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February 19, 2009

The Honorable Harry S. Reid
Majority Leader
United States Senate

Subject: *Bureau of Reclamation's Legal Obligation to Dredge Laughlin Lagoon*

Dear Senator Reid:

This letter responds to your request for GAO's opinion regarding whether the Department of the Interior's Bureau of Reclamation (BoR) has a legal obligation to maintain the channels in Laughlin Lagoon that provide access to the Colorado River for boat traffic. Laughlin Lagoon was created in the late 1960s as a result of BoR's construction of a so-called training structure on the Colorado River in present-day Laughlin, Nevada, primarily to improve navigation along the river. The town of Laughlin, landowners, and others believe BoR is responsible for maintaining the lagoon in a condition that permits boat access to the river. BoR disagrees.

Based on the available information and as detailed below, we conclude that BoR does not have a legal obligation to maintain the channels in Laughlin Lagoon that provide river access for boats. Neither a federal permit authorizing one-time BoR dredging in 1999-2000, nor any statutory or other legal requirements, impose a duty on BoR to maintain the navigability of Laughlin Lagoon's access channels.¹

¹ Consistent with our regular practice in preparing legal opinions, see GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at <http://www.gao.gov/legal/resources.html>, we obtained BoR's legal views on whether it is required to maintain Laughlin Lagoon's access channels. Its position is set forth in an internal September 3, 2008, legal memorandum ("September 2008 BoR Memorandum"), which BoR provided to us. We also met with BoR counsel and other officials knowledgeable about the agency's legal position, and we reviewed relevant BoR documents dating from the 1960s to the present day. In addition to obtaining BoR's views, we reviewed U.S. Army Corps of Engineers and U.S. Fish and Wildlife documents concerning BoR's 1999-2000 dredging of the lagoon and met with U.S. Army Corps of Engineers and U.S. Fish and Wildlife officials, the Laughlin Town Manager, a Laughlin landowner, and the Clark County, Nevada, Department of Public Works.

BACKGROUND

I. Construction of the Training Structure: 1950s-1970s

In the early 1950s, BoR determined that the Colorado River was carrying millions of tons of sediment from the upper Mohave Valley in Arizona downstream to Nevada and that the sediment was degrading the river's channel. To clear the channel, eliminate sediment-producing areas, and salvage water, BoR decided to dredge the river in and around an area in Nevada known as Big Bend—a large “S” curve in the river about 8 miles below Davis Dam and at the present location of Laughlin, then a small community supporting three casinos. The “channelization project” in the Big Bend area, which began in the 1950s and ended in 1960, included the construction of four jetties in the Big Bend area of the river to influence the current in order to protect the outside bank of the Bend, define a definite river channel, and prevent the channel from shifting. Enclosure I depicts the Big Bend area of the Colorado River.

BoR carried out the channelization project pursuant to the Colorado River Front Work and Levee System Act (CRFWLSA),² which authorizes appropriations “for the purpose of controlling the floods, improving navigation, and regulating the flow of the Colorado River.” Act of June 28, 1946, 60 Stat. 338. Specifically, the act authorizes appropriations for, among other things, “(a) operating and maintaining the Colorado River front work and levee system in Arizona, Nevada, and California; (b) constructing, improving, extending, operating, and maintaining protection and drainage works and systems along the Colorado River; [and] (c) controlling [the] river, and improving, modifying, straightening, and rectifying the channel thereof.”³ *Id.*

In 1966, BoR noticed that an upstream island was diverting water directly into the base of one of the jetties. BoR also had received numerous complaints about difficulties navigating the Big Bend. In 1968, to protect the jetty and improve navigation on the river by confining its flow, BoR decided to construct a training structure in the Big Bend upstream of the jetties. According to BoR, training structures are low dikes constructed within the river channel to confine the flow to a well defined and narrow channel. As with the channelization project, BoR built this structure pursuant to CRFWLSA. Construction of the training structure resulted in the creation of a backwater, or lagoon, behind it that would eventually be known as Laughlin Lagoon.

Landowners and others we interviewed told us that either before or during construction of the training structure, BoR promised landowners that it would

² Act of Mar. 3, 1925, 43 Stat. 1186, 1198, *amended by* Act of Jan. 21, 1927, 44 Stat. 1010, 1021; Act of July 1, 1940, 54 Stat. 708; Act of Apr. 1, 1944, 58 Stat. 150, 157; Act of June 28, 1946, 60 Stat. 338; Act of May 1, 1958, 72 Stat. 101.

³ Appropriations are made to carry out authorizing laws. GAO, *Principles of Federal Appropriations Law*, vol. 1, 3rd ed., GAO-04-261SP (Washington, D.C.: Jan. 2004), at 2-43.

maintain the lagoon.⁴ Although the BoR documents we reviewed reveal landowners' concerns about the recreational and aesthetic quality of the lagoon, none memorializes nor mentions a commitment by BoR to maintain the lagoon.⁵ The documents state only that BoR would provide "controlled access to the river through the structure."⁶

Shortly after construction of the training structure in 1969, BoR recognized it would eventually need to make some modifications to aid water circulation. In 1998, BoR repaired one culvert, a drain under a levee, and installed three additional culverts. Current residents and landowners told us that, apart from these modifications, BoR never maintained the training structure or lagoon prior to 1999.

II. BoR's Dredging of the Lagoon: 1999-2000

Laughlin had a development boom beginning in the mid-1980s, with a surge of casino construction that continued through the late-1980s. According to one landowner, sediment accumulation in the lagoon became a problem in the mid- to late-1980s, although it did not interfere with navigation. Landowners told us that by the mid-1990s, however, sediment accumulation in the lagoon impeded navigation and that overgrowth on the training structure had blocked their river views. In response to the landowners' concerns about the lack of maintenance, the Senate Appropriations Committee, in its report accompanying the Senate version of BoR's fiscal year 1999 appropriation, directed BoR "to clean up and dredge the Laughlin Lagoon along the Colorado River in Nevada." S. REP. NO. 105-206, at 88 (1998). The report stated that the Senate Committee on Appropriations "has been informed that the BoR has acknowledged its obligation to maintain and correct deficiencies caused by work previously undertaken by the Bureau," but provided no further information about BoR's purported acknowledgment or obligation. *Id.* However, in a memorandum to persons concerned about the project, BoR stated that "as long as a public purpose is served, Reclamation has sufficient authority" to undertake maintenance work to improve circulation and reasonable access to the Lagoon if all parties agree to participate and an appropriation is received. We note that this is an acknowledgment of BoR's statutory authority, not its legal obligation, to maintain the access channels.

⁴ The landowners' statements appear to be informed by a study of Laughlin Lagoon's development that interested persons, including landowners, commissioned in 1997 (the study is referred to colloquially as the Ladd study). This study consists of a four-page summary of selected BoR documents from the 1950s-1970s relating to Laughlin Lagoon and the documents themselves. We found that the four-page summary misrepresented and overstated the documents' contents.

⁵ BoR documents do note that the construction of the training structure could create a sheltered area for swimming beaches and marinas and that BoR found the private or commercial use of a backwater "acceptable as long as it was conducted in such a manner as not to undermine the training structure." BoR's documents also note that the training structure would probably enhance the value of adjacent lands.

⁶ As originally designed, the training structure had only "a natural drainage opening" at its southern end. The training structure as built reaches the shore at both ends but has an opening in the middle that allows river access.

Because Laughlin Lagoon is deemed to be a “navigable water of the United States,” BoR had to obtain a River and Harbors Act section 10 permit, 33 U.S.C. § 403, and a Clean Water Act section 404 permit, 33 U.S.C. § 1344(a), from the United States Army Corps of Engineers (Corps) before it could commence dredging. The section 10 permit was necessary because the Secretary of the Army must authorize excavation of any navigable water of the United States. 33 U.S.C. § 403. The section 404 permit was necessary because the discharge of dredge or fill material into a navigable water without a permit is generally prohibited. 33 U.S.C. § 1344(a). BoR’s permit application characterized the proposed dredging as a “maintenance action” designed to maintain the established historic conditions and uses of Laughlin Lagoon.⁷ Similarly, in supporting documents, BoR stated that under CRFWLSA, it was “mandated to maintain facilities constructed to maintain flow conditions” and “obligated to provide and maintain the historic Colorado River access for property owners located on the Nevada bankline of the lagoon.”⁸

Consistent with its customary practice, the Corps issued the section 10 and section 404 permits as a single permit. According to the Corps, the permit’s main focus was improvement of water flow and, as discussed below, creation of habitat for the endangered species in the lagoon. The permit authorized BoR to dredge the access channel along the lagoon’s shoreline and the other channel from the shoreline to the access opening in the training structure as well as to excavate a channel on the south side of the lagoon.

As depicted in enclosure II to this opinion, the dredged channels are perpendicular to each other and intersect at the mouth of an unnamed wash (a gully that is ordinarily dry but occasionally fills with running water), which deposits runoff from upland areas and sediment from the shoreline into the lagoon. According to the internal September 3, 2008, legal memorandum, BoR originally sought to install three additional culverts in the training structure and to remove sediment and rock from the access opening. September 2008 BoR Memorandum at 4. The Corps told us that BoR added dredging of the access channels to the project in response to resource agencies’ concerns about the need to protect endangered and threatened species in the lagoon and landowners’ complaints that sediment accumulation prevented boats from reaching the access opening.

In addition to dredging, the permit authorized BoR to deposit the dredged material in three areas on shore and, in order to create island habitats, within the lagoon itself. The areas were: (1) several acres along the northern shoreline of the lagoon, where a marina was constructed in 2004 and where the unnamed wash is located; (2) several

⁷ We address the permit application and supporting documents’ acknowledgment of BoR’s obligation to maintain the lagoon in footnote 19.

⁸ The September 2008 BoR Memorandum explains that “it is not entirely clear what is meant by the term ‘obligated,’ and whether this statement refers to a legal obligation or to one based on administrative policy. The only reference to a legal authority is to CRFWLSA.” We received no other explanation of these documents or the official position BoR held in 1998-2000 regarding its maintenance obligations.

acres at the western end of the lagoon; and (3) approximately 18 acres west of the lagoon and a channelized wash.⁹

The permit contained several relevant general and special conditions. General condition 1 authorized work on the project until December 31, 2002. General condition 2 required BoR to “maintain the activity authorized by this permit in good condition” and in conformance with its terms and conditions. Special condition 1 required BoR to construct mitigation wetland habitat.¹⁰ Special condition 8 required BoR to perform mitigation work if the habitat islands in the lagoon failed to meet their success criteria or goals. The permit contained no general or special conditions specifically requiring or relating to maintenance dredging of the lagoon for the purpose of maintaining access to the river. According to the Corps, under its regulations if a project proponent were required to conduct maintenance dredging, the permit would include a special condition detailing the requirement.¹¹ Moreover, when a permit requires maintenance dredging, other special conditions, such as for the state certification required by section 401 of the Clean Water Act, are included in the permit.¹²

Because three endangered or threatened species—the razorback sucker, Yuma clapper rail, and southern willow flycatcher—inhabit the lagoon, BoR sought Fish and Wildlife Service’s (FWS) concurrence with a finding that the dredging project is “Not Likely to Adversely Affect” (“NLAA”) these species or their critical habitat, as

⁹ There are two significant washes in the vicinity of Laughlin Lagoon. The first is unchannelized and located within the dredge spoils site along the northern shoreline at the intersection of the dredged access channels. This wash, known as the “unnamed wash,” empties into the lagoon and is the source of sediment currently accumulating in the lagoon, as described below. The second is a wash that was created during upstream development in the 1980s to divert runoff away from the developed areas. At the time, the mouth of the wash emptied into Laughlin Lagoon. In the late 1980s, a major flood breached this wash and inundated a neighborhood. As a result, Clark County created a special improvement district to fund a regional flood control project that included channelizing the wash and re-routing it so that its mouth emptied into the Colorado River instead of Laughlin Lagoon. (The county creates specialized improvement districts to fund construction and maintenance of projects through assessments of the properties which benefit from them.) Because this channelized wash now empties into the river and not the lagoon, it is not a current source of sediment in the lagoon. We refer to this wash as the “channelized wash.” Both these washes are depicted in enclosure II.

¹⁰ Under Corps regulations and guidance, a section 404 permittee is expected to avoid deliberate discharge of fill materials into wetlands or other federally regulated waters, and then to minimize discharges that cannot be avoided. If such discharges are unavoidable, the Corps can require mitigation to compensate for the loss and/or degradation of wetlands from permitted activities as a condition of issuing the permit. GAO, *Wetlands Protection: Corps of Engineers Does not Have an Effective Oversight Approach to Ensure that Compensatory Mitigation is Occurring*, GAO-05-898 (Washington, D.C.: Sept. 2005), at 1.

¹¹ See 33 C.F.R. § 325.6(e).

¹² Under section 401, an applicant for a federal permit to carry out an activity that may result in any discharge into the navigable waters must provide a certification from the relevant state that the discharge will comply with applicable Clean Water Act provisions. 33 U.S.C. § 1341(a).

required by the Endangered Species Act (ESA).¹³ After reviewing additional information about the project, FWS concurred with the NLAA finding for the Yuma clapper rail and southern willow flycatcher. BoR and FWS then entered into formal consultations about the razorback sucker, which resulted in FWS issuing a biological opinion (BiOp) concluding that BoR's dredging project was not likely to jeopardize the continued existence of the species. The BiOp states that the dredging project was based on BoR commitments made at the time of the training structure's construction and BoR's responsibility to provide river access for the landowners under CRFWLSA. The BiOp includes several "reasonable and prudent measures" that BoR had to implement in order to comply with the ESA. These measures included completing dredging by March 1, 2000, or revising the work schedule in coordination with FWS if that deadline was not met.¹⁴ The BiOp does not discuss continued or maintenance dredging.

Prior to dredging, BoR also had to comply with the National Environmental Policy Act of 1969 (NEPA). NEPA requires federal agencies to evaluate the likely environmental effects of their activities using an environmental assessment (EA) or, if the activity likely would significantly affect the environment, a more detailed environmental impact statement (EIS). *See* 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.9, 1508.11. If the agency determines that the activity falls within a category of activities previously determined to have no significant environmental impact—called a categorical exclusion—then the agency generally need not prepare an EA or EIS. *See* 40 C.F.R. § 1508.4. BoR found the dredging to be categorically excluded from NEPA because it was "maintenance, rehabilitation, and replacement of existing facilities which may involve a minor change in size, location and/or operation."¹⁵ Accordingly, BoR did not prepare an EA or EIS for the project.

BoR conducted the dredging project between September 1999 and June 2000. In accordance with its permit, BoR used some of the dredged material to create island habitats and placed some on the northern side of the lagoon where the unnamed wash and present day marina are located (depicted as dredged spoils site #1 in enclosure II) as well as on the western side of the lagoon (depicted as dredged spoils site #2 in enclosure II).

¹³ Under the ESA, the FWS is responsible for protecting terrestrial, or land-dwelling, and freshwater animal and plant species. *See* 16 U.S.C. § 1533(a)(2); Reorganization Plan No. 4 of 1970, 88 Stat. 2090. The act prohibits, without the appropriate exemption, the taking of any threatened or endangered species. 16 U.S.C. § 1538(a)(1)(B). When a federal agency determines that an activity it intends to authorize, fund, or carry out may affect a listed species, the agency may initiate a formal consultation with FWS. *See* 16 U.S.C. § 1536(a)(2)-(4). At the end of this process, FWS issues a "biological opinion" evaluating whether the activity is likely to jeopardize the species' continued existence or adversely modify its designated critical habitat and what actions, if any, are required to mitigate that impact. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h). Should the activity likely result in the incidental taking of listed species, the biological opinion must provide reasonable and prudent measures designed to minimize the activity's impact on the species. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

¹⁴ When BoR realized that dredging would not be complete by March 1, it sought and obtained an addendum to the BiOp in accordance with this "reasonable and prudent measure." The addendum imposed additional measures on BoR but these did not include continued or maintenance dredging.

¹⁵ Department of the Interior Departmental Manual, 516 DM 14.5.D(1).

III. Return of Sedimentation: 2002-Present

According to area residents, sediment began filling the lagoon again in 2002-2003. Some believe that development on a steep hillside above the lagoon facilitated runoff flowing into the unnamed wash. During heavy rains in 2002-2003, sediment, including some of the deposited dredging material, flowed through the unnamed wash and into the lagoon. In 2003, when a private landowner built a marina, west of the unnamed wash and within the dredged material deposition site, he dredged and removed some of this sediment. However, in 2005 heavy rains again brought a large load of sediment down and through the unnamed wash into the lagoon.

In addition to this unnamed wash, Clark County Department of Public Works has identified two other major sources of sediment in the lagoon. The first is runoff from a large subdivision upland of the lagoon. The second is the Hiko Springs Wash that empties into the lagoon.¹⁶ The county maintains that the Hiko Springs Wash's concrete lining and dissipator minimize the amount of sediment it carries into the lagoon.¹⁷ A 2005 BoR survey of the lagoon found sediment accumulation only at the mouth of the unnamed wash and 3,000 feet east of the access opening in the training structure. The county also believes the unnamed wash is the major area of concern for siltation.

In 2006, at the request of a landowner, the Corps evaluated BoR's compliance with its permit for the 1999-2000 dredging project. The evaluation revealed three compliance problems, all of which BoR has corrected. First, the evaluation stated that a gravel bar, caused by eddies, near the access opening in the training structure was obstructing navigation. The Corps concluded that this violated the section 10 permit. Second, the training structure's culverts were malfunctioning. The Corps concluded that CRFWLSA and the Corps permit required BoR to maintain the training structure in good condition. Third, a sand bar was impeding the flow of sediment out of the lagoon and potentially creating a habitat problem. This problem would have violated the permit's special conditions regarding habitat. The Corps also found that the dredged material deposited on the northern shore of the lagoon had come down through the unnamed wash and was the source of the sedimentation in the lagoon.

Sediment accumulation in the lagoon remains a problem that has the potential to continue in the future. However, BoR says that the sediment is not a threat to the endangered or threatened species in the lagoon. According to an April 2008 BoR survey of the lagoon, two areas, including the area in front of the unnamed wash's mouth, have notable sediment accumulation.¹⁸ According to the Clark County

¹⁶ Clark County, Nevada, created a special improvement district (SID) to line this wash with concrete and install a sediment deposition basin.

¹⁷ A dissipator is a device constructed in a waterway to reduce the kinetic energy of fast flowing water. Expert Glossary, <http://www.expertglossary.com/water/definition/energy-dissipator> (last visited Feb. 12, 2009).

¹⁸ The other area with sediment accumulation is along the marina's beach. According to the section 404 and section 10 permit, the beach is located near a dredged spoils deposition area. While the

Department of Public Works, sediment could continue coming down the unnamed wash, in part because not all of the dredged material placed along the northern shore of the lagoon has slid into the lagoon.

As a result of the increased sediment accumulation in the lagoon, some landowners and the town of Laughlin once again sought BoR's assistance in remedying the problem because, they argue, BoR is responsible for maintaining the lagoon, including the dredged access channels. They trace BoR's responsibility back to its construction of the training structure that created the lagoon. Some believe that responsibility for maintenance was inherent in the structure's construction; others believe that BoR explicitly committed to maintaining the lagoon during the planning or construction of the structure. Further, they believe that BoR incurred an obligation to maintain the lagoon and channels for boat traffic by dredging the lagoon in 1999-2000. Some believe BoR is obligated because it makes little sense to improve the lagoon once and not maintain it in the future; others believe that BoR is explicitly required to maintain the lagoon and the dredged access channels under the terms of the permit issued for the 1999-2000 dredging.

In the September 2008 BoR Memorandum, BoR concluded that the agency had the authority to dredge the lagoon but did not have a legal obligation to do so for the purpose of providing landowners with river access for private or commercial use. Specifically, BoR determined that construction of the training structure did not obligate it to maintain the lagoon and that the exercise of its authority to dredge in 1999-2000, including the permit issued for that project, did not create such an obligation. September 2008 BoR Memorandum, at 10.

ANALYSIS

A legal obligation for BoR to dredge the lagoon to ensure river access for boat traffic could arise in three ways: (1) if the Corps permit for the 1999-2000 dredging requires maintenance dredging; (2) if the federal government has a general duty to maintain navigable waters of the United States; or (3) if BoR has a specific legal duty to maintain the lagoon. We address each of these issues in turn.

I. Section 10 and Section 404 Permit for the 1999-2000 Dredging

The 1999-2000 Corps dredging permit does not authorize or require BoR to conduct future maintenance dredging to provide navigational access to the river from the lagoon's shoreline. Such maintenance is not specifically provided for under the section 404 and section 10 permit and is not necessary for compliance with any of the permit's general or special conditions. While some of these conditions could necessitate some limited maintenance dredging, this dredging would not be for the purpose of providing river access for boat traffic.

sediment might be from the dredged material falling back into the lagoon, siltation in this area has not been identified as an impediment to navigation.

BoR's application for a Corps section 404 and section 10 permit was for a one-time dredging project and did not request authorization to conduct future maintenance dredging.¹⁹ Moreover, the permit's lack of the special condition required by Corps regulations for maintenance dredging, and other related special conditions, demonstrates that the permit does not authorize maintenance dredging. Without such authorization, the permit does not authorize maintenance dredging unless it is necessary for compliance with the permit's general and special conditions. *See* 33 C.F.R. § 325.6(e). Accordingly, the Corps issued a permit that authorizes a one-time dredging project through December 31, 2002, but not continuing maintenance dredging.²⁰

As a result, the permit only authorizes maintenance dredging that is necessary for compliance with the permit's general and special conditions. Although BoR and the Corps have disagreed in the past about the scope of the permit's general and special conditions, today the two agencies agree that BoR must: (1) maintain the training structure itself;²¹ (2) maintain the access opening in the training structure; (3)

¹⁹ Some BoR documents suggest the agency may have believed it needed to carry out the dredging project because of a pre-existing legal obligation to provide navigational access to shoreline owners. As noted above, documents supporting the section 404 and 10 permit application state that the project is a "maintenance action" and that BoR was "obligated to provide and maintain" river access. Further, as explained earlier, BoR's consultation request to FWS stated that BoR believed it had a responsibility to provide river access for the landowners under CRFWLSA. Finally, as pointed out above, BoR determined that the dredging project was categorically excluded under NEPA because it was a maintenance action the agency was required to conduct. None of these statements contained any legal rationale for the asserted requirement.

However, three actions indicate that BoR did not believe it had a pre-existing obligation to maintain the backwater. First, the Corps issued an individual permit. Under Corps regulations, all applications for individual permits are reviewed for possible eligibility under a general permit. 33 C.F.R. § 330.1(f). General permits are issued for activities that are substantially similar in nature and cause only minimal individual and cumulative environmental impacts. 33 C.F.R. § 322.2(f). According to the Corps, if BoR had had an obligation to maintain the lagoon, such maintenance probably would have been covered in a general or nationwide permit, meaning that BoR would not have needed to obtain a separate individual permit for every maintenance activity. Second, BoR sought a formal consultation with FWS and a BiOp for the dredging project. FWS's Final Biological Opinion on Lower Colorado River Operations and Maintenance would probably have covered the dredging project if it had been obligatory maintenance. Third, BoR's project as originally proposed did not include dredging of the access channels.

Notwithstanding the inconsistencies these documents present, BoR applied for and received a permit to conduct one dredging project, not a permit to conduct future maintenance. Moreover, as discussed below, the documents indicating that BoR had a legal obligation to maintain the lagoon cannot themselves create a legal obligation where none previously existed.

²⁰ The BiOp issued for the dredging project similarly did not cover future maintenance dredging. The original BiOp was based on completion of dredging before March 1, 2000, and, as a "reasonable and prudent measure," required BoR to coordinate a revised work schedule with FWS if it did not meet this deadline. This "reasonable and prudent measure" demonstrates the BiOp's temporary scope, not future maintenance dredging.

²¹ Under the Corps permit's general condition 2, as well as CRFWLSA, BoR must maintain the training structure itself. The Corps told us that its regulations require inclusion of general condition 2 in all section 404 permits to prevent the disarray of a structure that could become a hazard. *See* 33 C.F.R. Part 325, App. A. According to the Corps, the only structures at issue in this permit were the inflow and outflow pipes BoR installed in the training structure. BoR has failed to maintain the training

maintain wildlife habitat in the lagoon; and (4) must address certain obstructions to navigation. Compliance with these requirements might require BoR to dredge the lagoon, if, for example, sediment obstructed the access opening or threatened wildlife habitat, but it would not require dredging of the access channels for boat traffic. Maintenance of wildlife habitat also might require dredging—or excavation of flow improvement channels as occurred in 2006—but BoR told us that the sediment in the lagoon is not currently threatening any listed species' habitat. BoR's obligation to address obstructions to navigation under the section 10 permit, like its 2006 removal of material from the gravel bar caused by eddies at the access opening, could entail dredging of access channels. However, the requirement only applies to obstructions of the access opening or obstructions caused by BoR. According to the Corps, BoR could not be held responsible for the sediment accumulation in the lagoon even if it obstructs navigation because BoR did not cause it. The Corps believes this sediment is the result of runoff coming down the unnamed wash. In any event, BoR's maintenance requirements that could entail dredging for these limited purposes is not tantamount to a separate obligation to dredge to maintain the access channels.

II. General Legal Duty to Maintain Navigable Waters of the United States

The courts that have addressed the issue have uniformly held that the United States has no general duty to maintain navigability. While Congress has the general power to regulate navigable waterways in interstate or foreign commerce under the Commerce Clause,²² “this grant of power certainly is not an assumption of the duty to make all interstate waterways navigable.” *Kommanvittselskapet Harwi v. United States*, 305 F.Supp. 882, 889 (E.D. Pa. 1969), *aff'd on other grounds*, 467 F.2d 456 (3rd Cir. 1970). “To require such a duty would in effect make the Government the guarantor or insurer of navigability at all times.” *Canadian Pacific (Bermuda) Ltd v. United States*, 534 F.2d 1165, 1170 (5th Cir. 1976).

In *Kommanvittselskapet*, shipowners alleged that the United States' failure to regularly survey and dredge the Delaware River caused their ship to ground on a shoal, or sandbank. At the time of the grounding, the Corps was in the process of dredging a new, deeper channel in the river for boat traffic and was not maintaining the older channel that the ship utilized. The court held that the United States was not liable for the accident because, in part, no statute required the Corps or any other federal agency to survey and maintain the Delaware River channel. Similarly, in *Canadian Pacific*, a boat owner alleged that the Corps's failure to maintain the St. Johns River caused its boat to ground on a shoal. The grounding occurred within 5 minutes of the boat passing a dredge that was deepening the river channel. The court found that the Corps's responsibility for maintaining existing project depths and supervising new project construction did not amount to a required or assumed

structure for most of its existence. Not only have the training structure's culverts malfunctioned repeatedly, but BoR also allowed the structure to become overgrown with weeds.

²² The Commerce Clause provides that Congress has the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes...” U.S. CONST., art. I, § 8, cl. 3.

general undertaking to conduct dredging on the river at any given time. Further, the court could not find any authority, statutory or otherwise, that would impose a duty on the Corps or any government agency to dredge navigable waters at any particular time.

As in *Kommanvittselskapet* and *Canadian Pacific*, BoR has no general legal duty to ensure that the lagoon is navigable. Even assuming the primary purpose of the 1999-2000 dredging project was to improve navigation, these cases establish that a federal agency does not acquire an ongoing duty to maintain navigability merely because it undertakes to improve navigability in a specific instance. Moreover, federal improvements of rivers, harbors, and other waterways are under the jurisdiction of the Corps except as “otherwise specifically provided by Act of Congress.” 33 U.S.C. § 540. Although CRFWLSA and other similar statutes give BoR jurisdiction over waterway improvements it constructs, we could find no statute creating a duty for BoR to maintain navigable waters. Since courts have not found the Corps to have a general duty to maintain navigable waters under its jurisdiction, BoR surely cannot have such a duty.²³

III. Specific Legal Duty for BoR to Maintain the Lagoon

There are six potential sources of a specific legal duty for BoR to maintain the access channels in the lagoon: (a) the Colorado River Front Work and Levee System Act; (b) BoR’s construction of the training structure; (c) promises by BoR to the landowners that the agency would dredge the lagoon; (d) Senate report language directing the 1999-2000 dredging; (e) BoR’s dredging in 1999-2000; and (f) arguably negligent actions on the part of BoR during the 1999-2000 dredging. We conclude that none of these impose a duty on BoR.

A.

As noted above, CRFWLSA, enacted for “the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River,” authorized BoR to use appropriations for a number of purposes related thereto, including “constructing, improving, extending, operating, and maintaining protection and drainage works and systems along the Colorado River.” Act of June 28, 1946, 60 Stat. 338.²⁴ As discussed below, the lagoon is separate and distinct from the training structure and does not serve these statutory functions. The lagoon is neither a protection nor drainage work that helps improve the navigation of or regulate the

²³ Our conclusion is supported by the Corps, which has determined that BoR does not have a duty to remove the sediment in the lagoon and maintain the lagoon’s navigability because BoR is not the cause of the sediment accumulation.

²⁴ CRFWLSA also states that the expenditure of funds for authorized purposes “shall not be deemed a recognition of any obligation or liability whatsoever on the part of the United States.” Act of Apr. 1, 1944, 58 Stat. 157. According to the legislative history, this provision affirmed well-settled law that any damages caused by BoR’s navigation improvements changing natural conditions were not compensable. H. REP. NO. 79-1818, at 3 (1946). Therefore, this provision is not relevant to whether BoR has an obligation to conduct maintenance dredging.

flow of the Colorado River. Therefore, CRFWLSA does not apply to the lagoon and in any event does not require BoR to dredge the lagoon.

B.

Although some believe the construction of the training structure created an obligation for BoR to maintain the lagoon, including the dredged access channels, construction did not create a legal duty for BoR to maintain the lagoon because the lagoon is not part of the structure. According to BoR's documents, the purpose of the training structure was not to create a lagoon for recreational uses, such as boating, but rather to control the river's flow and improve navigation of the river. The lagoon is incidental to the structure and does not assist the levee in accomplishing its purpose. BoR documents recognize that local communities would benefit from the construction because it would create backwaters for recreation and marinas, and BoR did make concessions, such as providing an opening for controlled access through the training structure to the river, which facilitated recreational uses of the lagoon. However, BoR's statements and concessions do not amount to an independent legal duty to maintain the access channels in the lagoon.

Further, BoR documents from the 1950s and 1960s clearly indicate that BoR believed it was not authorized to maintain the lagoon, except under certain circumstances. These documents state that BoR was not authorized to and would not generally dredge or maintain backwaters created along the river. According to these documents, BoR's appropriation was not available to dredge a navigation channel along an abandoned riverbank and CRFWLSA did not grant BoR authority to provide recreational structures that were not available prior to channelization. Specifically, BoR said it "can assist in publicly sponsored, river-management related projects which serve the general public if the assistance is within Reclamation's authority and capabilities."²⁵ In addition, BoR officials told landowners that private ownership of the riverfront complicated the possibility of dredging Laughlin Lagoon. BoR's belief that it was not authorized to maintain the lagoon or was only authorized in certain circumstances, supports our conclusion that construction did not create an independent legal duty for BoR to maintain the lagoon. If BoR was not authorized to maintain the lagoon, it certainly could not have been required to do so.

At one point in the 1950s, BoR appears to have concluded, for reasons that are not readily apparent, that it was authorized and had a duty to dredge the lagoon if the act of constructing the training structure degraded the lagoon's water quality. BoR documents predating construction of the training structure indicate that the agency was aware of and concerned about the effect construction would have on the lagoon's water quality. Several documents discuss utilizing construction procedures, such as building during low water periods or building rapidly, to minimize the sandbar that often forms and the siltation that builds up behind the structures during construction. BoR also suggested going forward without any mitigation procedures

²⁵ Additionally, BoR stipulated that Nevada would have to "assume sponsorship of the overall project and furnish conclusive acceptance of responsibility...for installation, operation, and maintenance of features exclusive of those associated with river management facilities to be provided by Reclamation."

and using corrective dredging to address any possible decline in the lagoon's water quality. In a memorandum to his supervisor, the Acting Project Engineer stressed the anticipated degradation and concluded "it is probable that maintenance of the backwater area can be anticipated at some future date."

Although the documents we reviewed do not clearly establish whether BoR chose to mitigate degradation during construction or to remedy any degradation after the fact, post-construction documents do not reveal a sedimentation or water stagnation problem in the lagoon.²⁶ In 1971, BoR noted that construction had raised a pre-existing sandbar a minor amount, water flow through the culvert was excellent and adequate enough to prevent stagnation, and that with the exception of one area, boat access to the shoreline did not appear to be a major problem. A 1972 review of the Colorado River front work and levee system noted that "sediment deposition at marina entrances and backwater areas may become more of a problem than at present" but this was not included in the list of major maintenance problems.²⁷ Interviews we conducted support this documented lack of a sediment problem post-construction; multiple interviewees told us that the lagoon's sedimentation problem began in the mid- to late-1980s. Not only was this almost twenty years after the training structure's construction, but it coincides with Laughlin's development boom, when heavy runoff could have been the source of the sediment. Assuming *arguendo* that BoR would be required to dredge the lagoon if construction degraded water quality, this cannot be the source of BoR's legal obligation because degradation did not occur.

C.

Although we found no documentary evidence that BoR promised to maintain the lagoon and provide river access, whether in the 1960s or more recently, if such a promise had been made it is unlikely the promise would have created a legal obligation for BoR to dredge the lagoon.

As discussed above, BoR believed that it only had an obligation to maintain the lagoon in certain limited circumstances. If a BoR official or employee had promised that BoR would maintain the lagoon, including the access channels, it would have been a misrepresentation of BoR's official position. Assuming such a promise was made and the landowners reasonably relied on such a promise to their detriment, the landowners may seek to invoke the legal doctrine of equitable estoppel to prevent BoR from abandoning its promise. *See* Restatement (Second) of Torts § 894 (1979). However, the Supreme Court has stated that equitable estoppel does not apply

²⁶ Shortly after construction was complete, landowners indicated that sand bars were present in the lagoon's upper end but that they were not of "paramount importance." Landowners hoped that BoR "would be able to work on them in the foreseeable future since at many water levels they reduce enjoyment of the lake."

²⁷ The document does list "model test entrances to marinas and backwater areas for reducing sediment deposition in an intake channel" as a recommendation of less importance that would be sound and beneficial to the operation of the training structure. Today's sedimentation problem, however, is caused mainly by run-off flowing into the lagoon through the unnamed wash and not by the river carrying sediment into the lagoon, so this maintenance activity would not resolve the problem.

against the government absent a showing of affirmative misconduct,²⁸ and some courts have held that estoppel will not apply where the federal official who made the representation lacked authority to bind the government²⁹ or where appropriated funds are at stake, absent extraordinary circumstances.³⁰ We found no evidence of affirmative misconduct or extraordinary circumstances in BoR's statements or actions related to the training structure and the lagoon.

D.

As discussed above, in 1999-2000, BoR dredged Laughlin Lagoon in response to language in the Senate Appropriations Committee report accompanying the Senate version of BoR's fiscal year 1999 appropriation act.³¹ S. REP. NO. 105-206, at 88 (1998). In general, directives contained in congressional reports and other legislative history are informational and not legally binding. *See, e.g., Hein v. Freedom from Religion Found., Inc.*, ___ U.S. ___, 127 S. Ct. 2553, 2568 n.7 (2007); *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 646 (2005); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993), *quoting* 55 Comp. Gen. 307, 319 (1975). Such directives are legally binding only if they are contained, or incorporated by reference, in enacted legislation. *See id.* The hallmarks of incorporation by reference are a clear congressional intent in the law to incorporate by reference and specific identification of the referenced material so that all know with certainty the duties, terms, conditions, and constraints enacted into the law. B-316010, Feb. 25, 2008.

The fiscal year 1999 Energy and Water Appropriations Act, which contained BoR's appropriation, did not contain or incorporate by reference the Senate report or its language about Laughlin Lagoon. *See* Pub. L. No. 105-245 (1998). The Senate report language did not create a legal obligation for BoR to dredge the lagoon in the first

²⁸ *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 421-23 (1990); *Heckler v. Cmty Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 60 (1984); *INS v. Miranda*, 459 U.S. 14, 19 (1982); *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Montana v. Kennedy*, 366 U.S. 308, 314-15 (1961). The Supreme Court has never defined "affirmative misconduct," but lower courts have developed various definitions. *See e.g., Socop-Gonzalez v. INS*, 272 F.3d 1176, 1184 (9th Cir. 2001) (deliberate lie or pattern of false promises); *LaBonte v. United States*, 233 F.3d 1049, 1053 (7th Cir. 2000) (requires more than mere negligence; it requires an affirmative act to misrepresent or mislead); *United States v. Marine Shale Processors*, 81 F.3d 1329, 1350 (5th Cir. 1986) (requires more than merely negligent conduct; the government official must intentionally or recklessly mislead the estoppel claimant).

²⁹ *Connor Bros. Constr. Co., Inc., v. United States*, 65 Fed. Cl. 657, 693 (Fed. Cl. 2005); *Doe v. United States*, 48 Fed. Cl. 495, 505 (Fed. Cl. 2000).

³⁰ *Exp.-Imp. Bank v. Agricola*, 536 F.Supp. 2d 345, 350 (S.D. N.Y. 2008) (citing *Office of Personnel Mgmt. v. Richmond*, 496 U.S. at 434).

³¹ In its September 2008 legal memorandum BoR acknowledges that even though the language in the Senate report was not included in the conference committee report, was not binding law, and may have had less force than intent expressed in a joint conference committee report, executive agencies do generally strive to abide by such expressions of intent. September 2008 Legal Memorandum at 4, *citing* 55 Comp. Gen. 307, 325 (1975) ("this does not mean that agencies are free to ignore clearly expressed legislative history applicable to the use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive branch...has a practical duty to abide by such expressions.")

instance, and certainly did not create any continuing obligation for the BoR to maintain the lagoon.³²

E.

The 1999-2000 dredging in and of itself did not create a legal obligation for BoR to conduct maintenance dredging, as evidenced by case law. In dictum, the *Kommanvittselskapet* court noted that the government had performed “a single service on a single occasion” by dredging the Delaware River. The court further observed that it would not “lightly presume the assumption of a duty” to dredge and survey the river channel on a regular basis, which “involves a costly course of conduct over an extended period, and the undertaking of which would be tantamount to making the government the virtual insurer of navigation on the Delaware.” 305 F.Supp. at 890-91. As in *Kommanvittselskapet*, BoR’s dredging of the lagoon was a single service on a single occasion and no presumption should be made that the agency assumed a duty to dredge the lagoon on a regular basis because of it.

F.

BoR deposited some of the material dredged from the lagoon onto a site along the northern shoreline of the lagoon. As previously noted, an unnamed wash is located in this area and heavy rains push the dredged material through it and into the lagoon. It could be argued that in placing the dredged material along the lagoon’s shoreline and in close proximity to the unnamed wash, where it was reasonably foreseeable that erosion and/or the wash would send the dredged material back into the lagoon, BoR was negligent, and this negligence warrants corrective dredging as a remedy. The difficulty with this argument is that the Federal Torts Claims Act (FTCA) bars a lawsuit against BoR for this alleged negligence because an agency’s decision to dredge and to conduct that dredging in a particular way falls within the FTCA’s discretionary function exception.³³ With the discretionary function exception barring

³² In any event, if the report language had been incorporated by reference, it clearly only refers to a one-time dredging.

³³ Absent a waiver, sovereign immunity shields the federal government and its agencies from lawsuits. *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994). The FTCA waives the government’s sovereign immunity for tort claims, like negligence, in certain circumstances and makes the government liable “in the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. However, an exception to FTCA exists for the exercise or performance of a “discretionary function or duty.” 28 U.S.C. § 2680(a). The discretionary function exception applies, and sovereign immunity bars a lawsuit, if (1) the government act is a result of the decisions involving an element of judgment and (2) the judgment is based on considerations of public policy. *United States v. Gaubert*, 499 U.S. 315, 322-23 (1991). When established governmental policy, as expressed or implied by statute, regulation or agency guidelines, allows a government agent to exercise discretion, the agent’s acts are presumed to be grounded in policy. *Id.* at 324.

Congress retained the government’s sovereign immunity as to river and harbor works to the extent that they fall within the discretionary exception. *Boston Edison Co. v. Great Lakes Dredge & Dock Co.*, 423 F.2d 891, 896 (1st Cir. 1970). In recent lawsuits alleging the Corps was negligent in dredging a harbor and maintaining a dredge spoils site, courts found the *Gaubert* test was satisfied. In *Northlight Harbor v. United States*, 561 F. Supp. 2d 517, 520 (D. N.J. 2008), the plaintiff alleged that the Corps’s dredging of a harbor caused the bulkhead across his waterfront property to collapse into the harbor. In *Williams v. United States Army Corps of Engineers*, No. 06-CV-834, 2007 U.S. Dist. LEXIS 56624, at *4-6 (D. N.J. Aug. 2, 2007), the plaintiff alleged that the Corps’s negligent operation of a nearby dredged

suit for possible negligent disposal, BoR cannot be held liable for negligence or obligated to perform corrective dredging.

CONCLUSION

As a navigable water of the United States, Laughlin Lagoon can only be dredged in accordance with a section 10 and section 404 permit. The permit issued for the 1999-2000 dredging does not authorize maintenance dredging of the river access channels and therefore does not create a legal obligation for BoR to dredge. In light of the case law declining to find that the United States has a duty to maintain navigable waters at all times, BoR does not have a general legal duty to dredge Laughlin Lagoon to maintain boat access to the river.

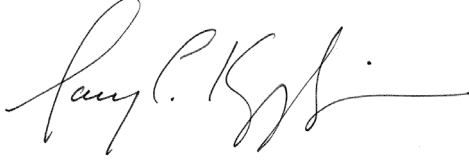
Further, BoR has no specific legal duty requiring it to dredge the lagoon. CRFWLSA authorizes appropriations for certain activities but does not require BoR to carry out any specific action, and therefore creates no continuing legal obligation for BoR to dredge access channels for boat traffic. Construction of the training structure itself did not create such a duty, and we found no evidence that BoR promised landowners that it would maintain the lagoon. Indeed, the documents we reviewed are to the contrary. However, even if a promise had been made, it likely is not enforceable. The directive in the fiscal year 1999 Senate Report to “clean up and dredge the Laughlin Lagoon” was not legally binding and thus it does not constitute a continuing legal obligation for BoR. Nor did BoR’s 1999-2000 dredging create a legal obligation for BoR to maintain the lagoon because one-time dredging does not create a legal obligation to dredge a particular place at a particular time in the future. Finally, any claims against the United States alleging that the placement of the dredged materials was negligent would be barred, and accordingly such a claim could not be a source for a legal obligation to dredge.

spoils site was causing her basement to flood with water. In both cases, the court found the first step of the *Gaubert* discretionary function test satisfied because no statute mandated a particular course of conduct nor did agency regulations or policies control the agency’s decisionmaking with respect to dredging activities or storage of dredge spoils. *Northlight*, 561 F. Supp. 2d at 523; *Williams*, 2007 LEXIS 56624 at *23-30. The *Northlight* court found the dredging to be the product of discretionary judgment based on accepted sound engineering principles. *Northlight*, 561 F. Supp. 2d at 523. The *Williams* court found that the Corps’s statutory authority granted it “wide discretion.” *Williams*, 2007 LEXIS 56624 at *27. Both courts also found the second *Gaubert* step satisfied because the plaintiffs did not overcome the presumption that the dredging, as an act undertaken pursuant to an agency’s discretionary authority, was grounded in policy considerations. *Northlight*, 561 F. Supp. 2d at 527; *Williams*, 2007 LEXIS 56624 at *29-30.

Like the Corps, BoR does not have a statute or regulation directing its decisionmaking in regards to dredging, so BoR’s decision to place the dredged material along the lagoon’s northern shoreline was left to its judgment. A landowner we spoke to said that the land used for the dredged spoils was offered to BoR for that purpose. We found no evidence refuting the presumption that this decision was grounded in policy considerations. Because the *Gaubert* test is satisfied, BoR’s decision to place the dredged spoils along the lagoon’s northern shoreline appears to fall within the FTCA’s discretionary function exception, and any lawsuit against the government alleging negligent placement of the dredged spoils would likely be barred by sovereign immunity.

If there are questions concerning these matters, please contact Managing Associate General Counsel Susan D. Sawtelle at (202) 512-6417. Deputy Assistant General Counsel Richard P. Johnson and Staff Attorney Jeanette M. Soares participated in preparing this opinion.

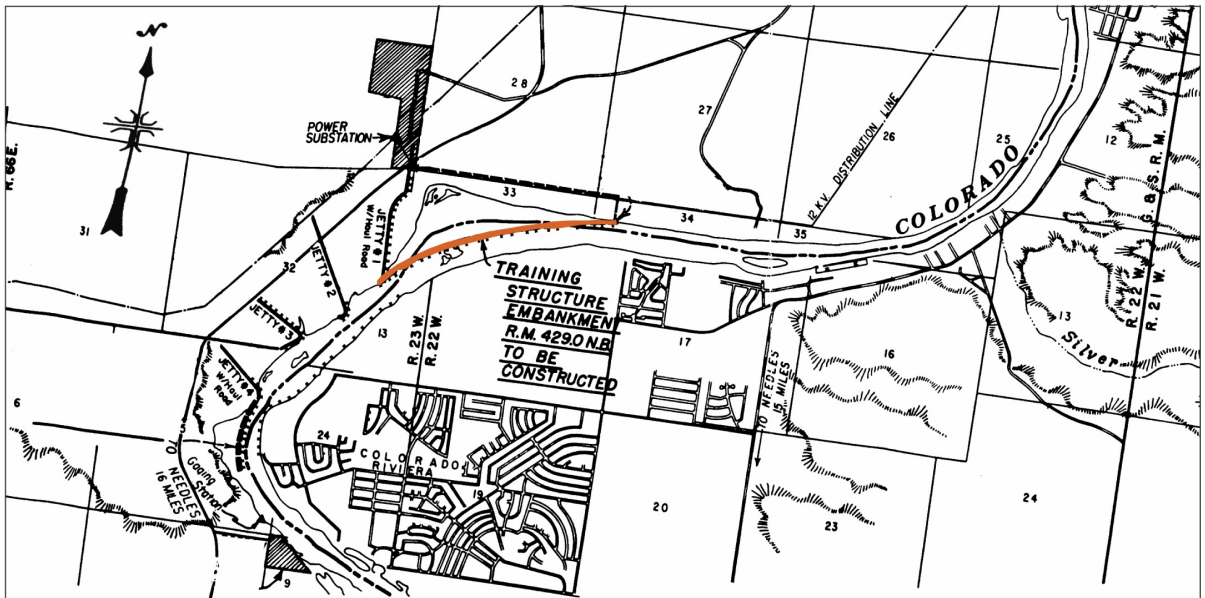
Sincerely yours,

A handwritten signature in black ink, appearing to read "Gary L. Keplinger". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Gary L. Keplinger
General Counsel

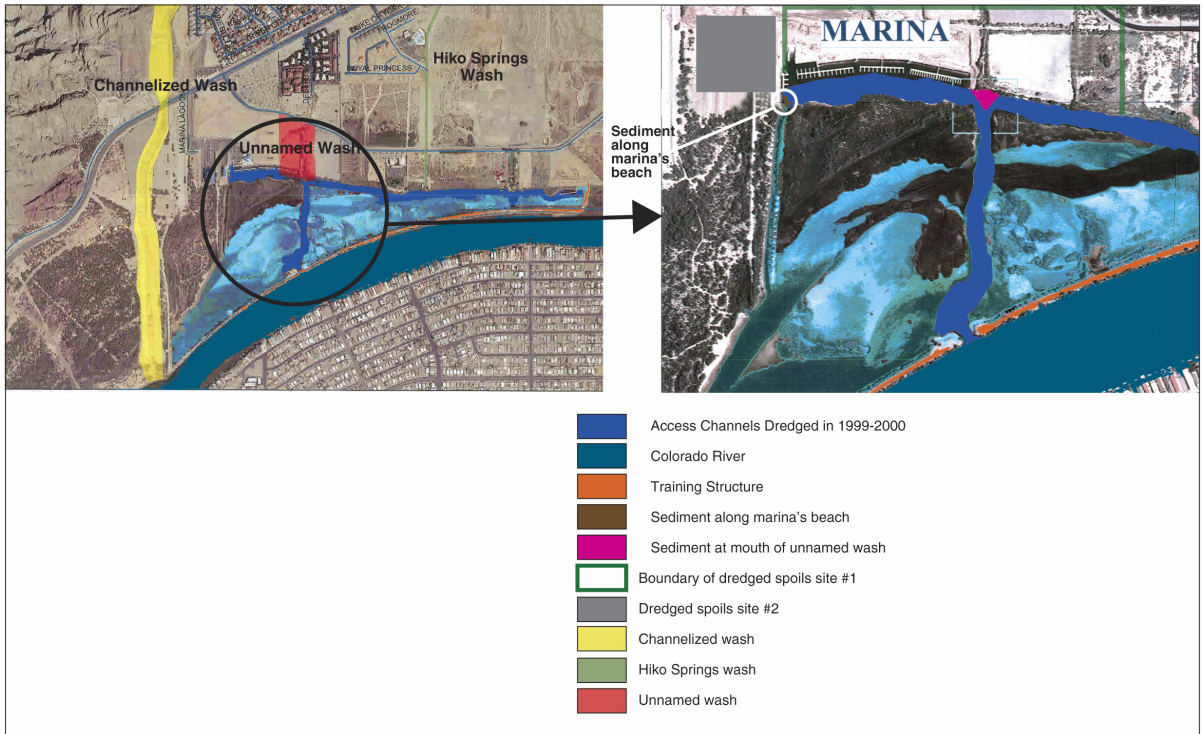
Enclosures - 2

Enclosure I - Big Bend Area of the Colorado River



Source: Bureau of Reclamation.

Enclosure II - Aerial Views of Laughlin Lagoon



Source: GAO adaptation of Bureau of Reclamation and Clark County, Nevada graphics.