

TOHONO O'ODHAM NATION OFFICE OF THE CHAIRMAN AND VICE CHAIRWOMAN

Verlon M. Jose
CHAIRMAN



Carla L. Johnson
VICE CHAIRWOMAN

December 8, 2023

Ms. Genevieve Johnson
Reclamation 2007 Interim Guidelines SEIS Project Manager
Upper Colorado River Basin Region
Bureau of Reclamation
125 South State Street
Salt Lake City, Utah 84138

Via email to CRinterimops@usbr.gov

Re: Tohono O'odham Nation's Comments on Revised Draft Supplemental Environmental Impact Statement for Near-term Colorado River Operations

Dear Ms. Johnson:

This letter conveys the comments of the Tohono O'odham Nation (Nation) on the Bureau of Reclamation's Revised Draft Supplemental Environmental Impact Statement for Near-Term Colorado River Operations¹ (Revised Draft SEIS or Revised DSEIS). The Revised DSEIS replaces Reclamation's original draft SEIS, issued April 14, 2023, and subsequently withdrawn in response to the May 23, 2023 release of a consensus-based alternative from the three Lower Basin/Division States. Reclamation has identified this alternative as the "Proposed Action" in the Revised DSEIS.

BRIEF SUMMARY

The withdrawn draft SEIS considered three alternatives: (1) a "No Action Alternative" that maintained the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead (2007 Interim Guidelines), as modified; (2) "Action Alternative 1" which apportioned these shortages among Lower Basin water users according to the "concept of priority," and (3) "Action Alternative 2" which apportioned these shortages based on the same percentage across all Lower Basin water users. Both action alternatives modeled Reclamation-imposed shortages beyond those contemplated in the 2007 Interim Guidelines. In the Revised DSEIS, Reclamation eliminated Alternatives 1 and 2 from consideration, leaving only the No Action Alternative and the Proposed Action.

In contrast to the eliminated Alternatives 1 and 2, the Proposed Action contemplates the preservation of existing tier-based reductions as identified in the 2007 Interim Guidelines (as

¹ EIS No. 20230146, 88 Fed. Reg. 73840 (October 27, 2023).

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modified) through the remainder of the interim period, while proposing a mix of compensated and uncompensated Colorado River system conservation in lieu of additional reductions. Compensated conservation would be funded primarily through funds identified in the Inflation Reduction Act and Bipartisan Infrastructure Law, with state and local funding making up the remainder.

Reclamation projects that the implementation of the Proposed Action will reduce the risk of lower elevations at Lake Mead, thereby resulting in a lower likelihood of severe shortages and comparable reductions to Central Arizona Project (CAP) deliveries, which would in turn preserve the Nation's CAP entitlement to a greater extent than the No Action Alternative. In this way, the Proposed Action also constitutes a marked improvement over Alternatives 1 and 2 in the now-withdrawn draft SEIS.

While this projected outcome is fortuitous for the Nation, it is primarily the product of an indirect benefit – compensated conservation for a narrow subset of Colorado River water users other than the Nation – rather than a conscious effort on Reclamation's part to prioritize its responsibility to protect the Nation's settled and unsettled federal reserved water rights. Similar to the draft SEIS, the Revised DSEIS employs an artificially narrow definition of "Indian Trust Assets," thus failing to take the full scope of impacts to the Nation's rights into account. Moreover, the Revised DSEIS continues avoid addressing critical aspects of the Nation's water settlement by failing to address Reclamation's responsibility to ensure that the Nation will continue to receive its full water delivery entitlement in the event of shortages.

Finally, the Revised DSEIS creates new triggers involving Lake Powell and Lake Mead that contemplate significant potential future actions on the part of Reclamation and the Lower Division States to protect critical elevations at these reservoirs, but without specifying what those actions may entail or how they would comport with the present NEPA process. Consistent with indications from Reclamation officials, Reclamation should confirm in its final SEIS that such actions will not involve additional involuntary Colorado River shortages.

BACKGROUND

In order to appreciate the potential impact of the Revised DSEIS on the Nation and its water rights, it is important to understand the historical context for the Nation's use, and the non-Indian impacts on, these rights. The Nation has one of the largest reservations in the United States, with over 35,000 members and multiple reservation land bases, mainly in southern Arizona, totaling nearly three million acres of land. Climate change and drought have exacerbated the damage caused by centuries of federal mismanagement of tribal water rights, and the failure by the federal government to protect against non-Indian damage to these rights.

The Nation's members (the Tohono O'odham) and their ancestors have cultivated this land since time immemorial, growing all manner of crops to support their way of life. Writing in the mid-19th century, a former Superintendent of Indian Affairs for the Arizona Territory noted:

The [Tohono O'odham] inhabit that triangular space of arid land bounded by the Santa Cruz, Gila and Colorado rivers, and the

Mexican boundary line.” “. . .and here they have lived and planted and watched their flocks and herds ever since. . .” “They raise wheat, corn, barley, beans, peas, melons, and pumpkins, and are experts in the manufacture of pottery and willow-ware. In harvest time they spread all over the country as reapers and gleaners, returning with their wages of grain for winter.” “They have horses, cattle, sheep, poultry, and a great number of dogs.” “As these Indians were found in possession of the soil, they cultivate and have maintained themselves there continuously ever since, it would seem equitable that their rights should be recognized by the Government of the United States.”²

A later visitor noted that “where floods occurred, the water spread out in a thin sheet over the valley” in the Tohono O'odham homelands, “doing no damage.”³ These same reports noted that “[a]s late as 1873 the valley was covered with grass.”⁴ In the late 19th century, a U.S. Indian Agent described the Nation’s San Xavier Reservation as:

[N]aturally more valuable than any other piece of land I have seen in the [Arizona Territory], because the water of the Santa Cruz River rises to the surface and flows almost 2 miles before leaving the Indian land. Here is also fully a thousand acres of the finest grazing land and more than seven thousand acres of the largest mesquite timber in the territory.⁵

Throughout the late 19th and into the 20th centuries, encouraged by the federal government, the Tohono O'odham improved and expanded their existing cultivation at San Xavier and developed thousands of additional acres of farmland in the northern portion of the Main Reservation in the Sif Oidak District.⁶

During the same period, however, non-Indian settlement and water use drastically undermined the Nation’s use of its water rights. This damage was further exacerbated by decades of inaction and mismanagement by the federal government, and by the encouragement of off-reservation irrigation through Reclamation loans and low cost preference-rate federal power, representing a comprehensive and profound failure on the part of the Nation’s trustee to protect its water rights. East of the Nation’s Main and San Xavier Reservations, mining, irrigation, and the growth of the nearby City of Tucson created “a serious imbalance between existing supply and

² *Water Rights of Ak Chin Indian Reservation, Ft. McDowell Indian Reservation, Gila River Indian Reservation, Papago Indian Reservation, and Salt River Pima-Maricopa Indian Reservation: Hearings Before the Senate Committee on Interior and Insular Affairs*, 94th Cong. 416 (1975) (1975 Senate Hearing) (testimony of Tohono O'odham Nation (formerly Papago) Chairman Cecil B. Antone, quoting 1863 Report of Charles D. Poston, Superintendent of Indian Affairs, Arizona Territory).

³ Clotts, H.V. 1915. *Report on Nomadic Papago Surveys*, at 59 (U.S. Department of Interior).

⁴ *Id.*

⁵ 1975 Senate Hearing at 417.

⁶ 1975 Senate Hearing at 418-423.

demand,” resulting in “significant, long term declines in local groundwater levels.”⁷ By 1975, “the surface flow of the Santa Cruz River...disappeared. Except for a few small Mesquite, the forest of trees...vanished; and due to the lack of water all farming, except for...800 acres [was] destroyed.”⁸ The damage to the Nation’s reservation and water supply ultimately led the Nation and the United States on the Nation’s behalf to file suit against major water users.⁹ Meanwhile, similar actions by non-Indians along the northern boundary of the Nation’s Main Reservation depleted the water table within the Sif Oidak District “to a point where many of the existing wells went dry and irrigation had to be abandoned.”¹⁰

The Nation settled a portion of the substantial water rights claims concerning the eastern portion of its reservation lands through the Southern Arizona Water Rights Settlement Act, Pub. L. 97-293 (1982) (SAWRSA), as amended by the Arizona Water Settlements Act, Pub. L. 108-451 (2004) (AWSA).¹¹ Under SAWRSA, the Nation gave up its significant claims concerning damages to groundwater and surface water in the Tucson Active Management Area. In exchange for releasing these claims, the United States promised that the Nation would receive reliable, affordable, and long-term access to CAP water. The federal government promised to safeguard the delivery of this entitlement through two separate mechanisms. First, the Secretary must deliver the Nation’s entitlement from the CAP “or an equivalent quantity of water from any appropriate source” notwithstanding any declaration of shortage or “other occurrence affecting water delivery caused by an act or omission” of the federal government and its agents.¹² In the event that the Secretary is unable to meet this obligation, she must compensate the Nation for this failure.¹³ Second, the Secretary must, pursuant to Section 105 of AWSA, firm 28,200 acre-feet per year of the Nation’s Non-Indian Agricultural priority water such that this water is delivered “during water shortages in the same manner as water with a municipal and industrial delivery priority in the Central Arizona Project system is delivered during water shortages.” Congress vested Interior with the responsibility to manage and fund delivery of the Nation’s CAP entitlement, and authorized substantial federal funding to pay for these deliveries. However, Interior has historically failed to seek adequate appropriations to fund this settlement, threatening access to the Nation’s CAP water.¹⁴

⁷ S. Rep. 97-568 at 38 (1982).

⁸ 1975 Senate Hearing 421-422.

⁹ S. Rep. 97-568 at 40.

¹⁰ 1975 Senate Hearing at 423.

¹¹ SAWRSA settled the Nation’s water rights claims to a little over 100,000 acres – less than 1/20th of its reservation lands. The Nation is currently in negotiations with the United States and others to settle the remainder of the Nation’s water rights.

¹² SAWRSA Sections 305(a)(2) and (b)(1) (as amended). These protections are reflected in both the Nation’s SAWRSA settlement agreement, at Section 5.1.3, and CAP contract, at Section 6.5.3.

¹³ Id. at Section 305(d).

¹⁴ Interior recently sought and obtained transfers of funding from the Indian Water Rights Settlement Completion Fund to assist with SAWRSA deliveries. Unfortunately, significant additional funding is necessary in order to address the chronic undercapitalization that has stymied the full implementation of SAWRSA.

THE NATION'S COMMENTS ON THE REVISED DRAFT SEIS

I. Reclamation must account for settled and unsettled Tribal water rights in analyzing the Revised Draft SEIS.

As confirmed by federal court decisions, as well as Reclamation's own internal guidance, the federal government's trust responsibility extends to the protection of tribal water rights, irrespective of other competing claims to water.¹⁵ The overarching lens through which Reclamation views impacts to the Nation and other federally recognized Indian Tribes is what it refers to as "Indian Trust Assets," (ITAs) namely, "assets held in trust by the federal government for the benefit of Native American Tribes or individuals,"¹⁶ and as "environmental justice populations."¹⁷ According to Reclamation's NEPA Handbook:

Reclamation is committed to carrying out its activities in a manner that avoids adverse impacts to ITAs, when possible, and mitigates or compensates for such impacts when it cannot avoid the impacts. All impacts to trust assets, even those considered nonsignificant, must be discussed in the trust analyses in NEPA documents and appropriate compensation or mitigation implemented.¹⁸

Indian Trust Assets analyzed for the purposes of the DSEIS derived from the Final Environmental Impact Statement for 2007 Interim Guidelines (2007 FEIS), and included "federal reserved Indian rights to Colorado River water including rights established pursuant to *Arizona v. California*, Colorado River water Tribal delivery contracts where such contracts are part of a congressional approved water rights settlement; and Indian reservations."¹⁹ As the NEPA Handbook acknowledges, *all impacts to trust assets*, even those that Reclamation may consider "nonsignificant," *must be discussed* in the DSEIS, and "appropriate compensation and mitigation implemented."²⁰

In addition to examining impacts to trust assets, Reclamation must prioritize the protection of these assets. Courts have repeatedly held and affirmed the priority that federally reserved water rights have over competing water rights.²¹ While Congress may sometimes require the federal

¹⁵ See, e.g., *Pyramid Lake Paiute Tribe v. Morton*, 354 F.Supp. 252, 256–257 (D.D.C. 1972); "Indian Policy of the Bureau of Reclamation," Reclamation Manual Policy NIA P10 (rev. September 24, 2020) at Sec. 6(F).

¹⁶ Revised DSEIS at 3-331.

¹⁷ *Id.* at 3-325.

¹⁸ Bureau of Reclamation NEPA Handbook at 3-29 (Feb. 2012).

¹⁹ Revised DSEIS at 3-331; see also FEIS at 3-87.

²⁰ NEPA Handbook at 3-29 (emphasis added).

²¹ See, e.g., *Colville Confederated Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) ("Where reserved rights are properly implied, they arise without regard to equities that may favor competing water users."); *Baley v. United States*, 134 Fed. Cl. 619, 668-680 (2017), *aff'd*, 942 F.3d at 1341 (Fed. Cir. 2019) (holding Klamath irrigators' water rights are subordinate to Hoopa, Yurok, and Klamath Tribes' federal reserved water rights); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1214 (9th Cir. 1999) (Reclamation "has a responsibility to divert the water and resources needed to fulfill the [Hoopa Valley] Tribes' rights, rights that take precedence over any alleged rights of the Irrigators").

government to “carry water on at least two shoulders” in representing both tribes and nontribal interests,²² “the government remains under a firm obligation to represent [a Tribe’s] interests forcefully despite its other representative obligations,” and its failure in this regard may constitute a breach of its trust obligation.²³

Unfortunately, like the now-withdrawn DSEIS, the Revised Draft SEIS employs flawed methodology to catalogue ITAs and to analyze potential impacts resulting from the alternatives on Tribes, appropriate “compensation or mitigation,” and environmental justice impacts. First, while the Nation’s SAWRSA settlement is included as an ITA, the Revised DSEIS does not account for or address Reclamation’s responsibilities to ensure the full delivery of the Nation’s entitlement in times of shortage, or compensation to the Nation in the event that such deliveries are not carried out. Second, while ITAs include “Indian reservations,” the DSEIS does not appear to assess the impact of the action alternatives on unquantified *Winters* rights²⁴ on Indian reservations that are not immediately adjacent to the Colorado River.

Nevertheless, the Revised DSEIS, as proposed, promises to have an ameliorative impact on the Nation’s trust assets in comparison to the No Action Alternative or the action alternatives in the now-withdrawn DSEIS. As the Nation discussed in its pre-scoping comments,²⁵ however, the Nation and other Tribes lacked a seat at the table producing this proposal. It is therefore incumbent on Reclamation, in fulfilment of its trust responsibility to Tribes, to prioritize tribal interests in finalizing the SEIS. It is also incumbent on Reclamation, in finalizing the SEIS, to rectify the errors in its now-withdrawn DSEIS and Revised Draft SEIS.

A. The Revised DSEIS must adequately address impacts to the Nation’s water rights settlement.

On the whole, the conservation measures in the Proposed Action appear to address the most significant concerns with the action alternatives in the now-withdrawn DSEIS. By foregoing additional reductions, the Proposed Action avoids setting up the kind of collision course between shortages and the Secretary’s SAWRSA delivery obligations contemplated under that the DSEIS action alternatives. Still, as discussed above, Interior has long failed to adequately fund CAP deliveries under the Nation’s SAWRSA water settlement, and Reclamation modeling predicts significant future strains on these deliveries, with or without the imposition of additional reductions contemplated under the original DSEIS action alternatives.

The 2007 FEIS explicitly included the Nation’s SAWRSA settlement as an ITA, and the Revised DSEIS incorporated this inclusion.²⁶ Through the Nation’s SAWRSA settlement, the Nation obtained a substantial CAP entitlement in return for releasing claims concerning damages to its federal reserved rights. Yet the Revised DSEIS does not discuss how the Secretary plans to carry out her obligation to deliver this water notwithstanding a declaration of shortage, nor how the

²² *Nevada v. United States*, 463 U.S. 110, 128 (1983).

²³ *White Mountain Apache Tribe v. Hodel*, 784 F. 2d 921, 925 (9th Cir. 1986).

²⁴ *Winters v. United States*, 207 U.S. 564 (1908).

²⁵ December 19, 2022 Letter to Reclamation 2007 Interim Guidelines SEIS Program Manager.

²⁶ 2007 FEIS at 3-90; Revised DSEIS at 3-331 – 3-332.

Secretary will provide compensation in the event that she is unable to fulfil this obligation. Instead, as detailed in Appendix E, the Revised DSEIS appears to assume that the Secretary will simply not deliver this water to the Nation.

Nor does the Revised DSEIS provide any analysis or discussion of the impact of the reductions on its firming obligation under AWSA – an obligation which Reclamation repeatedly has acknowledged requires the Secretary to identify and secure significant resources and alternative water supplies, and one that Reclamation must carry out for 100 years from the effective date of AWSA (i.e., through the year 2107). Reclamation repeatedly has acknowledged that firming requires the Secretary to identify and secure significant resources and alternative water supplies. Unfortunately, throughout the Interim Guidelines period, rather than taking a proactive approach to secure these resources in non-shortage years, Reclamation largely ceded control to non-Indian interests, thus exacerbating the impact, during shortage years, of shortages on the Nation.

A key example is Reclamation's dispute with the Central Arizona Water Conservation District (CAWCD) over Central Arizona Project Excess Water.²⁷ Reclamation's 2007 Stipulation with CAWCD over CAP repayment provides Reclamation with a priority right to purchase Excess Water, which Reclamation may then subsequently store for Indian firming – a right that Reclamation describes as a “critical resource for meeting the federal firming obligation.”²⁸ In violation of the stipulation, CAWCD instead diverted Excess Water for non-Indian programs, resulting in a loss to Reclamation's firming program of tens of thousands of acre-feet.²⁹ But apart from a series of strongly-worded emails, letters, and comments submitted to the Arizona State Auditor, it is unclear whether Reclamation has taken formal action to recover these lost resources.

The Revised DSEIS notes that the failure to deliver water could result in revenue losses to the Nation, but does not address this impact other than to merely state in its environmental justice section, without any further discussion, that it is “important to note that losses in revenue are impacted by other factors, including, but not limited to, the implementation of water rights settlements and availability of other resources.”³⁰ Elsewhere, the impacts of the reductions to the Nation's and other Tribes' allocations are addressed through a single, fine-print footnote:

Note: This *preliminary analysis* attributes shortage to the base allocation or entitlement according to its priority. *The ultimate impacts, both financial and in terms of the lost productive value of water, are diverse according to their varied uses and compensation structures under a large body of exchanges, leases, and other federal and non-federal arrangements and commitments.* This distribution of shortage to the base allocation only provides the *initial necessary information* to assess impacts in detail as part of administering

²⁷ Excess Water is CAP water in excess of water used, resold, or exchanged under long-term CAP contracts and subcontracts.

²⁸ Bureau of Reclamation Comments, Special Audit on Central Arizona Water Conservation District, Arizona Office of the Auditor General (November 2017) at 1.

²⁹ *Id.*

³⁰ Revised DSEIS at 3-336.

the related contracts; actual water orders received each year will affect those impacts.³¹

Not only does this all-encompassing caveat waive away Reclamation's responsibility under its NEPA Handbook to discuss "[a]ll impacts to trust assets, even those considered nonsignificant, . . . in the trust analyses in NEPA documents" and to implement "appropriate compensation or mitigation," but it does so while frankly acknowledging that Reclamation's analysis of these impacts is "preliminary" and that it provides "only the initial necessary information" to assess impacts – in other words, that the analysis in the DSEIS is incomplete.³²

This is plainly inadequate for NEPA purposes. NEPA requires a "useful analysis of the cumulative impacts of past, present, and future projects."³³ Consideration of cumulative impacts requires "some quantified or detailed information; ... [g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."³⁴ Nor is it appropriate for Reclamation "to defer consideration of cumulative impacts to a future date."³⁵ Reclamation's self-described "preliminary" analysis of "only initial necessary information" concerning the impact of its alternatives did not constitute the 'hard look' that the agency is obligated to provide, and thus fell short of what NEPA requires.

In order to satisfy its trust responsibility and obligations under NEPA, Reclamation must undertake the investigation and analysis necessary to examine the impacts of the Proposed Action on the Nation's SAWRSA settlement and Reclamation's obligations thereunder, and to prioritize the protection of the Nation's SAWRSA entitlement in this process.

B. The Revised DSEIS must adequately address the Nation's unquantified Winters rights.

As noted above, the ITAs analyzed in the Revised DSEIS include "federal reserved Indian rights to Colorado River water including rights established pursuant to *Arizona v. California*, Colorado River water Tribal delivery contracts where such contracts are part of a congressional approved

³¹ Revised DSEIS, Appendix E, at Table E-13 (note) (emphasis added).

³² The Revised DSEIS also does not adequately address impacts to all of the Nation's water entitlements. While Appendix E purported to examine the impact of various alternatives on the Nation's various CAP water delivery entitlements, including the delivery of 8,000 acre-feet of Indian priority water annually to the Sif Oidak District, the Revised DSEIS (through Appendix E or otherwise) does not clarify how the impacts to this entitlement are to be analyzed within Reclamation's ITA framework; instead, the Revised DSEIS merely assumes that there will be no impact to this entitlement, based on the notion that this water has never been put to consumptive use. The methodology employed by the Revised DSEIS thus effectively zeroes out this high priority water, potentially through 2026. But this water has gone unused in part due to the federal government's ongoing failure to construct on-reservation irrigation infrastructure necessary for the Nation to take delivery. Reclamation must appropriately examine this entitlement as an ITA, including Reclamation's responsibility to ensure that it is appropriately delivered to the Nation during the period examined by the Revised DSEIS.

³³ *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062, 1075 (9th Cir. 2002).

³⁴ *Id.*

³⁵ *Neighbors of Cuddy Mountain, v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998); see also *Natural Res. Defense Council v. Hodel*, 865 F.2d 288, 298 (D.C. Cir. 1988) ("Conclusory remarks [on cumulative impacts] ... do not equip a decisionmaker to make an informed decision about alternative courses of action or a court to review the Secretary's reasoning").

water rights settlement; and Indian reservations.” The Revised DSEIS does not specifically explain the extent to which unquantified *Winters* rights are included (or not included) within these categories, but later concludes, in a sweeping fashion, that “[n]o vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration.”³⁶ Such an unsupported conclusion is especially problematic for Tribes like the Nation, which has significant unsettled (and unquantified) federal reserved rights.

As noted above, prior to the construction of the CAP, off-reservation groundwater pumping by non-Indians severely damaged the Nation’s reservation, water rights, and its ability to make use of them. The United States affirmatively recognized the harm caused by these injuries, and (again, as noted above) in some cases filed suit to stop them. At the same time, the federal government pointed to the construction of the CAP as a means to alleviate these harms, testifying before Congress that “Project delivery of Colorado River water will help relieve present overpumping of the declining ground water reserve in Maricopa, Pinal, and Pima Counties, Arizona.”³⁷ There is little doubt that ongoing CAP water shortages in Arizona will lead to increased groundwater drawdowns near the Nation’s reservations, which will in turn have a significant negative impact on the Nation’s federal reserved rights. Indeed, as has been widely reported, Arizona farmers have anticipated this outcome and are either returning to groundwater pumping or preparing to do so, in some cases with federal financial support to drill additional wells.³⁸

The Revised DSEIS fails to address this possibility not only in delineating the scope of ITAs, but also in its analysis of the environmental consequences of agricultural impacts in Section 3.16.2, which assumes, incorrectly, that CAP reductions will lead to fallowing, rather than increased reliance on groundwater. The Revised DSEIS “applies the 2007 agricultural modeling framework,” which similarly examined the impact of various allocation alternatives on agriculture in Arizona, stating that “[k]ey to this impact analysis is the assumption that the most conservative way to estimate impacts is to assume that, if a shortage occurs, farmers would react by fallowing irrigated lands.”³⁹ While Reclamation acknowledged that “there are other sources of water that may be used by farmers in order to offset shortages,” such as “by pumping additional groundwater,” it nevertheless concluded that, because it was “difficult to project exactly how individual farmers, irrigation districts, or each of the Lower Division states may mitigate potential, future agricultural impacts from shortages,” it

³⁶ 3-332, quoting 2007 FEIS.

³⁷ 1975 Senate Hearing at 521 (testimony of Jack O. Horton, Assistant Secretary for Land and Water Resources, Department of the Interior).

³⁸ See, e.g., “Cutbacks in water for central AZ farmers expected,” Arizona Capitol Times (April 26, 2021) (<https://protect-eu.mimecast.com/s/wFe9CYvpzFLQDpGzH9eE8G?domain=azcapitoltimes.com>) (“[CAP Colorado River Program Manager Chuck] Cullom said agricultural users have been working for many years to develop their groundwater capacities in preparation for reductions.”); “First mandatory cutbacks of CAP water now likely in 2022, Arizona Daily Star (May 23, 2022) (https://tucson.com/news/local/first-mandatory-cutback-of-cap-water-now-likely-in-2022/article_9f7aec9a-9e50-11eb-babd-df8247d1bfd6.html) (“The farmers are also supposed to get enough state and federal money to drill wells to pump another 70,000 acre- feet of groundwater, although most of the federal money needed still hasn’t come in.”).

³⁹ Revised DSEIS at 3-294; 2007 FEIS at 4-301.

would choose instead to assume “that other sources of water would not be available.”⁴⁰ The Revised DSEIS repeats the mistakes from the 2007 FEIS, again basing its following assumption on the notion that because it will be “difficult to project” how farmers would respond to shortages, farmers would follow their crops instead of using alternative sources of water.⁴¹

These assumptions run counter to the overdrafts that federal officials previously acknowledged before Congress, and to the current reality on the ground, which augurs toward a return to this untenable history. They also appear to contradict other sections of the Revised DSEIS. For example, in discussing the environmental justice impacts of Alternative 2 in Section 3.17.2, the Revised DSEIS concludes that “water users within [Pima and Pinal Counties] who would have water delivery reduced to zero would face disproportionate consumptive use impacts on irrigation. Farmers who have used CAP excess water to irrigate crops would need to use alternative water supplies, such as groundwater, if available, to continue agricultural production.”⁴² Such an “internally inconsistent” decision is potentially arbitrary and capricious.⁴³

Reclamation must correct these errors and their potential impact on both Indian and non-Indian agriculture in the final SEIS.

II. Reclamation should confirm that future decision-making contemplated in the Proposed Action will not involve additional involuntary shortages.

The now-withdrawn DSEIS contemplated revisions to Section 7.C of the 2007 Interim Guidelines to allow for mid-year reductions in Fourth Priority allocations. As the Nation articulated in its December 2022 comments on the SEIS process, and as echoed by others, such an action would be inconsistent with the Nation’s CAP contract, which contains detailed provisions that clearly contemplate delivery, on an annual basis, of certain amounts ordered within a given shortage “Year,” and which does not contemplate any reductions outside of this structure.⁴⁴ Nor do Reclamation’s Long-Range Operating Criteria, the Consolidated Decree in *Arizona v. California*,⁴⁵ or

⁴⁰ *Id.*

⁴¹ Revised DSEIS at 3-294.

⁴² *Id.* at 3-323.

⁴³ See *ANR Storage Co. v. Fed. Energy Regulatory Comm’n*, 904 F.3d 1020, 1028 (D.C. Cir. 2018); see also, *Bauer v. DeVos*, 325 F. Supp. 3d 74, 109 (D.D.C. 2018) (noting that “an unacknowledged and unexplained inconsistency is the hallmark of arbitrary and capricious decision-making”).

⁴⁴ See e.g., CAP contract at Sections 5.1 and 5.46 (defining “Available CAP Supply” as water available in a given year, and “Year” to mean “the twelve-month period between January 1 through the next succeeding December 31”), Section 6.5.1 (providing that the Secretary “shall deliver annually from the CAP System” certain amounts), and Section 6.8 (providing that the Available CAP Supply “shall be distributed” in a given shortage “Year” in accordance with certain formulas).

⁴⁵ While Section I(2) of this criteria, originally adopted in 1972 and amended in 2005 (70 Fed. Reg. 15873 (March 29, 2005)), effectively provides for “revisions” to Reclamation’s annual plan of operations on an mid-year basis “to reflect the current hydrological conditions,” shortages are dealt with separately (at Section III(3)(c)), and are based on “annual consumptive use” as provided under Article II(B)(3) of the Consolidated Decree in *Arizona v. California*.

the Shortage Sharing Criteria in the Nation's SAWRSA settlement,⁴⁶ contemplate shortage-based reductions occurring under anything other than an annual basis. While the Secretary retains authority under the Long-Range Operating Criteria to revise Interior's annual operating plans to account for "current hydrologic conditions," Interior may not use the SEIS process to expand this authority beyond its limited scope.

The Proposed Action instead contemplates revisions to the Guidelines to allow the exercise of Secretarial authority to protect Lake Mead from reaching an elevation of 1,000 feet and protecting Lake Powell from dropping below an elevation of 3,500 feet.⁴⁷ For Lake Powell, these revisions allow for Reclamation to impose mid-year adjustments to reduce annual releases to no less than 6.0 maf if the minimum probable scenario in any 24-Month Study shows the reservoir dropping below 3,500 feet at any point in the subsequent 12 months.⁴⁸ For Lake Mead, these revisions contemplate the development of an implementation plan on the part of the Lower Division States (after consultation with the Upper Division States) to protect an elevation of 1,000 feet in the event that a minimum probable scenario in any 24-Month Study projects elevations below 1,025 feet, with Reclamation ultimately authorized to take unspecified actions in the event that it does not agree with the plan.⁴⁹

A. Reclamation should confirm that revisions to the Interim Guidelines to protect Lake Mead will not involve additional involuntary reductions to CAP deliveries.

The Revised DSEIS puts off significant decision-making concerning deliveries from Lake Mead, deferring first to the Lower Division States, and then ultimately to Reclamation. The Revised DSEIS explicitly acknowledges that this future decision-making is not modeled in the Proposed Action, but indicates that "the percent of traces that fall below Lake Mead elevations of 1,025 and 1,000 feet can be used to estimate the possibility of this occurring." While this modeling (shown in Table 3-16) suggests that the chances of Lake Mead falling below 1,000 feet are indeed remote (0% in 2024 and 2025, and 2% in 2026), the traces for 1,025 feet are far closer to the 10% minimum probable trigger for future decision-making in a April 24-Month Study: by 2026, 8% of traces dipped below this elevation.

A comparison of historical modeling with actual elevations at Lake Mead⁵⁰ provides further evidence that tripping the 10% minimum probable trigger is far more likely than the estimates in Table 3-16 suggest. Indeed, actual elevations at Lake Mead fell below the projected minimum probable elevations in recent April 24-Month studies on multiple occasions. For example, from April through September 2021 levels at Lake Mead dropped from a high of 1,079.30 feet to 1,067.68

⁴⁶ This criteria, appearing at Exhibit 5.3.4.1 to the Nation's SAWRSA Settlement, again provides for the Secretary to reduce CAP water based on Available CAP Supply, which as noted above (at n.40) is tied to water available in a given year.

⁴⁷ Revised DSEIS at 2-7 – 2-8.

⁴⁸ *Id.*

⁴⁹ *Id.* Unlike the provisions specific to Lake Powell, the Lake Mead provisions are not explicitly bounded by a 12 month subsequent timeframe.

⁵⁰ Reclamation maintains an archive of 24-Month Studies dating back to 2010, available at <https://www.usbr.gov/lc/region/g4000/24mo/index.html>.

feet; all of these actual elevations were below the projected minimum probable elevations as reflected in the April 2020 24-Month Study. This phenomenon carried forward into subsequent years; actual levels at Lake Mead from April 2022 through March 2023 were lower than the minimum most probable levels for each of those months in the April 2021 24-month study.

More to the point for NEPA purposes, this data shows that the 1,025 foot elevation trigger for a minimum most probable projection in a future April 2024 Month Study is reasonably foreseeable.⁵¹ However, the Revised DSEIS explicitly does not model significant adverse impacts (in this case, additional unilateral delivery reductions) that could arise from these reasonably foreseeable events. Reclamation officials have indicated that additional measures to protect Lake Mead elevations will include voluntary conservation measures rather than involuntary reductions. Reclamation should confirm this understanding in the final SEIS.⁵²

B. *Reclamation must ensure that mid-year adjustments to annual releases from Lake Powell do not involve additional involuntary reductions to CAP deliveries.*

As noted above, existing legal authorities and contracts (including the Nation's CAP contract) do not contemplate mid-year reductions to CAP delivery allocations. While the Proposed Action contemplates mid-year adjustments for releases from Lake Powell in certain circumstances, it is not fully clear from the modeling in the Revised DSEIS how these adjustments will or will not impact CAP deliveries. Most modeling traces in Figure 3-8 in the Revised DSEIS appear to demonstrate that the conservation measures in the Proposed Action effectively offset such adjustments. Reclamation should confirm in the Final SEIS that it will not undertake a mid-year adjustment to Lake Powell that will result in further reductions to CAP deliveries from Lake Mead.

Thank you for your consideration of the Nation's comments.

Sincerely,



Verlon M. Jose
Chairman

⁵¹ See, e.g., NEPA Handbook at 3-15 (“Reclamation will obtain the information necessary to fully evaluate all reasonably foreseeable, significant adverse impacts in NEPA documents, unless the information cannot be obtained because the costs are too great or the means of getting it are not available”); *Eagle Cnty., Colorado v. Surface Transportation Bd.*, 82 F.4th 1152, 1158 (D.C. Cir. 2023) (“The agency need not foresee the unforeseeable, but by the same token neither can it avoid drafting an impact statement, or including relevant effects in such statement, simply because describing the environmental effects of and alternatives to particular agency action involves some degree of forecasting.”) (cleaned up).

⁵² The Nation appreciates Reclamation's engaging in government-to-government consultation on the Revised DSEIS, as well as its commitment to engage in further government-to-government consultation in the event that additional measures to protect Lake Mead are contemplated.