

The primary function of an [EIS] under NEPA is to insure a fully informed and well-considered decision In order to fulfill its role, the EIS must set forth sufficient information for the general public to make an informed evaluation, and for the decisionmaker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks of harm to the environment against the benefits to be derived from the proposed action. In so doing, the EIS insures the integrity of the process of decision by giving assurance that stubborn problems or serious criticisms have not been swept under the rug.

Sierra Club v. United States Army Corps of Engineers, 701 F.2d 1011, 1029 (2nd Cir. 1983) (internal citations and quotation marks omitted).

Moreover, NEPA requires that an agency prepare a draft environmental impact statement with the same general thoroughness as it will its final impact statement:

Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping processThe draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section [4332](2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

40 C.F.R. § 1502.9(a)(1999). As discussed below, Reclamation must prepare and circulate a revised DEIS because the current DEIS is “so inadequate as to preclude meaningful analysis,” *see id.*, Reclamation must prepare and circulate a revised DEIS.

- B. The DEIS'S Analysis of Alternatives Is Incomplete Because it Does Not Contain the Water Use Projections for the Partnership Tribes' Water Rights.

In the DEIS model runs, Tribal water use is buried within the demand nodes used by the Colorado River Simulation System (CRSS). Diversions, in many cases, serve both Indian and non-Indian water users, making it difficult to determine the portion, or assumed portion, associated with each. Furthermore, the Tribes have not participated in the determination of their modeled demands or in the assumed water development schedules for each state. Thus, from the standpoint of the Partnership, the modeling of Tribal water in DEIS model runs is ambiguous. Unambiguous modeling of Partnership

9: Reclamation provided the Partnership with a grant for participation in this process. CRSS has been modified based on the data provided by the Partnership and subsequent discussions with the Partnership consultants clarifying that data.

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Tribes' water within CRSS requires representation of the Tribes' water at each node where the potential for present or future Tribal water demands exists. From this basis the Tribes can identify and fully participate in determining the schedule for their modeled demands. Accordingly, the Partnership submitted to Reclamation a nodal delineation of Tribal water rights and planned development schedules. *See* DEIS at Cover Sheet for Appendix O.

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Although Reclamation had the requisite data from the Partnership, Reclamation omitted a complete analysis in the DEIS of the projected water use of the Partnership Tribes' quantified water rights. Although concern about impacts on the future development of these water rights was clearly raised during the scoping process,⁴ the DEIS does not provide a substantive and meaningful discussion of the salient socioeconomic and environmental impacts that the alternatives could have on water use by the Tribes. If alternatives diminish the Partnership Tribes' ability to develop their water rights, those socioeconomic impacts must be described. Moreover, the DEIS fails to consider how the Ten Tribes' water use could affect the quantities of surplus water available under the various alternatives. Proper accounting of the Ten Tribes' ITAs begins with proper inputs into the model. This lack of any substantive discussion about data Reclamation had in its possession, but did not incorporate into the model, raises serious questions as to the accuracy of Reclamation's conclusions regarding environmental impacts of the proposed action.

10: The Department does not believe the alternatives of this proposed action preclude the Tribes from using their Colorado River entitlement.

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Instead of considering the impacts of the Partnership Tribes' water use on available surplus in the DEIS, Reclamation merely promised that it will update its Colorado River Surplus Simulation ("CRSS") model "to include discrete representation of the Ten Tribes' updated use schedules and their full quantified entitlements for the Final EIS" DEIS at 3.14-2. Reclamation conceded that it had "a draft listing of the Colorado River system reaches and demand points which was provided to Reclamation by the Ten Tribes Partnership" before the DEIS was issued, but that "[t]his data was not incorporated into the model for this DEIS." DEIS at Cover Sheet for Attachment O. There is no explanation in the DEIS why the data were not considered prior to releasing the DEIS, or why Reclamation ignored pertinent information relevant to the scope of the DEIS. If Reclamation fulfills its promise to incorporate the Tribes' water use projections in the CRSS prior to issuing the FEIS, *id.*, those figures will significantly affect the amount of water now projected in the DEIS as available surplus and will require that Reclamation issue a revised draft statement for additional public comment.

11: Reclamation has incorporated the Partnerships' data into the model runs.

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In addition to precluding meaningful analysis of the proposed action, the failure to incorporate the Partnership's water use projections in the DEIS's model runs contravenes a fundamental purpose of NEPA, to "insure that environmental information is available

12: Comment noted.

⁴ See letter from Joe Muniz, Chairman, Ten Tribes Partnership, to Jayne Harkins, Chairperson, Colorado River Management Work Group, Bureau of Reclamation (June 8, 1999). *See also* Letter from Stanley M. Pollack, Water Rights Counsel, Navajo Department of Justice, to Jayne Harkins, River Operations Manager, Bureau of Reclamation (June 29, 1999).

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to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1 (1999) (emphasis added). NEPA is intended to maximize meaningful public participation in decisions that affect the quality of the human environment. *See id.* at §§ 1500.2(d) and 1506.6 (1999). This policy works in harmony with having as complete a DEIS as possible. *See id.* at § 1502.9(a). If the DEIS is complete, public feedback can be meaningful. In preparing its final environmental impact statement on interim surplus criteria, Reclamation must “assess and consider [public] comments . . . and shall respond . . . stating its response in the final statement.” 40 C.F.R. § 1503.4(a) (1999). Reclamation has no corresponding obligation to respond to public comments after the FEIS is issued. Consequently, Reclamation's decision to omit incorporation of data in the DEIS regarding the Partnership Tribes' water use undermines a manifest policy that proposing agencies should “[e]ncourage and facilitate public involvement . . .” to the fullest extent possible. *Id.* at § 1500.2. This error can only be corrected by recirculating a revised DEIS which incorporates modeling runs and a discussion of Partnership Tribes' water use as it relates to the proposed interim surplus criteria.

TECHNICAL COMMENTS

I. SURPLUS ACCOUNTING

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The Ten Tribes Partnership has consistently asserted that the Colorado River Interim Surplus Criteria EIS should include a full and explicit accounting of the water making up the surplus to the Lower Basin.⁵ The Partnership contends that the surplus criteria alternatives cannot be properly evaluated without accounting for the sources of the surplus water.

The sources of surplus water to the Lower Basin, in order of declining magnitude during the interim period, are: storage drawdown in Lakes Mead and Powell; undeveloped Indian and non-Indian water in the Upper Basin; reduced spills (excess to Mexico); and reduced reservoir evaporation. The Partnership requests that this accounting be included in a revised DEIS and the final EIS.

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⁵ The Partnership submitted text to Reclamation describing the water rights of each Partnership Tribe which was incorporated by Reclamation in sections 3.14.2.1 through 3.14.2.10 of the DEIS. The Partnership recommends the following revisions to the text at section 3.14.2.6 discussing the Fort Mojave Indian Reservation. Revise the second paragraph as follows:

The Fort Mojave Tribe claim to additional land and water rights in California was recently settled and confirmed by the United States Supreme Court in *Arizona v. California*, ___ U.S. ___, 2000 WL 775538 at 17-18 (2000). That settlement provides an additional reserved water right in the amount of 3,022 acre-feet

Delete the first two sentences of the third paragraph because they reference a table that is not part of the DEIS. Add the following sentence at the beginning of the paragraph: “Water use by the Fort Mojave Tribe is estimated using records of electrical consumption at various pump stations and are not measured flows.” The third paragraph should then start with “The CRSS model contains”

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13: The Department declines the request to include the sources of water in the FEIS. Once tributary water commingles with Colorado River water it becomes Colorado River system water. This system water is used as such to make appropriate deliveries based on the Decree. The selection of any of the alternatives of this proposed action does not preclude any entitlement holder from using its water.

14: We have revised the second subparagraph under paragraph 3.14.2.6 in the FEIS to adopt these suggestions from the Ten Tribes Partnership.

A. Storage Drawdown

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During the interim period the storage drawdown in Lakes Mead and Powell is the largest source of surplus water to the Lower Basin. The accelerated drawdown of stored water under the more liberal surplus criteria (Six States, Seven States, California, and Shortage Protection) effectively trades future shortage protection for interim surplus. However, over the course of 60 years the mean annual change in storage (initial storage less ending storage divided by the number of years) is close to the same for all alternatives and is no longer a source of surplus water.

B. Undeveloped Upper Basin Water

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After the interim period, undeveloped Upper Basin Indian and non-Indian water accounts for the bulk of surplus water to the Lower Basin. During the interim period it is second to storage drawdown as a source for Lower Basin surplus. This source of Lower Basin surplus declines with time as the Upper Basin develops.

As explained earlier, the CRSS modeling for the DEIS did not explicitly include nodal representation of Upper Basin Indian water rights and development schedules. The Ten Tribes Partnership submitted to Reclamation a nodal delineation of the Tribal water rights and planned development schedule, which Reclamation states in the DEIS it intends to incorporate in the CRSS modeling for the Final EIS, and which incorporation requires the submission of a revised DEIS for public review and comment. See discussion *supra*. See also DEIS at Cover Sheet for Appendix O.

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Based on the rights and development schedule provided in DEIS Appendix O, the current depletion by Upper Basin Tribes is 357 KAF per year versus a total right and full development depletion of 728 KAF per year. Thus the undeveloped Upper Basin Tribal water right is 371 KAF per year. From the Upper Basin consumptive use schedule assumed for the DEIS modeling, the current total Upper Basin depletion is 3,836 KAF per year against an end of model run depletion of 5,204 KAF per year. Thus the total undeveloped water in the Upper Basin is assumed to be 1,368 KAF per year. The Indian portion of this total undeveloped Upper Basin water is 371/1,368 or 27%. This is the fraction assumed by the Ten Tribes Partnership in developing this response to the DEIS.

The consequence of undeveloped Upper Basin water on water made available to the Lower Basin is simulated as the difference between model runs with scheduled development of Upper Basin water and runs with full development for all model years. Inherent in this approach is the assumption that scheduled water development will not be hindered as a result of disincentives associated with the surplus alternatives being analyzed. If scheduled development were curtailed then the analysis should be based on the difference between current use in the Upper Basin and full rights, which would demonstrate even greater reliance on undeveloped water and hence potential adverse impact to Indian trust assets.

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15: See response to Comment No. 31-7 for a discussion of the results of interim surplus criteria implementation.

16: For the DEIS, the depletion schedules prepared and submitted by the Upper and Lower Basin states were used to model the basin water demands under normal, surplus and shortage water supply conditions. The states updated these schedules in consultation with the local agencies/tribes and Reclamation used the updated schedules in the modeling of the baseline conditions and surplus alternatives for the FEIS. All agency/tribe demands schedules are believed to have been appropriately modeled for the DEIS. However, for the DEIS, the demands of various agencies/tribes were clustered or aggregated at the respective nodal point on the model. For the FEIS, the demands of the individual agencies/tribes that have water service contracts with Reclamation and have direct diversions from the main stem Colorado River were disaggregated and modeled as individual demands at the respective nodal points on the model. See Attachment H which shows the Lower Basin use schedules and Attachment K which shows Upper Basin use schedules. All Tribes in the Ten Tribe Partnership, in the Lower Basin receive their scheduled depletion, with the exception of the Cocopah Tribe which has some Arizona Priority 4 water.

17: See response to Comment No. 53-16.