



United States Department of the Interior

BUREAU OF RECLAMATION
Lower Colorado Regional Office
P.O. Box 61470
Boulder City, NV 89006-1470

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Honorable Timothy Williams
Chairman
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363

**Subject: Calendar Year 2011 Inadvertent Overrun and Payback Policy (IOPP) Payback
Obligation for the Fort Mojave Indian Tribe (Tribe) in California**

Dear Chairman Williams:

It was a pleasure meeting you at the Colorado River symposium in Santa Fe, New Mexico, on September 22, 2011. We appreciated the opportunity to meet with you and Mr. John Algots during the symposium to discuss the IOPP.

Over the course of the last several months, in an effort to seek resolution of the issues relating to the Tribe's 2011 IOPP payback obligation, the Bureau of Reclamation has examined the Tribe's past use of Colorado River water and has reflected upon the Tribe's concerns expressed in the letter to Reclamation dated June 1, 2011. Reclamation has also engaged in multiple discussions with the Bureau of Indian Affairs (BIA) which plays a key role under 43 CFR Part 417 in the administration of Colorado River water use on Indian reservations. From this extended review and from these discussions, Reclamation has determined that unusual circumstances exist which support a reassessment of the Tribe's 2011 payback obligation.

Reassessment of the Tribe's 2011 Payback Obligation

First, communication between Reclamation and the Tribe with respect to the Tribe's 2011 water order has been less than optimal. Reclamation acknowledges that the Tribe submitted a water order in September of 2010 that was not challenged at the annual 43 CFR Part 417.5 consultation in October of 2010. Reclamation notes, however, that the BIA letter of November 16, 2010, approving estimated 2011 tribal diversions of Colorado River water indicated that the quantity for the Fort Mojave Indian Reservation in California was "To Be Determined." Reclamation acknowledges that the Tribe's water order was erroneously reflected as approved on Reclamation's website in mid-February.

Second, communication between Reclamation and the Tribe with respect to the approval of the Tribe's 2011 payback plan has also been less than optimal. Reclamation acknowledges that the Tribe submitted a payback plan to Reclamation in November 2010, but did not receive a notice that the plan was unacceptable until a point in time where increasing the amount of payback for

2011 was problematic for the Tribe. Reclamation notes that an earlier submission of the payback plan would have been preferable. Reclamation's letter of March 17, 2011, indicating the Tribe's payback plan for 2,255 acre-feet was unacceptable, was then reflected in the BIA letter of March 28, 2011, approving a water diversion estimate for the Tribe for 2011 of 12,163 acre-feet (16,720 acre-foot entitlement minus Reclamation determined payback of 4,557 acre-feet), short of the 14,465 acre-feet requested by the Tribe for the reservation lands in California which anticipated a payback of 2,255 af (16,720 acre-foot entitlement minus Tribal view of payback of 2,255 acre-feet).

The procedures to administer the IOPP, including the respective roles and interplay of Reclamation, the BIA, entitlement holders, and the IOPP Technical Committee and the development of practical timelines, were evolving during the years in question and may well have contributed to a lack of effective communication relating to the appropriate accounting for the Tribe's 2009 water use. Because of these unusual circumstances, Reclamation believes it is appropriate to establish the Tribe's payback obligation for 2011 at 2,049 af.¹

It is important to emphasize that the set of circumstances described above is very unlikely to occur again and thus very unlikely to serve as the basis for reassessing a future payback obligation. By letter dated August 25, 2010, Reclamation sought input from Colorado River stakeholders, including the Tribe, when drafting procedures to administer the IOPP. The provisional procedures, under which Reclamation is now operating, include a table of due dates for IOPP actions to ensure adequate time is provided for an entitlement holder to submit a payback plan that meets the established requirements, and for Reclamation to review and comment upon such plans. Please note, for example, that under these procedures a payback plan is due by July 1 of the year before a payback is required, and any modifications to an approved payback plan are due by April 30 of the year in which a payback is being made.

In deciding to reassess the Tribe's 2011 payback obligation, Reclamation has taken into account the Tribe's good-faith efforts, with the exception of 2009, to work with Reclamation and the BIA both in the 43 CFR Part 417 process and in the implementation of the IOPP to bring water use on the Tribe's California reservation lands within its entitlement, and to otherwise make all required paybacks. Reclamation has further taken into account that the implementation of the IOPP is fairly new, and that Reclamation had limited operational experience administering the IOPP.

Reclamation's Response to the Tribe's Comments in its June 1, 2011, Letter

Reclamation values its ongoing relationship with the Tribe. As with any collaborative relationship, open communication is the key to success and it would be helpful to address some of the comments in your letter of June 1, 2011, in order that the Tribe might better understand Reclamation's position.

¹The 2009 Water Accounting Report indicated that the Tribe had a 2009 diversion of 18,138 af. Subsequent to the publication of the report, Reclamation found an error in the data reported for the California 2 -West Pipe gage that measures diversions to the Tribe's California reservation. Correcting the error resulted in a 206 acre-foot reduction in the Tribe's 2009 diversion and a corresponding reduction in the Tribe's 2009 overrun amount and payback obligation. The payback obligation noted above incorporates this correction.

The letter indicated a belief that the IOPP was developed by and for the benefit of state water agencies and that the Tribe had not been provided an opportunity to participate in its development. In Reclamation's view, the IOPP benefits all Colorado River water entitlement holders by creating flexibility in river management. Our records indicate that, during the preparation of the Environmental Impact Statement for the *Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (EIS), Reclamation initiated a government-to-government consultation by memorandum dated April 26, 2001, to 55 Native American representatives. The Tribe responded with a request to be placed on the distribution list for the EIS and Reclamation complied. The Tribe later filed comments on the draft EIS but did not specifically address the provisions of the draft IOPP. Reclamation participated in a government-to-government consultation on June 26, 2002, with multiple tribes including the Tribe.

The letter further indicated a belief that the Tribe's rights under the 1964 Decree in *Arizona v. California* are not subject to the administration of 43 CFR Part 417, under which Colorado River water orders are approved. Please note that the legal basis for these Federal regulations is both the Boulder Canyon Project Act, under which water delivery contracts are issued, and the 1964 Decree. 43 CFR Part 417 is a protection for all who hold entitlements to Colorado River water because it is designed to ensure that no entitlement holder diverts and consumes water in excess of reasonable and beneficial use.

Finally, Reclamation notes that the Tribe operated in 2009 under the apparent assumption that a payback obligation could be put off during a year in which market conditions encouraged the diversion of water. This is simply not the case. Section 6 of the IOPP sets forth the number of years within which an overrun must be paid back and the minimum payback required for each year. The extent to which an entitlement holder implements an approved payback plan to meet a required payback obligation cannot depend upon the unpredictability of the marketplace.

Revised 2011 Payback Plan and the Tribe's Diversion Request

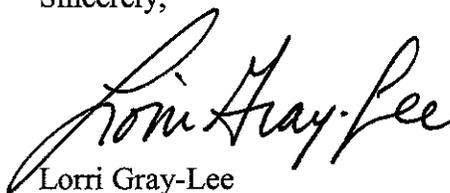
The IOPP requires an entitlement holder with a payback obligation to submit to Reclamation, for approval, a payback plan showing how the entitlement holder will intentionally forgo use of Colorado River water by extraordinary conservation measures. The extraordinary conservation measures must be sufficient to meet the payback obligation. An entitlement holder must have an approved payback plan in order to have any conservation created through implementation of the measures described therein applied towards a payback obligation.

The Tribe's 2011 Payback Plan was not approved. Reclamation requests the Tribe submit a revised payback plan describing the extraordinary conservation measures implemented by the Tribe during 2011 and the amount of conservation that will be created from these measures. If the Tribe anticipates the extraordinary conservation measures implemented during 2011 will not fully extinguish the Tribe's remaining payback obligation as established in this letter, the revised payback plan should note this and include a description of additional conservation measures that will be implemented in 2012 to pay back any remaining overrun balance. In accordance with 43 CFR Part 417, it is also recommended that the Tribe submit a revised 2011 diversion request to the BIA, reflecting the Tribe's estimated diversions for 2011 and the revised 2011 payback plan.

Reclamation appreciates the Tribe's willingness to engage in discussions on the issue of the 2011 payback of a previous inadvertent overrun and looks forward to working with you and your staff to develop practices which will reduce the likelihood of future overruns and increase the likelihood of prompt payback. As discussed with you on September 22, 2011, we look forward to consulting with the Tribe on the IOPP procedures before they are finalized.

Should you have questions, please contact Mr. Steven C. Hvinden, Chief, Boulder Canyon Operations Office, at 702-293-8414.

Sincerely,



Lorri Gray-Lee
Regional Director

cc: Mr. Bryan Bowker
Regional Director
Bureau of Indian Affairs
Western Regional Office
2600 N. Central Ave. 4th Floor
Phoenix, AZ 85004-3050

Ms. Catherine Wilson
Supervisory Water Rights Specialist
Bureau of Indian Affairs
Western Regional Office
2600 N. Central Ave. 4th Floor
Phoenix, AZ 85004-3050

Ms. Janice Staudte
Superintendent
Colorado River Agency
Bureau of Indian Affairs
12124 First Avenue
Parker, AZ 85344

Mr. John Algots
Director
Department of Physical Resources
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299

Mr. Christopher Harris
Acting Executive Director
Colorado River Board of
California
770 Fairmont Avenue, Suite 100
Glendale, CA 91203-1035

Ms. Sandra A. Fabritz-Whitney
Director
Arizona Department of Water Resources
3550 North Central Avenue
Phoenix, AZ 85012-2105

Ms. Jayne Harkins
Executive Director
Colorado River Commission of
Nevada
555 East Washington Avenue, Suite 3100
Las Vegas, NV 89101-1065

Honorable Shan Lewis
Vice Chairman
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299

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Honorable Martha McCord
Council Member
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299

Honorable Nichole Garcia
Council Member
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299

Honorable Norvin McCord
Council Member
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299

Honorable Colleen Garcia
Secretary
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299

Honorable Linda Otero
Council Member
Fort Mojave Indian Tribe
500 Merriman Avenue
Needles, CA 92363-2299