

The water rights of the Five Lower Basin Tribes are established pursuant to the Decree in *Arizona v. California*, 376 U.S. 340 (1964). From the outset of that case, the United States steadfastly asserted that it was appearing as trustee for the Tribes. *E.g.*, *Petition of Intervention on Behalf of the United States of America* ¶ 27 (Dec. 1953) (“US intervenes ‘as trustee for the Indians and Indian Tribes’”); *Arizona v. California*, 373 U.S. 546, 595 (1963). Indeed, as late as 1978, the United States contended that tribal intervention was not necessary because the federal government was appearing on behalf of the Tribes. *See Memorandum in Opposition to the Three Tribes Motion* (Feb. 1978). Ultimately, the United States acquiesced in tribal intervention, although continuing its role in the litigation as trustee for the Five Lower Basin Tribes. *Motion of the United States for Modification of Decree and Supporting Memorandum* at 5 (Dec. 1978) (“The present motion is submitted by the United States as trustee for, and guardian of, the Tribes of the Fort Mojave, Chemehuevi, Colorado River, Fort Yuma and Cocopah Indian Reservations on the lower Colorado River”). Nothing in any of the Court’s opinions or decrees suggests, or even hints, that the Five Lower Basin Tribes’ water rights are anything but held in trust by the United States.

Moreover, nothing in Interior or Reclamation policy suggests that tribal water rights established under federal law are not trust assets which must be fully protected by federal agencies. In a wide variety of circumstances, Interior has treated such water rights as trust assets and conducted the sort of rigorous investigation -- sorely lacking here -- that is needed to understand the potential effect of the activity in question and to determine whether the activity should proceed in light of the impact on the Tribes or whether means were available to offset adverse effects. *See, e.g.*, Bureau of Reclamation *Animas-La Plata Project, Colorado-New Mexico, Final Supplemental Environmental Impact Statement* (July 14, 2000).

B. The Partnership Tribes’ Water Rights Are, and Must Be Treated As, Unique Under the “Law of the River.”

The DEIS also ignores the unique nature of Tribal water rights under the “Law of the River,” a term used to denote the various compacts, legislation, court decrees and regulations that determine how the Colorado River is controlled and operated. The foundation for the “Law of the River” is the Colorado River Compact, which expressly provides: “Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Indian tribes.” Colorado River Compact of 1922, Art. VII. That provision leaves the Secretary of the Interior’s (“Secretary”) trust responsibilities undiminished by the enactment of the Compact and controls the relationship between *all* the Partnership Tribes, including the Five Lower Basin Tribes, and the United States concerning the operation of the Colorado River. The authoritative role of Article VII of the Compact in the “Law of the River,” and its preservation of the Secretary’s trust responsibilities, is expressly confirmed by the Boulder Canyon Project Act, 45 Stat. 1057, which provides: “The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as those claiming under the United States, shall be subject to and controlled by said Colorado River Compact.”

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45 Stat. 1064 § 13(b), 43 U.S.C. § 617l.(b)(1928). Thus, the Secretary's duties to the Partnership Tribes are not affected – let alone curtailed – by the “Law of the River.”

Nothing in *Arizona v. California* alters that conclusion. To be sure, the Decree in that case is frequently cited for the proposition that the Secretary is authorized to release water not used in one state in any one year for use in another. *See* DEIS at 1-12. In fact, the Decree is far less permissive; holding only that the Secretary of the Interior is *not prohibited* under the Decree from “releasing such apportioned but unused water during such year for consumptive use in the other States.” *Arizona v. California*, 376 U.S. at 343. This lack of prohibition does not provide definitive authority for the Secretary, whose trust duties to the Tribes remain unaffected, to release from storage “water controlled by the United States,” which the Secretary holds in trust for the Tribes, if the sole purpose is to facilitate water use by other water users along the River.

The DEIS never addresses the unique status of the tribal rights under the “Law of the River” or the fact that the Secretary, and Reclamation acting on the Secretary's behalf, have special obligations with regard to the water rights of the Five Lower Basin Tribes. Before embarking on his ambitious agenda of establishing interim criteria, the Secretary must examine the effect of such criteria on the rights all Partnership Tribes, including the Five Lower Basin Tribes. To construct the proper framework in the DEIS for that analysis, Interior must first recognize its trust responsibilities to all of the Partnership Tribes and the unique position which Tribal rights have under the “Law of the River.”

- C. Reclamation, Acting on Behalf of the Secretary, Is Subject to Exacting Standards if its Actions Affect the Water Rights of the Partnership Tribes.

The DEIS fails to acknowledge the United States' obligations to the Five Lower Basin Tribes and fails to properly analyze the potential effects on all ten Partnership Tribes from the adoption of interim surplus criteria. In the absence of a proper accounting of the effect of the proposed action on the Tribal rights, it is difficult to determine the appropriate steps that Reclamation, on behalf of the Secretary, should take to offset any adverse impact on the Tribes. It is clear, however, that Interior is subject to demanding standards that require it to take all possible actions to protect and promote the Tribal interests at stake.

Perhaps the most succinct statement of Interior's obligations is set forth in Secretarial Order 3215 - Departmental Responsibilities for Indian Trust Resources (Apr. 28, 2000). It is clear from this Order that Interior, including Reclamation, has an obligation under the present circumstances both to account for the potential effect on Tribal water rights and to ensure that its action “promotes,” as well as “protect[s] and maintain[s],” *see* DEIS at 3.14-1, the interests of the Tribes and their water rights.

Case law also demonstrates that far more is required than the minimal discussion found in the DEIS. In *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256-57 (D.C. 1972), the Pyramid Lake Tribe challenged regulations promulgated by

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Reclamation to regulate the operation of the Newlands Project, a federal Reclamation project in Nevada. The Tribe charged that Reclamation had not adequately considered the tribal interests in crafting the regulations that controlled the water supply available to the project. The district court agreed:

In order to fulfill his fiduciary duty, the Secretary must insure, to the extent of his power, that all water not obligated by court decree or contract with the District goes to Pyramid Lake. The United States, acting through the Secretary of the Interior, "has charged itself with moral obligations of the highest responsibility and trust. Its conduct as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

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The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result. Difficult as this process would be, and troublesome as the repercussions of his actions might be, the Secretary was required to resolve the conflicting claims in a precise manner that would indicate the weight given to each interest before him. Possible difficulties ahead could not simply be blunted by a "judgment call" calculated to place temporarily conflicting claims to precious water. The Secretary's action is therefore doubly defective and irrational because it fails to demonstrate an adequate recognition of his fiduciary duty to the Tribe. This also is an abuse of discretion and not in accordance with law.

The DEIS does not comport with this exacting standard; both because it fails to fully acknowledge Interior's trust responsibility and because it never attempts to analyze the effect on the Five Lower Basin Tribes of the various criteria which it considers.

The fact that the Secretary effectively serves as water master on the River does not alter the conclusion that he must act consistent with his trust responsibility to the Tribes. In *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F. 2d 1555, 1567 (10th Cir. 1984) (Seymour, J. concurring in part, dissenting in part), *as modified*, 782 F.2d 855 (10th Cir.)(en banc)(per curiam)(adopting dissenting opinion of Seymour, J.), *cert. denied sub nom.*, *Southern Union Co. v. Jicarilla Apache Tribe*, 479 U.S. 970 (1986), Judge Seymour clearly spelled out the steps that the Secretary must take when his role as an administrator requires him to deal with assets which he holds in trust for Tribes:

When the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one "reasonable" choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In

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short, he cannot escape his role as trustee by donning the mantle of administrator . . . . (citation omitted.)

728 F.2d at 1567. *Accord Burlington Resources Oil & Gas Co. v. United States Department of Interior*, 21 F. Supp. 1, 4-5 (D.C.D.C. 1998) (Secretary's decision must satisfy the "arbitrary and capricious" standard and provide optimum advantage for the trust beneficiary). Reclamation's own ITA policy acknowledges Interior's trust responsibility as well as the undeniable fact that the ITAs entitled to protection by Reclamation include Indian federal reserved water rights. *See* Bureau of Reclamation, *Indian Trust Asset Policy* (Aug. 31, 1994) ("Reclamation ITA Policy"), in Attachment A, United States Department of the Interior, *Protection of Indian Trust Resources* (notebook on file with the Department of the Interior) ("Protection of Indian Trust Resources").

## II. RECLAMATION FAILS TO FULLY ANALYZE THE IMPACTS TO THE INDIAN TRUST ASSETS OF THE PARTNERSHIP TRIBES IN VIOLATION OF RECLAMATION'S OWN INDIAN TRUST ASSET POLICY

- A. In Keeping with its Trust Duty to the Partnership Tribes, Reclamation Must Explicitly Address the Proposed Action's Impacts on the Ten Tribes' Water Rights and Must Avoid or Mitigate Those Impacts.

In accordance with the exacting fiduciary standards discussed above, Interior and Reclamation have adopted policies and procedures to ensure that their actions comply with the trust responsibility. Interior's policy, to which Reclamation is subject, states that it will "recognize and fulfill its legal obligations to identify, protect, and conserve the trust resources of federally recognized Indian tribes and tribal members." 512 DM 2.2 (Dec. 1995), in "Protection of Indian Trust Resources." Interior's 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 Department's trust responsibility.*" *Id.* (emphasis added).

In describing this duty, Reclamation states that the trust responsibility "requires that the United States, as trustee, [deal] with the trust assets in the same manner [as] a prudent person would deal with his own assets." Bureau of Reclamation, *Indian Trust Asset Policy and NEPA Implementation Procedures: Questions and Answers About the Policy and Procedures* ("ITA Q&A"), Section II-1 at 4, in "Protection of Indian Trust Resources."<sup>1</sup> In fulfillment of the trust responsibility, Reclamation commits in its own ITA policy to:

<sup>1</sup> Reclamation's policy statements regarding the proper discharge of the trust responsibility should be interpreted in light of the "guiding principles" in Secretarial Order No. 3215, *supra*. The Secretarial Order cites as a "source of guidance" *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942), wherein the United States Supreme Court stated that the government, in its dealings with Indians, is TEN TRIBES PARTNERSHIP COMMENTS  
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4: Comment noted.

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