

Comments Submitted By Indian Tribes

This section contains comment letters submitted by the following Indian tribes:

- IT-1 Ak-Chin Indian Community of the Maricopa Indian Reservation
- IT-2 Fort Mojave Indian Tribe of Arizona, California, and Nevada
- IT-3 Quechan Indian Tribe of the Fort Yuima Indian Reservation, California and Nevada
- IT-4 Southern Ute Indian Tribe of the Southern Ute Reservation
- IT-5 Colorado River Indian Tribes of the Colorado River Indian Reservation, Arizona and California
- IT-6 Yavapai-Apache Nation of the Camp Verde Indian Reservation
- IT-7 Tonto Apache Tribe of Arizona
- IT-8 Pascua Yaqui Tribe of Arizona
- IT-9 San Carlos Apache Tribe of the San Carlos Reservation
- IT-10 Gila River Indian Community
- IT-11 Navajo Nation, Arizona, New Mexico, and Utah

AK-CHIN INDIAN COMMUNITY Community Government

42507 W. Peters & Nall Road • Maricopa, Arizona 85239 • Telephone: (520) 568-1000 • Fax: (520) 568-4566



Regional Director Lower Colorado Region
U.S. Bureau of Reclamation
Attention: BCOO 1000
P.O. Box 61470
Boulder City, Nevada 89006-1470

COMMENTS BY AK-CHIN INDIAN COMMUNITY REGARDING BUREAU OF RECLAMATION PROPOSED COLORADO RIVER SHORTAGE EIS

Ak-Chin Indian Community, a federally recognized Indian tribe organized pursuant to the Indian Reorganization Act of 1934, appreciates the opportunity to review and comment on the Draft EIS issued by Bureau of Reclamation on February 28, 2007, and dealing with Colorado River Shortage regulations to be promulgated by the Secretary of Interior. Ak-Chin and its legal counsel have carefully reviewed all of the alternatives set forth in the Proposed EIS. Though considerable work has gone into each of the alternatives, and several meetings have been held to consult with Arizona and other Indian tribes, none of the alternatives represents a "Tribal Alternative" aimed specifically at protection of tribal rights to Colorado River water. This is of special concern to Ak-Chin, and we believe, to other tribes receiving Colorado River water. Receipt of such water in most cases has been decreed, or has been set forth in legislation, in settlement of the tribal federal reserved water rights, or *Winters* water rights. In Ak-Chin's case, the Community gave up its right to assert water rights held from "time immemorial" in return for specific provision by the US government of water from the Central Arizona Project (CAP) system, and from the Yuma Mesa Division of Gila Project. Ak-Chin's comments therefore stress the continuing viability of its water settlement legislation, including the specific provisions for treatment of scarcity set forth in its 1984 settlement act, and the requirement of the Secretary to protect tribal trust assets, including tribal water.

Ak-Chin's 1978 Water Settlement Act provided as follows:

"As a part of the contract referred to Section 2(b) of this Act, the Secretary shall provide for, commencing as soon as possible, but in no event later than the expiration of the twenty-five-year period following the date of the enactment of this Act, the permanent delivery, on an annual basis, to the lands comprising the Ak-Chin Indian Reservation, of eighty-five thousand acre-feet of water suitable for irrigation on the reservation."

In return for this provision of water, and "as consideration on the part of the Ak-Chin Indian Community for entering into any contract

or agreement pursuant to Section 2(b), the Ak-Chin Indian Community shall agree to waive, in a manner satisfactory to the Secretary, any and all claims of water rights or injuries to water rights of the Ak-Chin Indian Community, including both groundwater and surface water from time immemorial to the present, which it might have against the United States, the State of Arizona or agency thereof, or any other person, corporation, or municipal corporation, arising out of the laws of the United States or the State of Arizona." Sections 3 and 4(a), Public Law 95-328 (July 28, 1978).

The initial Water Settlement Act of 1978 contemplated delivery of water to Ak-Chin from off-reservation groundwater supplies. As it became apparent that that plan was not feasible, Ak-Chin and the federal government negotiated the 1984 Water Settlement Act. That Act required that "As soon as possible but not later than January 1, 1988, the Secretary shall deliver annually a permanent water supply from the main project works of the Central Arizona Project to the southeast corner of the Ak-Chin Indian Reservation of not less than seventy-five thousand acre-feet of surface water suitable for agricultural use except as otherwise provided under Subsections (b) and (c)."

Under Section 2(b) of the 1984 statute, the Secretary is required to "deliver such additional quantity of water as is requested by the Community not to exceed ten thousand acre-feet," if the Secretary makes a determination that there is "sufficient capacity available in the main project works of the Central Arizona Project to deliver such additional quantity."

Section 2(c) contains a provision for reduction of Ak-Chin's entitlement "in time of shortage." That Section provides that "If the aggregate supply of water referred to in Subsection (f) is not sufficient to deliver seventy-five thousand acre-feet, the Secretary may deliver a lesser quantity but in no event less than seventy-two thousand acre-feet."

Section 2(c) defines "time of shortage" as "a calendar year for the which the Secretary determines that a shortage exists pursuant to Section 301(b) of the Colorado River Basin Project Act of September 30, 1968 (Public Law 90-537), such that there is not sufficient Central Arizona Project water in that year to supply up to a limit of three hundred ninety thousand eight hundred twenty-eight acre-feet of water for Indian uses, and up to a limit of five hundred ten thousand acre-feet of water for non-Indian municipal and industrial uses."

According to Section 2(d) of the Act, the Secretary is required to deliver such water at a flow rate meeting "the seasonal requirements for agricultural use on the Reservation," not to exceed three hundred cubic feet per second.

IT-1

Section 2(f) contains the sources of water to be used to satisfy the government's obligation under the Act.

Fifty thousand acre-feet of the surface water comes from water authorized by the Act of July 30, 1947 (61 Stat. 628) for beneficial consumptive use on the lands of the Yuma Mesa Division of the Gila Project. The balance of the water to satisfy the requirements of the statute comes from the Central Arizona Project, at CAP priority.

Under Section 2(j) of the Act, "The Ak-Chin Indian Community shall have the right to devote permanent water supply provided for by this Act to any use, including but not limited to agricultural, municipal, industrial, mining or recreational use."

Whereas the water legislation was initially crafted to diminish the possibility of groundwater depletion, the Act and resulting 1985 contract with the United States provide that, if shortages exist preventing delivery of water to Ak-Chin from either of the two surface water sources listed in the Act, Ak-Chin may pump groundwater sufficient to make up any such deficiency.

Nothing in the proposed EIS or any regulations adopted by the Secretary may vary the provisions of Ak-Chin's water settlement legislation, passed by Congress, including those specific provisions relating to receipt by Ak-Chin of water in time of shortage, or alternative groundwater supplies available to Ak-Chin in times of shortage. Ak-Chin will continue to monitor the treatment of Colorado River water to ensure compliance with all aspects of its settlement legislation.

Since most Arizona tribes receive Colorado River water, in one form or another, in settlement of their "federal reserved water rights" or *Winters* rights, Ak-Chin Indian Community urges the Bureau of Reclamation and the Secretary of Interior to attempt to arrive at regulations which will best protect the rights of the tribes to Colorado River and related water supplies. Water is the lifeblood of the tribes in Arizona and elsewhere in the Southwest, and as part of the Secretary's continuing obligation to protect trust resources of the tribes, special attention should be paid to ensure that no diminution of such trust assets will be caused by any new regulations governing shortage.

We will be happy to discuss Ak-Chin's position on the proposed EIS further with you.

Della M. Carlyle
Della M. Carlyle, Chairman
Ak-Chin Indian Community

Date: 4-20-07

IT-1

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Reponses to Comment Letter IT-1

IT-1-1

Your comment is noted. No change to the Final EIS was necessary. As discussed in Section 4.10 of the Draft EIS and of the Final EIS, no vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration.

IT-1-2

Your comment is noted. No change to the Final EIS was necessary.

IT-1-3

Your comment is noted. No change to the Final EIS was necessary.

IT-1-4

Your comment is noted. No change to the Final EIS was necessary..

IT-1-5

Your comment is noted. No change to the Final EIS was necessary. Also see response to Comment No. IT-1-1.

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Fort Mojave Indian Tribe

NORA McDOWELL - Chairperson
SHAN LEWIS - Vice-Chairman
DEBBIE JACKSON - Secretary
COLLEEN GARCIA - Member • MARTHA McCORD - Member
NICHOLE GARCIA - Member • APRIL GARCIA - Member
500 Merriman Avenue • Needles, CA 92363
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4/30/07
BDC-1000
1003

April 2, 2007

Terrance Fulp, PhD
US Bureau of Reclamation
Lower Colorado River Region
PO Box 61470
Boulder City, Nevada 89006-1470

Dear Dr Fulp:

First, we wish to complement the Bureau of Reclamation on its efforts to produce the *Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* and are impressed by the detail of its contents.

We are disappointed however at the lack of consultation with the Fort Mojave Indian Tribe. Certainly there have been mass meetings often including tribes as far away as the Rio Grande and we have attended a few of these but this hardly constitutes consultation in the usual sense of the word. The Tribe is directly affected by lower flows in the Colorado River as few others are and we would have preferred that, after real consultation, this would have been addressed in the D.E.I.S. 1

It has long been the position of the Fort Mojave Indian Tribe that, if shortages are inevitable and they apparently are, it is best to start reductions earlier rather than later. The Tribe feels that there are those far more qualified to do the detailed River modeling than we are but, as policy, reductions should begin when reservoir storage is at about 50% of capacity and scale up fairly rapidly to avoid a run of the river situation with empty reservoirs. 2 3

It is also the position of the Tribe that the free market is a better way of dealing with shortage than involuntary reductions. We like the "Intentionally Created Surplus" provisions in the Basin States Alternative but a more flexible method of nomination would be more useful to the smaller entitlement holder. Using the Tribe as an example, We grow 4-5,000 acres of cotton. This is not the total of a number of smaller farms, it is the production of our tribal farm and is 100% controlled by the Tribe. 4 5

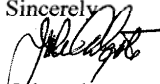
IT-2

There are good business reasons why we need to be in the cotton business but our climatic conditions are difficult with a late spring an early fall and a very hot summer. A delayed planting usually results in disappointing profit and nomination of the 20,000 acre feet of water we would use to grow the crop would be a desirable option but it needs to be done quickly in April, not the September before. 6

The term water delivery is often used in these discussions. We would like to point out that the Bureau of Reclamation does not deliver water to the Fort Mojave Indian Tribe. The Bureau delivers water to others and it passes through our Reservation and we have the right to take some of it, if we can, but there is no effort to deliver water. This is the Tribe's main concern. Senior water rights are useless if we cannot reach the water, a fact surely not lost on our friends who may be junior in right but have a nice federally built structure to draw from. 7

The Tribe hopes for and expects the help and cooperation of the Bureau of Reclamation and other concerned agencies in making the intake modifications necessary to deal with a diminished River. 8

The Fort Mojave Indian Tribe appreciates the opportunity to offer these comments.

Sincerely

John Algots, Director
Department of Physical Resources

IT-2

Reponses to Comment Letter IT-2

IT-2-1

Your comment is noted. No change to the Final EIS was necessary. Reclamation conducted extensive public outreach, held public scoping meetings, and consulted with representatives from the cooperating agencies, Basin States, Indian tribes, non-governmental organizations (NGOs), and other interested parties to obtain input on the scope of the study. The purpose and need for the proposed federal action as well as the action alternatives that were evaluated in the EIS were formulated based on the input that was received throughout the process.

IT-2-2 and IT-2-3

Your comment is noted. No change to the Final EIS was necessary. As discussed in Section 1.1 and 1.3, the tradeoffs between the magnitude and frequency of shortages are considered in EIS. The selection of the Preferred Alternative considers these tradeoffs while still being consistent with the Law of the River.

IT-2-4

Your comment is noted. No change to the Final EIS was necessary.

IT-2-5 and IT-2-6

Your comment is noted. Reclamation has included draft guidelines in the Final EIS (Appendix S), although dates regarding the administration of ICS have not been identified. Such dates will be specified in the final guidelines, anticipated to be implemented by the Record of Decision.

IT-2-7

Your comment is noted. No change to the Final EIS was necessary. While shortage determinations would reduce the annual release from Davis Dam, Section 4.3.6 indicates that Davis Dam releases under the Preferred Alternative are very similar to the No Action Alternative.

IT-2-8

Your comment is noted. No change to the Final EIS was necessary.

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April 30, 2007

FACSIMILE TRANSMITTAL SHEET

TO/FAX NO: Regional Director, Bureau of Reclamation
Lower Colorado Regional Office/(702) 293-8156

FROM: Mason D. Morisset
Morisset, Schlosser, Jozwiak & McGaw

REGARDING: Comments of Quechan Indian Tribe on Draft EIS re Colorado River
Interim Guidelines for Lower Basin Shortages and Coordinated
Operations for Lake Powell and Lake Mead, **BCOO-1000**

NO. OF PAGES: 3 (including this sheet) CLI/MAT NO: 0267/09751

PLEASE DELIVER TO ADDRESSEE AS SOON AS POSSIBLE. THANK YOU.

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IT-3

04/30/2007 12:30 FAX 2063867322

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April 30, 2007

Via Facsimile (702) 293-8156

Regional Director
Bureau of Reclamation
Lower Colorado Regional Office
P.O. Box 61470
Boulder City, Nevada 89006-1470

Re: Comments of Quechan Indian Tribe on Draft EIS re Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, **BCOO-1000**

Dear Regional Director:

On behalf of the Quechan Indian Tribe, we submit the following comments on the Draft Environmental Impact Statement regarding the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, BCOO-1000.

The Quechan Tribe's Fort Yuma Reservation was established at its current site in 1884, which gave the Tribe, under federal law, reserved rights to water in the Colorado River with a priority date of 1884. See *Arizona v. California I*, 376 U.S. 344 (1964); *Arizona v. California II*, 460 U.S. 605 (1983); *Arizona v. California* (consolidated decree), 126 S. Ct. 1543 (2006). Pursuant to the 2006 Supreme Court decree, the Tribe has diversion rights of 71,616 acre-feet per year in California and diversion rights of 6,350 acre-feet per year in Arizona. These rights have a priority date of 1884.

The DEIS correctly states that water deliveries to the Fort Yuma Indian Reservation may not be restricted, due to the senior priority of the Tribe's reserved water rights. See, e.g., *DEIS* at 4-213 ("water deliveries to the . . . Fort Yuma Indian Reservation will not be affected by the proposed federal action due to their early priority dates"). It appears that none of the alternatives analyzed by the Bureau would have a detrimental effect on the exercise or use of the Tribe's reserved water rights. However, as trustee to the Tribe, the Bureau of Reclamation has a continuing obligation to ensure that the Bureau's implementation of shortage guidelines, in practice, has no detrimental impact on the Tribe's water rights or the Tribe's future exercise and use of its water rights. The Tribe requests that the Bureau ensure that shortage guidelines, if

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IT-3

Regional Director, Lower Colorado Region
April 30, 2007
Page 2

adopted, are implemented in a manner consistent with the Tribe's water rights and the Bureau's trust obligation to the Tribe. 3

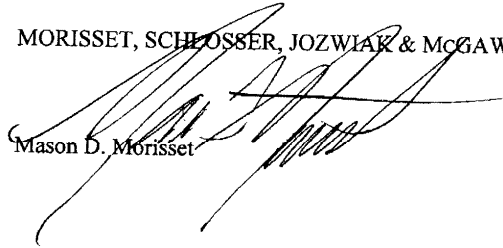
Although operations under the interim shortage guidelines will not affect water deliveries to the Tribe, variations in flow releases from upstream reservoirs could have an impact on habitat on and around the Fort Yuma Indian Reservation. The current DEIS contains relatively little discussion of potential impacts to habitat between Imperial Dam and the NIB, an area that includes habitat on and around the reservation. 4 5

The Tribe requests that the Bureau give further consideration to the following issues. First, to what extent will the variation in *timing* of flows have an effect on the vegetation resources that are adjacent to the Colorado River on and nearby the Fort Yuma Indian Reservation? For example, implementation of shortage guidelines may result in variations in the timing and duration of high or low flow events in the area between Imperial Dam and the NIB. Specifically, will there be any variation in the timing of flood flows that could negatively impact the Yuma East Wetlands located along the Fort Yuma Indian Reservation that are currently being restored by the Tribe and other agencies? The health of the riparian wetland areas depends, in large part, on the continued existence of high flow events. Second, to what extent will the variation in flows, both in terms of timing and quantity, impact groundwater on and nearby the Fort Yuma Indian Reservation? There does not appear to be any significant evaluation of potential impacts to groundwater on the reservation in the current DEIS. 6 7 8 9

The Tribe appreciates the opportunity to comment on the Bureau's DEIS. The Tribe requests that the Bureau continue to keep the Tribe directly informed as the proposed development of shortage guidelines moves forward. 10

Sincerely yours,

MORISSET, SCHEISSER, JOZWIAK & MCGAW



Mason D. Morisset

cc: Mike Jackson, Sr., President

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lk: 4/29/07

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Reponses to Comment Letter IT-3

IT-3-1

Your comment is noted. No change to the Final EIS was necessary.

IT-3-2

Your comment is noted. No change to the Final EIS was necessary.

IT-3-3

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-1-1.

IT-3-4 and IT-3-5

Your comment is noted. No change to the Final EIS was necessary. The information requested is found in Section 4.8.3.7 and Section 4.8.4.7.

IT-3-6 through IT-3-8

Your comment is noted. As discussed in Section 3.3.9 and Section 4.3.8, the proposed federal action will have no effect on the Imperial Dam to NIB river reach.

IT-3-9

Your comment is noted. See response to Comment No. IT-3-6 through IT-3-8.

IT-3-10

Your comment is noted. No change to the Final EIS was necessary.

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Regional Director
April 25, 2007
Page 2

DEIS at 1-7. Nonetheless, it is unrealistic to assert that in the event the Colorado River Basin is experiencing drought and low reservoir conditions, thus triggering the need for the Secretary of the Interior to reduce the annual amount of water available for consumptive use from Lake Mead to the Lower Basin states below 7.5 million acre-feet, that the Upper Basin states and tribes would not be affected.

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The Secretary has a variety of responsibilities over the waters of the Colorado River pursuant to the Law of the River as reflected in the documents set forth in Table 1.7-1. DEIS 1-13. Additionally, and to no lesser extent, the Secretary has a fiduciary responsibility to the Tribe to protect tribal trust resources. As an agency of the federal government, the Bureau of Reclamation (“Reclamation”) has a trust responsibility to all Indian tribes and tribal members, including the Southern Ute Indian Tribe and its members:

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The United States has an Indian trust responsibility (trust responsibility) to protect and maintain rights reserved by or granted to Indian tribes or Indian individuals by treaties, statutes, and executive orders, which rights are sometimes further interpreted through court decisions and regulations. This trust responsibility requires that all Federal agencies, including Reclamation, take all actions reasonably necessary to protect trust assets.

See Attachment 5, Bureau of Reclamation, Indian Trust Asset Policy (Aug. 31, 1994) in Protection of Indian Trust Resources (notebook on file with the Department of the Interior).¹

The Indian Trust Assets entitled to protection under the trust responsibility include water rights. See *id.* Thus, Reclamation has a trust responsibility to take all actions reasonably necessary to protect the Tribe’s water rights, including its historic, existing and future use water rights. In fact, the United States’ trust responsibility to the Tribe is of “the highest fiduciary standards,” *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 678 (1986), *aff’d*, 877 F.2d 961 (Fed. Cir. 1989),² and it does not wane because Congress has imposed upon it additional statutory obligations. *Nevada v. United States*, 463 U.S. 110, 128 (1983). Certainly, the United States may not subordinate its trust responsibility to protect the Tribe’s rights by claiming that the interim guidelines for Lower Basin shortages must be enforced.

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¹In February 1996, then Secretary of the Interior Babbitt and Assistant Secretary Deer transmitted to Interior employees a compilation of the policies and procedures adopted by the bureaus and offices of the Department of Interior relating to trust protection practices. This compilation notebook is referred to herein as “Protection of Indian Trust Resources.”

²See also *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 74 (Ariz. 2001).



Regional Director
April 25, 2007
Page 3

**II. RECLAMATION SHOULD SELECT
A PREFERRED ALTERNATIVE**

The DEIS provides that:

Reclamation has not identified a preferred alternative in the Draft EIS. The preferred alternative will be identified following public comments on the Draft EIS and will be expressed in the Final EIS. The preferred alternative may be one of the specific alternatives described below or it may incorporate elements or variations of these alternatives.

DEIS ES-3. By failing to identify a preferred alternative, the federal, state, tribal and local agencies are unable to provide any comments – an important part of the NEPA full disclosure process. Moreover, the Tribe is unable to determine whether the preferred alternative is in its best interests. *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, Jr., concurring in part, dissenting in part), *modified on reh'g*, 782 F.2d 885 (10th Cir.), *modified*, 793 F.2d 1171 (10th Cir.) (adopting concurring/dissenting opinion of Seymour, J.), *cert. denied sub nom. Southern Union v. Jicarilla*, 479 U.S. 970 (1986).

5

Particularly troubling is Reclamation’s assertion that it may cobble together a preferred alternative that “incorporate[s] elements or variations of these alternatives.” DEIS at ES-3. Stated another way, Reclamation may select a preferred alternative upon which no one had an opportunity to comment. It is the federal action as a whole that may have an adverse effect on the natural and/or human environment, not the constituent elements of various possible federal actions. Indeed, it is not possible to provide comments on separate pieces of possible federal actions because the alternatives set forth in the DEIS are not divided up into components, and, therefore, it is entirely unclear how Reclamation would select “elements or variations” of the identified alternatives in order to come up with a sixth, and heretofore unidentified, alternative. The “shuffle and deal” approach to identifying the preferred alternative is contrary to NEPA and Interior’s NEPA-implementing regulations.

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If Reclamation selects one of the alternatives set forth in the DEIS as its preferred alternative, the Tribe should nevertheless have an opportunity to provide additional comments at the time when Reclamation makes its selection because then the Tribe will be able to determine whether the preferred alternative is in its best interests. The Tribe acknowledges that the regulations do not require Reclamation identify a preferred alternative in the DEIS,³ nevertheless based on the

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³The applicable regulation provides the following:

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment . . . and the Environmental Consequences . . . , it should present the environmental

IT-4



Regional Director
April 25, 2007
Page 4

Secretary's trust responsibility, the Tribe should be given the opportunity to comment once Reclamation has selected its preferred alternative well in advance of release of the final environmental impact statement. If, on the other hand, Reclamation devises as its preferred alternative a new alternative from pieces of the existing alternatives in the DEIS, Reclamation should reissue a new draft environmental impact statement for public comment, since there will have been no public comment on that federal action.

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11

We appreciate the opportunity to comment on the DEIS and look forward to providing comments on the preferred alternative once it has been either selected or formulated.

Sincerely,


M. Catherine Condon

MCC/dav

cc: Council Member Jimmy Newton
Jim Fornea
Chuck Lawler

impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

....

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

40 C.F.R. § 1502.14(e).

IT-4

Reponses to Comment Letter IT-4

IT-4-1

Reclamation does not concur with this comment. As noted in Section 3.2, reservoirs located upstream of Lake Powell and operated independently of Lake Powell would not be affected by the proposed federal action.

IT-4-2 through IT-4-4

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-1-1.

IT-4-5 through IT-9

Your comment is noted. No change to the Final EIS was necessary. The Council on Environmental Quality (CEQ) regulations for implementing NEPA do not require identification of a Preferred Alternative in the Draft EIS. Reclamation considered all public comments on the Draft EIS in identifying the Preferred Alternative.

IT-4-10

Pursuant to the CEQ regulations, a 30-day review period will commence after the publication of the Final EIS.

IT-4-11

Your comment is noted. No change to the Final EIS was necessary.

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Reponses to Comment Letter IT-5

IT-5-1

Reclamation concurs with this comment. No change to the Final EIS was necessary.

IT-5-2 and IT-5-3

The potential impacts to biological resources were analyzed and presented in Section 4.8.3.4 and 4.8.4.6. The potential impacts to socioeconomic resources were analyzed and presented in Section 4.14.

IT-5-4

Your comment is noted. No change to the Final EIS was necessary.

IT-5-5

Your comment is noted. Reclamation has included draft operational guidelines in the Final EIS (Appendix S) that address the administration of the ICS mechanism.

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THE SPARKS LAW FIRM, P. C.

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April 27, 2007

Via U.S. Mail Certified - Return Receipt Requested
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BUREAU OF RECLAMATION
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Boulder City, Nevada 89006-1470

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Re: *Comments on the DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead - YAVAPAI-APACHE NATION*

Dear Regional Director:

This Firm serves as Special Legal Counsel to the Yavapai-Apache Nation ("Nation") and submits the following comments on the *DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* ("DEIS"). The Nation previously submitted written comments to the Bureau of Reclamation ("Reclamation") on August 31, 2005, and at meetings during scoping for the preparation of the DEIS. Those comments, including attachments, are incorporated here by reference.

The Yavapai-Apache Nation is located in central Arizona, near the communities of Camp Verde and Clarkdale. The Reservation is does not presently have an adequate water supply to serve the requirements of the Nation.

The Nation has a Central Arizona Project Indian Water Delivery Contract Between the United States and the Yavapai-Apache Nation dated December 11, 1980 ("CAP Contract"), a copy of which was previously provided in the Nation's letter of August 31, 2005. This CAP Contract provides 1,200 acre-feet of CAP water to the Nation.

IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 2

River management strategies or decisions which would increase the frequency of shortages or the participation of others in the shortage pools, or reduce the long-term reliability of the Nation’s CAP water by declarations of a “shortage,” and other schemes which manipulate “credits”, storage rights, and exchanges must be avoided. Several of the alternatives described in the DEIS present shortage sharing scenarios and “conservation” schemes that will substantially reduce the reliability of the Nation’s CAP water supply and will materially injure the right of the Nation to receive this water supply under its CAP Contract.

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Section 3.21 of the Nation’s CAP Contract defines a “**Time of Shortage**” as “**a calendar year for which the Secretary determines that a shortage exists pursuant to Section 301(b) of the Basin Project Act, such that there is not sufficient Project Water in that year to supply up to a limit of 309,828 acre feet of water for Indian uses, and up to a limit of 510,000 acre feet of water for non-Indian Municipal and Industrial uses.**” Under the Nation’s CAP Contract, deliveries of Project Water to the Nation in Times of Shortage may be reduced or terminated in accordance with Section 4.9 of the Nation’s CAP Contract.

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It is paramount that the Secretary of Interior (“Secretary”) reject the proposed management strategies for Lake Powell and Lake Mead that would threaten the security or breach the Nation’s CAP Contract or breach the Secretary’s trust responsibility to properly manage and protect the Nation’s CAP water as an Indian Trust Asset.

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The Nation has always understood the terms of the CAP Contract relating to shortage to mean that delivery of CAP water depends upon the physical situation of the Colorado River and not upon a scheme of management in which some are benefitted while others are not. The Secretary owes the Nation a trust duty to refrain from implementing management strategies which interfere with the Nation’s contractual rights and expectation of delivery of CAP water and funding for construction and

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IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 3

the payment of OM&R from the power generation revenues and Lower Colorado River Basin Development Fund under its CAP Contract.

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The following is a list of the Nation’s primary objections and concerns regarding the DEIS:

1. The DEIS Does Not Discuss How Shortages of the Natural Flow of the Colorado River Will Be Shared from Year to Year Between the Upper Basin and Lower Basin States

The DEIS provides no discussion as to how shortages in the annual natural flow of the Colorado River which is not adequate to meet the 15 m.a.f. of apportionments to the Upper and Lower Basin States will be imposed as between the Upper Basin and Lower Basin. The DEIS must first discuss how shortages would be borne between the Upper Basin and Lower Basin, before discussing the allocation of water that is stored in the Colorado River reservoirs. The Secretary must first look to the annual natural flow of the River to provide the water supply that is to be apportioned.

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Thereafter, the Secretary may look to the water which is stored in the reservoirs in the Lower Basin to provide the supplemental supply to meet the apportionment entitlements of contractors in the Lower Basin States.

2. The DEIS Cannot Lawfully Place Precedence Upon the Nevada Intake at 1050' Elevation Over the Requirements that the Nations Receive Their Entitlements from the Colorado River to Provide for Their Permanent Tribal Homelands

The DEIS should not place precedence and limit considerations regarding the mark at which shortages will be declared based upon the location of the State of Nevada’s intake at the 1050' elevation in Lake Mead. While Nevada may deepen its intake facilities into Lake Mead to mitigate impacts when a shortage is declared on the River, the Nations have very few, if any, alternatives to enable them to obtain access to Colorado River water or replacement water supplies to provide for their Permanent Tribal Homelands. The DEIS should consider alternatives for shortage based upon the Secretary’s

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IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 4

obligation to protect and make available the Colorado River water supply to the Tribes, and to the long term reliability of the water supply for all contractors with rights to the River. The man-made intake facilities at Lake Mead for Nevada may be readily altered to correspond with the possibility of shortage, and thus, should be of little or no concern with regard to the management of the River, as opposed to those who have no other options. 12

The Law of the River does not allow the Lower Basin water supply to be managed primarily to serve one State or interest over another. The sole beneficiary of the Lake Mead scenario is Nevada, to the detriment of others, including the CAP Tribes. The alternatives must be adjusted to provide scenarios with equal consideration of the importance of the delivery of CAP water to the Nation. 13
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3. The DEIS Erroneously Assumes that the Nation is a Subcontractor of the Central Arizona Water Conservation District

The DEIS erroneously assumes and conveys that the Nation is a subcontractor of CAP water under the Central Arizona Water Conservation District (“CAWCD”), a political arm of the State of Arizona. See Appendix E at E-1, showing the CAWCD as the entitlement holder for all CAP water. On the contrary, the Nation has a **direct** contract with the Secretary of Interior for the delivery of its CAP water, and the United States has a **direct** obligation to deliver this water pursuant to the Nation’s contract. See Nation’s CAP Contract. This misstatement should be corrected throughout the DEIS. 15
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Since the Nation is a direct contractor with the Secretary, it must be treated on a co-equal level with that of CAWCD and other contractors in other states with direct contracts with the Secretary to receive the waters of the Colorado River. CAWCD also has a direct contract with the Secretary for the delivery of the non-Indian portion of CAP water and an obligation to repay the cost of the non-Indian portion of the CAP project to the United States. 17
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IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 5

The Nation's water right to CAP water is a portion of Arizona's equitable apportionment under *Arizona v. California* that must be directly protected by the Secretary as an Indian Trust Asset for the Nation. The State of Arizona should have an interest in protecting the Nation's CAP water supply. However, the State's conduct in this matter shows that its sole interest and effort is focused upon committing the Nation's CAP water supply to non-Indian use, preventing the Nation from ever using the "wet" water to which the Nation has a right under its CAP Contract. Its conduct also indicates that the States seeks to take and keep the financial benefits from the CAP water to which the Nation is entitled, which is presently diverted and unlawfully "converted" to use by the State and other non-Indian interests.

4. Use of Reservoirs to Store and Deliver "Conserved" Colorado River System and Non-System Water

The DEIS, at ES-2, lists one of the purposes of the proposed federal actions as to "[a]llow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions." While this purpose appears to be reasonable and foresightful, the method of implementing this purpose, as proposed in certain of the DEIS alternatives, will result in a wholesale taking of the Nation's CAP water, and allow the Nation's water to be committed to use by others. This is a violation of the Law of the River and of the Nation's CAP water rights which are Indian Trust Assets that must be protected by the Secretary.

"The States [in the Basin States Alternative] propose that the Secretary develop a policy and accounting procedure concerning augmentation, extraordinary conservation, and system efficiency projects, including specific extraordinary conservation projects, tributary conservation projects, introduction of non-Colorado River system water, system efficiency improvements and exchange of non-Colorado River System water. The accounting and recovery process would be referred to as

IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 6

‘Intentionally Created Surplus’ consistent with the concept that the States will take actions to augment storage of water in the Lower Colorado River Basin. The water would be distributed pursuant to Section II(B)(2) of the Decree and forbearance agreements between the States. The ICS credits may not be created or released without such forbearance agreements.” (Appendix at J-11).

However, substantially all, if not all, of these “policy and accounting procedures” are based on a fiction. All of the Colorado River water, natural flow, storage, and surpluses are committed by contracts with the Secretary and the Treaty with the Republic of Mexico. There are no unallocated or uncommitted amounts of Colorado River water possible, including the fictional “Intentionally Created Surplus.” The fictional “Intentionally Created Surplus” is actually an attempt to convert the water that is committed to some other use to another entity.

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Due to its position, the State of Arizona has a particular interest in “conservation” methods for the Colorado River that would preclude the Arizona Tribes from participation. Once the same Colorado River water is labeled “conserved” by a particular party, the party (such as the State of Arizona) will preclude the Nation from participating in the benefits of the “conserved” Colorado River water.

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The use of the “conserved” water that will be stored in the reservoirs and claimed exclusively by the State of Arizona (which thereby excludes Arizona Indian Tribe access) will reduce and manipulate the amount of water from the Colorado River and its storage that could be used by the Nation from year to year to fulfill their CAP water orders. This manipulation of the Colorado River water source to preclude its lawful use by the Nation is a violation of the Law of the River and a violation of the Nation’s CAP Contract.

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Furthermore, the States cannot enter into forbearance agreements or shortage sharing agreements amongst themselves where the rights of Arizona Tribes to their share of Arizona’s equitable

IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 7

apportionment to the Colorado River would be manipulated by the States. *See e.g.* Appendix J-10 (“Arizona and Nevada will share shortages based on a shortage sharing agreement. In the event that no agreement has been reached, Arizona and Nevada will share shortages in accordance with the 1968 Colorado River Basin Project Act, the Decree, other existing law as applicable, and the Interstate Banking Agreement between Arizona and Nevada parties.”). The participation of the Arizona Tribes in the forbearance agreements or any other agreements between Arizona and other States, as co-equal water users of Arizona’s equitable apportionment, is required by the Law of the River, and by the direct contracts of the Tribes with the Secretary of Interior.

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The proposed alternatives must be revised so that any “conservation” regime used to reduce the potential conditions which may cause or enable the Secretary to make declarations of shortage on the Colorado River, or used to provide additional waters to Arizona (including Arizona Tribes), include all Arizona CAP Tribes in the mutual “wet water” and financial benefits of such schemes. Otherwise, the Tribes will be subject to significant injury as a result of the manipulation schemes in violation of the Law of the River, and the contractual and constitutional rights of the Tribes.

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5. The DEIS Does Not Discuss the Legal Authority for Allowing Credits for Fallowed Lands, Canal Lining and Other “Conservation” Measures

The DEIS does not discuss any legal authority which would permit the States to obtain credits for “fallowing” lands, canal lining and other measures undertaken to purportedly “conserve” Colorado River water. Under the law in Arizona, other western States and Federal Reclamation Law, the waters “conserved” by the fallowing of lands and the lining of canals is committed back to the stream flow to be used by the next water user in the system. *See Phelps Dodge Corp. v. Ariz. Dep’t of Water Res.*, 2005 Ariz. App. LEXIS 108 (Ariz. Ct. App. 2005) (observing that water rights in Arizona are “. . . usufructory, to ensure a maximum beneficial use of Arizona’s water resources.”) (citing *Clough v. Wing*, 2 Ariz. 371, 379-81, 17 P. 453, 455-56 (Terr. 1888)); *Salt River Valley Water Users’ Ass’n v. Kovacovich*, 3. Ariz.

27

IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 8

App. 28, 411 P.2d 201, 203 (Ariz. Ct. App. 1966) (“any practice, whether through water-saving procedures or otherwise, whereby [a diverter] may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant water rights.”); Kinney, *Treatise on the Law of Irrigation and Water Rights and the Arid Region*, (2nd Ed. 1912), §782, 783.

The DEIS must discuss what legal authority would permit the States to commit “conserved” water to inure to the benefit of a single party or particular beneficiary, rather than for the use and benefit of **all** users in the Colorado River system under the Law of the River. Furthermore, if such a “conservation” scheme could be lawfully implemented and used to benefit particular parties or beneficiaries, the Tribes must be permitted to participate, and the Secretary must fully support and protect the Nation’s full and unfettered participation and receipt of benefits.

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6. Use of Surplus by Basin States

The Basin States Alternative also proposes a different scheme for the distribution of surplus. For instance, the Basin States Alternative would “[d]istribute Arizona’s share to surplus demands in Arizona including off stream banking and interstate banking demands.” See Appendix at J-9. The problem is that based upon historical and present practices by Arizona (which is charged with protecting the entire State’s equitable apportionment from the Colorado River, including that which is used by the Tribes) the State would nevertheless use this surplus for the benefit of non-Indians, to the exclusion of the Tribes. In fact, the State of Arizona is engaging in this conduct now, through, *inter alia*, the Arizona Water Banking Authority and the interstate water banking agreement with Nevada. The Secretary’s approval of the Basin States Alternative would put the weight of authority of the United States behind these wrongful acts by the State of Arizona.

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IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 9

The Secretary should not select the Basin States Alternative or any other alternative, where it would exclude Tribes from participation in the arrangements made on the Colorado River during times of surplus. In addition, the Secretary must include the Arizona Tribes and ensure that the Arizona Tribes receive the mutual benefits of surplus on the Colorado River.

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7. The DEIS Does Not Provide Adequate Details Regarding the Basin States Proposal for Accounting Policy and Procedure for Intentionally Created Surplus

The DEIS does not provide sufficient detail regarding the alternatives for the accounting policy and procedure that the Secretary would implement for Intentionally Created Surplus or any other “conserved” water. Without this detail, it is unclear as to how the CAP Tribes would be permitted to participate in the ICS and the impact of the uses of the ICS upon the Tribes. This should be corrected in the DEIS.

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8. The Arizona Water Settlements Act, P.L. 108-451 Is Not Yet Enforceable

The DEIS’ underlying assumption and reliance upon the AWSA as defining the characteristics of the CAP is premature. *See* DEIS at 4-81. The AWSA is not yet enforceable and may never become enforceable. If so, the DEIS or Final EIS intended to be published by December 2007, will require immediate revision and further public comment. In addition, the existing DEIS should include an impact analysis which compares the impacts under the present characteristics of the CAP with the impacts under the characteristics which would exist if the AWSA were to become enforceable.

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9. There Is No Misunderstanding As To How Shortages Are To Be Distributed Between CAP Indian and M&I Priority Users Within the CAP

The DEIS states that “prior to the enactment of the AWSA, there were differing views as to how mild shortages would be distributed between CAP Indian and M&I priority users.” (DEIS at 4-124). While there may be so-called “differing views”, the Nation’s CAP Contract is very clear regarding how

IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 10

shortages are to be implemented as to the Nation. Furthermore, the AWSA did nothing to clarify how such shortages are shared, because the Nation’s CAP Contract cannot be affected or modified by the AWSA. The DEIS and its underlying assumptions must be changed to reflect and analyze the true nature of the Nation’s CAP entitlement and how shortages within CAP will be implemented as to the Nation.

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10. The DEIS Does Not List or Discuss the Impacts to the Nation’s CAP Entitlements

The Nation has a contractual right to CAP water under a direct contract with the United States. As reflected in the DEIS, the Nation’s CAP Contract could be used to satisfy the Nation’s *Winter’s* or federal reserved water rights. Since this water could be used in this way, the DEIS should analyze the impact of the shortage criteria as an Indian Trust Asset. In addition, since the Nation has a direct contract with the United States on a co-equal basis with CAWCD, the DEIS should analyze the impact of shortage sharing upon the Nation separately from any analysis of shortages which pertains to other CAP water users.

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11. The DEIS Fails to Adequately Discuss or Analyze the Impacts of the Alternatives Upon the Nation

The DEIS finds that “No vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration.” DEIS at 4-123. This is incorrect.

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The DEIS erroneously attempts to delineate between a paper water right and wet water. These are one in the same. Whether or not the paper water right becomes wet water is determined by whether or not the law is followed and whether or not the Secretary undertakes actions (or fails to take actions) which diminish the reliability or injure the ability of the Nation to receive its wet water. The implementation of shortage sharing criteria which would hinder the Nation’s ability to receive the water

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IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 11

to which it is entitled, and the selection of an alternative which would permit waters to be “conserved” and committed to exclusive use by certain parties, alters the reliability of the Nation’s entitlement to CAP water. The DEIS cannot distinguish between the effect of the alternative upon the legal entitlement of the Nation versus the effect upon the Nation’s receipt of the wet waters pursuant to the legal entitlement. 42

The DEIS proposes alternatives which will impact and diminish the reliability of the CAP water supply and thus, injure the ability of the Nation to receive the wet water to which it is entitled. The Secretary is charged with the responsibility to implement shortage sharing criteria which protect the Nation’s receipt of the CAP water supply which is an Indian Trust Asset. The DEIS must analyze the impacts upon the Nation’s receipt of the water to which it is entitled, and not merely make a statement that the alternatives will have “no effect” upon the Nation’s legal entitlement to the CAP water. A policy which proclaims no impact on the Nation’s legal entitlement which results in **no wet water** to fulfill its entitlement is deceptive and amounts to invidious discrimination. The DEIS’ avoidance of discussing the true impact of the alternatives upon the Nation must be corrected. 43
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12. The DEIS Fails to Discuss How “Voluntary” Shortages Would Be Implemented and Their Resultant Effect Upon the Nation and Its Right to CAP Water

The DEIS mentions that certain “voluntary” shortages could be implemented. DEIS at 4-12. 46
 However, the DEIS is unclear as to who would agree to such voluntary shortages. The Secretary cannot permit the State of Arizona to decide whether or not it would enter into a voluntary shortage, where such shortage would diminish the reliability of the Nation’s CAP water. This is simply unlawful. 47
 Furthermore, the Secretary cannot allow other states to enter into “voluntary” shortages and alternative River management schemes that would create conditions where the Tribes were required to bear shortages that would not otherwise be borne, absent such voluntary agreements or schemes. The DEIS 48

IT-6

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 12

fails to discuss this in any detail. The DEIS should be revised for clarity and to provide a meaningful analysis of the impacts of the proposed “voluntary” shortages to the Nation’s receipt of its CAP water supply.

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13. The DEIS Fails to Discuss the Potential Impact of Any of the Alternatives on Water Quality or Quantity to Which the Republic of Mexico is Entitled Under Treaty

The DEIS fails to discuss the ongoing and potential environmental impacts of any of the alternatives on the Colorado River delta, including wet lands, and the fact that the delta is one of the primary marine nurseries supporting aquatic life, fisheries and migratory wildlife subject to international treaties, and the ultimate fish production and annual catch allocated among countries of the Pacific Rim. The alternatives proposed by the DEIS, with the increase in use of the Colorado River proposed by the alternatives, including the Basin States Alternative, will undoubtedly impact the delta.

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Please continue to keep this Firm on your mailing list for all future communications and documents related to this matter.

Yours Truly,

THE SPARKS LAW FIRM, P.C.



Robyn L. Interpreter

RLI/rli

cc: Jamie Fullmer, Chairman
 David Kwail, Vice-Chairman
 Council Members

I:\INDIAN\AVAPAI\CAP\tr to sec on DEIS wpd

IT-6

Reponses to Comment Letter IT-6

IT-6-1 and IT-6-2

Your comment is noted. No change to the Final EIS was necessary.

IT-6-3

Your comment is noted. No change to the Final EIS was necessary.

IT-6-4

Reclamation does not concur with this comment. As discussed in Section 4.3.4.1 of the Draft EIS (renumbered to Section 4.3.4.2 in the Final EIS), conservation activities resulting from participation in a storage and delivery mechanism results in higher Lake Mead elevations, due to the system assessment whereby a percentage of the conserved water is retained in Lake Mead. Higher Lake Mead elevations would result in a decrease in the risk of shortages and an increase in the reliability of 4th priority Arizona water supplies.

IT-6-5

Your comment is noted. No change to the Final EIS was necessary.

IT-6-6

As noted in Section 4.4.3 of the Draft EIS and of the Final EIS, the proposed federal action will not affect the entitlements to water users within the Lower Division states. However, water deliveries to users within each state may be affected and were analyzed in the EIS.

IT-6-7

Reclamation does not concur with this comment. As noted in Section 1.2, the interim guidelines would be used by the Secretary to determine those circumstances under which the Secretary would reduce the annual amount of water available for consumptive use from Lake Mead to the Colorado River Lower Division states (Arizona, California, and Nevada) (Section 1.7) below 7.5 million acre-feet (maf) (a “Shortage”) pursuant to Article II(B)(3) of the Consolidated Decree. Section 301(b) of the Colorado River Basin Project Act clearly states that, under those circumstances, diversions to the CAP would be limited.

An analyses of the trade-offs between incurring more manageable yet more frequent shortages versus incurring no shortages for some period of time resulting in an increased risk of much larger, severe and less manageable shortages at a later date has been performed through the comparison of the alternatives that have been studied in the EIS. The Preferred Alternative proposes more frequent, less severe shortages, reducing the risk of incurring larger more severe shortages at a later date. These analyses included the potential impacts to water deliveries to CAP (Section 4.4.7.1 and Appendix G).

IT-6-8

See response to Comment No. IT-6-6.

IT-6-9 and IT-6-10

Your comment is noted. No change to the Final EIS was necessary. The apportionment to the Upper Basin and Lower Basin is outside the scope of this EIS.

IT-6-11 through IT-6-14

Reclamation does not concur with this comment. Of the alternatives considered in the Draft EIS, the Basin States, Reservoir Storage, and Water Supply alternatives did not assume absolute protection to either of SNWA's intakes (elevations 1,050 feet msl or 1,000 feet msl). In the Final EIS, the Preferred Alternative also does not provide absolute protection to SNWA's intakes.

IT-6-15 and IT-6-16

Your comment is noted. Table E-1 in Appendix E lists Arizona water entitlement holders and priorities and aggregates all CAP water contracts into one entry under the heading Central Arizona Water Conservation District (CAP) for presentation purposes only. It was not intended to suggest that CAP contracts with the Secretary were subcontracts with CAWCD. Table 3.2-2 in the Draft EIS lists the individual AP contractors, including the Indian tribes. In the Final EIS, Appendix G was modified to more clearly explain the CAP framework (Section G.4.8). In the Final EIS, Table G-3 shows the CAP entitlements by priority and Table G-4 shows the CAP priority 2 Indian entitlements by sub-priority. Both tables clearly show the Yavapai-Apache entitlement.

IT-6-17 and IT-6-18

Your comment is noted. No change to the Final EIS was necessary.

IT-6-19

See response to Comment No. IT-6-6.

IT-6-20

Your comment is noted. No change to the Final EIS was necessary.

IT-6-21

This comment does not accurately reflect the information published by Reclamation in the Draft EIS. As described in Section 2.3, Section 2.4, Section 2.5, the Basin States, Conservation Before Shortage, and Reservoir Storage alternatives proposed a storage and delivery mechanism that would encourage and account for augmentation and conservation of water supplies. In the Final EIS, Reclamation has identified the Preferred Alternative that includes a similar mechanism

(ICS). Draft operational guidelines have also been included in the Final EIS (Appendix S) that address the administration of the ICS mechanism.

IT-6-22 to IT-6-24

Reclamation does not concur with these comments. See response to Comment No. IT-6-21.

IT-6-25 and IT-6-26

As noted in Section 1.2 of the Draft EIS, the interim guidelines would be used by the Secretary to allow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead. Reclamation has included draft operational guidelines in the Final EIS (Appendix S) that address the administration of the ICS mechanism.

IT-6-27

See response to Comment No. IT-6-25.

IT-6-28

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-6-29

See response to Comment No. IT-6-25.

IT-6-30 and IT-6-32

Reclamation does not concur with these comments. The Basin States proposal (Appendix J) suggests that Arizona's share of surplus under a Quantified Surplus Condition be distributed to "surplus demands in Arizona *including* off stream banking and interstate banking demands" (emphasis added).

IT-6-33

Your comment is noted. Reclamation has included draft operational guidelines in the Final EIS (Appendix S) that address Lake Mead operations including surplus determinations. Inclusion of the statement "Distribute Arizona's share to surplus demands in Arizona including Off-stream Banking and interstate banking demands" in the draft guidelines does not preclude distribution of surplus within Arizona to other surplus demands including Tribal surplus demands.

IT-6-34

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-6-35 and IT-6-36

Your comment is noted. No change to the Final EIS was necessary. Reclamation's supplementing guidance states that if other projects in the affected area are likely to occur and the effects are reasonably foreseeable, they should be included and analyzed as part of the action.

IT-6-37

Your comment is noted. No change to the Final EIS was necessary. The Yavapai-Apache Nation is not affected by the shortage-sharing compromise in the AWSA (Section 4.4.7.1) because the compromise affects those entities within the M&I/Indian category with entitlements less firm than the Nation's entitlements.

IT-6-38

Your comment is noted. No change to the Final EIS was necessary. As noted in Section 3.10.1, ITAs are "... 'legal interests' in 'assets' held in 'trust' by the federal government for federally recognized Indian tribes or individual Indians" (USBR 1994). For this analysis, the Indian water rights and land assets considered include federally reserved Indian rights to Colorado River water including rights established pursuant to *Arizona v. California*; Colorado River water Tribal delivery contracts where such contracts are part of a congressionally approved water rights settlement; and Indian reservations (Section 3.10.1).

IT-6-39

Your comment is noted. No change to the Final EIS was necessary. However, based on the modeling assumptions used to distribute shortages to CAP users, the shortage to the Nation would be the same whether analyzed separately or included as part of the analysis with other CAP contractors. Appendix G (Attachment B) provides the modeled shortages to the Nation for a range of shortages for selected years.

IT-6-40 through IT-6-42

Reclamation does not concur with these comments. No change to the Final EIS was necessary.

IT-6-43

Reclamation does not concur with this comment. An analyses of the trade-offs between incurring more manageable yet more frequent shortages versus incurring no shortages for some period of time resulting in an increased risk of much larger, severe and less manageable shortages at a later date has been performed through the comparison of the alternatives that have been studied in the EIS. The Preferred Alternative proposes more frequent, less severe shortages, reducing the risk of incurring larger more severe shortages at a later date. These analyses included the potential impacts to water deliveries to users within the CAP (Section 4.4.7.1)

IT-6-44 and IT-6-45

Reclamation does not concur with these comments. See response to Comment No. IT-6-6.

IT-6-46 through IT-6-49

Your comment is noted. No change to the Final EIS was necessary. As noted in Section 2.4, the Conservation Before Shortage Alternative includes voluntary, compensated reductions in water use to minimize involuntary shortages in the Lower Basin and avoid risk of curtailments of use in the Upper Basin. The specific entities that might participate in a voluntary conservation program are unknown. However, for purposes of environmental analyses, it was assumed that the conservation amounts as specified in Section 2.4 would be achieved. Details of the modeling assumptions are presented in Appendix M.

IT-6-50 and IT-6-51

See response to Comment No. G-6-40.

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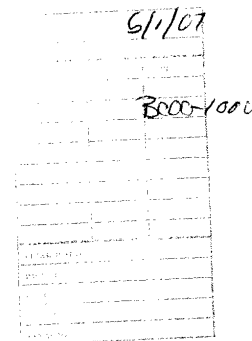
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April 27, 2007

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7006 0810 0000 6725 0815

BUREAU OF RECLAMATION
ATTN: BCOO-1000
P.O. Box 61470
Boulder City, Nevada 89006-1470



Re: *Comments on the DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead - TONTO APACHE TRIBE*

Dear Regional Director:

This Firm serves as Special Legal Counsel to the Tonto Apache Tribe ("Tribe") and submits the following comments on the *DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* ("DEIS"). The Tribe previously submitted written comments to the Bureau of Reclamation ("Reclamation") on August 31, 2005, and at meetings during scoping for the preparation of the DEIS. Those comments, including attachments, are incorporated here by reference.

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The Tonto Apache Tribe is located in eastern Arizona on the Tonto Apache Reservation ("Reservation") near Payson, Arizona. The Reservation is 85 acres and does not have an adequate water supply to serve the Reservation.

2

The Tribe has a Central Arizona Project Indian Water Delivery Contract Between the United States and the Tonto Apache Tribe dated December 11, 1980 ("CAP Contract"), a copy of which was previously provided in the Tribe's letter of August 31, 2005. This CAP Contract provides 125 acre-feet of CAP water to the Tribe.

IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 2

River management strategies or decisions which would increase the frequency of shortages or the participation of others in the shortage pools, or reduce the long-term reliability of the Tribe’s CAP water by declarations of a “shortage,” and other schemes which manipulate “credits”, storage rights, and exchanges must be avoided. Several of the alternatives described in the DEIS present shortage sharing scenarios and “conservation” schemes that will substantially reduce the reliability of the Tribe’s CAP water supply and will materially injure the right of the Tribe to receive this water supply under its CAP Contract.

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Section 3.21 of the Tribe’s CAP Contract defines a “**Time of Shortage**” as “**a calendar year for which the Secretary determines that a shortage exists pursuant to Section 301(b) of the Basin Project Act, such that there is not sufficient Project Water in that year to supply up to a limit of 309,828 acre feet of water for Indian uses, and up to a limit of 510,000 acre feet of water for non-Indian Municipal and Industrial uses.**” Under the Tribe’s CAP Contract, deliveries of Project Water to the Tribe in Times of Shortage may be reduced or terminated in accordance with Section 4.9 of the Tribe’s CAP Contract.

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It is paramount that the Secretary of Interior (“Secretary”) reject the proposed management strategies for Lake Powell and Lake Mead that would threaten the security or breach the Tribe’s CAP Contract or breach the Secretary’s trust responsibility to properly manage and protect the Tribe’s CAP water as an Indian Trust Asset.

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The Tribe has always understood the terms of the CAP Contract relating to shortage to mean that delivery of CAP water depends upon the physical situation of the Colorado River and not upon a scheme of management in which some are benefitted while others are not. The Secretary owes the Tribe a trust duty to refrain from implementing management strategies which interfere with the Tribe’s contractual rights and expectation of delivery of CAP water and funding for construction and the

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IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 3

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The following is a list of the Tribe’s primary objections and concerns regarding the DEIS:

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The DEIS provides no discussion as to how shortages in the annual natural flow of the Colorado River which is not adequate to meet the 15 m.a.f. of apportionments to the Upper and Lower Basin States will be imposed as between the Upper Basin and Lower Basin. The DEIS must first discuss how shortages would be borne between the Upper Basin and Lower Basin, before discussing the allocation of water that is stored in the Colorado River reservoirs. The Secretary must first look to the annual natural flow of the River to provide the water supply that is to be apportioned. 9
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Thereafter, the Secretary may look to the water which is stored in the reservoirs in the Lower Basin to provide the supplemental supply to meet the apportionment entitlements of contractors in the Lower Basin States.

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IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 4

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The Law of the River does not allow the Lower Basin water supply to be managed primarily to serve one State or interest over another. The sole beneficiary of the Lake Mead scenario is Nevada, to the detriment of others, including the CAP Tribes. The alternatives must be adjusted to provide scenarios with equal consideration of the importance of the delivery of CAP water to the Tribe. 13
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3. The DEIS Erroneously Assumes that the Tribe is a Subcontractor of the Central Arizona Water Conservation District

The DEIS erroneously assumes and conveys that the Tribe is a subcontractor of CAP water under the Central Arizona Water Conservation District (“CAWCD”), a political arm of the State of Arizona. See Appendix E at E-1, showing the CAWCD as the entitlement holder for all CAP water. On the contrary, the Tribe has a **direct** contract with the Secretary of Interior for the delivery of its CAP water, and the United States has a **direct** obligation to deliver this water pursuant to the Tribe’s contract. See Tribe’s CAP Contract. This misstatement should be corrected throughout the DEIS. 15
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IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 5

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4. Use of Reservoirs to Store and Deliver "Conserved" Colorado River System and Non-System Water

The DEIS, at ES-2, lists one of the purposes of the proposed federal actions as to "[a]llow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions." While this purpose appears to be reasonable and foresightful, the method of implementing this purpose, as proposed in certain of the DEIS alternatives, will result in a wholesale taking of the Tribe's CAP water, and allow the Tribe's water to be committed to use by others. This is a violation of the Law of the River and of the Tribe's CAP water rights which are Indian Trust Assets that must be protected by the Secretary.

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"The States [in the Basin States Alternative] propose that the Secretary develop a policy and accounting procedure concerning augmentation, extraordinary conservation, and system efficiency projects, including specific extraordinary conservation projects, tributary conservation projects, introduction of non-Colorado River system water, system efficiency improvements and exchange of non-Colorado River System water. The accounting and recovery process would be referred to as

IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 6

‘Intentionally Created Surplus’ consistent with the concept that the States will take actions to augment storage of water in the Lower Colorado River Basin. The water would be distributed pursuant to Section II(B)(2) of the Decree and forbearance agreements between the States. The ICS credits may not be created or released without such forbearance agreements.” (Appendix at J-11).

However, substantially all, if not all, of these “policy and accounting procedures” are based on a fiction. All of the Colorado River water, natural flow, storage, and surpluses are committed by contracts with the Secretary and the Treaty with the Republic of Mexico. There are no unallocated or uncommitted amounts of Colorado River water possible, including the fictional “Intentionally Created Surplus.” The fictional “Intentionally Created Surplus” is actually an attempt to convert the water that is committed to some other use to another entity.

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Due to its position, the State of Arizona has a particular interest in “conservation” methods for the Colorado River that would preclude the Arizona Tribes from participation. Once the same Colorado River water is labeled “conserved” by a particular party, the party (such as the State of Arizona) will preclude the Tribe from participating in the benefits of the “conserved” Colorado River water.

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The use of the “conserved” water that will be stored in the reservoirs and claimed exclusively by the State of Arizona (which thereby excludes Arizona Indian Tribe access) will reduce and manipulate the amount of water from the Colorado River and its storage that could be used by the Tribe from year to year to fulfill their CAP water orders. This manipulation of the Colorado River water source to preclude its lawful use by the Tribe is a violation of the Law of the River and a violation of the Tribe’s CAP Contract.

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Furthermore, the States cannot enter into forbearance agreements or shortage sharing agreements amongst themselves where the rights of Arizona Tribes to their share of Arizona’s equitable

IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 7

apportionment to the Colorado River would be manipulated by the States. *See e.g.* Appendix J-10 (“Arizona and Nevada will share shortages based on a shortage sharing agreement. In the event that no agreement has been reached, Arizona and Nevada will share shortages in accordance with the 1968 Colorado River Basin Project Act, the Decree, other existing law as applicable, and the Interstate Banking Agreement between Arizona and Nevada parties.”). The participation of the Arizona Tribes in the forbearance agreements or any other agreements between Arizona and other States, as co-equal water users of Arizona’s equitable apportionment, is required by the Law of the River, and by the direct contracts of the Tribes with the Secretary of Interior. 25

The proposed alternatives must be revised so that any “conservation” regime used to reduce the potential conditions which may cause or enable the Secretary to make declarations of shortage on the Colorado River, or used to provide additional waters to Arizona (including Arizona Tribes), include all Arizona CAP Tribes in the mutual “wet water” and financial benefits of such schemes. Otherwise, the Tribes will be subject to significant injury as a result of the manipulation schemes in violation of the Law of the River, and the contractual and constitutional rights of the Tribes. 26

5. The DEIS Does Not Discuss the Legal Authority for Allowing Credits for Fallowed Lands, Canal Lining and Other “Conservation” Measures

The DEIS does not discuss any legal authority which would permit the States to obtain credits for “fallowing” lands, canal lining and other measures undertaken to purportedly “conserve” Colorado River water. Under the law in Arizona, other western States and Federal Reclamation Law, the waters “conserved” by the fallowing of lands and the lining of canals is committed back to the stream flow to be used by the next water user in the system. *See Phelps Dodge Corp. v. Ariz. Dep’t of Water Res.*, 2005 Ariz. App. LEXIS 108 (Ariz. Ct. App. 2005) (observing that water rights in Arizona are “. . . usufructory, to ensure a maximum beneficial use of Arizona’s water resources.”) (citing *Clough v. Wing*, 2 Ariz. 371, 379-81, 17 P. 453, 455-56 (Terr. 1888)); *Salt River Valley Water Users’ Ass’n v. Kovacovich*, 3 Ariz. 27

IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 8

App. 28, 411 P.2d 201, 203 (Ariz. Ct. App. 1966) (“any practice, whether through water-saving procedures or otherwise, whereby [a diverter] may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant water rights.”); Kinney, *Treatise on the Law of Irrigation and Water Rights and the Arid Region*, (2nd Ed. 1912), §782, 783.

The DEIS must discuss what legal authority would permit the States to commit “conserved” water to inure to the benefit of a single party or particular beneficiary, rather than for the use and benefit of **all** users in the Colorado River system under the Law of the River. Furthermore, if such a “conservation” scheme could be lawfully implemented and used to benefit particular parties or beneficiaries, the Tribes must be permitted to participate, and the Secretary must fully support and protect the Tribe’s full and unfettered participation and receipt of benefits.

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6. Use of Surplus by Basin States

The Basin States Alternative also proposes a different scheme for the distribution of surplus. For instance, the Basin States Alternative would “[d]istribute Arizona’s share to surplus demands in Arizona including off stream banking and interstate banking demands.” See Appendix at J-9. The problem is that based upon historical and present practices by Arizona (which is charged with protecting the entire State’s equitable apportionment from the Colorado River, including that which is used by the Tribes) the State would nevertheless use this surplus for the benefit of non-Indians, to the exclusion of the Tribes. In fact, the State of Arizona is engaging in this conduct now, through, *inter alia*, the Arizona Water Banking Authority and the interstate water banking agreement with Nevada. The Secretary’s approval of the Basin States Alternative would put the weight of authority of the United States behind these wrongful acts by the State of Arizona.

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IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 9

The Secretary should not select the Basin States Alternative or any other alternative, where it would exclude Tribes from participation in the arrangements made on the Colorado River during times of surplus. In addition, the Secretary must include the Arizona Tribes and ensure that the Arizona Tribes receive the mutual benefits of surplus on the Colorado River.

7. The DEIS Does Not Provide Adequate Details Regarding the Basin States Proposal for Accounting Policy and Procedure for Intentionally Created Surplus

The DEIS does not provide sufficient detail regarding the alternatives for the accounting policy and procedure that the Secretary would implement for Intentionally Created Surplus or any other “conserved” water. Without this detail, it is unclear as to how the CAP Tribes would be permitted to participate in the ICS and the impact of the uses of the ICS upon the Tribes. This should be corrected in the DEIS.

8. The Arizona Water Settlements Act, P.L. 108-451 Is Not Yet Enforceable

The DEIS’ underlying assumption and reliance upon the AWSA as defining the characteristics of the CAP is premature. *See* DEIS at 4-81. The AWSA is not yet enforceable and may never become enforceable. If so, the DEIS or Final EIS intended to be published by December 2007, will require immediate revision and further public comment. In addition, the existing DEIS should include an impact analysis which compares the impacts under the present characteristics of the CAP with the impacts under the characteristics which would exist if the AWSA were to become enforceable.

9. There Is No Misunderstanding As To How Shortages Are To Be Distributed Between CAP Indian and M&I Priority Users Within the CAP

The DEIS states that “prior to the enactment of the AWSA, there were differing views as to how mild shortages would be distributed between CAP Indian and M&I priority users.” (DEIS at 4-124). While there may be so-called “differing views”, the Tribe’s CAP Contract is very clear regarding how

IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 10

shortages are to be implemented as to the Tribe. Furthermore, the AWSA did nothing to clarify how such shortages are shared, because the Tribe’s CAP Contract cannot be affected or modified by the AWSA. The DEIS and its underlying assumptions must be changed to reflect and analyze the true nature of the Tribe’s CAP entitlement and how shortages within CAP will be implemented as to the Tribe.

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10. The DEIS Does Not List or Discuss the Impacts to the Tribe’s CAP Entitlements

The Tribe has a contractual right to CAP water under a direct contract with the United States. As reflected in the DEIS, the Tribe’s CAP Contract could be used to satisfy the Tribe’s *Winter’s* or federal reserved water rights. Since this water could be used in this way, the DEIS should analyze the impact of the shortage criteria as an Indian Trust Asset. In addition, since the Tribe has a direct contract with the United States on a co-equal basis with CAWCD, the DEIS should analyze the impact of shortage sharing upon the Tribe separately from any analysis of shortages which pertains to other CAP water users.

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11. The DEIS Fails to Adequately Discuss or Analyze the Impacts of the Alternatives Upon the Tribe

The DEIS finds that “No vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration.” DEIS at 4-123. This is incorrect.

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The DEIS erroneously attempts to delineate between a paper water right and wet water. These are one in the same. Whether or not the paper water right becomes wet water is determined by whether or not the law is followed and whether or not the Secretary undertakes actions (or fails to take actions) which diminish the reliability or injure the ability of the Tribe to receive its wet water. The implementation of shortage sharing criteria which would hinder the Tribe’s ability to receive the water to

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IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 11

which it is entitled, and the selection of an alternative which would permit waters to be “conserved” and committed to exclusive use by certain parties, alters the reliability of the Tribe’s entitlement to CAP water. The DEIS cannot distinguish between the effect of the alternative upon the legal entitlement of the Tribe versus the effect upon the Tribe’s receipt of the wet waters pursuant to the legal entitlement.

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The DEIS proposes alternatives which will impact and diminish the reliability of the CAP water supply and thus, injure the ability of the Tribe to receive the wet water to which it is entitled. The Secretary is charged with the responsibility to implement shortage sharing criteria which protect the Tribe’s receipt of the CAP water supply which is an Indian Trust Asset. The DEIS must analyze the impacts upon the Tribe’s receipt of the water to which it is entitled, and not merely make a statement that the alternatives will have “no effect” upon the Tribe’s legal entitlement to the CAP water. A policy which proclaims no impact on the Tribe’s legal entitlement which results in **no wet water** to fulfill its entitlement is deceptive and amounts to invidious discrimination. The DEIS’ avoidance of discussing the true impact of the alternatives upon the Tribe must be corrected.

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12. The DEIS Fails to Discuss How “Voluntary” Shortages Would Be Implemented and Their Resultant Effect Upon the Tribe and Its Right to CAP Water

The DEIS mentions that certain “voluntary” shortages could be implemented. DEIS at 4-12. However, the DEIS is unclear as to who would agree to such voluntary shortages. The Secretary cannot permit the State of Arizona to decide whether or not it would enter into a voluntary shortage, where such shortage would diminish the reliability of the Tribe’s CAP water. This is simply unlawful. Furthermore, the Secretary cannot allow other states to enter into “voluntary” shortages and alternative River management schemes that would create conditions where the Tribes were required to bear shortages that would not otherwise be borne, absent such voluntary agreements or schemes. The DEIS fails to discuss

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IT-7

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 12

this in any detail. The DEIS should be revised for clarity and to provide a meaningful analysis of the impacts of the proposed “voluntary” shortages to the Tribe’s receipt of its CAP water supply. 49

13. The DEIS Fails to Discuss the Potential Impact of Any of the Alternatives on Water Quality or Quantity to Which the Republic of Mexico is Entitled Under Treaty

The DEIS fails to discuss the ongoing and potential environmental impacts of any of the alternatives on the Colorado River delta, including wet lands, and the fact that the delta is one of the primary marine nurseries supporting aquatic life, fisheries and migratory wildlife subject to international treaties, and the ultimate fish production and annual catch allocated among countries of the Pacific Rim. 50
 The alternatives proposed by the DEIS, with the increase in use of the Colorado River proposed by the alternatives, including the Basin States Alternative, will undoubtedly impact the delta. 51

Please continue to keep this Firm on your mailing list for all future communications and documents related to this matter.

Yours Truly,

THE SPARKS LAW FIRM, P.C.



Robyn L. Interpreter

RLL/rli

cc: Ivan Smith, Chairman
 Kenny Davis, Vice-Chairman
 Council Members

I:\INDIAN\TONTON\CAP\GENERAL CAP MATTERS\ltr to sec on DEIS.wpd

IT-7

Reponses to Comment Letter IT-7

IT-7-1 and IT-7-2

Your comment is noted. No change to the Final EIS was necessary.

IT-7-3

Your comment is noted. No change to the Final EIS was necessary.

IT-7-4

See response to Comment No. IT-6-4.

IT-7-5

Your comment is noted. No change to the Final EIS was necessary.

IT-7-6

See response to Comment No. IT-6-6.

IT-7-7

See response to Comment No. IT-6-7.

IT-7-8

See response to Comment No. IT-6-6.

IT-7-9 and IT-7-10

See responses to Comment Nos. IT-6-9 and IT-6-10.

IT-7-11 through IT-7-14

See responses to Comment Nos. IT-6-11 through IT-6-14.

IT-7-15 and IT-7-16

Your comment is noted. No change to the Final EIS was necessary. Table E-1 in Appendix E lists Arizona water entitlement holders and priorities and aggregates all CAP water contracts into one entry under the heading Central Arizona Water Conservation District (CAP) for presentation purposes only. It was not intended to suggest that CAP contracts with the Secretary were subcontracts with CAWCD. Reclamation concurs that the Tribe's CAP contract is a two-party contract between the Nation and the Secretary. In the Final EIS, Appendix G was modified to more clearly explain the CAP framework (Section G.4.8). In the Final EIS, Table G-3 shows the

CAP entitlements by priority and Table G-4 shows the CAP priority 2 Indian entitlements by sub-priority. Both tables clearly show the Tonto-Apache entitlement.

IT-7-17 and IT-18

See responses to Comment Nos. IT-6-17 and IT-6-18.

IT-7-19

See response to Comment No. IT-6-6.

IT-7-20

See response to Comment No. IT-6-20.

IT-7-21

See response to Comment No. IT-6-21.

IT-7-22 through IT-7-24

Reclamation does not concur with these comments. See response to Comment No. IT-6-21.

IT-7-25 and IT-7-26

See responses to Comment Nos. IT-6-25 and IT-6-26.

IT-7-27

See response to Comment No. IT-6-25.

IT-7-28

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-7-29

See response to Comment No. IT-6-25.

IT-7-30 through IT-7-32

See responses to Comment Nos. IT-6-30 through IT-6-32.

IT-7-33

See response to Comment No. G-6-33.

IT-7-34

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-7-35 and IT-7-36

See responses to Comment Nos. IT-6-35 and IT-6-36.

IT-7-37

Your comment is noted. No change to the Final EIS was necessary. The Tonto-Apache Tribe is not affected by the shortage-sharing compromise in the AWSA (Section 4.4.7.1) because the compromise affects those entities within the M&I/Indian category with entitlements less firm than the Tribe's entitlements.

IT-7-38

Reclamation does not concur with this comment. See response to Comment No. IT-6-38.

IT-7-39

Your comment is noted. No change to the Final EIS was necessary. However, based on the modeling assumptions used to distribute shortages to CAP users, the shortage to the Tribe would be the same whether analyzed separately or included as part of the analysis with other CAP contractors. Appendix G (Attachment B) provides the modeled shortages to the Tribe for a range of shortages for selected years.

IT-7-40 through IT-7-42

See response to Comment No. IT-6-40 through Comment No. IT-6-42.

IT-7-43

See response to Comment No. IT-6-43.

IT-7-44 through IT-7-45

Reclamation does not concur with this comment. See response to Comment No. IT-6-6.

IT-7-46 through IT-7-49

See response to Comment No. IT-6-46 through Comment No. IT-6-49.

IT-7-50 and IT-7-51

See response to Comment No. IT-6-50 and Comment No. IT-6-51.

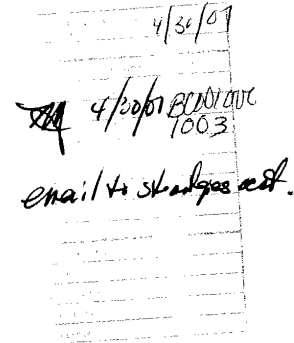
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April 27, 2007



Via U.S. Mail Certified - Return Receipt Requested
7006 0810 0000 6725 0808

BUREAU OF RECLAMATION
ATTN: BCOO-1000
P.O. Box 61470
Boulder City, Nevada 89006-1470

Re: Comments on the DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead - PASCUA YAQUI TRIBE

Dear Regional Director:

This Firm serves as Special Legal Counsel to the Pascua Yaqui Tribe (“Tribe”) and submits the following comments on the *DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* (“DEIS”). The Tribe previously submitted written comments to the Bureau of Reclamation (“Reclamation”) on August 31, 2005, and at meetings during scoping for the preparation of the DEIS. Those comments, including attachments, are incorporated here by reference.

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The Pascua Yaqui Tribe is located in southeastern Arizona near Tucson, Arizona. The Reservation does not have an adequate water supply to serve the Reservation.

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The Tribe has a Central Arizona Project Indian Water Delivery Contract Between the United States and the Pascua Yaqui Tribe dated December 11, 1980 (“CAP Contract”), a copy of which was previously provided in the Tribe’s letter of August 31, 2005. This CAP Contract provides 500 acre-feet of CAP water to the Tribe.

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 2

River management strategies or decisions which would increase the frequency of shortages or the participation of others in the shortage pools, or reduce the long-term reliability of the Tribe’s CAP water by declarations of a “shortage,” and other schemes which manipulate “credits”, storage rights, and exchanges must be avoided. Several of the alternatives described in the DEIS present shortage sharing scenarios and “conservation” schemes that will substantially reduce the reliability of the Tribe’s CAP water supply and will materially injure the right of the Tribe to receive this water supply under its CAP Contract.

Section 3.21 of the Tribe’s CAP Contract defines a “**Time of Shortage**” as “**a calendar year for which the Secretary determines that a shortage exists pursuant to Section 301(b) of the Basin Project Act, such that there is not sufficient Project Water in that year to supply up to a limit of 309,828 acre feet of water for Indian uses, and up to a limit of 510,000 acre feet of water for non-Indian Municipal and Industrial uses.**” Under the Tribe’s CAP Contract, deliveries of Project Water to the Tribe in Times of Shortage may be reduced or terminated in accordance with Section 4.9 of the Tribe’s CAP Contract.

It is paramount that the Secretary of Interior (“Secretary”) reject the proposed management strategies for Lake Powell and Lake Mead that would threaten the security or breach the Tribe’s CAP Contract or breach the Secretary’s trust responsibility to properly manage and protect the Tribe’s CAP water as an Indian Trust Asset.

The Tribe has always understood the terms of the CAP Contract relating to shortage to mean that delivery of CAP water depends upon the physical situation of the Colorado River and not upon a scheme of management in which some are benefitted while others are not. The Secretary owes the Tribe a trust duty to refrain from implementing management strategies which interfere with the Tribe’s contractual rights and expectation of delivery of CAP water and funding for construction and the payment of OM&R

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 3

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Thereafter, the Secretary may look to the water which is stored in the reservoirs in the Lower Basin to provide the supplemental supply to meet the apportionment entitlements of contractors in the Lower Basin States.

2. The DEIS Cannot Lawfully Place Precedence Upon the Nevada Intake at 1050' Elevation Over the Requirements that the Tribes Receive Their Entitlements from the Colorado River to Provide for Their Permanent Tribal Homelands

The DEIS should not place precedence and limit considerations regarding the mark at which shortages will be declared based upon the location of the State of Nevada’s intake at the 1050' elevation in Lake Mead. While Nevada may deepen its intake facilities into Lake Mead to mitigate impacts when a shortage is declared on the River, the Tribes have very few, if any, alternatives to enable them to obtain access to Colorado River water or replacement water supplies to provide for their Permanent Tribal 11

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 4

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The Law of the River does not allow the Lower Basin water supply to be managed primarily to serve one State or interest over another. The sole beneficiary of the Lake Mead scenario is Nevada, to the detriment of others, including the CAP Tribes. The alternatives must be adjusted to provide scenarios with equal consideration of the importance of the delivery of CAP water to the Tribe. 13
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Since the Tribe is a direct contractor with the Secretary, it must be treated on a co-equal level with that of CAWCD and other contractors in other states with direct contracts with the Secretary to receive the waters of the Colorado River. CAWCD also has a direct contract with the Secretary for the delivery of the non-Indian portion of CAP water and an obligation to repay the cost of the non-Indian portion of the CAP project to the United States. 17
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IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 5

The Tribe's water right to CAP water is a portion of Arizona's equitable apportionment under *Arizona v. California* that must be directly protected by the Secretary as an Indian Trust Asset for the Tribe. The State of Arizona should have an interest in protecting the Tribe's CAP water supply. However, the State's conduct in this matter shows that its sole interest and effort is focused upon committing the Tribe's CAP water supply to non-Indian use, preventing the Tribe from ever using the "wet" water to which the Tribe has a right under its CAP Contract. Its conduct also indicates that the States seeks to take and keep the financial benefits from the CAP water to which the Tribe is entitled, which is presently diverted and unlawfully "converted" to use by the State and other non-Indian interests.

4. Use of Reservoirs to Store and Deliver "Conserved" Colorado River System and Non-System Water

The DEIS, at ES-2, lists one of the purposes of the proposed federal actions as to "[a]llow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions." While this purpose appears to be reasonable and foresightful, the method of implementing this purpose, as proposed in certain of the DEIS alternatives, will result in a wholesale taking of the Tribe's CAP water, and allow the Tribe's water to be committed to use by others. This is a violation of the Law of the River and of the Tribe's CAP water rights which are Indian Trust Assets that must be protected by the Secretary.

"The States [in the Basin States Alternative] propose that the Secretary develop a policy and accounting procedure concerning augmentation, extraordinary conservation, and system efficiency projects, including specific extraordinary conservation projects, tributary conservation projects, introduction of non-Colorado River system water, system efficiency improvements and exchange of non-Colorado River System water. The accounting and recovery process would be referred to as

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 6

‘Intentionally Created Surplus’ consistent with the concept that the States will take actions to augment storage of water in the Lower Colorado River Basin. The water would be distributed pursuant to Section II(B)(2) of the Decree and forbearance agreements between the States. The ICS credits may not be created or released without such forbearance agreements.” (Appendix at J-11).

However, substantially all, if not all, of these “policy and accounting procedures” are based on a fiction. All of the Colorado River water, natural flow, storage, and surpluses are committed by contracts with the Secretary and the Treaty with the Republic of Mexico. There are no unallocated or uncommitted amounts of Colorado River water possible, including the fictional “Intentionally Created Surplus.” The fictional “Intentionally Created Surplus” is actually an attempt to convert the water that is committed to some other use to another entity.

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Due to its position, the State of Arizona has a particular interest in “conservation” methods for the Colorado River that would preclude the Arizona Tribes from participation. Once the same Colorado River water is labeled “conserved” by a particular party, the party (such as the State of Arizona) will preclude the Tribe from participating in the benefits of the “conserved” Colorado River water.

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The use of the “conserved” water that will be stored in the reservoirs and claimed exclusively by the State of Arizona (which thereby excludes Arizona Indian Tribe access) will reduce and manipulate the amount of water from the Colorado River and its storage that could be used by the Tribe from year to year to fulfill their CAP water orders. This manipulation of the Colorado River water source to preclude its lawful use by the Tribe is a violation of the Law of the River and a violation of the Tribe’s CAP Contract.

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Furthermore, the States cannot enter into forbearance agreements or shortage sharing agreements amongst themselves where the rights of Arizona Tribes to their share of Arizona’s equitable

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 7

apportionment to the Colorado River would be manipulated by the States. *See e.g.* Appendix J-10 (“Arizona and Nevada will share shortages based on a shortage sharing agreement. In the event that no agreement has been reached, Arizona and Nevada will share shortages in accordance with the 1968 Colorado River Basin Project Act, the Decree, other existing law as applicable, and the Interstate Banking Agreement between Arizona and Nevada parties.”). The participation of the Arizona Tribes in the forbearance agreements or any other agreements between Arizona and other States, as co-equal water users of Arizona’s equitable apportionment, is required by the Law of the River, and by the direct contracts of the Tribes with the Secretary of Interior. 25

The proposed alternatives must be revised so that any “conservation” regime used to reduce the potential conditions which may cause or enable the Secretary to make declarations of shortage on the Colorado River, or used to provide additional waters to Arizona (including Arizona Tribes), include all Arizona CAP Tribes in the mutual “wet water” and financial benefits of such schemes. Otherwise, the Tribes will be subject to significant injury as a result of the manipulation schemes in violation of the Law of the River, and the contractual and constitutional rights of the Tribes. 26

5. The DEIS Does Not Discuss the Legal Authority for Allowing Credits for Fallowed Lands, Canal Lining and Other “Conservation” Measures

The DEIS does not discuss any legal authority which would permit the States to obtain credits for “fallowing” lands, canal lining and other measures undertaken to purportedly “conserve” Colorado River water. Under the law in Arizona, other western States and Federal Reclamation Law, the waters “conserved” by the fallowing of lands and the lining of canals is committed back to the stream flow to be used by the next water user in the system. *See Phelps Dodge Corp. v. Ariz. Dep’t of Water Res.*, 2005 Ariz. App. LEXIS 108 (Ariz. Ct. App. 2005) (observing that water rights in Arizona are “. . . usufructory, to ensure a maximum beneficial use of Arizona’s water resources.”) (citing *Clough v. Wing*, 2 Ariz. 371, 379-81, 17 P. 453, 455-56 (Terr. 1888)); *Salt River Valley Water Users’ Ass’n v. Kovacovich*, 3 Ariz. 27

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 8

App. 28, 411 P.2d 201, 203 (Ariz. Ct. App. 1966) (“any practice, whether through water-saving procedures or otherwise, whereby [a diverter] may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant water rights.”); Kinney, *Treatise on the Law of Irrigation and Water Rights and the Arid Region*, (2nd Ed. 1912), §782, 783.

The DEIS must discuss what legal authority would permit the States to commit “conserved” water to inure to the benefit of a single party or particular beneficiary, rather than for the use and benefit of **all** users in the Colorado River system under the Law of the River. Furthermore, if such a “conservation” scheme could be lawfully implemented and used to benefit particular parties or beneficiaries, the Tribes must be permitted to participate, and the Secretary must fully support and protect the Tribe’s full and unfettered participation and receipt of benefits.

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6. Use of Surplus by Basin States

The Basin States Alternative also proposes a different scheme for the distribution of surplus. For instance, the Basin States Alternative would “[d]istribute Arizona’s share to surplus demands in Arizona including off stream banking and interstate banking demands.” See Appendix at J-9. The problem is that based upon historical and present practices by Arizona (which is charged with protecting the entire State’s equitable apportionment from the Colorado River, including that which is used by the Tribes) the State would nevertheless use this surplus for the benefit of non-Indians, to the exclusion of the Tribes. In fact, the State of Arizona is engaging in this conduct now, through, *inter alia*, the Arizona Water Banking Authority and the interstate water banking agreement with Nevada. The Secretary’s approval of the Basin States Alternative would put the weight of authority of the United States behind these wrongful acts by the State of Arizona.

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IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 9

The Secretary should not select the Basin States Alternative or any other alternative, where it would exclude Tribes from participation in the arrangements made on the Colorado River during times of surplus. In addition, the Secretary must include the Arizona Tribes and ensure that the Arizona Tribes receive the mutual benefits of surplus on the Colorado River.

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7. The DEIS Does Not Provide Adequate Details Regarding the Basin States Proposal for Accounting Policy and Procedure for Intentionally Created Surplus

The DEIS does not provide sufficient detail regarding the alternatives for the accounting policy and procedure that the Secretary would implement for Intentionally Created Surplus or any other “conserved” water. Without this detail, it is unclear as to how the CAP Tribes would be permitted to participate in the ICS and the impact of the uses of the ICS upon the Tribes. This should be corrected in the DEIS.

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8. The Arizona Water Settlements Act, P.L. 108-451 Is Not Yet Enforceable

The DEIS’ underlying assumption and reliance upon the AWSA as defining the characteristics of the CAP is premature. *See* DEIS at 4-81. The AWSA is not yet enforceable and may never become enforceable. If so, the DEIS or Final EIS intended to be published by December 2007, will require immediate revision and further public comment. In addition, the existing DEIS should include an impact analysis which compares the impacts under the present characteristics of the CAP with the impacts under the characteristics which would exist if the AWSA were to become enforceable.

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9. There Is No Misunderstanding As To How Shortages Are To Be Distributed Between CAP Indian and M&I Priority Users Within the CAP

The DEIS states that “prior to the enactment of the AWSA, there were differing views as to how mild shortages would be distributed between CAP Indian and M&I priority users.” (DEIS at 4-124).

IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 10

While there may be so-called “differing views”, the Tribe’s CAP Contract is very clear regarding how shortages are to be implemented as to the Tribe. Furthermore, the AWSA did nothing to clarify how such shortages are shared, because the Tribe’s CAP Contract cannot be affected or modified by the AWSA. The DEIS and its underlying assumptions must be changed to reflect and analyze the true nature of the Tribe’s CAP entitlement and how shortages within CAP will be implemented as to the Tribe.

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10. The DEIS Does Not List or Discuss the Impacts to the Tribe’s CAP Entitlements

The Tribe has a contractual right to CAP water under a direct contract with the United States. As reflected in the DEIS, the Tribe’s CAP Contract could be used to satisfy the Tribe’s *Winter’s* or federal reserved water rights. Since this water could be used in this way, the DEIS should analyze the impact of the shortage criteria as an Indian Trust Asset. In addition, since the Tribe has a direct contract with the United States on a co-equal basis with CAWCD, the DEIS should analyze the impact of shortage sharing upon the Tribe separately from any analysis of shortages which pertains to other CAP water users.

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11. The DEIS Fails to Adequately Discuss or Analyze the Impacts of the Alternatives Upon the Tribe

The DEIS finds that “No vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration.” DEIS at 4-123. This is incorrect.

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The DEIS erroneously attempts to delineate between a paper water right and wet water. These are one in the same. Whether or not the paper water right becomes wet water is determined by whether or not the law is followed and whether or not the Secretary undertakes actions (or fails to take actions) which diminish the reliability or injure the ability of the Tribe to receive its wet water. The

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IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 11

implementation of shortage sharing criteria which would hinder the Tribe’s ability to receive the water to which it is entitled, and the selection of an alternative which would permit waters to be “conserved” and committed to exclusive use by certain parties, alters the reliability of the Tribe’s entitlement to CAP water. The DEIS cannot distinguish between the effect of the alternative upon the legal entitlement of the Tribe versus the effect upon the Tribe’s receipt of the wet waters pursuant to the legal entitlement. 42

The DEIS proposes alternatives which will impact and diminish the reliability of the CAP water supply and thus, injure the ability of the Tribe to receive the wet water to which it is entitled. The Secretary is charged with the responsibility to implement shortage sharing criteria which protect the Tribe’s receipt of the CAP water supply which is an Indian Trust Asset. The DEIS must analyze the impacts upon the Tribe’s receipt of the water to which it is entitled, and not merely make a statement that the alternatives will have “no effect” upon the Tribe’s legal entitlement to the CAP water. A policy which proclaims no impact on the Tribe’s legal entitlement which results in **no wet water** to fulfill its entitlement is deceptive and amounts to invidious discrimination. The DEIS’ avoidance of discussing the true impact of the alternatives upon the Tribe must be corrected. 43
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12. The DEIS Fails to Discuss How “Voluntary” Shortages Would Be Implemented and Their Resultant Effect Upon the Tribe and Its Right to CAP Water

The DEIS mentions that certain “voluntary” shortages could be implemented. DEIS at 4-12. 46
However, the DEIS is unclear as to who would agree to such voluntary shortages. The Secretary cannot permit the State of Arizona to decide whether or not it would enter into a voluntary shortage, where such shortage would diminish the reliability of the Tribe’s CAP water. This is simply unlawful. Furthermore, the Secretary cannot allow other states to enter into “voluntary” shortages and alternative River management schemes that would create conditions where the Tribes were required to bear shortages that 47
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IT-8

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 12

would not otherwise be borne, absent such voluntary agreements or schemes. The DEIS fails to discuss this in any detail. The DEIS should be revised for clarity and to provide a meaningful analysis of the impacts of the proposed “voluntary” shortages to the Tribe’s receipt of its CAP water supply.

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13. The DEIS Fails to Discuss the Potential Impact of Any of the Alternatives on Water Quality or Quantity to Which the Republic of Mexico is Entitled Under Treaty

The DEIS fails to discuss the potential and ongoing environmental impacts of any of the alternatives on the Colorado River delta, including wet lands, and the fact that the delta is one of the primary marine nurseries supporting aquatic life, fisheries and migratory wildlife subject to international treaties, and the ultimate fish production and annual catch allocated among countries of the Pacific Rim. The alternatives proposed by the DEIS, with the increase in use of the Colorado River proposed by the alternatives, including the Basin States Alternative, will undoubtedly impact the delta.

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Please continue to keep this Firm on your mailing list for all future communications and documents related to this matter.

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Yours Truly,

THE SPARKS LAW FIRM, P.C.



Robyn L. Interpreter

RLL/rli

cc: Herminia Frias, Chairwoman
Peter Yucupicio, Vice-Chairman
Council Members
Justin Ruggieri, Interim Attorney General
Pilar Thomas, Assistant to Chairwoman

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IT-8

Reponses to Comment Letter IT-8

IT-8-1 and IT-8-2

Your comment is noted. No change to the Final EIS was necessary.

IT-8-3

Your comment is noted. No change to the Final EIS was necessary.

IT-8-4

See response to Comment No. IT-6-4.

IT-8-5

Your comment is noted. No change to the Final EIS was necessary..

IT-8-6

See response to Comment No. IT-6-6.

IT-8-7

See response to Comment No. IT-6-7.

IT-8-8

See response to Comment No. IT-6-6.

IT-8-9 and IT-8-10

See responses to Comment Nos. IT-6-9 and IT-6-10..

IT-8-11 through IT-8-14

See responses to Comment Nos. IT-6-11 through IT-6-14.

IT-8-15 and IT-8-16

Your comment is noted. No change to the Final EIS was necessary. Table E-1 in Appendix E lists Arizona water entitlement holders and priorities and aggregates all CAP water contracts into one entry under the heading Central Arizona Water Conservation District (CAP) for presentation purposes only. It was not intended to suggest that CAP contracts with the Secretary were subcontracts with CAWCD. Reclamation concurs that the Tribe's CAP contract is a two-party contract between the Nation and the Secretary. In the Final EIS, Appendix G was modified to more clearly explain the CAP framework (Section G.4.8). In the Final EIS, Table G-3 shows the

CAP entitlements by priority and Table G-4 shows the CAP priority 2 Indian entitlements by sub-priority. Both tables clearly show the Pascua Yaqui entitlement.

IT-8-17 and IT-8-18

Your comment is noted. No change to the Final EIS was necessary.

IT-8-19

See response to Comment No. IT-6-6.

IT-8-20

Your comment is noted. No change to the Final EIS was necessary.

IT-8-21

See response to Comment No. IT-6-21.

IT-8-22 through IT-8-24

Reclamation does not concur with these comments. See response to Comment No. IT-6-21.

IT-8-25 and IT-8-26

See responses to Comment Nos. IT-6-25 and IT-6-26.

IT-8-27

See response to Comment No. IT-6-25.

IT-8-28

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-8-29

See response to Comment No. IT-6-25.

IT-8-30 through IT-8-32

See responses to Comment Nos. IT-6-30 through IT-6-32.

IT-8-33

See response to Comment No. G-6-33.

IT-8-34

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-8-35 and IT-8-36

See responses to Comment Nos. IT-6-35 and IT-6-36.

IT-8-37

Your comment is noted. No change to the Final EIS was necessary. The Pasqua Yaqui Tribe is not affected by the shortage-sharing compromise in the AWSA (Section 4.4.7.1) because the compromise affects those entities within the M&I/Indian category with entitlements less firm than the Tribe's entitlement.

IT-8-38

Reclamation does not concur with this comment. See response to Comment No. IT-6-38.

IT-8-39

Your comment is noted. No change to the Final EIS was necessary. However, based on the modeling assumptions used to distribute shortages to CAP users, the shortage to the Tribe would be the same whether analyzed separately or included as part of the analysis with other CAP contractors. Appendix G (Attachment B) provides the modeled shortages to the Tribe for a range of shortages for selected years.

IT-8-40 through IT-8-42

See responses to Comment No. IT-6-40 through IT-6-42.

IT-8-43

See response to Comment No. IT-6-43.

IT-8-44 through IT-8-45

Reclamation does not concur with this comment. See response to Comment No. IT-6-6.

IT-8-46 through IT-8-49

See responses to Comment Nos. IT-6-46 through IT-6-49.

IT-8-50 and IT-8-51

See responses to Comment Nos. IT-6-50 and IT-6-51.

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THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 2

Act and Settlement Agreement confirm certain water rights for the Tribe, including, *inter alia*, rights to 64,145 acre-feet of Central Arizona Project (“CAP”) water. *See* Settlement Act at 106 Stat. 4740, 4742-4747 and Settlement Agreement at Sections 9-12.

The Tribe has a Central Arizona Project Indian Water Delivery Contract Between the United States and the San Carlos Apache Tribe dated December 11, 1980 (“CAP Contract”), a copy of which was previously provided in the Tribe’s letter of August 31, 2005. This CAP Contract originally allocated 12,700 acre-feet of CAP water to the Tribe. The Tribe’s CAP Contract was subsequently amended to include the additional 51,445 acre-feet of CAP water allocated to the Tribe under the Settlement Act. The Tribe agreed to settle a portion of its water rights claims in valuable consideration and return for, *inter alia*, this additional allocation of CAP water and CAP construction funds to pay for the exchange and delivery systems to enable the Tribe to receive and use its CAP entitlement on the Reservation. The allocation of CAP water to the Tribe pursuant to the Settlement Act and Settlement Agreement are trust assets of the Tribe which the Secretary of Interior has a specific trust responsibility to manage and protect. *See* 512 DM 2.2 (Dec. 1995); *see also*, Secretarial Order 3215, April 28, 2000.

River management strategies or decisions which would increase the frequency of shortages or the participation of others in the shortage pools, or reduce the long-term reliability of the Tribe’s CAP water by declarations of a “shortage,” and other schemes which manipulate “credits”, storage rights, and exchanges must be avoided. Several of the alternatives described in the DEIS present shortage sharing scenarios and “conservation” schemes that will substantially reduce the reliability of the Tribe’s CAP water supply and will materially injure the right of the Tribe to receive this water supply under the 1992 Settlement Act and Agreement.

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Section 3.21 of the Tribe’s CAP Contract defines a “**Time of Shortage**” as “**a calendar year for which the Secretary determines that a shortage exists pursuant to Section 301(b) of the Basin**

IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 3

Project Act, such that there is not sufficient Project Water in that year to supply up to a limit of 309,828 acre feet of water for Indian uses, and up to a limit of 510,000 acre feet of water for non-Indian Municipal and Industrial uses.” Under the Tribe’s CAP Contract, deliveries of Project Water to the Tribe in Times of Shortage may be reduced or terminated in accordance with Section 4.9 of the Tribe’s CAP Contract. 5

It is paramount that the Secretary of Interior (“Secretary”) reject the proposed management strategies for Lake Powell and Lake Mead that would threaten the security or breach the Tribe’s CAP Contract or breach the Secretary’s trust responsibility to properly manage and protect the Tribe’s CAP water as an Indian Trust Asset. 6

The Tribe has always understood the terms of the CAP Contract relating to shortage to mean that delivery of CAP water depends upon the physical situation of the Colorado River and not upon a scheme of management in which some are benefitted while others are not. The Secretary owes the Tribe a trust duty to refrain from implementing management strategies which interfere with the Tribe’s contractual rights and expectation of delivery of CAP water and funding for construction and the payment of OM&R from the power generation revenues and Lower Colorado River Basin Development Fund under its CAP Contract and the 1992 Settlement Act and Agreement. 7
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The following is a list of the Tribe’s primary objections and concerns regarding the DEIS:

1. The DEIS Does Not Discuss How Shortages of the Natural Flow of the Colorado River Will Be Shared from Year to Year Between the Upper Basin and Lower Basin States

The DEIS provides no discussion as to how shortages in the annual natural flow of the Colorado River which is not adequate to meet the 15 m.a.f. of apportionments to the Upper and Lower Basin States will be imposed as between the Upper Basin and Lower Basin. The DEIS must first discuss how 9
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IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 4

shortages would be borne between the Upper Basin and Lower Basin, before discussing the allocation of water that is stored in the Colorado River reservoirs. The Secretary must first look to the annual natural flow of the River to provide the water supply that is to be apportioned.

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Thereafter, the Secretary may look to the water which is stored in the reservoirs in the Lower Basin to provide the supplemental supply to meet the apportionment entitlements of contractors in the Lower Basin States.

2. The DEIS Cannot Lawfully Place Precedence Upon the Nevada Intake at 1050' Elevation Over the Requirements that the Tribes Receive Their Entitlements from the Colorado River to Provide for Their Permanent Tribal Homelands

The DEIS should not place precedence and limit considerations regarding the mark at which shortages will be declared based upon the location of the State of Nevada’s intake at the 1050' elevation in Lake Mead. While Nevada may deepen its intake facilities into Lake Mead to mitigate impacts when a shortage is declared on the River, the Tribes have very few, if any, alternatives to enable them to obtain access to Colorado River water or replacement water supplies to provide for their Permanent Tribal Homelands. The DEIS should consider alternatives for shortage based upon the Secretary’s obligation to protect and make available the Colorado River water supply to the Tribes, and to the long term reliability of the water supply for all contractors with rights to the River. The man-made intake facilities at Lake Mead for Nevada may be readily altered to correspond with the possibility of shortage, and thus, should be of little or no concern with regard to the management of the River, as opposed to those who have no other options.

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The Law of the River does not allow the Lower Basin water supply to be managed primarily to serve one State or interest over another. The sole beneficiary of the Lake Mead scenario is Nevada, to the detriment of others, including the CAP Tribes. The alternatives must be adjusted to provide scenarios with equal consideration of the importance of the delivery of CAP water to the Tribe.

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IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 5

3. The DEIS Erroneously Assumes that the Tribe is a Subcontractor of the Central Arizona Water Conservation District

The DEIS erroneously assumes and conveys that the Tribe is a subcontractor of CAP water under the Central Arizona Water Conservation District (“CAWCD”), a political arm of the State of Arizona. See Appendix E at E-1, showing the CAWCD as the entitlement holder for all CAP water. On the contrary, the Tribe has a **direct** contract with the Secretary of Interior for the delivery of its CAP water, and the United States has a **direct** obligation to deliver this water pursuant to the Tribe’s contract. See Tribe’s CAP Contract. This misstatement should be corrected throughout the DEIS.

Since the Tribe is a direct contractor with the Secretary, it must be treated on a co-equal level with that of CAWCD and other contractors in other states with direct contracts with the Secretary to receive the waters of the Colorado River. CAWCD also has a direct contract with the Secretary for the delivery of the non-Indian portion of CAP water and an obligation to repay the cost of the non-Indian portion of the CAP project to the United States.

The Tribe’s water right to CAP water is a portion of Arizona’s equitable apportionment under *Arizona v. California* that must be directly protected by the Secretary as an Indian Trust Asset for the Tribe. The State of Arizona should have an interest in protecting the Tribe’s CAP water supply. However, the State’s conduct in this matter shows that its sole interest and effort is focused upon committing the Tribe’s CAP water supply to non-Indian use, preventing the Tribe from ever using the “wet” water to which the Tribe has a right under its CAP Contract, as well as the 1992 Settlement Act and Agreement. Its conduct also indicates that the States seeks to take and keep the financial benefits from the CAP water to which the Tribe is entitled, which is presently diverted and unlawfully “converted” to use by the State and other non-Indian interests.

IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 6

4. Use of Reservoirs to Store and Deliver “Conserved” Colorado River System and Non-System Water

The DEIS, at ES-2, lists one of the purposes of the proposed federal actions as to “[a]llow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions.” While this purpose appears to be reasonable and foresightful, the method of implementing this purpose, as proposed in certain of the DEIS alternatives, will result in a wholesale taking of the Tribe’s CAP water, and allow the Tribe’s water to be committed to use by others. This is a violation of the Law of the River and of the Tribe’s CAP water rights which are Indian Trust Assets that must be protected by the Secretary.

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“The States [in the Basin States Alternative] propose that the Secretary develop a policy and accounting procedure concerning augmentation, extraordinary conservation, and system efficiency projects, including specific extraordinary conservation projects, tributary conservation projects, introduction of non-Colorado River system water, system efficiency improvements and exchange of non-Colorado River System water. The accounting and recovery process would be referred to as ‘Intentionally Created Surplus’ consistent with the concept that the States will take actions to augment storage of water in the Lower Colorado River Basin. The water would be distributed pursuant to Section II(B)(2) of the Decree and forbearance agreements between the States. The ICS credits may not be created or released without such forbearance agreements.” (Appendix at J-11).

However, substantially all, if not all, of these “policy and accounting procedures” are based on a fiction. All of the Colorado River water, natural flow, storage, and surpluses are committed by contracts with the Secretary and the Treaty with the Republic of Mexico. There are no unallocated or uncommitted amounts of Colorado River water possible, including the fictional “Intentionally Created

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IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 7

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Due to its position, the State of Arizona has a particular interest in “conservation” methods for the Colorado River that would preclude the Arizona Tribes from participation. Once the same Colorado River water is labeled “conserved” by a particular party, the party (such as the State of Arizona) will preclude the Tribe from participating in the benefits of the “conserved” Colorado River water.

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The use of the “conserved” water that will be stored in the reservoirs and claimed exclusively by the State of Arizona (which thereby excludes Arizona Indian Tribe access) will reduce and manipulate the amount of water from the Colorado River and its storage that could be used by the Tribe from year to year to fulfill their CAP water orders. This manipulation of the Colorado River water source to preclude its lawful use by the Tribe is a violation of the Law of the River and a violation of the Tribe’s 1992 Settlement Act and Agreement and CAP Contract.

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Furthermore, the States cannot enter into forbearance agreements or shortage sharing agreements amongst themselves where the rights of Arizona Tribes to their share of Arizona’s equitable apportionment to the Colorado River would be manipulated by the States. *See e.g.* Appendix J-10 (“Arizona and Nevada will share shortages based on a shortage sharing agreement. In the event that no agreement has been reached, Arizona and Nevada will share shortages in accordance with the 1968 Colorado River Basin Project Act, the Decree, other existing law as applicable, and the Interstate Banking Agreement between Arizona and Nevada parties.”). The participation of the Arizona Tribes in the forbearance agreements or any other agreements between Arizona and other States, as co-equal water users of Arizona’s equitable apportionment, is required by the Law of the River, and by the direct contracts of the Tribes with the Secretary of Interior.

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IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 8

The proposed alternatives must be revised so that any “conservation” regime used to reduce the potential conditions which may cause or enable the Secretary to make declarations of shortage on the Colorado River, or used to provide additional waters to Arizona (including Arizona Tribes), include all Arizona CAP Tribes in the mutual “wet water” and financial benefits of such schemes. Otherwise, the Tribes will be subject to significant injury as a result of the manipulation schemes in violation of the Law of the River, and the contractual and constitutional rights of the Tribes.

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5. The DEIS Does Not Discuss the Legal Authority for Allowing Credits for Fallowed Lands, Canal Lining and Other “Conservation” Measures

The DEIS does not discuss any legal authority which would permit the States to obtain credits for “fallowing” lands, canal lining and other measures undertaken to purportedly “conserve” Colorado River water. Under the law in Arizona, other western States and Federal Reclamation Law, the waters “conserved” by the fallowing of lands and the lining of canals is committed back to the stream flow to be used by the next water user in the system. *See Phelps Dodge Corp. v. Ariz. Dep’t of Water Res.*, 2005 Ariz. App. LEXIS 108 (Ariz. Ct. App. 2005) (observing that water rights in Arizona are “. . . usufructory, to ensure a maximum beneficial use of Arizona’s water resources.”) (citing *Clough v. Wing*, 2 Ariz. 371, 379-81, 17 P. 453, 455-56 (Terr. 1888)); *Salt River Valley Water Users’ Ass’n v. Kovacovich*, 3 Ariz. App. 28, 411 P.2d 201, 203 (Ariz. Ct. App. 1966) (“any practice, whether through water-saving procedures or otherwise, whereby [a diverter] may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant water rights.”); Kinney, *Treatise on the Law of Irrigation and Water Rights and the Arid Region*, (2nd Ed. 1912), §782, 783.

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The DEIS must discuss what legal authority would permit the States to commit “conserved” water to inure to the benefit of a single party or particular beneficiary, rather than for the use and benefit

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IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 9

of **all** users in the Colorado River system under the Law of the River. Furthermore, if such a “conservation” scheme could be lawfully implemented and used to benefit particular parties or beneficiaries, the Tribes must be permitted to participate, and the Secretary must fully support and protect the Tribe’s full and unfettered participation and receipt of benefits. 28
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6. Use of Surplus by Basin States

The Basin States Alternative also proposes a different scheme for the distribution of surplus. For instance, the Basin States Alternative would “[d]istribute Arizona’s share to surplus demands in Arizona including off stream banking and interstate banking demands.” See Appendix at J-9. The problem is that based upon historical and present practices by Arizona (which is charged with protecting the entire State’s equitable apportionment from the Colorado River, including that which is used by the Tribes) the State would nevertheless use this surplus for the benefit of non-Indians, to the exclusion of the Tribes. In fact, the State of Arizona is engaging in this conduct now, through, *inter alia*, the Arizona Water Banking Authority and the interstate water banking agreement with Nevada. The Secretary’s approval of the Basin States Alternative would put the weight of authority of the United States behind these wrongful acts by the State of Arizona. 30
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The Secretary should not select the Basin States Alternative or any other alternative, where it would exclude Tribes from participation in the arrangements made on the Colorado River during times of surplus. In addition, the Secretary must include the Arizona Tribes and ensure that the Arizona Tribes receive the mutual benefits of surplus on the Colorado River. 32
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7. The DEIS Does Not Provide Adequate Details Regarding the Basin States Proposal for Accounting Policy and Procedure for Intentionally Created Surplus

The DEIS does not provide sufficient detail regarding the alternatives for the accounting policy and procedure that the Secretary would implement for Intentionally Created Surplus or any other 34

IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 10

“conserved” water. Without this detail, it is unclear as to how the CAP Tribes would be permitted to participate in the ICS and the impact of the uses of the ICS upon the Tribes. This should be corrected in the DEIS. 34

8. The Arizona Water Settlements Act, P.L. 108-451 Is Not Yet Enforceable

The DEIS’ underlying assumption and reliance upon the AWSA as defining the characteristics of the CAP is premature. *See* DEIS at 4-81. The AWSA is not yet enforceable and may never become enforceable. If so, the DEIS or Final EIS intended to be published by December 2007, will require immediate revision and further public comment. In addition, the existing DEIS should include an impact analysis which compares the impacts under the present characteristics of the CAP with the impacts under the characteristics which would exist if the AWSA were to become enforceable. 35
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9. There Is No Misunderstanding As To How Shortages Are To Be Distributed Between CAP Indian and M&I Priority Users Within the CAP

The DEIS states that “prior to the enactment of the AWSA, there were differing views as to how mild shortages would be distributed between CAP Indian and M&I priority users.” (DEIS at 4-124). While there may be so-called “differing views”, the Tribe’s CAP Contract is very clear regarding how shortages are to be implemented as to the Tribe. Furthermore, the AWSA did nothing to clarify how such shortages are shared, because the Tribe’s CAP Contract cannot be affected or modified by the AWSA. The DEIS and its underlying assumptions must be changed to reflect and analyze the true nature of the Tribe’s CAP entitlement and how shortages within CAP will be implemented as to the Tribe. 37

10. The DEIS States an Incorrect Amount of CAP Water That Is Allocated to the Tribe

The DEIS incorrectly states the amount of CAP water to which the Tribe is entitled at 61,645. *See e.g.* DEIS at 3-85. Pursuant to the 1992 Settlement Act and Agreement, the Tribe is entitled to 38

IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007

Page 11

64,145 acre-feet of CAP water. The DEIS also shows all Indian CAP water as if it was part of the CAWCD contract with the Secretary. The DEIS must be revised to correct these errors.

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11. The DEIS Fails to Adequately Discuss or Analyze the Impacts of the Alternatives Upon the Tribe

The DEIS finds that “No vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration.” DEIS at 4-123. This is incorrect.

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The DEIS erroneously attempts to delineate between a paper water right and wet water. These are one in the same. Whether or not the paper water right becomes wet water is determined by whether or not the law is followed and whether or not the Secretary undertakes actions (or fails to take actions) which diminish the reliability or injure the ability of the Tribe to receive its wet water. The implementation of shortage sharing criteria which would hinder the Tribe’s ability to receive the water to which it is entitled, and the selection of an alternative which would permit waters to be “conserved” and committed to exclusive use by certain parties, alters the reliability of the Tribe’s entitlement to CAP water. The DEIS cannot distinguish between the effect of the alternative upon the legal entitlement of the Tribe versus the effect upon the Tribe’s receipt of the wet waters pursuant to the legal entitlement.

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The DEIS proposes alternatives which will impact and diminish the reliability of the CAP water supply and thus, injure the ability of the Tribe to receive the wet water to which it is entitled. The Secretary is charged with the responsibility to implement shortage sharing criteria which protect the Tribe’s receipt of the CAP water supply which is an Indian Trust Asset. The DEIS must analyze the impacts upon the Tribe’s receipt of the water to which it is entitled, and not merely make a statement that the alternatives will have “no effect” upon the Tribe’s legal entitlement to the CAP water. A policy

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IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
 Page 12

which proclaims no impact on the Tribe’s legal entitlement which results in **no wet water** to fulfill its entitlement is deceptive and amounts to invidious discrimination. The DEIS’ avoidance of discussing the true impact of the alternatives upon the Tribe must be corrected. 45

12. The DEIS Fails to Discuss How “Voluntary” Shortages Would Be Implemented and Their Resultant Effect Upon the Tribe and Its Right to CAP Water

The DEIS mentions that certain “voluntary” shortages could be implemented. DEIS at 4-12. 46
 However, the DEIS is unclear as to who would agree to such voluntary shortages. The Secretary cannot permit the State of Arizona to decide whether or not it would enter into a voluntary shortage, where such shortage would diminish the reliability of the Tribe’s CAP water. This is simply unlawful. Furthermore, 47
 the Secretary cannot allow other states to enter into “voluntary” shortages and alternative River management schemes that would create conditions where the Tribes were required to bear shortages that would not otherwise be borne, absent such voluntary agreements or schemes. The DEIS fails to discuss 48
 this in any detail. The DEIS should be revised for clarity and to provide a meaningful analysis of the impacts of the proposed “voluntary” shortages to the Tribe’s receipt of its CAP water supply. 49

13. The DEIS Fails to Discuss the Potential Impact of Any of the Alternatives on Water Quality or Quantity to Which the Republic of Mexico is Entitled Under Treaty

The DEIS fails to discuss the ongoing and potential environmental impacts of any of the alternatives on the Colorado River delta, including wet lands, and the fact that the delta is one of the primary marine nurseries supporting aquatic life, fisheries and migratory wildlife subject to international treaties, and the ultimate fish production and annual catch allocated among countries of the Pacific Rim. The alternatives proposed by the DEIS, with the increase in use of the Colorado River proposed by the alternatives, including the Basin States Alternative, will undoubtedly impact the delta. 50

IT-9

THE SPARKS LAW FIRM, P. C.

April 27, 2007
Page 13

Please continue to keep this Firm on your mailing list for all future communications and documents related to this matter. | 51

Yours Truly,

THE SPARKS LAW FIRM, P.C.



Robyn L. Interpreter

RLI/rli

cc: Wendsler Nosie, Sr., Chairman
David Reede, Vice-Chairman
Council Members

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IT-9

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Reponses to Comment Letter IT-9

IT-9-1 and IT-9-2

Your comment is noted. No change to the Final EIS was necessary.

IT-9-3

Your comment is noted. No change to the Final EIS was necessary.

IT-9-4

See response to Comment No. IT-6-4.

IT-9-5

Your comment is noted. No change to the Final EIS was necessary.

IT-9-6

See response to Comment No. IT-6-6.

IT-9-7

See response to Comment No. IT-6-7.

IT-9-8

See response to Comment No. IT-6-6.

IT-9-9 and IT-9-10

See responses to Comment Nos. IT-6-9 and IT-6-10.

IT-9-11 through IT-9-14

See responses to Comment Nos. IT-6-11 through IT-6-14.

IT-9-15 and IT-9-16

Your comment is noted. No change to the Final EIS was necessary. Table E-1 in Appendix E lists Arizona water entitlement holders and priorities and aggregates all CAP water contracts into one entry under the heading Central Arizona Water Conservation District (CAP) for presentation purposes only. It was not intended to suggest that CAP contracts with the Secretary were subcontracts with CAWCD. Reclamation concurs that the Tribe's CAP contract is a two-party contract between the Nation and the Secretary. In the Final EIS, Appendix G was modified to more clearly explain the CAP framework (Section G.4.8). In the Final EIS, Table G-3 shows the

CAP entitlements by priority and Table G-4 shows the CAP priority 2 Indian entitlements by sub-priority. Both tables clearly show the San Carlos Apache entitlement.

IT-9-17 and IT-9-18

Your comment is noted. No change to the Final EIS was necessary.

IT-9-19

See response to Comment No. IT-6-6.

IT-9-20

Your comment is noted. No change to the Final EIS was necessary.

IT-9-21

See response to Comment No. IT-6-21.

IT-9-22 through IT-9-24

Reclamation does not concur with these comments. See response to Comment No. IT-6-21.

IT-9-25 and IT-9-26

See responses to Comment Nos. IT-6-25 and IT-6-26.

IT-9-27

See response to Comment No. IT-6-25.

IT-9-28

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-9-29

See response to Comment No. IT-6-25.

IT-9-30 through IT-9-32

See responses to Comment Nos. IT-6-30 through IT-6-32.

IT-9-33

See response to Comment No. G-6-33.

IT-9-34

Your comment is noted. No change to the Final EIS was necessary. See response to Comment No. IT-6-25.

IT-9-35 and IT-9-36

See responses to Comment Nos. IT-6-35 and IT-6-36.

IT-9-37

Your comment is noted. No change to the Final EIS was necessary. The San Carlos Apache Tribe is not affected by the shortage-sharing compromise in the AWSA (Section 4.4.7.1) because the compromise affects those entities within the M&I/Indian category with entitlements less firm than the Tribe's entitlement.

IT-9-38

Your comment is noted. No change to the Final EIS was necessary. As noted in the fifth footnote on Table 3.10-2, the modeling assumptions used in the Draft EIS and the Final EIS assume that delivery losses of six percent on the Santa Rosa Canal would be incurred for the Ak-Chin water.

IT-9-39

Your comment is noted. No change to the Final EIS was necessary. However, based on the modeling assumptions used to distribute shortages to CAP users, the shortage to the Ak-Chin Tribe would be the same whether analyzed separately or included as part of the analysis with other CAP contractors. Appendix G (Attachment B) provides the modeled shortages to the Tribe for a range of shortages for selected years.

IT-9-40 through IT-9-42

Your comment is noted. No change to the Final EIS was necessary.

IT-9-43

See response to Comment No. IT-6-43.

IT-9-44 through IT-9-45

Reclamation does not concur with this comment. See response to Comment No. IT-6-6.

IT-9-46 through IT-9-49

See responses to Comment Nos. IT-6-46 through IT-6-49.

IT-9-50 and IT-9-51

See response to Comment No. G-6-40.

Comment 2:

The study is based upon the assumption that the Upper Basin States will release 8.23 million acre-feet per year in perpetuity. This assumption appears to be based upon the projected future use curve provided by the Upper Basin States seven years ago (Appendix C). This assumption is a fundamental assumption to the entire model. However, this assumption has two difficulties.

First, the development pattern shown in Appendix C is not realistic in light of historic data (attached as a graph). It overstates the water use in the near years and significantly understates the use in the more distant years. 5

The second difficulty is that the Upper Basin States are not legally required to release 8.23 million acre-feet per year. The model would be useful if, instead of assuming the release of 8.23 million acre-feet per year, it used the Colorado Compact scenario as interpreted by the Upper Basin States. Specifically, in the Colorado Compact scenario, the Upper Basin States only releases 75 million acre-feet every 10 years. Also, the sensitivity studies provided (Appendix N) relate solely to hydrologic assumptions, without regard to examining the assumptions relating to human activities. The assumed human actions are likely to greatly distort the answers and need to be considered. 6

Take for example the year 2026, the Basin States option show shortages of 400,000 plus acre-feet 35 percent of the time. If the Upper Basins' releases were cut by 750,000 acre-feet, then those shortages (instead of being 400,000 plus acre-foot shortages) would be 1,150,000 plus acre-foot shortages. By using this assumption, it has a tremendous impact on the Gila River Indian Community. The Central Arizona Project water, which constitutes a large part of the Community's Settlement for its Winters' Rights, would have the net CAP supply (after leases are met) go from the 224,300 acre-foot full supply to zero acre-feet. Further, in the years when normal conditions are projected, which is 27 percent of the time, the water supply would drop to approximately 37,500 acre-feet or roughly 15 percent of the allocation.

It appears that the shortages could be much greater and possibly longer with any of the alternatives if the Upper Basin States do not agree with the assumption that 8.23 million acre-feet will continue to be released to the Lower Basin States and Mexico. There could be significant impacts based on release of 7.5 million acre feet. Mexico's share of the shortages would be increased from 16.67% to 20%. All of the alternatives could be significantly impacted with these differences and/or Mexico or the Upper Basin States Agreement. 7

Comment 3:

The computer models are based upon the assumption that each of the alternatives being evaluated stops in 2027. The no-action alternative is evaluated for the rest of the period (page 4-3, lines 33-34). Thus, when statistical analyses are done, only 18¹ years represent the data concerning the alternatives being considered. The remaining 34 years are based upon a common alternative. In many cases, the data presented provide probabilities of this aggregate sample,

¹ 2008-2026= 18 years.

IT-10

making the impact of the alternative being evaluated a minor component of the aggregate data being presented.

The Community would recommend that all of the alternatives be modeled through the full period rather than the 2026 period. The irrigation delivery system that will deliver Colorado River water via the Central Arizona Project on the Community is scheduled for completion in 2029. By the time the system is completed, allowing for full delivery and benefit of the Arizona Water Settlements Act of 2004, there are only three years left on the guidelines and the modeling does not address what might then be the Preferred Alternative for the balance of the modeling period.

This type of modeling is highly misleading. Either data showing the impacts through 2026 should be provided or the various alternatives should be continued for the duration of the model. The Community requests that the data be provided or that alternatives continued for the duration of the model. 8

Comment 4:

The terms of the Mexican Treaty only provide that there will be sharing of shortages. It is inconsistent and probably impracticable to assume that Mexico takes its share of the shortages based solely on the Lower Basin supplies while, at the same time, assuming that the Upper Basin States are expected to share in the shortage. A more likely assumption is that Mexico accepts its pro-rata share of all waters in the Colorado River, which would increase the portion of the supply shorted to Nevada and the Central Arizona Project. As commented with regard to the Upper Basin assumptions, there has been no sensitivity study made concerning the human/legal impacts. The model merely assumes that Mexico shares in the shortages on the Colorado River. 9 10

Comment 5:

In Appendix P, it is indicated that various data will be presented, specifically including a section on the water delivery sections. However, the table of contents does not show any such section and, in scrolling through the Appendix P, does not show any such section. 11

Comment 6:

At paragraph 4.15.8, the EIS concludes that there is no significant impact on Indian Trust assets. However, the EIS does not adequately address the impacts on CAP supplies to the Central Arizona Tribes, specifically including the Gila River Indian Reservation. 12

Comment 7:

Many Central Arizona Project contracts exist with Tribes for delivery of water. The EIS does not address those contracts. The EIS does not adequately address those contracts with a discussion of BOR's fiduciary duty to protect Tribal water rights. 13

Comment 8:

Specific comment on the Conservation Alternative: While the Community does not object to the concept of conservation, if the water is going to be maintained in the Lower Colorado River Dams, then the release of that water should be restricted to times of normal or surplus supply. The Community understands that the modeling is based upon this assumption. This assumption is critical to the operation of the conservation before storage method and must be considered in 14

an integral matter with that alternative. If diversions are permitted to occur at the desire of the beneficiary, *i.e.*, environmental interests, then it is highly likely that additional releases will occur at exactly the same time and will exacerbate any shortages that occur to the users. This will create a much more erratic supply than would otherwise exist.

Comment 9:

Specific comment on the Water Supply Alternative: While it provides short-term supplies, it fails to recognize or prepare for the time when shortages will start to occur; such that, by 2026, shortages could occur of a substantial magnitude. It is highly beneficial to users and environmental activities to provide a relatively constant and dependable supply for natural and human use.

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The Gila River Indian Community currently receives a highly erratic supply from the Gila River. Even with substantial conservation capacity in Coolidge Dam, there is dramatic variability from year to year in the water supply. The Community has learned from bitter experience how this variability can dramatically impact the ability of its members to farm and maintain their farmland. This can lead to great hardship for the members and government of the Gila River Indian Community.

Comment 10:

Specific comment on the Reservoir Storage Alternative: While the Community believes in the concept of preserving the water to create as stable a supply as possible, it appears from Tables 4.4-5, 6, and 7, that this option reaches too far towards that goal. Severe shortages over 600,000 acre-feet become highly prevalent very early, yet it appears that no such restrictions are needed for the future.

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Comment 11:

Specific comment on the Basin States Alternative: In the worst case scenario, the magnitude of the shortages here are less severe than in the Reservoir Shortage Alternative. The water supply alternative, as presented, clearly indicates this is simply borrowing against the future--since dramatic shortages are probable beginning in 2027, when the criteria are revised. Long-term sustainability is probably one of the most critical interests to the Community.

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The Community requests that the Bureau of Reclamation provide the Community with modeling of the 75 million in any consecutive 10-year period to allow the Community to evaluate its risks *vis a vis* the highly contentious issue of the required releases by the Upper Basin States.

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Comment 12:

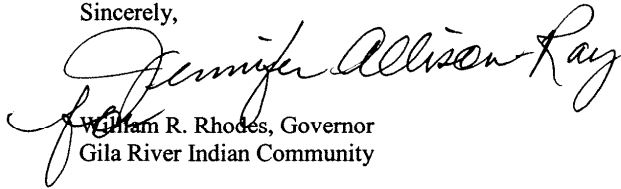
The Gila River Indian Community will be significantly impacted, as will all of the Central Arizona Tribes that receive their allocations through the Central Arizona Project. All of the alternatives, other than the No-Action Alternative, will extend a modified ISG through 2026. This provision allows other entities to utilize “surplus” Colorado River water while all of the Central Arizona Tribes and the five Colorado River Tribes are tied to consumptive use or take or lose deliveries.

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IT-10

If there are any questions regarding this letter, please contact Ann Marie Chischilly at the Office of Water Rights at 520-796-1344x3.

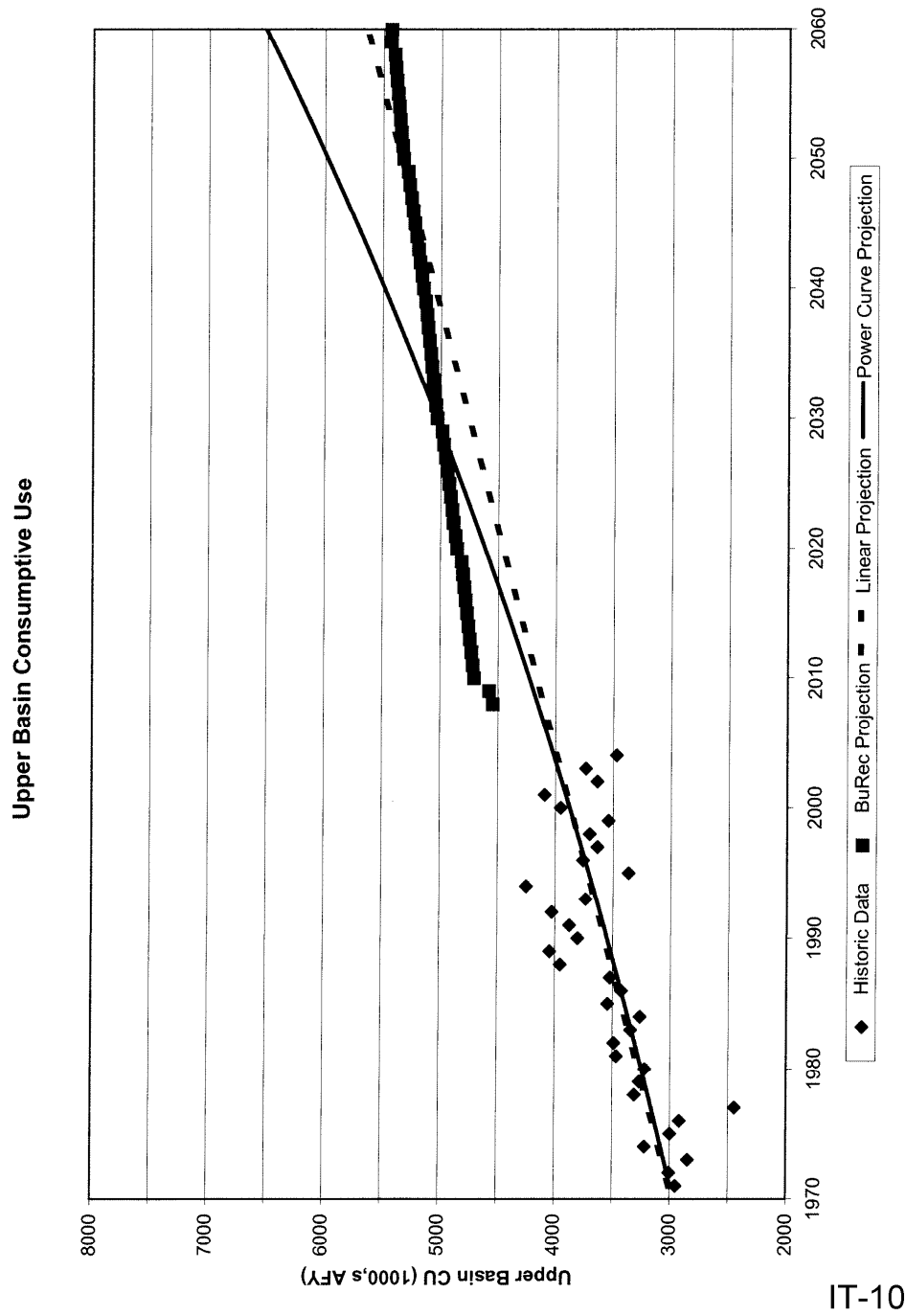
Sincerely,



William R. Rhodes, Governor
Gila River Indian Community

cc: Jennifer Giff, GRIC General Counsel
Margaret Cook, GRIC Department of Environmental Quality Director

IT-10



IT-10

Reponses to Comment Letter IT-10

IT-10-1 through IT-10-4

Reclamation does not concur with these comments. The Council on Environmental Quality (CEQ) regulations for implementing NEPA do not require identification of a Preferred Alternative in the Draft EIS. Reclamation considered all public comments on the Draft EIS in identifying the Preferred Alternative. Pursuant to the CEQ regulations, a 30-day review period will commence after the publication of the Final EIS.

IT-10-5

Reclamation does not concur with this comment. As discussed in Section 3.4.1 of the Final EIS, the depletion schedules for the Upper Basin states used in the EIS were developed by each Upper Basin state and are the best data currently available regarding future Upper Basin depletions. Reclamation will continue to work with the Upper Colorado River Commission and the Basin States and other stakeholders to update these depletion schedules as appropriate.

IT-10-6 and IT-10-7

Your comment is noted. No change to the Final EIS was necessary. As described in Section 2.2, the No Action Alternative provides a reasonable representation of future conditions under no action, including with regard to Lake Powell operations. Pursuant to the LROC, the minimum objective release from Lake Powell is 8.23 mafy and the No Action Alternative assumes that operation. The other alternatives assume different Lake Powell operations as summarized in Table 2.8-2. Section 4.3.3.2 provides an analysis of the Glen Canyon Dam 10-year running total of annual releases for each alternative. Section 4.4.4.1 provides an analysis of shortages for each alternative. Section 4.4.6 provides an analysis of water deliveries to Mexico for each alternative.

IT-10-8

Reclamation disagrees with this comment. As noted in Section 1.1, the Secretary proposes that the guidelines be interim in duration and extend through 2026. As noted in Section 4.2.2, the period of analysis was through 2060 in order to disclose potential resource impacts beyond the 19-year interim period. Since the operational rules are unknown after 2026, all action alternatives were assumed to revert back to the modeling assumptions used for the No Action Alternative beginning in 2027. Throughout the EIS, the graphs, tables, and statistics clearly display the results of the entire modeling period.

IT-10-9 and IT-10-10

See response to Comment No. F-5-2. A sensitivity analysis regarding the modeling assumptions regarding water delivery reductions to Mexico has been added in the Final EIS (Appendix Q).

IT-10-11

Your comment is noted. Additional graphs have been added in Appendix P regarding water deliveries.

IT-10-12 and IT-10-13

Reclamation does not concur with these comments. As discussed in Section 4.10 of the Draft EIS and of the Final EIS, no vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration. Furthermore, as noted in Section 4.4.3 of the Draft EIS and of the Final EIS, the proposed federal action will not affect the entitlements to water users within the Lower Division states. However, water deliveries to users within each state may be affected and were analyzed in the EIS.

Section 4.4.7.1 and Appendix G provides an analysis of shortages to all contractors within the CAP including tribes.

IT-10-14

Your comment is noted. No change to the Final EIS was necessary.

IT-10-15

Your comment is noted. No change to the Final EIS was necessary.

IT-10-16

Your comment is noted. No change to the Final EIS was necessary.

IT-10-17 and IT-10-18

Your comment is noted. No change to the Final EIS was necessary.

IT-10-19

Section 4.3.3.2 of the Draft EIS and in the Final EIS evaluates each of the alternatives regarding the 10-year running total of Glen Canyon Dam releases. Appendix N also evaluates the 10-year running total of Glen Canyon releases for alternative methodologies for projecting future hydrologic inflows.

IT-10-20

See response to Comment No. IT-6-33.



NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

LOUIS DENETSOSIE
ATTORNEY GENERAL

HARRISON TSOSIE
DEPUTY ATTORNEY GENERAL

April 29, 2007
via regular mail & email

Terrance J. Fulp, Ph.D., Area Manager
Boulder Canyon Operations
Bureau of Reclamation
Lower Colorado River Region
Attention: BCOO-1000
P.O. Box 61470
Boulder City, NV 89006-1470

tfulp@lc.usbr.gov & strategies@lc.usbr.gov

Re: Comments of the Navajo Nation on Draft Environmental Impact Statement on the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (“DEIS”)

Dear Dr. Fulp:

Please consider this letter as comments submitted on behalf of the Navajo Nation concerning the above-referenced DEIS. The Navajo Nation believes that the Secretary of the Interior has an affirmative obligation to take all necessary action to quantify the Navajo Nation’s water rights and needs from the Colorado River. President Shirley’s letter of August 31, 2005 to then Regional Director Johnson, requested the Department of the Interior to account for the water needs of the Navajo Nation as part of these Interim Guidelines. The DEIS fails to adequately account for or address the needs of the Navajo Nation.

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Reclamation asserts one purpose of the proposed federal action is to “provide mainstream United States users of Colorado River water, particularly those in the Lower Division states, a greater degree of predictability with respect to the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions.” DEIS at 1-3. The DEIS is deficient in that it does not fully account for how the Navajo claims would increase the risk of curtailment of water deliveries, particularly to users in the Lower Division states. As a general matter, the DEIS treats the Navajo claims in Arizona as part of that state’s water allocations; however, since these claims are not described in the water balance reporting nor were the impacts analyzed, the DEIS understates the impact of such claims on other water users within the State. Moreover, were the Navajo Nation successful in developing its water rights pursuant to these claims, such development upstream of Lake Mead would displace junior water users below Lake Mead. It appears that the DEIS does not fully examine the impact of exercising these Indian Trust Assets; therefore, the DEIS fails far short of its goal of providing a greater degree of predictability to the water users.

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IT-11

P.O. Drawer 2010 • Window Rock, Navajo Nation (AZ) 86515 • (928) 871-6192 • Fax (928) 871-7570

Terrance J. Fulp, Ph.D., LC, BOR
 Re: Comments of the Navajo Nation on DEIS
 April 29, 2007
 Page 2

Turning to the specific sections of the DEIS, the Navajo Nation offers the following comments:

ES-2.9 Executive Summary, Indian Trust Assets

The conclusion that “Tribal trust resources identified in the study area would not be adversely affected by any of the anticipated environmental impacts stemming from the proposed federal actions” is unwarranted. The DEIS does not include an analysis of the projected water needs of the Navajo Nation or identify any water sources to satisfy those needs. By letter of August 21, 2006, the Navajo Nation identified a reasonable breakdown of its anticipated demands. None of those demands are reflected in the DEIS analyses, nor are they reflected in Appendices C or D. If the water rights of the Navajo Nation, an Indian Trust Asset, are unknown and unquantified, no conclusion can be reached with respect to impacts on those assets. Moreover, even where Indian Trust Assets are known, such as the Navajo Nation’s dependency on Lake Powell as a source of water for development and for recreational values, the DEIS identifies very clear adverse impacts on water levels in Lake Powell resulting from various alternatives. Alternatives that increase the risk of lower water levels in Lake Powell have adverse impacts on the Navajo Nation because of increased pumping costs for water development or lost economic development opportunities at Navajo marinas.

3.2.1.1 Affected Environment, Lake Powell and Glen Canyon Dam

The DEIS does not analyze potential diversions by the Navajo Nation out of Lake Powell. Moreover, the DEIS does not even recognize current water uses from Lake Powell by the Navajo Nation. The Navajo Nation entered into contract on September 14, 1969, with the Department of the Interior for water from Lake Powell. This allows the City of Page to divert water from Lake Powell for use by the Navajo community of LeChee. An Environmental Assessment is underway for a new intake, and the Navajo Nation is negotiating a new Secretarial contract for an increased water supply for the LeChee area. The DEIS neglects to describe the current and ongoing economic development at Antelope Canyon and marina at Antelope Point. In addition, the Navajo Generating Station obtains its cooling water from Lake Powell. The Navajo Generating Station is located on the Navajo Reservation, employs hundreds of Navajos and burns coal produced from the Navajo Nation. Any adverse impact visited upon the Navajo Generating Station by any federal action should be viewed to have an adverse impact on the Navajo Nation.

These comments are equally applicable to the provisions at 3.3.2 Affected Environment, Lake Powell and Glen Canyon Dam.

3.4.1 Affected Environment, Apportionment to the Upper Division States

Reclamation relies on depletion schedules for the Upper Division states developed by the Upper Colorado River Commission and submitted to Reclamation in December 1999. Revised depletions schedules were provided in 2006.

IT-11

Terrance J. Fulp, Ph.D., LC, BOR
Re: Comments of the Navajo Nation on DEIS
April 29, 2007
Page 3

3.10.6.1 Affected Environment, Navajo Indian Reservation

The DEIS asserts that the “Navajo Nation economy is historically based on livestock herding and dry farming.” This statement is a gross over simplification of the Navajo economy. Royalty and tax revenues from mineral production on the Navajo Nation account for at least 90% of the non-federal portion of the Navajo Nation’s operating budget. With respect to agricultural production, the Navajo Nation has significant resources in addition to the Navajo Indian Irrigation Project. In 1986 the USDA Soil Conservation Service conducted a partial inventory of irrigation projects on the Navajo Reservation. The 1986 SCS inventory identified more than 80 irrigation projects that included more than 40,000 acres. In 1994 in the *Report of Amended Water Claims by the United State of America for the Indian Lands in the Little Colorado River Basin*, the U.S. Justice Department reports more than 69,000 acres irrigated with surface water on the Navajo Reservation just within the Little Colorado River Basin.

By letter of August 21, 2006, referenced in this section, the Navajo Nation estimated that it would need at least 76,732 acre-feet per year from the mainstream of the Colorado River in Arizona. That budget does not appear to be included within the depletion schedules at Appendices C or D. In addition to this demand from the mainstream, the Navajo Nation also projected a demand of 63, 000 acre-feet per year from the Little Colorado River, a tributary of the Colorado River. The DEIS does not appear to account for the 139,732 acre-feet of potential Navajo uses from the Colorado River system in Arizona. The DEIS does not attempt to evaluate the impact of the exercise of these water demands as part of any of the alternatives. It is misleading to conclude that this water would simply be deducted from Arizona’s allocation without impact on the overall water balance. The diversion and use of water by the Navajo Nation upstream of Lake Mead and/or Lee Ferry would be to the detriment of junior users downstream of Lake Mead. Since such diversions would be at points different than the junior rights displaced, there could be differential impacts visited upon the various alternatives.

Impacts on the ability of the Navajo Nation to meet the needs of its people are not just related to hydrologic variables such as lower median water levels in Lake Powell, “occasionally” reduced flows below Lake Powell, and altered water quality. These impacts may also involve any number of administrative or operational variables for instance, securing Secretarial water contracts, establishing points of diversion above or below Lee Ferry, and protecting endangered species in the future. The DEIS fails to conduct a thoughtful analysis of all of the variables that need to be considered. Without this analysis it is impossible for the DEIS to unequivocally conclude in this document that there are no impacts on Indian Trust Assets.

3.11.7.2, Affected Environment, City of Page Water Supply Intake

This description is flawed for the reasons stated above concerning section 3.2.1.1. The DEIS does not address Navajo municipal uses from Lake Powell or future impacts on the Navajo Nation’s ability to use the lake as a forebay for additional water projects, including projects

IT-11

Terrance J. Fulp, Ph.D., LC, BOR
 Re: Comments of the Navajo Nation on DEIS
 April 29, 2007
 Page 4

recently evaluated by Reclamation in the *North Central Arizona Water Supply Study Report*, December 2006.

The Navajo Nation’s recreational interests at Lake Powell include but are not limited to the Quality Inn Lake Powell, Antelope Canyon, Antelope Point Marina, Navajo Bridge, and Castle Rock. Reservoir elevations that could potentially impact Navajo Nation tourism include Castle Rock Cut, which is closed at 3,620 feet mean storage level, and the Antelope Point Public Launch Ramp, which is closed at 3,588 feet mean storage level. Each of the alternatives predict some impact on the mean storage level, but the DEIS provides no analysis of the impacts on Navajo tourism revenues, including tourist accommodations, park entrance fees, tour guides, etc. 22

3.15.1 Minority, Low-income Populations, and Indian Tribes

The DEIS relies on county level statistics to describe Minority, Low-income Populations, and Indian Tribes. This recitation of county level statistics obfuscates the desperate socioeconomic conditions of those living on the Navajo Reservation. The U.S. Census Bureau produced ample data that far better reflect these on-reservation conditions than the county level data. The document needs to more accurately address this issue so that the readers will better understand that the high rates of poverty and unemployment, the high number of homes that do not have direct access to safe drinking water, and the need for improved infrastructure are very closely related. 23

4.10.1 Environmental Consequences, Water Rights and Trust Lands

The DEIS states that to the extent that “additional Tribal water rights are developed, established or quantified, during the interim period of the proposed federal action, the United States will manage Colorado River facilities to deliver water consistent with such additional water rights, if any, pursuant to federal law.” This commitment merely to follow federal law, rather than affirmatively manage the Colorado River consistent with the Navajo Nation’s trust assets, ensures that other interests will continue to rely on water supplies claimed by, reserved for, and potentially belonging to the Navajo Nation. Reclamation has an affirmative obligation to operate federal water projects, such as Glen Canyon Dam and Hoover Dam, consistent with “vested, fairly implied senior Indian water rights.” *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts*, 832 F.2d 1127 (9th Cir. 1987). It is logical to expect that the current water users will have even more incentive to resist the development of Colorado River water by the Navajo Nation in order to minimize their risk of shortage. 24

Moreover, the DEIS fails to provide any analysis of the impacts on the vested, but unquantified water rights of the Navajo Nation. The U.S. Supreme Court has repeatedly recognized that tribes possess reserved water rights that vest no later than the date their reservations were established. *See: Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). It is not sufficient for the DEIS to evaluate only those water rights presently “developed, established or quantified.” As part of the adjudication of its water rights, 25

IT-11

Terrance J. Fulp, Ph.D., LC, BOR
 Re: Comments of the Navajo Nation on DEIS
 April 29, 2007
 Page 5

the Navajo Nation will have to prove that the water necessary for its permanent homeland can be diverted and used in a practicable manner. The recent decision of the Arizona Supreme Court suggests that tribes must demonstrate the practicability of diversion for beneficial use for all water claimed. *See: In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 80 (Ariz. 2001) (“[P]roposed projects should be scrutinized to insure that they are practical and economical.”) The Navajo Nation’s ability to divert water from Lake Powell in a feasible manner will depend to a large degree on the cost of the energy needed to lift the water. To the extent that any alternative will result in lower water levels at Lake Powell, the costs of diverting water necessarily increase as noted at 3.11.7.2 of the DEIS. (“[D]rops in the elevation of Lake Powell could cause an increase in the cost of power for the City of Page’s intake pump station.”) While the DEIS considered drops in lake elevation to be an environmental consequence that must be evaluated for the City of Page and the Navajo Generating Station, the DEIS completely ignores the potential impact that such changes in elevation would have, not only on the ability of the Navajo Nation to divert water from Lake Powell, but to demonstrate the practicability of such diversions in any future water rights adjudications. 26

In short, the DEIS fails to provide any meaningful evaluation of impacts on Navajo water rights. 27

4.15.8 Environmental Consequences, Indian Trusts Assets

The Department of the Interior has made no effort to quantify the Navajo Nation’s water rights. It is unclear how the DEIS can conclude that there are no significant impacts on Indian Trust Assets when the extent of those trust assets are unknown. Even though the water rights of the Navajo Nation are unquantified, the DEIS failed to give meaningful consideration to the water budget proposed in the Navajo Nation’s letter of August 21, 2006 or to account for any impacts on the unquantified water rights for reasons discussed above. 28
29

Similarly, the statement at 5.1.29.7 concerning the absence of cumulative effects on Indian Trust Assets is also fundamentally wrong. 30

* * *

As President Shirley previously advised in his letter of August 31, 2005, the Secretary must account for the needs of the Navajo Nation as he undertakes the difficult task of developing guidelines to deal with Lake Powell and Lake Mead in times of shortage. Moreover, absent forceful action by the Secretary to secure an adequate water supply for the Navajo Nation, the stated objective of providing certainty about the quantities of water available to other users cannot be achieved because those supplies will always be at risk from the outstanding and unquantified Navajo claims.

Terrance J. Fulp, Ph.D., LC, BOR
Re: Comments of the Navajo Nation on DEIS
April 29, 2007
Page 6

Please do not hesitate to contact me if you have any questions concerning the information provided here. Thank you for your anticipated cooperation.

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE

signed on original

Stanley M. Pollack
Assistant Attorney General

IT-11

Reponses to Comment Letter IT-11

IT-11-1

Your comment is noted. No change to the Final EIS was necessary.

IT-11-2 through IT-11-8

Your comment is noted. To the extent that additional Tribal water rights are developed, established or quantified during the interim period of the proposed federal action, the United States will manage Colorado River facilities to deliver water consistent with such additional water rights, if any, pursuant to federal law. Thus, modifications to system operation, in accordance with pertinent legal requirements, will be considered as Tribal water rights and will be exercised in accordance with applicable law.

IT-11-9 and IT-11-10

Your comment is noted. No change to the Final EIS was necessary.

IT-11-11

Your comment is noted. Some confusion may exist with respect to the modeled Upper Basin Arizona uses. As shown in Table C-1 of Appendix C, the Upper Basin states depletion schedules include Arizona use of 45 kafy for 2008 and 2009, and 50 kafy from 2010 through 2060. In the hydrologic model, this node includes the use of the Navajo Generating Station, the City of Page, and the Gallup-Navajo project.

IT-11-12

Your comment is noted. Section 4.12 has been updated to include a discussion of the effects of the alternatives on operations to the marina at Antelope Point. The assessment, conducted in a similar fashion to the other recreation resources at Lake Powell evaluated in the EIS, is based on the probabilities that the surface elevation of Lake Powell would fall below the level at which the marina can operate.

IT-11-13

Your comment is noted. Reclamation estimated the annual changes in pumping costs to supply water to the Navajo Generating Station and the City of Page (Section 4.11). In addition, Section 4.3.2 presents the analysis of the probabilities of Lake Powell falling below key elevations, including 3490 feet msl.

IT-11-14

See response to Comment No. S-1-21.

IT-11-15

Your comment is noted. The referenced sentence in Section 3.10.6.1 has been revised to include mining.

IT-11-16

Your comment is noted. No change to the Final EIS was necessary.

IT-11-17 through IT-11-19

See response to Comment No. IT-11-2.

IT-11-20

Your comment is noted. No change to the Final EIS was necessary.

IT-11-21

See response to Comment No. IT-11-13.

IT-11-22

Section 4.12 discloses the effects of the no-action and action alternatives on recreation occurring at Lake Powell. This analysis concluded that lake levels would be similar among all the alternatives, with the exception of the Reservoir Storage Alternative, which would result in higher lake levels when compared to conditions occurring under the No Action Alternative. The socioeconomic assessment concluded that there would be no substantial difference in recreation-related economic activity among the alternatives because the lake levels and resulting recreation opportunities would be similar.

IT-11-23

As noted in Section 3.15.1, the Census data included Indian tribes.

IT-11-24 and IT-11-25

See response to IT-1-1.

IT-11-26

See response to Comment No. IT-11-13.

IT-11-27

See response to Comment No. IT-11-1.

IT-11-28 through IT-11-29

See response to Comment No. IT-1-1 and IT-11-2.

IT-11-30

Reclamation does not concur with this comment.

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