

COMMENT LETTER

RESPONSES

**NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**LEVON B. HENRY
ATTORNEY GENERALBRITT E. CLAPHAM, II
DEPUTY ATTORNEY GENERAL

September 8, 2000

VIA TELEFAX : 702-293-8042 & email: jharkins@lc.usbr.gov.

Jayne Harkins
Attention BCOO-4600
Bureau of Reclamation
P.O. Box 61470
Boulder City, NV 49006-1470**Re: Draft Environmental Impact Statement ("Draft EIS or DEIS") on the Colorado
River Interim Surplus Criteria**

Dear Ms. Harkins:

Please consider this letter as comments submitted on behalf of the Navajo Nation concerning the above-referenced Draft EIS. These comments are intended to supplement the comments submitted by the Colorado River Basin Tribes Partnership on behalf of the ten tribes, including the Navajo Nation, with Colorado River allocations. Those comments will not be reiterated here, but should be considered as submitted by the Navajo Nation as though fully set forth herein.

GENERAL COMMENTS

In general, the Draft EIS is a fundamentally flawed document since no effort was made to account for the unquantified water rights of the mainstream tribes above Lake Mead in Arizona: the Navajo Nation,¹ the Havasupai Tribe, and the Hualapai Tribe (herein "the Arizona Mainstream Tribes above Lake Mead"). Reclamation, in all of its capacities relating to Colorado River operations, has historically ignored the rights of the Arizona Mainstream Tribes above Lake Mead to a quantity of Colorado River, and the Draft EIS continues this practice. The Draft EIS is also fundamentally flawed because Reclamation does not recognize tribal entitlements to Colorado River water, whether quantified or unquantified, to constitute an Indian Trust Asset to be protected from

¹ The Navajo Nation has submitted extensive comments to the Bureau of Reclamation concerning its unquantified mainstream water rights. See: Letter to Bruce Ellis, re Draft Environmental Impact Statement (EIS) on the Allocation of Water Supply and Long-Term Contract Execution, Central Arizona Project (CAP), Arizona, August 23, 2000 with attachments: Letter to Bruce Ellis, re Public Scoping for Proposed Allocation of Water Supply and Expected Long-Term Contract Execution, CAP, September 27, 1999; Letter to Carol Lynn Erwin, Area Manager, Bureau of Reclamation - Phoenix Area Office, re Nonbinding Plans to Use Reallocated Water from the CAP, December 29, 1999; Letter to Bruce Ellis, re Supplemental Comments re Public Scoping for Proposed Allocation of Water Supply and Expected Long-Term Contract Execution, CAP; Letter to David J. Hayes, Deputy Secretary, Department of the Interior, re Navajo Mainstream Claims, April 4, 2000; and Letter to Secretary Babbitt, re Navajo Mainstream Colorado River Rights in Arizona, August 1, 2000.

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adverse impacts resulting from Reclamation policies and actions. DEIS at 3.14-1. Given the short shrift afforded the quantified water rights of the ten tribes, it is axiomatic that Reclamation would simply ignore the unquantified claims of the Arizona Mainstream Tribes above Lake Mead.

SPECIFIC COMMENTS

1. The Draft EIS Does Not Consider the Unquantified Water Rights of the Navajo Nation and the other Arizona Mainstream Tribes Above Lake Mead.

1: Comment noted.

The Draft EIS makes no effort to incorporate an allocation of water for the Arizona Mainstream Tribes above Lake Mead in the analyses of the various surplus criteria, including the status quo. Reclamation merely acknowledges that "some tribal rights remain adjudicated" (DEIS at 1-11). However, the discussion in the DEIS of the interests of the State of Arizona does not make reference to the claims of the Arizona Mainstream Tribes above Lake Mead. Therefore, no analysis was made of the potential impacts that may be visited on such claims through the adoption of the various surplus criteria, nor was any analysis made concerning how water uses by those tribes could affect the availability of water under the various surplus criteria.

In *Arizona v. California*² the Supreme Court did not attempt to quantify the water rights of the Mainstream Tribes above Lake Mead. Nevertheless, the Supreme Court recognized that any use of water above Lake Mead must be charged against the state in which such use is made.³ Neither the 1964 Decree nor the 1979 Decree specifies a water right for the Navajo Nation, the Hualapai Tribe, or the Havasupai Tribe for mainstream water. However, if these tribes were allocated Colorado River water, the amount of water available to the Central Arizona Project would be diminished, affecting all the surplus criteria scenarios.

2. The Failure to Consider the Unquantified Water Rights of the Navajo Nation Further Ensures the Continued Reliance by the Lower Basin States on Such Water Supplies.

2: See response to Comment 52-1.

By failing to acknowledge the unquantified water rights of the Navajo Nation, Reclamation continues to manage the Colorado River in a manner that ensures that other interests will continue to rely on water supplies claimed by, reserved for, and potentially belonging to the Navajo Nation. Reclamation has an affirmative obligation to operate federal water projects, such as Glen Canyon Dam and Hoover Dam, consistent with "vested, fairly implied senior Indian water rights."⁴ As a general matter, the surplus criteria proposed by California and the Six States, effectively trade future shortage protection for interim surplus. Under such scenarios, it is logical to expect that the Lower

² *Arizona v. California*, 373 U.S. 546 (1963).

³ 373 U.S. at 591.

⁴ *Memorandum to Regional Director, Region One, U.S.F.W.S. et al.*, January 9, 1997; see also: *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032 (9th Cir.), cert. denied, 474 U.S. 1032 (1985); and *Joint Board of Control of Flathead, Mission and Jocko Irrigation Districts*, 832 F.2d 1127 (9th Cir. 1987). The Ninth Circuit recently affirmed these principles. *Klamath Water Users Protective Assn v. Patterson*, 191 F.3d 1115, 1122-23 (9th Cir. 1999) ("[T]he United States, as trustee for the Tribes, has a responsibility to protect their rights and resources...Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights, rights that take precedence over any alleged rights of the Irrigators.")

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Basin States will have even more incentive to resist allocations of mainstream water for the Navajo Nation and the other Mainstream Tribes above Lake Mead.

In the comments submitted by the Ten Tribes Partnership, the Partnership notes that Reclamation, through its operations generally, and through the proposed surplus criteria specifically, is continuing to institutionalize the reliance by the Lower Basin States on unused tribal water supplies. Such reliance creates political disincentives for the development of the tribes' water supplies. In the case of Navajo Nation, the Lower Basin States rely on the lack of quantification of the Navajo right as a basis for their continued use of Colorado River water potentially belonging to the Navajo Nation. This not only creates institutional incentive against the development of Navajo water supplies, but it creates institutional incentives and political opposition against the efforts of the Navajo Nation to receive an allocation of Colorado River water and to otherwise quantify its mainstream water rights. The Draft EIS contains no analysis of the impacts attributable to the various surplus criteria on the ability of the Arizona Mainstream Tribes above Lake Mead to obtain Colorado River allocations; therefore, the Indian Trust Asset analysis is entirely deficient for these tribes.

3. The High Priority of Indian Water Rights Does Not Reduce the Institutional Reliance on Surplus Water Nor Diminish the Disincentive Against Tribal Water Development.

At S.3.14.2, concerning the Indian Trust Assets⁵ of the Ten Tribes Partnership, the Draft EIS acknowledges that:

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.) Reclamation's explanation that the "interim surplus criteria will not alter the quantity or priority of the tribal entitlements" is entirely inapposite. The institutional reliance on unused tribal water creates disincentives toward tribal water development *notwithstanding* the high priority of such rights. The tribes lack the political clout to develop their water. Because tribal water has such high priorities, non-Indian water users will use their political clout to ensure that tribal water is not developed, thereby protecting non-Indian water supplies.⁶ In the case of Navajo Nation, its claim for Colorado River water with an early priority only ensures the continued opposition by the Lower Basin States to the quantification of the Navajo right. The claimed early priority provides no protection from the institutional opposition to such a claim. The Draft EIS does not acknowledge the potential claims; therefore, it offers no analysis of how the various surplus criteria would affect such claims. The Draft EIS is entirely deficient in this respect and should be redone.

⁵ The comments here will not attempt to address Reclamation's absurd contention that tribal entitlements to present perfected federal reserved rights are not ITAs. (DEIS at 3.14-1.) That contention is addressed in the comments submitted by the Ten Tribes Partnership.

⁶ See John B. Weldon, Jr., *Non-Indian Water User's Goals: More is Better, All is Best* in INDIAN WATER IN THE NEW WEST 79, 83 (1993) ("[M]any non-Indian appropriators would prefer to use political clout in Congress to prevent the tribes from obtaining the funds necessary to exercise their reserved rights.")

3: Reclamation respectfully disagrees and does not believe that the DEIS is deficient. Reclamation does not believe that identifying the limited amounts of surplus water will provide any additional disincentives for Tribal water development.

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4. The Draft EIS Does Not Adequately Address the Impacts of Fluctuating Water Levels at Lake Powell on the Navajo Nation's Marina.

4: See response to Comment 51-3(b).

At S.3.14.2.3, concerning the Indian Trust Assets of the Navajo Indian Reservation the Draft EIS acknowledges that the Navajo Nation operates a marina at Lake Powell and the boat ramp is not operational when the lake level drops below 3,677 feet msl. (DEIS at 3.14-5.) Reference is made to Section 3.9.2.3.1 concerning Lake Powell elevations. Under the shortage criteria proposed by California and the Six States (and the Shortage Protection Alternative), lake levels would be significantly lower than under baseline conditions and the flood control alternative. It is not sufficient for the EIS to merely identify impacts; the EIS must identify how such impacts can be mitigated, particularly when Indian Trust Assets are involved.

5. The Draft EIS Mischaracterizes the Nature of Arizona's Upper Basin Apportionment.

In at least two separate sections, the Draft EIS mischaracterizes Arizona's Upper Basin apportionment of 50,000 acre-feet as a right to the *delivery* of water above Glen Canyon Dam. (DEIS at 1-18⁷ & 3.4-3.⁸) This characterization is not consistent with Reclamations practice of counting every *use* of water by the Navajo Nation in the Upper Basin of Arizona against Arizona's Upper Basin apportionment of 50,000 acre-feet. Despite Reclamation's accounting procedures, there is no basis in the Upper Colorado River Basin Compact for the water uses by the Navajo Nation to be constrained by the Compact.⁹

5: Upper Basin accounting procedures are based on use, not delivery, and the Compact point is a better reference point for the Upper Basin than Glen Canyon Dam. The FEIS has been modified accordingly. Please see response to Comment 50-1 regarding resolution to Tribal water rights being constrained by the Upper Colorado River Basin Compact.

Conclusion

For reasons expressed in this letter, the Draft EIS is fundamentally flawed. The Draft EIS does not consider the implications of the unquantified Navajo mainstream Colorado River rights or how the implementation of the various surplus criteria adversely interferes with the Navajo Nation's efforts to settle or quantify such mainstream rights.

Sincerely,

NAVAJO NATION DEPARTMENT OF JUSTICE

Stanley M. Pollack
 Water Rights Counsel

⁷ "In Arizona, there are several points of diversion plus up to 50,000 af delivered above Glen Canyon Dam." The reference to Glen Canyon Dam should be to Lees Ferry. Nevertheless, very little water is actually delivered above the dam. Instead, Reclamation charges all water uses by the Navajo Nation in the Arizona portion of the Upper Basin against Arizona's 50,000 acre-foot apportionment.

⁸ "In addition, Arizona is also charged for use of water pumped from Lake Powell under the state's Upper Basin apportionment of 50,000 afy." Arizona is charged for water *used*, not necessarily *pumped*.

⁹ See Article XIX (a) Upper Colorado River Basin Compact, 1948 ("Nothing in this Compact shall be construed as: (a) Affecting the obligations of the United States of America to Indian tribes.").