



TOHONO O'ODHAM NATION

December 19, 2022

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

Via email to CRinterimops@usbr.gov

Re: Tohono O'odham Nation's Comments on Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS) for 2007 Colorado River Interim Guidelines

To the Reclamation 2007 Interim Guidelines SEIS Project Manager:

This letter conveys the comments of the Tohono O'odham Nation (Nation) on the Bureau of Reclamation's Notice of Intent to Prepare a Supplemental Environmental Impact Statement for December 2007 Record of Decision Entitled Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations For Lake Powell and Lake Mead (87 Fed. Reg. 69042) (Proposed SEIS). In light of the unprecedented drought and climate change conditions facing the West, it is evident that the existing Interim Guidelines are insufficient for the management of Colorado River shortage conditions, and that action must be taken to address the current hydrology and reservoir conditions in the Upper and Lower Basins.

Reclamation proposes two action alternatives in the Proposed SEIS: a Framework Agreement Alternative, and a Reservoir Operations Modification Alternative. In considering consensus-based actions under a Framework Agreement Alternative, or the exercise of Secretarial authority under a Reservoir Operations Modification Alternative, it is incumbent on Reclamation to prioritize the tribal trust responsibility and to engage in tribal consultation in parallel with the NEPA process for the SEIS. In considering these action alternatives, Reclamation must also seek to protect both federal reserved water rights and existing tribal water entitlements.

BACKGROUND

The Nation has one of the largest reservations in the United States, with over 35,000 members and multiple reservation land bases in southern Arizona totaling more than two million acres of land. Our Main Reservation also shares a 62-mile border (as well as several important aquifers) with the Republic of Mexico. Water rights are especially vital for the Nation and other Tribes in the desert Southwest, where 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 also has one of the oldest water rights settlements in the United States – 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). Under SAWRSA, the Nation gave up its significant claims concerning damages to groundwater and surface water in the far eastern portion of the Nation's Main Reservation. In exchange for releasing these claims, the United States promised that the Nation would receive reliable, affordable, and long-term access to Central Arizona Project (CAP) water, which delivers the majority of Arizona's allocation from the Colorado River Basin. The United States also agreed to deliver the Nation's full SAWRSA entitlement, notwithstanding a declaration of shortage.

SAWRSA settled the Nation's water rights claims to a little over 100,000 acres – less than 1/20th of our reservation lands. The Nation is currently in negotiations with the United States and others to settle the rest of the Nation's water rights. As with our prior settlement (and like other Basin Tribes with ongoing settlement negotiations), the Nation and our Federal Negotiating Team are working to ensure that the Nation has access to Colorado River water in return for settling its claims.

THE NATION'S COMMENTS ON THE PROPOSED SEIS

Consistent with the above, the Nation submits the following comments on Reclamation's SEIS:

I. In Considering Alternatives for Action under the Proposed SEIS, Reclamation Must Prioritize the Tribal Trust Responsibility, and Must Engage in Government to Government Consultation with Tribes in Parallel with the NEPA Process.

Both of Reclamation's proposed action alternatives contemplate consideration, first and foremost, of a "consensus-based set of actions that would build on the existing framework for Colorado River Operations." Under the Framework Agreement Alternative, this consensus-based approach would "facilitate implementation of Section 7.B.2 of the 2007 Interim Guidelines." Under the Reservoir Operations Modification Alternative, Reclamation would "consider any inadequacies or limitations of the consensus-based framework" alternative, and exercise Secretarial authority "under applicable federal law" to address these inadequacies and limitations. While Reclamation suggests that the Framework Agreement Alternative "would likely build on commitments and

obligations developed” by Basin Tribes in addition to Basin States and non-governmental organizations, Basin States are the only non-federal parties specifically identified in Section 7.B.2 of the Interim Guidelines.

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.¹ Given that Tribes do not have an explicitly confirmed “seat at the table” under the Interim Guidelines for the purposes of developing a consensus-based modification, it is critical that Reclamation protect the tribal trust responsibility by ensuring that Tribes are included in the decision-making that formalizes any consensus-based modification, and by prioritizing the protection of tribal water rights in exercising Secretarial authority to address inadequacies or limitations in the consensus-based framework.

Moreover, Reclamation must engage in regular government to government consultation with Tribes as it develops modifications to the Interim Guidelines. As confirmed by a host of authorities, the federal government is required to conduct meaningful government-to-government consultation with federally recognized Indian tribes in conjunction with (and prior to) the implementation of plans with tribal implications.² As Interior’s Departmental Manual makes clear, “Bureaus and offices must consult tribes . . . whenever a DOI plan or action with tribal implications arises,” and must “incorporate tribal views in their decision making processes.”³ The modifications to the Interim Guidelines contemplated in the Proposed SEIS unquestionably have tribal implications within the meaning of the federal government’s consultation requirements. Reclamation’s responsibility to engage in such consultation runs parallel with (and is not superseded by) the NEPA process for the Proposed SEIS.

II. In Considering Alternatives for Action under the Proposed SEIS, Reclamation Must Seek to Protect Both Unquantified Federal Reserved Rights and Existing Tribal Water Entitlements.

A. Reclamation Must Protect Federal Reserved Rights by Implementing Conservation Measures to Limit Groundwater Depletion.

The vast majority of the Nation’s federal reserved water rights underlying its two million acre Reservation remain unquantified. Reclamation’s action alternatives under the Proposed SEIS contemplate significant reductions for releases from both Lake Powell and Lake Mead, as well as corresponding reductions in deliveries to water users in the Lower Basin in particular. Any action to

¹ 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).

² See, e.g., Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments* (Nov. 9, 2000); Presidential Memorandum, *Tribal Consultation and Strengthening Nation to-Nation Relationships* (Jan. 26, 2021).

³ 512 DM 5 at 5.4(A).

reduce deliveries must be accompanied by corresponding conservation measures aimed at limiting the inevitable impacts to groundwater, and in particular federal reserved rights to groundwater.

Prior to the construction of the Central Arizona Project, groundwater diversions by non-Indian water users in Arizona drastically undermined the Nation’s and other Tribes’ federal reserved rights, and damaged or destroyed related cultural, environmental, and agricultural uses of this water. 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 our trustee to protect our water rights.

In the absence of meaningful and enforceable conservation measures, the significant reductions in water deliveries from Lake Mead contemplated under the Proposed SEIS action alternatives will inevitably lead to a return to the (untenable) status quo ante, with impacts to federal reserved rights that meet or exceed the historic damage suffered by the Nation and other Tribes. Reclamation has the both the authority and the responsibility as trustee to the Nation and other Tribes, to ensure that any consensus-based approach to Colorado River operational modifications are accompanied by conservation measures sufficient to protect federal reserved rights.

Reclamation must also extend these principles to the process for coordination with the State Department and the United States Section of the International Boundary and Water Commission concerning potential modification of deliveries to the Republic of Mexico. As the federal government is aware, several of the aquifers underlying the Nation’s Reservation extend across the border into Mexico. Reclamation must ensure that adequate protections for the Nation’s federal reserved rights accompany any agreement to modify Mexico’s Colorado River allocation in times of shortage.

B. Reclamation Must Protect Existing Tribal Water Entitlements by Ensuring that Alternative Resources are Available to Offset Delivery Reductions.

As noted above, 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. 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.⁴ Second, the Secretary must, pursuant to Section 105 of AWSA, firm a portion of the Nation’s entitlement 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.”

⁴ SAWRSA Sections 305(a)(2) and (b)(1) (as amended).

Both of these obligations require the Secretary to identify and secure significant resources and alternative water supplies. Reductions for Lake Mead deliveries contemplated under the SEIS action alternatives will strain these resources and supplies beyond their already limited capacity. Thankfully, SAWRSA and AWSA provide Reclamation with authorization for congressional appropriations sufficient to meet these obligations.⁵ In considering such Lake Mead delivery reductions, Reclamation should identify appropriations necessary to offset the impacts that these deliveries will have to the Nation.

Finally, the SEIS indicates that “Reclamation anticipates revising Section 7.C (“Mid-Year Review”) to allow for potential determinations in a mid-year review that would allow for reduced deliveries from Lake Mead pursuant to Section 2 of the 2007 Interim Guidelines.” The Nation’s SAWRSA settlement and Central Arizona Project water delivery contract do not clearly contemplate mid-year delivery reductions. Accordingly, Reclamation should consult with the Nation concerning any proposed mid-year reductions from Lake Mead as part of a modification to Section 7.C of the Interim Guidelines to ensure compliance with these agreements.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Ned Norris, Jr.", with a stylized flourish at the end.

Ned Norris, Jr.
Chairman

⁵ SAWRSA Sections 310(a)(2)B) and (b)(1) (as amended); AWSA Section 105(c).