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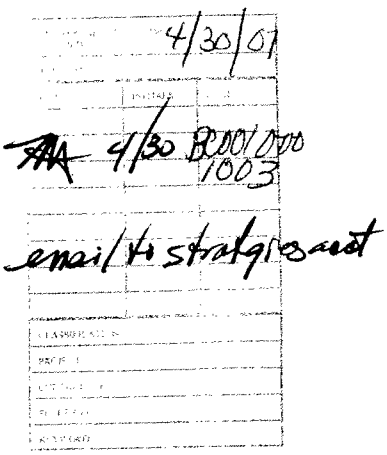

April 27, 2007

Via U.S. Mail Certified - Return Receipt Requested
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BUREAU OF RECLAMATION
ATTN: BCOO-1000
P.O. Box 61470
Boulder City, Nevada 89006-1470

Re: Comments on the DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead - SAN CARLOS APACHE TRIBE

Dear Regional Director:

This Firm serves as Special Legal Counsel to the San Carlos Apache Tribe ("Tribe") and submits the following comments on the *DRAFT Environmental Impact Statement for the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* ("DEIS"). The Tribe previously submitted written comments to the Bureau of Reclamation ("Reclamation") on August 31, 2005, and at meetings during scoping for the preparation of the DEIS. Those comments, including attachments, are incorporated here by reference.

The San Carlos Apache Tribe is located in east-central Arizona on the San Carlos Apache Reservation ("Reservation"). The Reservation is approximately 2 million acres, is largely arid, and still does not have an adequate water supply to serve the Reservation, though it is located along the Black River, Salt River and Gila River, to name a few.

Pursuant to the San Carlos Apache Tribe Water Rights Settlement Act of 1992, 106 Stat. 4740 ("Settlement Act"), the Tribe settled a portion of its water rights claims. Under the Settlement Act, the settling parties, including the United States, entered into the San Carlos Apache Tribe Water Rights Settlement Agreement, dated March 30, 1999, as amended ("Settlement Agreement"). The Settlement

Act and Settlement Agreement confirm certain water rights for the Tribe, including, *inter alia*, rights to 64,145 acre-feet of Central Arizona Project ("CAP") water. *See* Settlement Act at 106 Stat. 4740, 4742-4747 and Settlement Agreement at Sections 9-12.

The Tribe has a Central Arizona Project Indian Water Delivery Contract Between the United States and the San Carlos Apache Tribe dated December 11, 1980 ("CAP Contract"), a copy of which was previously provided in the Tribe's letter of August 31, 2005. This CAP Contract originally allocated 12,700 acre-feet of CAP water to the Tribe. The Tribe's CAP Contract was subsequently amended to include the additional 51,445 acre-feet of CAP water allocated to the Tribe under the Settlement Act. The Tribe agreed to settle a portion of its water rights claims in valuable consideration and return for, *inter alia*, this additional allocation of CAP water and CAP construction funds to pay for the exchange and delivery systems to enable the Tribe to receive and use its CAP entitlement on the Reservation. The allocation of CAP water to the Tribe pursuant to the Settlement Act and Settlement Agreement are trust assets of the Tribe which the Secretary of Interior has a specific trust responsibility to manage and protect. *See* 512 DM 2.2 (Dec. 1995); *see also*, Secretarial Order 3215, April 28, 2000.

River management strategies or decisions which would increase the frequency of shortages or the participation of others in the shortage pools, or reduce the long-term reliability of the Tribe's CAP water by declarations of a "shortage," and other schemes which manipulate "credits", storage rights, and exchanges must be avoided. Several of the alternatives described in the DEIS present shortage sharing scenarios and "conservation" schemes that will substantially reduce the reliability of the Tribe's CAP water supply and will materially injure the right of the Tribe to receive this water supply under the 1992 Settlement Act and Agreement.

Section 3.21 of the Tribe's CAP Contract defines a **"Time of Shortage" as "a calendar year for which the Secretary determines that a shortage exists pursuant to Section 301(b) of the Basin**

Project Act, such that there is not sufficient Project Water in that year to supply up to a limit of 309,828 acre feet of water for Indian uses, and up to a limit of 510,000 acre feet of water for non-Indian Municipal and Industrial uses." Under the Tribe's CAP Contract, deliveries of Project Water to the Tribe in Times of Shortage may be reduced or terminated in accordance with Section 4.9 of the Tribe's CAP Contract.

It is paramount that the Secretary of Interior ("Secretary") reject the proposed management strategies for Lake Powell and Lake Mead that would threaten the security or breach the Tribe's CAP Contract or breach the Secretary's trust responsibility to properly manage and protect the Tribe's CAP water as an Indian Trust Asset.

The Tribe has always understood the terms of the CAP Contract relating to shortage to mean that delivery of CAP water depends upon the physical situation of the Colorado River and not upon a scheme of management in which some are benefitted while others are not. The Secretary owes the Tribe a trust duty to refrain from implementing management strategies which interfere with the Tribe's contractual rights and expectation of delivery of CAP water and funding for construction and the payment of OM&R from the power generation revenues and Lower Colorado River Basin Development Fund under its CAP Contract and the 1992 Settlement Act and Agreement.

The following is a list of the Tribe's primary objections and concerns regarding the DEIS:

1. The DEIS Does Not Discuss How Shortages of the Natural Flow of the Colorado River Will Be Shared from Year to Year Between the Upper Basin and Lower Basin States

The DEIS provides no discussion as to how shortages in the annual natural flow of the Colorado River which is not adequate to meet the 15 m.a.f. of apportionments to the Upper and Lower Basin States will be imposed as between the Upper Basin and Lower Basin. The DEIS must first discuss how

shortages would be borne between the Upper Basin and Lower Basin, before discussing the allocation of water that is stored in the Colorado River reservoirs. The Secretary must first look to the annual natural flow of the River to provide the water supply that is to be apportioned.

Thereafter, the Secretary may look to the water which is stored in the reservoirs in the Lower Basin to provide the supplemental supply to meet the apportionment entitlements of contractors in the Lower Basin States.

2. The DEIS Cannot Lawfully Place Precedence Upon the Nevada Intake at 1050' Elevation Over the Requirements that the Tribes Receive Their Entitlements from the Colorado River to Provide for Their Permanent Tribal Homelands

The DEIS should not place precedence and limit considerations regarding the mark at which shortages will be declared based upon the location of the State of Nevada's intake at the 1050' elevation in Lake Mead. While Nevada may deepen its intake facilities into Lake Mead to mitigate impacts when a shortage is declared on the River, the Tribes have very few, if any, alternatives to enable them to obtain access to Colorado River water or replacement water supplies to provide for their Permanent Tribal Homelands. The DEIS should consider alternatives for shortage based upon the Secretary's obligation to protect and make available the Colorado River water supply to the Tribes, and to the long term reliability of the water supply for all contractors with rights to the River. The man-made intake facilities at Lake Mead for Nevada may be readily altered to correspond with the possibility of shortage, and thus, should be of little or no concern with regard to the management of the River, as opposed to those who have no other options.

The Law of the River does not allow the Lower Basin water supply to be managed primarily to serve one State or interest over another. The sole beneficiary of the Lake Mead scenario is Nevada, to the detriment of others, including the CAP Tribes. The alternatives must be adjusted to provide scenarios with equal consideration of the importance of the delivery of CAP water to the Tribe.

3. The DEIS Erroneously Assumes that the Tribe is a Subcontractor of the Central Arizona Water Conservation District

The DEIS erroneously assumes and conveys that the Tribe is a subcontractor of CAP water under the Central Arizona Water Conservation District ("CAWCD"), a political arm of the State of Arizona. *See* Appendix E at E-1, showing the CAWCD as the entitlement holder for all CAP water. On the contrary, the Tribe has a **direct** contract with the Secretary of Interior for the delivery of its CAP water, and the United States has a **direct** obligation to deliver this water pursuant to the Tribe's contract. *See* Tribe's CAP Contract. This misstatement should be corrected throughout the DEIS.

Since the Tribe is a direct contractor with the Secretary, it must be treated on a co-equal level with that of CAWCD and other contractors in other states with direct contracts with the Secretary to receive the waters of the Colorado River. CAWCD also has a direct contract with the Secretary for the delivery of the non-Indian portion of CAP water and an obligation to repay the cost of the non-Indian portion of the CAP project to the United States.

The Tribe's water right to CAP water is a portion of Arizona's equitable apportionment under *Arizona v. California* that must be directly protected by the Secretary as an Indian Trust Asset for the Tribe. The State of Arizona should have an interest in protecting the Tribe's CAP water supply. However, the State's conduct in this matter shows that its sole interest and effort is focused upon committing the Tribe's CAP water supply to non-Indian use, preventing the Tribe from ever using the "wet" water to which the Tribe has a right under its CAP Contract, as well as the 1992 Settlement Act and Agreement. Its conduct also indicates that the States seeks to take and keep the financial benefits from the CAP water to which the Tribe is entitled, which is presently diverted and unlawfully "converted" to use by the State and other non-Indian interests.

4. Use of Reservoirs to Store and Deliver "Conserved" Colorado River System and Non-System Water

The DEIS, at ES-2, lists one of the purposes of the proposed federal actions as to "[a]llow for the storage and delivery, pursuant to applicable federal law, of conserved Colorado River system and non-system water in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, particularly under drought and low reservoir conditions." While this purpose appears to be reasonable and foresightful, the method of implementing this purpose, as proposed in certain of the DEIS alternatives, will result in a wholesale taking of the Tribe's CAP water, and allow the Tribe's water to be committed to use by others. This is a violation of the Law of the River and of the Tribe's CAP water rights which are Indian Trust Assets that must be protected by the Secretary.

"The States [in the Basin States Alternative] propose that the Secretary develop a policy and accounting procedure concerning augmentation, extraordinary conservation, and system efficiency projects, including specific extraordinary conservation projects, tributary conservation projects, introduction of non-Colorado River system water, system efficiency improvements and exchange of non-Colorado River System water. The accounting and recovery process would be referred to as 'Intentionally Created Surplus' consistent with the concept that the States will take actions to augment storage of water in the Lower Colorado River Basin. The water would be distributed pursuant to Section II(B)(2) of the Decree and forbearance agreements between the States. The ICS credits may not be created or released without such forbearance agreements." (Appendix at J-11).

However, substantially all, if not all, of these "policy and accounting procedures" are based on a fiction. All of the Colorado River water, natural flow, storage, and surpluses are committed by contracts with the Secretary and the Treaty with the Republic of Mexico. There are no unallocated or uncommitted amounts of Colorado River water possible, including the fictional "Intentionally Created

Surplus." The fictional "Intentionally Created Surplus" is actually an attempt to convert the water that is committed to some other use to another entity.

Due to its position, the State of Arizona has a particular interest in "conservation" methods for the Colorado River that would preclude the Arizona Tribes from participation. Once the same Colorado River water is labeled "conserved" by a particular party, the party (such as the State of Arizona) will preclude the Tribe from participating in the benefits of the "conserved" Colorado River water.

The use of the "conserved" water that will be stored in the reservoirs and claimed exclusively by the State of Arizona (which thereby excludes Arizona Indian Tribe access) will reduce and manipulate the amount of water from the Colorado River and its storage that could be used by the Tribe from year to year to fulfill their CAP water orders. This manipulation of the Colorado River water source to preclude its lawful use by the Tribe is a violation of the Law of the River and a violation of the Tribe's 1992 Settlement Act and Agreement and CAP Contract.

Furthermore, the States cannot enter into forbearance agreements or shortage sharing agreements amongst themselves where the rights of Arizona Tribes to their share of Arizona's equitable apportionment to the Colorado River would be manipulated by the States. *See e.g.* Appendix J-10 ("Arizona and Nevada will share shortages based on a shortage sharing agreement. In the event that no agreement has been reached, Arizona and Nevada will share shortages in accordance with the 1968 Colorado River Basin Project Act, the Decree, other existing law as applicable, and the Interstate Banking Agreement between Arizona and Nevada parties."). The participation of the Arizona Tribes in the forbearance agreements or any other agreements between Arizona and other States, as co-equal water users of Arizona's equitable apportionment, is required by the Law of the River, and by the direct contracts of the Tribes with the Secretary of Interior.

The proposed alternatives must be revised so that any "conservation" regime used to reduce the potential conditions which may cause or enable the Secretary to make declarations of shortage on the Colorado River, or used to provide additional waters to Arizona (including Arizona Tribes), include all Arizona CAP Tribes in the mutual "wet water" and financial benefits of such schemes. Otherwise, the Tribes will be subject to significant injury as a result of the manipulation schemes in violation of the Law of the River, and the contractual and constitutional rights of the Tribes.

5. The DEIS Does Not Discuss the Legal Authority for Allowing Credits for Fallowed Lands, Canal Lining and Other "Conservation" Measures

The DEIS does not discuss any legal authority which would permit the States to obtain credits for "fallowing" lands, canal lining and other measures undertaken to purportedly "conserve" Colorado River water. Under the law in Arizona, other western States and Federal Reclamation Law, the waters "conserved" by the fallowing of lands and the lining of canals is committed back to the stream flow to be used by the next water user in the system. *See Phelps Dodge Corp. v. Ariz. Dep't of Water Res.*, 2005 Ariz. App. LEXIS 108 (Ariz. Ct. App. 2005) (observing that water rights in Arizona are ". . .usufructory, to ensure a maximum beneficial use of Arizona's water resources.") (citing *Clough v. Wing*, 2 Ariz. 371, 379-81, 17 P. 453, 455-56 (Terr. 1888)); *Salt River Valley Water Users' Ass'n v. Kovacovich*, 3. Ariz. App. 28, 411 P.2d 201, 203 (Ariz. Ct. App. 1966) ("any practice, whether through water-saving procedures or otherwise, whereby [a diverter] may in fact reduce the quantity of water actually taken inures to the benefit of other water users and neither creates a right to use the waters saved as a marketable commodity nor the right to apply same to adjacent property having no appurtenant water rights."); Kinney, *Treatise on the Law of Irrigation and Water Rights and the Arid Region*, (2nd Ed. 1912), §782, 783.

The DEIS must discuss what legal authority would permit the States to commit "conserved" water to inure to the benefit of a single party or particular beneficiary, rather than for the use and benefit

of **all** users in the Colorado River system under the Law of the River. Furthermore, if such a "conservation" scheme could be lawfully implemented and used to benefit particular parties or beneficiaries, the Tribes must be permitted to participate, and the Secretary must fully support and protect the Tribe's full and unfettered participation and receipt of benefits.

6. Use of Surplus by Basin States

The Basin States Alternative also proposes a different scheme for the distribution of surplus. For instance, the Basin States Alternative would "[d]istribute Arizona's share to surplus demands in Arizona including off stream banking and interstate banking demands." *See* Appendix at J-9. The problem is that based upon historical and present practices by Arizona (which is charged with protecting the entire State's equitable apportionment from the Colorado River, including that which is used by the Tribes) the State would nevertheless use this surplus for the benefit of non-Indians, to the exclusion of the Tribes. In fact, the State of Arizona is engaging in this conduct now, through, *inter alia*, the Arizona Water Banking Authority and the interstate water banking agreement with Nevada. The Secretary's approval of the Basin States Alternative would put the weight of authority of the United States behind these wrongful acts by the State of Arizona.

The Secretary should not select the Basin States Alternative or any other alternative, where it would exclude Tribes from participation in the arrangements made on the Colorado River during times of surplus. In addition, the Secretary must include the Arizona Tribes and ensure that the Arizona Tribes receive the mutual benefits of surplus on the Colorado River.

7. The DEIS Does Not Provide Adequate Details Regarding the Basin States Proposal for Accounting Policy and Procedure for Intentionally Created Surplus

The DEIS does not provide sufficient detail regarding the alternatives for the accounting policy and procedure that the Secretary would implement for Intentionally Created Surplus or any other

"conserved" water. Without this detail, it is unclear as to how the CAP Tribes would be permitted to participate in the ICS and the impact of the uses of the ICS upon the Tribes. This should be corrected in the DEIS.

8. The Arizona Water Settlements Act, P.L. 108-451 Is Not Yet Enforceable

The DEIS' underlying assumption and reliance upon the AWSA as defining the characteristics of the CAP is premature. *See* DEIS at 4-81. The AWSA is not yet enforceable and may never become enforceable. If so, the DEIS or Final EIS intended to be published by December 2007, will require immediate revision and further public comment. In addition, the existing DEIS should include an impact analysis which compares the impacts under the present characteristics of the CAP with the impacts under the characteristics which would exist if the AWSA were to become enforceable.

9. There Is No Misunderstanding As To How Shortages Are To Be Distributed Between CAP Indian and M&I Priority Users Within the CAP

The DEIS states that "prior to the enactment of the AWSA, there were differing views as to how mild shortages would be distributed between CAP Indian and M&I priority users." (DEIS at 4-124). While there may be so-called "differing views", the Tribe's CAP Contract is very clear regarding how shortages are to be implemented as to the Tribe. Furthermore, the AWSA did nothing to clarify how such shortages are shared, because the Tribe's CAP Contract cannot be affected or modified by the AWSA. The DEIS and its underlying assumptions must be changed to reflect and analyze the true nature of the Tribe's CAP entitlement and how shortages within CAP will be implemented as to the Tribe.

10. The DEIS States an Incorrect Amount of CAP Water That Is Allocated to the Tribe

The DEIS incorrectly states the amount of CAP water to which the Tribe is entitled at 61,645. *See e.g.* DEIS at 3-85. Pursuant to the 1992 Settlement Act and Agreement, the Tribe is entitled to

64,145 acre-feet of CAP water. The DEIS also shows all Indian CAP water as if it was part of the CAWCD contract with the Secretary. The DEIS must be revised to correct these errors.

11. The DEIS Fails to Adequately Discuss or Analyze the Impacts of the Alternatives Upon the Tribe

The DEIS finds that "No vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water, rights pursuant to the Consolidated Decree or Congressionally-approved water right settlements utilizing CAP water, will be altered as a result of any of the alternatives under consideration." DEIS at 4-123. This is incorrect.

The DEIS erroneously attempts to delineate between a paper water right and wet water. These are one in the same. Whether or not the paper water right becomes wet water is determined by whether or not the law is followed and whether or not the Secretary undertakes actions (or fails to take actions) which diminish the reliability or injure the ability of the Tribe to receive its wet water. The implementation of shortage sharing criteria which would hinder the Tribe's ability to receive the water to which it is entitled, and the selection of an alternative which would permit waters to be "conserved" and committed to exclusive use by certain parties, alters the reliability of the Tribe's entitlement to CAP water. The DEIS cannot distinguish between the effect of the alternative upon the legal entitlement of the Tribe versus the effect upon the Tribe's receipt of the wet waters pursuant to the legal entitlement.

The DEIS proposes alternatives which will impact and diminish the reliability of the CAP water supply and thus, injure the ability of the Tribe to receive the wet water to which it is entitled. The Secretary is charged with the responsibility to implement shortage sharing criteria which protect the Tribe's receipt of the CAP water supply which is an Indian Trust Asset. The DEIS must analyze the impacts upon the Tribe's receipt of the water to which it is entitled, and not merely make a statement that the alternatives will have "no effect" upon the Tribe's legal entitlement to the CAP water. A policy

which proclaims no impact on the Tribe's legal entitlement which results in **no wet water** to fulfill its entitlement is deceptive and amounts to invidious discrimination. The DEIS' avoidance of discussing the true impact of the alternatives upon the Tribe must be corrected.

12. The DEIS Fails to Discuss How "Voluntary" Shortages Would Be Implemented and Their Resultant Effect Upon the Tribe and Its Right to CAP Water

The DEIS mentions that certain "voluntary" shortages could be implemented. DEIS at 4-12. However, the DEIS is unclear as to who would agree to such voluntary shortages. The Secretary cannot permit the State of Arizona to decide whether or not it would enter into a voluntary shortage, where such shortage would diminish the reliability of the Tribe's CAP water. This is simply unlawful. Furthermore, the Secretary cannot allow other states to enter into "voluntary" shortages and alternative River management schemes that would create conditions where the Tribes were required to bear shortages that would not otherwise be borne, absent such voluntary agreements or schemes. The DEIS fails to discuss this in any detail. The DEIS should be revised for clarity and to provide a meaningful analysis of the impacts of the proposed "voluntary" shortages to the Tribe's receipt of its CAP water supply.

13. The DEIS Fails to Discuss the Potential Impact of Any of the Alternatives on Water Quality or Quantity to Which the Republic of Mexico is Entitled Under Treaty

The DEIS fails to discuss the ongoing and potential environmental impacts of any of the alternatives on the Colorado River delta, including wet lands, and the fact that the delta is one of the primary marine nurseries supporting aquatic life, fisheries and migratory wildlife subject to international treaties, and the ultimate fish production and annual catch allocated among countries of the Pacific Rim. The alternatives proposed by the DEIS, with the increase in use of the Colorado River proposed by the alternatives, including the Basin States Alternative, will undoubtedly impact the delta.

Please continue to keep this Firm on your mailing list for all future communications and documents related to this matter.

Yours Truly,

THE SPARKS LAW FIRM, P.C.

Robyn L. Interpreter

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cc: Wendsler Nosie, Sr., Chairman
David Reede, Vice-Chairman
Council Members

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