

COMMENT LETTER

RESPONSES

in Protection of Indian Trust Resources (compilation on file with the DOI) ("Reclamation Indian Trust Asset Policy").²

The Indian Trust Assets ("ITAs") entitled to protection under the trust responsibility include water rights. 512 DM 2.2 (Dec. 1995). Thus, DOI has a trust responsibility to take all actions reasonably necessary to protect the Hualapai Tribe's water rights.

To help avoid or mitigate ITA impacts, DOI has adopted procedures requiring ITA impacts to be analyzed during the NEPA process for proposed actions. DOI procedures require that "[a]ny effect [on Indian trust resources] must be explicitly addressed in the planning/decision documents, including, but not limited to . . . Environmental Impact Statements. . . ." 512 DM 2.4(A) (emphasis added). Such documents "shall . . . [e]xplain how the decision will be consistent with the DOI's trust responsibility." *Id.*

Reclamation's procedures similarly require the assessment of impacts on ITAs from "[a]ctions that could impact the value, use or enjoyment of the ITA." Bureau of Reclamation, Indian Trust Asset Policy and NEPA Implementing Procedures: Questions and Answers About the Policy and Procedures (hereinafter "ITA Q&A"), Section IV-4 at 9 (Aug. 31, 1994) in *Protection of Indian Trust Resources*. "Such actions could include interference with the exercise of a reserved water right." *Id.* "[A]ll impacts, both positive or negative, should be analyzed and discussed." *Id.* Unavoidable impacts should be fully mitigated:

The first strategy should be to avoid causing significant adverse impacts. When this is not possible, an attempt should be made to minimize such impacts. If adverse impacts do occur, the next step is to identify mitigation or compensation measures to offset adverse impacts so that there is no net loss to the Indian beneficial owners of the asset.

ITA Q&A, Section V-1 at 13.

While DOI has implemented its ITA policies through NEPA for administrative convenience, DOI's legal duties with respect to ITAs are not limited to NEPA's procedural requirements. NEPA requires, as a procedural matter, that an environmental impact statement "shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. By contrast, the trust duty is a substantive obligation to protect trust resources, not merely an obligation to make an informed decision.

² In February 1996, Secretary of the Interior Babbitt and Assistant Secretary Deer transmitted to Interior employees a compilation of the policies and procedures adopted by the bureaus and offices of the DOI relating to trust protection practices. This compilation is referred to herein as "Protection of Indian Trust Resources."

COMMENT LETTER

RESPONSES

1

In addition to NEPA and trust duty, DOI must comply with various applicable Executive Orders and Presidential Memoranda, including: Executive Order 13084 of May 14, 1998, "Consultation and Coordination with Indian Tribal Governments" 63 Fed. Reg. 27655 (May 19, 1998); Memorandum of April 29, 1994, "Government-to-Government Relations With Native American Tribal Governments," 59 Fed. Reg. 22951 (May 4, 1994); and Executive Order 12898 of February 11, 1994, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," 59 Fed. Reg. 7629 (February 16, 1994).

Executive Order 13084 provides in pertinent part:

In formulating policies significantly or uniquely affecting Indian tribal governments, agencies shall be guided, to the extent permitted by law, by principles of respect for Indian tribal self-government and sovereignty, for tribal treaty and other rights, and for responsibilities that arise from the unique legal relationship between the Federal Government and Indian tribal governments.

E.O. 13084, § 2, 63 Fed. Reg. 27655.

President Clinton's Memorandum of April 29, 1994 requires federal agencies to ensure that they operate within a government-to-government relationship with federally recognized tribes, consult with tribal governments to the greatest extent permitted by law prior to taking actions that affect them, and:

assess the impact of Federal Government plans, projects, programs, and activities on tribal trust resources and assure that tribal government rights and concerns are considered during the development of such plans, projects, programs and activities.

Memorandum of April 29, 1994, §§ (a), (b) and (c), 59 Fed. Reg. 22951.

Executive Order 12898 requires in pertinent part that:

[t]o the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs on minority populations and low-income populations.

E.O. 12898 § 1-101, 59 Fed. Reg. 7629.

1: Reclamation respectfully believes that appropriate consultation with Indian Tribal Governments occurred with respect to the development of interim surplus criteria. A full listing of the consultations during the development of the interim surplus criteria is found in Section 5.4.

COMMENT LETTER

RESPONSES

The Proposed Interim Surplus Criteria Would Have Significant Adverse Impacts on the Hualapai Tribe's Colorado River Water Rights.

The Supreme Court held in Arizona v. California that the water uses on each reservation within a Basin state must be accounted for out of the water allocated to that state. See 376 U.S. at 343. This means that the Hualapai Tribe's mainstream water rights are included in Arizona's 2.8 million acre-feet apportionment. Adoption of the surplus criteria will increase the Lower Basin States' reliance on the use of unquantified water rights, and thereby increase their incentive to oppose the quantification of unquantified Indian water rights in the Lower Basin. As a result, the Tribe's ability to access these waters for beneficial uses in the future will be jeopardized.

The DEIS acknowledges that the proposed action will diminish the ability of the tribes in the Ten Tribes Partnership to utilize their undeveloped Colorado River water rights in precisely this manner. The DEIS states:

The Ten Tribes have a significant amount of undeveloped water rights. The availability of surplus water on the Colorado River is primarily a direct result of unused existing entitlements, including those of the tribes. The interim surplus criteria could make other entitlement holders develop a reliance on surplus water, provide a disincentive for those entitlement holders to support future development, and have the practical effect of diminishing the tribes' ability to utilize their entitlements.

DEIS at 3.14-2.

The DEIS should acknowledge that the proposed action will also diminish the Hualapai Tribe's ability to utilize its entitlements for the same reasons. The inability to beneficially use its vast Colorado River water rights is unquestionably a significant impact on the Hualapai Tribe and its trust resources. Strangely, the DEIS is silent on the Hualapai Tribe's water rights, as discussed in the following section.

The DOI Violates NEPA and the Trust Duty by Ignoring the Proposed Action's Impacts on the Hualapai Tribe's Water Rights.

The DEIS fails to analyze – or even mention – the proposed action's impacts on the Hualapai Tribe's water rights. This omission is a violation of NEPA, the trust duty and Executive Order 12898.

In Section 3.14, "Indian Trust Assets," the DEIS purports to analyze the proposed action's impacts on ITAs. In this section, the DEIS discusses the water rights of each of the tribes in the Ten Tribes Partnership and the tribes served by the CAP. Id. at 3.14-1 to 3.14-22. Section 3.14 includes a detailed analysis of impacts on the CAP tribes' water rights. Id. at 3.14-

1a: The interim surplus criteria will not alter the quantity of priority of Tribal entitlements. In fact, as noted by the description of the Tribes' water rights above, the Tribes have the highest priority water rights on the Colorado River. Surplus determinations have been made by the Secretary since 1996, and surplus water supplies have been utilized by valid Colorado River contractors under the Secretary's annual surplus determinations since that date. Adoption of ISC will not make any additional surplus water available as compared with current conditions, but rather will provide more objective criteria for surplus determinations and will quantify the amounts of surplus water to be made available on an annual basis. Reclamation does not believe that identifying the limited amounts of surplus water will provide any additional disincentives for Tribal water development. Interim surplus criteria are also intended to complement efforts by California to reduce its over reliance on surplus water. The selection of any of the alternatives of this proposed action does not preclude any entitlement holder from using its water rights.