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September 8, 2000

VIA E-MAIL TO jharkins@lc.usbr.gov, AND FACSIMILE TO (702) 293-8042
AND FIRST-CLASS MAIL

Regional Director Robert Johnson
Bureau of Reclamation Lower Colorado Region
c/o Jayne Harkins
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Boulder City, NV 89006-1470

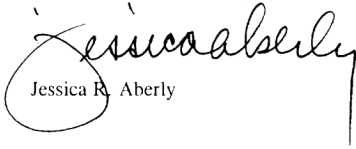
Re: **Colorado River Interim Surplus Criteria Draft Environmental
Impact Statement (July 2000)**

Dear Mr. Johnson and Ms. Harkins:

The Nordhaus Law Firm is general counsel to the Jicarilla Apache Tribe. The Jicarilla Apache Tribe, through its designated representative, Mr. Joe Muniz, is serving as President of the Colorado River Basin Tribes Partnership, which is also known as the Ten Tribes Partnership. On behalf of Mr. Muniz, I am transmitting with this cover letter the comments of the Ten Tribes Partnership to the above-referenced draft environmental impact statement.

Attachment A to the Ten Tribes Partnership's comments cannot be e-mailed, but will be included in the fax and in the hard copy that are being sent to you this day.

Very truly yours,

NORDHAUS, HALTOM, TAYLOR,
TARADASH & BLADH, LLP
Jessica R. Aberly

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4600

Mr. Johnson and Ms. Harkins
September 8, 2000
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Enclosure: Ten Tribes Partnership Comments on the Colorado River Interim Surplus Criteria
Draft Environmental Impact Statement

cc: Designated Representatives and Legal Counsel for the Partnership's Member
Tribes
Mr. Ron Bliesner and Mr. Andrew Keller, Keller-Bliesner Engineering, Technical
Consultants for the Ten Tribes Partnership

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**TEN TRIBES PARTNERSHIP COMMENTS ON THE
COLORADO RIVER INTERIM SURPLUS CRITERIA
DRAFT ENVIRONMENTAL IMPACT STATEMENT****INTRODUCTION**

The Colorado River Basin Tribes Partnership is composed of four tribes with quantified or otherwise congressionally-sanctioned water rights in the Upper Colorado River Basin, including the Ute Indian Tribe of the Uintah and Ouray Reservation, Southern Ute Indian Tribe, Ute Mountain Ute Tribe, and Jicarilla Apache Tribe; and, five tribes in the Lower Colorado River Basin whose water rights on the mainstream of the Colorado River were decreed in *Arizona v. California*, including the Fort Mojave Indian Tribe, Colorado River Indian Tribes, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and the Quechan Indian Tribe. The tenth member is the Navajo Nation, which has quantified or otherwise congressionally-sanctioned water rights in both the Upper and Lower Basin. The Partnership is informally called the Ten Tribes Partnership and referenced as such throughout this document. References to Tribal, Tribe, and Indian throughout this text refer to the Partnership Tribes only and not to other Indian tribes within the Colorado River Basin.

1
cont'd
below

The Colorado River Interim Surplus Criteria – Draft Environmental Impact Statement (“DEIS”) is deeply and fatally flawed. It fails to take into account and analyze the impacts of the various surplus scenarios on the water right assets of the Partnership’s members. These water rights are Indian trust assets and, therefore, entitled to the highest degree of impact analysis and protection by the Bureau of Reclamation (“Reclamation”). The DEIS fails to provide even minimal analysis of impacts and, with respect to the five Tribes located in the Lower Basin, complete disavows any obligation to do so. The lack of an analysis of the impacts on the Partnership members’ trust resources, as recommended by the Partnership throughout its consultation with Reclamation, undermines the accuracy, thoroughness, and adequacy of the DEIS and requires that the

1: The statement in the DEIS made by Reclamaton was in error. This statement has been modified.

TEN TRIBES PARTNERSHIP COMMENTS
COLORADO RIVER INTERIM SURPLUS CRITERIA
DRAFT ENVIRONMENTAL IMPACT STATEMENT

¹
cont'd | analysis now be properly completed and a revised DEIS be published for public review and comment.

The Partnership's comments are set forth below. First, we address the various legal misstatements and legal inadequacies within the document. These are followed by our technical comments which more specifically address the nature of the Tribes' water rights and the analysis required to fully describe and address the impacts on those trust assets.

LEGAL ISSUES AND COMMENTS

I. THE WATER RIGHTS OF ALL TEN PARTNERSHIP TRIBES ARE INDIAN TRUST ASSETS AND MUST BE TREATED AS UNIQUE IN THE DEIS ANALYSIS

² | The DEIS's discussion of Indian Trust Assets ("ITAs"), beginning at page 3.14-1, contains confusing misstatements regarding the legal status of the Partnership Tribes' water rights and an inadequate analysis of the impacts of interim surplus criteria on those trust assets. Contrary to all law and in conflict with the position taken by the United States at least since the negotiation of the Colorado River Compact of 1922, the DEIS asserts that the United States does not hold the water rights which were reserved in trust for the benefit of the Fort Mojave, Colorado River, Chemehuevi, Cocopah and Quechan Tribes ("Five Lower Basin Tribes"). However, the discussion that follows this inexplicable and unsupportable contention refers to the water rights of the "Ten Tribes." See DEIS at 3.14-2. Of course, there is no principled basis for the position in the DEIS that the water rights of the Five Lower Basin Tribes are not held in trust and should not be treated as ITAs.

³ | The Department of the Interior's ("Interior") fundamental error in refusing to acknowledge its trust duties cannot be cured in the absence of a new draft environmental impact statement. In short, Interior's denial of its trust responsibilities contaminates the entire analysis of the potential effect on the Five Lower Basin Tribes of the implementation of surplus criteria. Having concluded in the DEIS that it has no trust responsibility related to the Five Tribes' water rights, Interior, by definition, could not have properly considered those obligations in its analysis of the surplus criteria. Indeed, in addition to Interior's trust responsibilities, it is clear that the Tribal water rights hold a unique status within the "Law of the River," which status requires Interior to examine such rights independently rather than merely including the tribal rights among the other rights that are treated as part of the "system" water supply. Interior never conducted such an analysis. Because Interior never sought to investigate the effect on the tribal water rights from its perspective as trustee for the Five Lower Basin Tribes nor did it account for the unique status of the tribal rights on the River, it must now prepare a new draft analysis that considers these special circumstances.

A. The United States Has Acknowledged its Trust Responsibilities to the Tribes in *Arizona v. California*.

TEN TRIBES PARTNERSHIP COMMENTS
COLORADO RIVER INTERIM SURPLUS CRITERIA
DRAFT ENVIRONMENTAL IMPACT STATEMENT

2: Reclamation was in error. See Section 3.14 for additional analysis.

3: See Section 3.14 for additional analysis. After review of this additional material, the Department has made the decision that a new draft was not necessary.