COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

26600 MOHAVE ROAD
PARKER, ARIZONA 85344
TELEPHONE (928) 669-9211
FAX (928) 669-1216

November 7, 2024

The Honorable Camille Touton
Commissioner
Bureau of Reclamation
Department of the Interior
1849 C Street NW
Washington, DC 20240

Subject: **Proposed Alternative from the Colorado River Indian Tribes for Inclusion in the Post-2026 NEPA Process.**

Dear Commissioner Touton:

This letter includes a proposed alternative recommended by the Colorado River Indian Tribes (CRIT) for inclusion in the Post-2026 National Environmental Policy Act (NEPA) process. These are unprecedented times with the severe and extended drought in the Colorado River Basin. It is during these difficult times that we must adhere to the foundational legal principles for management of the lower Colorado River as established by the Boulder Canyon Project Act; the United States Supreme Court in *Arizona v California*, 373 U.S. 546 (1963); the 2006 Consolidated Decree for *Arizona v California,* 547 U.S. 150; and the Colorado River Indian Tribes Water Resiliency Act (CRIT Act), P.L. 117-343. The CRIT proposals described in this letter are based on these foundational legal principles and acknowledge the need for consensus-based arrangements to share water supplies on a voluntary basis—as the CRIT have done in California as part of the California Quantitative Settlement Agreement, during the Pilot System Conservation Program, and the Drought Contingency Plan. The CRIT will continue to work with others to be part of the long-term solution in sustaining the Colorado River and evaluate opportunities to authorize the off-reservation use of our water. But let us be clear, as part of the long-term solution or otherwise, the CRIT will do what is necessary to protect our water rights.

We understand that the current Post-2026 NEPA Process is different from other recent NEPA processes undertaken by Reclamation. However, there remain unresolved issues from the recent Reclamation NEPA analysis in the Final Supplemental Environmental Impact Statement (SEIS) for Near-term Colorado

River Operations. Resolution of these concerns—concerns that have been raised numerous times by this Council—will benefit all Colorado River Basin stakeholders by providing clarity and stability that comes from observing long-standing and accepted legal frameworks.

Without consultation with or input from the CRIT, Reclamation developed and analyzed an alternative in the draft SEIS to unilaterally reallocate senior tribal water rights, including from the most senior lower basin rights of the CRIT, for the benefit of junior users, without identifying any legal authority for this proposed action alternative. As expressed in our comments on the draft SEIS, such reallocation of water from the CRIT to junior priority users violates the injunctive order of the Supreme Court provided in the Consolidated Decree, results in uncompensated takings in violation of the 5th Amendment to the Constitution and is contrary to our tribal sovereignty and tribal rights that you have a trust responsibility to protect.

Despite the opposition by the CRIT and others to Alternative 2 as contained in the draft SEIS, Reclamation brought this alternative forward for evaluation in the final SEIS, again without identifying any legal authority for the action proposed.

Reclamation did not choose Alternative 2 as its preferred alternative for near-term action under the SEIS but at the same time Reclamation also failed to acknowledge its legal infirmities. **We therefore wish to reiterate this point: the CRIT will use all resources at our disposal to stop any efforts by Reclamation, the Basin States, or other Basin interests, to develop and analyze alternatives and/or proposals, in any process, including but not limited to the Post-2026 Process, that re-allocates the CRIT's water without CRIT's consent. Such an alternative/proposal is in violation of the injunction of the Supreme Court in *Arizona v. California*, violate rights afforded to the CRIT under the Constitution, and an abrogation of the Secretary's trust responsibility to the CRIT.**

We also note that Reclamation has failed to respond to our numerous requests to address the related issue of its lack of authority to assess system losses against the CRIT consumptive use. Over 24 months ago, the CRIT informed Reclamation in a letter from our Attorney General, dated October 26,2022, that it lacks authority to assess system losses against the CRIT. The CRIT have repeatedly followed-up during in-person meetings with you and your staff, and through additional correspondence—including two additional letters on April 12, 2024, and June 28, 2024—asking by what authority Reclamation can assess losses to CRIT. It continues to be deeply troubling that these letters remain unanswered (copies are attached hereto). Two years of questions and requests for answers, over 743 days and counting,

have left us with a cloud of uncertainty over our water use plans, effectively harming our members and the surrounding communities that provide economic and social support to our farming operations.

While we appreciate the recent efforts of Reclamation's regional staff to address some of our operational issues at Headgate Rock Dam and in working with us on potential improvements to capture system spills, it does not erase the pall that is cast upon our water rights by Reclamation continuing to evaluate potential scenarios that would take our water while simultaneously not respond to our repeated requests to address the legal authority to undertake such actions. It is with these concerns we are requesting the evaluation of our proposal and principles, which can be viewed as an independent proposal or incorporated with other action alternatives. We also note these principles are not new to Reclamation as they been raised by the CRIT both formally and informally on multiple occasions, including federal-tribal-state consultations and other public forums.

Background

A. The CRIT's Relationship to the Colorado River

The Colorado River is part of us and flows through each of us. It identifies and unifies our membership and sustains our way of life. We have a sacred obligation to care for the River and to ensure that future generations of our people maintain their own religious, spiritual, cultural, and environmental relationship with the River.

Our Chemehuevi and Mohave ancestors' homeland was in the desert along the Colorado River. Our ancestors lived in tandem with the River's seasonal flows, the River's physical being, its cultural significance, its spiritual connection to our people, and the ways it provides sustenance. This traditional knowledge has been passed from generation to generation, from our ancestors down to our membership today. In the 1940s, Hopi and Navajo people relocated to the reservation bringing their own cultural and religious connections to the River as they learned to farm on our desert reservation. All of our tribal members, no matter their ancestry, continually maintain and strengthen their connections to the River, and its waters, as we have done since time immemorial.

From the game that we hunted in the past to the crops we grow today that feed us, the River sustains the ecosystem around us and all life forms, big and small to survive in this desert climate. The River stabilized our food economy in our past and it empowers us to pursue economic sovereignty today. Stewardship of the Colorado River is vital for the CRIT and all users in the basin.

The Colorado River is the only source of water for the CRIT reservation and, as such, is the principal economic driver for the tribal government. Farm leasing, farm commodities, business leases, and the Blue Water Casino are all dependent on water from or in the Colorado River. Our ability to access the bulk of our water is through the Bureau of Indian Affairs' (BIA) Colorado River Indian Irrigation Project (Project), which is constantly subject to deferred maintenance and in desperate need of extensive repairs. The Project operates at roughly a 54% efficiency, which continually declines with more and more deferred maintenance each year.

B. CRIT's Water Rights

The Supreme Court confirmed an allocation for the CRIT in *Arizona v California* for the right to divert waters of the Colorado River from the mainstream for use on reservation lands in both Arizona and California. These rights predate the development of civil works on the River and are not based on storage. To provide an historical perspective, the reservation was established 37 years before the Reclamation act of 1902, 47 years before Arizona became a state, 57 years before the Colorado River Compact, and 103 years before Congress authorized the construction of the Central Arizona Project. The CRIT do not have a contract with Reclamation for delivery from storage and the Supreme Court confirmed that the CRIT allocation is not subject to shortage or delivery losses. CRIT's water rights are present perfected rights (PPRs), and the most senior in the Lower Basin, and therefore, under the Decree, are the last water rights to be shorted.

> If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines...may apportion the amount remaining available for consumptive use.... (2006 Consolidated Decree, 547 U.S. at 156)

Despite this language, the SEIS included an alternative that would have reallocated the water supplies of senior water rights holders with present perfected rights, like CRIT, to junior users in violation of the Decree. The SEIS and some commenters used terms such as "equitable distribution of shortages" to justify this proposal. Regardless of how labeled, any involuntary and uncompensated reallocation of water from the CRIT's senior rights would be in violation of the Supreme Court injunction limiting the Secretary' s actions, contrary to the plain language of the Consolidated Decree, and a taking of property

in violation of the 5th Amendment. There is nothing equitable about taking our allocation to benefit junior users.

Principal 1: Reclamation must fix its broken systems for administering Colorado River conservation programs; the current systems disadvantage the CRIT.

A. Colorado River accounting methods penalize the CRIT for not fully using its water.

Reclamation currently relies on what we understand to be a "baseline approach" in administering participation by the CRIT and other tribal nations in conservation programs like Intentionally Created Surplus (ICS) and the System Conservation Pilot Program (SCPP), where a user like CRIT limits its diversion to an amount less than its full allocation. This baseline approach, however, fundamentally treats CRIT differently than other users who do not have to calculate return flows to determine overall water use.

Due to CRIT's location on the river, determining return flows are an integral component of calculating CRIT's overall water use. For the CRIT, consumptive use is diversions minus return flows. Conversely, for most other water users that are not on the river, the amount that is delivered is considered to be their consumptive use, without regard to any return flows. This distinction is important because junior users are the beneficiaries of the CRIT's unused water. To protect these junior users, under the DCP, CRIT had to agree to a diversion cap, even though that amount is less than our overall Decreed right. Reclamation included the following language in the proposed system conservation agreements with the CRIT:

> The Agricultural Baseline Diversion is Contractor's highest annual diversion of Colorado River water for calendar years ____ through ____ as reported in the annual Colorado River Accounting and Water Use Report – Arizona, California, and Nevada (Water Accounting Report), which occurred in ____; provided, the Agricultural Baseline Diversion may be adjusted if a shortage is declared by the Secretary which impacts the volume of water available to Contractor in calendar year 2023.

This places a cap on the annual diversion based upon past diversions as reported in the Annual Accounting and Water Use Report published by Reclamation, not based on the CRIT allocation as identified in the Consolidated Decree.

Moving forward, this practice has been addressed through section 11(c) of the CRIT Act, which prohibits Reclamation from reducing or otherwise limiting the CRIT's ability to use the remaining portion of its decreed allocation.

> (c) RESERVATION OF RIGHTS.—The lease, exchange, storage, or conservation of a portion of the consumptive use shall not reduce or limit the right of the CRIT to use the remaining portion of the decreed allocation on the Reservation.

Consequently, Reclamation may not place a cap on CRIT's diversion as part of an agreement for system conservation of any kind and this accounting method should not be carried forward into the Post-2026 operational guidelines.

While this baseline approach is not limited to CRIT alone, its application at CRIT is exacerbated by the lack of efficiency in the Colorado River Indian Irrigation Project because almost half of what is diverted by CRIT *returns back to the river.* This limits our ability to fully place our lands in production, thereby limiting our "baseline" diversion amounts. The lack of efficiency, as well as current water accounting practices, unfairly burdens the CRIT in our efforts to create conservation water. For example, the CRIT committed to conserving 50,000 acre-feet of consumptive use during the Drought Contingency Plan, requiring a diversion reduction of double that amount- 100,000 acre-feet- in addition to capping our baseline diversion. These actions translated into 18,000+ acres of prime farmland fallowed in a manner contrary to standard conservation practices.

> B. Federal failures to properly manage and maintain the Colorado River Indian Irrigation Project limit CRIT's ability to participate in conservation programs.

The irrigation Project on our reservation is a federally owned project operated exclusively by the BIA. It is not a trust asset for the CRIT. But the failure of the Secretary, acting through the Bureau of Indian Affairs to adequately fund the project is placed on our communities and our economy. Our experts estimate the amount of maintenance backlog to be approximately $300 million. In addition, the appropriated funds allocated by BIA to the project is inadequate to cover operations & maintenance (O&M) costs. Furthermore, the O&M user charges, with CRIT being its largest user, have left our growers questioning how funds are used as there are minimal system improvements performed annually.

Consequently, we have expended significant time and limited tribal resources to meet program requirements from the Reclamation Water SMART program and other sources, including private sources, to improve the efficiency of this federal asset, as the historical record has shown the BIA is

unwilling to make the necessary investments in the irrigation project. Reclamation staff know the effort and time required to try to improve operations of the Project from working with us on the Science and Technology grant as well as the Diversion Management Plan (a Plan which is currently in use but was never approved by the BIA) and through our recent discussions about the potential development of reregulating reservoirs to capture operational spills.

The federal BIA management of the Project has created hundreds of millions of dollars in deferred maintenance. To date, the Department has provided significant funding to junior users throughout the basin from the billions of dollars Congress appropriated for conservation and efficiency improvements in the Bipartisan Infrastructure Law and the Inflation Reduction Act. No funding from these sources, however, has been provided for the irrigation project.

Principal 3: Reclamation must acknowledge the injunctive mandate in the Decree prohibits it from unilaterally reducing CRIT's water without compensation or consent.

The CRIT's ability to market and conserve water to help address system shortages depends on preserving its legal priorities. The CRIT Act authorizes the CRIT to market water for off-reservation uses, such as leases to municipalities and for system conservation. Investment by lessees or transferees to obtain water from the CRIT requires certainty that the priority system will be upheld. If Reclamation cuts the CRIT water allocation, as they set forth previously in the SEIS, the CRIT allocation is treated the same as a 4th priority water right and will not be available as a shortage supply to help junior users. The River priority system and injunctions in the Decree *must* be maintained and observed in order to maintain sufficient consumptive use on our reservation to meet obligations to potential multi-year water lessees, to meet multi-year system conservation agreements, and to meet our on-reservation needs.

In addition, the farm commodity prices for multi-year contracts are influenced by the security of the supply of water. The CRIT commodity prices, and our farm lease rates, depend on multi-year security in our water supply being maintained by following the Law of the River.

Components of the CRIT Proposed Alternative

1) Follow the Decree.

A. The Supreme Court's injunction against the Secretary mandates that during times of shortage, Present Perfected Rights holders, such as the CRIT, are to be satisfied first.

As a threshold matter, the Secretary, acting through Reclamation, is bound by the provisions of the Decree with regard to operations in the Colorado River below Hoover Dam. Article II(B)(3) of the Decree establishes operational standards when there is insufficient water available to satisfy the annual consumptive use of 7,500,000 acre-feet in Arizona, California, and Nevada.

> (3) If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre-feet in the aforesaid three States, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights;

Simply put, the Secretary's authority to operate the physical works authorized by Congress on the Colorado River starts with the plain language of the Decree. Any action proposed by the Secretary involving the operations at Hoover Dam must relate back to the Decree unless there is a comprehensive agreement by all relevant parties whose rights are acknowledged by the Supreme Court in the Decree. Stated differently, there can be no involuntary reduction of tribal rights acknowledged by the Supreme Court in the Decree except as provided in the Decree itself.

B. The Decree does not allow for reduction in water supplies for CRIT due to Evaporation and Evapotranspiration losses.

The CRIT's water rights confirmed by the Supreme Court in the Decree are both a diversion right and a consumptive use right. As stated in the Decree, the United States is enjoined from "releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment named in this subdivision(D) except in accordance with the allocations made herein:

* * * * *

> (4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet of diversions from the mainstream or (ii) the quantity of main-stream water

necessary to supply the consumptive use required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

The water rights for CRIT predate the 1922 Compact and predate the original Decree. They are *diversion* rights and, as such, are not subject to reduction due to evaporative losses in the storage of water or for losses in the transportation of that water. The authorization for Reclamation to reduce water rights for system losses is addressed in most Boulder Canyon Project Act Section 4 and Section 5 contracts. The CRIT do not have such a contract, and their right remains an unaltered PPR for diversion from the mainstream.

2) Follow the Colorado River Indian Tribes Water Resiliency Act of 2022.

The Colorado River Indian Tribes Resiliency Act of 2022 states in Section 11 that CRIT may divert its full decreed allocation. Any agreement for off-Reservation water use by lease, exchange, or agreement for storage or conservation as those terms are defined in the CRIT Act must conform with the requirements of the Act including Section 11(c) which states:

> The lease, exchange, storage, or conservation of a portion of the consumptive use **shall not reduce or limit the right of the CRIT to use the remaining portion of the decreed allocation on the Reservation** (emphasis added).

Reclamation staff have asserted that, because Arizona does not have an agreement among its water users regarding limits on the ability to fully utilize our allocation, similar to the Quantification Settlement Agreement (QSA) in California, the CRIT will need the agreement of all water users in Arizona to change its diversion amounts from an historical level that is lower than the full allocation. Such a requirement violates section 11(c) of the CRIT Act, which prohibits Reclamation from placing a cap on our diversions as a result of participation in any agreement to reduce consumptive use. Consequently, the Post-2026 Guidelines cannot include "caps" or the use of "baseline" limits on the CRIT full allocation. The refusal of Reclamation to remove the limitations on the CRIT full utilization of its allocation in the proposed system conservation agreements presented have deprived the River system from the benefits of

additional water from the CRIT, and denied the CRIT the funding for such proposed system conservation. This is extremely disappointing as the CRIT has repeatedly expressed its desire to be a part of the solution to the current drought. Reclamation's failure to follow the law has—after exceeding 150,000 acre-feet of system conservation from reduced consumptive use under the Drought Contingency Plan—prevented any of our further participation.

3) Remove Barriers that Limit Full Tribal Participation in the Process.

A. Developing a long-term sustainable funding stream for Tribal Nations.

There is a compelling need to invest in Tribal Nations in a manner that recognizes each is unique in its cultural and physical connection to the Colorado River, as well as in the development and use of its water resources. Unfortunately, the funds eligible to be distributed to Tribal Nations from the Inflation Reduction Act (IRA) and Bipartisan Infrastructure Law (BIL) are limited in scope and do not include over-arching authority to address tribal needs. What is needed is an authorization flexible enough to address individual tribal needs with sufficient funding to make a difference and help us thrive economically.

Similar to the IRA and BIL, this will need congressional authorization. But we also understand there is general agreement for the need of additional authority to implement a Post-2026 plan. Thus, as part of the Post-2026 discussion, we should also be discussing the many different ways this could be accomplished. One example would be to place a nominal surcharge on every acre-foot of tribal water consumed by non-tribal entities in the Basin and directing those proceeds into a special account in the Treasury to be expended according to a plan developed jointly with Tribal Nations. Similar benefits can be achieved by also directing revenues from leasing on public lands into a special fund similar to Public Law 111-11, the Reclamation Water Rights Settlement Fund.

These funds could be used to provide compensation on forbearance agreements and to provide funding for infrastructure for water use to facilitate tribal marketing. According to a published report from Utah State University, the Colorado River supports $1.4 trillion in annual economic activity and 16 million jobs across the Western United States. The CRIT and most other tribal nations, because of actions taken by the United States, continue to be frozen out of such economic activity. A dedicated fund to address tribal needs would be a strong first step toward equality.

B. Allow use of forbearance agreements.

One way to address the inequity of the current system that requires reductions in consumptive use to participate in conservation programs is through forbearance agreements. Water users in California and in Nevada currently benefit from tribal forbearance agreements. The CRIT propose that the Post-2026 Operational Guidelines include accounting methodologies necessary to account for funding and tracking tribal forbearance throughout the Basin. Once a tribal fund is developed as discussed in Section 1(B)(2) above, tribal forbearance can maintain water in the system for use by others. Tribal water rights are generally senior on the Colorado River. **The inability of the CRIT and other tribes to fully develop or use their water rights is usually because of a lack of infrastructure, meaning that water to which these tribes are entitled flows to a junior water user, free of charge, because the tribe cannot consumptively use its water. This leaves Reclamation with little incentive to fund on-reservation water infrastructure and the Basin States with little incentive to support changes to the accounting methodology.** Authorizing forbearance agreements will provide equity within the Basin between those who historically accessed financial support from Reclamation for water infrastructure improvements, and the tribes who could not access those financial mechanisms.

C. Remove Barriers to Tribal Participation in Intentionally Created Surplus.

It is our understanding that the current mechanism of ICS will be replaced with a new program that may be called "assigned water." The CRIT and the Gila River Indian Community (GRIC) are the only two tribes who have ICS Exhibits and have created an ICS account. This was a difficult process because the ICS Forbearance Agreement among the major water users in the lower basin permitted each of them to exercise a veto over new Exhibits. This is what happened to both the CRIT and the GRIC for reasons unrelated to the creation or accounting for ICS. GRIC overcame the veto with a statement about the nature of their settlement water; CRIT was unable to do so, not having a water settlement.

The veto was overcome by having the CRIT ICS Exhibit S attached to the agreements for the Drought Contingency Plan that were part of the Drought Contingency Plan approved by Congress—not the path outlined in the 2007 Interim Guidelines.

The Post-2026 Guidelines program for storing water in Lake Mead, to be delivered at a later date, must take into account the nature of all of the tribal water rights and provide that tribes have equality of access to this mechanism. Carry-over storage of water for delivery at a later time is a valuable tool during periods of drought that should not be denied to the CRIT.

D. Provide for Direct Tribal Participation in the Federal and Basin States Process.

The inequity of the current system is exacerbated by the reality that the CRIT and other Tribes are not directly involved in the negotiations for the Post-2026 Process. Instead, we have been relegated to meetings at which Reclamation and the Basin States provide reports about the status of the negotiations. The reasons for exclusion are many but reality is simple—if there were a true desire to include tribes in the negotiations, Reclamation would find a way and together we could work on a path forward together.

For example, the Reclamation Reform Act requires water contracts to be negotiated in public with opportunity for public comment during certain identified periods during negotiation sessions. Why is that not the case with the current negotiations? It is time to broaden the participation and the ideas under consideration. This is just one example of the many different ways Tribal Nations could easily be incorporated into the discussion.

The application of precedent is a big part of the administration of the Colorado River. And history has shown us that if Tribal Nations were not directly involved in the previous processes, like the Compact, the Interim Guidelines and DCP, we will be excluded from direct participation in the subsequent process—which is exactly what is happening right now. We are sovereign nations with a responsibility to the future of our peoples. Discussions about water resources that will fundamentally affect our future should not be closed-off from our direct participation.

Reservation of Rights

By providing these legal principles and alternative proposal, the CRIT does not waive any rights, claims, or defenses we may have under law against the United States or any other individual, organization, or government. This letter is provided solely in furtherance of the National Environment Policy Act and other processes required by applicable law. We further reserve the right to provide additional comments and engage with Reclamation as it proceeds with subsequent phases of this and other processes for the Post-2026 Operations of the Colorado River under applicable law and policy.

Conclusion

Our components for an additional alternative to be evaluated are simple and straightforward and are borne from a desire to both ensure that our trustee will follow the law and fulfill its duty to protect our trust resources, as well as reiterate the CRIT's desire to be a part of the overall solution. These components rely on following the Law of the River, including the injunctions in the Decree and the CRIT Act, and for there to be full agreement among all affected interests if there will be alternative

arrangements. If there are any questions, comments, or need for follow-up please contact our Attorney General Rebecca Loudbear at Rebecca.Loudbear@crit-nsn.gov.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Amelia Flores
Chairwoman

Cc: The Honorable Katie Hobbs
The Honorable Mark Kelly
The Honorable Ruben Gallego
The Honorable Alex Padilla
The Honorable Adam Schiff
The Honorable Paul Gosar
The Honorable Raul Grijalva
The Honorable Tom Buschatzke
The Honorable J.B. Hamby
The Honorable John Entsminger

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COLORADO RIVER INDIAN TRIBES
OFFICE OF THE ATTORNEY GENERAL

October 26, 2022

The Honorable Debra Haaland, Secretary of the Interior
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Brian Newland, Assistant Secretary Indian Affairs
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Tanya Trujillo, Assistant Secretary for Water and Science
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

The Honorable Camille CalimlimTouton, Commissioner
Bureau of Reclamation
Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Sent via email to all addressees

Re: System losses and the Colorado River Indian Tribes

Dear Secretary Haaland, Assistant Secretary Newland, Assistant Secretary Trujillo and Commissioner Touton:

Officials within the Department of Interior have announced that Reclamation is developing a process to assess "system losses" in the Lower Basin of the Colorado River. System losses are water lost by the Colorado River and its reservoirs from evaporation, seepage and "other losses."

Telephone (928) 669-1271 • Fax (928) 669-5675
26600 Mohave Road • Colorado River Indian Reservation • Parker, Arizona 85344

The water rights allocation of the Colorado River Indian Tribes is not subject to an assessment of system losses.

Background on System Losses

Each year Reclamation estimates that the evaporation from Lake Mead, seepage from the River and water use by phreatophytes results in approximately 1.2 million acre-feet (maf) of system losses each year. This is referred to as the *structural deficit*. Reclamation does not account for these losses as "uses." This results in reductions in water in Lake Mead that is not attributed to water users.

An example illustrates this situation. If Reclamation releases 7maf from Glen Canyon Dam to Lake Mead and the intervening inflows between Glen Canyon Dam and Lake Mead are 500,000af this provides a potential available new annual supply for delivery from Lake Mead of 7.5maf. To deliver 7.5maf from Lake Mead to points of diversion for water users, Reclamation must include an additional 600,000af release to compensate for seepage and other losses from the River. Depending on the elevation of the surface and the climatic conditions, the evaporation losses from Lake Mead may average an additional 600,000af per year. Completing this example, in a water year in which Lake Mead receives 7.5maf of inflow Reclamation releases 8.1maf to deliver 7.5maf to water users in the Lower Basin results and Lake Mead loses 600,000af to evaporation this results in a water depletion from Lake Mead of 8.7maf. This *structural deficit* of 1.2maf has not been accounted for within the Lower Basin for decades. Reclamation announced recently that they are working on a process to assess this system loss against the water users.

System losses are not assessable against the allocation for the Colorado River Indian Tribes

The Mohave people and the Chemehuevi people of the Colorado River Indian Reservation (CRIR) have been irrigating and farming with the water of the Colorado River from time immemorial. The CRIR was established from Mohave homelands in 1865. Congress appropriated money for irrigation ditches to divert water directly from the mainstream of the Colorado River to the CRIR for use by the Mohave people on the Reservation in 1867. The CRIT have used direct diversions from the mainstream of the Colorado River for farming ever since; first from hand dug ditches, then pumps in the River, and since 1944 through Headgate Rock Dam.

Headgate Rock Dam was funded and constructed by the United States to deliver water to the Reservation through the Colorado River Irrigation Project which is operated by the Bureau of Indian Affairs. The construction of Headgate Rock Dam was funded under the Rivers and Harbors Act. Both Headgate Rock Dam and the Colorado River Irrigation Project are federal projects, but neither are Reclamation projects or facilities.

The CRIT water rights were adjudicated and quantified by the United States Supreme Court in the 1963 case of *Arizona v. California* (373 U.S. 546 (1963)) and included in the 1964 decree.

(*Arizona v. California,* 376 U.S. 340, 344 (1964)) They have been increased since 1964 in subsequent decrees to account for lands that were not included within the original federal assessment of reservation lands.

The CRIT have federal Indian reserved water rights to divert water from the mainstream as they have done throughout millennia. The reservation of water for the CRIR was made at the time the Reservation was created—decades before the formation of the Reclamation Service or the construction of Reclamation projects and facilities on the Colorado River. This is not a water right based on storage in a Reclamation project or delivery through a Reclamation facility. This is a water right for direct diversion from the Colorado River.

The Supreme Court characterizes the CRIT reserved water right as an allocation from the mainstream.

Arizona v. California

The water rights of the CRIT and the attributes of those rights were confirmed by the United States Supreme Court decision in 1963(*Az v Ca,* 373 U.S. 546 (1963) and the 1964 Decree.(*Az v Ca,* 376 U.S. 340 (1964)) This has carried forward to the 2006 Consolidated decree without change except to increase in the volume of water available for the CRIT use. (*Arizona v. California,* 547 U.S. 150, 158 (2006)

The United States prepared and presented claims on behalf of the CRIT in the litigation between the states of Arizona and California over the states' apportionment of the Colorado River. The United States claimed the right to **divert water flowing in the mainstream of the Colorado River** sufficient to satisfy the agricultural purpose for which the CRIR was established. This amount of water is quantified as sufficient water to irrigate all the practicably irrigable acreage on the Reservation. The Special Master and the Court agreed.(*Az. V. Ca.* 373 at 595 – 601)

The CRIT water right was quantified for present and future use by the CRIT. The holding of the Court and the Decree make clear that the CRIT water right is a right to directly divert water from the mainstream of the Colorado River, it is not based on storage in Lake Mead. It is different from contractual water rights to storage behind Hoover Dam as authorized in the Boulder Canyon Project Act.

The exact language of the Supreme Court confirming the water delivery to the CRIT from the mainstream is excerpted below.

> "The Government, on behalf of five Indian Reservations in Arizona, California, and Nevada, asserted **rights to water in the mainstream of the Colorado River.**" (emphasis added, *Az v Ca*, 373 U.S. at 595)

"The Master found both as a matter of fact and law that when the United States created these reservations [the five Indian reservations in the Lower Basin including the CRIR] or added to them, it reserved not only land but also the use of enough water **from the Colorado** to irrigate the irrigable portions of the reserved lands."(*Az v Ca,* 373 at 596)

"The Court in *Winters* concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless.... We follow [*Winters*] now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are "present perfected rights" and as such are entitled to priority under the Act."(*Az v Ca,* 373 U.S. 600)

"We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." (*Az v Ca,* 373 at 600)

The Decree also includes an injunction against the United States from delivering water other than as set forth in the Decree. This includes the CRIT reserved water right.

The United States is enjoined:
"From releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment named in this subdivision (D) except in accordance with the allocations made herein;

.....

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 719,248 acre-feet **of diversions from the mainstream** or (ii) **the quantity of mainstream water necessary to supply the consumptive use** required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less...." (*Az v Ca,* 376 at 341 and 344-45)

The Court held that the CRIT allocation is a Present Perfected Right and defined of "Perfected Right" as "water rights **created by the reservation of mainstream water for the use of federal establishments** under federal law whether or not the water has been applied to beneficial use...." (*Az v Ca,* 376 at 340)

The definition of "Present Perfected Rights (PPRs)" is perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act." (*Id.)*

<u>Non-Tribal Holders with Present Perfected Rights entered Contracts with the United States</u>

The CRIT do not hold a contract for delivery of water from Hoover Dam. Other holders of PPR's do have Reclamation contracts and those contracts permit the assessment of system losses. Reclamation asserted this authority in the contracts authorized under the Boulder Canyon Project Act and the contractors agreed with it.

At the time of the Boulder Canyon Project Act most water diversions were in California. The holders of PPRs, for the most part, entered contracts with the United States for delivery of water from storage behind Hoover Dam in Lake Mead as authorized in Section 5 of the Boulder Canyon Project Act. These contracts contain uniform terms and requirements in addition to the terms specific to the project repayment obligations.

First, each contract includes the exact language of the 1931 Seven Party Agreement with Reclamation.(*Available at: https://www.usbr.gov/lc/region/pao/lawofrvr.html#7pty)* The 1948 Hoover Dam compilation of laws and regulations notes that Reclamation, by regulation, also required at least two other standard provisions.

Using the Imperial Irrigation District (IID)as an example, Reclamation and IID entered the Contract for Construction of Diversion Dam, Main Canal, and Appurtenant Structures and for Delivery of Water with the United States on December 1, 1932 (IID 1932 Contract). The IID 1932 Contract includes the following two provisions that are also included in the other contracts with holders of PPRs in California.

The first provision confirms that the water for delivery to IID is water from Lake Mead, not that of a direct diversion from the River:

> [T]he United States shall from **storage available in the Boulder Canyon Reservoir [Lake Mead]**, deliver to the District each year at a point in the Colorado River... so much water as may be necessary to supply the District a total quantity" of its water right. (Art. 17 of the IID 1932 Contract)

The second common provision addresses the complete authority of Reclamation to regulate the amount of water delivered, which includes the authority to assess system losses.

> Rules and Regulations: There is reserved to the Secretary the right to prescribe and enforce rules and regulations not inconsistent with this contract, governing the diversion and delivery of water hereunder to the District and to other contractors. Such rules and regulations may be modified, revised and/or extended from time to time after notice to the District and opportunity for it to be heard....The District hereby agrees that in the operation and maintenance of its diversion works at [the point of diversion], all such rules and regulations will be fully adhered to. (Art. 24 of the IID 1932 Contract)

<u>Other Reclamation Contracts</u>

Reclamation entered a contract with the Metropolitan Water District of Southern California (1930 MWD Contract) in 1930 (amended in 1931) for delivery of water from storage in Lake Mead, referred to at the time as the Boulder Canyon Reservoir. The MWD Contract includes an almost exact version of the Rules and Regulations paragraph quoted above authorizing Reclamation to "prescribe and enforce" rules and regulations and the agreement of the contractor to adhere to them. (See 1930 MWD Contract at Paragraph (15))

In 1944 Reclamation entered a Contract with the State of Arizona for delivery of water from storage in Lake Mead to water users in the State.

The 1944 Contract with the State of Arizona at **Paragraph** 7(d) specifically addresses system losses.

> 7(d) The obligation to deliver water at or below Boulder Dam...shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

The Reclamation contract for construction and operation of the Central Arizona Project is subject to the terms of the 1944 Contract with the State of Arizona including Paragraph 7(d) quoted above. The original 1972 Reclamation Contract with the Central Arizona Water Conservation District states at Paragraph 8.7(b):

> The quantity of Colorado River water available under this contract for project purposes shall not exceed the quantity of water available to Arizona under the aforementioned Supreme Court Decree in Arizona v. California and in **Arizona's water delivery contract with the United States after first providing for satisfaction of:**
>
> **(i) present perfected rights** and perfected rights described in Ariticle II(D) of the Decree and the rights of other Federal reservations established prior to September 30, 1968....

This CAP contract provision confirms that the delivery of water to the CAP is subject to "reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act." (See 1944 Contract with Arizona). It is also subordinate to the CRIT water right which is a present perfected right.

Conclusion

The United States does not have the authority to assess system losses against the delivery of water to the Colorado River Indian Reservation. The water right for the Colorado River Indian Tribes is for the diversion of water from the mainstream and dates back to the establishment of the reservation in 1865.

Reclamation by contract has imposed restrictions on water users specifically related to the assessment of system losses as in the Arizona contract and through the requirement to abide

by rules and regulations adopted by Reclamation that is included in Reclamation contracts for delivery of water from Lake Mead.

The United States presented a claim on behalf of the CRIT before the Special Master in Arizona v. California for diversion of the water flowing in the mainstream of the Colorado River. This claim was accepted by the Special Master and the Court and the CRIT were allocated 719,248 acre-feet **of diversions from the mainstream** or (ii) **the quantity of mainstream water necessary to supply the consumptive use** required for irrigation of 107,903 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less. (This total is from *Az v Ca,* 547 U.S. 150, 158 (2006)

Reclamation knows the difference between a right to divert water delivered from storage in Lake Mead and the CRIT right to divert water directly from the mainstream with a measurement of the full water right at the point of diversion.

The CRIT water right is for diversion from the mainstream, it pre-dates any Reclamation projects on the River and the CRIT never entered a contract for delivery of water from storage in Lake Mead. Therefore, Reclamation does not have the authority to assess system losses against the CRIT water right.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Rebecca Loudbear
Attorney General

cc:
Tommy Beaudreau, Deputy Secretary
Sam Kuhn, Counselor to the Assistant Secretary for Indian Affairs
Lisa Lance, Solicitor
Robert Snow, Solicitor
Pamela Williams, Director, Secretary's Indian Water Rights Office

COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

26600 MOHAVE ROAD
PARKER, ARIZONA 85344
TELEPHONE (928) 669-9211
FAX (928) 669-1216

April 12, 2024

The Honorable Camille Touton
Commissioner of Reclamation
1849 C Street NW
Washington, DC 20240

Subject: Lower Colorado River Mainstream Evaporation and Riparian Evapotranspiration Losses Report (Dec 2023) and Outstanding Request for Confirmation there is no Authority for Involuntary Reduction of Senior Present Perfected Rights Acknowledged by Supreme Court in Arizona v. California.

Dear Commissioner Touton:

On October 26, 2022, in response to public statements by Reclamation that it was undertaking an analysis of evaporation and evapotranspiration (E&E) losses in the lower Colorado River, CRIT Attorney General Rebecca Loudbear forwarded to the Department an analysis of why, pursuant to the injunction issued by the Supreme Court in *Arizona v California*, Reclamation cannot reduce the amount of Colorado River water delivered to CRIT under its Present Perfected Right (PPR) to account for E&E losses. Since that time, Reclamation has finalized its report, yet there has been no response to Attorney General Loudbear's letter. I am therefore asking you to provide a formal response to Attorney General Loudbear's correspondence of October 26th, 2022 (attached hereto).

I understand and appreciate that, as Commissioner, you must undertake certain actions and studies in order to fully appreciate the suite of potential options for resolving the current crisis on the Colorado River. In that light, we did not oppose Reclamation when it announced development of the Lower Colorado River Mainstream Evaporation and Riparian Evapotranspiration Losses Report (Report) roughly two years ago. Instead, we informed you of our views regarding the inapplicability of reducing CRIT's water supply to account for system losses and requested your confirmation on our legal position.

While we appreciate the factual nature of the Report and Reclamation's position that "this report does make recommendations on how to account for system losses in the lower Colorado River mainstream," the simple reality is that the report implies that CRIT's water

rights could be reduced to address system losses by including the section of the river where CRIT's reservation is located in the analysis. Any such implication directly conflicts with the injunction issued by the Supreme Court, as Attorney General Loudbear's letter makes clear.

This is not the only forum in which our request that the department confirm the nature of our senior water rights is still outstanding. In the Near-Term Colorado River Operations draft and final EIS, Reclamation developed Alternative 2, which would unilaterally reallocate water supplies among water users without regard to priority date. CRIT commented through the NEPA process that Alternative 2 is in violation of the Supreme Court's permanent injunction in the decree regarding the recognition of PPRs during shortages and would be an illegal taking in violation of the 5th Amendment. CRIT also requested that Reclamation address its lack of authority for this alternative in the final EIS.

> Reclamation should clarify for this and all future actions on the Colorado River that it does not have the legal authority to take actions such as those embodied in alternative 2 because doing so would be in violation of the clear injunctive language of the Supreme Court in the Decree. *December 11, 2023 Comment Letter to Genevieve Johnson.*

Reclamation did not address our comment letter in its responses. Instead, Reclamation stated that Alternative 2 would not be taken forward for additional analysis given that the preferred alternative achieves a similar outcome on a voluntary basis. While we are pleased Alternative 2 was not taken forward, our comment letter and the question of Reclamation's authority to contemplate reallocation of water supplies away from CRIT remains unanswered.

We believe the failure to address both the senior nature of CRIT's water rights and the injunctive nature of the decree creates unnecessary confusion about what is, and is not, in the realm of possibility as we all work towards a post-2026 agreement for operating the Colorado River. Continuing to leave open this question is at odds with the Department's public statements about seeking inclusion of tribal nations in the process. Failing to acknowledge that the Supreme Court has prohibited the Department from reallocating water away from CRIT (and other PPRs) has also led to seriously flawed environmental analyses, in violation of NEPA. *See Nat. Res. Def. Council, Inc. v. Evans*, 279 F. Supp. 2d 1129, 1164 (N.D. Cal. 2003) (finding alternatives analysis inadequate where one alternative was "per se illegal" and therefore "a phantom option"). We therefore reiterate our request that Reclamation acknowledge it does not have the authority to involuntarily reallocate our water supplies and for you to cease any potential modeling exercises to the contrary.

We understand the seemingly endless number of issues facing all of us in the Colorado River Basin and I do appreciate your time and efforts in assisting CRIT. Nonetheless, raising questions about whether our senior PPR water rights can be reduced through either system losses or by involuntary reallocation and then ignoring CRIT's legal objections to this approach

for 18 months is troubling and unnecessarily dampens the otherwise strong relationship between our two sovereign nations.

I look forward to the department's response.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Amelia Flores
Chairwoman

cc: Tribal Council
Honorable Katie Hobbs
Tom Buschatzke
J.B. Hamby
John Entsminger

COLORADO RIVER INDIAN TRIBES

Colorado River Indian Reservation

26600 MOHAVE ROAD
PARKER, ARIZONA 85344
TELEPHONE (928) 669-9211
FAX (928) 669-1216

June 28, 2024

The Honorable Deb Haaland
Secretary
Department of the Interior
1849 C Street NW
Washington, DC 20240

Subject: Bureau of Reclamation's Post 2026 Process for Colorado River Operations

Dear Secretary Haaland:

Thank you for meeting with me on Saturday, May 18th while you were at the Salton Sea. As we discussed, the Bureau of Reclamation (Reclamation) is undertaking a technical analysis evaluating the involuntary reduction of water supplies for all water users in the lower Colorado River without regard to priority date. As you may recall from your trip to CRIT last month for signing documents required under the Colorado River Indian Tribes Water Resiliency Act of 2022, CRIT's water rights have a priority date as early as 1865 and are among are the most senior on the lower Colorado River. Therefore, when Reclamation is modelling reductions for all water users regardless of priority date, they are evaluating the involuntary reduction of our water rights. Our tribal economy is based on agriculture and taking away our water will harm our members economically and limit the services our tribal government can provide for their well-being.

CRIT's water rights were confirmed by the Supreme Court in the decree from *Arizona v. California,* 547 U.S. 150 (2006). The analysis Reclamation is undertaking contemplates operational scenarios that violate the decree. Specifically, the decree enjoins Reclamation from operating federal facilities on the lower Colorado River, except as provided in the decree itself. And the decree specifies how to operate these federal facilities when there is a shortage by directing the United States to meet senior rights first. By evaluating scenarios that do not reflect the plain language of the Supreme Court, Reclamation is in violation of the decree. For additional information and detail, I am attaching copies of our most recent correspondence to the Department in this matter. We have yet to receive a reply.

Our tribal rights are for all time. They are the realization of a sacred bond between our two nations of what is necessary to maintain our homelands and provide for future generations.

Taking our water is the same as taking our lands, for without water, our lands cannot provide for our future.

While we understand undertaking a technical analysis does not constitute final agency action, that Reclamation is even contemplating such an operation violates this bond and creates a troubling precedent that tribal rights are potentially at risk of involuntary reduction for the benefit of junior users anytime there are shortages.

We understand the Colorado River is facing unprecedented challenges. But we also believe there are tools, such as our recently enacted legislation, where tribal nations can be part of the solution. Such an outcome is far preferable to what Reclamation is evaluating.

I am thankful for your commitment to review this matter and I look forward to your reply.

Sincerely,

COLORADO RIVER INDIAN TRIBES

Amelia Flores
Chairwoman

cc: Tribal Council