

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.*

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

COMMENT LETTER

4
cont'd

- 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.

5
cont'd
below

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.

5
cont'd

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.

6

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.

7
cont'd
below

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

part of 5

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.

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

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).

7
cont'd

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 . . .").

8

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:

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

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.