

GILA RIVER INDIAN COMMUNITY

Executive Office of the Governor & Lieutenant Governor

“Putting Our People First”

Stephen Roe Lewis
Governor



Robert Stone
Lieutenant Governor

November 13, 2020

U.S. Bureau of Reclamation
Attention: Ms. KayLee Nelson, LC-6056
P.O. Box 61470
Boulder City, NV 98006-1470

Subject: Gila River Indian Community's Comments on 7.D. Review Draft Report

To Whom It May Concern:

This letter provides the Gila River Indian Community's ("Community") comments regarding the Bureau of Reclamation's ("Reclamation") draft report evaluating the effectiveness of the 2007 Interim Guidelines¹ ("Guidelines") as required by Section 7.D. of the Guidelines ("Report"). The Community understands that the Report is limited in scope – documenting Reclamation's operational experience and providing "a retrospective evaluation of whether operations and actions specified by the Guidelines have adhered to common themes and been effective with respect to the purpose stated in the [Guidelines]." Our comments are limited to two topics:

1. Reclamation's consultation and coordination obligations with Indian tribal governments, as required by Executive Order 13177, Presidential Memoranda and Department of the Interior and Reclamation tribal consultation policies; and
2. The Community's participation in the creation of Intentionally Created Surplus ("ICS").

Addressing Shortcomings Regarding Government-to-Government Consultation with Tribes.

The draft Report mentions consultation in a number of areas that could be interpreted as including government-to-government consultation with tribes. The Community recognizes that there were many instances (e.g., development of the comprehensive framework for adaptively managing Glen Canyon Dam) that involved government-to-government consultation with tribes but did not directly impact the Community. We also appreciate that tribal involvement in

¹ Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortage and the Coordinated Operations for Lake Powell and Lake Mead, December 2007.

implementing the Guidelines is mentioned throughout the Report. But the Community also experienced instances where the United States failed to meet its tribal consultation obligations as they relate to implementing the Guidelines. The Community believes the Report should also acknowledge how the United States tribal consultation obligations were not met at times and how these shortcomings were addressed.

Government-to-government consultation with tribes is expressly addressed in Section 2 of the Report in the summary of the notification and consultation with 29 federally recognized that briefly describes what consultation efforts took place as part of the NEPA process from June 2005 to November 2007.² During the 2005-2007 period the Community was focused on the time consuming and complicated task of ensuring the enforceability of our water settlement, which Congress approved on December 10, 2004, when it adopted the Arizona Water Settlements Act.³ As a result of focusing on this critical effort, the Community was not actively involved in the NEPA process and our leadership and water team were not aware, nor were we sufficiently notified, that the actions anticipated under the Guidelines may impact the Community's Central Arizona Project ("CAP") water rights, despite the fact that we were in nearly daily contact with the Department officials regarding our water settlement during this time.

Given the complicated nature of the Guidelines, the complicated nature of our water settlement and that it was not yet enforceable, and the assumption at the time that tribal CAP water rights would not be impacted by Arizona's CAP water reductions under the Guidelines, it is understandable that there was a failure to recognize the Guidelines' true potential impact on the Community's CAP water rights. Nevertheless, the Community must agree with the June 27, 2020, letter signed by leaders of 17 Basin tribes that Reclamation's finding in the Guidelines that Indian trust assets would not be significantly affected by the adoption of the Guidelines was inaccurate.

On December 14, 2007, the Community's water settlement became enforceable, which included a 311,800 acre-feet entitlement to CAP water, which is comprised almost exclusively of Colorado River water. As a result, the Community is the single largest CAP water entitlement holder, and, as became clear during the Lower Basin Drought Contingency Plan ("LBDCP") negotiations, we face the largest impact to our water supplies under LBDCP reductions. Among Basin tribes the Community is unique because: (i) our CAP/Colorado River supplies have a lower priority date than Basin tribes with an adjudicated right, (ii) we are putting this entire quantity of water to beneficial use, and (iii) only a small portion of our CAP water right is firmed in times of shortage.

The Community believes that the United States' difficulty in meeting its tribal consultation obligations was due, in part, to the misapplication of the "common theme" the Report identified in the Guidelines to "[c]ontinue to have the federal government facilitate – but not dictate – informed decision-making in the Basin and Encourages parties to address future controversies on the Colorado River through consultation and negotiation . . . before resorting to

² 7.D. Review Draft Report, Oct. 23, 2020 [hereinafter "Report"], at pp. 2-3.

³ Pub. L. 108-451, Dec. 10, 2004.

litigation.”⁴ This theme implies a fair process where stakeholders, including tribes, would be consulted with early in the decision-making process to better enable Reclamation to facilitate informed-decision making. In practice, adherence to this theme led to the confidential negotiations of the LBDCP framework between non-tribal Lower Basin State parties with encouragement from Reclamation, which resulted in a proposed action that would have significantly and adversely impacted the Community’s water rights without the Community knowing that non-federal third-parties were making decisions about its water rights, let alone having an opportunity to comment on these deliberations while the framework was being developed.

The Community was first made aware of a potential shortage declaration by Reclamation letter in June 2015. This letter did not indicate that discussions were underway among the Lower Basin State parties or that the Community could be involved. The Community first became aware of the possible impacts of what the emerging the LBDCP would be thorough a meeting with the Arizona Department of Water Resources (“ADWR”) in December 2015. In February 2016 Reclamation formally informed the Community of the LBDCP discussions and, as a major entitlement holder of Colorado River water delivered through the CAP, Reclamation sought a meeting with the Community to bring the Community up to date on the LBDCP process and the cuts that were being proposed to CAP deliveries, including Community CAP deliveries.

The Community met with Reclamation in March 2016 and became convinced that it was not only facing a significant threat, but that no party, including the United States, was adequately representing its interests in the LBDCP process, and that the United States had tacitly approved the LBDCP cuts without first consulting with tribes. To be clear, by agreeing to freeze out tribes during the early deliberations and development of the LBDCP the United States failed to meet its tribal consultation obligations vis-à-vis its federal trust responsibility to protect the Community’s CAP water rights, as well as other tribes’ interests.

As a result, once the Community leadership learned of the potential impact of the proposed LBDCP on its CAP water supplies, we immediately elevated our concerns about the lack of tribal consultation to senior Department officials, the White House, and ADWR, and shared these concerns in a White House Summit on water in late March 2016, and in senior level meetings with Reclamation. During this period the Community seriously contemplated initiating litigation to stop the LBDCP process because of the impact it would have on the Community’s CAP water rights, water rights held in trust by the United States on behalf of the Community and allottees pursuant to federal statute.⁵

As you know, the Community did not pursue litigation, but instead decided to engage with Reclamation, ADWR, and other Arizona stakeholders. This effort ultimately culminated in the LBDCP being approved by the State of Arizona, and the Basin wide approval of the DCP. But a successful outcome was put at risk by the United States when it failed to consult with tribes early on when the LBDCP was being formulated. The Community requests that these consultation missteps be addressed in the Report, as well as how the United States compensated

⁴ Report at p. 5.

⁵ Sec. 204(a)(2), Arizona Water Settlements Act, Pub. L. 108-451, Dec. 10, 2004.

for this initial mistake. The Community believes that including this in the Report will help better inform parties of the United States' obligation to initiate meaningful government-to-government consultation with tribes early on in the re-consultation process. Further, given our experience described above, express incorporation of a meaningful tribal consultation process in whatever replaces the Guidelines will be something the Community will demand.⁶

ICS.

The Community agrees with the Report's assessment that ICS was fundamental to the development of the Lower Basin DCP. Without ICS mechanisms the Community believes it would have been impossible for Arizona stakeholders to agree on a LBDCP implementation plan.

The Community also concurs with the Report's characterization that the requirement of written approval from all Parties to the Forbearance Agreement for ICS exhibits to be effective was burdensome and unnecessarily limited participation. The Community appreciates that Reclamation acknowledged that the recalcitrance of some of the Parties to the Forbearance Agreement was an ongoing obstacle and their ability to gum up the works was contrary to the intent of the process envisioned in the Guidelines.

Page 34 of the Report also highlights that the ICS accumulation capacity was increased but that Arizona and Nevada may reach their accumulation limits by the end of 2021, and California may reach its limit by the end of 2022. The Community has the ability to create much more ICS but is unable to do so after 2021 given the current accumulation limits. The Community has every intention of creating smaller amounts of ICS when other Arizona Contractors take delivery of their ICS and free up capacity. The Community asks that the Report reflect the Community's ability and desire to create more ICS but that is prevented from providing significant amounts above what is already planned through 2021 due to current accumulation limits.

Thank you for the opportunity to provide our comments. If you have any questions please feel free to contact Jason Hauter at jhauter@akingump.com.

Sincerely yours,



Stephen R. Lewis
Governor

Cc: Carly Jerla

⁶ The term "consultation" is used throughout the Guidelines but is limited to Reclamation's consultation with the Basin States and key non-Tribal Basin State parties. It is clear that inclusion of tribes in collaborative efforts to implement the Guidelines was not really considered during the development of the Guidelines.

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