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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

*From 1/1/00
4600*

Regional Director Robert Johnson
Bureau of Reclamation Lower Colorado Region
c/o Jayne Harkins
BC00-4600
P.O. Box 61470
Boulder City, NV 89006-1470

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

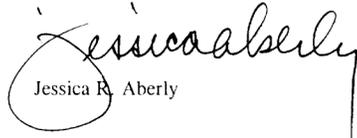
Dear Mr. Johnson and Ms. Harkins:

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

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.

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

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

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

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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 unsupported 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.

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.

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

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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.

* * *

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

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- 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.

4: Comment noted.

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.”¹ In fulfillment of the trust responsibility, Reclamation commits in its own ITA policy to:

¹ 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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carry out its activities in a manner which protects trust assets and avoids adverse impacts when possible. When Reclamation cannot avoid adverse impacts, it will provide appropriate mitigation or compensation.

Reclamation ITA Policy in “Protection of Indian Trust Resources.”

Reclamation’s procedures implementing its ITA policy require that the assessment of impacts on ITAs cover “[a]ctions that could impact the value, use or enjoyment of the ITA.” ITA Q&A, Section IV-4 at 9. “Such actions could include interference with the exercise of a reserved water right.” *Id.* Reclamation requires all impacts, whether positive or negative, to be analyzed and discussed. *See id.* Reclamation’s analysis, according to its own policies and procedures, encompasses the following steps:

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.

According to its procedures, when implementing its ITA policy, Reclamation should perform interdisciplinary studies in order “to identify potential impacts and reasonable measures that could prevent or mitigate the adverse impacts.” ITA Q&A, Section IV-7 at 10.

Reclamation’s procedures for implementing its ITA policy also seek to uphold the United States’ “government-to-government” policy by “[trying] to insure that tribes are not treated as ‘just another interest group.’” ITA Q&A, Section II-6 at 7. Reclamation’s ITA policy recognizes that working “government-to-government” with tribes “requires that federal agencies design solutions and tailor federal programs, in appropriate circumstances, to address specific or unique needs of Indian tribes.” *Id.*

Because the Partnership Tribes’ water rights are Indian trust assets, *see* discussion *supra*, Reclamation must follow Interior’s and its own ITA policies and procedures in addressing the Partnership Tribes’ water rights in the DEIS. In accordance with these policies and procedures, the DEIS must explain and assure that the decision will be consistent with the trust responsibility by:

- a) Explicitly addressing how the proposed action, the development of specific interim surplus criteria, will impact the Partnership Tribes’ water rights.

charged with “moral obligations of the highest responsibility and trust” and should be “judged by the most exacting fiduciary standard.” *Id.*

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- b) Explaining how the proposed action will be consistent with Reclamation's responsibility to protect and promote these water rights.
- c) Fully analyzing whether the proposed action *could* interfere with the Partnership Tribes' exercise of these water rights now or in the future.
- d) Analyzing the impacts and reasonable mitigation measures based upon an interdisciplinary approach.
- e) Designing mitigation solutions that recognize and promote the Tribes' unique relationship with the federal government.
- f) Including, to the extent significant adverse impacts from the proposed action cannot be avoided, sufficient mitigation measures to ensure that the Partnership Tribes' water rights and the ability to exercise those water rights now or in the future are protected.

As is discussed in more detail below, the DEIS is woefully lacking in meeting any of these obligations in its ITA analysis.

B. The DEIS Fails to Analyze the Significance of the Impacts on the Partnership Tribes' Water Rights and Fails to Discuss How the Impacts May Be Avoided or Mitigated.

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Despite inconsistent statements to the contrary in the DEIS's summary, *see* DEIS at S-14,² and despite the DEIS's erroneous statement that the present perfected rights of the Five Lower Basin Tribes are not ITAs, the DEIS clearly states that the proposed action could have a significant impact on the Indian trust assets of the Partnership Tribes. The DEIS recognizes that a substantial portion of the surplus water made available under the interim criteria is "primarily a direct result of unused existing entitlements, including those of the [Ten] tribes," whom, the document recognizes "have a significant amount of undeveloped water rights." DEIS at 3.14-2. Having recognized that fact, the DEIS concludes that the development of an interim surplus criteria has the "practical effect of diminishing the tribes' ability to utilize their entitlements." *Id.* There is, however, no analysis of this clearly stated impact and no discussion of how such an impact might be mitigated.

Notwithstanding the perfunctory presentation, Interior and Reclamation have recognized that establishing interim surplus criteria will create a disincentive for the

² In fact, the conclusory statement in the DEIS summary, that water availability for the Partnership Tribes would be unaffected because the Partnership Tribes' water rights "have priorities sufficiently early in time," is inaccurate. The erroneous statement ignores the fact that many of the Partnership's Upper Basin Tribes have *subordinated* senior priority dates as part of congressional settlements or project authorizations.

5: The Department acknowledges this concern and recognizes that a number of Tribes have been unable to use their entitlement to date. The Department is committed to making progress to help Tribes make better use of their water rights. In the Upper Colorado Region, Reclamation and the Department have undertaken numerous efforts to pursue opportunities for the Ten Tribes to utilize their water rights. Implementation of water right settlements for both the Northern Ute Tribe and the Jicarilla Apache Tribe continues to be a focus of the Department, along with seeking final implementation of the Colorado Ute settlement. In addition, the Department is working with the Navajo Nation on reapportionment of the Navajo Reservoir, which will assist efforts to move the Navajo Indian Irrigation Project towards completion. Efforts also continue on a settlement of the Little Colorado River.

In the Lower Colorado Region, Reclamation and the Department have likewise undertaken numerous efforts to pursue opportunities for various Tribes to utilize their water rights. The Department has worked for years to address the needs of Lower Basin Tribes served by the Central Arizona Project in a comprehensive Arizona Water Rights Settlement. For example, recently this effort led to introduction of a bill in Congress that would address the claims of the Gila River Indian Community, resolving the largest Indian water rights claim in the western United States.

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development of the Tribes' quantified but currently "undeveloped water rights." *Id.* Stated another way, the three Lower Basin States, and the water users within those States who benefit from the interim surplus criteria, now have (yet another) incentive to oppose and to seek to prohibit any further development of the Partnership Tribes' quantified federal reserved rights.³ Although the DEIS thus correctly acknowledges that the proposed action could impact the value, use, or enjoyment of the Partnership Tribes' Indian trust assets, the DEIS fails to provide the thorough discussion and analysis of this impact that is necessary for decisionmakers and the public to understand both the extent of the impact and the need for mitigation. As discussed above, Reclamation is required to "explicitly address" the impacts on ITAs and to avoid or mitigate those impacts in a manner that recognizes, respects, and implements the trust relationship between the federal government and the Tribes. The DEIS explicitly addresses the extent of impacts to those Tribes with entitlements to Central Arizona Project water, but it contains no analysis of the magnitude of the disincentive that each of the various alternative proposed interim surplus criteria could have for development of the Partnership Tribes' water rights. Reclamation has not employed an "interdisciplinary" or any other analysis to properly assess the impacts of the alternatives on the Partnership Tribes. This is yet another reason why a revised draft environmental impact statement should be issued.

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By virtue of the fact that their rights are quantified, the Ten Tribes' rights can, and should be, explicitly accounted for, and assessed, *see also* n.3 *supra*, in a manner that reflects the actual value of using their water in various shortage, normal, or surplus determinations, as those determinations would be made according to the various alternatives in the DEIS. *See* discussion in the Technical Comments *infra*. Such an assessment is necessary in order to, at the very least, analyze the one impact Reclamation actually recognized in the DEIS at 3.14-1. Furthermore, having an analysis that is tailored to the specific and unique needs of the Partnership Tribes is in keeping with Reclamation's own policies to foster government-to-government relationships and to protect Indian trust assets. Because the DEIS contains literally no analysis of the one impact recognized in the DEIS, the disincentive to future water development by the Tribes, the Partnership has provided such an assessment. *See* discussion in the Technical Comments *infra*. As the Partnership's analysis reveals, the impact varies depending on the alternative criteria employed.

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In addition to ignoring a complete analysis of the impacts, the DEIS fails to discuss appropriate mitigation for the Tribes. Such a discussion cannot occur, however, without performing the proper accounting of the effect that the proposed action will have

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³ It is important to note that this disincentive argument holds true for unquantified and undeveloped federal reserved water rights as well. The Partnership's request that a revised DEIS explicitly account for and analyze the amount of the disincentive on the Tribes' quantified rights does not diminish the need for Reclamation to also analyze, and mitigate impacts to, Indian federal reserved water rights that are not yet quantified. The analysis may be different, however. It is also important to note that, even if impacts to all Tribes and, indeed, the Six States, are lessened by establishing criteria that allows California to curtail its over dependence on the Colorado River, implementation of interim criteria still can, and does, have impacts.

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6: The Department does not believe this proposed action would preclude the Tribes or any entitlement holder from using their Colorado River entitlement. The interim surplus criteria will not alter the quantity or priority of Tribal entitlements. In fact, as noted by the description of the Tribes' water rights in Section 3.14, 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 is 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.

7: The Department does not believe mitigation is warranted based upon the Department's conclusion that the proposed action will not adversely affect the water rights of the Tribes (or any entitlement holder).

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on the Partnership Tribes' quantified rights. Once the accounting is done and the impacts are analyzed, but before a preferred alternative is chosen, Reclamation has a duty to consult with the Tribes regarding mitigation determinations. *See* ITA Q&A, Section V-1 at 13 ("Mitigation determinations should be done as they are now, by consulting with affected Indian entities . . ."); *see also id.*, Section IV-11 at 11 ("[T]he government-to-government policy requires that tribal governments be consulted to the greatest extent practicable concerning actions with potential affects on . . . tribal ITAs . . .").

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III. A REVISED DEIS SPECIFICALLY ADDRESSING THE PARTNERSHIP WATER USE MUST BE CIRCULATED IN ORDER TO COMPLY WITH NEPA

A. Under NEPA, a Draft Environmental Impact Statement Must Fulfill and Satisfy to the Greatest Extent Possible the Requirements Established for the Final Environmental Impact Statement.

In addition to the deficient ITA analyses, the DEIS's discussion of the environmental impact of the proposed action is insufficient according to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370(d) (West Supp. 2000) ("NEPA") and its implementing regulations. The only cure for the deficiencies discussed herein, as provided by NEPA, is to recirculate a revised DEIS as it pertains to analysis of the Partnership Tribes' water rights and water use.

NEPA requires impact statements to include "a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332 (C). *See also* 40 C.F.R. §§ 1508.8 and 1508.27 (1999). The fundamental purpose of this requirement is to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1 (1999). The Council on Environmental Quality's implementing regulations for NEPA apply to Reclamation's actions. *See id.* at § 1500.3. Those regulations provide that:

[impact statements] 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 . . . *Statements . . . shall be supported by evidence that the agency has made the necessary environmental analyses.* An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

40 C.F.R. § 1502.1 (1999)(emphasis added).

The Second Circuit has elaborated on these regulatory requirements and provided a concise summation of NEPA case law as it pertains to an impact statement's fundamental purpose:

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8: Reclamation disagrees with the commentor's opinion that the ITA analysis is deficient and the environmental impact of the proposed action is insufficient. To meet the requirements of NEPA, it is common practice to update DEIS information in the FEIS as was the case on Tribal water rights and uses. Reclamation has used the best information available in the DEIS and has updated the ITA section appropriately. The determination of Tribal water rights and uses are legal matters beyond the scope of the proposed action. The NEPA process is not the vehicle to determine water rights of any party. Reclamation did not exclude identification or analysis of Tribal water rights or uses in the DEIS. The DEIS and FEIS identifies and appropriately analyzes impacts to Tribal water rights based on information available to Reclamation, thus Reclamation believes it is not required to recirculate a revised DEIS.

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.

10

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.

11

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

13

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.

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

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”

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.

15 A. Storage Drawdown

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.

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

16 B. Undeveloped Upper Basin Water

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.

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.

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.

17 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.

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

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.

18

C. Reduced Spills

Relative to the Flood Control Alternative, each of the other alternatives results in less excess flows to Mexico. This reduction in spills from Lake Mead is the third largest source of surplus water to the Lower Basin.

18: Comment noted.

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D. Reduced Evaporation

With the accelerated drawdown of Lakes Powell and Mead the mean reservoir surface area is reduced with a consequential reduction in evaporation loss. This is the smallest source of surplus water to the Lower Basin. It is calculated relative to the evaporation occurring under the Flood Control Alternative, which has the largest mean reservoir storage and, accordingly, the largest mean annual evaporation loss.

19: Comment noted.

II. LOWER BASIN TRIBAL ACCOUNTING POOL

The Lower Basin presently exceeds its compact apportionment, even though the Lower Basin Tribes have not fully developed their perfected water rights. This undeveloped portion of the Lower Basin Tribal depletion right is represented in all analyses as its proportionate share of the Lower Basin use, indicating that other users in the Lower Basin are presently consuming these depletion rights. In addition, this undeveloped portion of Lower Basin Partnership water could be tracked by in-reservoir accounting in Lake Mead explained in more detail below.

20: The Department declines the request to adopt a Lower Basin Tribal Accounting Pool.

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Because the undeveloped Five Lower Basin Tribes' water assets are an implicit component of the Lower Basin consumptive use they should be treated differently than the undeveloped Upper Basin water when analyzing the potential effects of the various surplus criteria.

Since the Lower Colorado River Basin States presently receive more than their 7.5 million acre-feet (MAF) apportionment, even though the Five Lower Basin Tribes have not fully developed their decreed right, the Lower Basin is implicitly using and relying on Tribal water. The consequence of undeveloped Lower Basin Tribal water could be tracked as the difference between model runs with and without full development as for the Upper Basin Tribal water. While tracking the Lower Basin Tribal rights on this annual basis is instructive and important to the Partnership, it is not a meaningful accounting method that reflects the true value of this trust asset. Impacts accounted for in this manner do not clearly reflect the value of the Tribal water thus used by others. For example, in wet periods when excess water is available, there would be no use of this water by others, yet in dry years its use becomes very important in off-setting shortages that would exist otherwise. Another accounting instrument is required that better represents this differential use. Accordingly, Partnership proposes to represent their unused Lower Basin water with in-reservoir accounting in Lake Mead. In addition to better assessing the use of Lower Basin Tribal water, this accounting method allows differential assessment of impacts among the alternatives. Such an accounting method

provides the best tool for Reclamation, on behalf of the Secretary, to meet its trust responsibility to the Partnership.

In-reservoir accounting of the undeveloped Five Lower Basin Tribes' water will not conceptually change the surplus declaration alternatives or the simulated releases from Lake Mead. Rather, it is simply a bookkeeping process that determines the portion of surplus, normal, and shortage water delivered to other non-Partnership Lower Basin users as a result of undeveloped Ten Tribes' water in the Lower Basin. Because the Tribal Accounting Pool ("TAP") does not affect simulated releases from Hoover Dam, TAP accounting can be done as a post-modeling process provided all trigger elevations for Lake Mead surplus and shortage are output. However, the Partnership promotes having TAP explicitly incorporated into the simulation model as this will expedite the analysis and will better assist the Secretary in assessing the importance and significance of undeveloped Tribal waters in the Lower Basin consumptive use allowed by the various surplus criteria.

Presently, the undeveloped Lower Basin Partnership water is approximately 185 KAF annually. This amount decreases during the interim period due to development of Tribal Rights as represented in Appendix O of the DEIS, with an average of 155 KAF over the interim period. Thus, each year 155 KAF will be added to TAP. If excess flow is released to Mexico then TAP would be reduced by the lesser of the amount of excess flow and the volume in TAP. If top water banks maintained by others are operating, the reduction due to spill would be shared in proportion to the water in each bank and TAP. Evaporation would be charged to TAP according to its portion of the total Lake Mead surface area (difference between the surface area with and without TAP water).

Figure 1 shows various storage conditions in Lake Mead relative to surplus (+) and shortage (-) trigger elevations.

- a) Under the condition shown in Figure 1a excess water would be delivered to Mexico and TAP would be reduced by the amount of excess. If the excess to Mexico exceeds the amount in TAP, TAP contents would be zeroed. The sharing of impact with top water banks discussed above would apply to this condition.
- b) The condition shown in Figure 1b would result in a surplus delivery with or without TAP and no water would be withdrawn from TAP.
- c) Under the condition shown in Figure 1c a surplus would be declared. Without TAP a normal release (no surplus) would be declared. Because it is the contents of TAP that put the lake level above the surplus trigger elevation and allow a surplus to be declared, an amount equal to the lesser of the surplus and TAP contents would be added to the tally of surplus water resulting from the undeveloped Lower Basin Tribal water and withdrawn from TAP.

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- d) The condition shown in Figure 1d would result in a normal delivery with or without TAP and no water would be withdrawn from TAP.
- e) Under the condition shown in Figure 1e a normal delivery would be declared. Without TAP shortage would occur. Since it is the contents of TAP that put the lake level above the shortage trigger elevation and allow normal delivery rather than shortage, an amount equal to the lesser of TAP and the difference between normal and shortage deliveries would be added to the tally of normal water (shortage relief) resulting from the undeveloped Lower Basin Tribal water and withdrawn from TAP.
- f) Under the condition shown in Figure 1f shortage occurs with or without TAP water; however, to the extent that releases are greater with TAP water than without, the difference would be added to the tally of shortage reduction attributed to the undeveloped Lower Basin Tribal water and withdrawn from TAP.

At the end of each model run, the tallies of surplus enabling, normal (shortage relief), and shortage reduction water withdrawn from TAP are averaged across all traces for each year of the simulation.

Combinations of these six conditions may also occur, and TAP accounting rules will likely evolve through application. However, the above provides a conceptual overview of how the Ten Tribes Partnership believes the undeveloped Tribal water in the Lower Colorado River Basin should be represented and tracked in order for the DEIS to contain a sufficient ITA analysis of the impacts on Partnership water rights.

III. ANALYSIS OF SURPLUS ALTERNATIVE USING ACCOUNTING CONCEPTS

The Ten Tribes Partnership applied the accounting procedures described above as part of its evaluation of the surplus criteria alternatives described in the DEIS.

The description of the model inputs and configuration details in the DEIS are insufficient to replicate Reclamation's results.⁶ Since the proposed accounting procedures require the full detail of the model output, the Partnership made CRSS-ez model runs configured to closely approximate the RiverWare CRSS model results reported in the DEIS.

⁶ This appears to be a violation of, among other things, NEPA's mandate that environmental impact statements be "supported by evidence that agencies have made the necessary environmental analyses." 40 C.F.R. § 1502.1.

21: See response to Comment No. 71-16. See also Attachment Q which shows the Ten Tribe depletions and diversions that were used in the FEIS alternatives.

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An attempt was made to evaluate the Seven States Alternative, *see* 65 Fed.Reg. 42028 (2000), but due to inconsistencies between trigger elevations, demand schedules, post interim criterion (70R versus 75R), and modeling platforms (CRSS-ez versus RiverWare CRSS), results compatible with the DEIS model runs were not obtainable. However, it is believed that the Seven States Alternative would fall between the Six States and California Alternatives, and the Partnership evaluated it accordingly.

The relative magnitudes of the five sources of Lower Basin surplus (storage drawdown, undeveloped Upper Basin Indian and non-Indian water, reduced spills, and reduced evaporation) for each of the surplus alternatives in the DEIS are shown in stacked bar graphs in Figures 2a (annual averages for interim period, 2000-2015), 2b (annual averages for post interim period, 2016-2060), and 2c (annual averages for the entire model study period, 2000-2060).

Figure 2a shows that the storage drawdown in Lakes Powell and Mead is the largest source of surplus water to the Lower Basin for all surplus alternatives during the interim period (2000-2015). With the exception of the No Action Alternative, undeveloped water in the Upper Basin is the next largest source of Lower Basin surplus, followed by reduction in spills (excess to Mexico), and then reduced evaporation loss due to the lowering Lakes Powell and Mead.

For the post-interim period (2016-2060), Figure 2b, the average Lower Basin consumptive use is below 7.5 MAF and there is no surplus resulting from change in storage in Lakes Mead and Powell as these reservoirs were effectively drawn down during the interim period. The No Action Alternative produces the greatest Lower Basin consumptive use during the post-interim period and with less than half the dependency on undeveloped Upper Basin water as the other alternatives.

Figure 2c shows the annual averages over the entire 60-year modeling period. Because the change in storage over the entire modeling period is practically the same for all alternatives it does not figure in to a 60-year average comparison of the alternatives. Figure 2c as well demonstrates that the No Action Alternative has the least reliance on undeveloped Upper Basin water of all the alternatives.

Figures 3a-c provide an analysis, using a top-water accounting method in Lake Mead, of the implicit use of undeveloped Lower Basin Indian water rights by non-Partnership entities. As mentioned earlier, the Lower Basin currently exceeds its 7.5 MAF apportionment despite underdevelopment of Lower Basin Tribal waters rights. Thus the undeveloped Lower Basin Tribal water rights are a basic component of Lower Basin non-Indian use. The Partnership believes that the implicit use of its undeveloped Lower Basin water can best be analyzed through water accounting methods described earlier. For this analysis the Partnership assumed that on average 155 KAF was deposited in the Tribal Accounting Pool (TAP) each year. The 155 KAF is the average undeveloped

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Lower Basin depletion right when utilizing the CRSS depletion schedule used in the DEIS during the interim period.

Figure 3a shows a relatively large amount (nearly 80 KAF annually) of TAP water going to realize surplus deliveries (TAP condition shown in Figure 1c) under the California, Six State, and Shortage Protection Alternatives and a modest amount (17 KAF annually) under the No Action Alternative during the interim period. Small amounts of TAP water also go to normal (TAP condition shown in Figure 1e) and extreme shortage relief (TAP condition shown in Figure 1f).

During the post-interim period over 40 KAF annually of TAP water goes to extreme shortage relief and a near equal amount to meet normal deliveries under all surplus alternatives. With exception of the Flood Control Alternative there is little difference in TAP releases among the alternatives during the post-interim period. Note that for the Flood Control Alternative there is never any surplus TAP release (TAP condition shown in Figure 1c) since under this alternative surplus is coincidental with the condition shown in Figure 1a when the TAP is reset.

Figure 3c shows the 60-year average TAP releases. From this figure it is apparent that there is little difference among the liberal criteria (California, Six State, and Shortage Protection Alternatives) with respect to TAP releases and hence to the implicit reliance on undeveloped Lower Basin Tribal waters. The No Action and Flood Control Alternatives have moderately lower 60-year average TAP releases than the three liberal interim criteria.

IV. DISINCENTIVE TO INDIAN WATER DEVELOPMENT

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As the DEIS acknowledges but does not analyze, *see* DEIS at 3.14-2, there is a disincentive to Indian water development due to the implicit reliance on undeveloped Tribal water assets. As demonstrated by the accounting above, this implicit reliance varies depending on the surplus criterion. The more liberal the surplus criterion, the greater is the implicit reliance on undeveloped water both in the Upper and Lower Basins, and hence the greater is the disincentive to Indian water development. Since the Lower Basin is over-allocated, the development of Tribal water would reduce the delivery of water to others in the Lower Basin, requiring either a reduction in use or the purchase of water to replace that amount of Tribal water that others have previously used.

By assigning per acre-foot dollar values to the Lower Basin non-Indian use of undeveloped Indian waters, we can estimate the economic disincentive to Tribal water development. Using the negotiated cost per acre-foot transferred under the Imperial Irrigation District/San Diego County Water Authority conservation agreement as a current guideline, transferred water is valued at approximately \$290/af. Recognizing that the normal and shortage relief releases from TAP would have even greater value, normal

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22: The Department does not believe that the proposed action will serve as a disincentive to Indian water development. See response to Comment 53-6.

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TAP releases are valued at \$435/af, and shortage relief TAP releases at \$580/af. Table 1 gives the results of assigning these values to the implicitly used Upper and Lower Basin undeveloped Tribal waters. The amounts shown represent the 60-year annual average value of the Tribal water that will be used by the Lower Basin non-Indians under the various alternatives. It may be considered a disincentive to the development of Tribal water as those using this water would have to replace it at the approximate values shown, thereby providing this level of disincentive to others to allow for development of the water on Tribal lands. From Table 1 the No Action Alternative results in the lowest economic disincentive to Tribal water development.

Table 1. Potential Economic Disincentive to Tribal Water Development (\$million/year).

	California	Six State	Shortage Protection	No Action	Flood Control
Upper Basin	\$ 14.24	\$ 13.14	\$ 14.34	\$ 5.50	\$ 12.01
Lower Basin	38.24	37.67	38.21	34.26	31.70
Total	\$ 52.48	\$ 50.81	\$ 52.54	\$ 39.76	\$ 43.71

If the development schedule submitted by the Partnership is utilized in the final EIS as promised in the DEIS, and in a revised DEIS, *see* discussion *supra*, then the water supply available to meet the excess lower basin demand is diminished. When the new model runs are completed for the revised DEIS, the disincentive should be recomputed as the difference in delivery of Lower Basin Tribal water to Lower Basin non-Tribal uses for the two alternatives (full build-out as shown and the schedule shown in the DEIS). While the revised DEIS should recognize the full build out scheduled, it should also acknowledge that the loss of this water to the non-Tribal Lower Basin users has an economic impact and that impact becomes a disincentive for others to allow the Tribes to accomplish their desired build-out.

CONCLUSION

As presently drafted, the DEIS fails to fully and adequately account for the Partnership Tribes’ water rights and the impact Reclamation admits the interim surplus criteria will have upon those rights. These failures must be corrected to fulfill the requirements of NEPA and Interior’s and Reclamation’s own policies regarding ITAs. This additional analysis, together with a complete analysis of the Seven States proposal, will require that Reclamation circulate a revised DEIS that fully accounts for impacts to ITAs and proposes mitigation for those impacts based upon consultation with the Partnership. Without the requisite analysis in a revised DEIS, there is no basis upon which the Partnership – or the Secretary – may support a preferred alternative.

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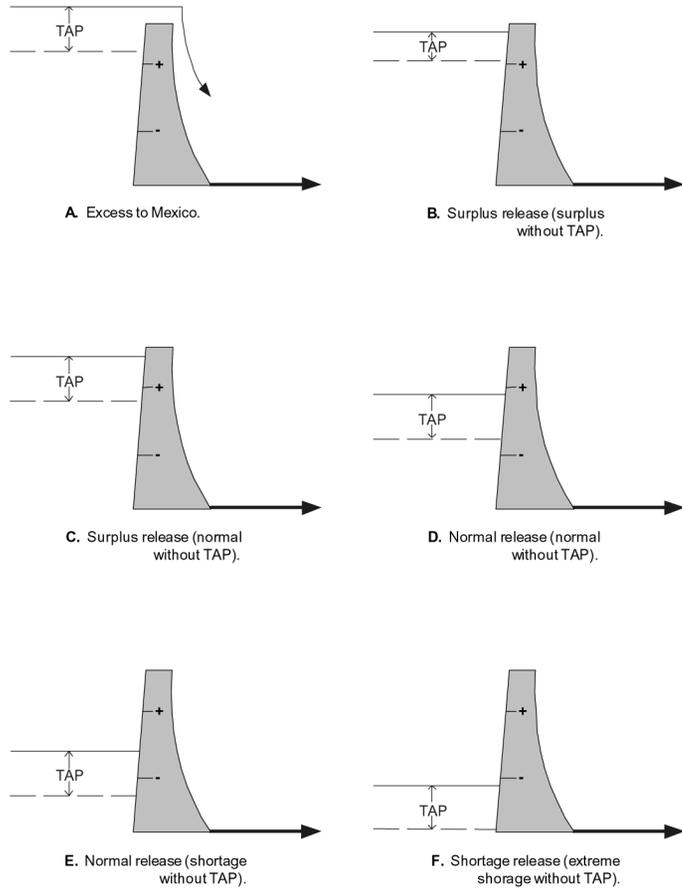
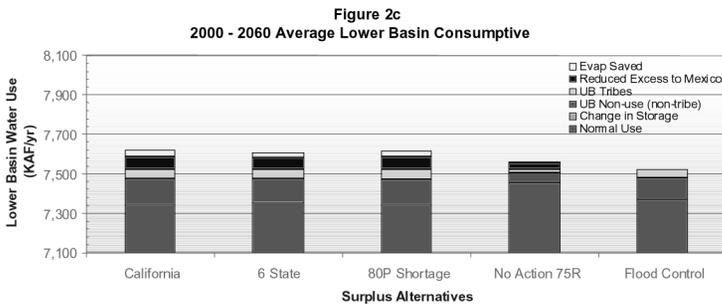
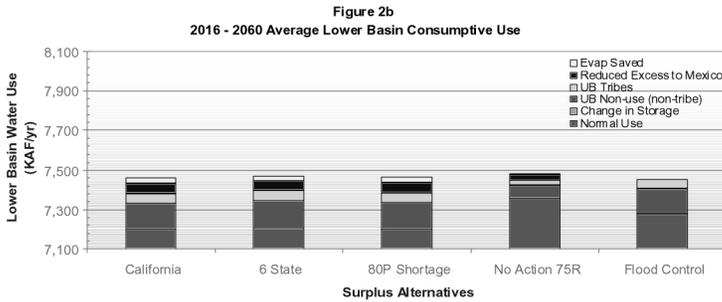
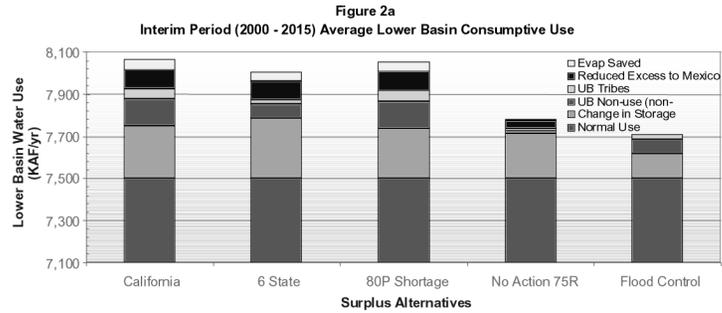


Figure 1. Different combinations of Tribal Accounting Pool (TAP) and contents of Lake Mead relative to surplus (+) and shortage (-) trigger elevations.

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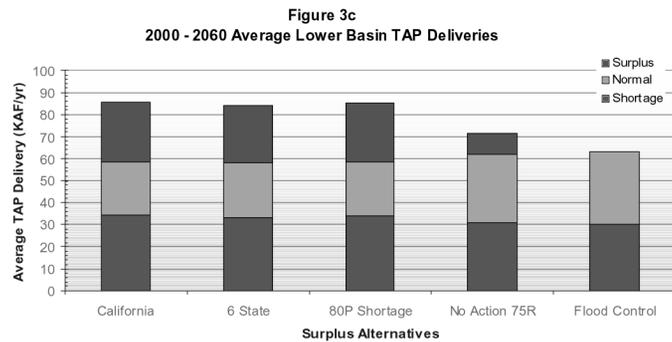
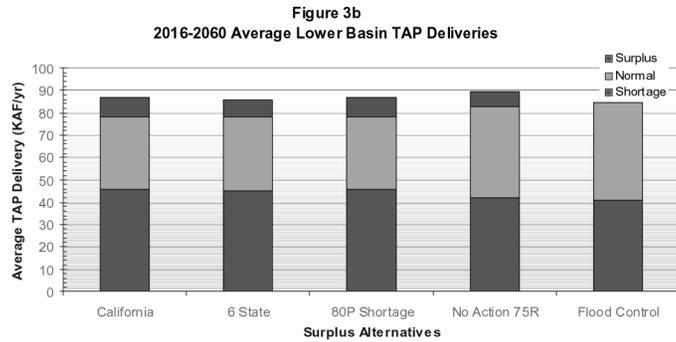
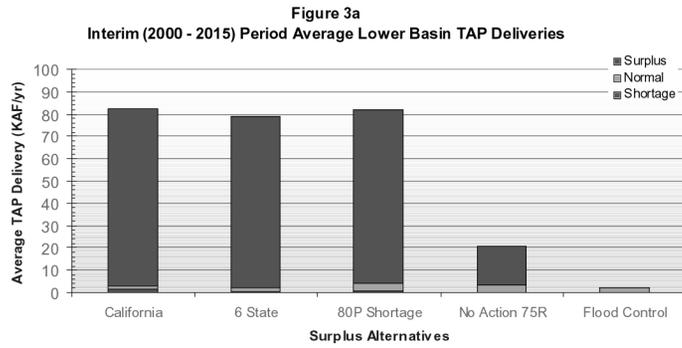
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TEN TRIBES PARTNERSHIP COMMENTS
COLORADO RIVER INTERIM SURPLUS CRITERIA
DRAFT ENVIRONMENTAL IMPACT STATEMENT

INFORMATION SHEET

#71 – Ten Tribes Partnership

The following attachments to the comment letter received from the Nordhaus Law Firm on behalf of the Ten Tribes Partnership (comment letter #71) were not scanned into the database:

- (1) Department of the Interior, Departmental Manual release 512 DM 2
Protection of Indian Trust Resources
- (2) Bureau of Reclamation, Indian Trust Asset Policy and NEPA Implementing Procedures

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