August 15, 2023

The Honorable Camille Touton
Commissioner
U.S. Bureau of Reclamation
1849 C Street, NW
Washington, D.C. 20240
mtouton@usbr.gov
crbpost2026@usbr.gov

Re: Fort Yuma Quechan Indian Tribe Comments to Reclamation’s Post-2026 EIS Notice

By E-mail

Dear Commissioner Touton:

The Bureau of Reclamation’s Notice of Intent To Prepare an Environmental Impact Statement and Notice To Solicit Comments and Hold Public Scoping Meetings on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead, Fed. Reg. Vol. 88, No. 116, p. 39455 (June 16, 2023), requested “that the public submit comments concerning the scope of specific operational guidelines, strategies, and any other issues that should be considered” in connection with the preparation of that Environmental Impact Statement (EIS). On behalf of the Fort Yuma Quechan Indian Tribe (Tribe), I now submit the following comments in response to this Notice.

As we have previously explained to you, the Colorado River has been the lifeblood of the Quechan people since time immemorial, and we have a deep and abiding responsibility to be good stewards of the River – for the Tribe and its members, for the species and ecosystems that it sustains, and for the benefit of our fellow tribes and non-Indian neighbors throughout the entire Colorado River Basin (Basin). The development of the next management framework for the Basin will profoundly affect all of these interests. It is therefore critical that we get this EIS process right, both in process and in substance.

As to process, an essential starting point is ensuring the inclusion of Basin tribes in every step of the development and analysis of potential alternatives, the identification of a preferred alternative, and the implementation of the suite of actions that the Bureau of Reclamation
Reclamation ultimately adopts through a Final EIS and Record of Decision (ROD). We are encouraged that you seem to have taken to heart the spirit of the comment we provided last year, that "[t]he most effective way we see to ensure appropriate tribal inclusion in the process of developing a post-2026 management framework is for the United States to serve as the convener of the forum in which the substantive negotiations over that framework are to take place." The all-sovereigns meeting you convened in Phoenix on August 10 was a positive step in this direction, particularly your commitment there that this gathering was only a beginning, and that regular and continued engagement remains necessary as we move forward in charting our collective post-2026 future. We look forward to Reclamation’s continued fulfillment of that commitment.

We also appreciate Reclamation making available technical information and tools to facilitate our ability to engage effectively in this process. The Integrated Technical Education Workgroup is an extremely valuable and constructive forum, and we look forward to the release of the shortage allocation tool this fall that Reclamation has informed us is under development. These efforts – and your leadership – will remain vital throughout the development of the post-2026 EIS and the implementation of the next management framework to ensure that good words and positive first steps toward genuine tribal inclusion remain matched with action.

Another important process improvement from the 2007 Interim Guidelines (2007 IGs) that must be incorporated in the post-2026 EIS and ROD relates to consultation. In Section 7.B of the ROD adopting the 2007 IGs, Reclamation specifically committed to consulting with the Basin states in the event circumstances arose that were not squarely addressed in the 2007 IGs themselves. While such consultation is certainly appropriate, the failure to extend these consultation requirements to include Basin tribes was yet another example of the ways tribes have been cut out of Basin governance since the adoption of the Colorado River compact (and before). This error must not be repeated in the ROD that emerges at the end of the post-2026 EIS process. Instead, any such ROD should specifically require Reclamation to consult with Basin tribes in parity with the Basin states.

This sort of genuinely inclusive consultation is particularly important because it is almost inevitable that adaptation will be necessary. As a society and a species, humans have created climatic conditions that constrain our ability to predict future hydrology with reasonable certainty. Thus, while the next management framework needs to be robust enough to address a range of potential future (and poorer) water supply conditions, it must also build in process steps to allow ample room for adaptative management if and when hydrologic conditions or other circumstances arise that were not fully contemplated in the post-2026 EIS and ROD. Meaningful consultation with Basin tribes – along with Basin states and other stakeholders – must be a component of that effort.

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1 We note, and appreciate, that Reclamation took steps to consult with Basin tribes in connection with the 7.D review process required under the 2007 IGs despite Section 7.D requiring only consultation with the Basin States. The formal inclusion of tribal consultation requirements in the next management framework is an appropriate progression from this more ad hoc effort.

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Our changing climatic conditions and the experience of the past two decades also illustrate why the purpose and need of the post-2026 EIS must be more broadly formulated than that of the 2007 IGs. The hydrology confronting the Basin has become less predictable and less stable than previously considered, and a management framework that focuses primarily on the coordinated allocation of water between Lake Mead and Lake Powell has already proven insufficient to avoid seemingly constant crisis management. Going forward, the Basin must do a better job by building a management framework that can provide predictability in shortage allocations as well as adaptive pathways that allow for better planning by entitlement holders and contractors. This requires making management decisions by looking at whole system conditions rather than only at the elevations of Lake Mead and Lake Powell at specific moments in time. It also puts a premium on modeling any proposed alternative to assess its performance under a wide range of conditions, including hydrologies that are materially poorer and more dynamic than those seen in prior periods of record.

The next management framework must also acknowledge that the Colorado River system and individual water users have benefited from over a century of free use of un- and undeveloped tribal water rights. As a matter of basic equity and justice—and in recognition of the trust obligation the United States owes each Basin tribe—a necessary component of all future management frameworks must therefore be the protection of tribal trust resources, including but not limited to tribal water rights. Any future management framework must therefore abjure the possibility of involuntary, out-of-priority cuts imposed on the water rights that our Tribe, and all Basin tribes, need to ensure that our reservations can be true homelands for our people.²

The next management framework also needs to look beyond simply managing water deliveries and reservoir storage to include environmental and cultural needs. It is of the utmost importance to the Tribe and our members that the Colorado continues to flow as a living river. This commitment must extend to the reaches of the River below Imperial Dam—which includes the portion of the River flowing through our Reservation—that were excluded from the environmental analysis in the EIS for the 2007 IGs and again in this spring’s now-withdrawn (but apparently soon to be reissued in modified form) draft Supplemental EIS (DSEIS). It is vital that we preserve and enhance the habitat and species and the cultural connections between and among tribes, other communities, and the River. The potential effects on these critical resources of various proposed alternatives must therefore be carefully analyzed in any post-2026 EIS, and at a granular and localized manner free from the overgeneralizations that compromised the

² As we have repeatedly explained to Reclamation, including in my letter to you of June 9, 2023, the Secretary lacks the legal authority to impose out-of-priority cuts to our water rights and to those of the other tribes whose rights were decreed in Arizona v. California, 547 U.S. 150 (2006). I am deeply disappointed not yet to have received any response from you—or from anyone else in the Department of the Interior—to the specific request I made to you personally nearly three months ago, when you and your team met with our Tribal Council on May 24, 2023, and that I reiterated in my June 9 letter. Reclamation has neither acknowledged the accuracy of our legal analysis on this issue nor provided us with any identification or analysis of the legal authority Interior may believe it has to impose such cuts. It is therefore also profoundly troubling that all indications we have are that Reclamation intends to continue to sidestep this issue when it issues a revised DSEIS this fall, discarding Alternative 2 as considered-but-rejected because it is outperformed by the Lower Basin States consensus alternative—not because it is an alternative that Reclamation lacks the legal authority to implement due to its failure to exclude the Arizona v. California tribes from out-of-priority cuts.

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quality of the environmental analysis in the DSEIS. This also means that water used for environmental benefits in the Lower Basin should not be treated as evaporative or transmission losses, to the extent that responsibility for any such losses is allocated in the next management framework.

To be able to integrate these multiple priorities into a durable management framework, the river system’s overall structural deficit must be confronted. Whether it is through coordinated reservoir management, physical infrastructure modifications, transparent and predictable mechanisms for curtailing existing non-Indian water uses, investment in historically underserved communities including through innovative financing, or some combination of these (and potentially other) tools, the Basin needs to arrive at a more realistic alignment between water supply and demand. Reductions in water use will therefore be necessary. The post-2026 EIS should analyze not just the scope of potential cuts but also potential mitigation strategies – including those that might require authorities Reclamation does not currently possess – so the need for supplemental NEPA processes can be minimized and so Basin stakeholders can work at the congressional level to ensure that this process is fully integrated with the other parallel processes that must move in tandem (such as negotiations between the United States and Mexico and Multi-Species Conservation Plan reconsultation) to craft a resilient and sustainable future for the Basin.

The more voluntary conservation efforts can be incentivized and facilitated as part of this effort, the less disruptive and painful the Basin’s adaptation to a drier and hydrologically more uncertain future may be. To this end, programs that incentivize reservoir storage, such as the 2007 IGs Intentionally Created Surplus (ICS) mechanism, should be extended – but with lower barriers to tribal participation. In addition, consideration should be given to managing created system conservation water in a manner more akin to ICS, where it can remain in Lake Mead – and thus protects its elevation – for multiple years. For example, the federal ICS account created under the 2007 IGs could be reinvigorated. The current mechanism of rolling system conservation water into the overall water budget after its year of creation minimizes the conservation – and reservoir protection – benefits that might otherwise be realized.

Because of the inescapable need for reductions in overall Colorado River water use, a clear mechanism for expanding the use of compensated forbearance agreements for currently un- and under-developed tribal water rights is a tool that should be included as part of any preferred alternative selected for the post-2026 EIS. Our Tribe’s forbearance agreement with the Metropolitan Water District (MWD) has allowed both the Tribe and MWD to benefit from the additional water rights the Tribe secured in the 2005 Settlement Agreement among the Tribe, MWD, the Coachella Valley Water District, and the United States without increasing the net consumptive demand on the river system. Currently, other tribes are largely forced to develop new consumptive uses of water before they can benefit from their water rights or utilize them in creative ways off their reservations, an incentive system that perversely pits necessary tribal economic and social development against the Basin’s need to decrease overall water use. It

3 We articulated many of our specific concerns with the DSEIS’s deficient analytic approach – which extended beyond environmental impacts to infect considerations such as the economic and tribal trust resources analysis as well – in my letter to you on June 9, 2023, which we incorporate by reference here.

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would perpetuate fundamental historical injustices to persist with a system that creates meaningful political disincentives to broader support for tribal development. And it is of course unconscionable that in 2023 there are tribes in the Basin who still lack the resources to provide clean and sanitary water for their members. Compensated forbearance agreements can generate needed revenue to support important tribal governmental programs, while reducing a significant source of upward pressure on consumptive demands, and better align incentives and interests among tribes and other Basin water users. This is an opportunity that should not be squandered.

Thank you for your consideration of these comments. We look forward to remaining actively engaged with the United States, our fellow Tribes, the Basin States, and other key stakeholders in order to find a durable and sustainable path forward for the River upon which we all rely.

Sincerely,

[Signature]

Jordan D. Joaquin
President, Quechan Indian Tribe

Cc: Michael Brain, Acting Assistant Secretary for Water and Science
    David Palumbo, Deputy Commissioner, Bureau of Reclamation
    Carly Jerla, Senior Water Resources Program Manager