between the Bureau and WMIDD regarding ARFs, similar to that referenced in MOA Section 2(d) and DEIS 1-6, but that does not terminate upon transfer, as Section 2(d) does.

8-21 · provisions to prevent land withdrawn from irrigation (via P.L. 93-320) from re-irrigation and/or changes as to land classified as irrigable. These lands were acquired due to their relatively high contribution to saline flows (*see* DEIS at 1-11) and they should not be put back into production. Then Commissioner Eluid Martinez stated that "we believe that salinity issues must be directly addressed in any agreement to transfer title. This issue is of critical importance." S.Rep.No. 289, 105th Cong., 2d Sess.7 (1998). We agree completely.

8-22 · wetlands management in the river corridor to benefit species dependent on these areas.

8-23 · public access to the river corridor. Under the "no action" alternative, BOR states that it "may make available" land for public purposes such as parks, schools, and governmental administrative areas. By implication, no such provision would be made if lands were transferred to the District. As a result, public access and set-asides for public use should be included as part of an operating plan.

7

8-20 The proposed action is administrative in nature and will not alter the operation of the District or ARFs. As stated in Section 1.6.1, the District will operate the drainage wells as needed to control groundwater depths and meet Reclamation goals for the annual ARFs delivered to the Main Outlet Drain at Station 0+00.

8-21 Under the District's delivery contract with Reclamation, as amended, the District is permitted to provide irrigation water to a maximum of 62,875 acres of irrigable land.

8-22 Wetlands management in the Gila River Flood Channel is a District responsibility, as prescribed by the mitigation plan developed with USACE under the Clean Water Act, Section 404 permit for the flood channel, which is not affected by the transfer. The permit is applicable for the life of the flood channel project.

8-23 Under the no action alternative, a minor amount of land may be made available for public purposes, such as schools, parks and governmental administrative areas. However, Reclamation is not aware of proposed public projects that have a need for land in the project area, with the exception of the Juan Bautista de Anza National Historic Trail. In the future, these potential uses of the land are not excluded from consideration under the proposed action alternative. Post-transfer development would be in accordance with Yuma County rules and regulations.

8-23 (cont') Section 3.12.2 indicates that the District does not intend to restrict public access to the lands proposed for transfer, except for tracts to be developed or established for conservation purposes. Additionally, the District plans to work with the National Park Service to facilitate a mutually agreeable plan for portions of the trail within the jurisdiction of the District.

8-24

In a parallel manner, the proposed transfer would remove the land and facilities from the requirements and protections of several environmental laws and their regulations, including NEPA, ESA, FWCA, and other statutes. Therefore, the Bureau must consider mitigation for this loss of protection through a requirement that the transferee stipulate to consultation processes similar to the ones currently required under federal law, for any future changes to the management, operations, or repair of the land and facilities.

4. Environmental Consequences Are Not Defined

8-25

An EIS must analyze the nature and severity of the environmental impacts -- the "significance" of the proposed action. *See* 42 U.S.C. §4332(2)(C). The Bureau has not done this, but instead has listed activities that may affect or have the potential for adverse impacts, but does not analyze the type or extent of the adverse impact, for itself or for the reader. *See Defenders of Wildlife v. Babbitt*, 130 F.Supp. 121, 138 (D.D.C. 2001) (holding an EIS insufficient because it stated that noise would increase and pronghorn and their habitat would be disturbed, there was no analysis of the nature and extent of the impacts on the pronghorn) (citing *NRDC v. Hodel*, 865 F.2d at 299). "There must be an analysis of the status of the environmental baseline given the listed impacts, not simply a recitation of the activities of the agencies." *Id.* at 128.

8-26

In its present form, the Draft EIS fails to analyze the significance of the proposed transfer. The proposed transfer satisfies most of the elements of "significance" listed in 40 C.F.R. § 1508.27(b) and, therefore, is significant. The transfer could affect public health and safety because the District has fewer financial resources than the United States to dedicate to repair and maintenance. The transfer is closely intertwined with ecologically sensitive watersheds. The transfer is controversial, especially in relation to the uncertain effects of potential future actions. And the transfer may set a precedent for future actions, and thus warrants a special level of scrutiny by the action agency. *See* 40 C.F.R. § 1508.27(b)(2), (b)(3), (b)(4), and (b)(6).

8-27

Of special significance, the proposed transfer would take most, if not all, future actions related to the land and facilities out from under compliance with NEPA, FWCA, and other federal statutory requirements, including most provisions of the ESA. However, BOR has not analyzed these impacts in the Draft EIS. *See* DEIS at 3-29 (omitting any discussion of the impacts of this change). This, in itself, requires serious consideration in a revised Draft EIS due to the potential loss of federal and public oversight and control over future actions by the transferee. Public involvement in future changes to operations is critical. Although the Draft EIS asserts that the transfer "does not involve construction, modification to facilities, or operational changes," DEIS at 2-3, there is, as yet, no guarantee that future operational changes will not take place. Thus, in a revised Draft EIS, the Bureau should consider alternatives and mitigation for the proposed action (in addition to or part of the alternatives proposed elsewhere in these comments) that include a process for continued public input and/or federal agency oversight into future operation, maintenance, and repair of the facilities post-transfer. Terms and conditions of transfer must be expressly spelled out in a plan of operations that is available for review in a revised Draft EIS.

8

8-24 Comment noted. See response to comment 8-27.

8-25 A discussion of the potential affects has been added to Section 3.6.3.2.3.

8-26 Comment noted. The EIS adequately addresses the significance of the proposed action. Additionally, as stated in the *Framework for the Transfer of Title for Bureau of Reclamation Projects*, dated August 7, 1995, reclamation originally constructed irrigation projects in the West at a time when there were no local communities and utilities. Much of the West is now urbanized and Reclamation owns and operates public utility facilities, which, if located in other parts of the country, would likely be owned, operated and funded by publicly regulated private corporations or local government agencies. The District has the financial resources to operate, repair and maintain the Division facilities, as they have been doing now and for the life of the Wellton-Mohawk Division of the Gila Project.

8-27 District contracts with Reclamation for the delivery of water, the amount of irrigable acreage within the District and supply of power are not considered in this proposed action. The District is obligated to continue to meet the needs of its members and is accountable to the public in this regard. The District has demonstrated its commitment and ability to manage the facilities of the Division for more than 50 years.

B. Threatened and Endangered Species

8-28 The Draft EIS fails to comply fully with the ESA in several ways. First, and most notably, it fails to fully address the possible impacts of the transfer and current Bureau operations on several federally listed threatened and endangered species. Second, the Draft EIS fails to

8-29 analyze or mitigate for the fact that the transfer would sever the federal nexus from the land and facilities proposed for transfer and thereby remove the lands from the applicability of several important ESA provisions.

Because the proposed transfer would be a federal agency action, several provisions of the ESA apply, including the requirement that the Bureau consult with the Fish and Wildlife Service (FWS) to prevent jeopardy to listed species and to carry out programs to conserve listed species. Section 7(a)(2) of the ESA provides:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat.

16 U.S.C. §1536(a)(2). In addition to §7(a)(2), ESA § 7(a)(1) requires that federal agencies "utilize their authorities . . . by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. §1536(a)(1).

For example, FWS has found that the proposed action "may affect" the Yuma clapper rail and BOR's Biological Resources Assessment concluded that cumulatively the "Yuma clapper rail population on Transfer lands and elsewhere in the Region appears to be declining, and

8-30 improved efforts to assess and monitor population and habitat status, and mitigate or restore its population and habitat may be warranted." DEIS at App. F. BOR must analyze the significance of the proposed action's impacts on endangered species, including cumulative impacts but has not. As a result, the Draft EIS also lacks the mitigation measures for the action's direct, indirect and cumulative impacts suggested by the Biological Resources Assessment. *See* DEIS at 3-29. Such measures must be included in a revised Draft EIS and stipulated to as part of a transfer.

Second, the Bureau asserts that, post-transfer, operation, maintenance and other activities

8-31 may no longer be subject to the Section 7 consultation requirements of the ESA. *See* DEIS at 3-29. In other words, as currently written, the Bureau believes that the proposed action in the Draft EIS would sever the federal nexus to the transferred facilities and the Bureau's § 7 obligation (as well as compliance with NEPA and other federal laws and policies) for future activities. BOR omits any discussion of the impacts of this change in the Draft EIS. This defect must be cured before issuing a Final EIS.

If the proposed transfer would erase the Bureau's authority (rendering most federal law

9

8-28 See response to comment 8-25

8-29 See response to comment 8-25

8-30 See response to comment 8-25

8-31 See response to comment 8-25

8-31 (cont')

provisions inapplicable) by severing the nexus of federal ownership in the property, this gaping hole in federal authority and control will have significant adverse impacts that must be analyzed,[1] and mitigated. Indeed, to be consistent with previous Departmental policy, the Bureau must lock-in provisions in the transfer that ensure that any future use of the land transferred will not adversely affect endangered or threatened species.

As an existing owner of the lands of the Wellton-Mohawk Division, the Bureau cannot delegate to non-federal entities its responsibility under ESA § 7(a)(2). As noted by Secretary Norton when she served as Associate Solicitor for the Division of Conservation and Wildlife, land transfers from Department of Interior agencies must include stipulations that prevent future adverse impacts to federally listed species. In a memo on Bureau of Land Management responsibilities under the ESA, Secretary Norton states:

> [With] land exchanges with states, while the land remains under BLM's control, the section 7(a)(2) responsibility to consult [with the U.S. Fish & Wildlife Service] is BLM's and cannot be delegated to the state to which the land will ultimately be transferred. To ensure that any future use of the land will not adversely affect endangered or threatened species, BLM, in consultation with FWS, should incorporate into the patent a set of stipulations for that purpose. BLM's statutory obligations would thereby be fulfilled, and there would be no need for delegation to the states of section 7 responsibilities.

Memo from Gale Norton, Associate Solicitor, to BLM Director (5/5/97) (emphasis added) (Attachment B). Similarly, proposed transfers from the Bureau to the District must include specific stipulations that ensure that future lands uses will not adversely affect federally listed species. It should be noted that the FWS agrees with this approach. *See* Appendix F, letter from Steven Spangle, FWS to Cynthia Hoeft, BOR (6/9/03) (suggesting that "the District continue to consider these species [Yuma clapper rail and southwestern willow flycatcher] in future operation and management of these lands").

These stipulations might take the form of ongoing federal and stakeholder involvement post-transfer and retention of ESA § 7 requirements when any changes are proposed in the operation of the facilities or if newly threatened or endangered species could be benefited by facility re-operation. Other mitigation proposals are outlined in greater detail above.

To fully assess the effects of the proposed action, the revised Draft EIS must analyze the effect of transfer on the loss of the federal government's authority to carry out programs to conserve listed species pursuant to ESA § 7. The preferred alternative to the proposed action should include a means to retain enough federal and public control to prevent jeopardy to currently listed species and a means to deal with species listed as threatened or endangered in the future.

---

[1] The degree to which an action impacts threatened and endangered species is a measure of its significance in the NEPA analysis. *See* 40 C.F.R. § 1508.27(b)(9).

C. Fish and Wildlife Coordination Act

The proposed transfer also must satisfy the requirements of the Fish and Wildlife Coordination Act (FWCA). 16 U.S.C. §661 *et seq*. The FWCA requires that "wildlife conservation shall receive equal consideration and be coordinated with" other features of water-resource projects. 16 U.S.C. §661.

8-32

To satisfy the FWCA, BOR must consult with the FWS and the appropriate state wildlife agency "with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof." 16 U.S.C. §662(a). FWCA also requires that "[r]ecommendations of the Secretary should be as specific as practicable with respect to features recommended for wildlife conservation and development . . . [and] shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages." 16 U.S.C. §662(a). FWCA requires that "adequate provision" be made for the use of water project facilities for wildlife purposes, consistent with the primary purposes of the project. 16 U.S.C. §663(a).

In sum, FWCA's consultation requirement establishes a safety net beneath ESA's §7 consultation requirement. ESA §7 requires federal agencies to consult with FWS to ensure that agency action does not jeopardize the continued existence of any federally endangered or threatened species. By way of supplementing ESA requirements, FWCA consultation addresses the potential action's effects on fish and wildlife that are of concern at the state level, regardless of whether they appear on federal lists.

The Draft EIS for the proposed transfer of land and irrigation facilities to WMIDD fails to comply with the FWCA. The State of Arizona apparently made only one contact with BOR. *See* Appendix F, letter from Sabra Schwartz to Michael Collins (3/21/02). In that letter, the state agency identified several special status species occurring in the project area. The letter also notes that the state agency wanted to evaluate impacts of project activities on wildlife and wildlife habitats and that the provision of this information does not substitute for the Department's review of the proposal. There is no record of any follow-up correspondence between the BOR and State. Such cursory "consultation" does not satisfy the spirit or the letter of the FWCA.

D. Additional Areas of Concern

Several additional concerns with the Draft EIS also must be noted.

1. Wellton-Mohawk Generating Facility EIS

The proposed transfer includes 120 acres of land upon which the District would work with a private entity to construct the proposed Wellton-Mohawk Generating Facility, described in the Draft EIS as a natural gas-fired combined cycle electric generating facility. DEIS at 1-4. The District would secure its role as an equity partner in this proposal by "contributing" use of the

11

8-32 The Fish and Wildlife Coordination Act (FWCA) applies when "waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened or the stream or other body of water otherwise controlled or modified" and therefore is not applicable to the proposed action since none of these actions would be conducted as part of the title transfer.

120 acres 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 (O&M) costs, post-transfer. It is unclear whether the District would be entitled to use any of the power generated by the plant for pumping its waters up the Gila River.

Despite the integral role that this proposed power plant would play in providing necessary funds for the District's post-transfer oversight of project lands and facilities, the BOR has decided to review the environmental impacts of the proposed generating under a separate NEPA document. *Id.* Despite this artificial bifurcation of the land transfer EIS from the power plant EIS the land transfer EIS must consider the cumulative impacts of the power plant EIS. *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").

8-33

Any EIS prepared for the transfer of Bureau lands 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 power plant. 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). The power plant is a functionally or economically-related "cumulative action," which must be considered in the same EIS as the land transfer. *See Fritiofson v. Alexander*, 772 F.2d 1225 (5th Cir. 1985) ("[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 revised Draft EIS should explain the BOR's rationale for subjecting the connected actions described above to separate NEPA review.

2. Compliance with all provisions of the MOA

All the provisions of the MOA must be completed prior to transfer. *See* Appendix A, letter from Eluid Martinez, Commissioner, to Frank Murkowski, Chairman of the U.S. Senate Committee on Energy and Natural Resources (7/20/00). Thus far, it is clear that many elements of the MOA have not been done. These should take place prior to a revised DEIS so the public may view and provide input.

8-34

Among these requirements (in addition to identifying and appraising lands for transfer or purchase, as discussed in greater length above) is that the District and the Bureau share (50-50) all expenses related to environmental compliance. It is unclear from the current Draft EIS, however, whether the District has paid for preparation of the Draft EIS, Biological Resources Assessment, and other elements of environmental review. An up-to-date accounting of cost-sharing, as well as elements of the MOA borne solely by the District or the Bureau, should be

12

8-33 The proposed Wellton-Mohawk Generating Facility was a separate and independent action, unconnected with the title transfer except by geographic location, hence functionally distinct, and which could proceed with or without the title transfer. Further, the Generating Facility project is no longer viable.

8-34 The Wellton-Mohawk Transfer Act, Pub. L. 106-221 and the MOA outline the requirement for cost sharing between the District and Reclamation and are included in Appendix A.

included in the revised Draft EIS.

8-35

3. Retention of Rights and Obligations by the Bureau

The revised Draft EIS, as well as the final Quitclaim Deed and transfer contract, should go further toward clarifying what part, if any, of the land, facilities, and project operations are proposed to be retained by the Bureau. Before any transfer or partial transfer takes place, the Bureau must retain the ability to comply with all federal laws in the future. In drafting a contract to transfer title, *see* DEIS at 2-3, the United States must clearly articulate federal and District ongoing obligations related to the project.

To what extent will the Bureau and the federal taxpayer remain liable for damage resulting from the operation of the transferred facilities? The Bureau's 1995 Framework document anticipates potential transferees are "willing and able to fulfill all legal obligations" and assume full liability "for all matters associated with ownership and operation of the transferred facilities." (Attachment C.) Does this mean that the WMIDD is fully and completely liable under Arizona law for all damage related to every aspect of the land and facilities proposed for transfer? The final EIS should consider whether the potential transferee has the financial resources to assume liability for possible flood/catastrophe scenarios.

4. The Ciénega de Santa Clara

Conservation and restoration of aquatic and wetland habitat inside the District and supported by the District (such as the Ciénega) is crucial to protecting the species and ecosystems found there. *See generally* E.P. Glenn et al., *Ciénega de Santa Clara: endangered wetland in the Colorado Delta*, 32 Natural Resources Journal 817 (1992); E.P. Glenn et al., *Water management impacts on the wetlands of the Colorado River delta, Mexico*, 10 Conservation Biology 1175 (1996); E. Glenn et al., *Ecology and conservation biology of the Colorado River delta, Mexico*, 49 Journal of Arid Environments 5 (2001); O. Hinojosa-Huerta et al., *Distribution and abundance of the Yuma clapper rail (Rallus longirostris yumanensis) in the Colorado River delta, Mexico*, 49 J. of Arid Environments 171 (2001); E. Mellink et al., *Notes on the nesting birds of the Ciénega de Santa Clara salt flat, northwestern Sonora, Mexico*, 27 Western Birds 202 (1996).

Today the Ciénega de Santa Clara is home to thousands of migratory and resident birds, is a critical link in the Pacific Flyway, and harbors several endangered species, including at least 70% of the world's population of the endangered Yuma clapper rail. In recognition of the Ciénega's central importance, Mexico has protected the wetland by including it within the borders of the Biosphere Reserve of the Upper Gulf of California and Colorado River Delta. The Ciénega is also included in the RAMSAR convention, and is internationally recognized as a wetland of great ecological significance. The Ciénega also represents an important economic and cultural resource for local communities in Mexico. Residents of the nearby community operate birding tours by canoe on the Ciénega, supplementing their income from an economy that would otherwise be based entirely on subsistence farming. La Ruta de Sonora, a tour operator based in

13

8-35 The transfer contract and quitclaim deed will outline the terms of the proposed title transfer. As stated in the purpose and need, the transfer of title will divest Reclamation of, and liability for the project facilities and appurtenant lands. The District is willing and able to meet the guidelines established in the 1995 Framework document, as follows:

Potential transferees must be competent to manage the project and be willing and able to fulfill all legal obligations associated with taking ownership of that project, including compliance with federal, state and tribal laws that apply to facilities in private ownership and assumption of full liability for all matters associated with ownership and operation of transferred facilities.

Tucson, also regularly sends commercial tours to the Ciénega.

As the largest remaining wetland in the Colorado River Delta, the Ciénega also functions as a critical component of the larger Delta ecosystems. Recent research has demonstrated that the Delta plays a critical ecological role in the Colorado River Basin, the Gulf of California, and indeed, throughout North America, providing crucial support to fisheries and the Sea of Cortez marine ecosystem, serving as an enormous species reservoir for the Colorado basin, and functioning as the cornerstone of a bird migration corridor that serves more than 75% of North American birds.

8-36 Loss of the District's agricultural return flows (ARFs) would have irreparable and devastating effects on the Ciénega, starving the marshlands of their water even as salinity increases beyond the salt-tolerance of the dominant vegetation. These effects are neither speculative nor uncertain, as the effects of the deprivation of water on the Ciénega have been well documented in the scientific literature. In one example, after just a temporary interruption in flows, the Ciénega rapidly lost between 60 and 70 percent of its wetland habitat. *See* S. Zengel & E. P. Glenn, *Presence of the endangered desert pupfish, (Cyprinodon macularius, Cyprinidontidae) in Ciénega de Santa Clara, Mexico, following an extensive marsh dry down*, 41 Southwestern Naturalist 73 (1996); S. Zengel et al., *Vegetation analysis and effects of drydown on Ciénega de Santa Clara, a remnant wetland in the Colorado River delta*, 4 Ecological Engineering 19 (1995).

RECOMMENDATIONS

The Bureau Must Substantially Revise and Re-issue the Draft EIS

Many outstanding issues for the proposed transfer remain.

8-37 The Draft EIS is inadequate. Many of its elements, discussed in detail above, fail to fully satisfy the requirements of NEPA, ESA, FWCA, and other federal law and policy considerations. The Bureau must complete substantial additional work prior to deciding whether to approve the proposed transfer of facilities. At a bare minimum, this will require a substantial revision in the substance and range of alternatives found in the Draft EIS. More specifics about a proposed plan of operation and management for the lands and facilities need to be developed and thoroughly reviewed by the Bureau and the public through a revised Draft EIS.

After closer review, the Bureau is likely to find the most prudent and legally defensible course of action to be the "no action" alternative. In many respects, retaining federal ownership of the lands and facilities proposed for transfer is the best and perhaps only way of protecting these valuable public resources. If the Bureau chooses to carry out the proposed transfer, it should be under a new alternative, one that incorporates the specific comments noted in detail above, and that is available for public review in a reissued Draft EIS.

8-38 **The Bureau Should Propose Mitigation and/or Provide a Process to Achieve Such Mitigation Through Continued Federal and Public Input Post-Transfer**

14

8-36 The proposed action does not include changes to ARFs from the District, nor does it affect Reclamation's national obligations and handling of drainage water in the Yuma-Transboundary area.

8-37 Comment noted.

8-38 (cont')

Retained U.S. ownership, as opposed to the proposed transfer to private ownership, would allow a higher level of control over land and operations to protect the environment, threatened and endangered species, wetlands, and river flows. Transfer out of federal ownership would erase most of these protections. Therefore, choosing the "no action" alternative may prove to be the best course of action.

In the event the "no action" alternative is rejected, any transfer that moves forward must compensate for the loss of these federal protections. New alternatives included in the final EIS should include mitigation measures, either through on-the-ground improvements to the affected environment or through continued federal and public involvement and oversight in the management of these valuable water conveyance facilities even after transfer takes place.

Thank you for accepting the above comments. We look forward to seeing our concerns addressed and implemented in a revised Draft EIS. Also, we would be willing to meet with the Bureau and WMIDD to craft a management plan that would support an improved alternative to the proposed action. If you have any questions or are interested in working together to develop such a management plan, please contact any of us.

Sincerely,

Kara Gillon
Water Counsel
Defenders of Wildlife
824 Gold SW
Albuquerque, NM 87102

Jennifer Pitt
Senior Resource Analyst
Environmental Defense
2334 N. Broadway
Boulder, CO 80304

Myra Wilensky
Western Natural Resource Center
National Wildlife Federation
3500 5th Avenue, Suite 101
San Diego, CA 92103

Michael Cohen
Senior Associate
Pacific Institute
948 North Street, Suite 7
Boulder, CO 80304

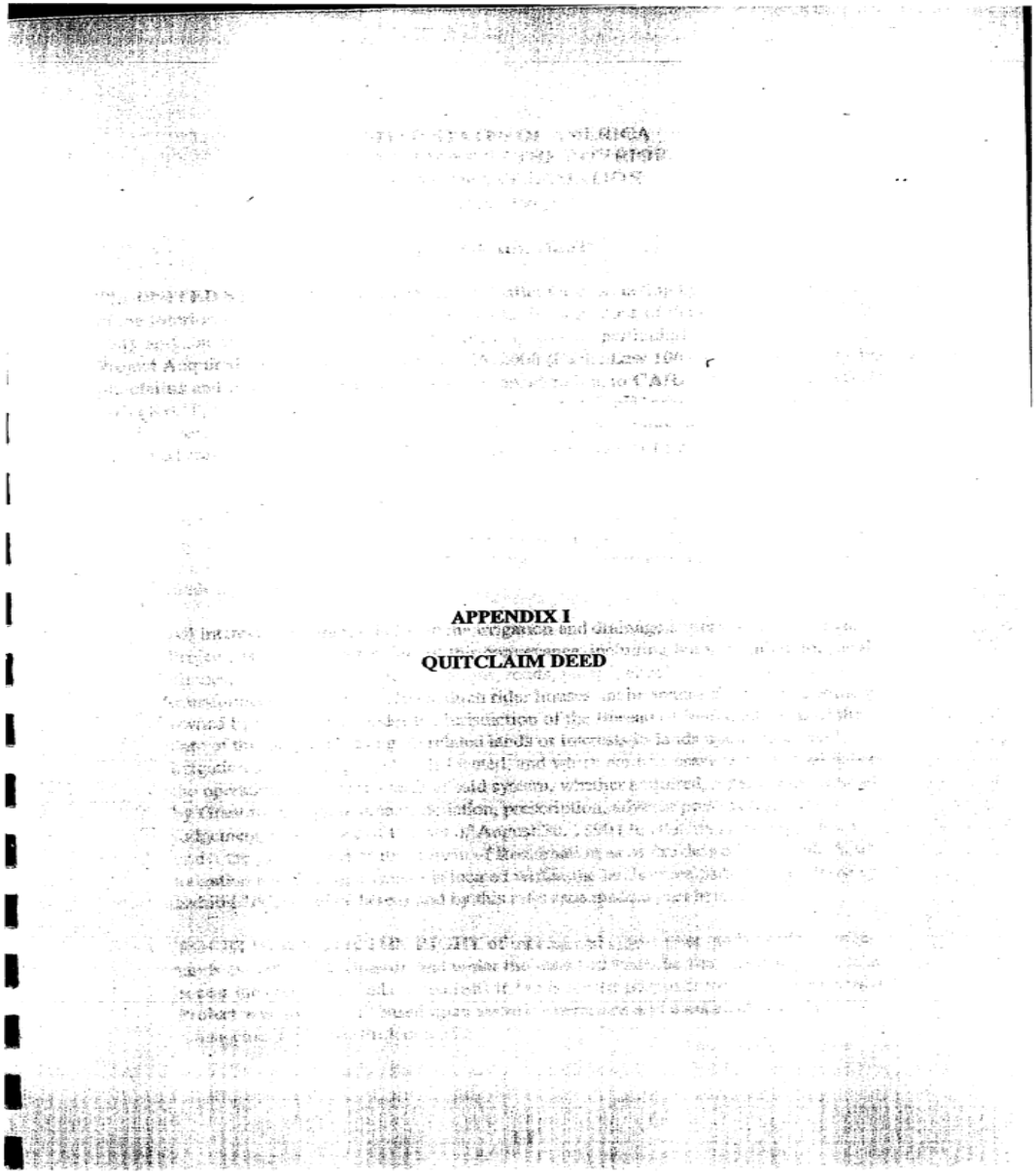
Steve Glazer
Colorado River Task Force, Chair
Sierra Club
Box 459
Crested Butte, CO 81224

Bart Miller
Water Program Director
Western Resource Advocates
2260 Baseline Road, Suite 200
Boulder, CO 80302

Cary Meister
Conservation Chair
Yuma Audubon Society
P.O. Box 6395
Yuma, AZ 85366-6395

15

8-38 Comment noted.



APPENDIX I

QUITCLAIM DEED

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
Carlsbad Project

QUITCLAIM DEED

The UNITED STATES OF AMERICA, hereinafter Grantor, acting by and through the Department of the Interior, Bureau of Reclamation, pursuant to the provisions of the Act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, particularly the Carlsbad Irrigation Project Acquired Land Transfer Act of June 26, 2000 (Public Law 106-220, 114 Stat. 347), hereby quitclaims and conveys, for good and valuable consideration, to **CARLSBAD IRRIGATION DISTRICT**, an irrigation district formed and duly organized under the laws of the State of New Mexico, hereinafter Grantee, all of its right, title and interest, without warranty, in and to the following described real property or interests in real property in the County of Eddy, State of New Mexico, to wit:

All lands covered in Section 2(b) of Public Law 106-220, including mineral rights, if any, which were acquired by the Grantor for the purposes of the Carlsbad Project, and as more particularly described in Exhibit "A", attached hereto and by this reference made a part hereof; and,

All interests the Grantor holds in the irrigation and drainage system of the Carlsbad Project, as it exists on the date of this conveyance, including but not limited to, canals, ditches, laterals, feeders, flumes, drains, roads, pumps, checks, headgates, sluiceways, transformers, transmission lines, ditch rider houses, maintenance shop and buildings, owned by Grantor and under the jurisdiction of the Bureau of Reclamation as of the date of this deed; including all related lands or interests in lands upon which said irrigation and drainage system is located, and which are necessary and reasonable for the operation and maintenance of said system, whether acquired, obtained or claimed by Grantor through purchase, donation, prescription, adverse possession, court judgement, or exercise of the Act of August 30, 1890 (26 Stat. 391), and which are under the jurisdiction of the Bureau of Reclamation as of the date of this deed. Said irrigation and drainage system is located within the lands more particularly described in Exhibit "B", attached hereto and by this reference made a part hereof.

TOGETHER WITH THE RIGHT of ingress and egress over lands or interests in lands owned by the Grantor, and under the jurisdiction of the Bureau of Reclamation, to access the conveyed lands or interests in lands for the purposes for which the Carlsbad Project was authorized, based upon historic operations and consistent with the management of other Project lands;

TOGETHER WITH THE RIGHTS AND OBLIGATIONS of Grantor, insofar as they relate to those lands conveyed herein, under that certain agreement between the United States and the Director, New Mexico Department of Game and Fish, dated July 28, 1994, (Contract Number 2-LM-40-00640), for the management of lands near Brantley Reservoir for fish and wildlife purposes, a copy of which is attached hereto as Exhibit "C" and by this reference made a part hereof; subject, however, to the exceptions provided in Sections 2(c)(3)(A) and 2(c)(3)(B) of Public Law 106-220; and

TOGETHER WITH THE RIGHTS AND OBLIGATIONS of Grantor, insofar as they relate to those lands conveyed herein, under that certain agreement between the United States and the New Mexico Department of Energy, Minerals, and Natural Resources, dated March 9, 1977 (Contract Number 7-07-57-X0888), for the management and operation of Brantley Lake State Park, a copy of which is attached hereto as Exhibit "D" and by this reference made a part hereof; subject, however, to the exceptions provided in Sections 2(c)(3)(A) and 2(c)(3)(B) of Public Law 106-220; and

TOGETHER WITH THE RIGHTS AND OBLIGATIONS of the Grantor for all mineral and grazing leases, licenses, and permits existing on the lands conveyed under Section 2(b) of Public Law 106-220 as described in Exhibit "A", including the right to any receipts from such leases, licenses and permits accruing after the date of this conveyance.

ALL OF THE ABOVE lands, interests in lands, and facilities are hereinafter collectively referred to as the "Property".

EXCEPTING AND RESERVING from this conveyance, unto Grantor, its heirs and assigns forever:

The surface estate (but not the mineral estate) of those lands located under the footprint of Brantley and Avalon Dams, together with Brantley and Avalon Dams with their gates, structures and appurtenant works as are presently in use on those dams, directly or indirectly for the operation and maintenance of these dams.

A perpetual easement to use those facilities which may be necessary for the conveyance of any water released from Brantley Dam or Avalon Dam for any Reclamation use.

All right, title and interest to those elements, as described in the 1996 National Register of Historic Places nomination form being: (1) McMillan Dam, (4) McMillan West Embankment, (5) McMillan East Embankment, (6) McMillan Railroad Dike, (7) McMillan Gate Keepers House, (8) McMillan Garage/boathouse, (9) Avalon Dam, (10) Avalon Spillway No. 1, (11)

Avalon Spillway No. 2, (12) Avalon Spillway No. 3, (13) Avalon Suspension Bridge, (14) Avalon Distribution System, (15) Avalon Gate Keeper's House, (16) Avalon garage, (17) Avalon warehouse, (18) Avalon guard house, (19) Avalon storage building; Together with an easement upon the Property as necessary to accommodate the physical location of these elements. Those numbers in parentheses reference the numbers on the 1996 National Register of Historic Place nomination form.

A perpetual right of ingress and egress on, over, and across the Property for authorized Reclamation purposes and National Historic Preservation Act purposes, including but not limited to operating, repairing, maintaining, replacing, or reconstructing the works and facilities of the Carlsbad Project and those elements on the 1996 National Register of Historic Places nomination form which are reserved by the Grantor and listed above.

A perpetual right, without liability, to flood, overflow, seep, store, impound, release upon, or otherwise affect with water those lands described in Exhibit "A".

A perpetual easement on, over, or across those portions of the Property described in Exhibit "A", which are used as mitigation for the effects of the Carlsbad Project on fish and wildlife pursuant to the Fish and Wildlife Coordination Act associated with the portion of the Carlsbad Project which was formerly known as the Brantley Project and are, as of the date of this conveyance, managed by the State of New Mexico through its Department of Game and Fish; said easement to be used for activities related to protecting and enhancing fish and wildlife and fish and wildlife habitat, including but not limited to, managing for wildlife benefits, establishing or removing fencing, and establishing and maintaining improvements. Under this perpetual easement, Grantor specifically reserves the right to enter into agreements to provide law enforcement and regulatory protection for the lands and associated habitat. In the exercise and enjoyment of the easement herein reserved, Grantor shall not unreasonably interfere with the ability of the Grantee to exercise its rights to the mineral estate beyond those restrictions and stipulations set forth in Exhibit "E".

A perpetual easement on, over, or across those portions of the Property described in Exhibit "A" for such existing reasonable public access as may be required to maintain public recreational and fish and wildlife uses in existence as of the date of this conveyance.

THIS CONVEYANCE DOES NOT TRANSFER nor include any water or water rights whatsoever.

THIS CONVEYANCE IS SUBJECT TO:

Oil, gas and other mineral rights heretofore reserved or of record by or in favor of third parties;

Permits, licenses, leases, rights-of-use, or rights-of-way outstanding in third parties on, over, or across the Property not heretofore granted;

The requirement of Section 2(c)(1) of Public Law 106-220 that the Property be managed and used for the authorized purposes of the Carlsbad Project, based on historic operations and consistent with the management of other adjacent project lands, including compliance with the stipulations established and in effect at the time of enactment of Public Law 106-220 for oil and gas drilling and operations, a copy of which is attached hereto as Exhibit "E", and by this reference made a part hereof;

NOTWITHSTANDING THE CONVEYANCES MADE HEREIN, nothing in this Deed shall be construed as including the quitclaim, abandonment, forfeiture, or relinquishment by the United States of its basic patent right reserved by the Act of August 30, 1890 (26 Stat. 391) or of any right-of-way exercised thereunder which is not specifically described in this Deed.

TO HAVE AND TO HOLD unto Grantee, and Grantee's successors and assigns, the Property, together with all the rights and appurtenances thereto in any wise belonging, forever.

THE GRANTEE, its successors and assigns shall be responsible for the protection, identification and preservation of cultural resources located on the Property as required by existing and future laws and regulations of the State of New Mexico. The Memorandum of Agreement attached as Exhibit "F" and by this reference made a part hereof, between the New Mexico State Historic Preservation Office, the Carlsbad Irrigation District, the Advisory Council on Historic Preservation and the Bureau of Reclamation entered into as part of the negotiation of the transfer shall serve as the terms and conditions for meeting these obligations. Nothing herein shall limit the extent or ability of the State of New Mexico to implement its laws and regulations with regard to the cultural resources herein transferred, either known or later identified.

NOTICE IS HEREBY GIVEN that:

(a) Acting pursuant to the requirements of 40 CFR Part 373, Grantor performed hazardous waste surveys of the lands and facilities herein conveyed. The lands and facilities conveyed herein to the Grantee are being conveyed in the same condition as existed on the date of the surveys. No remediation by Grantor on behalf of the Grantee has been or will be made because none is necessary.

The information contained in this notice is required under authority of regulations promulgated under Section 120(h) of the Comprehensive Environmental Response Liability, and Compensation Act (CERCLA), 42 United States Code (U.S.C.) Section 9620(h).

The United States has conducted a search of files at the Albuquerque Area Office of the Bureau of Reclamation, located in Albuquerque, New Mexico, to identify available information with respect to hazardous substances that were stored for one year or more, are known to have been released, or have been disposed of at the property. That search of available information produced no information about hazardous substances so stored, released, or disposed of.

(b) Grantee accepts these facilities, premises and appurtenances "as is."

(c) CERCLA Environmental Covenants and Stipulations:

In the event releases of hazardous materials are uncovered, the following shall apply:

1. Grantee stipulates that it would be a potentially responsible party should the release have occurred on the property during the Grantee's operation of the facilities under contract with the Grantor.

2. To the extent the United States is determined responsible, and to the extent allowed under the provisions of public law (P. L.) 106-220, Grantor warrants that any response or corrective action found to be necessary after the date of the transfer shall be conducted by the United States.

3. Grantee grants the United States access to the property in any case in which a response action or corrective action is found to be necessary by the United States after such date at such property, or access is necessary to carry out a response action or corrective action on adjoining property.

WITNESS the hand of said Grantor this _____ day of _____ , 2001.

UNITED STATES OF AMERICA

_____

Regional Director
Department of the Interior
Bureau of Reclamation
Upper Colorado Region
Salt Lake City, Utah,
Acting for the Secretary of the Interior of the United States

Regional Solicitors' Office Approved

_____

ACKNOWLEDGMENT

State of UTAH)
) ss.
County of Salt Lake)

On the ____ day of _____ , 2001, personally appeared before me _____ _____, known to me to be the Acting Regional Director of the Bureau of Reclamation, Upper Colorado Region, United States Department of the Interior, the signer of the above instrument, who duly acknowledged to me that he executed the same on behalf or THE UNITED STATES OF AMERICA pursuant to authority delegated to him.

_____

Notary Public in and for the State of Utah

(NOTARY SEAL)

ACCEPTANCE

The parties intend for the above Quitclaim Deed to satisfy the terms of Public Law 106-220. Grantee accepts this Quitclaim Deed on the terms and conditions stated herein.

CARLSBAD IRRIGATION DISTRICT

By: _____
L. A. JOHNSON, President

ATTEST:

By: _____ (DISTRICT SEAL)
TOM W. DAVIS, Secretary-Treasurer

ACKNOWLEDGMENT

STATE OF NEW MEXICO

COUNTY OF EDDY

On this _____ day of _____, 2001, before me, the undersigned officer, personally appeared L. A. JOHNSON and TOM W. DAVIS, to me known and known to be me to be the same persons whose names are subscribed to the foregoing acceptance, who being by me duly sworn did depose and say that they are the President and the Secretary-Treasurer, respectively, of the CARLSBAD IRRIGATION DISTRICT, that they are duly designated, empowered, and authorized by a resolution adopted by the Board of Directors of the CARLSBAD IRRIGATION DISTRICT, on _____, 2001, to execute the foregoing acceptance and sign their names thereto, and that they signed their names thereto and acknowledge that they executed the foregoing instrument for and on behalf of the CARLSBAD IRRIGATION DISTRICT for the purposes and uses therein described.

_____
Notary Public in and for the State of New Mexico

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

MAY 5

In Reply Refer To:
FWS.CW.0440

Memorandum

To: Director, Bureau of Land Management

From: Gale A. Norton
Associate Solicitor [Sgd.] Gale A. Norton
Conservation and Wildlife

Subject: BLM Responsibilities under the Endangered Species Act (ESA)

In response to the two questions raised in your memo of February 9, 1987, we have the following comments.

1. Section 5(a) of the ESA, 16 U.S.C. § 1534(a), directs the Secretary of the Interior to establish and implement a program to conserve fish, wildlife, and plants, including those that are endangered. To carry out that program, the Secretary is authorized to acquire lands, waters, and interests therein. Section 5(b), 16 U.S.C. § 1534(b), authorizes the use of funds made available under the Land and Water Conservation Fund Act (LWCFA) for such acquisitions.

The Secretary's authority under this section has been delegated to the Assistant Secretary for Fish and Wildlife and Parks (209 DM 6.1), thence to the Director, Fish and Wildlife Service (242 DM 1.1A). If BLM is desirous of obtaining authority to acquire lands for purposes of carrying out the Secretary's obligation to implement a conservation program for endangered and threatened species, BLM should seek a delegation of such authority from the Secretary, or pursuant to 209 DM 6.2, from the Assistant Secretary for Fish and Wildlife and Parks.

The authority of section 5 is not limited to any one particular agency of the Department. Rather, the authority is given to the Secretary who in turn may delegate it to his subordinates. In addition, the Assistant Secretary for Fish and Wildlife and Parks is authorized to redelegate some of the authorities delegated to him. See 209 DM 6.2. Whether the Secretary or the Assistant Secretary for Fish and Wildlife and Parks should delegate their ESA section 5 authority in a particular circumstance is a discretionary matter.

In addition, however, it should be noted that any lands so acquired by BLM would become part of the National Wildlife Refuge System and would be administered by the Fish and Wildlife Service. The National Wildlife Refuge System Administration Act (NWRSAA), 16 U.S.C. § 668dd(a)(1), consolidated all of the authorities relating to the various categories of areas administered by the Secretary for the conservation of fish and wildlife, and provided that those areas be administered by the Fish and Wildlife Service.

> [A]ll lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, games ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service.

Emphasis added. Because areas acquired by BLM under ESA section 5 would necessarily be "for the protection and conservation of fish and wildlife that are threatened with extinction", they would fall into the category of lands above enumerated, which are to be administered by the Secretary through the Fish and Wildlife Service.

2. BLM's statutory obligations under section 7 of the ESA, 16 U.S.C. § 1536, cannot be delegated to the states. Section 7 requires "[e]ach Federal agency" to take certain steps to ensure that agency actions are not likely to jeopardize the continued existence of endangered or threatened species or result in destruction or adverse modification of critical habitat.

The plain wording of section 7 clearly indicates that Congress intended to impose on federal agencies the above stated obligations. There is no provision for delegation of that responsibility.

We emphasize, however, that BLM's lack of authority to delegate its ESA section 7(a)(2) responsibilities to the states, does not impair its ability to transfer control of land to a state either by exchange or otherwise.

Thus, in your example of land exchanges with states, while the land remains under BLM's control, the section 7(a)(2) responsibility to consult is BLM's and cannot be delegated to the state to which the land will ultimately be transferred. To

ensure that any future use of the land will not adversely affect endangered or threatened species, BLM, in consultation with FWS, should incorporate into the patent a set of stipulations for that purpose. BLM's statutory obligations would thereby be fulfilled, and there would be no need for delegation to the states of section 7 responsibilities.

Once the land has been transferred, there is no federal agency involvement, and section 7 of the ESA is not operative. Thus, there is no need to delegate BLM's section 7(a)(2) responsibilities when the land is under state control.

Prior to transfer of the land, BLM cannot delegate to a state its statutory mandate under section 7(a)(2) of the ESA. A federal agency cannot delegate to a nonfederal entity a federal function that has been assigned to that agency by Congress. See, e.g., In re Murnane, et al., 39 Fed. 99 (S.D.N.Y 1889). For many years, even the President could not delegate to other executive branch officials functions that had been entrusted to him by law.1/ In 1950, Congress enacted a statute expressly authorizing the President to delegate to the head of any department or agency in the executive branch, or any official thereof who is required to be appointed with the advice and consent of the Senate, any function vested in the President or required to be performed only with approval or ratification of the President. 3 U.S.C. §§ 301-303. Even with the statute, there has still been litigation over whether a presidential delegation is lawful. Updegraff v. Talbott, 221 F.2d 342 (4th Cir. 1955); Sima v. U.S., 96 F.Supp. 932 (Ct. Cl. 1951).

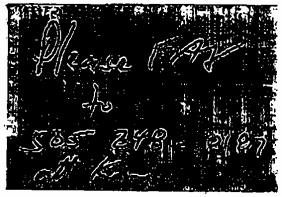
There has even been considerable litigation over the issue of delegation within an agency, i.e., from the agency head to some subordinate. By case law and statutes, however, such delegations have generally been permitted. Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111, (1947); EEOC v. Raymond Metal Products Co., 530 F.2d 590 (4th Cir. 1976); United States Health Club v. Major, 292 F.2d 665 (3d Cir. 1961), cert. denied, 368 U.S. 896 (1961).

With regard to the Department of the Interior, section 2 of Reorganization Plan No. 3 of 1950 authorizes the Secretary to delegate to "an other officer, or . . . . any agency or employee, of the Department of the Interior" any function of the Secretary. 64 Stat. 1262, 43 U.S.C. § 1451, Note. Section 403(e) of Reorganization Plan No. 3 of 1946, 60 Stat. 1100, 43 U.S.C. § 1, Note, established BLM, and provided that

---

1/ See, e.g., Runkle v. U.S., 122 U.S. 543 (1887); for a discussion of the cases, see 35 O.A.G 15 (1925) and 7 O.A.G. 453 (1855).

ATTACHMENT B



FRAMEWORK
FOR THE
TRANSFER OF TITLE TO
BUREAU OF RECLAMATION PROJECTS
AUGUST 7, 1995

The criteria and guidance outlined in this document applies to "uncomplicated" projects. "Uncomplicated" projects are generally defined in the Scope of Application section following. This guidance is intended to initiate the Bureau of Reclamation's title transfer process.

This guidance does not apply to the more complicated projects, e.g., large multi-purpose projects where there is no consensus among the project beneficiaries concerning the transfer, where more than one competent beneficiary has expressed an interest in acquiring title, or where the institutional and legal concerns cannot be readily resolved.

BACKGROUND:
The Reclamation program was founded in 1902. Its original mission was one of civil works construction to develop the water resources of the arid Western United States to promote the settlement and economic development of that region. The results of that work are well known in the hundreds of projects that were developed to store and deliver water. That substantial infrastructure made Reclamation the largest wholesale supplier of water in the United States, the sixth largest electric power generator, and the manager of 45 percent of the surface water in the Western United States. Many of these projects were constructed at a time when there were no local communities and utilities. Today much of the West is settled and is, in some respects, the most urbanized region of the country. Reclamation owns and operates public utility facilities which, if located in other parts of the country, would likely be owned, operated, and funded by publicly regulated private corporations or local government agencies. While it has been Reclamation's policy for decades to transfer operation and maintenance of projects to local entities where and when appropriate, interest in the actual transfer of title (with its attendant responsibilities) is now growing.

PURPOSE
As part of the second phase of the National Performance Review (REGO II), Reclamation is undertaking a program to transfer title of facilities that could be efficiently and effectively managed by non-Federal entities and that are not identified as having national importance. This effort is a recognition of

27

Reclamation's commitment to a Federal Government that works better and costs less. The transfer of title will divest Reclamation of the responsibility for the operation, maintenance, management, regulation of, and liability for the project. The transfer of title to a project will, in effect, sever Reclamation's ties with that project.[1]

SCOPE OF APPLICATION OF FRAMEWORK

It is the intent of Reclamation to transfer title and responsibility for certain projects or facilities, when and where appropriate, to qualifying non-Federal interests. Uncomplicated projects are projects or facilities where there are no competing interests, the facilities are not hydrologically integrated with other projects, the financial arrangements are relatively simple and easily defined, and the legal and institutional concerns[2] associated with a transfer can be readily addressed. In other words, after meeting the requirements set forth in the Criteria section below, projects will be selected for title transfer on the basis of the transfer being achievable and able to move forward quickly.

For purposes of this document and the transfer of title to the projects, the terms "beneficiary" and "stakeholder" are defined as follows: (a) **beneficiary** refers to (i) contractors and others who receive direct benefits under the authorized purposes for that project and (ii) non-Federal governmental entities in the project area; (b) **stakeholder** is a broader term and includes the beneficiaries, as well as those individuals, organizations, or other entities which receive indirect benefits from the project or may be particularly affected by any change from the status quo.

CRITERIA FOR TITLE TRANSFER

Following are the six major criteria that must be met before any project is transferred:

1) The Federal Treasury, and thereby the taxpayer's financial interest, must be protected
2) There must be compliance with all applicable State and Federal laws
3) Interstate compacts and agreements must be protected
4) The Secretary's Native American trust responsibilities must be met
5) Treaty obligations and international agreements must be fulfilled
6) The public aspects of the project must be protected

GENERAL GUIDANCE FOR DETERMINING PROJECTS ELIGIBLE FOR TRANSFER

Reclamation Area offices will review projects nominated by an interested transferee and will pursue negotiations regarding those projects where the issues associated with transfer are relatively easy to resolve. This could include projects with multiple purposes and numerous stakeholders, but only if it is clear that outstanding issues are resolved and that there is consensus among the stakeholders.

---

[1] Note: Reclamation recognizes that the complete severance of the relationship between Reclamation and the transferee may not be possible in all instances.

[2] Such concerns include, but are not limited to, unresolved Native American claims, endangered species considerations, international or interstate issues, absence of consensus among beneficiaries, significant disagreements raised by the stakeholders, a need to prepare an Environmental Impact Statement, and substantive objections from other governmental entities.

28

Reclamation will not initiate negotiations on those projects where title transfer will involve a protracted process to ensure that the six criteria listed above are met.

Generally, Reclamation will not pursue transfer of powerhouses and generating facilities where power is marketed by the Power Marketing Administrations or where such power is used for purposes not directly associated with project purposes.

GENERAL GUIDELINES APPLYING TO TRANSFERS

All transfers will be voluntary.

Reclamation's intent is to transfer projects to current project beneficiaries, including non-Federal governmental entities, or to entities approved by the current beneficiaries.

All transfers must have the consent of other project beneficiaries. If another beneficiary raises substantive objections which cannot be resolved, the project will remain in Federal ownership.

Reclamation will comply with National Environmental Policy Act and other applicable laws in all transfers. [3]

All transfers must ensure the United States' Native American trust responsibilities are satisfied. In addition, outstanding Native American claims that are directly pending before the Department and that would be directly affected by the proposed transfer will be resolved prior to transfer.

Reclamation officials will meet with representatives from all interested Federal and State agencies to consider their concerns early in the transfer process.

Potential transferees must be competent to manage the project and be willing and able to fulfill all legal obligations associated with taking ownership of that project, including compliance with Federal, State, and tribal laws that apply to facilities in private ownership and assumption of full liability for all matters associated with ownership and operation of the transferred facilities. Potential transferees must be able to demonstrate the technical capability to maintain project safety on a permanent basis and an ability to meet financial obligations associated with the project.

In general, it is Reclamation's expectation that, upon the transfer of title to a project, its jurisdiction over that project will be divested. Reclamation further recognizes that in some cases the complete divestiture of jurisdiction may not be attainable because the transferee still receives water supplied from a Reclamation facility, or only a portion of the project was transferred and the rest of the project remains in

---

[3] Reclamation is proceeding to develop a new Categorical Exclusion (CE) for those title transfers which would not significantly impact the environment and thus could be categorically excluded from a detailed NEPA review. Generally, Reclamation would anticipate such a CE would apply on projects involving transfer of title of Reclamation projects or facilities, in whole or in part, to entities who would operate and maintain the facilities or manage the lands so that there would be no significant changes in operation and maintenance or in land and water use in the reasonably foreseeable future. It is Reclamation's expectation that a CE would apply to a relatively small number of projects, i.e. some of the small single-purpose projects where no change in use is anticipated after the transfer.

29

Federal ownership, or there are other extenuating circumstances. The degree to which the Reclamation Reform Act of 1982 will apply following transfer will be negotiated on a case-by-case basis.

The financial interests of the Government and general taxpayers will be protected. Transferees must agree to fair and equitable terms based upon the factual circumstances associated with each project. (See attachment which describes the valuation of projects.) Transferees will be expected to pay upfront the estimated transaction costs, such as costs associated with compliance with the National Environmental Policy Act, real estate boundary surveys, and so forth. Reclamation will not provide new loans to finance transfers.

No transferred Federal asset will be considered for federal assistance for project operation, maintenance, and replacement or capital construction purposes following completion of the transfer.

Prior to the initiation of detailed discussions on title transfer, Reclamation and the potential transferees will execute an agreement covering the responsibilities of all parties during the negotiations.

A base value will be determined for each project as it becomes the subject of serious negotiations for transfer. (See attached guidance on valuation.) The negotiated price for the project may deviate up or down from the base value. It will be necessary for Reclamation and the interested non-Federal entity to document how the factual circumstances and equitable treatment considerations justify such adjustments. In addition, Reclamation may consider future uses on the transferred lands and waters in establishing a price.

Potentially affected State, local, and tribal governments, appropriate Federal agencies, and the public will be notified of the initiation of discussions to transfer title and will have (1) the opportunity to voice their views and suggest options for remedying any problems and (2) full access to relevant information, including proposals, analyses, and reports related to the proposed transfer. The title transfer process will be carried out in an open and public manner.

Once Reclamation has negotiated an agreement with a transferee, Reclamation will seek legislation specifically authorizing the negotiated terms of the transfer of each project or feature.

--This page left intentionally blank--