NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

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September 8, 2000

VIA TELEFAX : 702-293-8042 & email: jharkins@lc.usbr.gov.

Jayne Harkins
Attention BCOO-4600
Bureau of Reclamation
P.O. Box 61470
Boulder City, NV 49006-1470

Re: Draft Environmental Impact Statement ("Draft EIS or DEIS") on the Colorado River Interim Surplus Criteria

Dear Ms. Harkins:

Please consider this letter as comments submitted on behalf of the Navajo Nation concerning the above-referenced Draft EIS. These comments are intended to supplement the comments submitted by the Colorado River Basin Tribes Partnership on behalf of the ten tribes, including the Navajo Nation, with Colorado River allocations. Those comments will not be reiterated here, but should be considered as submitted by the Navajo Nation as though fully set forth herein.

GENERAL COMMENTS

In general, the Draft EIS is a fundamentally flawed document since no effort was made to account for the unquantified water rights of the mainstream tribes above Lake Mead in Arizona: the Navajo Nation,[1] the Havasupai Tribe, and the Hualapai Tribe (herein "the Arizona Mainstream Tribes above Lake Mead"). Reclamation, in all of its capacities relating to Colorado River operations, has historically ignored the rights of the Arizona Mainstream Tribes above Lake Mead to a quantity of Colorado River, and the Draft EIS continues this practice. The Draft EIS is also fundamentally flawed because Reclamation does not recognize tribal entitlements to Colorado River water, whether quantified or unquantified, to constitute an Indian Trust Asset to be protected from

[1] The Navajo Nation has submitted extensive comments to the Bureau of Reclamation concerning its unquantified mainstream water rights. *See:* Letter to Bruce Ellis, re Draft Environmental Impact Statement (EIS) on the Allocation of Water Supply and Long-Term Contract Execution, Central Arizona Project (CAP), Arizona, August 23, 2000 with attachments: Letter to Bruce Ellis, re Public Scoping for Proposed Allocation of Water Supply and Expected Long-Term Contract Execution, CAP, September 27, 1999; Letter to Carol Lynn Erwin, Area Manager, Bureau of Reclamation - Phoenix Area Office, re Nonbinding Plans to Use Reallocated Water from the CAP, December 29, 1999; Letter to Bruce Ellis, re Supplemental Comments re Public Scoping for Proposed Allocation of Water Supply and Expected Long-Term Contract Execution, CAP; Letter to David J. Hayes, Deputy Secretary, Department of the Interior, re Navajo Mainstream Claims, April 4, 2000; and Letter to Secretary Babbitt, re Navajo Mainstream Colorado River Rights in Arizona, August 1, 2000.

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adverse impacts resulting from Reclamation policies and actions. DEIS at 3.14-1. Given the short shrift afforded the quantified water rights of the ten tribes, it is axiomatic that Reclamation would simply ignore the unquantified claims of the Arizona Mainstream Tribes above Lake Mead.

SPECIFIC COMMENTS

1 **1. The Draft EIS Does Not Consider the Unquantified Water Rights of the Navajo Nation and the other Arizona Mainstream Tribes Above Lake Mead.**

The Draft EIS makes no effort to incorporate an allocation of water for the Arizona Mainstream Tribes above Lake Mead in the analyses of the various surplus criteria, including the status quo. Reclamation merely acknowledges that "some tribal rights remain unadjudicated" (DEIS at 1-11). However, the discussion in the DEIS of the interests of the State of Arizona does not make reference to the claims of the Arizona Mainstream Tribes above Lake Mead. Therefore, no analysis was made of the potential impacts that may be visited on such claims through the adoption of the various surplus criteria, nor was any analysis made concerning how water uses by those tribes could affect the availability of water under the various surplus criteria.

In *Arizona v. California I*[2] the Supreme Court did not attempt to quantify the water rights of the Mainstream Tribes above Lake Mead. Nevertheless, the Supreme Court recognized that any use of water above Lake Mead must be charged against the state in which such use is made.[3] Neither the 1964 Decree nor the 1979 Decree specifies a water right for the Navajo Nation, the Hualapai Tribe, or the Havasupai Tribe for mainstream water. However, if these tribes were allocated Colorado River water, the amount of water available to the Central Arizona Project would be diminished, affecting all the surplus criteria scenarios.

1: Comment noted.

2 **2. The Failure to Consider the Unquantified Water Rights of the Navajo Nation Further Ensures the Continued Reliance by the Lower Basin States on Such Water Supplies.**

By failing to acknowledge the unquantified water rights of the Navajo Nation, Reclamation continues to manage the Colorado River in a manner that 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."[4] As a general matter, the surplus criteria proposed by California and the Six States, effectively trade future shortage protection for interim surplus. Under such scenarios, it is logical to expect that the Lower

2: See response to Comment 52-1.

[2] *Arizona v. California*, 373 U.S. 546 (1963).

[3] 373 U.S. at 591.

[4] *Memorandum to Regional Director, Region One, U.S.F.W.S. et al.*, January 9, 1997; see also: *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir.), *cert. denied*, 474 U.S. 1032 (1985), and *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts*, 832 F.2d 1127 (9th Cir. 1987). The Ninth Circuit recently affirmed these principles. Klamath Water Users Protective Assn v. Patterson, 191 F.3d 1115, 1122-23 (9th Cir. 1999) ("[T]he United States, as trustee for the Tribes, has a responsibility to protect their rights and resources...Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators.")

Jayne Harkins, Bureau of Reclamation
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2 cont'd

Basin States will have even more incentive to resist allocations of mainstream water for the Navajo Nation and the other Mainstream Tribes above Lake Mead.

In the comments submitted by the Ten Tribes Partnership, the Partnership notes that Reclamation, through its operations generally, and through the proposed surplus criteria specifically, is continuing to institutionalize the reliance by the Lower Basin States on unused tribal water supplies. Such reliance creates political disincentives for the development of the tribes' water supplies. In the case of Navajo Nation, the Lower Basin States rely on the lack of quantification of the Navajo right as a basis for their continued use of Colorado River water potentially belonging to the Navajo Nation. This not only creates institutional incentive against the development of Navajo water supplies, but it creates institutional incentives and political opposition against the efforts of the Navajo Nation to receive an allocation of Colorado River water and to otherwise quantify its mainstream water rights. The Draft EIS contains no analysis of the impacts attributable to the various surplus criteria on the ability of the Arizona Mainstream Tribes above Lake Mead to obtain Colorado River allocations; therefore, the Indian Trust Asset analysis is entirely deficient for these tribes.

3

3. The High Priority of Indian Water Rights Does Not Reduce the Institutional Reliance on Surplus Water Nor Diminish the Disincentive Against Tribal Water Development.

At S.3.14.2, concerning the Indian Trust Assets[5] of the Ten Tribes Partnership, the Draft EIS acknowledges that:

> The interim surplus criteria could make other entitlement holders develop a reliance on surplus water, provide a disincentive for those entitlement holders to support future development, and have the practical effect of diminishing the tribes' ability to utilize their entitlements.

(DEIS at 3.14-2.) Reclamation's explanation that the "interim surplus criteria will not alter the quantity or priority of the tribal entitlements" is entirely inapposite. The institutional reliance on unused tribal water creates disincentives toward tribal water development *notwithstanding* the high priority of such rights. The tribes lack the political clout to develop their water. Because tribal water has such high priorities, non-Indian water users will use their political clout to ensure that tribal water is not developed, thereby protecting non-Indian water supplies.[6] In the case of Navajo Nation, its claim for Colorado River water with an early priority only ensures the continued opposition by the Lower Basin States to the quantification of the Navajo right. The claimed early priority provides no protection from the institutional opposition to such a claim. The Draft EIS does not acknowledge the potential claims; therefore, it offers no analysis of how the various surplus criteria would affect such claims. The Draft EIS is entirely deficient in this respect and should be redone.

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[5] The comments here will not attempt to address Reclamation's absurd contention that tribal entitlements to present perfected federal reserved rights are not ITAs. (DEIS at 3.14-1.) That contention is addressed in the comments submitted by the Ten Tribes Partnership.

[6] *See* John B. Weldon, Jr., *Non-Indian Water User's Goals: More is Better, All is Best* in INDIAN WATER IN THE NEW WEST 79, 83 (1993)("[M]any non-Indian appropriators would prefer to use political clout in Congress to prevent the tribes from obtaining the funds necessary to exercise their reserved rights.")

3: Reclamation respectfully disagrees and does not believe that the DEIS is deficient. Reclamation does not believe that identifying the limited amounts of surplus water will provide any additional disincentives for Tribal water development.

COMMENT LETTER

RESPONSES

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4. The Draft EIS Does Not Adequately Address the Impacts of Fluctuating Water Levels at Lake Powell on the Navajo Nation's Marina.

4 At S.3.14.2.3, concerning the Indian Trust Assets of the Navajo Indian Reservation the Draft EIS acknowledges that the Navajo Nation operates a marina at Lake Powell and the boat ramp is not operational when the lake level drops below 3,677 feet msl. (DEIS at 3.14-5.) Reference is made to Section 3.9.2.3.1 concerning Lake Powell elevations. Under the shortage criteria proposed by California and the Six States (and the Shortage Protection Alternative), lake levels would be significantly lower than under baseline conditions and the flood control alternative. It is not sufficient for the EIS to merely identify impacts; the EIS must identify how such impacts can be mitigated, particularly when Indian Trust Assets are involved.

5. The Draft EIS Mischaracterizes the Nature of Arizona's Upper Basin Apportionment.

5 In at least two separate sections, the Draft EIS mischaracterizes Arizona's Upper Basin apportionment of 50,000 acre-feet as a right to the *delivery* of water above Glen Canyon Dam. (DEIS at 1-18[7]& 3.4-3.[8]) This characterization is not consistent with Reclamations practice of counting every *use* of water by the Navajo Nation in the Upper Basin of Arizona against Arizona's Upper Basin apportionment of 50,000 acre-feet. Despite Reclamation's accounting procedures, there is no basis in the Upper Colorado River Basin Compact for the water uses by the Navajo Nation to be constrained by the Compact.[9]

Conclusion

For reasons expressed in this letter, the Draft EIS is fundamentally flawed. The Draft EIS does not consider the implications of the unquantified Navajo mainstream Colorado River rights or how the implementation of the various surplus criteria adversely interferes with the Navajo Nation's efforts to settle or quantify such mainstream rights.

Sincerely,
NAVAJO NATION DEPARTMENT OF JUSTICE

Stanley M. Pollack
Water Rights Counsel

[7] "In Arizona, there are several points of diversion plus up to 50,000 af of delivered above Glen Canyon Dam." The reference to Glen Canyon Dam should be to Lees Ferry. Nevertheless, very little water is actually delivered above the dam. Instead, Reclamation charges all water uses by the Navajo Nation in the Arizona portion of the Upper Basin against Arizona's 50,000 acre-foot apportionment.

[8] "In addition, Arizona is also charged for use of water pumped from Lake Powell under the state's Upper Basin apportionment of 50,000 afy." Arizona is charged for water *used*; not necessarily *pumped*.

[9] *See* Article XIX (a) Upper Colorado River Basin Compact, 1948 ("Nothing in this Compact shall be construed as: (a) Affecting the obligations of the United States of America to Indian tribes.").

4: See response to Comment 51-3(b).

5: Upper Basin accounting procedures are based on use, not delivery, and the Compact point is a better reference point for the Upper Basin than Glen Canyon Dam. The FEIS has been modified accordingly. Please see response to Comment 50-1 regarding resolution to Tribal water rights being constrained by the Upper Colorado River Basin Compact.

COMMENT LETTER

NAVAJO TRIBAL UTILITY AUTHORITY
AN ENTERPRISE OF THE NAVAJO NATION

September 7, 2000

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Ms. Jayne Harkins
Bureau of Reclamation
Attn: BCOO – 4600
P.O. Box 61470
Boulder City, NV 89006-1470

RE: Comments on Draft EIS on Colorado River Interim Surplus Criteria

Dear Ms. Harkins:

The Navajo Tribal Utility Authority (NTUA) has numerous interests in the operation of dams in the Upper and Lower Colorado River Basins. NTUA has reviewed the Draft EIS on the Interim Surplus Criteria and finds that there will be significant impacts to NTUA. NTUA has the following concerns and comments on the scope of the proposed EIS.

1 a. NTUA is a member of the Colorado River Energy Distributors Association and purchases approximately 22 MW of hydropower from the Colorado River Storage Project (CRSP). We feel that generating capacity at Glen Canyon Dam will be reduced and higher cost replacement power will impact NTUA significantly.

2 b. The existence of Lake Powell will also be affected in some manner and will have an impact on NTUA's, and the Navajo Nation's, plans to capitalize on tourism and economic development on the Lake. NTUA has expended considerable energy and resources on the development of Antelope Point Marina at Lake Powell and we are concerned.

3 c. Water in the Colorado River, its tributaries, and the associated lakes are sources of Indian water rights. For example, water in Lake Powell helps the Upper Colorado River Basin meet its commitments to Lower Basin States under the Colorado River Compact of 1922, thus, firming up the water supply for the Navajo Indian Irrigation Project. Calls of water from the Upper Basin are made from Lake Powell and may be affected from

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RESPONSES

1: Please see response to Comment 16-2.

2: Reclamation recognizes the Navajo Nation's concerns with regard to facilities at Antelope Point. Section 3.9 of the EIS discusses potential effects of interim surplus criteria on shoreline facilities at Lake Powell, including those at Antelope Point. The analysis in Section 3.9 of the FEIS has been modified to consider the probability of Lake Powell surface elevations occuring below 3,677 ft msl (as opposed to an elevation of 3,670 ft msl considered in the DEIS) and 3626 ft msl, based upon information provided by the NPS and the Navajo Nation.

3: (a) Reclamation recognizes that the Navajo Nation is a preference customer at Glen Canyon Dam. The status of a Tribe doesn't sanction any more of a status than that of a preference customer. This action will in no way affect the Tribes right to the power. Impacts to the power and energy produced at Glen Canyon Dam are found in Section 3.10. The Department does not view this as a trust asset as we are not affecting the contract right to the power. (b) Section 3.9.2.2.2 discusses impacts to Lake Powell and the operation of Antelope Point Marina. Reclamation and the Department have considered the analysis and feel the ISC alternatives are minor impacts to Lake Powell elevations. Reclamation and the Department believe that inflows and increasing UB depletions will have a greater impact on Lake Powell water surface elevations. The Marina and any other economic ventures on Lake Powell need to take into consideration the normal operational ranges of Lake Powell. (c) In the DEIS, Reclamation attempted to consider all Indian water rights that could be affected by interim surplus criteria, covering both adjudicated and non-adjudicated water rights. For the FEIS, Reclamation's RiverWare model, which simulates the operation of the Colorado River Basin, was modified to more accurately and precisely account for Indian water rights.

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interim surplus criteria. The draft EIS must include Indian water rights which are vested property rights to meet the present and future needs of Indian Tribes, regardless of whether those rights have been adjudicated or otherwise formally recognized and regardless of whether those rights have been exercised.

The impacts of the surplus criteria on NTUA deserve full analysis and discussion in the EIS process. NTUA will be willing to assist in any way possible to achieve this goal. I can be reached at (520) 729-6203 or email bhanley@ntua.com.

Sincerely yours,

Benjamin Hanley

Benjamin W. Hanley
Government Liaison

COMMENT LETTER

RESPONSES

Sep-08-00 07:57A Ute Mtn Chairman's Office (970) 565-2313 P.01

OFFICE OF THE CHAIRMAN

Ernest House, Sr.
Chairman
Ute Mountain Ute Tribe

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September 7, 2000

Jane Harkins
USBR
Boulder City, NV

FAX: 702-293-8042

Re: Colorado River Interim Surplus Criteria DEIS

While we appreciate USBR's survey of Ute Mountain Ute Tribe reserved water rights set forth in the DEIS, we are concerned that Reclamation fails to set forth in the document any commitment to protect these important Indian trust assets.

1 On one hand Reclamation acknowledges it has a duty to protect the Ute Mountain Ute Tribe's water rights (p.3-14-1), but on the other hand Reclamation ignores the Tribe's concern that the surplus criteria analysis will perpetuate California's reliance on unused Tribal water (p.3-14-2).

2 Reclamation needs to stand up and make an affirmative statement in the final environmental impact statement and in the underlying record of decision that its Lower Colorado River Water Master policies will never be utilized to reduce directly or indirectly the development of the Ute Mountain Ute Tribe's water rights. We request on behalf of our Tribe and the other Tribes in the Upper and Lower Basin that such a commitment be expressly stated in the final EIS.

Thank you for this opportunity to comment.

Very truly yours,

Ernest House, Sr., Tribal Chairman
Ute Mountain Ute Tribe

1: The Department is working closely with the State of California to reduce its over reliance of Colorado River water. The selection of the Basin State alternative as the preferred alternative brings with it satisfactory progress measures and reversion to conservative surplus criteria if those progress measures are not met. The Depratment believes this will provide incentive to California to reduce its use of Colorado River water.

2: In response, Reclamation states that its policies with respect to the proposed action will not serve to reduce the development of the Ute Mountatin Ute Tribe's water rights.

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September 8, 2000

**VIA E-MAIL TO jharkins@lc.usbr.gov, AND FACSIMILE TO (702) 293-8042
AND FIRST-CLASS MAIL**

BC00-4600

Regional Director Robert Johnson
Bureau of Reclamation Lower Colorado Region
c/o Jayne Harkins
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P.O. Box 61470
Boulder City, NV 89006-1470

Re: **Colorado River Interim Surplus Criteria Draft Environmental Impact Statement (July 2000)**

Dear Mr. Johnson and Ms. Harkins:

The Nordhaus Law Firm is general counsel to the Jicarilla Apache Tribe. The Jicarilla Apache Tribe, through its designated representative, Mr. Joe Muniz, is serving as President of the Colorado River Basin Tribes Partnership, which is also known as the Ten Tribes Partnership. On behalf of Mr. Muniz, I am transmitting with this cover letter the comments of the Ten Tribes Partnership to the above-referenced draft environmental impact statement.

Attachment A to the Ten Tribes Partnership's comments cannot be e-mailed, but will be included in the fax and in the hard copy that are being sent to you this day.

Very truly yours,

NORDHAUS, HALTOM, TAYLOR,
TARADASH & BLADH, LLP

Jessica Aberly

Jessica R. Aberly

Mr. Johnson and Ms. Harkins
September 8, 2000
Page 2

JRA\slg

Enclosure: Ten Tribes Partnership Comments on the Colorado River Interim Surplus Criteria Draft Environmental Impact Statement

cc: Designated Representatives and Legal Counsel for the Partnership's Member Tribes
Mr. Ron Bliesner and Mr. Andrew Keller, Keller-Bliesner Engineering, Technical Consultants for the Ten Tribes Partnership

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TEN TRIBES PARTNERSHIP COMMENTS ON THE COLORADO RIVER INTERIM SURPLUS CRITERIA DRAFT ENVIRONMENTAL IMPACT STATEMENT

INTRODUCTION

The Colorado River Basin Tribes Partnership is composed of four tribes with quantified or otherwise congressionally-sanctioned water rights in the Upper Colorado River Basin, including the Ute Indian Tribe of the Uintah and Ouray Reservation, Southern Ute Indian Tribe, Ute Mountain Ute Tribe, and Jicarilla Apache Tribe; and, five tribes in the Lower Colorado River Basin whose water rights on the mainstream of the Colorado River were decreed in *Arizona v. California,* including the Fort Mojave Indian Tribe, Colorado River Indian Tribes, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and the Quechan Indian Tribe. The tenth member is the Navajo Nation, which has quantified or otherwise congressionally-sanctioned water rights in both the Upper and Lower Basin. The Partnership is informally called the Ten Tribes Partnership and referenced as such throughout this document. References to Tribal, Tribe, and Indian throughout this text refer to the Partnership Tribes only and not to other Indian tribes within the Colorado River Basin.

1 cont'd below

The Colorado River Interim Surplus Criteria – Draft Environmental Impact Statement ("DEIS") is deeply and fatally flawed. It fails to take into account and analyze the impacts of the various surplus scenarios on the water right assets of the Partnership's members. These water rights are Indian trust assets and, therefore, entitled to the highest degree of impact analysis and protection by the Bureau of Reclamation ("Reclamation"). The DEIS fails to provide even minimal analysis of impacts and, with respect to the five Tribes located in the Lower Basin, complete disavows any obligation to do so. The lack of an analysis of the impacts on the Partnership members' trust resources, as recommended by the Partnership throughout its consultation with Reclamation, undermines the accuracy, thoroughness, and adequacy of the DEIS and requires that the

1: The statement in the DEIS made by Reclamaton was in error. This statement has been modified.

1 cont'd analysis now be properly completed and a revised DEIS be published for public review and comment.

The Partnership's comments are set forth below. First, we address the various legal misstatements and legal inadequacies within the document. These are followed by our technical comments which more specifically address the nature of the Tribes' water rights and the analysis required to fully describe and address the impacts on those trust assets.

LEGAL ISSUES AND COMMENTS

I. THE WATER RIGHTS OF ALL TEN PARTNERSHIP TRIBES ARE INDIAN TRUST ASSETS AND MUST BE TREATED AS UNIQUE IN THE DEIS ANALYSIS

2 The DEIS's discussion of Indian Trust Assets ("ITAs"), beginning at page 3.14-1, contains confusing misstatements regarding the legal status of the Partnership Tribes' water rights and an inadequate analysis of the impacts of interim surplus criteria on those trust assets. Contrary to all law and in conflict with the position taken by the United States at least since the negotiation of the Colorado River Compact of 1922, the DEIS asserts that the United States does not hold the water rights which were reserved in trust for the benefit of the Fort Mojave, Colorado River, Chemehuevi, Cocopah and Quechan Tribes ("Five Lower Basin Tribes"). However, the discussion that follows this inexplicable and unsupportable contention refers to the water rights of the "Ten Tribes." *See* DEIS at 3.14-2. Of course, there is no principled basis for the position in the DEIS that the water rights of the Five Lower Basin Tribes are not held in trust and should not be treated as ITAs.

3 The Department of the Interior's ("Interior") fundamental error in refusing to acknowledge its trust duties cannot be cured in the absence of a new draft environmental impact statement. In short, Interior's denial of its trust responsibilities contaminates the entire analysis of the potential effect on the Five Lower Basin Tribes of the implementation of surplus criteria. Having concluded in the DEIS that it has no trust responsibility related to the Five Tribes' water rights, Interior, by definition, could not have properly considered those obligations in its analysis of the surplus criteria. Indeed, in addition to Interior's trust responsibilities, it is clear that the Tribal water rights hold a unique status within the "Law of the River," which status requires Interior to examine such rights independently rather than merely including the tribal rights among the other rights that are treated as part of the "system" water supply. Interior never conducted such an analysis. Because Interior never sought to investigate the effect on the tribal water rights from its perspective as trustee for the Five Lower Basin Tribes nor did it account for the unique status of the tribal rights on the River, it must now prepare a new draft analysis that considers these special circumstances.

A. The United States Has Acknowledged its Trust Responsibilities to the Tribes in *Arizona v. California*.

2: Reclamation was in error. See Section 3.14 for additional analysis.

3: See Section 3.14 for additional analysis. After review of this additional material, the Department has made the decision that a new draft was not necessary.

The water rights of the Five Lower Basin Tribes are established pursuant to the Decree in *Arizona v. California*, 376 U.S. 340 (1964). From the outset of that case, the United States steadfastly asserted that it was appearing as trustee for the Tribes. *E.g., Petition of Intervention on Behalf of the United States of America ¶ 27* (Dec. 1953) ("US intervenes 'as trustee for the Indians and Indian Tribes'"); *Arizona v. California*, 373 U.S. 546, 595 (1963). Indeed, as late as 1978, the United States contended that tribal intervention was not necessary because the federal government was appearing on behalf of the Tribes. *See Memorandum in Opposition to the Three Tribes Motion* (Feb. 1978). Ultimately, the United States acquiesced in tribal intervention, although continuing its role in the litigation as trustee for the Five Lower Basin Tribes. *Motion of the United States for Modification of Decree and Supporting Memorandum* at 5 (Dec. 1978) ("The present motion is submitted by the United States as trustee for, and guardian of, the Tribes of the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma and Cocopah Indian Reservations on the lower Colorado River"). Nothing in any of the Court's opinions or decrees suggests, or even hints, that the Five Lower Basin Tribes' water rights are anything but held in trust by the United States.

Moreover, nothing in Interior or Reclamation policy suggests that tribal water rights established under federal law are not trust assets which must be fully protected by federal agencies. In a wide variety of circumstances, Interior has treated such water rights as trust assets and conducted the sort of rigorous investigation -- sorely lacking here -- that is needed to understand the potential effect of the activity in question and to determine whether the activity should proceed in light of the impact on the Tribes or whether means were available to offset adverse effects. *See, e.g.,* Bureau of Reclamation *Animas-La Plata Project, Colorado-New Mexico, Final Supplemental Environmental Impact Statement* (July 14, 2000).

B. The Partnership Tribes' Water Rights Are, and Must Be Treated As, Unique Under the "Law of the River."

The DEIS also ignores the unique nature of Tribal water rights under the "Law of the River," a term used to denote the various compacts, legislation, court decrees and regulations that determine how the Colorado River is controlled and operated. The foundation for the "Law of the River" is the Colorado River Compact, which expressly provides: "Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Indian tribes." Colorado River Compact of 1922, Art. VII. That provision leaves the Secretary of the Interior's ("Secretary") trust responsibilities undiminished by the enactment of the Compact and controls the relationship between *all* the Partnership Tribes, including the Five Lower Basin Tribes, and the United States concerning the operation of the Colorado River. The authoritative role of Article VII of the Compact in the "Law of the River," and its preservation of the Secretary's trust responsibilities, is expressly confirmed by the Boulder Canyon Project Act, 45 Stat. 1057, which provides: "The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as those claiming under the United States, shall be subject to and controlled by said Colorado River Compact."

45 Stat. 1064 § 13(b), 43 U.S.C. § 617*l*.(b)(1928). Thus, the Secretary's duties to the Partnership Tribes are not affected – let alone curtailed – by the "Law of the River."

Nothing in *Arizona v. California* alters that conclusion. To be sure, the Decree in that case is frequently cited for the proposition that the Secretary is authorized to release water not used in one state in any one year for use in another. *See* DEIS at 1-12. In fact, the Decree is far less permissive; holding only that the Secretary of the Interior is *not prohibited* under the Decree from "releasing such apportioned but unused water during such year for consumptive use in the other States." *Arizona v. California*, 376 U.S. at 343. This lack of prohibition does not provide definitive authority for the Secretary, whose trust duties to the Tribes remain unaffected, to release from storage "water controlled by the United States," which the Secretary holds in trust for the Tribes, if the sole purpose is to facilitate water use by other water users along the River.

The DEIS never addresses the unique status of the tribal rights under the "Law of the River" or the fact that the Secretary, and Reclamation acting on the Secretary's behalf, have special obligations with regard to the water rights of the Five Lower Basin Tribes. Before embarking on his ambitious agenda of establishing interim criteria, the Secretary must examine the effect of such criteria on the rights all Partnership Tribes, including the Five Lower Basin Tribes. To construct the proper framework in the DEIS for that analysis, Interior must first recognize its trust responsibilities to all of the Partnership Tribes and the unique position which Tribal rights have under the "Law of the River."

C. Reclamation, Acting on Behalf of the Secretary, Is Subject to Exacting Standards if its Actions Affect the Water Rights of the Partnership Tribes.

The DEIS fails to acknowledge the United States' obligations to the Five Lower Basin Tribes and fails to properly analyze the potential effects on all ten Partnership Tribes from the adoption of interim surplus criteria. In the absence of a proper accounting of the effect of the proposed action on the Tribal rights, it is difficult to determine the appropriate steps that Reclamation, on behalf of the Secretary, should take to offset any adverse impact on the Tribes. It is clear, however, that Interior is subject to demanding standards that require it to take all possible actions to protect and promote the Tribal interests at stake.

Perhaps the most succinct statement of Interior's obligations is set forth in Secretarial Order 3215 - Departmental Responsibilities for Indian Trust Resources (Apr. 28, 2000). It is clear from this Order that Interior, including Reclamation, has an obligation under the present circumstances both to account for the potential effect on Tribal water rights and to ensure that its action "promotes," as well as "protect[s] and maintain[s]," *see* DEIS at 3.14-1, the interests of the Tribes and their water rights.

Case law also demonstrates that far more is required than the minimal discussion found in the DEIS. In *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256-57 (D.C. 1972), the Pyramid Lake Tribe challenged regulations promulgated by

Reclamation to regulate the operation of the Newlands Project, a federal Reclamation project in Nevada. The Tribe charged that Reclamation had not adequately considered the tribal interests in crafting the regulations that controlled the water supply available to the project. The district court agreed:

> In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake. The United States, acting through the Secretary of the Interior, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.
>
> * * *
>
> The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result. Difficult as this process would be, and troublesome as the repercussions of his actions might be, the Secretary was required to resolve the conflicting claims in a precise manner that would indicate the weight given to each interest before him. Possible difficulties ahead could not simply be blunted by a "judgment call" calculated to place temporarily conflicting claims to precious water. The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with law.

The DEIS does not comport with this exacting standard; both because it fails to fully acknowledge Interior's trust responsibility and because it never attempts to analyze the effect on the Five Lower Basin Tribes of the various criteria which it considers.

The fact that the Secretary effectively serves as water master on the River does not alter the conclusion that he must act consistent with his trust responsibility to the Tribes. In *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F. 2d 1555, 1567 (10th Cir. 1984) (Seymour, J. concurring in part, dissenting in part), *as modified*, 782 F.2d 855 (10th Cir.)(en banc)(per curiam)(adopting dissenting opinion of Seymour, J.), *cert. denied sub nom., Southern Union Co. v. Jicarilla Apache Tribe*, 479 U.S. 970 (1986), Judge Seymour clearly spelled out the steps that the Secretary must take when his role as an administrator requires him to deal with assets which he holds in trust for Tribes:

> When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In

short, he cannot escape his role as trustee by donning the mantle of administrator . . . . (citation omitted.)

728 F.2d at 1567. *Accord Burlington Resources Oil & Gas Co. v. United States Department of Interior,* 21 F. Supp. 1, 4-5 (D.C.D.C. 1998) (Secretary's decision must satisfy the "arbitrary and capricious" standard *and* provide optimum advantage for the trust beneficiary). Reclamation's own ITA policy acknowledges Interior's trust responsibility as well as the undeniable fact that the ITAs entitled to protection by Reclamation include Indian federal reserved water rights. *See* Bureau of Reclamation, *Indian Trust Asset Policy* (Aug. 31, 1994) ("Reclamation ITA Policy"), in Attachment A, United States Department of the Interior, *Protection of Indian Trust Resources* (notebook on file with the Department of the Interior) ("Protection of Indian Trust Resources").

II. RECLAMATION FAILS TO FULLY ANALYZE THE IMPACTS TO THE INDIAN TRUST ASSETS OF THE PARTNERSHIP TRIBES IN VIOLATION OF RECLAMATION'S OWN INDIAN TRUST ASSET POLICY

4 cont'd below

A. In Keeping with its Trust Duty to the Partnership Tribes, Reclamation Must Explicitly Address the Proposed Action's Impacts on the Ten Tribes' Water Rights and Must Avoid or Mitigate Those Impacts.

4: Comment noted.

In accordance with the exacting fiduciary standards discussed above, Interior and Reclamation have adopted policies and procedures to ensure that their actions comply with the trust responsibility. Interior's policy, to which Reclamation is subject, states that it will "recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members." 512 DM 2.2 (Dec. 1995), in "Protection of Indian Trust Resources." Interior's procedures require that "[a]ny effect [on Indian trust resources] *must be explicitly addressed* in the planning/decision documents, including, but not limited to . . . Environmental Impact Statements . . . ." 512 DM 2.4(A) (emphasis added). Such documents "*shall* . . . [e]xplain how the decision will be consistent with the Department's trust responsibility." *Id.* (emphasis added).

In describing this duty, Reclamation states that the trust responsibility "requires that the United States, as trustee, [deal] with the trust assets in the same manner [as] a prudent person would deal with his own assets." Bureau of Reclamation, *Indian Trust Asset Policy and NEPA Implementation Procedures: Questions and Answers About the Policy and Procedures* ("ITA Q&A"), Section II-1 at 4, in "Protection of Indian Trust Resources."[1] In fulfillment of the trust responsibility, Reclamation commits in its own ITA policy to:

[1] Reclamation's policy statements regarding the proper discharge of the trust responsibility should be interpreted in light of the "guiding principles" in Secretarial Order No. 3215, *supra*. The Secretarial Order cites as a "source of guidance" *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942), wherein the United States Supreme Court stated that the government, in its dealings with Indians, is

> carry out its activities in a manner which protects trust assets and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation.

Reclamation ITA Policy in "Protection of Indian Trust Resources."

Reclamation's procedures implementing its ITA policy require that the assessment of impacts on ITAs cover "[a]ctions that could impact the value, use or enjoyment of the ITA." ITA Q&A, Section IV-4 at 9. "Such actions could include interference with the exercise of a reserved water right." *Id.* Reclamation requires all impacts, whether positive or negative, to be analyzed and discussed. *See id.* Reclamation's analysis, according to its own policies and procedures, encompasses the following steps:

> The first strategy should be to avoid causing significant adverse impacts. When this is not possible, an attempt should be made to minimize such impacts. If adverse impacts do occur, the next step is to identify mitigation or compensation measures to offset adverse impacts so that there is no net loss to the Indian beneficial owners of the asset.

ITA Q&A, Section V-1 at 13.

According to its procedures, when implementing its ITA policy, Reclamation should perform interdisciplinary studies in order "to identify potential impacts and reasonable measures that could prevent or mitigate the adverse impacts." ITA Q&A, Section IV-7 at 10.

Reclamation's procedures for implementing its ITA policy also seek to uphold the United States' "government-to-government" policy by "[trying] to insure that tribes are not treated as 'just another interest group." ITA Q&A, Section II-6 at 7. Reclamation's ITA policy recognizes that working "government-to-government" with tribes "requires that federal agencies design solutions and tailor federal programs, in appropriate circumstances, to address specific or unique needs of Indian tribes." *Id.*

4 cont'd this page and next

Because the Partnership Tribes' water rights are Indian trust assets, *see* discussion *supra*, Reclamation must follow Interior's and its own ITA policies and procedures in addressing the Partnership Tribes' water rights in the DEIS. In accordance with these policies and procedures, the DEIS must explain and assure that the decision will be consistent with the trust responsibility by:

a) Explicitly addressing how the proposed action, the development of specific interim surplus criteria, will impact the Partnership Tribes' water rights.

charged with "moral obligations of the highest responsibility and trust" and should be "judged by the most exacting fiduciary standard." *Id.*

4 cont'd

b) Explaining how the proposed action will be consistent with Reclamation's responsibility to protect and promote these water rights.

c) Fully analyzing whether the proposed action *could* interfere with the Partnership Tribes' exercise of these water rights now or in the future.

d) Analyzing the impacts and reasonable mitigation measures based upon an interdisciplinary approach.

e) Designing mitigation solutions that recognize and promote the Tribes' unique relationship with the federal government.

f) Including, to the extent significant adverse impacts from the proposed action cannot be avoided, sufficient mitigation measures to ensure that the Partnership Tribes' water rights and the ability to exercise those water rights now or in the future are protected.

As is discussed in more detail below, the DEIS is woefully lacking in meeting any of these obligations in its ITA analysis.

5 cont'd below

B. The DEIS Fails to Analyze the Significance of the Impacts on the Partnership Tribes' Water Rights and Fails to Discuss How the Impacts May Be Avoided or Mitigated.

Despite inconsistent statements to the contrary in the DEIS's summary, *see* DEIS at S-14,[2] and despite the DEIS's erroneous statement that the present perfected rights of the Five Lower Basin Tribes are not ITAs, the DEIS clearly states that the proposed action could have a significant impact on the Indian trust assets of the Partnership Tribes. The DEIS recognizes that a substantial portion of the surplus water made available under the interim criteria is "primarily a direct result of unused existing entitlements, including those of the [Ten] tribes," whom, the document recognizes "have a significant amount of undeveloped water rights." DEIS at 3.14-2. Having recognized that fact, the DEIS concludes that the development of an interim surplus criteria has the "practical effect of diminishing the tribes' ability to utilize their entitlements." *Id.* There is, however, no analysis of this clearly stated impact and no discussion of how such an impact might be mitigated.

Notwithstanding the perfunctory presentation, Interior and Reclamation have recognized that establishing interim surplus criteria will create a disincentive for the

[2] In fact, the conclusory statement in the DEIS summary, that water availability for the Partnership Tribes would be unaffected because the Partnership Tribes' water rights "have priorities sufficiently early in time," is inaccurate. The erroneous statement ignores the fact that many of the Partnership's Upper Basin Tribes have *subordinated* senior priority dates as part of congressional settlements or project authorizations.

5: The Department acknowledges this concern and recognizes that a number of Tribes have been unable to use their entitlement to date. The Department is committed to making progress to help Tribes make better use of their water rights. In the Upper Colorado Region, Reclamation and the Department have undertaken numerous efforts to pursue opportunities for the Ten Tribes to utilize their water rights. Implementation of water right settlements for both the Northern Ute Tribe and the Jicarilla Apache Tribe continues to be a focus of the Department, along with seeking final implementation of the Colorado Ute settlement. In addition, the Department is working with the Navajo Nation on reapportionment of the Navajo Reservoir, which will assist efforts to move the Navajo Indian Irrigation Project towards completion. Efforts also continue on a settlement of the Little Colorado River.

In the Lower Colorado Region, Reclamation and the Department have likewise undertaken numerous efforts to pursue opportunities for various Tribes to utilize their water rights. The Department has worked for years to address the needs of Lower Basin Tribes served by the Central Arizona Project in a comprehensive Arizona Water Rights Settlement. For example, recently this effort led to introduction of a bill in Congress that would address the claims of the Gila River Indian Community, resolving the largest Indian water rights claim in the western United States.

5 cont'd

development of the Tribes' quantified but currently "undeveloped water rights." *Id.* Stated another way, the three Lower Basin States, and the water users within those States who benefit from the interim surplus criteria, now have (yet another) incentive to oppose and to seek to prohibit any further development of the Partnership Tribes' quantified federal reserved rights.[3] Although the DEIS thus correctly acknowledges that the proposed action could impact the value, use, or enjoyment of the Partnership Tribes' Indian trust assets, the DEIS fails to provide the thorough discussion and analysis of this impact that is necessary for decisionmakers and the public to understand both the extent of the impact and the need for mitigation. As discussed above, Reclamation is required to "explicitly address" the impacts on ITAs and to avoid or mitigate those impacts in a manner that recognizes, respects, and implements the trust relationship between the federal government and the Tribes. The DEIS explicitly addresses the extent of impacts to those Tribes with entitlements to Central Arizona Project water, but it contains no analysis of the magnitude of the disincentive that each of the various alternative proposed interim surplus criteria could have for development of the Partnership Tribes' water rights. Reclamation has not employed an "interdisciplinary" or any other analysis to properly assess the impacts of the alternatives on the Partnership Tribes. This is yet another reason why a revised draft environmental impact statement should be issued.

6

By virtue of the fact that their rights are quantified, the Ten Tribes' rights can, and should be, explicitly accounted for, and assessed, *see also* n.3 *supra*, in a manner that reflects the actual value of using their water in various shortage, normal, or surplus determinations, as those determinations would be made according to the various alternatives in the DEIS. *See* discussion in the Technical Comments *infra*. Such an assessment is necessary in order to, at the very least, analyze the one impact Reclamation actually recognized in the DEIS at 3.14-1. Furthermore, having an analysis that is tailored to the specific and unique needs of the Partnership Tribes is in keeping with Reclamation's own policies to foster government-to-government relationships and to protect Indian trust assets. Because the DEIS contains literally no analysis of the one impact recognized in the DEIS, the disincentive to future water development by the Tribes, the Partnership has provided such an assessment. *See* discussion in the Technical Comments *infra*. As the Partnership's analysis reveals, the impact varies depending on the alternative criteria employed.

7 cont'd below

In addition to ignoring a complete analysis of the impacts, the DEIS fails to discuss appropriate mitigation for the Tribes. Such a discussion cannot occur, however, without performing the proper accounting of the effect that the proposed action will have

part of 5

[3] It is important to note that this disincentive argument holds true for unquantified and undeveloped federal reserved water rights as well. The Partnership's request that a revised DEIS explicitly account for and analyze the amount of the disincentive on the Tribes' quantified rights does not diminish the need for Reclamation to also analyze, and mitigate impacts to, Indian federal reserved water rights that are not yet quantified. The analysis may be different, however. It is also important to note that, even if impacts to all Tribes and, indeed, the Six States, are lessened by establishing criteria that allows California to curtail its over dependence on the Colorado River, implementation of interim criteria still can, and does, have impacts.

6: The Department does not believe this proposed action would preclude the Tribes or any entitlement holder from using their Colorado River entitlement. The interim surplus criteria will not alter the quantity or priority of Tribal entitlements. In fact, as noted by the description of the Tribes' water rights in Section 3.14, the Tribes have the highest priority water rights on the Colorado River. Surplus determinations have been made by the Secretary since 1996, and surplus water supplies have been utilized by valid Colorado River contractors under the Secretary's annual surplus determinations since that date. Adoption of ISC will not make any additional surplus water available as compared with current conditions, but rather will provide more objective criteria for surplus determinations and will quantify the amounts of surplus water to be made available on an annual basis. Reclamation does not believe that identifying the limited amounts of surplus water will provide any additional disincentives for Tribal water development. Interim surplus criteria is also intended to complement efforts by California to reduce its over reliance on surplus water. The selection of any of the alternatives of this proposed action does not preclude any entitlement holder from using its water rights.

7: The Department does not believe mitigation is warranted based upon the Department's conclusion that the proposed action will not adversely affect the water rights of the Tribes (or any entitlement holder).

7 cont'd

on the Partnership Tribes' quantified rights. Once the accounting is done and the impacts are analyzed, but before a preferred alternative is chosen, Reclamation has a duty to consult with the Tribes regarding mitigation determinations. *See* ITA Q&A, Section V-1 at 13 ("Mitigation determinations should be done as they are now, by consulting with affected Indian entities . . ."); *see also id.,* Section IV-11 at 11 ("[T]he government-to-government policy requires that tribal governments be consulted to the greatest extent practicable concerning actions with potential affects on . . . tribal ITAs . . . .").

8

III. A REVISED DEIS SPECIFICALLY ADDRESSING THE PARTNERSHIP WATER USE MUST BE CIRCULATED IN ORDER TO COMPLY WITH NEPA

A. Under NEPA, a Draft Environmental Impact Statement Must Fulfill and Satisfy to the Greatest Extent Possible the Requirements Established for the Final Environmental Impact Statement.

In addition to the deficient ITA analyses, the DEIS's discussion of the environmental impact of the proposed action is insufficient according to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(d) (West Supp. 2000) ("NEPA") and its implementing regulations. The only cure for the deficiencies discussed herein, as provided by NEPA, is to recirculate a revised DEIS as it pertains to analysis of the Partnership Tribes' water rights and water use.

NEPA requires impact statements to include "a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332 (C). *See also* 40 C.F.R. §§ 1508.8 and 1508.27 (1999). The fundamental purpose of this requirement is to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1 (1999). The Council on Environmental Quality's implementing regulations for NEPA apply to Reclamation's actions. *See id.* at § 1500.3. Those regulations provide that:

> [impact statements] shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment . . . . *Statements . . . shall be supported by evidence that the agency has made the necessary environmental analyses.* An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.1 (1999)(emphasis added).

The Second Circuit has elaborated on these regulatory requirements and provided a concise summation of NEPA case law as it pertains to an impact statement's fundamental purpose:

8: Reclamation disagrees with the commentor's opinion that the ITA analysis is deficient and the environmental impact of the proposed action is insufficient. To meet the requirements of NEPA, it is common practice to update DEIS information in the FEIS as was the case on Tribal water rights and uses. Reclamation has used the best information available in the DEIS and has updated the ITA section appropriately. The determination of Tribal water rights and uses are legal matters beyond the scope of the proposed action. The NEPA process is not the vehicle to determine water rights of any party. Reclamation did not exclude identification or analysis of Tribal water rights or uses in the DEIS. The DEIS and FEIS identifies and appropriately analyzes impacts to Tribal water rights based on information available to Reclamation, thus Reclamation believes it is not required to recirculate a revised DEIS.

> The primary function of an [EIS] under NEPA is to insure a fully informed and well-considered decision . . . . In order to fulfill its role, the EIS must set forth sufficient information for the general public to make an informed evaluation, and for the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action. In so doing, the EIS insures the integrity of the process of decision by giving assurance that stubborn problems or serious criticisms have not been swept under the rug.

Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011, 1029 (2nd Cir. 1983) (internal citations and quotation marks omitted).

Moreover, NEPA requires that an agency prepare a draft environmental impact statement with the same general thoroughness as it will its final impact statement:

> Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process . . . .The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section [4332](2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

40 C.F.R. § 1502.9(a)(1999). As discussed below, Reclamation must prepare and circulate a revised DEIS because the current DEIS is "so inadequate as to preclude meaningful analysis," *see id.*, Reclamation must prepare and circulate a revised DEIS.

9 cont'd below

B. The DEIS'S Analysis of Alternatives Is Incomplete Because it Does Not Contain the Water Use Projections for the Partnership Tribes' Water Rights.

In the DEIS model runs, Tribal water use is buried within the demand nodes used by the Colorado River Simulation System (CRSS). Diversions, in many cases, serve both Indian and non-Indian water users, making it difficult to determine the portion, or assumed portion, associated with each. Furthermore, the Tribes have not participated in the determination of their modeled demands or in the assumed water development schedules for each state. Thus, from the standpoint of the Partnership, the modeling of Tribal water in DEIS model runs is ambiguous. Unambiguous modeling of Partnership

9: Reclamation provided the Partnership with a grant for participation in this process. CRSS has been modified based on the data provided by the Partnership and subsequent discussions with the Partnership consultants clarifying that data.

9 cont'd Tribes' water within CRSS requires representation of the Tribes' water at each node where the potential for present or future Tribal water demands exists. From this basis the Tribes can identify and fully participate in determining the schedule for their modeled demands. Accordingly, the Partnership submitted to Reclamation a nodal delineation of Tribal water rights and planned development schedules. *See* DEIS at Cover Sheet for Appendix O.

10 Although Reclamation had the requisite data from the Partnership, Reclamation omitted a complete analysis in the DEIS of the projected water use of the Partnership Tribes' quantified water rights. Although concern about impacts on the future development of these water rights was clearly raised during the scoping process,[4] the DEIS does not provide a substantive and meaningful discussion of the salient socioeconomic and environmental impacts that the alternatives could have on water use by the Tribes. If alternatives diminish the Partnership Tribes' ability to develop their water rights, those socioeconomic impacts must be described. Moreover, the DEIS fails to consider how the Ten Tribes' water use could affect the quantities of surplus water available under the various alternatives. Proper accounting of the Ten Tribes' ITAs begins with proper inputs into the model. This lack of any substantive discussion about data Reclamation had in its possession, but did not incorporate into the model, raises serious questions as to the accuracy of Reclamation's conclusions regarding environmental impacts of the proposed action.

10: The Department does not believe the alternatives of this proposed action preclude the Tribes from using their Colorado River entitltement.

11 Instead of considering the impacts of the Partnership Tribes' water use on available surplus in the DEIS, Reclamation merely promised that it will update its Colorado River Surplus Simulation ("CRSS") model "to include discrete representation of the Ten Tribes' updated use schedules and their full quantified entitlements for the Final EIS . . . ." DEIS at 3.14-2. Reclamation conceded that it had "a draft listing of the Colorado River system reaches and demand points which was provided to Reclamation by the Ten Tribes Partnership" before the DEIS was issued, but that "[t]his data was not incorporated into the model for this DEIS." DEIS at Cover Sheet for Attachment O. There is no explanation in the DEIS why the data were not considered prior to releasing the DEIS, or why Reclamation ignored pertinent information relevant to the scope of the DEIS. If Reclamation fulfills its promise to incorporate the Tribes' water use projections in the CRSS prior to issuing the FEIS, *id.,* those figures will significantly affect the amount of water now projected in the DEIS as available surplus and will require that Reclamation issue a revised draft statement for additional public comment.

11: Reclamation has incorporated the Partnerships' data into the model runs.

12 cont'd below In addition to precluding meaningful analysis of the proposed action, the failure to incorporate the Partnership's water use projections in the DEIS's model runs contravenes a fundamental purpose of NEPA, to "insure that environmental information is available

12: Comment noted.

[4] *See* letter from Joe Muniz, Chairman, Ten Tribes Partnership, to Jayne Harkins, Chairperson, Colorado River Management Work Group, Bureau of Reclamation (June 8, 1999). *See also* Letter from Stanley M. Pollack, Water Rights Counsel, Navajo Department of Justice, to Jayne Harkins, River Operations Manager, Bureau of Reclamation (June 29, 1999).

12 cont'd

to *public officials and citizens* before decisions are made and before actions are taken." 40 C.F.R. § 1500.1 (1999) (emphasis added). NEPA is intended to maximize meaningful public participation in decisions that affect the quality of the human environment. *See id.* at §§ 1500.2(d) and 1506.6 (1999). This policy works in harmony with having as complete a DEIS as possible. *See id.* at § 1502.9(a). If the DEIS is complete, public feedback can be meaningful. In preparing its final environmental impact statement on interim surplus criteria, Reclamation must "assess and consider [public] comments . . . and shall respond . . . stating its response in the final statement." 40 C.F.R. § 1503.4(a) (1999). Reclamation has no corresponding obligation to respond to public comments after the FEIS is issued. Consequently, Reclamation's decision to omit incorporation of data in the DEIS regarding the Partnership Tribes' water use undermines a manifest policy that proposing agencies should "[e]ncourage and facilitate public involvement . . ." to the fullest extent possible. *Id.* at § 1500.2. This error can only be corrected by recirculating a revised DEIS which incorporates modeling runs and a discussion of Partnership Tribes' water use as it relates to the proposed interim surplus criteria.

TECHNICAL COMMENTS

I. SURPLUS ACCOUNTING

13

The Ten Tribes Partnership has consistently asserted that the Colorado River Interim Surplus Criteria EIS should include a full and explicit accounting of the water making up the surplus to the Lower Basin.[5] The Partnership contends that the surplus criteria alternatives cannot be properly evaluated without accounting for the sources of the surplus water.

The sources of surplus water to the Lower Basin, in order of declining magnitude during the interim period, are: storage drawdown in Lakes Mead and Powell; undeveloped Indian and non-Indian water in the Upper Basin; reduced spills (excess to Mexico); and reduced reservoir evaporation. The Partnership requests that this accounting be included in a revised DEIS and the final EIS.

14

[5] The Partnership submitted text to Reclamation describing the water rights of each Partnership Tribe which was incorporated by Reclamation in sections 3.14.2.1 through 3.14.2.10 of the DEIS. The Partnership recommends the following revisions to the text at section 3.14.2.6 discussing the Fort Mojave Indian Reservation. Revise the second paragraph as follows:

> The Fort Mojave Tribe claim to additional land and water rights in California was recently settled and confirmed by the United States Supreme Court in *Arizona v. California*, ___ U.S. ___, 2000 WL 775538 at 17-18 (2000). That settlement provides an additional reserved water right in the amount of 3,022 acre-feet

Delete the first two sentences of the third paragraph because they reference a table that is not part of the DEIS. Add the following sentence at the beginning of the paragraph: "Water use by the Fort Mojave Tribe is estimated using records of electrical consumption at various pump stations and are not measured flows." The third paragraph should then start with "The CRSS model contains . . . ."

13: The Department declines the request to include the sources of water in the FEIS. Once tributary water commingles with Colorado River water it becomes Colorado River system water. This system water is used as such to make appropriate deliveries based on the Decree. The selection of any of the alternatives of this proposed action does not preclude any entitlement holder from using its water.

14: We have revised the second subparagraph under paragraph 3.14.2.6 in the FEIS to adopt these suggestions from the Ten Tribes Partnership.

A. Storage Drawdown

15 During the interim period the storage drawdown in Lakes Mead and Powell is the largest source of surplus water to the Lower Basin. The accelerated drawdown of stored water under the more liberal surplus criteria (Six States, Seven States, California, and Shortage Protection) effectively trades future shortage protection for interim surplus. However, over the course of 60 years the mean annual change in storage (initial storage less ending storage divided by the number of years) is close to the same for all alternatives and is no longer a source of surplus water.

B. Undeveloped Upper Basin Water

16 After the interim period, undeveloped Upper Basin Indian and non-Indian water accounts for the bulk of surplus water to the Lower Basin. During the interim period it is second to storage drawdown as a source for Lower Basin surplus. This source of Lower Basin surplus declines with time as the Upper Basin develops.

As explained earlier, the CRSS modeling for the DEIS did not explicitly include nodal representation of Upper Basin Indian water rights and development schedules. The Ten Tribes Partnership submitted to Reclamation a nodal delineation of the Tribal water rights and planned development schedule, which Reclamation states in the DEIS it intends to incorporate in the CRSS modeling for the Final EIS, and which incorporation requires the submission of a revised DEIS for public review and comment. *See* discussion *supra*. *See also* DEIS at Cover Sheet for Appendix O.

17 Based on the rights and development schedule provided in DEIS Appendix O, the current depletion by Upper Basin Tribes is 357 KAF per year versus a total right and full development depletion of 728 KAF per year. Thus the undeveloped Upper Basin Tribal water right is 371 KAF per year. From the Upper Basin consumptive use schedule assumed for the DEIS modeling, the current total Upper Basin depletion is 3,836 KAF per year against an end of model run depletion of 5,204 KAF per year. Thus the total undeveloped water in the Upper Basin is assumed to be 1,368 KAF per year. The Indian portion of this total undeveloped Upper Basin water is 371/1,368 or 27%. This is the fraction assumed by the Ten Tribes Partnership in developing this response to the DEIS.

The consequence of undeveloped Upper Basin water on water made available to the Lower Basin is simulated as the difference between model runs with scheduled development of Upper Basin water and runs with full development for all model years. Inherent in this approach is the assumption that scheduled water development will not be hindered as a result of disincentives associated with the surplus alternatives being analyzed. If scheduled development were curtailed then the analysis should be based on the difference between current use in the Upper Basin and full rights, which would demonstrate even greater reliance on undeveloped water and hence potential adverse impact to Indian trust assets.

15: See response to Comment No. 31-7 for a discussion of the results of interim surplus criteria implementation.

16: For the DEIS, the depletion schedules prepared and submitted by the Upper and Lower Basin states were used to model the basin water demands under normal, surplus and shortage water supply conditions. The states updated these schedules in consultation with the local agencies/tribes and Reclamation used the updated schedules in the modeling of the baseline conditions and surplus alternatives for the FEIS. All agency/tribe demands schedules are believed to have been appropriately modeled for the DEIS. However, for the DEIS, the demands of various agencies/tribes were clustered or aggregated at the respective nodal point on the model. For the FEIS, the demands of the individual agencies/tribes that have water service contracts with Reclamation and have direct diversions from the main stem Colorado River were disaggregated and modeled as individual demands at the respective nodal points on the model. See Attachment H which shows the Lower Basin use schedules and Attachment K which shows Upper Basin use schedules. All Tribes in the Ten Tribe Partnership, in the Lower Basin receive their scheduled depletion, with the exception of the Cocopah Tribe which has some Arizona Priority 4 water.

17: See response to Comment No. 53-16.

18 C. Reduced Spills

Relative to the Flood Control Alternative, each of the other alternatives results in less excess flows to Mexico. This reduction in spills from Lake Mead is the third largest source of surplus water to the Lower Basin.

D. Reduced Evaporation

19 With the accelerated drawdown of Lakes Powell and Mead the mean reservoir surface area is reduced with a consequential reduction in evaporation loss. This is the smallest source of surplus water to the Lower Basin. It is calculated relative to the evaporation occurring under the Flood Control Alternative, which has the largest mean reservoir storage and, accordingly, the largest mean annual evaporation loss.

II. LOWER BASIN TRIBAL ACCOUNTING POOL

The Lower Basin presently exceeds its compact apportionment, even though the Lower Basin Tribes have not fully developed their perfected water rights. This undeveloped portion of the Lower Basin Tribal depletion right is represented in all analyses as its proportionate share of the Lower Basin use, indicating that other users in the Lower Basin are presently consuming these depletion rights. In addition, this undeveloped portion of Lower Basin Partnership water could be tracked by in-reservoir accounting in Lake Mead explained in more detail below.

20 cont'd below

Because the undeveloped Five Lower Basin Tribes' water assets are an implicit component of the Lower Basin consumptive use they should be treated differently than the undeveloped Upper Basin water when analyzing the potential effects of the various surplus criteria.

Since the Lower Colorado River Basin States presently receive more than their 7.5 million acre-feet (MAF) apportionment, even though the Five Lower Basin Tribes have not fully developed their decreed right, the Lower Basin is implicitly using and relying on Tribal water. The consequence of undeveloped Lower Basin Tribal water could be tracked as the difference between model runs with and without full development as for the Upper Basin Tribal water. While tracking the Lower Basin Tribal rights on this annual basis is instructive and important to the Partnership, it is not a meaningful accounting method that reflects the true value of this trust asset. Impacts accounted for in this manner do not clearly reflect the value of the Tribal water thus used by others. For example, in wet periods when excess water is available, there would be no use of this water by others, yet in dry years its use becomes very important in off-setting shortages that would exist otherwise. Another accounting instrument is required that better represents this differential use. Accordingly, Partnership proposes to represent their unused Lower Basin water with in-reservoir accounting in Lake Mead. In addition to better assessing the use of Lower Basin Tribal water, this accounting method allows differential assessment of impacts among the alternatives. Such an accounting method

18: Comment noted.

19: Comment noted.

20: The Department declines the request to adopt a Lower Basin Tribal Accounting Pool.

provides the best tool for Reclamation, on behalf of the Secretary, to meet its trust responsibility to the Partnership.

In-reservoir accounting of the undeveloped Five Lower Basin Tribes' water will not conceptually change the surplus declaration alternatives or the simulated releases from Lake Mead. Rather, it is simply a bookkeeping process that determines the portion of surplus, normal, and shortage water delivered to other non-Partnership Lower Basin users as a result of undeveloped Ten Tribes' water in the Lower Basin. Because the Tribal Accounting Pool ("TAP") does not affect simulated releases from Hoover Dam, TAP accounting can be done as a post-modeling process provided all trigger elevations for Lake Mead surplus and shortage are output. However, the Partnership promotes having TAP explicitly incorporated into the simulation model as this will expedite the analysis and will better assist the Secretary in assessing the importance and significance of undeveloped Tribal waters in the Lower Basin consumptive use allowed by the various surplus criteria.

20 cont'd below

Presently, the undeveloped Lower Basin Partnership water is approximately 185 KAF annually. This amount decreases during the interim period due to development of Tribal Rights as represented in Appendix O of the DEIS, with an average of 155 KAF over the interim period. Thus, each year 155 KAF will be added to TAP. If excess flow is released to Mexico then TAP would be reduced by the lesser of the amount of excess flow and the volume in TAP. If top water banks maintained by others are operating, the reduction due to spill would be shared in proportion to the water in each bank and TAP. Evaporation would be charged to TAP according to its portion of the total Lake Mead surface area (difference between the surface area with and without TAP water).

Figure 1 shows various storage conditions in Lake Mead relative to surplus (+) and shortage (-) trigger elevations.

a) Under the condition shown in Figure 1a excess water would be delivered to Mexico and TAP would be reduced by the amount of excess. If the excess to Mexico exceeds the amount in TAP, TAP contents would be zeroed. The sharing of impact with top water banks discussed above would apply to this condition.

b) The condition shown in Figure 1b would result in a surplus delivery with or without TAP and no water would be withdrawn from TAP.

c) Under the condition shown in Figure 1c a surplus would be declared. Without TAP a normal release (no surplus) would be declared. Because it is the contents of TAP that put the lake level above the surplus trigger elevation and allow a surplus to be declared, an amount equal to the lesser of the surplus and TAP contents would be added to the tally of surplus water resulting from the undeveloped Lower Basin Tribal water and withdrawn from TAP.

20 cont'd at end

d) The condition shown in Figure 1d would result in a normal delivery with or without TAP and no water would be withdrawn from TAP.

e) Under the condition shown in Figure 1e a normal delivery would be declared. Without TAP shortage would occur. Since it is the contents of TAP that put the lake level above the shortage trigger elevation and allow normal delivery rather than shortage, an amount equal to the lesser of TAP and the difference between normal and shortage deliveries would be added to the tally of normal water (shortage relief) resulting from the undeveloped Lower Basin Tribal water and withdrawn from TAP.

f) Under the condition shown in Figure 1f shortage occurs with or without TAP water; however, to the extent that releases are greater with TAP water than without, the difference would be added to the tally of shortage reduction attributed to the undeveloped Lower Basin Tribal water and withdrawn from TAP.

At the end of each model run, the tallies of surplus enabling, normal (shortage relief), and shortage reduction water withdrawn from TAP are averaged across all traces for each year of the simulation.

Combinations of these six conditions may also occur, and TAP accounting rules will likely evolve through application. However, the above provides a conceptual overview of how the Ten Tribes Partnership believes the undeveloped Tribal water in the Lower Colorado River Basin should be represented and tracked in order for the DEIS to contain a sufficient ITA analysis of the impacts on Partnership water rights.

21 cont'd below

III. ANALYSIS OF SURPLUS ALTERNATIVE USING ACCOUNTING CONCEPTS

The Ten Tribes Partnership applied the accounting procedures described above as part of its evaluation of the surplus criteria alternatives described in the DEIS.

The description of the model inputs and configuration details in the DEIS are insufficient to replicate Reclamation's results.[6] Since the proposed accounting procedures require the full detail of the model output, the Partnership made CRSS-ez model runs configured to closely approximate the RiverWare CRSS model results reported in the DEIS.

[6] This appears to be a violation of, among other things, NEPA's mandate that environmental impact statements be "supported by evidence that agencies have made the necessary environmental analyses." 40 C.F.R. § 1502.1.

21: See response to Comment No. 71-16. See also Attachment Q which shows the Ten Tribe depletions and diversions that were used in the FEIS alternatives.

21 cont'd below

An attempt was made to evaluate the Seven States Alternative, *see* 65 Fed.Reg. 42028 (2000), but due to inconsistencies between trigger elevations, demand schedules, post interim criterion (70R versus 75R), and modeling platforms (CRSS-ez versus RiverWare CRSS), results compatible with the DEIS model runs were not obtainable. However, it is believed that the Seven States Alternative would fall between the Six States and California Alternatives, and the Partnership evaluated it accordingly.

The relative magnitudes of the five sources of Lower Basin surplus (storage drawdown, undeveloped Upper Basin Indian and non-Indian water, reduced spills, and reduced evaporation) for each of the surplus alternatives in the DEIS are shown in stacked bar graphs in Figures 2a (annual averages for interim period, 2000-2015), 2b (annual averages for post interim period, 2016-2060), and 2c (annual averages for the entire model study period, 2000-2060).

Figure 2a shows that the storage drawdown in Lakes Powell and Mead is the largest source of surplus water to the Lower Basin for all surplus alternatives during the interim period (2000-2015). With the exception of the No Action Alternative, undeveloped water in the Upper Basin is the next largest source of Lower Basin surplus, followed by reduction in spills (excess to Mexico), and then reduced evaporation loss due to the lowering Lakes Powell and Mead.

For the post-interim period (2016-2060), Figure 2b, the average Lower Basin consumptive use is below 7.5 MAF and there is no surplus resulting from change in storage in Lakes Mead and Powell as these reservoirs were effectively drawn down during the interim period. The No Action Alternative produces the greatest Lower Basin consumptive use during the post-interim period and with less than half the dependency on undeveloped Upper Basin water as the other alternatives.

Figure 2c shows the annual averages over the entire 60-year modeling period. Because the change in storage over the entire modeling period is practically the same for all alternatives it does not figure in to a 60-year average comparison of the alternatives. Figure 2c as well demonstrates that the No Action Alternative has the least reliance on undeveloped Upper Basin water of all the alternatives.

Figures 3a-c provide an analysis, using a top-water accounting method in Lake Mead, of the implicit use of undeveloped Lower Basin Indian water rights by non-Partnership entities. As mentioned earlier, the Lower Basin currently exceeds its 7.5 MAF apportionment despite underdevelopment of Lower Basin Tribal waters rights. Thus the undeveloped Lower Basin Tribal water rights are a basic component of Lower Basin non-Indian use. The Partnership believes that the implicit use of its undeveloped Lower Basin water can best be analyzed through water accounting methods described earlier. For this analysis the Partnership assumed that on average 155 KAF was deposited in the Tribal Accounting Pool (TAP) each year. The 155 KAF is the average undeveloped

21 cont'd

Lower Basin depletion right when utilizing the CRSS depletion schedule used in the DEIS during the interim period.

Figure 3a shows a relatively large amount (nearly 80 KAF annually) of TAP water going to realize surplus deliveries (TAP condition shown in Figure 1c) under the California, Six State, and Shortage Protection Alternatives and a modest amount (17 KAF annually under the No Action Alternative during the interim period. Small amounts of TAP water also go to normal (TAP condition shown in Figure 1e) and extreme shortage relief (TAP condition shown in Figure 1f).

During the post-interim period over 40 KAF annually of TAP water goes to extreme shortage relief and a near equal amount to meet normal deliveries under all surplus alternatives. With exception of the Flood Control Alternative there is little difference in TAP releases among the alternatives during the post-interim period. Note that for the Flood Control Alternative there is never any surplus TAP release (TAP condition shown in Figure 1c) since under this alternative surplus is coincidental with the condition shown in Figure 1a when the TAP is reset.

Figure 3c shows the 60-year average TAP releases. From this figure it is apparent that there is little difference among the liberal criteria (California, Six State, and Shortage Protection Alternatives) with respect to TAP releases and hence to the implicit reliance on undeveloped Lower Basin Tribal waters. The No Action and Flood Control Alternatives have moderately lower 60-year average TAP releases than the three liberal interim criteria.

22 cont'd below

IV. DISINCENTIVE TO INDIAN WATER DEVELOPMENT

As the DEIS acknowledges but does not analyze, *see* DEIS at 3.14-2, there is a disincentive to Indian water development due to the implicit reliance on undeveloped Tribal water assets. As demonstrated by the accounting above, this implicit reliance varies depending on the surplus criterion. The more liberal the surplus criterion, the greater is the implicit reliance on undeveloped water both in the Upper and Lower Basins, and hence the greater is the disincentive to Indian water development. Since the Lower Basin is over-allocated, the development of Tribal water would reduce the delivery of water to others in the Lower Basin, requiring either a reduction in use or the purchase of water to replace that amount of Tribal water that others have previously used.

By assigning per acre-foot dollar values to the Lower Basin non-Indian use of undeveloped Indian waters, we can estimate the economic disincentive to Tribal water development. Using the negotiated cost per acre-foot transferred under the Imperial Irrigation District/San Diego County Water Authority conservation agreement as a current guideline, transferred water is valued at approximately $290/af. Recognizing that the normal and shortage relief releases from TAP would have even greater value, normal

22: The Department does not believe that the proposed action will serve as a disincentive to Indian water development. See response to Comment 53-6.

22 cont'd

TAP releases are valued at $435/af, and shortage relief TAP releases at $580/af. Table 1 gives the results of assigning these values to the implicitly used Upper and Lower Basin undeveloped Tribal waters. The amounts shown represent the 60-year annual average value of the Tribal water that will be used by the Lower Basin non-Indians under the various alternatives. It may be considered a disincentive to the development of Tribal water as those using this water would have to replace it at the approximate values shown, thereby providing this level of disincentive to others to allow for development of the water on Tribal lands. From Table 1 the No Action Alternative results in the lowest economic disincentive to Tribal water development.

Table 1. Potential Economic Disincentive to Tribal Water Development ($million/year).

	California	Six State	Shortage Protection	No Action	Flood Control
Upper Basin	$ 14.24	$ 13.14	$ 14.34	$ 5.50	$ 12.01
Lower Basin	38.24	37.67	38.21	34.26	31.70
Total	$ 52.48	$ 50.81	$ 52.54	$ 39.76	$ 43.71

If the development schedule submitted by the Partnership is utilized in the final EIS as promised in the DEIS, and in a revised DEIS, *see* discussion *supra*, then the water supply available to meet the excess lower basin demand is diminished. When the new model runs are completed for the revised DEIS, the disincentive should be recomputed as the difference in delivery of Lower Basin Tribal water to Lower Basin non-Tribal uses for the two alternatives (full build-out as shown and the schedule shown in the DEIS). While the revised DEIS should recognize the full build out scheduled, it should also acknowledge that the loss of this water to the non-Tribal Lower Basin users has an economic impact and that impact becomes a disincentive for others to allow the Tribes to accomplish their desired build-out.

CONCLUSION

As presently drafted, the DEIS fails to fully and adequately account for the Partnership Tribes' water rights and the impact Reclamation admits the interim surplus criteria will have upon those rights. These failures must be corrected to fulfill the requirements of NEPA and Interior's and Reclamation's own policies regarding ITAs. This additional analysis, together with a complete analysis of the Seven States proposal, will require that Reclamation circulate a revised DEIS that fully accounts for impacts to ITAs and proposes mitigation for those impacts based upon consultation with the Partnership. Without the requisite analysis in a revised DEIS, there is no basis upon which the Partnership – or the Secretary – may support a preferred alternative.

20 cont'd

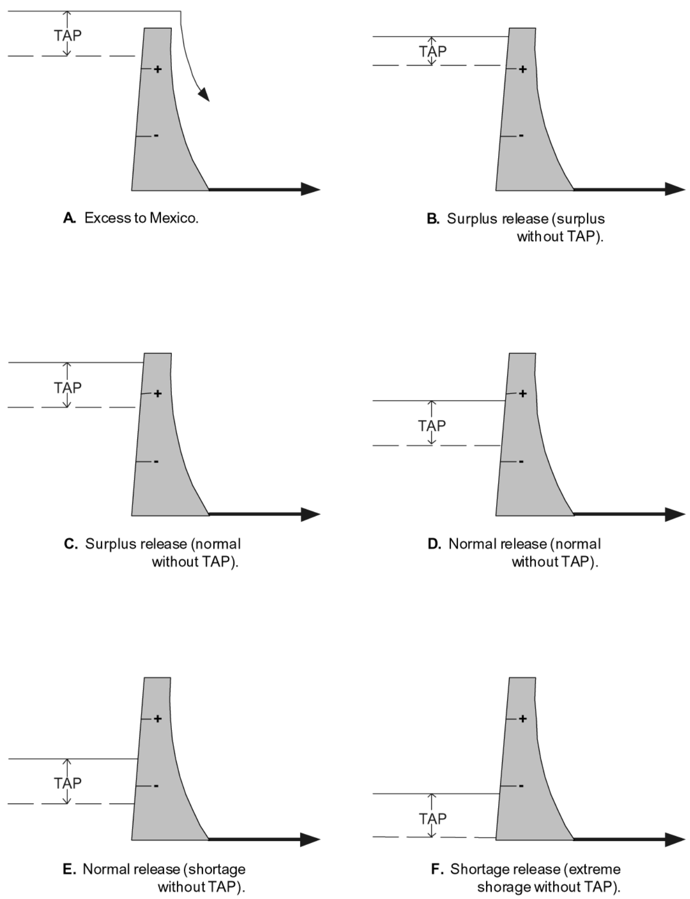


Figure 1. Different combinations of Tribal Accounting Pool (TAP) and contents of Lake Mead relative to surplus (+) and shortage (-) trigger elevations.

21 cont'd

Figure 2a
Interim Period (2000 - 2015) Average Lower Basin Consumptive Use

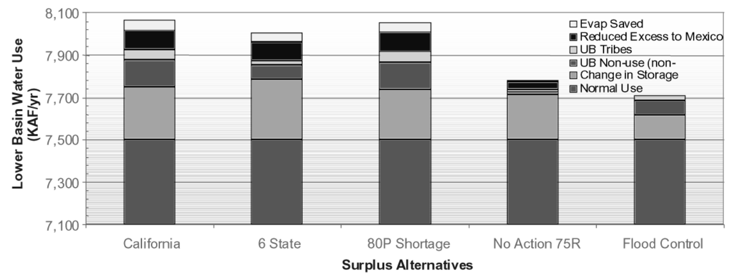


Figure 2b
2016 - 2060 Average Lower Basin Consumptive Use

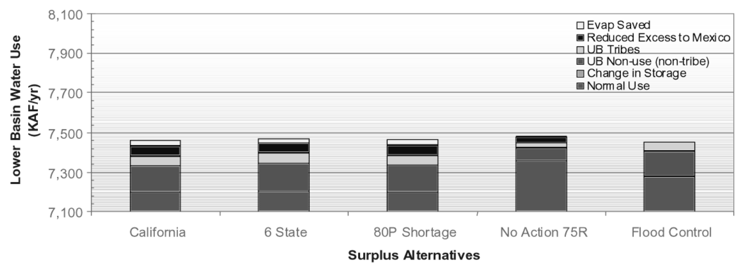
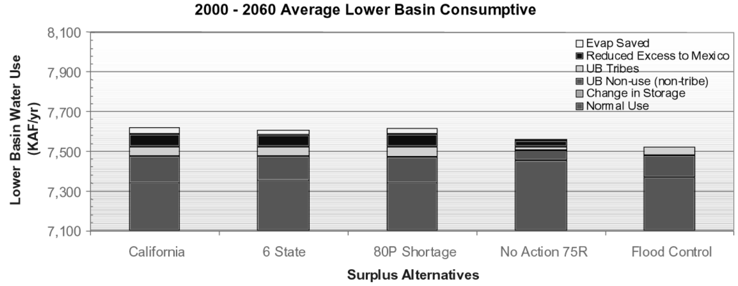


Figure 2c
2000 - 2060 Average Lower Basin Consumptive



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cont'd

Figure 3a
Interim (2000 - 2015) Period Average Lower Basin TAP Deliveries

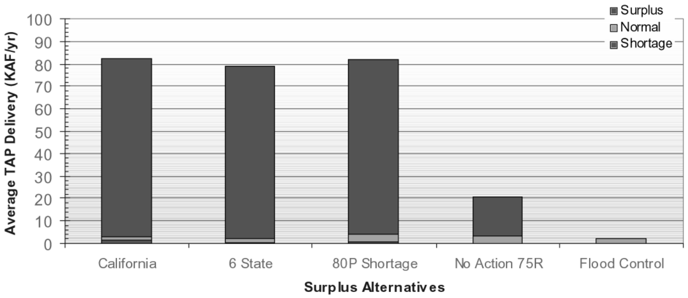


Figure 3b
2016-2060 Average Lower Basin TAP Deliveries

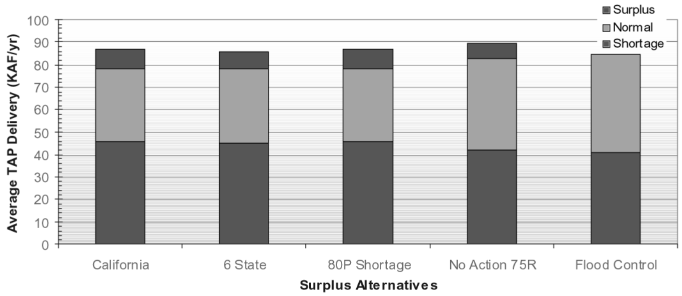
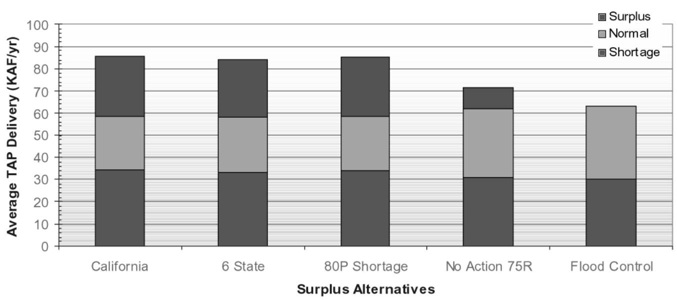


Figure 3c
2000 - 2060 Average Lower Basin TAP Deliveries



<u>INFORMATION SHEET</u>
#71 – Ten Tribes Partnership

The following attachments to the comment letter received from the Nordhaus Law Firm on behalf of the Ten Tribes Partnership (comment letter #71) were not scanned into the database:

(1) Department of the Interior, Departmental Manual release 512 DM 2
Protection of Indian Trust Resources

(2) Bureau of Reclamation, Indian Trust Asset Policy and NEPA Implementing Procedures

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FEDERAL AGENCIES

United States Department of the Interior

TAKE PRIDE IN AMERICA

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

SEP

BC00/0222
SEP 12 2000
4600

Regional Director
c/o Jayne Harkins, BC00-4600
Lower Colorado Regional Office
Bureau of Reclamation
P.O. Box 61470
Boulder City, NV 89006-1470

Dear Ms. Harkins:

We are writing to provide comments on the draft environmental impact statement (DEIS) for the **Colorado River Interim Surplus Criteria, Colorado River Basin**. It appears that implementation of interim surplus criteria is proposed largely to assist California in the transition to compliance with the basic 4.4 Million Acre Feet apportionment. Accordingly, there should be discussion of potential impacts to California Indian Trust Resources from the DEIS Interim Surplus Criteria Alternatives as associated with the various water management scenarios proposed for the California Colorado River Water Use Plan ("4.4 Plan").

1 We are particularly concerned about proposed groundwater recharge/groundwater storage (banking or conjunctive use of Colorado River Water) for tribes in the Salton Sea watershed under the 4.4 Plan as associated with the DEIS surplus alternatives. The DEIS must adequately describe potential adverse impacts to Federal Trust Assets of Indian Reservation water supplies that may become unusable due to the result of groundwater degradation from imported Colorado River water. In addition, the DEIS should include impact scenarios related to reduction of flows to MWD's Colorado River Aqueduct, including description of impacts to the Soboba Indian Reservation and Morongo Indian Reservation.

2 cont'd below Chapters 2 and 3 (Description of Alternatives and Affected Environment & Environmental Consequences, respectively) lack information with respect to the Federal Trust Assets or Resources affiliated with California tribes of the Salton Sea Watershed and the San Luis Rey River Watershed. The San Luis Rey Indian Water Rights Settlement Act of 1988 includes the Five Bands of Mission Indians involved with the Settlement Act, and the water to be delivered to each of the five Indian Reservations associated with the Act, of which source is likely to be diverted and conveyed from the Colorado River. The following Indian Reservations may receive adverse impacts, if not mitigated depending on final Alternative:

1: Metropolitan Water District of Southern California (MWD) and the Coachella Valley Water District (CVWD) have and are currently storing portions of their basic and surplus apportionments of Colorado River water for intrastate purposes. Intrastate storage (e.g. groundwater storage) activities/facilities are not within Reclamation's jurisdiction, and thus does not permit nor follow the water for environmental compliance purposes once delivered to a water user's point of diversion. The federal government does not have jurisdiction over groundwater aquifers, recharge sites or other off-stream storage sites within the states. Ongoing or new groundwater storage projects would be regulated by state and local regulations and compliance requirements under CEQA, California Water Control Board, and the California Department of Health Services. Some groundwater projects may require federal permits or approvals thus a CEQA/NEPA document may be prepared. Potential impact to trust assets on or adjacent to the Soboba Indian Reservation or the Morongo Indian Reservation from the operation and maintenance of MWD's Colorado River aqueduct are the responsibility of MWD and are not caused by or the result of the federal action addressed in this EIS.

2: The Salton Sea Watershed Tribes do not have Winters Rights to Colorado River Water thus there is no trust asset to impact. Potential impacts to Tribal assets from intrastate groundwater storage are not within the jurisdiction of Reclamation but are regulated by state and local regulations. Water to satisfy the San Luis Rey Water Rights Settlement is dependant on and shall be derived from conserved water from the lining of the All American Canal. Once lined, and conservation accounted for, a portion of the conserved water will be transferred by a point of delivery change to MWD facilities which is being addressed by separate Reclamation compliance documentation. Reclamation understands that the BIA is preparing separate environmental compliance for the use of this settlement water. The development nor transfer of the San Luis Settlement water is affected by the federal action addressed in this EIS.

COMMENT LETTER

RESPONSES

Salton Sea Watershed Tribes

2 cont'd

- Agua Caliente Band of Cahuilla Indians,
- Augustine band of Mission Indians,
- Cabezon band of Mission Indians,
- Morongo Band of Mission Indians,
- Torres-Martinez Desert Cahuilla Indians,
- Twenty-Nine Palms Band of Mission Indians;

San Luis Rey River Watershed Tribes

- La Jolla Band of Mission Indians,
- Rincon Band of Mission Indians,
- Pauma-Yuima Band of Mission Indians,
- Pala Band of Mission Indians,
- San Pasqual Band of Mission Indians.

3 The Distribution List does not indicate that BIA Southern California Agency (Riverside) was provided a copy of the DEIS. Reclamation did not include the BIA Pacific Regional Office in the initial distribution of the DEIS. This comment constitutes at least the 7th time your office has been notified to provide copies of NEPA-related notices and environmental documents to these offices.

If you have any questions concerning our request or need additional information, please contact William Allan, Regional Environmental Protection Specialist, at (916) 978-6043, or Dale Morris, Regional Natural Resources Officer at 978-6051.

Sincerely,

Regional Director

cc: Regional Environmental Officer, Office of Environmental Policy and Compliance
Superintendent, Southern California Agency
Director, Palm Springs Field Office

3: The Riverside office of BIA was sent a copy of the FEIS, as requested. As a commentor, the Pacific Regional Office was added to the distribution list.

COMMENT LETTER

RESPONSES

United States Department of the Interior

TAKE PRIDE IN AMERICA

BUREAU OF INDIAN AFFAIRS
NAVAJO REGION
P. O. Box 1060
Gallup, New Mexico 87305-1060

IN REPLY REFER TO:

RRES/520

SEP 2 1 2000

9/25 Harkin #600

Ms. Jayne Harkins
Bureau of Reclamation
Attention: BCC00-4601
P. O. Box 61470
Boulder City, Nevada 89006-1470

Dear Ms. Harkins:

On behalf of the Navajo Nation, the Bureau of Indian Affairs, Navajo Region, is providing comments on the *Colorado River Interim Surplus Criteria Draft Environmental Impact Statement* (DEIS). We have reviewed the DEIS relating especially to water quantity and water quality and are providing several comments as included below.

1 1. The DEIS does not consider the unquantified water rights of the Navajo Nation and the other Arizona Mainstream Tribes above Lake Mead. If tribes are allocated Colorado River water, the amount of water available to the Central Arizona Project would be diminished, affecting all the surplus criteria. Because the DEIS does not analyze the impacts attributable to the various surplus criteria on the ability of the Arizona Mainstream Tribes above Lake Mead to obtain Colorado River allocations, the Indian Trust Asset analysis is deficient for these tribes.

2 2. Although the DEIS states that interim surplus criteria would be implemented for 15 years, it assesses effects of the criteria for 50 years. After the 15-year period, all alternatives revert to baseline conditions, which is only one of the alternatives. Why do you assess effects for only one of the alternatives for 50 years? It is more appropriate if the final environmental impact statement (FEIS) provided some analysis of the effect of continuing the various alternatives throughout the 50-year period.

3 The DEIS provides information on the effects of water level changes on recreation facilities (marinas) in Lake Powell and Lake Mead caused by interim surplus criteria by quantifying the costs associated with facility adjustment and capitol acquisition both incrementally and over the 15-year period. Total costs for the entire 15-year period for the 10, 50 and 90 percent hydrologic inflow projections should be quantified in the FEIS.

1: See response to Comment 53-5.

2: See response to Comment 59-2.

3: It is recognized that different percentiles could be used for presenting the information in Section 3.9.6, however, Reclamation believes that using median elevations appropriately presents the differences between the alternatives and baseleine conditions. It should be noted that using 90th percentile elevations would show no discernable differences between the alternatives and baseline conditions for Lake Powell or Lake Mead, and use of the 10th percentile elevations would indicate differences similar to those identified using the median elevations (see FEIS Figures 3.9.1 and 3.9.4).

COMMENT LETTER

4 While the DEIS suggests that one or more marina sites could become inoperable at certain unspecified water levels, no analysis of these critical levels is provided. The effects of the marina closures could have broad economic consequences to the local and
5 regional economy including that of the Navajo Nation. The effect of the closures of marinas on the ability of the concessionaire to make a profit should be analyzed. The Navajo Nation plans on opening a new facility at Antelope Point on Lake Powell. The
6 ability of the Navajo Nation to open and operate a new facility at Antelope Point on Lake Powell should be analyzed and discussed in the FEIS.

3. Water quality is an issue in the DEIS since lake water levels and related lake volume are critical factors in predicting overall water quality. Existing contaminants in the lake will
7 be more diluted if there is more volume in the lake. A general summary of the chemical and pollutant characteristics of the lake is provided in the DEIS, but no specific projections are given on how these concentrations would change with various lake levels. Because the limnology and water quality of Lake Mead are generally known, predictions about changes could be developed and appropriately included in the FEIS.

We appreciate the opportunity to comment on the draft EIS. If you have any questions or comments, please contact Jane Farris, Supervisory Hydrologist, at 505-863-8214.

Sincerely,

ACTING Regional Director, Navajo

cc: Stanley Pollack, Navajo Nation Department of Justice – Window Rock, Arizona
John Leeper, Navajo Nation Water Management Branch – Ft. Defiance, Arizona
Leonard Robbins, Navajo Region – Environmental
Tom Hemstreet, Navajo Region – Tribal Services

RESPONSES

4: The discussion of threshold elevations, particularly for Antelope Point Marina, has been expanded. See Section 3.9.2.2.2 for a description of the elevations and Section 3.9.2.3.1 for an analysis of threshold elevations.

5: Potential costs incurred from relocating marina facilities are addressed in Section 3.9.6. Section 3.2 states that the scope of the analysis at Lake Powell is limited to the maximum water surface elevation; regional economic effects are not analyzed. As shown in Figure 3.9-6, the probabilities of Lake Powell elevation falling below 3626 feet msl (the approximate bottom elevation of future boat ramp useability under baseline conditions and the preferred (Basin States) alternative) are typically within 5 percent of each other.

6: Due to the small difference in probabilities (discussed above) between the baseline conditions and preferred alternative, interim surplus criteria would not have a significant effect on the feasibility of a marina at Antelope Point. Reclamation is providing information to the Navajo Nation as requested, regarding results of analyses significant to Antelope Point.

7: The water quality analysis in the EIS appropriately identifies the potential effects of interim surplus criteria. Potential effects are discussed in terms of the general effects of changing reservoir elevations because specific elevations and periods that such elevations would occur are unknown and cannot be predicted.

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

September 8, 2000

Robert W. Johnson, Regional Director
c/o Jayne Harkins, BC00-4600
Bureau of Reclamation
Lower Colorado River Region
Boulder Canyon Operations Office
P.O. Box 61470
Boulder City, NV 89006-1470

Dear Mr. Johnson:

The Environmental Protection Agency (EPA) has reviewed the draft environmental impact statement (DEIS) for the **Colorado River Interim Surplus Criteria, Colorado River Basin** (CEQ #239). Our review is pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act.

The Secretary of the US Department of the Interior (Secretary), acting through the US Bureau of Reclamation (Reclamation), is considering the adoption of specific interim criteria under which surplus water conditions may be declared in the Lower Colorado River Basin during an interim period that would extend through 2015. The interim surplus criteria would be subject to five-year reviews concurrent with the Long-Range Operating Criteria (LROC) reviews, and applied each year as part of the Annual Operating Plan (AOP). To date the Secretary has applied factors, including but not limited to the LROC, in annual determinations of the availability of surplus quantities of water for pumping or release from Lake Mead.

For many years, California has been diverting more than its 4.4 maf apportionment from the Colorado River. Prior to 1996, California drew on unused apportionments of other Lower Division states made available by the Secretary. Since 1996, California has also drawn on surplus water made available by Secretarial determination. California is in the process of developing the means to reduce its annual use of Colorado River water to 4.4 maf (4.4 Plan). Adoption of specific interim surplus criteria would afford mainstream users of Colorado River water, particularly users in California who currently utilize surplus flows, a greater degree of predictability with respect to the likely existence, or lack thereof, of surplus conditions on the river in a given year. Thus, interim surplus criteria would accommodate implementation of California's 4.4 Plan and ease California's transition to living within its basic 4.4 maf apportionment.

The DEIS considers four interim surplus criteria alternatives as well as a No Action Alternative (baseline). The four surplus criteria alternatives considered are the Flood Control Alternative, Six States Alternative, California Alternative, and Shortage Protection Alternative. In addition, another alternative was announced in the August 8, 2000 Federal Register (Volume 65, Number 153, pages 48531- 48538), herein named the Seven States Consensus Alternative. This alternative is judged by Reclamation to be within the range of the four alternatives evaluated in the DEIS. All alternatives propose Lake Mead water surface elevations which would be used for determining the availability of surplus water through 2015. The Flood Control Alternative is the most conservative, even more than baseline, whereby a surplus condition is determined only when flood control releases from Lake Mead are required. Flood control releases occur only when Lake Mead is near a full condition. The Shortage Protection Alternative is the least conservative since surplus conditions are determined when Lake Mead surface water elevations are relatively low, thus providing for more frequent probability of surplus determinations. The Six States, California, and Seven States Consensus alternatives provide for tiered elevation criteria which could be tied to specific uses of the surplus water. A preferred alternative has not been identified.

The analysis presented in the DEIS is based on a computer model of the operation of the Colorado River system under baseline conditions and the four surplus criteria alternatives. Attributes modeled were Lake Mead and Lake Powell surface water elevations and Lower Colorado River flows from 2000 - 2050. In general, model results for all alternatives, including baseline, indicate that Lake Mead surface elevations are likely to decline over the 50-year period of analysis. This decline is attributed to increasing Upper Basin depletions. The proposed surplus criteria alternatives would increase the rate and magnitude of decline in Lake Mead surface elevations. Since Lake Mead carryover storage helps minimize water supply shortages during dry periods, a reduction in its surface elevation and associated volume could also increase the probable frequency and magnitude of shortages to Lower Basin States and Mexico.

EPA commends Reclamation and the seven basin states for their thoughtful efforts to address the growing need for water supply limits in the Lower Colorado River Basin. The reduction of unused apportionment and increased development in both the upper and lower basins, clearly demonstrate the potential for significant water scarcity and the need for long-term strategies to address future shortages. In fact, EPA advocates operation of the Colorado River system in a way which will provide flexibility to accommodate future shifts in water policy and assure a long-term, sustainable balance between available water supplies, ecosystem health (e.g., in-stream beneficial uses), and water contract commitments. To help provide this flexibility, we urge Reclamation to utilize all available tools for enhancing water management flexibility, supply reliability, and water quality. These tools could include water transfers and exchanges, conservation, pricing, irrigation efficiencies, operational flexibilities, market-based incentives, water acquisition, conjunctive use, voluntary temporary or permanent land fallowing, and wastewater reclamation and recycling. Within the context of interim surplus criteria, we believe the surplus determination should include more specific requirements, such as conservation measures, for efficient and beneficial use of the surplus water.

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We strongly support California's reduction of its use of Colorado River water down to its basic 4.4 maf apportionment and acknowledge the need for interim surplus criteria to help ease California's transition. On-the-other hand, interim surplus criteria could incrementally increase

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1: Comment noted.

2: Comment noted.

COMMENT LETTER

RESPONSES

3 the decline of Lake Mead surface water elevations and the probability of more frequent and higher magnitude water shortages to other users of Lower Colorado River water. These effects would contribute to incremental adverse impacts to water supply availability, water quality, hydropower generation, and recreational facilities. Adequate water supply for the Central Arizona Project (CAP) could be significantly reduced since it has the lowest priority water rights. Thus, the CAP would be the first to experience shortages and could be reduced to zero allocation prior to shortages for other higher priority users. In addition, the probable release of surplus and excess flows to Mexico and the Colorado River delta would be significantly reduced to near zero, especially during the 15 year interim period. Thus, the proposed criteria could impact a wide range of water users, and because of that, we are concerned that there is little evaluation of indirect impacts and of mitigation measures for direct, indirect, and cumulative effects.

4 While the DEIS provides a good evaluation of potential direct impacts, the scope of the analysis is limited to the 100-year flood plain and reservoir maximum water surface elevations (pg. 3.2-1). Therefore, indirect impacts caused by use and storage of the surplus water are not addressed. This is of concern because proposed use of surplus water includes groundwater banking in basins that are extremely controversial and/or have not been adjudicated and which do not provide protection for existing users (e.g., Desert/Coachella Basin, Cadiz). In addition, a number of Indian Tribes and their Indian trust assets could be adversely affected by proposed storage actions.

5 We are also concerned by the minimal consideration, description or evaluation of mitigation for identified potential impacts. Although the direct impacts may be an incremental increase above baseline, we strongly believe Reclamation has an obligation to describe and
6 consider mitigation for these impacts. Mitigation for potential increased CAP shortages is of concern, especially for Indian Tribes who have unquantified or outstanding water rights (e.g., Hualapai Tribe) or are dependent on CAP water. The FEIS should describe and consider mitigation for potential impacts on all potentially affected Indian Tribes (CAP and non-CAP Tribes), CAP users, and others who may be interested in CAP water. As stated in the DEIS, Reclamation has an obligation to protect Indian trust assets from adverse impacts resulting from its programs (pg. 3.14-1). Furthermore, in the interest of international cooperation, Reclamation
7 should address the mitigation concerns of Mexico per their request (Attachment Q). The FEIS should describe mitigation options and who could fund and implement them. We note that CEQ regulations state that the EIS should include the "means to mitigate adverse environmental effects." (40 CFR 1502.16(h)).

8 Because of the above significant concerns, we have rated the proposed alternatives and DEIS as EC-2, Environmental Concerns - Insufficient Information (see attached "Summary of the EPA Rating System"). We trust that these comments will assist you in improving the document so that you can move forward with this important action. We urge adoption of a conservative and protective alternative which would maximize long-term operational flexibility, minimize the risk of more frequent and higher magnitude shortages, and ensure aggressive implementation of California's 4.4 Plan.

3: Potential effects on water supply to the lower Basin states, Indian Tribes, and Mexico; water quality; hydropower production; and recreational facilities are discussed in the EIS. Determining the effects on individual water users is beyond the scope of the EIS. Flows to Mexico and potential transboundary effects are discussed in Section 3.16.

4: Because the proposed action is implementation of interim surplus criteria (surplus has and will be delivered under the No Action Alternative/AOP), Reclamation has determined that analysis of potential indirect effects associated with the use of Colorado River water is outside of the area of potential effect as defined in the EIS and is not within the purview of Reclamation's Federal action or the NEPA process being conducted for interim surplus criteria. The indirect effects analysis from the use of any Colorado River apportionment is the responsibility of the California parties and any other state users. It should be noted that California's Colorado River depletion has been 600-800 kaf over their 4.4 apportionment for a number of years. This demand has been met historically through unused apportionment and surplus deliveries.

5: No significant impacts have been identified that require specific mitigation. However, Section 3.17 has been added to the FEIS to discuss environmental commitments that Reclamation would commit upon adoption of interim surplus criteria through the Secretary's Record of Decision.

6: The CAP master contract, through which the Tribes receive water has no guarantee of the availability of water. The Department is of the opinion that the trust asset in this case is the contract the Tribes have for delivery of CAP water. This contract has fully disclosed the potential diminishment of the water. The EIS, in Section 3.14.3 has fully disclosed the impacts of this action to the delivery of CAP water.

7: Potential effects in Mexico will be addressed through continued coordination with Mexico.

8: Comment noted.

We appreciate the opportunity to review this DEIS. Please send three (3) copies of the Final environmental impact statement to this office at the same time it is officially filed with our HQ Office of Federal Activities. If you have any questions, please call Laura Fujii, of my staff, at 415-744-1601, email: fujii.laura@epa.gov.

Sincerely,

Deanna Wieman

Deanna Wieman
Deputy Director
Cross Media Division

File: intercri.wpd
Main ID# 003345
Enclosure: Detailed Comments (8 pages)
Summary of the EPA Rating System

cc: Patricia Port, Office of Environmental Affairs, US Department of Interior
US Fish & Wildlife Service, Arizona and California Ecological Services Field Office
US Geological Survey, Water Resources Division, Yuma, AZ.
Bureau of Indian Affairs, Phoenix Area Office
US IBWC, Environmental Management Division
Charles Keene, CA DWR

DEIS COMMENTS, BOR, INTERIM SURPLUS CRITERIA, SEPT. 2000

DETAILED COMMENTS

ENVIRONMENTAL ANALYSIS

Indirect and Cumulative Impacts

9 1. The implementation of interim surplus criteria releases are key to the implementation of California's 4.4 Plan and its transition down to its basic Colorado River apportionment. California would receive surplus water which it can store for future use when surplus is not available and prior to achieving its 4.4 maf demand goal. The FEIS should fully evaluate the potential indirect and cumulative impacts of storage and use of surplus water obtained pursuant to the interim surplus criteria.

10 2. One tool which California could use to store surplus water is provided by Reclamation's Off-Stream Storage Rule. This rule allows storage and transfer of water between lower Basin States. The DEIS does not mention the Off-Stream Storage Rule or how it relates to interim surplus criteria and implementation of California's 4.4 Plan. The FEIS should describe the Off-Stream Storage Rule, its role in water management of the Lower Basin States, and potential indirect and cumulative impacts of storage of surplus water pursuant to this Rule. Of specific concern are potential effects to Tribal Trust lands especially where there is a shared aquifer that is not adjudicated.

11 3. It is our understanding that surplus water allocated to California could be used for groundwater banking within the Cadiz Basin, Hayfield/Chuckwalla Basin, and Desert/Coachella Basin. While these groundwater basins may already be used for water banking, the potential increase in surplus water could significantly alter their management and rate of use. Furthermore, there is a significant concern regarding potential adverse effects to groundwater quality from the injection of lower quality Colorado River water. The FEIS should fully evaluate potential indirect and cumulative impacts of storage of surplus water in these groundwater basins. In addition, the FEIS should describe management of these groundwater basins, for example, storage criteria, extraction of stored surplus water, and protections for users of a shared aquifer.

General Environmental Analysis Comments

12 1. The environmental analysis is based upon computer models simulating potential future Lake Mead and Lake Powell surface elevations and flows in the Lower Colorado River. Many model assumptions are made (pg. 3.3-9). Given the large number of assumptions, the FEIS should include sensitivity analyses for those parameters which may be especially vulnerable to slight changes in assumptions, e.g. fisheries and sensitive species. Parameters which may be of

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9: The direct, indirect, and cumulative effects of the interim surplus criteria alternatives were analyzed within the project area, which extends from the upper reaches of Lake Powell to the Southerly International Boundary with Mexico within the 100-year floodplain. Off-river effects of storage and use of surplus water have been or are being addressed in existing or ongoing NEPA and/or California Environmental Quality Act and California Endangered Species Act compliance documents as appropriate. These activities are authorized by state actions. These include the Quantification Settlement Agreement PEIR, Secretarial Implementation Agreement EA, IID/SDCWA Transfer EIS/EIR, and the San Diego County HCP. The federal government does not have jurisdiction over groundwater aquifers, recharge sites or other off-stream storage sites within the States.

10: The Rule would establish the procedural framework for the Secretary to follow in considering, participating in, and administering Storage and Interstate Release Agreements (SIRA). The Rule establishes a framework only and does not authorize any specific activities. The Rule is based on the understanding that this type of offstream storage is a beneficial use of Colorado River water. To date no SIRA have been received by Reclamation for review and approval. California, specifically MWD, has voiced interested in interstate storage in Arizona. However, the quantity of water for storage and retrieval is substantially in excess of what is permitted by law for the Arizona Water Banking Authority. MWD's schedule for storage and retrieval also does not comply with Arizona State law. It is unknown if MWD would revise its proposed storage and retrieval quantities and schedule to meet Arizona law or if Arizona would amend its law. It is highly speculative if interstate banking under the Rule would benefit MWD considering MWD's development of its own storage facilities for intrastate storage purposes. It should be noted that California entities have and are presently storing portions of their basic and surplus apportionments for intrastate purposes. Interim surplus is unlikely to vary in quantity or quality from surplus Colorado River water already delivered. Intrastate storage activities/facilities are not within Reclamation's jurisdiction but are regulated by state and local regulations and compliance requirements under the California Environmental Quality Act (CEQA). Some groundwater projects may require Federal permits or approvals thus a joint CEQA/NEPA may be prepared for the Cadiz, Hayfield/Chuckwalla , and Desert/Coachella projects. A draft EIR/EIS and Supplement for the Cadiz project has been published. Environmental documents for the latter two projects are in progress.

11: Comment noted. See response to Comment 56-10.

12: The FEIS includes sensitivity analyses related to California intrastate transfers and the Lake Mead elevation at which shortage is declared.

cont'd critical concern to the Basin States, such as level of water supply depletions during shortages, should also be considered for sensitivity to different model assumptions.

13 2. The DEIS states that interim surplus criteria alternatives are not expected to affect flows in the Colorado River between Glen Canyon Dam and Lake Mead because it is assumed flow release patterns would be determined by the Glen Canyon Adaptive Management Program pursuant to the Glen Canyon Dam Operations Record of Decision (ROD) (pg. 3.2-5, 3.9-33). Although the Glen Canyon Adaptive Management Program would still be in effect, the timing and magnitude of releases from Glen Canyon Dam could be influenced by interim surplus criteria and subsequent equalization requirements between Lake Powell and Lake Mead. We note that even slight changes in flows can significantly alter the configuration of whitewater rapids within the Grand Canyon changing the level of risk and safety.
14 The FEIS should include a summary of the Glen Canyon Dam Operations ROD and additional data supporting the assumption of no affect on river flows.

WATER NEEDS ASSESSMENT

15 EPA has concerns with both the assumptions and calculation methods for water needs projections. The DEIS appears to use water supply projections provided by the States. It is not clear whether Reclamation has evaluated these projections to determine whether they are fully protective of beneficial uses, ensure efficient use of water, and integrate aggressive water conservation and demand management. We recommend the FEIS describe the processes used by the States to derive their water supply projections and whether these methods assure that water would not go to waste, go to environmentally harmful areas, or hinder achieving water quality objectives within the scope of applicable state water law.

TRANSBOUNDARY EFFECTS

16 1. Interim surplus criteria could reduce by up to 37% the frequency of Mexico receiving surplus water (pg. S-14, Section 3.16). The release of excess flood flows could also decrease. The lower frequency of surplus water and excess flood flows to Mexico could significantly reduce the amount of flows reaching the Colorado River Delta (Delta). Historically, the Delta was an extensive and rich wetland area of significant cultural and economic importance to the Cocopah Indian Tribe and other Mexicans of the Gulf of California. Already greatly depleted and only recently partially revived by excess flood flows, further reduction of Colorado River flows could have adverse effects on Delta wetlands and hinder efforts to restore this area.

We urge Reclamation to actively work with Mexico, the International Boundary and Water Commission (IBWC), States, Federal agencies and other stakeholders in restoration of the Delta region. We understand that such a process is under development. We would like to be

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13: The Bureau has determined that the Adaptive Management Program will protect whitewater boating opportunities in the Colorado River between Lake Powell and Lake Mead in compliance with the Grand Canyon Protection Act. Therefore, the interim surplus criteria would not adversely affect whitewater boating opportunities in the Colorado River. The Grand Canyon Protection Act directs the Secretary, among others, to operate Glen Canyon Dam in accordance with the additional criteria and operating plans specified in section 1804 of the Act and to exercise other authorities under existing law in such a manner as to protect, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including but not limited to the natural and cultural resources and visitor use. The Glen Canyon Dam Adaptive Management Program (AMP) was established as a Federal Advisory Committee to assist the Secretary of the Interior in implementing the Grand Canyon Protection Act. We agree that interim surplus criteria could have an influence on releases from Glen Canyon Dam; however, releases will continue to be governed by the criteria in the Record of Decision which was developed in full consideration of both the safety and quality of recreational experiences in Glen and Grand Canyons. A summary of the Glen Canyon Dam Record of Decision has been included as Appendix D of this document.

14: The ROD for the Operation of the Glen Canyon Dam is included as Attachment D. Pertinent information from it is summarized in various sections throughout the FEIS. The section on river flows (3.6) identifies that the action alternatives would have an effect on the frequency of Beach/Habitat-Building Flows and Low Steady Summer Flows.

15: Reclamation does not review and independently change the Tribes and States water supply projections, though Reclamation staff has some understanding of the calculation methods used. See response to Comment 56-29 of this letter for a complete description of Reclamation's process for assuring the beneficial use of Colorado River water.

16: The delivery of water to Mexico under all modeled conditions in this FEIS were consistant with the requirements of the Treaty. The diversion and use of such Treaty water is solely at Mexico's discretion. The delivery of excess flows to Mexico occurs when available flows in the Colorado River exceeds that amount that is necessary to meet the beneficial needs and uses of Lower Basin users in the United States. It is not within Reclamation's discretionary authority to make unilateral adjustments to water deliveries to the international border. Also, as mentioned in response to Comment 56-7, potential effects on habitat and special status species along the river in Mexico and efforts to restore the Delta are being addressed through continued coordination with Mexico. The Executive Order on Environmental Effects Abroad, as discussed by section 3.16.2, focuses on impacts to natural resources, and specifically excludes consideration of socioeconomic impacts.

cont'd active participants in this process. When appropriate, please contact Catherine Kuhlman of our Water Division at 415-744-2001, regarding upcoming meetings and forums. Per Mexico's request (Attachment Q), the FEIS should describe mitigation for possible transboundary impacts and means to address the concerns of Mexico. Potential indirect and cumulative impacts to the Cocopah Indian Tribe and Mexican residents of the Gulf (e.g., shrimp fisherman) should also be acknowledged and described in the FEIS.

17 2. Describe in the FEIS what water is used to satisfy the 1.5 maf allocation to Mexico. Is this water part of the 7.5 maf allocated to the Lower Basin States? Is it taken from unused Lower Basin States' apportionment? or Is this water taken equally from the upper and lower basins? Describe where this water would come from under shortage conditions.

WATER QUALITY

18 1. The DEIS appears to address only salinity (total dissolved solids) and potential impacts to the Southern Nevada Water Authority (SNWA) drinking water intakes in Lake Mead. EPA is significantly concerned with the potential impacts of interim surplus criteria on perchlorate, nutrients, and mercury in fish tissue. It is clear that Lake Mead surface elevation and volume would decrease thus reducing dilution effects and potentially changing contaminant movement from Las Vegas Wash and within Las Vegas Bay (Section 3.5). The FEIS should evaluate the potential direct, indirect, and cumulative effects of interim surplus criteria on the concentration and movement of perchlorate, nutrients, mercury and other heavy metals within Lake Mead and downstream. Modeling and monitoring of these contaminants and projection of downstream flows may be needed. Amounts of mercury and other heavy metals in fish tissue should be described more accurately. These contaminants are of grave concern because of their potential adverse health effects.

19 2. Perchlorate contamination is already known to travel down to the international border. Thus, the FEIS should evaluate potential contaminant impacts to drinking water intakes below Lake Mead. Of special interest are the intakes for MWD's California Aqueduct, especially since the interim surplus criteria will be providing more water for MWD.

20 3. Lower Lake Mead surface elevations could result in a reduction in water quality from tributaries (pg. 3.5-22). The reduced water quality is a result of longer channels, more evaporation and heating, and the resulting greater concentration of contaminants. The DEIS states that this adverse effect may be offset by the development of riparian habitat at the mouths of the tributaries which would help filter the water. If this is the case, Reclamation should consider sponsoring efforts to restore tributary wetlands as mitigation for reduced water quality. For example, there is a major effort to restore the historical wetlands of Las Vegas Wash which Reclamation could actively support.

17: The U.S.-Mexico Treaty of 1944 guarantees an annual quantity of 1.5 maf to Mexico. This quantity is a scheduled delivery from Lake Mead, in addition to the 7.5 maf allocated to the Lower Division states. The Colorado River Compact of 1922 stated that if this right was recognized, the water would be supplied by water over and above the Basin States apportionment of 16 maf, and that if such water was insufficent, any deficiency would be borne equally by the upper and lower basin. Under shortage conditions, Article 10 (b) of the Treaty states "in the event of extraordinary drought or serious accident to the irrigation system in the United States....the water allotted to Mexico....will be reduced in the same proportion as consumptive uses in the United States are reduced."

18: Comment noted. Additional information regarding contaminants has been added to Section 3.5 of the FEIS.

19: Through a 1999 consent agreement with the Nevada Department of Environmental Protection, remediation of perchlorate in groundwater entering Las Vegas Wash and Lake Mead will continue into the future which will reduce the concentration of perchlorate down river, at the MWD intake, and below this point. It is expected that the California standard of 18 ppb for drinking water will not be exceeded but reduced in Colorado River water through time. See also response to Comment 56-18.

20: Reclamation is a partner in the Las Vegas Wetland Restoration program and other programs around Lake Mead and along the Lower Colorado River.

DEIS COMMENTS, BOR, INTERIM SURPLUS CRITERIA, SEPT. 2000

ALTERNATIVES ANALYSIS

Seven States Consensus Alternative

21

1. Since the alternative announced in the August 8, 2000 Federal Register (Volume 65, Number 153, pages 48531- 48538) appears to represent a consensus agreement between the seven basin states, we anticipate the selection of this alternative as the preferred alternative in the FEIS. As such, we urge Reclamation to provide a full description and environmental evaluation of this alternative in the FEIS. While this alternative may be within the range of the alternatives evaluated in the DEIS, we believe it is important to include a full evaluation of its potential effects in the FEIS to provide a clear comparison with other proposed alternatives. This comparison is of special interest because the Seven States Consensus alternative appears to propose significantly more complex criteria and a shortage determination elevation well below existing management triggers or those proposed by the other alternatives.

As stated, the Seven States Consensus Alternative appears to propose a shortage determination criteria of 20% or greater probability of going below a Lake Mead surface elevation of 1050 msl. This shortage criteria is of significant concern because it is well below the minimum elevation level required for power generation (1083 msl). In addition, reduction of Lake Mead surface elevations below 1050 msl could have significant adverse effects to recreation, water quality, and future water supplies.

2. Give the close link between interim surplus criteria and transition of California down to its 4.4 maf basic apportionment, we are pleased with the proposed review of progress in implementation of California's 4.4 Plan and the specific California water conservation targets set out in the Seven States Consensus Alternative.

3. The Seven States Consensus Alternative includes a commitment by the Metropolitan Water District (MWD) to reparation to Arizona for increased water supply shortages. This reparation would be by MWD agreement to forbear the delivery of a specific quantity of Colorado River water. It appears that the water which would be foregone by MWD would be Priorities 6 and 7 water. The FEIS should describe how this reparation would work, especially in the likely shortage years when water may not be sufficient to provide for priorities 6 and 7 water.

General Alternatives Analysis Comments

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1. We strongly recommend anticipated storage and use options for the surplus water be described (e.g., groundwater banks, storage reservoirs, recharge basins). Although these options may already be in use, water available pursuant to interim surplus criteria could significantly modify the management of these facilities and the rate and magnitude of indirect effects.

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21: The preferred alternative in this FEIS was derived from the draft Seven States Proposal, and was evaluated at the same degree of detail as the other alternatives. Reclamation did not structure the preferred alternative precisely as described in that draft proposal, but made some changes for consistency with the purpose and need of the proposed action, Reclamation policy and operational procedures. The proposed shortage determination criteria were not included in the preferred alternative. Reclamation regards California's proposed reparation to Arizona for increased shortages as a matter between California and Arizona, and has not included the reparation in this FEIS. The Secretary intends to honor reparation agreements among various entities.

22: Reclamation does not federalize intrastate uses of Colorado River water and does not follow the water for environmental compliance purposes once delivered to a water user's point of diversion. The federal government does not have jurisdiction over groundwater aquifers, recharge sites or other off-stream storage sites within the States. Those activities are authorized by state and local actions. Other federal permits and environmental compliance may be required for specific facilities on a case by case basis. See also response to Comment 56-10.

COMMENT LETTER

RESPONSES

23 2. The DEIS states that the Flood Control Alternative conditions were modeled with the assumption that California's 4.4 Plan was not implemented (pg. 3.3-9). The FEIS should describe the rationale for this modeling assumption. Was the assumption made that the 4.4 Plan would not be implemented because the probability of surplus determinations under the Flood Control Alternative is even lower than baseline?

24 3. While other Lower Basin States may receive less than their full apportionment under shortage conditions, the DEIS appears to assume that California would never receive less than 4.4 maf/year (pg. 3.4-20). Is this assumption made because 4.4 maf is already considered a shortage condition for California? Is this assumption valid? Are there conditions under which California may be unable to receive its full basic apportionment?

25 4. Instead of referring to Attachment G, Lower Division Depletion Schedule and H, Draft Interim Surplus Guidelines; we suggest the description of alternatives include a summary of the information provided in these attachments. For example, describe the percentage of years that water transfers would occur to California under Tier 2 of the Six States Alternative versus just referencing Attachment G. The alternative descriptions should also include specific information on the water use restrictions which would apply for each surplus criteria tier. For instance, what types of storage and use would be acceptable for surplus water obtained during a Partial Domestic Surplus year pursuant to the Seven States Consensus alternative?

26 5. The FEIS should also provide short narratives explaining how the Lower Division Depletion Schedule (Attachment G) and Draft Interim Surplus Guidelines (Attachment H) would be interpreted. How would the Guidelines work if different surface elevation levels are triggered in different years? For example, if surplus is declared under Tier 3 of the Six States Alternative in 2002, what would be the amount of surplus released in year 2005, if surplus were declared under Tier 2 in 2005? Providing a simple example of how the Guidelines would be implemented would be helpful.

27 There is a similar risk of confusion regarding the California Alternative. This alternative appears to trigger surplus determination based on a prediction of what surface elevation levels would be achieved in the year 2015. For instance, what surplus would occur if 2015 surface elevations are at 1166 msl and 2001 surface elevations are at or above 1098 msl?

MONITORING AND ADMINISTRATION

1. A key objective of interim surplus criteria is to provide MWD surplus water, when available, to meet direct water supply demands while California's 4.4 Plan programs and projects are implemented, as well as to provide a source of water for conjunctive use and storage programs (pg. 12 August 8, 2000 Federal Register Notice on Seven States Consensus

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23: Implementation of the California Plan and intrastate transfers was included in the FEIS Flood Control alternative. See response to Comment 37-11 for more details.

24: Shortage conditions for the Colorado River have not been defined. They were assumed for modeling purposes in the EIS. Section 3.3.3.4 describes the Lake Mead water level protection assumptions and the modeling conditions under which California could receive less than its normal apportionment.

25: See Attachment H for additional information.

26: Additional discussion has been added to the Lower Division Demand Schedules (FEIS Att. H) regarding the influence on surplus water deliveries. The guidelines (FEIS Att. I) would be applied annually to whatever water surface elevation existed.

27: The surplus triggers would be used once a year to determine whether surplus conditions would occur in the following year. For example, in August 2007, while preparing the AOP for 2008, Reclamation would project the January 1, 2008 Lake Mead elevation using our 24 month study (2 year model). If the water surface elevation of Lake Mead were projected to be above approximately 1163 ft, the surplus volume stipulated for Tier 1 for 2008 would be triggered for delivery during 2008, regardless of the resulting lake level within year 2008. The monthly delivery to each Lower Division state would be according to its monthly surplus water demand schedule for Tier 1. In addition, the amount of surplus water allowed for delivery in 2008 would be subject to a determination of beneficial use by the Regional Director, Lower Colorado Region.

28 Alternative). Therefore, Reclamation states that failure of California to carry out the 4.4 Plan may result in termination or suspended application of the 15-year interim surplus criteria (pg. 1-22). A condition of interim surplus criteria continuation would be a showing of satisfactory progress in implementing the 4.4 Plan. The FEIS should provide more details on how "satisfactory progress" would be defined and measured. For example, describe how water conservation will be interpreted, monitored, and accounted for under California's 4.4 Plan.

29 2. The FEIS should also describe how surplus water would be monitored and measured. Effective and sustainable management of water supplies depends on an accurate knowledge of water supply availability and water use. This knowledge can only be obtained through monitoring and accounting of water supply and use. We urge Reclamation to make a firm commitment to timely and accurate monitoring and accounting of the surplus water depletions. We recommend a monitoring and accounting plan be included in the FEIS.

30 3. Attachment D Surplus Criteria Proposal by Six States includes a section requesting a commitment by Reclamation to move forward with its identification of Lower Basin water users who are either exceeding contract entitlements or are diverting water without a contract. Furthermore, it states that Reclamation must take steps necessary to require more accurate measurement and reporting of diversions and develop accurate techniques for determining both measured and unmeasured return flows to the river. EPA concurs with this statement of the Six States. We also firmly believe that an era of limits in the Lower Basin has begun and that accurate measurement of use and control of illegal diversions and uses is critical to the long-term sustainable use of the Colorado River water supply.

MITIGATION

31 1. The FEIS should describe whether MWD would provide reparation for increased shortages to specific Indian Tribes which are dependent upon CAP allocations. If reparation is not proposed, the FEIS should describe mitigation measures for potential adverse effects to Indian Tribes and their Indian trust assets.

32 2. Reparations to Nevada for potential increased shortages are also not described. The FEIS should provide the rationale for this decision.

TRIBAL ISSUES

33 1. Section 3.14 describes potential impacts to Indian trust assets. While Reclamation appears to have coordinated closely with the Ten Colorado River Tribes and Tribes utilizing Central Arizona Project (CAP) water, it is not clear whether the concerns of Tribes located in shared water basins/aquifers where the surplus water would be stored have been addressed. The

28: The purpose of this action is not to get California to 4.4 maf and thus the 4.4 Plan (now the CA Plan) is not within the scope of this EIS. Water transfers within California and their effects on and off the river are being handled by joint and separate NEPA and CEQA documentation. Through monitoring, verification, and accounting of all users uses, particularly as California begins to implement transfers and develop conservation programs, these data will be considered as part of the AOP process for measuring California's success in reducing its use to 4.4 maf. This description of monitoring, verification, and accounting of water use involves ongoing Reclamation processes that are outside the purpose and need of this action.

29: Reclamation is currently and has been monitoring diversions, return flows and consumptive uses by water users along the Colorado River since 1964. Reclamation is required by the Supreme Court (Article V, Supreme Court Decree in Arizona v California dated March 9, 1964) to prepare and maintain complete, detailed and accurate annual records of: releases of water through regulatory structures, diversions, returns and consumptive uses by State and diverter, water ordered but not diverted, and deliveries to Mexico in satisfaction of their entitlement. Reclamation began preparing this report in 1964. Since then, the accounting and monitoring procedures have been augmented with a monthly report tracking users diversion, returns and consumptive uses throughout the year. In addition to the monthly reporting and end of year accounting, Reclamation approves water use estimates by major water users before the beginning of each calendar year. Title 43, CFR 417 requires entitlement holders to provide an estimate of monthly diversion requirements (schedule), for Reclamationˆs planning purposes, prior to the beginning of the calendar year. The major water users are also required by contract to provide a monthly water use report which includes actual diversions and return flows. Others either report annually or have diversions and return flows reported by the USGS at the end of the year. This information is reported to all interested parties in the monthly reports and the annual report titled "Compilation of Records in Accordance with Article V of the Decree of the Supreme Court of the United States in Arizona V. California, Dated March 9, 1964." The schedules are reviewed by the water conservation, water contracts, and water operations staff to ensure that the next year demands do not exceed contract holders entitlements and that the water requested will be available in the system. Monthly reports are tracked throughout the year to monitor trends in water use which indicate when users are likely to exceed their entitlements. When surplus water is available, entitlement holders are allowed to divert up to their entitlement for surplus water, if any, in addition to their basic entitlement for a normal year in which no surplus would be available. How much surplus water was diverted by an entitlement holder can be determined only at the end of the calendar year by comparing the actual use, as reported in the Decree Accounting report, to their entitlement. Reclamation is developing a method to compare actual use to entitlements for the purpose of identifying surplus uses and uses in excess of entitlement.

30: Reclamation is taking steps to require more accurate measurement and reporting of diversions and return flows to the river. The most common case of water users who divert water without a contract involve persons who divert water from a well that is replaced with Colorado River water. Reclamation is, and for the last 5 years has been, funding the Geological Survey to perform an inventory of wells in the Colorado river flood plain and on adjacent terraces and slopes that have the potential to pump Colorado River water. The Geological Survey, at Reclamation's request and with Reclamation funding, has completed two reports which document a method for use in making a presumption if the use of water pumped by a well is pumping Colorado River water. The first report, published in 1994, provides a method of accounting for the lower Colorado River between the mouth of the Grand Canyon and Laguna Dam. The second report, published in 2000, provides a method of accounting for the lower Colorado River from Laguna Dam to Mexico. All uses of Colorado River water must be reported in the Colorado River water accounting report required by the Supreme Court (Article V, Supreme Court Decree in Arizona v California dated March 9, 1964). To date, the initial well inventory is about half complete and the methods documented in the reports identified above have been used to presume if new or planned wells would likely pump water that should be accounted for as Colorado River water. Few existing wells have been made subject to the methods described within the above identified reports. Reclamation recognizes that the accounting of water required by the Supreme Court must include accurate records of diversions, return flows, and consumptive use. Past efforts to uniquely and separately identify unmeasured return flows for individual diverters have met with mixed success. While estimates for many diverters currently exist, they cannot be considered definitive. Reclamation and others recognized many years ago that estimates on unmeasured return flows could not be made without first estimating consumptive use by some method other than measured diversion less measured return. To this end, the lower Colorado River Accounting System (LCRAS) was developed to estimate agricultural consumptive use as the evapotranspiration of the crops and related uses plus a portion of the residual of a water budget between major structures along the lower Colorado River. CONTINUED ON NEXT PAGE

COMMENT LETTER

cont'd FEIS should include more specific information on the government-to-government meetings held with all potentially affected tribes, a list of each Tribes' concerns, and how these concerns have been addressed. We are especially interested in how Indian trust assets would be protected in unadjudicated shared water basins/aquifers.

34 2. The majority of Section 3.14 is focused on potential impacts to Tribes that utilize CAP water. The evaluation is confusing because it refers to the loss of Non-Indian Agriculture water when discussing losses to Indian Central Arizona Project customers. We suggest providing a table with data of the potential loss of water to the Tribes (either collectively or for each Tribe) for each interim surplus criteria alternative for 2015 and 2050 with the assumption that the Gila River Indian Community Settlement has been implemented.

BIOLOGICAL EFFECTS

35 1. The DEIS appears to focus on potential impacts to special species within the region encompassed by Lake Mead, Lake Powell, and the Grand Canyon between Glen Canyon Dam and Lake Mead. It is not clear how extensively potential impacts to species below Lake Mead were addressed. We recommend the FEIS include, at least a summary, of potential impacts to biological resources in each of the significant reaches of the river (Lake Powell, Glen Canyon Dam to Lake Mead, Lake Mead, and below Lake Mead to the International Border).

36 2. Although the DEIS references the Biological and Conference Opinion on Lower Colorado River Operations and Maintenance (BCO), it does not provide a summary of the 17 specific provisions made pursuant to the reasonable and prudent alternative as defined by the BCO. We recommend the FEIS provide this summary in order to provide a clear picture of what actions Reclamation is taking to benefit the riparian region of the lower Colorado River and its special status species.

37 3. We note that a separate Section 7 Endangered Species Act consultation is being conducted for this DEIS (pg. 1-25). We understand that consultation is not yet complete and that there is the intent to include consultation results in the FEIS. EPA supports this intent and urges Reclamation to make a firm effort and commitment towards completing consultation and providing a copy of US Fish and Wildlife Service decision within the FEIS.

GENERAL ISSUES

38 1. The DEIS states that the All-American Canal is used to divert water for Mexico (pg. 1-19). The FEIS should provide a short description of how this is done or provide this information on one of the project maps.

RESPONSES

30 (cont'd): LCRAS is fully functional and is undergoing a demonstration phase. The LCRAS program has also funded a study by the Geological Survey to determine the standard error of estimate of the stream-flow gages along the mainstream used by the LCRAS water budget. The results of this study will not only improve LCRAS, but will also identify and quantify the practical limits of water measurement capabilities with the current measurement network in place; providing the basis for an analysis of technically feasible and economically justifiable modifications to the current water-measurement network. The effort to identify diverters who exceed their entitlements includes an analysis of water use by riparian vegetation within diverter boundaries to determine the proper portion of water use by riparian vegetation that should be included in the consumptive use calculation for each diverter. The implementation of LCRAS, together with a determination of what portion of water use by riparian vegetation should be charged to each diverter, will provide a complete and supportable value of consumptive use that can be compared with the contract entitlement of the diverter.

31: See response to Comment 56-6. Reparations as provided in the Working Draft of the Seven States Plan would assist all users of CAP water.

32: Reclamation is not proposing to make reparations part of the interim surplus criteria.

33: This issue is handled by an overall settlement in central Arizona between the United States and the CAWCD. The United States has made agreements which protect the Indian portion or interest in a shared aquifer. In addition, the storage of surplus water in an aquifer in a shared basin is considered a positive impact by tribes located within shared water basins because the water stored in the aquifer is increased. Chapter 5 has more specific information regarding the consultations with the Tribes.

34: Some non-Indian agricultural water has been reallocated to Indian users of CAP water. When non-Indian agricultural water is allocated to Indians, the water retains its non-Indian agricultural priority and is referred to as "non-Indian agricultural water". Table 3.14-4 shows the potential loss of water by tribes under the GRIC Settlement. Line 3 of the title of Table 3.14-4 has been corrected to read, "Likely Future With GRIC Settlement."

35: Additional analysis of potential effects below Lake Mead have been incorporated into Section 3.5, Water Quality, Section 3.7, Aquatic Resources, (potential effects of changes in Hoover Dam release water temperature on fisheries below Hoover Dam to Lake Mohave), and Section 3.8 to discuss potential effects between Hoover Dam and the SIB.

36: The noted documents are incorporated by reference and are available for review by the public at Reclamation's Office. The BCO has been provided to interested public and agencies and is available on Reclamation's web site.

37: Section 7 consultation is in progress.

38: Please refer to Section 3.3.4.5.4 for a description of river flows below Imperial Dam and delivery of water to Mexico.

COMMENT LETTER

RESPONSES

39 2. Chapter 3 Affected Environment and Environmental Consequences often illustrates potential effects using figures and charts (e.g., Figure 3.3-19a-d, Figure 3.4-6). We suggest providing an explanatory example on how to accurately interpret these figures and charts.

40 3. Modeled annual depletions of various interim surplus criteria (e.g., Figure 3.4-12, pg. 3.4-22) indicate surplus conditions for the period 2001 to 2004. The FEIS should provide an explanation for this surplus. Is the high level of depletions available for these years because the system is already relatively full and can therefore provide surplus water for the next few years? or is this surplus due to the continued availability of unused Arizona apportionment?

39: Additional explanation has been added to Section 3.3.and Section 3.4 with respect to the interpretation of the figures in these sections and the meaning of the analysis results.

40: The observed surpluses are due to relatively full starting conditions of Colorado River reservoirs. You will notice that the FEIS graphs have been modified. See Section 3.3.4.1 for a detailed explantion.

SUMMARY OF EPA RATING DEFINITIONS

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

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

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

"EC" (Environmental Concerns)

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

"EO" (Environmental Objections)

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

"EU" (Environmentally Unsatisfactory)

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

ADEQUACY OF THE IMPACT STATEMENT

Category 1" (Adequate)

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

"Category 2" (Insufficient Information)

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

"Category 3" (Inadequate)

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

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