

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

"Gila River Strong"

Stephen Roe Lewis
Governor



Monica Lynn Antone
Lieutenant Governor

December 11, 2023

VIA E-MAIL (CRinterimops@usbr.gov)

Reclamation 2007 Interim Guidelines SEIS Project Manager
Upper Colorado Basin Region
125 South State Street, Suite 8100
Salt Lake City, Utah 84138

Re: Gila River Indian Community's Comments Regarding the Bureau of Reclamation's Revised Draft Supplemental Environmental Impact Statement for Near-term Colorado River Operations

Dear Project Manager,

This letter transmits comments from the Gila River Indian Community (the "Community") regarding the Revised Draft Supplemental Environmental Impact Statement ("Revised Draft SEIS") published in the Federal Register on October 27, 2023. 88 Fed. Reg. 73840 (Oct. 27, 2023).

As a leader in drought mitigation, the Community appreciates the opportunity to provide input on the Revised Draft SEIS. The Community has a long history of tackling drought through innovation and cooperation. For example, earlier this year, we worked with the Bureau of Reclamation ("Reclamation") on our historic Reclaimed Water Pipeline Project. And, just last week, we celebrated a groundbreaking for, and Reclamation's agreement to fund, Phase II of our pioneering Solar Covered Canal Pilot Project on the Reservation. Both projects highlight the excellent working relationship the Community has with federal partners to conserve and protect our most precious resource, water.

While we are pleased with the improved hydrology in the Colorado River Basin, we urge Reclamation to not lose sight of its statutory trust responsibility to protect, develop, and defend Tribal water resources. Regardless of which Alternative Reclamation ultimately adopts, Reclamation should ensure any and all reductions to Tribal statutory water entitlements are voluntary and compensated or replaced. Reducing the dependence of Tribes on the Colorado River is an important objective for Reclamation to consider throughout this process. This is especially true for Tribes, like the Community, with congressionally enacted water settlements with statutorily protected water resources. *See Arizona Water Settlements Act ("AWSA")* § 204(a)(2), Pub. L. 108-451, 118 Stat. 3502 (2004).

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The Community agrees with Reclamation that both the Proposed Action and No Action Alternatives are, given improved hydrology, viable options. The Proposed Action may reduce the now unlikely event that Lake Powell and Lake Mead reach critical elevations in the near-term. That is a good outcome. It has only been made possible by Reclamation's critical efforts to encourage voluntary compensated system conservation throughout the Lower Basin. The Community is pleased to have been a major partner with Reclamation in that effort and we believe it has helped to improve the outlook for both Lake Mead and Lake Powell.

As we enter into a new phase of drought response, with the major elements of voluntary compensated system conservation now in place, it is essential that Reclamation not let up on its efforts to invest in new infrastructure to reduce the dependence of entities like the Community on Colorado River water. Due to your successful efforts to encourage the levels of system conservation already achieved, Reclamation has put the Basin in a position whereby elevation levels face minimal risk of dropping to critical elevations over the interim period. While the Proposed Action Alternative, if adopted, would provide further protections against such risk, the system conservation effort you launched to allow the Lower Basin entities to step up with substantial commitments for long-term system conservation, such as ours, will serve us in good stead regardless of whether the Proposed Action Alternative is now adopted or not.

Thus, the Community has no strong position about whether to adopt the Proposed Action Alternative or the No Action Alternative. As we have pointed out in the past, it will be prudent for Reclamation to await some preliminary data about precipitation and runoff this spring before taking any action on the Revised Draft SEIS. This has been a consistent theme of our comments to date and we are pleased to see that Reclamation has slowed down this process in a manner that will take this new data into account.

This is not to say that Reclamation should not take action on the Revised Draft SEIS. Rather, we are simply urging you to wait until the end of the first quarter in 2024 when the precipitation and runoff indications for the coming year will be more accurate and base your final decision on that data. The Community looks forward to supporting Reclamation as it continues to consider the No Action and Proposed Action Alternatives in the SEIS process.

In the interim, we strongly urge Reclamation to keep its focus on making decisions about long-term system efficiency investments through your "Bucket 2" program. As you know, there are a number of very important investments that can be made for projects that will have a nearly immediate impact on system efficiency, including our own. Having the benefit of those projects in place even before the end of the Post-2026 negotiation period would be highly beneficial to the overall negotiation environment.

As part of your Bucket 2 deliberations, we also urge you to pay particular attention to projects that could develop new water supplies to replace anticipated reductions to Lower Basin entitlements. There are many viable projects for new water supplies in Arizona that could have a significant impact on our State's current dependence on the Colorado River, especially for CAP Tribes like ours, and we look forward to engaging in more detailed discussions with you on that topic in the coming weeks and months.

The Community has one criticism of the Revised Draft SEIS that I only raise because it is significant to the Community. During our government-to-government consultation with Reclamation this Spring, one of our specific criticisms of the original draft SEIS was its failure to adequately describe the nature of the trust asset that is the Community's CAP entitlement of 311,800 acre-feet of Colorado River water per year. Chapter 3 of the Revised Draft SEIS describes the affected environment and environmental consequences for the resources that could be significantly affected by the Alternatives. Section 3.18 of the Revised Draft SEIS is titled "Indian Trust Assets," which implies that all Tribal water rights discussed under the section, both *Arizona v. California* 2006 Consolidated Decree rights and CAP entitlements, are considered Indian Trust Assets ("ITAs") without distinction.

The Community continues to be dismayed with Reclamation's apparent inability to acknowledge that most, if not all, CAP entitlements come from water rights settlements that have specific statutory language establishing CAP water as a trust asset, which creates specific obligations for the United States in terms of the protections it must provide for such water resources, or else face liability under established U.S. Supreme Court precedent regarding trust responsibilities.¹ For example, Section 204(a)(2) of the Gila River Indian Community Water Rights Settlement Act of 2004 (a part of the AWSA) expressly states that "[t]he water rights and resources described in the Gila River agreement shall be held in trust by the United States on behalf of the Community and the allottees as described in this section."² AWSA § 204(a)(2), Pub. L. 108-451, 118 Stat. 3502 (2004).

The Community is very concerned with how Reclamation characterizes these different rights in the Revised Draft SEIS. As the draft currently reads, Section 3.18 (page 3-331) has a heading for *Arizona v. California* water rights titled "Indian Trust Assets Determined under *Arizona v. California*" but the heading for CAP water rights merely says, "Central Arizona Project." Nowhere in the body of the Revised Draft SEIS are CAP rights identified as Indian Trust Assets or ITAs. By not specifically acknowledging CAP Tribal entitlements as ITAs the Revised Draft EIS fails to adequately describe Reclamation's statutory trust responsibility to Tribes, like the Community, that have statutory trust entitlements to Colorado River water delivered through the CAP to satisfy claims to senior water rights. This either demonstrates Reclamation's failure to understand the significance of these specific "trust" provisions in water rights settlement legislation, or a purposeful effort to diminish the significance of these provisions. Given our strong partnership with Reclamation, the Community believes it is the former and we hope this can be easily addressed with edits to the Revised Draft SEIS.

¹ See *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) and its progeny.

² Under Section 2(26) of the Arizona Water Settlements Act, the Gila River Agreement is defined to mean the Gila River Indian Community Water Rights Settlement Agreement, dated February 4, 2003. AWSA § 2(26), Pub. Law 108-451, 118 Stat. 3479 (2004). Subparagraph 4.1 of the Gila River Indian Community Water Rights Settlement Agreement lists the Community's water rights, which includes 311,800 acre-feet per year of CAP water.

We strongly believe that Section 3.18 should be revised to clarify the nature of Tribal entitlements to CAP water that are included in congressionally-approved water settlements. Ideally, Reclamation should list out the water rights settlement legislation for CAP Tribes, like it did under Section 3.10.1.2 of the 2007 FEIS (Reclamation 2007), with a specific citation to each provision in each water rights settlement legislation that expressly identifies these water rights as trust assets held by the United States. If that is too cumbersome, we respectfully insist that the heading and paragraph describing CAP Tribal entitlements in Section 3.18 read as follows:

Central Arizona Project Indian Trust Assets

Tribal entitlements to CAP water and/or non-CAP Colorado River water delivered through the CAP in central Arizona are administered pursuant to water delivery contracts between Tribes and the Secretary. A summary of water rights settlements as of 2007 is presented in Section 3.10.1.2 of the 2007 FEIS (Reclamation 2007), and water rights for the CAP Tribes as of 2007 are summarized in Table 3.10-2, Central Arizona Project Indian Tribal Diversion Entitlements (Water Rights) (Reclamation 2007). As of 2023, water rights settlements approved by an Act of Congress involving CAP water have been executed with the Ak-Chin Indian Community, Fort McDowell Yavapai Nation, Gila River Indian Community, San Carlos Apache Tribe, Salt River Pima-Maricopa Indian Community, Tohono O'odham Nation, Yavapai-Prescott Indian Tribe, Hualapai Tribe, and White Mountain Apache Tribe. The statutes approving these water rights settlements include a provision that expressly holds water rights and resources, including CAP water, in trust by the United States. CAP water is also retained for a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation's claims to water in Arizona.

The Community looks forward to continuing its partnership with Reclamation to stabilize the Colorado River Basin and ensure a stable water supply for the West. I commend your work up to this point to address the challenges of drought. This is no easy task and our continued collaboration is essential to sustained forward progress.

Respectfully,

A handwritten signature in black ink on a yellow rectangular background. The signature is stylized and appears to read 'S. Lewis'.

**Stephen Lewis, Governor
Gila River Indian Community**