

CHAPTER 11

COMMENTS AND RESPONSES

INDEX OF COMMENT LETTERS

Federal Agencies

<i>Abbreviation</i>	<i>Organization</i>	<i>Name</i>
EPA	United States Environmental Protection Agency	Lisa Hanf, Federal Activities Office, Cross Media Division
BIA	United States Department of the Interior, Bureau of Indian Affairs	Acting Regional Director
FWS	United States Department of the Interior, U.S. Fish and Wildlife Service	David Harlow, Field Supervisor
NPS	United States Department of the Interior, National Park Service	William Jackson, Chief, Water Operations Branch
IBWC	International Boundary and Water Commission, United States Section	Sylvia Waggoner, Division Engineer, Environmental Management Division

Tribal Governments

<i>Abbreviation</i>	<i>Organization</i>	<i>Name</i>
AT	San Carlos Apache Tribe, Yavapai-Apache Nation, Tonto Apache Tribe	Robyn L. Kline; Sparks, Tehan & Ryley, P.C.; Attorneys for the San Carlos Apache Tribe, Yavapai-Apache Nation, and Tonto Apache Tribe
CRIT	Colorado River Indian Tribes	Daniel Eddy, Jr., Tribal Council Chairman
FMIT	Fort Mojave Indian Tribe	Tod J. Smith, Whiteing & Smith, Attorneys for the Fort Mojave Indian Tribe
NN	Navajo Nation Department of Justice	Stanley M. Pollack, Water Rights Counsel
QT	Quechan Indian Tribe	Mason D. Morisset; Morisset, Schlosser, Jozwiak & McGaw; Attorneys for the Quechan Indian Tribe
TM	Torres Martinez Band of Desert Cahuilla Indians	Les W. Ramirez, Special Counsel for Water Resources & Environmental Affairs

State Agencies

<i>Abbreviation</i>	<i>Organization</i>	<i>Name</i>
ADWR	Arizona Department of Water Resources	Thomas Carr, Chief, Colorado River Management Section
AGFD	State of Arizona Game and Fish Department	Duane L. Shroufe, Director
APA	Arizona Power Authority	Douglas V. Fant
CA STATE	State of California, Governor's Office of Planning and Research, State Clearinghouse	Terry Roberts, Director, State Clearinghouse
CRB	State of California, Colorado River Board of California	Gerald R. Zimmerman, Executive Director
CRWQCB	California Regional Water Quality Control Board, Colorado River Basin Region	Teresa Newkirk, Senior Environmental Scientist
CWCB	State of Colorado, Colorado Water Conservation Board	Rob Kuharich, Director
SNWA	Southern Nevada Water Authority	David Donnelly, Deputy General Manager, Engineering/Operations
WSE	Wyoming State Engineer's Office	Patrick T. Tyrell, State Engineer

Local Agencies

<i>Abbreviation</i>	<i>Organization</i>	<i>Name</i>
IC	County of Imperial	Antonio Rossmann, Special Counsel to the County of Imperial
PVID	Palo Verde Irrigation District	Roger Henning, Chief Engineer

Interested Organizations and Individuals

<i>Abbreviation</i>	<i>Organization</i>	<i>Name</i>
DW	Defenders of Wildlife, Environmental Defense, Friends of Arizona Rivers, Living Rivers, National Audubon-California, National Wildlife Federation, Pacific Institute, Sierra Club, and Southwest Rivers	Kara Gillon (Defenders of Wildlife), Jennifer Pitt (Environmental Defense), Timothy Flood (Friends of Arizona Rivers), Lisa Force (Living Rivers), J. William Yeates (Attorney for National Audubon-California), Kevin Doyle (National Wildlife Federation), Michael Cohen (Pacific Institute), Steve Glazer (Sierra Club), Pamela Hyde (Southwest Rivers)
IED	Irrigation and Electrical Districts Association of Arizona	Robert S. Lynch, Asst. Secretary/Treasurer
ZARBIN	-	Earl Zarbin
ANON	-	Anonymous

FEDERAL AGENCIES

The proposed QSA is an agreement among the California Parties for distribution and use of Colorado River water for a period of up to 75 years. The QSA and IA are integral to the successful implementation of California's Draft Colorado River Water Use Plan (CA 4.4 Plan) which was developed to ensure California limits its annual use of Colorado River water, starting in year 2016, to no more than its legal allocation of 4,400,000 af per year in normal water years. The QSA involves a series of nine water transfers, water exchanges, water conservation measures and other changes, including the Imperial Irrigation District (IID)/San Diego County Water Authority (SDCWA) Water Conservation and Transfer Project (IID/SDCWA Water Transfer). The potential environmental impacts of the QSA and IID/SDCWA Water Transfer are addressed in separate environmental impact reports/environmental impact statements. EPA will be providing comments on both of these actions and their environmental documentation.

We endorse the effort to reduce Southern California's historic use of Colorado River water to California's legal apportionment of 4.4 million acre-feet per year (maf/yr) while minimizing the adverse effects on urban and industrial water use. We commend the Bureau, California, and the other six basin states for their efforts to address the water supply limits in the Colorado River Basin. The reduction of unused apportionment and increased development in both the upper and lower basins, clearly demonstrate the potential for significant water scarcity and the need for long-term strategies to address future shortages. We recognize and support the efforts to provide flexibility to meet California's Colorado River allocation goals while ensuring adequate water supply reliability for all beneficial uses. We acknowledge and are encouraged by the shifts in water policy, management, and planning for water resources in California.

Although the IA, QSA, and IID/SDCWA Water Transfer are inextricably linked; the comment deadlines dates for these actions are sequential, making it difficult for the public, local, state, and Federal entities to provide comprehensive comments on these actions. We continue to recommend that the comment deadline dates for the three projects be more closely aligned. Our goal is to help ensure comprehensive disclosure of critical issues, concerns, and adverse impacts; and avoidance and minimization of potential impacts on the environment and other secondary and third parties.

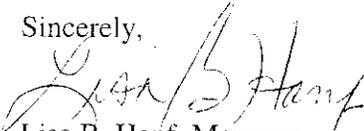
EPA-1

We note that execution of the IA enables the QSA and IID/SDCWA Water Transfer and that the three projects are clearly connected actions [40 CFR 1508.25(a)(1)]. Since the IA enables the other two projects, it also provides tacit endorsement of the potential impacts of the QSA and IID/SDCWA Water Transfer actions. Although our review of the DEIR for the QSA and DEIS for the IID/SDCWA Water Transfer is not yet complete, we may have significant concerns regarding potential impacts of implementation of these actions and significant information gaps in the environmental documentation. These concerns will be described in detail in our subsequent comments on the QSA DEIR and IID/SDCWA Water Transfer DEIS.

Our current comments are in response to the evaluation of potential impacts of implementation of the IA and IOP which focuses on the impacts to the Lower Colorado River caused by the change in point of delivery and implementation of biological conservation measures. Of major concern are possible impacts to water quality, biological resources, and

Indian tribes. We also remain significantly concerned with the potential cumulative impacts of the IA, IOP, QSA, associated water transfers, and the interim surplus guidelines (which affects the quantity and timing of releases from Lake Mead) on water quality constituents (e.g., perchlorate, selenium) and the increased probability of more frequent and higher magnitude water shortages for other users of Lower Colorado River water (see Detailed Comments).

Because of the above significant concerns, we have rated the DEIS as EC-2, Environmental Concerns - Insufficient Information (see attached "Summary of the EPA Rating System"). Detailed comments are enclosed. We appreciate the opportunity to review this DEIS. Please send three copies of the final EIS to our office when it is officially filed with our HQ EPA Office of Federal Activities. If you have any questions, please call Laura Fujii, of my staff, at 415-972-3852, email: fujii.laura@epa.gov.

Sincerely,

Lisa B. Hanif, Manager
Federal Activities Office
Cross Media Division

Enclosure: Detailed Comments (9 pages)
Summary of the EPA Rating System
Tribal Consultation Executive Order

MI003639

Filename: BORIAQSAdeis.wpd

cc: William Rinne, BOR
Carol Roberts, USFWS
Charles Fisher, IBWC
Charles Keene, CA DWR
Phil Gruenberg, RWQCB
Patricia Port, DOI
Tom Kirk, Salton Sea Authority
Arizona and California Ecological Services Field Offices, USFWS
Water Resources Division, USGS, Yuma, AZ
Sacramento and Phoenix Area Offices, BIA
Elston Grubaugh, IID
Potentially affected Indian tribes

DETAILED COMMENTS

Water Quality Comments

Perchlorate

EPA is very concerned with the potential cumulative impacts of the proposed Implementation Agreement (IA) and related actions on perchlorate concentrations and distribution within Lake Mead and below Hoover Dam in the Colorado River. Perchlorate is of grave concern because of its potential adverse health effects. EPA considers perchlorate to be a water contaminant and is in the process of developing information that would support a specific regulatory level. Perchlorate has been on the Contaminant Candidate List for several years. As of January 2001, perchlorate was included in EPA's nationwide "Unregulated Contaminant Monitoring Requirement" for public water supplies, with a method detection level of 4 parts per billion (ppb). Nearly every sample of Colorado River water from the Las Vegas Wash to the Mexican border has exceeded 4 ppb for the last three years. This level of perchlorate is of concern because of the increased use of Colorado River water for urban use.

The California Department of Health Services (CA DHS) has recently lowered the State Action Level for perchlorate in drinking water to 4 ppb requiring water agencies to notify public officials if this level is exceeded. As the first step in developing an enforceable Primary Drinking Water Standard for California, the California Office of Environmental Health Hazard Assessment has begun accepting public comments on a draft Public Health Goal of 6 ppb for perchlorate in drinking water supplies. EPA's National Center for Environmental Assessment recently published a draft Toxicity Health Assessment recommending a dose of approximately 1 ppb as a safe level for perchlorate in drinking water. Analytical methods to reliably detect perchlorate below 4 ppb are in development for general use. The February 22, 2002 sample of the Colorado River immediately below Hoover Dam had 8 ppb of perchlorate, well above the current detection limit.

Recommendations:

We strongly recommend the IA Final Environmental Impact Statement (FEIS) provide data on the possible levels of perchlorate in Colorado River water diverted for domestic drinking water use. If no data is available, we urge Reclamation, the California Parties, and other Colorado River interests work together to develop and implement monitoring and research programs to obtain this data. The FEIS should describe existing or planned actions to obtain additional information on levels of perchlorate in Colorado River water.

We believe effective monitoring and remediation of perchlorate is needed. In the past, the US Geological Service (USGS) has provided adequate sampling and monitoring. The USGS monitoring program has been severely reduced as of October 2000 due to lack of funding. We understood that Reclamation intended to

EPA-2

contact the USGS regarding resumption of the monitoring program. The FEIS should state whether Reclamation has been able to sponsor the USGS monitoring program.

EPA-2

EPA has a vested interest in the perchlorate remediation program and in assuring the monitoring program has an adequate level of quality assurance. Please contact Kevin Mayer, Region 9 EPA, Northern California Cleanup Section, Superfund Division at 415-972-3176, email: Mayer.Kevin@epa.gov, regarding the proposed monitoring program and perchlorate remediation program.

Tribal Resources and Consultation and Coordination with Indian Tribal Governments

1. A total of thirty-five Indian Tribes could be affected by the proposed action and related actions: five tribes on the lower Colorado River, six tribes in the Salton Sea watershed, six tribes that use or may be affected by the Central Arizona Project, and 18 tribes within San Diego County. These Tribes have a major interest in water allocation, water use, and water quality within the region. For example, the Northern San Diego County Tribes water rights settlement allocate them rights over water from water conservation practices, and the Cocopah and Quechan Tribal groups have a major interest in restoration of the lower Colorado River Delta. The DEIS did not provide evidence that these tribes have been consulted or that potential impacts to tribal resources have been fully evaluated.

EPA-3

We note that the DEIS only evaluated the potential direct effects of Federal actions (e.g., IA) on tribal resources and did not address the indirect effects which would occur within the service areas of the participating non-Federal agencies (e.g., IID water conservation measures) (pg. 3.10-1). Although Reclamation may have limited control over these effects, the execution of the IA would enable these other actions to take place. Reclamation has a duty to evaluate potential direct and indirect impacts to tribal resources [40 CFR 1508.8(b)].

Recommendation:

We strongly recommend that all potentially affected Indian Tribes be consulted on a government-to-government basis pursuant to the Executive Order on Consultation and Coordination with Indian Tribal Governments (enclosed). For assistance with Arizona Tribes, you may contact James Fletcher, Region 9 EPA, State, Tribal, and Municipal Programs Office, 619-235-4763 (place-based in San Diego, CA) and Daniel Pingaro, Indian Programs Office, 415-972-3782. For assistance with California Tribes, you may contact Clancy Tenley, Manager of the Indian Programs Office, 415-972-3785.

2. The DEIS predicts a 5% loss of power generation at the Bureau of Indian Affairs' (BIA) Headgate Rock Dam due to the reduction in river flows. Although this reduction would not affect the ability to meet current needs, it would affect BIA's ability to meet future tribal power needs. Reclamation has concluded that power generation is not an Indian Trust Asset and has not

EPA-4

proposed mitigation or compensation for this power loss. While the power loss may not be an Indian Trust Asset, the proposed action will still adversely affect BIA's ability to meet their trust responsibilities to the affected tribes.

EPA-4

Recommendation:

We urge Reclamation to work with BIA and the affected tribes to minimize and mitigate the loss of power at Headgate Rock Dam for tribal purposes. Options that could be explored include the development of alternative power sources or compensation to BIA and the tribes paid by beneficiaries of the action.

3. Nearly 12,000 acres of the Torres Martinez Reservation lies under the existing Salton Sea and would be exposed sooner under the proposed action. The DEIS speculates that this land may be suitable for agriculture or other purposes, such as recreational uses, and could be developed by the Torres Martinez Indians (pg. 3.4-8). We note that this statement is contrary to the statement that the level of dust emissions from exposed sediments would be contingent upon the amount of human disturbance of these exposed soils (pg. 3.11-4).

EPA-5

Given the designation of the Salton Sea as a repository for agricultural drainage water which may contain selenium, metals, perchlorate, pesticides and other contaminants; EPA questions the ability to utilize exposed land. The Salton Sea has been sustained by agricultural drainage water for more than 60 years. Constituents of this water are not well known and may contain hazardous materials. In addition, it is believed that a large portion of the constituents may be deposited in the form of sediments in the Salton Sea.

Recommendation:

A significant amount of research and data collection is required before making a determination on the use of and potential impacts from exposed Salton Sea sediment. We recommend the FEIS describe existing research on Salton Sea sediment and the efforts to obtain more data. For instance, the Regional Water Quality Control Board has recently entered into an agreement with the Torres Martinez Band to conduct water quality sampling and sediment analysis for various constituents. If information in the IID/SDCWA Water Transfer DEIS is referenced, the IA FEIS should contain a summary of the evaluation, conclusions and mitigation measures proposed in the IID/SDCWA document.

4. The DEIS indicates there is the potential for adverse impacts to population trends and employment from decreased water levels and water quality of the Salton Sea (Table ES-1, pg. ES-28). The evaluation also states that while the loss of employment opportunities would have social consequences, it would not constitute a substantive change to the environment and a discussion of potential measures to minimize these socioeconomic impacts is not provided.

EPA-6

Recommendation:

The Torres Martinez Band of Desert Cahuilla have always lived in this region and would be less able to relocate for employment. Therefore, we believe an evaluation of potential measures to reduce socioeconomic impacts is important, even though these impacts may not constitute a substantive change to the environment. We urge Reclamation and project beneficiaries work with affected tribes in minimizing potential socioeconomic impacts caused by adverse effects on the Salton Sea.

EPA-6

Air Quality Comments

1. The DEIS states that the surface elevation of the Salton Sea is expected to decline under both the No Action and Proposed Action alternatives, exposing currently inundated lands. Under the Proposed Action, the shoreline would recede at a faster rate than under No Action. The evaluation of potential air quality impacts states that exposed Salton Sea sediments would dry with a crust covering which would minimize the ability of winds to generate dust emissions. Thus, the DEIS appears to conclude that the level of dust emissions would be dependent upon the amount of human disturbance of these exposed soils (pg. 3.11-4).

EPA-7

EPA is concerned with the above assumption that the exposed lake bed, caused by reduced inflows to the Salton Sea, would dry and form a crust covering which would minimize the ability of winds to generate dust emissions. EPA believes that the crust formed may breakup under natural events similar to the Owens dry lake bed in California. These natural events could come from ground water evaporation, surface moisture, or rain. These events can cause the surface to crack and, when exposed to wind, will contribute to PM-10 emissions. The Owens dry lake bed is approximately 105 square miles of which 35 square miles are highly emissive. Crust formations do accrue upon the Owens dry lake bed that can sustain the weight of a car. As the weather changes, these surfaces break up and cause the worst PM-10 emissions in the United States.

EPA has significant concerns regarding potential air quality impacts of exposed Salton Sea sediment. This concern is increased by the lack of information and data regarding constituents of the sediments and its potential behavior when exposed to high winds and human disturbance.

Recommendations:

We strongly recommend that Reclamation and the California Parties initiate a study to determine the durability and sustainability of crust formations on the exposed Salton Sea shoreline. A description of proposed data collection actions should be fully disclosed in the IA FEIS and environmental documentation for the QSA and IID/SDCWA Water Transfer. We note that the composition of the sediments and weather patterns may vary along the shoreline and affect crust formation. This fact should be considered when designing the crust formation

study. The IA FEIS should also evaluate possible control measures for the newly exposed shoreline. Control measures could include, but are not limited to, the introduction of native plants to provide ground cover. Human disturbances along the exposed shore line should also be addressed as they too can contribute to PM-10 and dust emissions.

EPA-7

We also recommend that the IA FEIS contain a detailed summary of the air quality evaluation, conclusions, and proposed mitigation measures provided in the IID/SDCWA Water Transfer DEIS. We believe it is especially important to describe various air quality mitigation options for affected tribal land since this land is considered an Indian Trust Asset.

2. EPA believes that it is important and appropriate that the IA FEIS address the new eight-hour ozone standard and the new "fine" particulate matter standard (PM2.5). Although EPA has not designated nonattainment areas for either of these standards, we believe these standards may have bearing on the proposed action and the projects it will enable. Because the eight-hour ozone standard is more stringent than the one-hour ozone standard, it is likely that parts of the project area would be designated as a nonattainment area for the eight-hour ozone standard, possibly within the time frame of the proposed action. Therefore, it would be useful, and appropriate under the public disclosure requirements of NEPA, to include a discussion of the implications of the new eight-hour ozone standard with respect to the execution of the IA, QSA, and IID/SDCWA Water Transfer. EPA recognizes the serious health effects that "fine" particulates can cause, and, therefore, urges project proponents to reduce particulate emissions to the greatest extent possible. This is particularly important where the project will impact sensitive receptors, such as children and the elderly.

EPA-8

Recommendations:

In its discussion of air quality impacts the IA FEIS should address the following:

Affected Environment

- Include a discussion of the new eight-hour ozone standard, as well as the new PM2.5 standard. To the extent that monitoring data is available on these two criteria pollutants, include that information in the EIS.

Construction

- Reduce the use of diesel-powered equipment.
- Specify the duration and concentration of air emissions by pollutant and location for each phase of project construction.
- Identify sensitive receptors in the project area, such as children, elderly, infirm, and athletes, and schedule construction to minimize impact to these populations.
- Include mitigation measures that detail how diesel emissions will be minimized for each phase of project construction. For example, require contractors to keep the equipment fine-tuned or use alternative fueled vehicles.
- Include a fugitive dust control plan.

- Address how traffic congestion related to project construction can contribute to increased levels of carbon monoxide, especially at already congested intersections. EPA-8

3. Federal agencies are required by the Clean Air Act to assure that actions conform to an approved air quality implementation plan. EPA-9

Recommendation:

If the proposed project area is in a nonattainment area, Reclamation may need to demonstrate compliance with general conformity requirements of the Clean Air Act [Section 176(c)]. General Conformity Regulations can be found in 40 CFR Parts 51 and 93 (58 Federal Register, page 63214, November 30, 1993). These regulations should be examined for applicability to the proposed actions. The IA FEIS should clearly state whether a conformity determination is required and, if yes, provide a copy of the determination in the FEIS.

Biological Resources Comments

1. Biological conservation measures include restoration or creation of 44 acres of backwaters along the Colorado River between Parker Dam and Imperial Dam. While selenium levels in the Lower Colorado River may be below the Department of Interior level of concern of 5 micrograms per liter (ug/l), backwater areas could act as a sink for selenium which may then become an issue due to its bioaccumulation up the food web. We note that the level of concern is being re-evaluated and may be lowered to 2 ug/l. EPA-10

Recommendation:

We recommend the IA FEIS evaluate the potential for selenium to accumulate in the proposed backwater areas. If there is potential for adverse impacts, specific backwater design criteria to minimize the problem should be explored or mitigation measures provided.

2. Under the No Action alternative, the DEIS states that Colorado River flows, and therefore water levels, from Hoover Dam to Imperial Dam would likely be lower than historic conditions, since surplus and unused apportionment waters would not be available (pg. 3.2-14). However, since these changes would be consistent with what is allowed under the current legal framework of the Law of the River, potential biological impacts are not disclosed. EPA-11

Recommendation:

We recommend Reclamation consider providing an evaluation of potential impacts to biological resources which may be caused by the reduction of flows under the No Action alternative. Although these changes may be within the framework of the Law of the River, the reduction in flows could result in a loss of backwaters and riparian areas critical to maintenance of sensitive, threatened, and endangered species.

Water Supply Comments

EPA-12

EPA remains concerned with the probability of more frequent and higher magnitude water shortages to other users of Lower Colorado River water caused by cumulative effects of the interim surplus guidelines, IA, QSA, the proposed water transfers, and build out of the upper and lower basins. For instance, adequate water supply for the Central Arizona Project (CAP) could be significantly reduced since it has the lowest priority water rights. Thus, the CAP would be the first to experience shortages and could be reduced to zero allocation prior to shortages for other higher priority users.

The Interim Surplus Guidelines FEIS indicated that forbearance arrangements made by the Lower Division states and individual contractors were being considered to address potential increased shortages for specific users (pg. 2-13, Interim Surplus Guidelines FEIS). For instance, California had proposed reparation to Arizona for increased shortages (pg. B-232, responses to comment letter 56).

Recommendation:

We recommend Reclamation provide information in the IA FEIS on these potential reparation and/or forbearance agreements and commit to facilitating the development of mitigation measures for potential increased water supply shortages.

National Environmental Policy Act Comments

EPA-13

The range of alternatives evaluated in the DEIS is very limited, including only the Proposed Action and No Action (executing the IA or not executing the IA). Execution of the IA would enable the QSA and its associated IID/SDCWA Water Transfer. It is our understanding that the environmental documentation for these projects evaluate a number of alternatives which would also require Secretarial approval for a change in delivery point and water use. If this is the case, it is not clear why Reclamation has not included these other potential alternatives in its range of alternatives for the IA.

Recommendations:

The IA FEIS should justify Action and No Action as a reasonable range of alternatives pursuant to NEPA [40 CFR 1502.14(a) and (c)]. Commitments to future environmental documentation, if any, should be clearly stated.

We also recommend the FEIS evaluate what actions and projects could go forward without the IA, QSA, and Interim Surplus Guidelines. For instance, it is our understanding that the IID/SDCWA water transfer, as originally formulated in the 1998 IID/SDCWA water transfer agreement, could still move forward without the QSA. Furthermore, surplus water, albeit under more constrained conditions, could still be declared by the Secretary without the Interim Surplus Guidelines.

Comments Specific to Implementation of an Inadvertent Overrun and Payback Policy

EPA-14

Given the growing need to ensure a sustainable balance between existing water supplies and demand, EPA supports the effort to define inadvertent overruns, establish accounting procedures, and define payback requirements. We believe payback of the water overruns, as soon as possible (e.g., in the next calendar year), regardless of the water year type or declaration of flood flows and surplus, is critical due to the potential for significant water scarcity and the need for long-term strategies to address future shortages. We support the use of extraordinary conservation measures as one means of obtaining adequate payback of inadvertent overruns to the mainstream of the Colorado River.

1. Use of extraordinary conservation measures are recommended as the means to obtain payback water. Such measures may not always be feasible.

Recommendation:

The FEIS should include a description of possible water supply backup options for payback water in case the proposed extraordinary conservation measures are not feasible or sufficient to provide the required makeup water. For example, we recommend consideration of water transfers, temporary or permanent fallowing, and groundwater banking. We advocate aggressive conservation and management flexibility to achieve equitable water supply allocation and a sustainable balance between water supply and demand.

General Comments

EPA-15

1. The IA would provide for transfer of conserved water to CVWD, SDCWA, and MWD for groundwater recharge and urban use (Chapter 2). This water would replace Colorado River water that is no longer available (e.g., unused apportionment and surplus water). Thus, the DEIS concludes that there would be no induced growth or impact to population (Section 3.7). EPA remains concerned with the potential for growth and the need to ensure a sustainable balance between existing water supply and demand.

Recommendations:

To maximize water supply benefits and project flexibility, we urge Reclamation and other Federal Agencies to work with the CVWD, IID, MWD, SDCWA to consider and integrate all available tools for enhancing water management flexibility, supply reliability, and water quality. EPA advocates integration of aggressive water conservation and management practices into the IA and QSA. For instance, we recommend Reclamation consider including specific criteria in the IA to ensure that delivered water is effectively used.

We also recommend the IA FEIS provide a more in-depth discussion of water use efficiency measures that have been or could be implemented by MWD, CVWD, and SDCWA.

EPA-15

2. It is well known that Colorado River water supply actions are often complex and controversial. Thus, we are pleased with the description of major proposed and related Federal and State actions in the Lower Colorado River region provided in Chapter 1. While this description is helpful, a discussion of how these projects and actions interrelate, why they are being implemented, and their effects on each other would significantly help minimize confusion, clarify issues, and provide supporting rationale for the IA and QSA.

EPA-16

Recommendations:

We recommend the IA FEIS discuss how all the projects and actions interrelate, how they affect each other, how they fit into the larger picture of California and Lower Colorado River water supply allocation and management and why these actions are being implemented. For example, describe the potential affect of the TMDL program, which may implement water conservation measures, on efforts to improve water use efficiency in the Imperial Valley.

An evaluation of the relationships between the IA, QSA, and IID/SDCWA Water Transfer is of immediate importance since all three projects have been released for public review. For instance, the FEIS should clearly state what each project environmental document evaluates and its focus (e.g., lower Colorado River, Salton Sea, or Coachella Valley impacts) and why.

3. The DEIS frequently refers to evaluations contained in other environmental documents (e.g., IID/SDCWA Water Transfer) without providing a summary of these evaluations. A major objective of NEPA is full disclosure to help public officials and the public make better decisions. Thus, it is critical that a complete picture of the IA and the actions it enables (e.g., QSA, IID/SDCWA Water Transfer) should be provided in the EIS.

EPA-17

Recommendation:

We strongly recommend the IA FEIS include a summary of the issues and environmental consequences of other projects referenced in the IA DEIS.

SUMMARY OF EPA RATING DEFINITIONS

This rating system was developed as a means to summarize EPA's level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the EIS.

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the CEQ.

ADEQUACY OF THE IMPACT STATEMENT

Category 1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

"Category 2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analysed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

"Category 3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analysed in the draft EIS, which should be analysed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

*From EPA Manual 1640, "Policy and Procedures for the Review of Federal Actions Impacting the Environment."

EO 11-6-00.txt

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release
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November 6, 200

EXECUTIVE ORDER

CONSULTATION AND COORDINATION
WITH INDIAN TRIBAL GOVERNMENTS

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes; it is hereby ordered as follows:

Section 1. Definitions. For purposes of this order:

(a) "Policies that have tribal implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

(b) "Indian tribe" means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

(c) "Agency" means any authority of the United States that is an "agency" under 44 U.S.C. 3502(1), other than those considered to be independent regulatory agencies, as defined in 44 U.S.C. 3502(5).

(d) "Tribal officials" means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

Sec. 2. Fundamental Principles. In formulating or implementing policies that have tribal implications, agencies shall be guided by the following fundamental principles:

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(a) The United States has a unique legal relationship with Indian tribal governments as set forth in the Constitution of the United States, treaties, statutes, Executive Orders, and court decisions. Since the formation of the Union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.

(b) Our Nation, under the law of the United States, in accordance with treaties, statutes, Executive Orders, and judicial decisions, has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

(c) The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination.

Sec. 3. Policymaking Criteria. In addition to adhering to the fundamental principles set forth in section 2, agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have tribal implications:

(a) Agencies shall respect Indian tribal self-government and sovereignty, honor tribal treaty and other rights, and strive to meet the responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

(b) With respect to Federal statutes and regulations administered by Indian tribal governments, the Federal Government shall grant Indian tribal governments the maximum administrative discretion possible.

(c) When undertaking to formulate and implement policies that have tribal implications, agencies shall:

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and

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d
any alternatives that would limit the scope of Federal
standards or otherwise preserve the prerogatives and authorit
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of Indian tribes.

Sec. 4. Special Requirements for Legislative Proposals. Agencies shall not submit to the Congress legislation that would be inconsistent with the policymaking criteria in Section 3.

Sec. 5. Consultation. (a) Each agency shall have an accountable process to ensure meaningful and timely input by tribal officials in th
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development of regulatory policies that have tribal implications. Within 30 days after the effective date of this order, the head of each agency shall designate an official with principal responsibility for th
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agency's implementation of this order. Within 60 days of the effective date of this order, the designated official shall submit to the Office of Management and Budget (OMB) a description of the agency's consultation process.

(b) To the extent practicable and permitted by law, no agency shall
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promulgate any regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute, unless:

(1) funds necessary to pay the direct costs incurred by the India
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tribal government or the tribe in complying with the regulation are provided by the Federal Government; or

(2) the agency, prior to the formal promulgation of the regulation

(A) consulted with tribal officials early in the process of developing the proposed regulation;

(B) in a separately identified portion of the preamble to th
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regulation as it is to be issued in the Federal Register

provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials

a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and

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- (C) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(c) To the extent practicable and permitted by law, no agency shall
1 promulgate any regulation that has tribal implications and that preempts tribal law unless the agency, prior to the formal promulgation of the regulation,

- (1) consulted with tribal officials early in the process of developing the proposed regulation;
- (2) in a separately identified portion of the preamble to the regulation as it is to be issued in the Federal Register, provides to the Director of OMB a tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met; and
- (3) makes available to the Director of OMB any written communications submitted to the agency by tribal officials.

(d) On issues relating to tribal self-government, tribal trust resources, or Indian tribal treaty and other rights, each agency should explore and, where appropriate, use consensual mechanisms for developing regulations, including negotiated rulemaking.

Sec. 6. Increasing Flexibility for Indian Tribal Waivers.

(a) Agencies shall review the processes under which Indian tribes apply for waivers of statutory and regulatory requirements and take appropriate steps to streamline those processes.

(b) Each agency shall, to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by the agency with a general view toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate.

(c) Each agency shall, to the extent practicable and permitted by law, render a decision upon a complete application for a waiver within 120 days of receipt of such application by the agency, or as otherwise provided by law or regulation. If the application for waiver is not granted, the agency shall provide the applicant with timely written notice of the decision and the reasons therefor.

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(d) This section applies only to statutory or regulatory requirements that are discretionary and subject to waiver by the agency

Sec. 7. Accountability.

(a) In transmitting any draft final regulation that has tribal implications to OMB pursuant to Executive Order 12866 of September 30, 1993, each agency shall include a certification from the official designated to ensure compliance with this order stating that the requirements of this order have been met in a meaningful and timely manner.

(b) In transmitting proposed legislation that has tribal implications to OMB, each agency shall include a certification from the official designated to ensure compliance with this order that all relevant requirements of this order have been met.

(c) Within 180 days after the effective date of this order the Director of OMB and the Assistant to the President for Intergovernmental Affairs shall confer with tribal officials to ensure that this order is being properly and effectively implemented.

Sec. 8. Independent Agencies. Independent regulatory agencies are encouraged to comply with the provisions of this order.

Sec. 9. General Provisions. (a) This order shall supplement but not supersede the requirements contained in Executive Order 12866 (Regulatory Planning and Review), Executive Order 12988 (Civil Justice Reform), OMB Circular A-19, and the Executive Memorandum of April 29, 1994, on Government-to-Government Relations with Native American Tribal Governments.

(b) This order shall complement the consultation and waiver provisions in sections 6 and 7 of Executive Order 13132 (Federalism).

(c) Executive Order 13084 (Consultation and Coordination with Indian Tribal Governments) is revoked at the time this order takes effect.

(d) This order shall be effective 60 days after the date of this order.

Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

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WILLIAM J. CLINTON

THE WHITE HOUSE,
November 6, 2000.

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Responses

EPA-1 As stated in sections 1.1 and 1.5, the Secretary will make her final decision concurrently on both the IA EIS and the IID Water Conservation and Transfer Project EIR/EIS, even though the comment deadlines for these documents were not coincidental. Therefore, any comments made in the context of the IID Water Conservation and Transfer Project EIR/EIS will still be considered by the Secretary prior to making a decision on the Implementation Agreement. The QSA is an independent action by the participating individual water agencies, outside the discretion of the Secretary, in compliance with CEQA.

EPA-2 Reclamation does not monitor for perchlorate but does collect water samples for Southern Nevada Water Authority as part of an ongoing limnology study, which the water authority then uses to analyze for perchlorate in Lake Mead. Kerr-McGee Chemical Company, working with the Nevada Division of Environmental Protection, began intercepting perchlorate-laden groundwater in the Las Vegas Wash in 1999. This effort has significantly reduced the amount of perchlorate entering the Las Vegas Wash. Even more significantly, Kerr-McGee has developed a system that is expected to intercept and eliminate the vast majority of perchlorate currently reaching the wash. This system went online in April 2002. Reclamation does not monitor for perchlorate; it is Reclamation's understanding that USGS collects water samples at three sites around Lake Mead (USGS Site ID 09419700 Las Vegas Wash at Pabco Road near Henderson, USGS Site ID 09419800 Las Vegas Wash below Lake Las Vegas near Boulder City, and USGS Site ID 09421000 Colorado River below Hoover Dam). Perchlorate sampling at these sites is cooperatively funded by USGS and the Southern Nevada Water Authority. These water samples are provided on a quarterly basis to the EPA for perchlorate analysis (personal communication Robert Boyd, USGS-Water Resources Division).

The proposed action would not increase the load of perchlorate in the Colorado River system, nor would the proposed action hinder efforts to remediate perchlorate in the Las Vegas Wash. Reclamation does not intend to undertake a perchlorate monitoring or mitigation program as part of the proposed action. See also response to TM-3b.

EPA-3 Reclamation sent a memorandum to 55 Indian Tribal representatives on April 26, 2001, inviting them to enter into government-to-government coordination pursuant to CEQ regulations for implementing the procedural provisions of NEPA; the National Historic Preservation Act; and Executive Order 13175 of November 6, 2000, pertaining to consultation and coordination with Indian tribal governments. Reclamation has met with Colorado River Indian Tribes (CRIT) staff and had numerous telephone conversations to discuss potential impacts to the CRIT from the proposed action, and provided a grant to CRIT under which CRIT has hired an independent consultant to review the hydropower-related studies conducted for this EIS. A formal government-to-government consultation meeting was held with CRIT, Fort Mojave Indian Tribe,

Chemehuevi Tribe, Quechan Indian Tribe, and Cocopah Indian Tribe on June 26, 2002. See also response to CRIT-11.

A Reclamation staffperson has also met with representatives of the Torres Martinez Band of Desert Cahuilla Indians to discuss potential impacts related to local actions that would be generated by non-Federal entities in California to the Salton Sea and the Tribe's reservation, portions of which lie beneath the Sea. FWS sent a letter to the Torres Martinez Band of Desert Cahuilla Indians on March 14, 2002, requesting a government-to-government consultation meeting, and the meeting was held on April 12, 2002. The meeting was attended by representatives of the Torres Martinez Band of Desert Cahuilla Indians, Reclamation, FWS, BIA and the EPA. FWS also sent a letter on April 8, 2002, to five Tribes in the Coachella Valley, offering technical assistance and government-to-government consultations regarding the water transfer and HCP.

Section 3.10 of the EIS has been revised to include a discussion of potential effects related to local actions that would be generated by non-Federal entities in California, which mainly affect California Indian tribes in Imperial and Riverside counties. As pointed out in this EIS, these effects are related to local actions that are outside the control of Reclamation.

EPA-4 Reclamation does not propose to compensate, or require the parties to the transfer to compensate, for the lost power production. It is Reclamation's view that power production is an opportunity created by water deliveries, and not an entitlement that is subject to compensation during low or reduced flow. See also responses to CRIT-6 and CRIT-8.

EPA-5 We accept your recommendation. The reference to potential use of the land for agricultural purposes and other uses has been deleted from section 3.4 of the EIS, and additional information has been included in section 3.10 on existing research on sediments and the potential for hazardous materials.

EPA-6 Under the IA, the Secretary would agree to reduce Colorado River water deliveries to IID, consistent with the provisions of the QSA. Reduced water deliveries to IID do not necessarily result in reduced inflows to the Salton Sea, since IID could choose to create the conserved water in a manner that would reduce or eliminate the effects of conservation on the Sea. The decision by IID on how to conserve water is outside the control of Reclamation.

Notwithstanding the fact that impacts described in this comment would result from actions by local entities over which the Federal government has no control, FWS and Reclamation have ongoing government-to-government consultations with the Torres Martinez Band of Desert Cahuilla Indians regarding the impacts to Tribal resources from IID's proposed water conservation actions. If IID implements its SSHCS, no impacts are anticipated to occur to sports fishery or recreation-related socioeconomics. If IID's proposed HCP and associated SSHCS is not implemented, Reclamation has developed a proposed species conservation plan as an alternative means of providing incidental take authorization for IID's

water conservation actions. Unlike the SSHCS, the proposed species conservation plan would not minimize impacts to the Salton Sea sports fishery or recreation-related socioeconomics.

EPA-7

The IID has determined that currently there is not enough data or exposed shoreline to accurately predict the potential for the proposed IID Water Conservation and Transfer Project to increase dust emissions from these areas or to determine their impacts to ambient concentrations of particulate matter less than 10 microns in diameter (PM₁₀) (IID and USBR 2002). However, IID has concluded that the potential for wind blown dust to occur from exposed shorelines of the Salton Sea is substantially less than for the dry Owens Lake. To be conservative, the IID determined that the project would produce significant amounts of windblown dust from the exposed shoreline of the Salton Sea. IID proposes to implement a program to mitigate dust emissions that could occur from the exposed shorelines as a result of the proposed project. The mitigation program includes a phased approach to monitor the receding shoreline and its dust emitting properties and to reduce emissions associated with this potentially significant impact. However, IID indicates that a level of uncertainty would remain regarding whether or not the mitigation program would reduce short-term and long-term impacts, and that cost and water availability may affect the feasibility of certain dust mitigation measures.

Section 3.11 of the IA EIS has been revised to include discussions of the impacts to air quality that would result from the IID water conservation program and the four-step mitigation plan that IID would implement as part of its proposed Water Conservation and Transfer Project.

EPA-8

The text in section 3.11 has been revised to include a discussion of the proposed PM_{2.5} and 8-hour O₃ standards. However, the present air quality analysis is adequate in regard to these standards, as use of the existing PM₁₀ and O₃ standards are reasonable surrogates for describing PM_{2.5} and 8-hour O₃ levels.

The impacts of proposed construction activities are qualitatively assessed, as specific information related to equipment usage needed to complete these activities are unknown at this time. These impacts will be quantitatively analyzed in subsequent project-specific environmental documentations for implementation of the biological conservation measures. The text in section 3.11 has been revised to include additional measures that could be implemented to minimize combustive emissions from proposed construction activities.

EPA-9

Since Reclamation has yet to finalize locations or designs of the proposed biological conservation measures, it is not possible to accurately locate and quantify the emissions from this portion of the Federal action for the purpose of determining conformity, as they are not deemed reasonably foreseeable. The General Conformity Rule allows a Federal agency to defer a conformity analysis for a programmatic action of this nature until project-specific information is available upon which to base the analysis. As a result, the conformity analysis for this portion of the IA Federal action will occur at a future date in association

with proposals for project-specific actions. The requirements of the General Conformity Rule for the IA biological conservation measures will apply to the portions of the Colorado River Valley within Imperial (O₃ nonattainment area) and San Bernardino (PM₁₀ nonattainment area) Counties and the greater Yuma area (PM₁₀ nonattainment area). It is anticipated that air emissions generated from the creation and/or enhancement of approximately 44 acres of wetlands would be well below the *de minimis* thresholds that would trigger a conformity determination.

EPA-10 We also recognize concerns about selenium. Monitoring for selenium will be incorporated into the design standards for development of the wetlands.

EPA-11 Although the implementation of the No-Action Alternative may result in some decrease in flow over a long period of time, the decrease in river flow and changes to habitat are considered small and speculative. Any changes would occur slowly over a number of years. Flows of priority 1-4 would not change and the amount of water in priorities 5 and 6 are dependent on a number of factors including upper basin uses and rainfall. It is therefore not possible to predict loss of habitat in any quantitative fashion.

EPA-12 The State of Arizona and MWD have executed an agreement, which provides additional water to the State of Arizona in future shortage years. Additional information has been provided in section 3.1.2.

EPA-13 As noted in section 2.4 of the EIS, we believe the nature of the QSA and IA, as a negotiated agreement among the California parties being proposed to the Secretary for implementation, is really an approval/disapproval choice for the Secretary. It is not useful or appropriate for Reclamation to construct alternatives for Secretarial consideration, which would not be acceptable to the QSA parties, or potentially the other Basin States. More importantly, given that the QSA would serve to avoid inevitable litigation by and between the California water agencies and was the result of hard-fought compromise, Reclamation has presented the only alternative that would meet the purpose and need for the action. It is premature to consider the specific provisions of an IA that would implement the IID Water Conservation and Transfer Agreement in the absence of the QSA. The QSA is the only vehicle that has the agreement of the parties critical to a successful transfer, and speculation about other possible scenarios is premature.

Commitments for future NEPA compliance are noted in this document, where appropriate. In general, future NEPA compliance is not anticipated, except for follow-on federal actions such as implementation of the biological conservation measures on the Colorado River. The use of the water made available to CVWD, MWD, and SDCWA under the QSA, and IID's future implementation of water conservation measures, for example, are local actions which would comply with CEQA and local requirements, but are not federal actions. Absent the Interim Surplus Guidelines, surpluses would be declared on an annual basis in the Annual Operating Plan using the factors listed in the criteria for Coordinated

Long-Range Operation of Colorado River Reservoirs. It is beyond the scope of this EIS to revisit the surplus guidelines.

EPA-14

Because of the large storage capacity on the lower Colorado River system, flood control events generally occur in clusters. It can take several high flow years to fill the storage space, but once in flood control, or once a high level of storage is reached, the likelihood of future flood control releases is significantly increased. A policy which would require payback during or following a flood control release would need to address why Reclamation is intentionally increasing the potential for downstream flood damages.

Even in a worst-case long-term drought sequence, it would likely take more than five years for storage to drop from a surplus condition into a shortage condition. The three-year payback arrangement, which decreases to one year should Lake Mead's elevation drop below 1,125 feet and does not allow an overrun to occur during years of shortages, reasonably assures that payback will occur prior to a water user being impacted by the policy.

The policy does not preclude the use of water transfers, temporary or permanent fallowing, or use of groundwater exchanges as methods to pay back the overrun. The policy recognizes that for each user the means and resources for accomplishing payback will be different. To assure that payback is from measures that are above and beyond the normal consumptive use of water, an entitlement holder must submit to Reclamation, along with their water order, a plan which will show how they will intentionally forbear use of Colorado River water by extraordinary conservation and/or fallowing measures. Extraordinary conservation are measures in addition to those found in the entitlement holders Reclamation-approved water conservation plan and in addition to measures the user is implementing in order to provide for transfers.

Prior to the beginning of the calendar year, the user's water order, along with the payback plan, and the user's existing Reclamation-approved conservation plan will be submitted to Reclamation for review and approval within the normal 43 CFR 417 process. Reclamation will review a users payback plan solely to assure that the plan will adequately result in water savings equal to their payback requirement. In their payback plan, the user will be required to demonstrate that the extra-ordinary measures are not part of any on-going measures intended to reduce use for a transfer.

Under the 43 CFR 417 process, Reclamation will also determine the user's adjusted entitlement and require a water order that is consistent with the adjusted entitlement.

During the year, Reclamation would monitor the implementation of the extra-ordinary conservation measures, and require that the user's consumptive use be at or below their adjusted entitlement. Should the user's actual monthly deliveries for the first five months exceed their forecasted orders, and projections indicate the user's end of year use is likely to be 5 percent above their adjusted

entitlement, Reclamation will notify the user in writing. At the end of seven months, if it continues to appear that the user is likely to be above its adjusted entitlement, Reclamation will notify the user that it is at risk of exceeding its adjusted entitlement, and having its next year's orders placed under enforcement proceedings.

Similar to the provisions for payback, the level of enforcement becomes more stringent should the user not accomplish the reduced diversions. Should the user's measured diversion exceed the adjusted entitlement in the first year of payback, the amount by which it exceeded the adjusted entitlement would be carried forward and added to any previously scheduled overrun payback. Because the user would have violated its payback obligation, Reclamation would initiate stringent enforcement proceedings.

Under enforcement proceedings, during the year, Reclamation would again monitor the implementation of the extra-ordinary conservation measures, and require that the user's consumptive use to be at or below their re-adjusted entitlement. Should the user's actual monthly deliveries for the first five months exceed their forecasted orders, and projections indicate the user's end of year use is likely to be 5 percent above their re-adjusted entitlement, Reclamation will notify the user in writing that they are at risk of being subjected to enforcement proceedings. Should the user's actual monthly deliveries for the first seven months exceed its forecasted orders, and projections indicate the user's end of year use is likely to be above its re-adjusted entitlement, Reclamation would advise the entitlement holder in writing by July 31, consult with the entitlement holder on a modified diversion schedule and then limit diversions to the entitlement holder for the remainder of the year such that by the end of the year the individual entitlement holder has met its payback obligation.

EPA-15

We agree with the intent of the recommendation and are already taking actions within our existing authorities and funding to facilitate water conservation and effective water management. As you are aware, Reclamation has an active water conservation program with eight full-time water conservation specialists and an annual budget commitment of \$2.5 million in the Lower Colorado Region. The program emphasizes water management planning, conservation education, demonstration of innovative technologies, and implementation of conservation measures. In addition, our Southern California Area Office (SCAO) is providing leadership and significant funding in the field of wastewater reuse. SCAO, which has been providing funds for water recycling projects in southern California since 1994, has executed 46 funding agreements with water agencies, with a total estimated value of over \$232.6 million. The ultimate capacity of all these projects will be about 380 KAFY.

The entire agriculture to urban transfer project proposed under the QSA for Federal implementation through the IA is an attempt to foster water management flexibility within the constraints of existing law, and operates on the principle of more efficient irrigation use funded through a market-based

approach. Reclamation believes it is unnecessary to include specific water conservation criteria in the IA. Water users are required, under the Reclamation Reform Act, to develop and implement water conservation plans. This is done under current Reclamation authority.

EPA-16 Text has been added to section 1.3.1 to clarify the relationship between the QSA EIR, the IID Water Conservation and Transfer Project EIR/EIS, and the IA EIS. Text has also been added to section 3.1.2 to provide additional information on the potential effect of the TMDL program. See also responses to DW-1 and IC-2a.

EPA-17 Reclamation will continue to closely coordinate with the California parties and other agencies to provide full disclosure of the environmental consequences of the proposed action. Text has been added to sections 3.2 (Biological Resources), 3.5 (Recreation), 3.6 (Agriculture), 3.7 (Socioeconomics), 3.8 (Environmental Justice), 3.10 (Tribal Resources), and 3.11 (Air Quality), among others, to provide additional information on the resource issues and environmental consequences of the QSA and IID Water Conservation and Transfer Project.

providing a copy of DOI Solicitor Krulitz’s letter of November 21, 1978, defining the nature of the Department’s trust responsibilities to Indian Tribes in the hope that consideration of its implications will refine Bureau of Reclamation policy in this area.

BIA-2

As we have repeatedly reiterated, water projects, management actions and alternatives attached to the California Water Plan and the associated plans summarized in the environmental documents above have the potential to affect a majority of the tribes in Southern California. In our view the California Water Plan has a high potential to affect the following tribes, located in the Coachella Valley area: Agua Caliente Band of Cahuilla Indians; Augustine Band of Mission Indians; Cabazon Band of Mission Indians; Morongo Band of Mission Indians; Torres-Martinez Desert Cahuilla Indians; Twenty-Nine Palms Band of Mission Indians. We strongly recommend that the Bureau of Reclamation make an effort to initiate meaningful government-to-government consultation with these affected tribes. A copy of Secretarial Order 3206 is enclosed as a guide for this effort.

General Comments

We understand that the Salton Sea Restoration Project EIR/EIS and the BOR/IID Water Transfer (IID-SDCWA) Draft EIR/EIS are being developed on parallel tracts; however, we are uncertain of the status of the former. We also understand that the Quantification Settlement Agreement Program EIR and the subject BOR Implementation Agreement draft EIS are being developed on parallel tracts and timed with the CVWD Water Management Plan Draft Program EIR. We are uncertain of the status of the two draft Program EIRs. This is a concern, because throughout the subject IA draft EIS there is reference to the CVWD Water Management Plan for which there is no CEQA compliance, and no draft CEQA QSA PEIR document.

BIA-3

We are particularly concerned that the analysis in section 3.10 (Tribal Resources) does not include the trust resources associated with Indian reservations in or near the Salton Sea Sub-region. Many subsections discussing the Salton Sea make mention of effects of increased salinity; however, most do not address reductions in the altitude level of the Salton Sea (and resultant impacts due to a receding shore). Where the Habitat Conservation Plan is concerned (for the Salton Sea), we note that one alternative, which would result in a reduction of water levels in the Salton Sea, could also result in significant environmental justice issues. Lands which become re-exposed are likely to contain high levels of selenium, pesticides and other contaminants. Many of these lands are held in trust for the Torres Martinez Desert Cahuilla Indians. Since the area of project effect is not only the whole Coachella Valley but most of San Diego County as well, it appears that Torres Martinez has been singled out for disproportionate adverse effects from contaminants. Therefore, by definition, an environmental justice issue exists and should be addressed in the Environmental Justice subsection.

BIA-4

Specific Comments

Page 1-18 - We are not aware of the CVWD-IID-MWD-SDCWA QSA draft PEIR being available for public review and comment. Similarly, we are not aware of the CVWD’s Water Management Plan draft PEIR being available for public review and comment.

BIA-5

Page 1-19 – A complete discussion of the San Luis Rey Indian Water Rights Settlement should include the “Implementation Agreement Among The United States Of America, The La Jolla, Pala, Pauma, Rincon, And San Pasqual Bands Of Mission Indians, The San Luis Rey Indian

BIA-6

Water Authority, The City Of Escondido, and The Vista Irrigation District.” This IA is dated January 18, 2001. ↑
BIA-6

1-20 – The QSA PEIR and the CVWD Water Management Plan PEIR do not exist, and the Record of Decision for the IID-SDCWA Water Transfer BOR/IID EIS/EIS has not been issued. Because these are related products to and components of the subject IA, it is difficult to assess some of the impact analysis later in the subject EIS when these other actions have not been approved. (Also see comment below for page 1-21). This is particularly so in light of the mechanisms for MWD and CVWD to acquire water from the Coachella and All American Canal lining projects under the QSA and the subject IA (there is provisions allowing such water with high TDS to be recharged and stored underground in aquifers of native groundwater with excellent water quality in Coachella Valley which exist beneath five Indian reservations). BIA-7

1-21 - It is doubtful that the impact assessment description in the subject EIS for lands presently adjacent to and underlying the Salton Sea (including Indian natural resources and real property trust assets) can be fully assessed until such time that the impacts and decisions affiliated with the BOR/SSA Salton Sea Restoration Project EIS/EIR are known. BIA-8

Page 2-10 – Figure 2.2-1 – This is a particularly functional map showing nearly all relevant features. However, it would be more useful if the Indian reservation lands for all tribes in the Upper and Lower Coachella Valley were depicted on this map, because potential water transfers involving groundwater storage of lower quality Colorado River Water have a potential to negatively affect the water quality and eventually the water quantity of tribal portions of native high quality groundwater aquifers. This would include the Agua Caliente Band of Cahuilla Indians Reservation, Cabazon Indian Reservation, Augustine Indian Reservation, Torres-Martinez Desert Cahuilla Indian Reservation and the Twenty-Nine Palms Indian Reservations (see comment for page 10-5, below). BIA-9

Page 2-21 – The CVWD Water Management Plan draft PEIR is not available, thus CEQA requirements have not been achieved for the draft Final Plan. BIA-10

Page 3.1-8 – The type of perchlorate should be mentioned here (as was mentioned in earlier discussions) because another type can occur in some abundantly used fertilizers. Is the stated detection of perchlorate for all forms of perchlorate anion, or is this range of limits for ammonium perchlorate? BIA-11

Page 3.1-39 – Regarding Coachella Valley Water District, from what we know the draft Program EIR for CVWD’s Water Management Plan has not been made available for public review. BIA-12

Page 3.1-41 – Regarding Salton Sea, there is no discussion of other water users causing less inflows to the Salton Sea. MWD and CVWD both, in different plans, have described how to route irrigation drainage flows in the lower Whitewater River Drain back to their respective source aqueducts (Colorado River Aqueduct and Coachella Canal). In MWD’s situation, the proposal did not indicate that the cleaned up water routed to a point at the Colorado River Aqueduct at the Whitewater River would be deployed in the Upper Coachella Valley, or sent to the Coastal Plain (i.e., MWD service area). The possibility exists that there could be exportation of water from the Coachella Valley, or return flows would be delayed reaching the Salton Sea, or possibly in a perpetual recycling of the delay in reaching the Salton Sea. BIA-13

Page 3.2-17 – As envisioned in the QSA, and as described in the IA, additional Colorado River water will be made available in significant amounts, adding to what was already a multi-tribal concern involving plans to recharge Colorado River water into native groundwater aquifers in the Coachella Valley up gradient of five Indian reservations: Agua Caliente, Augustine, Cabazon, Torres-Martinez and Twenty-Nine Palms Indian Reservations. The tribal aquifers of good to excellent water quality are in overdraft. Reduction of groundwater overdraft conditions is in part accomplished by CVWD and others through recharge of high TDS Colorado River water from the Coachella Canal into low TDS native groundwater in existing aquifers beneath the Coachella Valley. This is occurring in the northern portion of the Upper Coachella Valley and the future plans of CVWD include doing likewise in the Lower Coachella Valley, in part recharging Canal water for IID. A portion of the impact would be at the expense of the tribes for IID’s benefit, if and when CVWD stores water under ground on behalf of IID. These and related impacts are not discussed and evaluated in the subject IA DEIS. As well, these impacts are not discussed and evaluated in the BOR-IID IID/SDCWA Water Transfer EIS/EIR, of which the subject DEIS largely incorporates by reference or refers as appropriate when discussing Salton Sea, and CVWD service areas and associated impacts.

BIA-14

Page 3.4-4 Coachella Valley Water District Area: Percent of land use is stated for Coachella Valley, which is a larger area than the service area of CVWD. The statement “ although a number of lands owned by Indian tribes also are present” is a misleading understatement. There are five Indian reservations wholly or partly within the CVWD service area. The Agua Caliente Indian Reservation exists in the Upper Coachella Valley, and the other four are located in the Lower Coachella Valley: Augustine, Cabazon, Torres-Martinez, and Twenty-Nine Palms Indian reservations.

BIA-15

As mentioned previously, Colorado River surface water of poorer quality that is artificially recharged to Coachella Valley groundwater of better quality has a negative influence on the aquifer system. Chronic infiltration practices such as these will result in negative impacts to tribal groundwater supplies throughout the Coachella Valley. A part of the water presumed to be used for recharge would be for IID; possibly at the expense of impacts to these tribes. This change, a lowering of water quality, may have impacts on or cause changes in current or future land uses on Indian reservations in the Coachella Valley.

BIA-16

Page 3.4-8 – A statement (line 26-27) indicates inflows to Salton Sea could decrease due to IID water conservation measures. It appears this could be somewhat offset by the increase of drainage flows into the Salton Sea (Page 3.1-39, line 21 Coachella Valley Water District) due to maximization of new options available to CVWD (Page 3.1-39, lines 14-18).

BIA-17

The parenthetical note at the end of the Salton Sea subsection refers the reader to the discussion in Section 3.10, Tribal Resources. However, there is no discussion in Section 3.10 about the Salton Sea nor, for that matter, anything about the five tribes and respective Indian reservations in the Coachella Valley, particularly, the Torres-Martinez Indian Reservation. The Torres-Martinez Indian Reservation lies under and adjacent to the Salton Sea.

A decrease of inflows to the Salton Sea would cause shoreline recession, exposing the lake-bottom on some tribal lands while increasing the salinity of the remaining water body over submerged tribal lands. This shoreline alteration has the potential to cause impacts to Torres-

BIA-18

Martinez land uses including the tribally-supported Habitat Management Plan along the northern portion of the Salton Sea. ↑
BIA-18

The subject document suggests that tribal lands exposed by the shoreline recession could be developed for agricultural use. This seems not well thought out as there would be, as follows: (1) limitations to irrigation drainage and need for removal of salts; (2) insufficient sources of inexpensive irrigation water supply since the lands are outside of CVWD Irrigation Improvement District No. 1 and The Law Of The River; and, (3) preclusion of surface usage due to submerged lands settlement agreement. BIA-19

We are also concerned about future impacts on land use including potential airborne dust pollution from exposed lakebed sediments such as observed at Owens Lake in the Owens Valley. The Los Angeles Department of Water and Power (LADWP) is mitigating that pollution problem through conversion of the dry lake-bed surface of Owens Lake to “Owens Moist Lake Bed.” Similarly, there would probably be a need to develop irrigation systems and water supplies to keep exposed Torres-Martinez Indian Reservation lakebed soils moist. BIA-20

Page 3.10 –1 TRIBAL RESOURCES Affected Environment – The Introduction in this section omits discussion of impacts to Torres-Martinez Indian Reservation and the Salton Sea, and other reservations within the Coachella Valley Water District service area (Agua Caliente, Augustine, Cabazon, and Twenty-Nine Palms Indian reservations). The section also omits discussion of impacts to trust resources (water quality and water quantity) of tribes in or near the service area of MWD and its member water agencies, where aquifers shared with other Indian reservations could be targets of recharge and subsurface storage options using Colorado River water or other water such as State Water Project (SWP) water that involves water transfers/exchange agreements of Colorado River water by MWD. The option of subsurface storage along with water transfers can cause impacts to other Indian reservation native groundwater supplies/water quality when Colorado River or SWP water is stored underground in an aquifer that tribes utilize (that has lower TDS concentrations than Colorado River or SWP water). BIA-21

Page 4-8 – Coachella Canal Lining Project: This subsection omits discussion of impacts to trust resources due to the option approved in the IA for CVWD to store Colorado River water underground in the CVWD service area for itself or for IID (and possibility exists for water transfer agreements with other agencies, see comment for page 3.10-1, above). BIA-22

Page 4-8 – Offstream Storage of Colorado River Water: We are interested to know what plans California authorized water purveyors will have regarding offstream storage of Colorado River and the effects on Indian Trust Assets. The appropriate project level of NEPA analysis should clearly identify potential impacts to such Indian Trust Assets when the specific Storage and Interstate Release Agreements are presented to the Secretary. BIA-23

We are very concerned for tribes that use groundwater from aquifer(s) down gradient from points of recharge of Colorado River water by these California authorized entities (similar to comment for Page 3.10, above). There is no analysis of impacts for this proposal regarding this scenario in the reasonably foreseeable future of 75 years. This scenario was pointed out in our comments to the BOR regarding the proposed rulemaking. In addition, the draft and final EA for the Offstream Storage Rule remained unanalyzed under NEPA. As this is being adopted as part of the proposed action for the subject IA and draft EIS, the impacts should be addressed. ↓

Page 4-9 – CVWD Water Management Plan – There is no discussion of impacts to Indian reservations in the Coachella Valley due to recharge of Colorado River water (see comments for Pages 3.10-1, page 4-8, and 4-9 above). Again, as mentioned previously, the CVWD Water Management Plan Draft Program EIR is not available for review. | BIA-24

Page 4-12 – Water Quality: There is no discussion involving cumulative impacts (primarily groundwater quality degradation) to tribal trust resources for Indian reservations in the Coachella Valley and other Indian reservations in southern California. | BIA-25

Page 4-15 – Coachella Valley Water District: CVWD Water Management Plan will affect tribal trust resources in the Coachella Valley. | BIA-26

Page 4-18 – Tribal Resources: In our view, the statements in this subsection that the “proposed action” would not affect water rights and therefore would not contribute to a cumulative impact involving tribal water rights, and that neither the proposed action nor any of the cumulative projects would impact tribal water rights, are misleading. While the tribes’ federal reserved water rights to surface and groundwater whether appurtenant to their trust lands or established by treaty, laws or executive orders, are not being disputed nor necessarily threatened by the “proposed action,” the ability of the tribes to access and utilize the water they are entitled to appears to be in jeopardy. Even though many of the tribes in the Coachella Valley area do not yet have their water rights quantified, as the trustee the U.S. Government is responsible to ensure that the tribes’ water rights are asserted and acknowledged. In our opinion, the discussions in this environmental analysis regarding the effects to the groundwater supplies and water quality in the Coachella Valley area that the tribes residing in that area are entitled to and dependent on are wholly inadequate. | BIA-27

Page 4-18 – Tribal Resources: There is no discussion involving cumulative impacts regarding native groundwater quality degradation to tribal trust resources for Indian Reservations in the Coachella Valley, or other Indian Reservations in southern California coastal drainages that could be affected by up-gradient sites for Colorado River water recharge involved with direct recharge or water transfers/exchange agreements. This also includes water transfers/exchange agreements and recharge of groundwater due to changes in delivery of Colorado River water due to All-American Canal and Coachella Canal Lining Projects that are considered as part of the proposed project of the subject IA and draft EIS, as well as CVWD storing water for IID. | BIA-28

Page 10-5 – The Twenty-Nine Palms Band of Mission Indians is not listed. Please incorporate this tribe in your mail list and submit a copy of the draft EIS, as follows: | BIA-29

Dean Mike, Spokesperson
Twenty-Nine Palms Band of Mission Indians
46-Harrison Place
Coachella, CA 92236

If you have any questions concerning our comments, please contact William Allan, Regional Environmental Protection Specialist, at (916) 978-6043, or Dale Morris, Regional Natural Resources Officer, at 978-6051.

Sincerely,


Acting Regional Director

Enclosures

cc: Regional Director, U.S. Fish and Wildlife Service, Region I (w/o enclosures)
Superintendent, Southern California Agency (w/o enclosures)
Chairperson, Torres Martinez Band of Desert Cahuilla Indians (w/o enclosures)
Regional Administrator, Environmental Protection Agency, Region IX (w/o enclosures)



UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Honorable James W. Moorman
Assistant Attorney General
United States Department of Justice
Washington, D.C. 20530

Re: United States v. Maine

Dear Mr. Moorman:

By letter of October 20, 1978, to the Attorney General, I requested that Justice not file any pleading designed to advise the federal district court of the government's view of the nature of the trust relationship between the United States and Indian tribes. I hereby reaffirm the views set forth in my October 20 letter. I did suggest in the letter, however, that Justice and Interior continue to work on the legal questions concerning the government's trust responsibility.

Congress has reposed principal authority for "the management of all Indian affairs and of all matters arising out of Indian relations" with this Department. 25 U.S.C. Sec. 2. As you no doubt realize, any legal memorandum filed by the Attorney General on such a broad issue as the trust responsibility would have far reaching policy implications. We have serious reservations about the statement as originally drafted and I am attaching a line by line critique, as promised, as a way to highlight some of the disputed issues. To be of further assistance to you, set forth below is this Department's view of the legal obligations of the United States, as defined by the courts, with respect to Indian property interests.

That the United States stands in a fiduciary relationship to American Indian tribes, is established beyond question. The specific scope and content of the trust responsibility is less clear. Although the law in this area is evolving, meaningful standards have been established by the declined cases and these standards affect the government's administration of Indian policy. Our discussion is confined to the government's responsibilities concerning Indian property interests and should be understood in that context. Our conclusions may be summarized as follows:

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1. There is a legally enforceable trust obligation owed by the United States Government to American Indian tribes. This obligation originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians.

2. While Congress has broad authority over Indian affairs, its actions on behalf of Indians are subject to Constitutional limitations (such as the Fifth Amendment), and must be "tied rationally" to the government's trust obligation; however, in its exercise of other powers, Congress may act contrary to the Indians' best interests.

3. The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.

4. Executive branch officials have discretion to determine the best means to carry out their responsibilities to the Indians, but only Congress has the power to set policy objectives contrary to the best interests of the Indians.

5. These standards operate to limit the discretion not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.

ORIGIN OF THE DOCTRINE

The origin of the trust relationship lies in the course of dealings between the discovering European nations and (later the original states and the United States) the Native Americans who occupied the continent. The interactions between these peoples resulted in the conclusion by this country of treaties and agreements recognizing the quasi-sovereign status of the Native American tribes.

The Supreme Court has stated that:

In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection

against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. Board of County Commissioners v. Seber, 318 U.S. 705, 715 (1943).

Implicitly, the Court recognized the course of history by which the Indian tribes concluded treaties of alliance or-after military conquest-peace and reconciliation with the United States. In virtually all these treaties, the United States promised to extend its protection to the tribes. Consequently, the trust responsibility to Native Americans has its roots for the most part in solemn contracts and agreements with the tribes. The tribes ceded vast acreages of land and concluded conflicts on the basis of the agreement of the United States to protect them from persons who might try to take advantage of their weak position. No comparable duty is owed to other United States citizens.

While the later executive agreements and presidential orders implementing them with tribes are shorter and less explicit than the treaties, a similar guarantee of protection can be implied from them. As the Court stated recently in Morton v. Mancari, 471 U.S. 535 (1974), then, "the unique legal status of Indian tribes under federal law (is) . . . based on a history of treaties and the assumption of a guardian-ward status."

The treaties and agreements represented a kind of land transaction, contract, or bargain. The ensuing special trust relationship was a significant part of the consideration of that bargain offered by the United States. By the treaties and agreements, the Indians commonly reserved part of their aboriginal land base and this reservation was guaranteed to them by the United States. By administrative practice and later by statute, the title to this land was held in trust by the United States for the benefit of the Indians.

From the beginning, the Congress was a full partner in the establishment of the federal trust responsibility to Indians. Article III of the Northwest Ordinance of 1787, which was ratified by the first Congress assembled under the new Constitution in 1789, 1 Stat. 50, 52, declared:

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The utmost good faith shall always be observed toward the Indians/ heir lands and property shall never be taken from them without their consent; and in their property, rights and liberty they shall never be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

And in 1790, Congress enacted the Non-Intercourse Act, 1 Stat. 137, 138, now codified as 25 U.S.C. § 177, which itself established a fiduciary obligation on the part of the United States to protect Indian property rights. See Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F. 2d 370 (1st Cir. 1975), and United States v. Southern Pacific Transportation Co., 543 F 2d 676, 677-699 (9th Cir. 1976).

Articulation of the concept of the federal trust responsibility as including more protection than simple federal control over Indian lands evolved judicially. It first appeared in Chief Justice Marshall's decision in Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Cherokee Nation was an original action filed by the tribe in the Supreme Court seeking to enjoin enforcement of the state laws on lands guaranteed to the tribe by treaties. The Court decided that it lacked original jurisdiction because the tribe, though a "distinct political community" and thus a "state," was neither a State of the United States nor a foreign state and was thus not entitled to bring the suit initially in the Court. Chief Justice Marshall concluded that Indian tribes "may, more correctly, perhaps, be denominated domestic dependent nations. . . in a state of pupilage" and that "Their relation to the United States resembles that of a ward to his guardian." Chief Justice Marshall's subsequent decision in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), reaffirmed the status of Indian tribes as self-governing entities without, however, elaborating on the nature or meaning of the guardian-ward relationship.

Later in the nineteenth century, the Court used the guardianship concept as a basis for congressional power, separate and distinct from the commerce clause. United States v. Kagama, 118 U.S. 375 (1886), concerned the constitutionality of the Major Crimes Act. Although it concluded that this statute was outside the commerce power, the Court sustained the

validity of the act by reference to the Government's fiduciary responsibility. The court stated that "[t]hese Indian tribes are the wards of the nation. They are communities dependent on the United States. . . . from their very weakness and helplessness. . . there arises the duty of protection, and with it the power."

A number of cases in the decades on either side of 1900 make express reference to such a power based on the federal guardianship, e.g., LaMotte v. United States, 254 U.S. 570, 575 (1921) (power of Congress to modify statutory restrictions on Indian land is "an incident of guardianship"); Cherokee Nation v. Hitchcock, 187 U.S. 294, 308 (1902) ("The power existing in Congress to administer upon and guard the tribal property"), and the Supreme Court has continued to sustain the constitutionality of Indian statutes as derived from an implicit power to implement the "unique obligation" and "special relationship" of the United States with tribal Indians. Cf. Morton v. Mancari, 417 U.S. 345, 552, 555 (1973).

LIMITATIONS ON CONGRESS

Congressional power over Indian affairs is subject to constitutional limitations. While Congress has the power to abrogate Indian treaties, Lone Wolf v. Hitchcock, 197 U.S. 553 (1903), Indian property rights are protected from repeal by the Fifth Amendment, Choate v. Trapp, 224 U.S. 665, 678 (1912). The Supreme Court held in Chippewa Indians v. United States, 301 U.S. 358 (1937), that

* * * Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards in good faith for their welfare, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another, or to deal with them as its own. * * * (P. 375-376).

In addition to these constitutional limitations on Congress' power to implement its trust responsibility, the court has observed that the guardianship "power to control and manage" is also "subject to limitations inhering in a guardianship," United States v. Creek Nation, 295 U.S. 103, 110 (1935), although the cases do not clarify with precision what limitations "inhere in a guardianship" so far as Congress is concerned. Recent cases have, however, considered the United States' trust

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obligations as an independent limited standard, for judging the constitutional validity of an Indian statute, rather than solely a source of power. In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the constitutionality of a statute granting Indians an employment preference in the Bureau of Indian Affairs, stating:

As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indian, such legislative judgments will not be disturbed. Id. at 555.

Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977), expressly held that the plenary power of Congress and the separation of powers shield "does not mean that all federal legislation concerning Indians is . . . immune from judicial scrutiny." The Court in Weeks took the significant step of examining on the merits claims by one group of Indians that legislation had denied them due process, and it applied the above-quoted standard from Mancari.

This standard, in practice, does not suggest that a reviewing court will second guess a particular determination by Congress that a statute in fact is an appropriate protection of the Indians' interests. Congressional discretion seems necessarily broad in that respect. But the power of Congress to implement the trust obligation would not seem to authorize enactments which are manifestly contrary to the Indians best interests. This does not mean that Congress could never pass a statute contrary to its determination that the Indian's best interests are served by it. Congress in its exercise of other powers such as eminent domain, war, or commerce, may act in a manner inimical to Indians. However, where Congress is exercising its authority over Indians, rather than some other distinctive power, the trust obligation would appear to require that its statutes must be based on a determination that the protection of the Indians will be served. Otherwise, a statute would not be rationally related to the trusteeship obligation to Indians. Cf., Fort Berthold Reservation v. United States, 390 F.2d 686, 691-693 (Ct. Cl. 1968).

The trust obligations of the United States constrain congressional power in another way. Since it is exercising a trust responsibility in its enactment of Indian statutes, courts presume that Congress' intent toward the Indians is benevolent. Accordingly, courts construe statutes (as well as treaties) affecting Indians as not abrogating prior Indian rights or,

in case of ambiguity, in a manner favorable to the Indians. E.g., United States v. Santa Fe Pacific Ry., 314 U.S. 339 (1941). This presumption is rebuttable in that the courts have also held that Congress can unilaterally alter treaty rights or act in a fashion adverse to the Indians interests—even to the point of terminating the trust obligation. But such an intent must be “clear,” “plain” or “manifest” in the language or legislative history of an enactment. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977).

LIMITATION ON ADMINISTRATIVE DISCRETION

In Indian, as in other matters, federal executive officials are limited by the authority conferred on them by statute. In addition, the federal trust responsibility imposes fiduciary standards on the conduct of the executive—unless, of course, Congress has expressly authorized a deviation from those standards. Since the trust obligation is binding on the United States, fiduciary standards of conduct would seem to pertain to all executive departments that may deal with Indians, not just those such as the Departments of Interior and Justice which have special statutory responsibilities for Indian affairs. This principle is implicit in United States v. Winnebago Tribe, 542 F. 2d 1002 (8th Cir. 1976), where the court employed the canon of construction that ambiguous federal statutes should be read to favor Indians to thwart the efforts of the Army Corps of Engineers to take tribal land.

A number of court decisions hold that the federal trust responsibility constitutes a limitation upon executive authority and discretion to administer Indian property and affairs. A leading case is United States v. Creek Nation, 295 U.S. 103 (1935), where the Supreme Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages against the United States for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. The court bottomed its decision on the federal trust doctrine:

The tribe was a dependent Indian community under the guardianship of the United States and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. 295 U.S. at 109-110. (emphasis added)

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Creek Nation stands for the proposition that-unless Congress has Expressly directed otherwise-the federal executive is held to a strict Standard of compliance with fiduciary duties. For example, the executive must exercise due care in its administration of Indian property; it cannot as a result of negligent survey "give the tribal lands to others, or . . . appropriate them to its own purposes." Other decisions of the Supreme Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." Seminole Nation v. United States, 316 U.S. 286, 296-297, (1942); United States v. Payne, 264 U.S. 466, 488 (1924). Decisions of the Court of Claims have also held that the ordinary standards of a private fiduciary must be adhered to by executive officials administering Indian property. E.g., Coast Indian Community v. United States, 213 Ct. Cl. 129, 550 F.2d 639 (1977); Cheyenne-Arapahoe Tribes v. United States, 206 Ct. Cl. 340, 512 F.2d 1390 (1975); Menominee Tribe v. United States, 101 Ct. Cl. 10, 18-19 (1944); Navajo Tribe v. United States, 364 F. 2d. 320, 322-324 (Ct. Cl. 1966).

Creek Nation and the other cited cases were for money damages under special jurisdictional statutes in the court of Claims. Other decisions have granted declaratory and injunctive relief against executive actions in violation of ordinary fiduciary standards. An important example is Lane v. Pueblo of Santa Rosa; 249 U.S. 110 (1919), where the supreme Court enjoined the Secretary of the Interior from disposing of tribal lands under the general public land laws. That action, the Court observed, "would not be an exercise of the guardianship, but an act of confiscation." 249 U.S. at 113.

Federal officials as trustees are not insurers. The case of United States v. Mason, 411 U.S. 391 (1973), sustains as reasonable a decision by the Interior Department not to question certain state taxes on trust property. But the case law in recent years generally holds executive action to be reviewable both under the terms of specific statutes and for breach of obligations of an ordinary trustee. A significant recent federal district court decision, Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), enjoins certain diversions of water for a federal reclamation project which adversely affected a downstream lake on an Indian reservation. Although the diversions violated no specific statute or treaty, the court held them in violation of the trust responsibility.

The court held that the Secretary of the Interior--as trustee for the Indians--was obliged to discharge his potentially conflicting duty to administer reclamation statutes in a manner which does not interfere with Indian rights. The court restrained to diversions because the Secretary's activities failed "to demonstrate an adequate recognition of his fiduciary duty to the Tribe." The Department of Justice acquiesced in this decision and chose not to appeal.

If, as we believe, the decisions in such cases as Creek Nation, Pueblo of Santa Rosa, and Pyramid Lake are sound, it follows that executive branch officials are obliged to adhere to fiduciary principles. These cases, in other words, lead to the conclusion that the government is in fact a trustee for the Indians and executive branch officials must act in accordance with trust principles unless Congress specifically directs otherwise.

INDEPENDENT EXISTENCE

In addition, the decided cases strongly suggest that the trust obligation of the United States exists apart from specific statutes, treaties or agreements. As previously stated, the Supreme Court in United States v. Kagama, 118 U.S. 375 (1886), sustained the validity of the Major Crimes Act on the basis of the trust relationship, separate and apart from other constitutional powers. And Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919), United States v. Creek Nation, 295 U.S. 103 (1935), and Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), apply the trust responsibility to restrain executive action without regard to any specific treaty, statute or agreement.

This view is reinforced by reference to the origins of the trust responsibility doctrine. Originally, Great Britain claimed for itself sovereignty over all Indian lands in the English colonies. In 1763, the King issued a Royal Proclamation, the precursor of the federal Non-Inter-course Act, decreeing that Indian lands were owned by the Crown and that no person or government could acquire such lands without the consent of the Crown. This policy reflected the practical need of the Crown to assert its control over the land and wealth of the colonies and to preserve peace among the colonists and the Indians. Notably, the 1763 Proclamation applied to all Indians without regard to the presence or absence of specific treaties or agreements.

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When the United States acquired sovereignty from Great Britain, it succeeded to all the incidents of the prior sovereign's power. The United States not only did not renounce the peculiar power and duty assumed by Great Britain over Indians, but endorsed it by specific reference in Article I of the Constitution.

The recent decision in Delaware Tribal Business Council v. Weeks, 430 U.S. 73 (1977), holds that the trust responsibility is subject to due process limitations. Weeks holds that Congress is not free to legislate with respect to Indians in any manner it chooses; rather, Congressional action with respect to Indians is subject to judicial review and will be sustained only so long as it can be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

Other recent Supreme Court opinions shed further light on what is meant by the "unique obligation toward the Indian." In Morton v. Ruiz, 415 U.S. 199 (1974), the Court in holding that the Bureau of Indian Affairs erred in excluding a certain category of Indians from the benefits of its welfare program spoke of the "overriding duty of our Federal Government to deal fairly with Indians." 415 U.S. at 236. This statement appears as part of the procedural rights of Indians, and in this connection the Court cited Seminole Nation v. United States, 316 U.S. 286, 296 (1942), which says governmental action must be judged by the "strictest fiduciary standards." Most recently, in Santa Clara Pueblo v. Martinez, _____ U.S. _____ (1978), the court reviewed the record of limited Indian participation in the hearings on the Indian Civil Rights Act and said:

It would hardly be consistent with "the overriding duty of our Federal Government to deal fairly with Indians," Morton v. Ruiz, 415 U.S. 199, 236 (1974), lightly to imply a cause of action on which the tribes had no prior opportunity to present their views. _____ U.S. _____, _____ n. 30 (1978).

The "unique obligation" mentioned in Weeks and the "overriding duty" of fairness discussed in Ruiz and Martinez exist apart from any specific statute, treaty or agreement, and they impose substantive constraints on the Congress (Weeks), the Executive (Ruiz) and the Judiciary (Martinez) with respect to Indians. These recent decisions of the supreme Court lead to the conclusion that the government's trust responsibility to the Indian has an independent legal basis and is not limited to the specific language of the statutes, treaties and agreements.

At the same time, however, the content of the trust obligation - apart from specific statutes and treaties - is limited to dealing fairly, not arbitrarily, with the Indians both with respect to procedural and substantive issues. The standard of fairness is necessarily vague and allows considerable room for discretion. But these independently based duties do not stand alone. They must be read together with the host of statutory and treaty provisions designed to provide protection for Indian interests. Illustrative of such statutes are 25 U.S.C. Sec. 81 (contracts); 25 U.S.C. Sec. 175 (legal representation); 25 U.S.C. Sec. 177 (conveyance of property); 25 U.S.C. Sec 194 (burden of proof in property cases); 25 U.S.C. Secs. 261-264 (regulation of traders); 25 U.S.C. Sec. 465 (acquisition of land in trust).

The more general notions of the "unique obligations" and "overriding duty" of fairness form a backdrop for the construction and interpretation of the statutes, treaties, and agreements respecting the Indians. This means that provisions for the benefit of Indians must be read to give full effect to their protective purposes and also they must be given a broad construction consistent with the trust relationship between the government and the Indians. General notions of fiduciary duties drawn from private trust law form appropriate guidelines for the conduct of executive branch officials in their discharge of responsibilities toward Indians and are properly utilized to fill any gaps in the statutory framework.

SPECIFIC OBLIGATIONS

The decided cases set forth a number of specific obligations of the trusteeship. Navajo Tribe v. United States, 364 F.2d 320 (Ct. Cl. 1966). During the second World War, an oil company had leased tribal land for oil and gas purposes. Upon discovering helium, bearing noncombustible gas which it had not desire to produce, the company assigned the lease to the Federal Bureau of Mines. The Bureau developed and produced the helium under the terms of the assigned lease instead of negotiating a new, more remunerative lease with the tribe. In Navajo, the court analogized these facts to the case of a "fiduciary who learns of an opportunity, prevents the beneficiary from getting it, and seizes it for himself," and held the action unlawful. Pyramid Lake discussed above also involves the fiduciary duty of loyalty.

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Manchester Band of Pomo Indian v. United States, 363 F. Supp. 1238 N.D. Cal., 1973), holds that the government as trustee has a duty to make trust property income productive. The federal district court held, in that case, that officials of this Department had violated their trust obligations by failing to invest tribal funds in nontreasury accounts bearing higher interest than was paid by treasury accounts. Menominee Tribe v. United States, 101 Ct. Cls. 10 (1944), also enforces the fiduciary obligation to make trust property income productive.

Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.D.C. 1972), imposes on the United States the duty to enforce reasonable claims of the beneficiary. This duty may be seen as related to the duty of loyalty. In Pyramid Lake, the court rejected an accommodation of public interests and trust obligations and held that the Secretary of Interior had a higher obligation to protect Indian property rights than to advance public projects within his charge - again, absent an express direction from Congress. Where there is a dispute between Indians and other government interests, executive branch officials are required to favor the Indian claim so long as it is reasonable.

The Supreme Court has held that executive branch officials are not required to advance or accede to every colorable claim which may be suggested by an Indian tribe. United States v. Mason, 412 U.S. 39; (1973). It appears that the government may properly examine these claims critically and make a dispassionate analysis of their merit, it may consider whether the advancement of a particular claim is in the long term best interests of the Indians, and it may determine the timing and the forum in which a claim is advanced. But executive branch officials may not reject or postpone the assertion of a claim on behalf of Indians on the ground that it would be inimical to some other governmental or private interest or refuse to advance an Indian claim on the ground that it is merely "reasonable" as opposed to clearly "meritorious." Although trust duties are neither rigid nor absolute, the controlling principle is that executive branch officials must act in the best interests of the Indians.

The Supreme Court has held that the United States as trustee has some discretion to exercise reasonable judgment in choosing between alternative courses of action. United States v. Mason, 412 U.S. 391 (1973). In Mason, Indian allottees claimed that Bureau of Indian Affairs officials erred in paying state estate tax assessments on trust properties. Bureau officials relied on a prior decision of the Supreme Court which had sustained the particular taxes in question. With some plausibility, however, the allot-

tees claimed that subsequent Supreme Court decisions had eroded the vitality of the earlier case. The Court determined that in this instance the trustee had acted reasonably by paying the taxes without protest. In Mason, unlike Pyramid Lake, there was no suggestion that any conflicting interests had detracted from the trustee's duty of loyalty to the Indians, and the case stands for the proposition that in the nonconflict situation, the trustee's reasonable judgments will be sustained.

Another principle which follows from this reading of the Indian trust cases is that affirmative action is required by the trustee to preserve trust property, particularly where inaction results in default of trust rights. Cf., Poafybitty v. Skelly Oil Co., 390 U.S. 365, 369 (1968); Edwardson v. Morton, 369 F. Supp. 1359 (D.D.C. 1973). The water rights area is a prime example. The Indians' rights to water pursuant to cases like Winters v. United States, 207 U.S. 564 (1908), and Arizona v. California, 373 U.S. 546 (1963), is prior to any subsequent appropriations. But failure of the trustee in the past to assert or protect these rights, and to assist in construction of Indian irrigation projects, has led non-Indian ranchers and farmers to invest large sums in land development in reliance on the seeming validity of their appropriations. See Report of the National Water Commission, ch. 14 (1973). The trust obligation would appear to require the trustee both to take vigorous affirmative action to assert or defend these Winters Doctrine claims. See, Pyramid Lake Paiute Tribe v. Morton, supra.

The impact of these principles upon the public administration within the government appears to be surprisingly modest, for present policies are essentially consistent with the dictates of the trust responsibility. In the area of water rights, for example, President Carter has called for the prompt quantification of Indian claims and their determination through negotiation if possible or litigation if necessary, and he has also called for development of Indian water resources projects so that the Indian rights may be put to beneficial use. The President's perception of the government's responsibility in this area appears entirely consistent with the dictates of the trust responsibility doctrine. The obligation of executive branch officials is to implement the President's policy. Similarly, the Departments of Interior and Justice are engaged in the processing of enforcing reasonable Indian claims in some instances by negotiation and in others through litigation. The Bureau of Indian Affairs works to make trust property income productive and the present Secretary of the Interior, so far as we are aware, has taken no action inconsistent with his duty of loyalty to the Indians.

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Even if the imposition of the trust responsibility doctrine is assumed to be completely consistent with present policy and administrative practice, the doctrine clearly places constraints on the future policy formulation and administrative discretion. Executive branch officials have some discretion in the discharge of the trust, but it is limited. For example, they may make a good faith determination that the compromise of an Indian claim is in the long term best interests of the Indians, but they are not free to abandon Indian interests or to subordinate those interests to competing policy considerations. Flexibility in setting policy objectives rests with Congress which alone is free to direct a taking or subordination of the otherwise paramount Indian interests.

Instances will surely arise where the discharge of trust responsibilities to the Indians raises unmanageable, practical or political difficulties for executive branch officials. It may be that congressional appropriations are inadequate to carry out a perceived duty - say, the quantification of Indian water entitlements - or that the enforcement of trust responsibilities results in an extraordinarily intense political backlash against the administration. Under such circumstances, it would seem that the responsibility of executive branch officials would be to seek express direction from the Congress. The existence of this congressional safety valve assures that the legal trust responsibility to American Indians is a viable doctrine not only now but in the future as well.

THE DEPARTMENT OF JUSTICE

The remainder of this memorandum will address some of the more specific questions which have been raised by the Attorney General in connection with litigation by the Department of Justice on behalf of Indians. How does Indian litigation differ, if at all, from other litigation handled by the Department of Justice? Do special standards constrain the prosecutorial discretion of the Attorney General?

By statute, the conduct of litigation in which the United States is a party is reserved to the officers of the Department of Justice under the direction of the Attorney General. 28 U.S.C. 516, 519. In addition, the United States Attorneys, under the direction of the Attorney General, are specifically authorized to represent Indians in all suits at law and in equity. 25 U.S.C. 175.

Generally, the Attorney General has broad discretion to determine whether and when to initiate litigation and on what theories. As the chief legal officer of the United States, the Attorney General may consider broad policy consequences of a litigation strategy and may refuse to initiate litigation despite the requests of a particular agency.

The discretion of the Attorney General with respect to the initiation of litigation is not unlimited. First, the exercise of prosecutorial discretion by the Attorney General is subject to judicial review in order to insure that the Attorney General's decision is based on a correct understanding of the law. Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 388 F. Supp. 649, 665-666 (D. Me. 1975), aff'd 528 F.2d 370 (1st Cir. 1975). Cf. e.g., Nader v. Saxbe, 497 F.2d 676, 679-680 n. 19 (D.C. Cir. 1974). And second, all executive branch officials including the Attorney General can be required by the judiciary to "faithfully execute the laws" which, in some instances, may require the initiation of litigation. E.g., Adams v. Richardson, 351 F. Supp. 636, 641 (D.D.C. 1972), 356 F. Supp. 921 (D.D.C. 1973), mod. and aff'd., 480 F.2d 1159 (D.C. Cir. 1973).

In the case of Indian litigation, the Attorney General's discretion is somewhat more limited than in other areas. As under the principles discussed above, an officer of the executive branch of government the Attorney General Acts as a fiduciary and must accord the Indians a duty of loyalty. This means that in the exercise of discretion the Attorney General may not refuse to initiate litigation on the ground that it would be inimical to the welfare of some other governmental or private interest. And the Supreme Court has suggested that the Attorney General has an affirmative obligation to institute litigation on behalf of Indians. Poafybitty v. Skelly Oil, 390 U.S. 365, 369 (1968).

The Attorney General has no obligation to assert every claim or theory advanced by an Indian tribe without regard to its merit. At the same time, the Attorney General may not abandon reasonable Indian claims on any ground other than the best interests of the Indians. Further, in the exercise of discretion, the Attorney General must take care that litigation decisions do not undercut the efforts of the Secretary of Interior or other executive branch officials to discharge their trust responsibilities to the Indians. As the Supreme Court recently stated: "Where the responsibility for rendering a decision is vested in a coordinate branch of government, the duty of the Department of Justice is to implement that decision and not repudiate it." S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 (1972). Indeed, published opinions of the Attorney General reflect the great deference which has been accorded by the Department of Justice to the decisions of the Secretary of Interior. 25 Op. Atty. Gen. 524, 529 (1905); 20 Op. Atty. Gen. 711, 713 (1894); 17 Op. Atty. Gen. 332, 333, (1882).

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The fulfillment of this nation's trust responsibility to American Indians is one of the major missions of this Department. Both the President and the Vice-President have publicly stated their support of the trust responsibility as a matter of policy.

The definition of the government's trust responsibilities to Native Americans involves both legal and policy issues. The President's P.R.I.M. Process is designed to assure development of policy after input from all Concerned. It would be unfortunate to preempt this process by filing a Memorandum in a court case that was not asked for by the judge and is Not necessary to the litigation which will be moot if Congress and the Tribes approve. If the Attorney General wants to address the legal Issues regarding the trust responsibility, it would be more appropriate To do so through a formal Attorney General's opinion.

Sincerely,

LEO M. KRULITZ

SOLICITOR



SECRETARIAL ORDER 3206

Subject: American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act

Sec. 1. Purpose and Authority. This Order is issued by the Secretary of the Interior and the Secretary of Commerce (Secretaries) pursuant to the Endangered Species Act of 1973, 16 U.S.C. §1531, as amended (the Act), the federal-tribal trust relationship, and other federal law. Specifically, this Order clarifies the responsibilities of the component agencies, bureaus and offices of the Department of the Interior and the Department of Commerce (Departments), when actions taken under authority of the Act and associated implementing regulations affect, or may affect, Indian lands, tribal trust resources, or the exercise of American Indian tribal rights, as defined in this Order. This Order further acknowledges the trust responsibility and treaty obligations of the United States toward Indian tribes and tribal members and its government-to-government relationship in dealing with tribes. Accordingly, the Departments will carry out their responsibilities under the Act in a manner that harmonizes the Federal trust responsibility to tribes, tribal sovereignty, and statutory missions of the Departments, and that strives to ensure that Indian tribes do not bear a disproportionate burden for the conservation of listed species, so as to avoid or minimize the potential for conflict and confrontation.

Sec. 2. Scope and Limitations. (A) This Order is for guidance within the Departments only and is adopted pursuant to, and is consistent with, existing law.

(B) This Order shall not be construed to grant, expand, create, or diminish any legally enforceable rights, benefits or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Order be construed to alter, amend, repeal, interpret or modify tribal sovereignty, any treaty rights, or other rights of any Indian tribe, or to preempt, modify or limit the exercise of any such rights.

(C) This Order does not preempt or modify the Departments' statutory authorities or the authorities of Indian tribes or the states.

(D) Nothing in this Order shall be applied to authorize direct (directed) take of listed species, or any activity that would jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. Incidental take issues under this Order are addressed in Principle 3(C) of Section 5.

(E) Nothing in this Order shall require additional procedural requirements for substantially completed Departmental actions, activities, or policy initiatives.

(F) Implementation of this Order shall be subject to the availability of resources and the requirements of the Anti-Deficiency Act.

(G) Should any tribe(s) and the Department(s) agree that greater efficiency in the implementation of this Order can be achieved, nothing in this Order shall prevent them from implementing strategies to do so.

(H) This Order shall not be construed to supersede, amend, or otherwise modify or affect the implementation of, existing agreements or understandings with the Departments or their agencies, bureaus, or offices including, but not limited to, memoranda of understanding, memoranda of agreement, or statements of relationship, unless mutually agreed by the signatory parties.

Sec. 3. Definitions. For the purposes of this Order, except as otherwise expressly provided, the following terms shall apply:

(A) The term "Indian tribe" shall mean any Indian tribe, band, nation, pueblo, community or other organized group within the United States which the Secretary of the Interior has identified on the most current list of tribes maintained by the Bureau of Indian Affairs.

(B) The term "tribal trust resources" means those natural resources, either on or off Indian lands, retained by, or reserved by or for Indian tribes through treaties, statutes, judicial decisions, and executive orders, which are protected by a fiduciary obligation on the part of the United States.

(C) The term "tribal rights" means those rights legally accruing to a tribe or tribes by virtue of inherent sovereign authority, unextinguished aboriginal title, treaty, statute, judicial decisions, executive order or agreement, and which give rise to legally enforceable remedies.

(D) The term "Indian lands" means any lands title to which is either: 1) held in trust by the United States for the benefit of any Indian tribe or individual; or 2) held by any Indian tribe or individual subject to restrictions by the United States against alienation.

Sec. 4. Background. The unique and distinctive political relationship between the United States and Indian tribes is defined by treaties, statutes, executive orders, judicial decisions, and agreements, and differentiates tribes from other entities that deal with, or are affected by, the federal government. This relationship has given rise to a special federal trust responsibility, involving the legal responsibilities and obligations of the United States toward Indian tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights.

The Departments recognize the importance of tribal self-governance and the protocols of a government-to-government relationship with Indian tribes. Long-standing Congressional and Administrative policies promote tribal self-government, self-sufficiency, and self-determination, recognizing and endorsing the fundamental rights of tribes to set their own priorities and make decisions affecting their resources and distinctive ways of life. The Departments recognize and respect, and shall consider, the value that tribal traditional knowledge provides to tribal and federal land management decision-making and tribal resource management activities. The Departments recognize that Indian tribes are governmental sovereigns; inherent in this sovereign authority is the power to make and enforce laws, administer justice, manage and control Indian lands, exercise tribal rights and protect tribal trust resources. The Departments shall be sensitive to the fact that Indian cultures, religions, and spirituality often involve ceremonial and medicinal uses of plants, animals, and specific geographic places.

Indian lands are not federal public lands or part of the public domain, and are not subject to federal public land laws. They were retained by tribes or were set aside for tribal use pursuant to treaties, statutes, judicial decisions, executive orders or agreements. These lands are managed by Indian tribes in accordance with tribal goals and objectives, within the framework of applicable laws.

Because of the unique government-to-government relationship between Indian tribes and the United States, the Departments and affected Indian tribes need to establish and maintain effective working relationships and mutual partnerships to promote the conservation of sensitive species (including candidate, proposed and listed species) and the health of ecosystems upon which they depend. Such relationships should focus on cooperative assistance, consultation, the sharing of information, and the creation of government-to-government partnerships to promote healthy ecosystems.

In facilitating a government-to-government relationship, the Departments may work with intertribal organizations, to the extent such organizations are authorized by their member tribes to carry out resource management responsibilities.

Sec. 5. Responsibilities. To achieve the objectives of this Order, the heads of all agencies, bureaus and offices within the Department of the Interior, and the Administrator of the National Oceanic and Atmospheric Administration (NOAA) within the Department of Commerce, shall be responsible for ensuring that the following directives are followed:

Principle 1. THE DEPARTMENTS SHALL WORK DIRECTLY WITH INDIAN TRIBES ON A GOVERNMENT-TO-GOVERNMENT BASIS TO PROMOTE HEALTHY ECOSYSTEMS.

The Departments shall recognize the unique and distinctive political and constitutionally based relationship that exists between the United States and each Indian tribe, and shall view tribal governments as sovereign entities with authority and responsibility for the health and welfare of ecosystems on Indian lands. The Departments recognize that Indian tribes are governmental sovereigns with inherent powers to make and enforce laws, administer justice, and manage and control their natural resources. Accordingly, the Departments shall seek to establish effective government-to-government working relationships with tribes to achieve the common goal of promoting and protecting the health of these ecosystems. Whenever the agencies, bureaus, and offices of the Departments are aware that their actions planned under the Act may impact tribal trust resources, the exercise of tribal rights, or Indian lands, they shall consult with, and seek the participation of, the affected Indian tribes to the maximum extent practicable. This shall include providing affected tribes adequate opportunities to participate in data collection, consensus seeking, and associated processes. To facilitate the government-to-government relationship, the Departments may coordinate their discussions with a representative from an intertribal organization, if so designated by the affected tribe(s).

Except when determined necessary for investigative or prosecutorial law enforcement activities, or when otherwise provided in a federal-tribal agreement, the Departments, to the maximum extent practicable, shall obtain permission from tribes before knowingly entering Indian reservations and tribally-owned fee lands for purposes of ESA-related activities, and shall communicate as necessary with the appropriate tribal officials. If a tribe believes this section has been violated, such tribe may file a complaint with the appropriate Secretary, who shall promptly investigate and respond to the tribe.

Principle 2. THE DEPARTMENTS SHALL RECOGNIZE THAT INDIAN LANDS ARE NOT SUBJECT TO THE SAME CONTROLS AS FEDERAL PUBLIC LANDS.

The Departments recognize that Indian lands, whether held in trust by the United States for the use and benefit of Indians or owned exclusively by an Indian tribe, are not subject to the controls or restrictions set forth in federal public land laws. Indian lands are not federal public lands or part of the public domain, but are rather retained by tribes or set aside for tribal use pursuant to treaties, statutes, court orders, executive orders, judicial decisions, or agreements. Accordingly, Indian tribes manage Indian lands in accordance with tribal goals and objectives, within the framework of applicable laws.

Principle 3. THE DEPARTMENTS SHALL ASSIST INDIAN TRIBES IN DEVELOPING AND EXPANDING TRIBAL PROGRAMS SO THAT HEALTHY ECOSYSTEMS ARE PROMOTED AND CONSERVATION RESTRICTIONS ARE UNNECESSARY.

(A) The Departments shall take affirmative steps to assist Indian tribes in developing and expanding tribal programs that promote healthy ecosystems.

The Departments shall take affirmative steps to achieve the common goals of promoting healthy ecosystems, Indian self-government, and productive government-to-government relationships under this Order, by assisting Indian tribes in developing and expanding tribal programs that promote the health of ecosystems upon which sensitive species (including candidate, proposed and listed species) depend.

The Departments shall offer and provide such scientific and technical assistance and information as may be available for the development of tribal conservation and management plans to promote the maintenance, restoration, enhancement and health of the ecosystems upon which sensitive species (including candidate, proposed, and listed species) depend, including the cooperative identification of appropriate management measures to address concerns for such species and their habitats.

(B) The Departments shall recognize that Indian tribes are appropriate governmental entities to manage their lands and tribal trust resources.

The Departments acknowledge that Indian tribes value, and exercise responsibilities for, management of Indian lands and tribal trust resources. In keeping with the federal policy of promoting tribal self-government, the Departments shall respect the exercise of tribal sovereignty over the management of Indian lands, and tribal trust resources. Accordingly, the Departments shall give deference to tribal conservation and management plans for tribal trust resources that: (a) govern activities on Indian lands, including, for the purposes of this section, tribally-owned fee lands, and (b) address the conservation needs of listed species. The Departments shall conduct government-to-government consultations to discuss the extent to which tribal resource management plans for tribal trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

(C) The Departments, as trustees, shall support tribal measures that preclude the need for conservation restrictions.

At the earliest indication that the need for federal conservation restrictions is being considered for any species, the Departments, acting in their trustee capacities, shall promptly notify all potentially affected tribes, and provide such technical, financial, or other assistance as may be appropriate, thereby assisting Indian tribes in identifying and implementing tribal conservation and other measures necessary to protect such species.

In the event that the Departments determine that conservation restrictions are necessary in order to protect listed species, the Departments, in keeping with the trust responsibility and government-to-government relationships, shall consult with affected tribes and provide written notice to them of the intended restriction as far in advance as practicable. If the proposed conservation restriction is directed at a tribal activity that could raise the potential issue of direct (directed) take under the Act, then meaningful government-to-government consultation shall occur, in order to strive to harmonize the federal trust responsibility to tribes, tribal sovereignty and the statutory missions of the Departments. In cases involving an activity that could raise the potential issue of an incidental take under the Act, such notice shall include an analysis and determination that all of the following conservation standards have been met: (i) the restriction is reasonable and necessary for conservation of the species at issue; (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities; (iii) the measure is the least restrictive alternative available to achieve the required conservation purpose; (iv) the restriction does not discriminate against Indian activities, either as stated or applied; and, (v) voluntary tribal measures are not adequate to achieve the necessary conservation purpose.

Principle 4. THE DEPARTMENTS SHALL BE SENSITIVE TO INDIAN CULTURE, RELIGION AND SPIRITUALITY.

The Departments shall take into consideration the impacts of their actions and policies under the Act on Indian use of listed species for cultural and religious purposes. The Departments shall avoid or minimize, to the extent practicable, adverse effects upon the noncommercial use of listed sacred plants and animals in medicinal treatments and in the expression of cultural and religious beliefs by Indian tribes. When appropriate, the Departments may issue guidelines to accommodate Indian access to, and traditional uses of, listed species, and to address unique circumstances that may exist when administering the Act.

Principle 5. THE DEPARTMENTS SHALL MAKE AVAILABLE TO INDIAN TRIBES INFORMATION RELATED TO TRIBAL TRUST RESOURCES AND INDIAN LANDS, AND, TO FACILITATE THE MUTUAL EXCHANGE OF INFORMATION, SHALL STRIVE TO PROTECT SENSITIVE TRIBAL INFORMATION FROM DISCLOSURE.

To further tribal self-government and the promotion of healthy ecosystems, the Departments recognize the critical need for Indian tribes to possess complete and accurate information related to Indian lands and tribal trust resources. To the extent consistent with the provisions of the Privacy Act, the Freedom of Information Act (FOIA) and the Departments' abilities to continue to assert FOIA exemptions with regard to FOIA requests, the Departments shall make available to an Indian tribe all information held by the Departments which is related to its Indian lands and tribal trust resources. In the course of the mutual exchange of information, the Departments shall protect, to the maximum extent practicable, tribal information which has been disclosed to or collected by the Departments. The Departments shall promptly notify and, when appropriate, consult with affected tribes regarding all requests for tribal information relating to the administration of the Act.

Sec. 6. Federal-Tribal Intergovernmental Agreements. The Departments shall, when appropriate and at the request of an Indian tribe, pursue intergovernmental agreements to formalize arrangements involving sensitive species (including candidate, proposed, and listed species) such as, but not limited to, land and resource management, multi-jurisdictional partnerships, cooperative law enforcement, and guidelines to accommodate Indian access to, and traditional uses of, natural products. Such agreements shall strive to establish partnerships that harmonize the Departments' missions under the Act with the Indian tribe's own ecosystem management objectives.

Sec. 7. Alaska. The Departments recognize that section 10(e) of the Act governs the taking of listed species by Alaska Natives for subsistence purposes and that there is a need to study the implementation of the Act as applied to Alaska tribes and natives. Accordingly, this Order shall not apply to Alaska and the Departments shall, within one year of the date of this Order, develop recommendations to the Secretaries to supplement or modify this Order and its Appendix, so as to guide the administration of the Act in Alaska. These recommendations shall be developed with the full cooperation and participation of Alaska tribes and natives. The purpose of these recommendations shall be to harmonize the government-to-government relationship with Alaska tribes, the federal trust responsibility to Alaska tribes and Alaska Natives, the rights of Alaska Natives, and the statutory missions of the Departments.

Sec. 8. Special Study on Cultural and Religious Use of Natural Products. The Departments recognize that there remain tribal concerns regarding the access to, and uses of, eagle feathers, animal parts, and other natural products for Indian cultural and religious purposes. Therefore, the Departments shall work together with Indian tribes to develop recommendations to the Secretaries within one year to revise or establish uniform administrative procedures to govern the possession, distribution, and transportation of such natural products that are under federal jurisdiction or control.

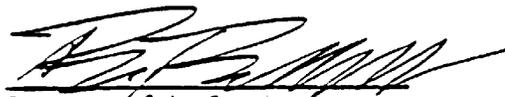
Sec. 9. Dispute Resolution. (A) Federal-tribal disputes regarding implementation of this Order shall be addressed through government-to-government discourse. Such discourse is to be respectful of government-to-government relationships and relevant federal-tribal agreements, treaties, judicial decisions, and policies pertaining to Indian tribes. Alternative dispute resolution processes may be employed as necessary to resolve disputes on technical or policy issues within statutory time frames; provided that such alternative dispute resolution processes are not intended to apply in the context of investigative or prosecutorial law enforcement activities.

(B) Questions and concerns on matters relating to the use or possession of listed plants or listed animal parts used for religious or cultural purposes shall be referred to the appropriate Departmental officials and the appropriate tribal contacts for religious and cultural affairs.

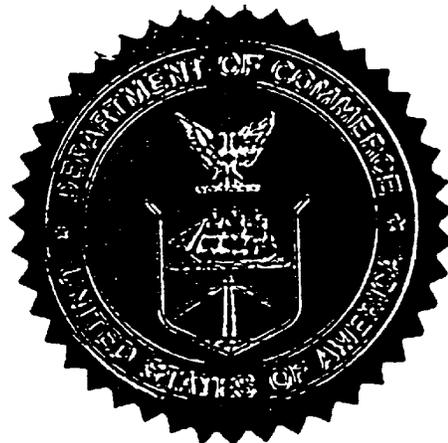
Sec. 10. **Implementation.** This Order shall be implemented by all agencies, bureaus, and offices of the Departments, as applicable. In addition, the U.S. Fish and Wildlife Service and the National Marine Fisheries Service shall implement their specific responsibilities under the Act in accordance with the guidance contained in the attached Appendix.

Sec. 11. **Effective Date.** This Order, issued within the Department of the Interior as Order No. 3206, is effective immediately and will remain in effect until amended, superseded, or revoked.

This Secretarial Order, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act," and its accompanying Appendix were issued this 5th day of June, 1997, in Washington, D.C., by the Secretary of the Interior and the Secretary of Commerce.


Secretary of the Interior


Secretary of Commerce



Date: JUN 5 1997

APPENDIX

Appendix to Secretarial Order issued within the Department of the Interior as Order No. 3206

Sec. 1. Purpose. The purpose of this Appendix is to provide policy to the National, regional and field offices of the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), (hereinafter "Services"), concerning the implementation of the Secretarial Order issued by the Department of the Interior and the Department of Commerce, entitled "American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act." This policy furthers the objectives of the FWS Native American Policy (June 28, 1994), and the American Indian and Alaska Native Policy of the Department of Commerce (March 30, 1995). This Appendix shall be considered an integral part of the above Secretarial Order, and all sections of the Order shall apply in their entirety to this Appendix.

Sec. 2. General Policy. (A) **Goals.** The goals of this Appendix are to provide a basis for administration of the Act in a manner that (1) recognizes common federal-tribal goals of conserving sensitive species (including candidate, proposed, and listed species) and the ecosystems upon which they depend, Indian self-government, and productive government-to-government relationships; and (2) harmonizes the federal trust responsibility to tribes, tribal sovereignty, and the statutory missions of the Departments, so as to avoid or minimize the potential for conflict and confrontation.

(B) **Government-to-Government Communication.** It shall be the responsibility of each Service's regional and field offices to maintain a current list of tribal contact persons within each Region, and to ensure that meaningful government-to-government communication occurs regarding actions to be taken under the Act.

(C) **Agency Coordination.** The Services have the lead roles and responsibilities in administering the Act, while the Services and other federal agencies share responsibilities for honoring Indian treaties and other sources of tribal rights. The Bureau of Indian Affairs (BIA) has the primary responsibility for carrying out the federal responsibility to administer tribal trust property and represent tribal interests during formal Section 7 consultations under the Act. Accordingly, the Services shall consult, as appropriate, with each other, affected Indian tribes, the BIA, the Office of the Solicitor (Interior), the Office of American Indian Trust (Interior), and the NOAA Office of General Counsel in determining how the fiduciary responsibility of the federal government to Indian tribes may best be realized.

(D) **Technical Assistance.** In their roles as trustees, the Services shall offer and provide technical assistance and information for the development of tribal conservation and management plans to promote the maintenance, restoration, and enhancement of the ecosystems on which sensitive species (including candidate, proposed, and listed species) depend. The Services should be creative in working with the tribes to accomplish these objectives. Such technical assistance may include the cooperative identification of appropriate management measures to address

concerns for sensitive species (including candidate, proposed and listed species) and their habitats. Such cooperation may include intergovernmental agreements to enable Indian tribes to more fully participate in conservation programs under the Act. Moreover, the Services may enter into conservation easements with tribal governments and enlist tribal participation in incentive programs.

(E) Tribal Conservation Measures. The Services shall, upon the request of an Indian tribe or the BIA, cooperatively review and assess tribal conservation measures for sensitive species (including candidate, proposed and listed species) which may be included in tribal resource management plans. The Services will communicate to the tribal government their desired conservation goals and objectives, as well as any technical advice or suggestions for the modification of the plan to enhance its benefits for the conservation of sensitive species (including candidate, proposed and listed species). In keeping with the Services' initiatives to promote voluntary conservation partnerships for listed species and the ecosystems upon which they depend, the Services shall consult on a government-to-government basis with the affected tribe to determine and provide appropriate assurances that would otherwise be provided to a non-Indian.

Sec. 3. The Federal Trust Responsibility and the Administration of the Act.

The Services shall coordinate with affected Indian tribes in order to fulfill the Services' trust responsibilities and encourage meaningful tribal participation in the following programs under the Act, and shall:

(A) Candidate Conservation.

(1) Solicit and utilize the expertise of affected Indian tribes in evaluating which animal and plant species should be included on the list of candidate species, including conducting population status inventories and geographical distribution surveys;

(2) Solicit and utilize the expertise of affected Indian tribes when designing and implementing candidate conservation actions to remove or alleviate threats so that the species' listing priority is reduced or listing as endangered or threatened is rendered unnecessary; and

(3) Provide technical advice and information to support tribal efforts and facilitate voluntary tribal participation in implementation measures to conserve candidate species on Indian lands.

(B) The Listing Process.

(1) Provide affected Indian tribes with timely notification of the receipt of petitions to list species, the listing of which could affect the exercise of tribal rights or the use of tribal trust resources. In addition, the Services shall solicit and utilize the expertise of affected Indian tribes in responding to listing petitions that may affect tribal trust resources or the exercise of tribal rights.

(2) Recognize the right of Indian tribes to participate fully in the listing process by providing timely notification to, soliciting information and comments from, and utilizing the expertise of, Indian tribes whose exercise of tribal rights or tribal trust resources could be affected by a particular listing. This process shall apply to proposed and final rules to: (i) list species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; and (v) designate experimental populations.

(3) Recognize the contribution to be made by affected Indian tribes, throughout the process and prior to finalization and close of the public comment period, in the review of proposals to designate critical habitat and evaluate economic impacts of such proposals with implications for tribal trust resources or the exercise of tribal rights. The Services shall notify affected Indian tribes and the BIA, and solicit information on, but not limited to, tribal cultural values, reserved hunting, fishing, gathering, and other Indian rights or tribal economic development, for use in: (i) the preparation of economic analyses involving impacts on tribal communities; and (ii) the preparation of "balancing tests" to determine appropriate exclusions from critical habitat and in the review of comments or petitions concerning critical habitat that may adversely affect the rights or resources of Indian tribes.

(4) In keeping with the trust responsibility, shall consult with the affected Indian tribe(s) when considering the designation of critical habitat in an area that may impact tribal trust resources, tribally-owned fee lands, or the exercise of tribal rights. Critical habitat shall not be designated in such areas unless it is determined essential to conserve a listed species. In designating critical habitat, the Services shall evaluate and document the extent to which the conservation needs of the listed species can be achieved by limiting the designation to other lands.

(5) When exercising regulatory authority for threatened species under section 4(d) of the Act, avoid or minimize effects on tribal management or economic development, or the exercise of reserved Indian fishing, hunting, gathering, or other rights, to the maximum extent allowed by law.

(6) Having first provided the affected Indian tribe(s) the opportunity to actively review and comment on proposed listing actions, provide affected Indian tribe(s) with a written explanation whenever a final decision on any of the following activities conflicts with comments provided by an affected Indian tribe: (i) list a species as endangered or threatened; (ii) designate critical habitat; (iii) reclassify a species from endangered to threatened (or vice versa); (iv) remove a species from the list; or (v) designate experimental populations. If an affected Indian tribe petitions for rulemaking under Section 4(b)(3), the Services will consult with and provide a written explanation to the affected tribe if they fail to adopt the requested regulation.

(C) ESA §7 Consultation.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected Indian tribes in addition to data provided by the action agency during the consultation process. The Services shall provide timely notification to affected tribes as soon as the Services are aware that a proposed federal agency action subject to formal consultation may affect tribal rights or tribal trust resources.

(2) Provide copies of applicable final biological opinions to affected tribes to the maximum extent permissible by law.

(3)(a) When the Services enter formal consultation on an action proposed by the BIA, the Services shall consider and treat affected tribes as license or permit applicants entitled to full participation in the consultation process. This shall include, but is not limited to, invitations to meetings between the Services and the BIA, opportunities to provide pertinent scientific data and to review data in the administrative record, and to review biological assessments and draft biological opinions. In keeping with the trust responsibility, tribal conservation and management plans for tribal trust resources that govern activities on Indian lands, including for purposes of this paragraph, tribally-owned fee lands, shall serve as the basis for developing any reasonable and prudent alternatives, to the extent practicable.

(b) When the Services enter into formal consultations with an Interior Department agency other than the BIA, or an agency of the Department of Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and provide for the participation of the BIA in the consultation process.

(c) When the Services enter into formal consultations with agencies not in the Departments of the Interior or Commerce, on a proposed action which may affect tribal rights or tribal trust resources, the Services shall notify the affected Indian tribe(s) and encourage the action agency to invite the affected tribe(s) and the BIA to participate in the consultation process.

(d) In developing reasonable and prudent alternatives, the Services shall give full consideration to all comments and information received from any affected tribe, and shall strive to ensure that any alternative selected does not discriminate against such tribe(s). The Services shall make a written determination describing (i) how the selected alternative is consistent with their trust responsibilities, and (ii) the extent to which tribal conservation and management plans for affected tribal trust resources can be incorporated into any such alternative.

(D) Habitat Conservation Planning.

(1) Facilitate the Services' use of the best available scientific and commercial data by soliciting information, traditional knowledge, and comments from, and utilizing the expertise of, affected tribal governments in habitat conservation planning that may affect tribal trust resources or the exercise of tribal rights. The Services shall facilitate tribal participation by providing timely notification as soon as the Services are aware that a draft Habitat Conservation Plan (HCP) may affect such resources or the exercise of such rights.

(2) Encourage HCP applicants to recognize the benefits of working cooperatively with affected Indian tribes and advocate for tribal participation in the development of HCPs. In those instances where permit applicants choose not to invite affected tribes to participate in those negotiations, the Services shall consult with the affected tribes to evaluate the effects of the proposed HCP on tribal trust resources and will provide the information resulting from such consultation to the HCP applicant prior to the submission of the draft HCP for public comment. After consultation with the tribes and the non-federal landowner and after careful consideration of the tribe's concerns, the Services must clearly state the rationale for the recommended final decision and explain how the decision relates to the Services' trust responsibility.

(3) Advocate the incorporation of measures into HCPs that will restore or enhance tribal trust resources. The Services shall advocate for HCP provisions that eliminate or minimize the diminishment of tribal trust resources. The Services shall be cognizant of the impacts of measures incorporated into HCPs on tribal trust resources and the tribal ability to utilize such resources.

(4) Advocate and encourage early participation by affected tribal governments in the development of region-wide or state-wide habitat conservation planning efforts and in the development of any related implementation documents.

(E) Recovery.

(1) Solicit and utilize the expertise of affected Indian tribes by having tribal representation, as appropriate, on Recovery Teams when the species occurs on Indian lands (including tribally-owned fee lands), affects tribal trust resources, or affects the exercise of tribal rights.

(2) In recognition of tribal rights, cooperate with affected tribes to develop and implement Recovery Plans in a manner that minimizes the social, cultural and economic impacts on tribal communities, consistent with the timely recovery of listed species. The Services shall be cognizant of tribal desires to attain population levels and conditions that are sufficient to support the meaningful exercise of reserved rights and the protection of tribal management or development prerogatives for Indian resources.

(3) Invite affected Indian tribes, or their designated representatives, to participate in the Recovery Plan implementation process through the development of a participation plan and through tribally-designated membership on recovery teams. The Services shall work cooperatively with affected Indian tribes to identify and implement the most effective measures to speed the recovery process.

(4) Solicit and utilize the expertise of affected Indian tribes in the design of monitoring programs for listed species and for species which have been removed from the list of *Endangered and Threatened Wildlife and Plants* occurring on Indian lands or affecting the exercise of tribal rights or tribal trust resources.

(F) Law Enforcement.

(1) At the request of an Indian tribe, enter into cooperative law enforcement agreements as integral components of tribal, federal, and state efforts to conserve species and the ecosystems upon which they depend. Such agreements may include the delegation of enforcement authority under the Act, within limitations, to full-time tribal conservation law enforcement officers.

(2) Cooperate with Indian tribes in enforcement of the Act by identifying opportunities for joint enforcement operations or investigations. Discuss new techniques and methods for the detection and apprehension of violators of the Act or tribal conservation laws, and exchange law enforcement information in general.

**SUMMARY OF THE
SECRETARIAL ORDER ON TRIBAL RIGHTS
AND THE ENDANGERED SPECIES ACT**

Sec. I - **Purpose.** The order is intended to help the Departments of Interior and Commerce implement the Endangered Species Act (ESA) in a manner that harmonizes the federal trust responsibility, tribal sovereignty, and the legal responsibilities of the Departments, and that ensures that tribes do not bear a disproportionate burden for the conservation of endangered or threatened species.

Sec. II - **Scope.** The Order does not change or create any legal rights, modify any rights of tribes, or modify the legal authority of the departments, tribes or the states. The Order does not permit the take of listed species or any activity that could adversely modify critical habitat.

Sec. III - **Definitions.** Terms including "Indian tribe", "tribal trust resources and "Indian lands" are defined in this section.

Sec. IV **Background.** This section recognizes the special legal relationship between tribes and the federal government and provides justification for issuance of the Order. This section also authorizes the departments to work with intertribal organization to the extent such organizations are authorized to carry out tribal resource management responsibilities.

Sec. V - **Responsibilities.** Five principles are set forth that will be followed by the Department of the Interior and the National Oceanic and Atmospheric Administration (NOAA).

Principle 1 - Departments To Work With Tribes on a Government to Government Basis. The Departments will maintain government to government relations with tribes. This includes consulting with tribes whenever departmental. actions may impact tribal trust resources. This also includes providing tribes opportunities to participate in data collection, consensus-seeking and associated processes. The Departments must ask permission before entering reservations and tribally owned lands, except for law enforcement activities.

Principle 2 - Indian Lands are Not Federal Lands. Indian lands are not subject to the same restrictions as other federal lands. They are private trust assets. Indian tribes manage Indian lands in accordance with tribal goals.

Principle 3 - Tribal Programs for Healthy Ecosystems. This principle includes 3 subsections.

(A) Assistance to Tribal Programs. The Departments will help tribes develop programs that promote healthy ecosystems by offering technical assistance for tribal conservation and management plans.

(B) Tribes Manage Their Lands and Trust Resource. The Departments acknowledge that tribes exercise management authority over Indian lands and trust resources and that the Departments should give deference to tribal management plans on Indian lands. The Departments will consult with tribes to determine the extent to which tribal management plans for trust resources outside Indian lands can be incorporated into actions to address the conservation needs of listed species.

(C) The Departments Will Support Tribal Measures that Preclude Conservation Restrictions. The Departments will notify tribes when they begin considering conservation restrictions and provide assistance to the tribes so that the tribes can implement voluntary tribal conservation measures.

If the Departments decide conservation restrictions are necessary, they will provide tribes with notice of the intended restrictions as far in advance as possible. If the restrictions are directed at activity that would constitute direct take under the ESA, government to government consultation will occur in an attempt to harmonize the trust responsibility and the ESA. If the activity would constitute incidental take under the ESA the notice to tribes will include a determination that all of the five conservation standards have been met. Those five conservation standards are as follows:

- (i) the restriction is reasonable and necessary for conservation of the species;
- (ii) the conservation purpose of the restriction cannot be achieved by reasonable regulation of non-Indian activities;
- (iii) the measure is the least restrictive alternative available-
- (iv) the restriction does not discriminate against Indian activities; and
- (v) voluntary tribal measures are not adequate to achieve the conservation purpose.

Principle 4 - Indian Culture and Religion. The Departments will minimize the impact of their actions on Indian use of listed species for cultural and religious purposes.

Principle 5 - Information Sharing. The Departments will make available to Indian tribes information related to Indian lands and trust resources and endeavor to protect tribal information that has been disclosed to or collected by the Departments.

Section VI - Intergovernmental Agreements. Agreements with tribes to formalize arrangements involving sensitive species are encouraged. These agreements could cover land and resource management, cooperative law enforcement and guidelines to accommodate Indian access to natural products located on federal lands.

Section VII - Alaska. This section authorizes a study on application of the ESA to Alaska tribes and Natives. The study will develop recommendations on administration of the ESA in Alaska.

Section VIII - Study on Cultural and Religious Uses. This section authorizes a study to develop recommendations on procedures to govern possession, distribution and transportation of eagle feathers, animal parts and other natural products for cultural and religious purposes.

Section IX - Dispute Resolution. This section encourages resolution of disputes through government to government consultations.

Section X - Implementation. This section directs the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) to implement their responsibilities in accordance with the Appendix to the order.

SUMMARY OF THE APPENDIX TO THE SECRETARIAL ORDER

Section I - Purpose. Provides direction to NMFS and FWS (the Services) in implementing the Secretarial order.

Section II - Policy.

A. Goals. The goal of the appendix is to recognize the common federal tribal goals of conserving sensitive species and healthy ecosystems, and to harmonize the federal trust responsibility, tribal sovereignty and the ESA.

B. Government to Government Consultation. Regional and field offices are directed to maintain a list of tribal contact persons to ensure meaningful communication occurs.

C. Agency Coordination. The Services will consult with each other, affected tribes, the BIA, and other agencies in determining how the trust responsibility may be best realized.

D. Technical Assistance. The Services will provide technical assistance to tribes that wish to develop tribal management plans to maintain, restore or enhance ecosystems on which sensitive species depend. This assistance could include identification of appropriate management measures, intergovernmental agreements, conservation easements and tribal participation in incentive programs.

E. Tribal Conservation Measures. The Services will assess conservation measures in tribal resource management plans and provide technical advice to tribes on how to enhance benefits for sensitive species.

Section III - Trust Responsibility and Administration of the ESA.

A. Candidate Conservation. The Services will solicit and utilize tribal expertise in evaluating which species should be included on the list of candidate species, and in designing candidate conservation actions. The Services also will provide technical advice to tribes and support tribal participation in voluntary measures to preserve candidate species on Indian lands.

B. The Listing Process. The Services will recognize the right of tribes to participate in the listing process, provide notice to tribes of petitions to list species, and utilize tribal expertise in responding to petitions that may affect tribal resources or rights.

The Services will encourage tribal participation in reviews of proposals to designate critical habitat. They will solicit information on tribal cultural values, reserved rights and tribal economic development that can be used in the preparation of the economic analysis that is part of the designation of critical habitat process. The Services will not designate critical habitat in an area that may impact tribal trust resources or tribal rights unless the Service have documented that the conservation needs of the species cannot be achieved by limiting the designation to non-Indian lands.

When exercising authority under section 4(d) of the ESA, the service will avoid or minimize effects on tribal management, economic development or reserved treaty rights.

The Services will provide tribes with a written explanation whenever an agency decision on certain listing issues conflicts with comments that have been provided by the tribes.

C. Section 7 Consultations. The Services will provide notification to tribes and solicit information and comments from tribes when a consultation may affect tribal rights or trust resources.

When the Services enter into consultation on actions proposed by the BIA, the affected tribes will be permitted full participation in the consultation process. Tribal management plan will serve as the basis for developing reasonable and prudent alternatives.

When agencies other than the BIA began consultations with the Services on actions that may affect tribal rights or trust resources, the tribes will be notified and the BIA will be allowed to participate in the consultation process.

In developing reasonable and prudent alternatives, the Services will make a written determination describing how the selected alternative is consistent with their trust responsibilities and the extent to which tribal management plans can be incorporated into the alternative.

D. Habitat Conservation Plans (HCPs). The Services will provide timely notification of draft HCPs that may affect tribal resources. The Services also will encourage applicants to work cooperatively with tribes in the development of HCPs. The Services will state the rationale for their decisions on HCPs and explain how the decisions relate to their trust responsibility. The Services will be cognizant of the impacts of HCP measures on tribal trust resources and advocate for measures that will enhance or restore tribal trust resources.

E. Recovery. The Services will solicit tribal participation in recovery teams when the species occurs on Indian lands and cooperate with tribes to develop recovery plans that minimize impacts on tribes. The Services also will be cognizant of tribal desires to attain population levels that are sufficient to allow exercise of reserved rights. The Services will invite tribes to participate in the Recovery Plan implementation process and utilize tribal expertise in the design of monitoring programs.

E. Law Enforcement. The Services, upon tribal request, will enter into cooperative law enforcement agreements with tribes, which may include delegation of enforcement authority to tribal enforcement officers.

Responses

BIA-1 Thank you.

BIA-2 Reclamation sent a memorandum to 55 Indian Tribal representatives on April 26, 2001, inviting them to enter into government-to-government coordination pursuant to CEQ regulations for implementing the procedural provisions of NEPA; the National Historic Preservation Act; and Executive Order 13175 of November 6, 2000, pertaining to consultation and coordination with Indian tribal governments. The Twenty-Nine Palms Band of Mission Indians was inadvertently not included in the distribution of the memorandums; a letter has been sent to the tribal chairperson to remedy this oversight.

A Reclamation staffperson has also met with representatives of the Torres Martinez Band of Desert Cahuilla Indians to discuss potential impacts to the Salton Sea and the Tribe's reservation. A government-to-government consultation meeting was held on April 12, 2002, that was attended by representatives of the Torres Martinez Band of Desert Cahuilla Indians, Reclamation, FWS, BIA and the EPA. In addition, Reclamation has met with Colorado River Indian Tribes (CRIT) staff and had numerous telephone conversations to discuss potential impacts to the CRIT from the proposed action, and provided a grant to CRIT under which CRIT has hired an independent consultant to review the hydropower-related studies conducted for this EIS. A formal government-to-government consultation meeting was held with CRIT, Fort Mojave Indian Tribe, Chemehuevi Tribe, Quechan Indian Tribe, and Cocopah Indian Tribe on June 26, 2002. None of the other tribes has requested a formal government-to-government meeting with Reclamation.

BIA-3 A Salton Sea Restoration Project Draft EIS/EIR was released in January 2000 (USBR and SSA 2000). A revised alternatives document and modeling and impact analyses are currently being prepared. This document is currently scheduled to come out in November 2002. The draft QSA PEIR was released January 2002 (State Clearinghouse Number 2000061034), and the Final PEIR was certified by the co-lead agencies in June 2002. The Coachella Valley Water Management Plan Draft PEIR was issued in June 2002, the Final PEIR was released in September 2002, and the CVWD Board certified the document in October 2002. Because the Draft CVWMP PEIR document was not available for public review at the time the IA Draft EIS was released, it could not be incorporated by reference in the IA Draft EIS. Available information was used to describe the potential impacts of CVWD water use in the IA Draft EIS, and the IA Final EIS was revised slightly to be consistent with the then released CVWMP PEIR.

BIA-4 Section 3.10 has been revised to include the Torres Martinez Band of Desert Cahuilla Indians and five other Tribes in the Coachella Valley. Even though impacts to these Tribes (either by reduced inflow to Salton Sea or use of additional Colorado River water by CVWD) are the result of actions and

decisions made by IID or CVWD and are outside the control of Reclamation, a description of these potential impacts has been included.

The revised Indian Trust Assets section of the final IID Water Conservation and Transfer Project EIR/EIS indicates sufficient data do not exist to predict the amount of PM10 emissions from the exposed Salton Sea shoreline, nor do enough data exist to pinpoint the locations and extent of elevated metals concentrations (if any) in the exposed shoreline sediment. Therefore, a meaningful health risk assessment is not possible at this time. However, because the potential does exist for incremental health risks under the proposed Water Conservation and Transfer Project, IID has developed a mitigation and monitoring plan for its proposed project that includes the following steps to minimize the potential for health risks:

- Collect additional sediment samples
- Monitor emissions from exposed shoreline
- Monitor airborne concentrations
- Assess potential health risks if necessary
- Apply mitigation if necessary

IID anticipates that these five steps would be sufficient to suppress the potential for project-generated health effects from toxic compounds in PM10 to less-than-significant levels. However, a level of uncertainty remains regarding whether short-term and long-term air quality impacts and related health effects associated with exposed shoreline can be minimized. Therefore, the IID Water Conservation and Transfer Project EIR/EIS concludes that air quality impacts, which include possible health effects as described above, are potentially significant and unavoidable. Sections 3.8 (Environmental Justice), 3.10 (Tribal Resources), and 3.11 (Air Quality) of the IA EIS has been revised to include more information on adverse impacts related to PM10 emissions from the exposed Salton Sea shoreline.

BIA-5 See response to BIA-3.

BIA-6 The text has been revised to address your comment.

BIA-7 See response to BIA-3 for status of the CVWD Water Management Plan PEIR and the QSA PEIR. The draft IID Water Conservation and Transfer Project EIR/EIS was released January 2002.

The Secretary will make her final decision concurrently on both the IA EIS and the IID Water Conservation and Transfer Project EIR/EIS. Therefore, any comments made in the context of the IID Water Conservation and Transfer Project EIR/EIS will still be considered by the Secretary prior to making a decision on the Implementation Agreement. The QSA is an independent action by the participating individual water agencies, outside the discretion of the Secretary, in compliance with CEQA.

See response to TM-3 for more information on groundwater recharge and associated water quality.

- BIA-8 The relationship between the water transfers implemented through the QSA and IA and the potential restoration of the Salton Sea is described in Chapter 1 of this EIS. The two projects have different objectives and timelines for implementation. The Salton Sea Reclamation Act anticipated reductions in inflows as a result of water conservation and transfers of water out of the Salton Sea Basin, such as those addressed in this EIS. Implementation of the IA, therefore, is not inconsistent with subsequent implementation of a restoration project for the Salton Sea. Transfers of water under the QSA and IA would potentially begin as early as 2002 in order to facilitate meeting the water use benchmarks in the Interim Surplus Guidelines. The Salton Sea Restoration Project, however, is still in the developmental stage, and the project has not been authorized, approved, or funded by Congress.
- BIA-9 Figure 2.2-1 has been revised to include the five tribes mentioned in your comment.
- BIA-10 The QSA requires that all NEPA and CEQA documentation, including the Coachella Valley Water Management Plan PEIR, be completed prior to the closing date. The Coachella Valley Water Management Plan Draft PEIR was issued in June 2002, the Final PEIR was released in September 2002, and the CVWD Board certified the document in October 2002.
- BIA-11 The text has been revised to address this comment. The type of perchlorate that is of concern in the Las Vegas Wash, Lake Mead, and lower Colorado River is ammonium perchlorate.
- Perchlorate readily forms salts with sodium, potassium, or ammonium; ammonium perchlorate is the major source of perchlorate in drinking water (CA DHS 2002). Perchlorate salts dissociate completely in water. The stated detection limit for perchlorate, 4 ppb, refers to the perchlorate anion, ClO₄⁻ (CA DHS 2002). See section 3.1.1 for additional information.
- BIA-12 See response to BIA-3.
- BIA-13 Several years ago MWD and CVWD considered recycling agricultural drainage of the Whitewater Drain for reuse in the MWD and/or CVWD service areas. However, this plan is no longer under consideration, and discussions with MWD and CVWD in April 2002 did not identify any plans to reroute irrigation drainage from the lower Whitewater River Drain to the Coachella Canal or Colorado River Aqueduct. Instead, these agencies are focusing on QSA actions.
- BIA-14 See response to TM-3A.
- BIA-15 The text has been revised to address your comment.
- BIA-16 At the current time, there are no plans by CVWD to store or bank groundwater for later use by IID; however, such an arrangement is allowed under the QSA. If such a project is proposed, it would be subject to appropriate environmental review under CEQA. See also response to TM-3a.
- BIA-17 The confusion relates to changes in Colorado River water deliveries to CVWD and IID, and the resulting flow to the Salton Sea. Deliveries to IID decrease by as much as 300 KAF, resulting in a decrease in flows to the Salton Sea by as much as

300 KAF. Deliveries to CVWD increase by 52 KAF to 152 KAF. This increase in deliveries to CVWD, in conjunction with the implementation of the Coachella Valley Water Management Plan, would result in a net increase in return flow to the Salton Sea of approximately 90 KAFY. Due to the loss of IID drain water, the Salton Sea would experience a net decrease in inflow volume despite the increase in drain flow from CVWD. Overall, impacts to the Salton Sea resulting from changes in drainage flows from both the IID and CVWD service areas were considered in the Salton Sea modeling performed for the IID Water Conservation and Transfer Project and are discussed in that EIR/EIS.

- BIA-18 The five tribes and respective Indian reservations in the Coachella Valley mentioned in this comment would potentially be affected by local actions that would be generated by non-Federal entities in California. The text in section 3.10 has been revised to include a discussion of these effects. As pointed out in the EIS, these effects are related to local actions that are outside the control of Reclamation.
- BIA-19 The reference to potential use of currently submerged tribal lands for future agricultural purposes has been deleted from section 3.4 of the EIS.
- BIA-20 See response to EPA-7.
- BIA-21 Section 3.10 has been revised to include tribes potentially affected by declining Salton Sea levels and water deliveries to CVWD. Tribes and Reservations on the coastal plain have not been included, since the IA will not result in additional water going to the MWD service area. The only exceptions are the parties to the San Luis Rey Indian Water Rights Settlement Act, since they are directly considered in the IA. Any potential recharge or subsurface storage projects by MWD or its member water agencies would be carried out in compliance with State and local laws and requirements, including CEQA as appropriate.
- BIA-22 We do not understand the comment in the context of the Coachella Canal Lining Project, but we do recognize that the IA will likely result in deliveries of up to 152 KAFY of additional Colorado River water to CVWD, much of which is expected to be used for groundwater recharge. Reclamation, in discussions with CVWD, has not identified any plans to store IID water underground in the CVWD service area. The potential impacts of CVWD recharge on groundwater are effects of local actions that would be generated by non-Federal entities in California, and section 3.1 has been revised to describe these impacts based on available information from CVWD, even though these actions are outside the control of Reclamation. See also response to TM-3.
- BIA-23 MWD has inquired of AWBA about the potential of entering into discussions for an interstate water banking agreement for storage of Colorado River water in Arizona. Discussions between MWD and AWBA have been very preliminary and specific plans have not been developed. Although a California authorized entity could potentially store water for the benefit of Arizona or Nevada, at the present time California is legally using Colorado River water in excess of its basic apportionment because the Secretary, in accordance with the Decree, has annually released for consumptive use within California the Colorado River

water apportioned to but unused by Arizona and Nevada. We believe that if a California entity participates in an interstate banking transaction, it will be as a consuming entity, rather than as a storing entity. We are not aware of any proposal for a California entity to store water for use in interstate transactions by an entity in Arizona or Nevada. When a specific proposal is developed for a California entity to participate in an interstate transaction as either a storing entity or a consuming entity, we will have the details needed to identify and analyze potential impacts to Indian Trust Assets and be able to determine the appropriate level of environmental compliance for the proposed action.

- BIA-24 Information has been added to the IA EIS regarding potential impacts of CVWD recharge on groundwater used by Tribes in the Coachella Valley (see section 3.10, Tribal Resources). Available information was used to describe the impacts of CVWD water use in the IA Draft EIS since the Coachella Valley Water Management Plan Draft PEIR release date was delayed. The CVWMP Draft PEIR was issued in June 2002, and the Final PEIR was released in September 2002. The IA Final EIS was revised slightly to be consistent with the CVWMP PEIR. See also responses to BIA-22 and TM-3.
- BIA-25 The potential impacts of CVWD recharge on groundwater are effects of local actions that would be generated by non-Federal entities in California. The text in Chapter 4 has been revised to clarify the cumulative impacts to water quality and tribal resources based on available information from CVWD. See also response to TM-3.
- BIA-26 See response to BIA-24.
- BIA-27 We do not agree with the comment that the proposed action would jeopardize the ability of the tribes to access and utilize the water to which they are entitled. CVWD's intention is to utilize its transferred water as a substitute for groundwater, and to recharge it into the aquifer. This would ameliorate the overdrafting of the aquifer and ensure the tribes' ability to pump groundwater once their water rights have been quantified.
- BIA-28 See response to BIA-25.
- BIA-29 The Twenty-Nine Palms Band of Mission Indians has been added to the distribution list.

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