

# Comments on Interim Report No. 1

## Colorado River Basin Water Supply and Demand Study

*Submitted: July 7, 2011*

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### General Comments

Indian tribes are a major force in the management of water resources throughout the Colorado River Basin. They hold senior rights to those resources, rights essential to maintaining economically vibrant and culturally strong permanent tribal homelands.

Tribes occupied this land and enjoyed the use of water from time immemorial. The right of tribes to use water is one of a bundle of vested property rights included in full beneficial title to their lands. These rights are associated with the use of water resources that traverse, underlie and border tribal lands. These rights are not judicially created, but are pre-existing vested property rights that have been effectively confirmed by judicial, legislative and executive action on the part of the government of the United States and the governments of the various states.

Tribal water rights exist whether the water is currently used or not, whether it is currently leased to others or not and whether the volume is currently quantified or not.

Future reports of the Basin Study, including the final report, should indicate:

- The importance of the role of tribes in the management of the water resources of the Colorado River Basin.
- The significance of tribal water rights, including rights not currently quantified.
- The extent of currently quantified tribal rights, along with data on projected future use if supplied by the tribe involved.
- That all water to which tribes have rights must be considered as tribal water and not available to other users without tribal consent.

Other data sources, including those from build-out or projected depletion schedules and from state data, such as the Arizona Water Atlas, are not appropriate for use in the report.

The Interim Report indicates that the Basin Study intends to project future water demand using four "storylines." However, none of the currently described storylines adequately captures the factors critical to a projection of tribal water demand.

The reasons are described in the comments below on Technical Report C--Water Demand Assessment. A separate storyline should be developed to deal with tribal water demand. Its basic elements are described in those comments.

A reliability metric should be added to the report relating to the ability of the system to deliver water sufficient to meet all currently quantified tribal water rights, along with estimates of tribal water rights not currently quantified and projections of future use, if supplied by tribes.

This metric should include the ability of the system to provide full deliveries consistent with all entitlements to water from the Central Arizona Project (CAP). The metric should be tested under all potential CAP shortage conditions.

The metric is described further in the comments on Technical Report D--System Reliability Metrics below.

## Comments on Executive Summary

Page numbers and paragraphs are indicated in *italics*. A discussion of the comment is in the normal font. Suggested revisions are noted in **bold face**.

*Page ES-1, first paragraph*

The paragraph refers to the Colorado River and its tributaries as supplying water to "at least 15 Native American tribes. . ." (The same number was used by Commissioner Connor in his remarks at the recent conference on the future of the Colorado River sponsored by the Natural Resources Law Center at the University of Colorado.)

In fact, there are 30 federally recognized Indian tribal governments located within the Basin. All depend, to one extent or another, on water from the River or its tributaries.

**The number should be revised.**

*Page ES-1, footnote 1*

**The words "to Native American tribes and" should be inserted between the words "deliveries" and "for municipal, industrial, and agricultural use".**

*Page ES-3, 3.0 Water Demand Assessment*

The Water Demand Assessment should note that not all demands are equal in priority in their claims on the water resources of the Basin. Indian tribes and other senior rights holders have priority in accordance with the Law of the River.

As noted in the comments below on Technical Report C--Water Demand Assessment, the four storylines developed to project future water demand do not capture factors specific to tribal water needs.

*Page ES-4, System Reliability Metrics*

As noted in the General Comments above and the comments below on Technical Report D--System Reliability Metrics, a system reliability metric should be added which involves the ability of the system to deliver a sufficient quantity of water to fully satisfy the water rights of all tribes, including the full amounts of water for tribes that have CAP entitlements, especially under shortage conditions.

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*Page ES-7, Disclaimer, 3rd sentence of 3rd paragraph*

**Suggest inserting the words "any Native American tribe," between the words "the Federal government" and the words "or the Upper Colorado River Commission."**

Further, suggest including this insert in the Disclaimer section of each section of each report on the Basin Study that contains this Disclaimer.

## Comments on Status Report

Page numbers and paragraphs are indicated in *italics*. A discussion of the comment is in the normal font. Suggested revisions are noted in **bold face**.

*Page SR-2, first paragraph under subheading "2.0 Background and Need"*

**Suggest changing number of Native American tribes to 30.**

See discussion in comments on the Executive Summary above.

*Page SR-16, Table 1*

**Suggest changing the text of the last item under Social and Governance to read as follows:**

"Changes arising from the settlement of tribal water rights claims, development of facilities enabling tribes to use water and changes in tribal water use."

*Page SR-17, discussion of scenarios at top of page*

As noted in the comments on Technical Report C below, the quantification of tribal rights through decrees or settlements and the ability of tribes to develop facilities to use the water to which they have rights are not a product of economic conditions. All scenarios should take into account the potential full use of all water to which tribes have rights.

*Page SR-30, Table 3*

**Suggest adding a bullet in the Water Deliveries category to read as follows:**

"Ability to satisfy tribal water rights, including tribal CAP entitlements"

# Comments on Technical Report C

## Water Demand Assessment

### Overall

It is apparent from this report and other analyses that it is very difficult to quantify water demand and even current water use for most tribal lands using the data sources now available. It is difficult to attempt such quantification for individual reservation areas. It is virtually impossible to quantify water use by sector for most of the larger and middle-size reservation areas.

In the case of Arizona, data from state sources, such as the Arizona Water Atlas, was not collected from tribes. That data is known to be incomplete and is considered by tribes to be inaccurate.

Even if an accurate quantification of current use was possible, it would still not fully account for demand. Moreover, any such quantification would fail to account for all of the water to which tribes have rights.

The amount of water to which tribes have rights arising from court decrees, settlements or other entitlements (such as those to CAP water) is known and can serve as a partial baseline. However, tribal water rights also extend to water which is not quantified in decrees or settlements.

Not all tribes in the Basin have adjudicated rights or settlements covering all of their tribal lands. In Arizona, five federally recognized tribal governments do not currently have quantified water rights: the Havasupai Tribe, the Hualapai Tribe, the Kaibab Band of Paiute Indians, the Navajo Nation and the San Juan Paiute Tribe. An additional six tribes do not have adjudicated rights or settlements for at least some of their lands: the Hopi Tribe, the Pascua Yaqui Tribe, the San Carlos Apache Tribe, the Tohono O'odham Nation, the Tonto Apache Tribe, and the Yavapai-Apache Nation. The currently unquantified rights of each of these tribes must be taken into account in the Basin Study's water demand assessment.

These considerations make it essential that a methodology be developed for tribal water demand which is outside the scope of the four "storylines" currently under consideration. None of those storylines captures the full picture of tribal water demand.

Such a tribal methodology must encompass the full extent of currently quantified tribal water rights using data in the public record or data verified by tribes. It must also take

into account the extent of current and future demand for water on tribal lands that is not currently quantified.

In the case of a tribe that has projected the future need for water on its lands and is prepared to share that projection, as in the case of the Navajo Nation, that tribal water demand should be included in the calculations of the Basin Study.

The current storylines do not adequately deal with tribal water demand in another respect. All four are based in large part on economic conditions -- a continuation of current trends, an economic slowdown and economic growth under two different scenarios. However, critical factors influencing the ability of tribes to use water to which they have rights are, for the most part, political, not economic.

The ability of tribes without fully adjudicated or settled rights to quantify the extent of those rights depends on actions in the courts, in legislative bodies, particularly the US Congress, and in negotiations with other water users in the vicinity of tribal lands. Economic factors are generally not the driving forces behind these processes.

Apart from all these considerations is the fact that the driving forces at play in the current storylines can move differently on tribal lands than they do elsewhere. For example, economic hardship that depresses population growth and thus M&I water demand in the large cities may result in tribal members who were living in those cities and become unemployed moving back to their tribal homelands, increasing M&I water demand there.

**It is suggested that a separate scenario be developed for tribal water demand. This scenario should, at a minimum, show the full extent of tribal water demand based on tribally-provided projections, or, in the absence of such projections, currently quantified tribal water rights with an allowance for rights which are not currently quantified. This scenario should explicitly indicate that all water to which tribes have rights, currently used or not, currently leased or not, currently quantified or not, belongs to tribes and is not available to other users without tribal consent.**

## Specific Comments on Technical Report C

Page numbers and paragraphs are indicated in *italics*. A discussion of the comment is in the normal font. Suggested revisions are noted in **bold face**.

*Page C-1, Subheading 1.0 Introduction, second paragraph*

**Suggest deleting the phrase "including municipal and irrigation use" and substituting the phrase "including municipal, irrigation and tribal use".**

*Page C-38, first full paragraph, remarks on tribal use*

The remarks on tribal water use in Arizona exemplify the problems with the way tribal water use is characterized in state data sources. The state of Arizona has no way of fully accounting for tribal water use, by tribe or by sector by tribe. In addition, its principal source of data on water use, the Arizona Water Atlas, completely ignores the issue of tribal water rights.

Tribal rights to water, currently used or not, should be characterized in an accurate and consistent manner for all tribes in the Basin. This illustrates the need for an alternative methodology to deal with tribal water issues.

*Page C-42, first paragraph under the subheading 7.2.7 Nevada*

Tribal water is simply subsumed into an urban M&I category, even while acknowledging that the main use on the Fort Mojave (misspelled in the text) reservation is for agricultural purposes.

## Comments on Technical Report D System Reliability Metrics

**It is suggested that an additional metric be added under the Water Deliveries category. The metric would measure the ability of the system to deliver sufficient water to honor all currently quantified tribal water rights in full, as well as projections as supplied by the tribes involved of their water demand not covered by currently quantified rights and projections as supplied by tribes with respect to additional future needs.**

The US government, including the Bureau of Reclamation, has a solemn obligation to meet its trust responsibilities to Indian tribes. These responsibilities include an obligation to insure that sufficient water is available to insure the viability of permanent tribal homelands. In the case of some, but not all tribes, the amount of water involved has been established through court decrees, final negotiated settlements or other judicial, legislative or administrative processes.

With respect to the seven steps in Figure D-1 Approach to Metric Development on page D-2:

- The resource category is Water Deliveries.
- The proposed attribute of interest for this metric is a quantity of water.
- The location of interest is the point of diversion or delivery of water for the tribe involved.
- The attribute of interest is usually directly measurable.
- The reference value method can be used.
- The reference values for tribes with currently quantified rights are the full amounts of those rights. The reference values for tribes without fully quantified rights should be determined by consultation with the tribes involved, a process that may also be used with respect to tribal projections of additional future water demand.
- The documentation of the procedure should be straightforward.

With respect to tribes with CAP entitlements, the metric should be tested under a variety of shortage conditions that affect CAP's ability to divert a sufficient quantity of water to meet the entitlements involved.

In addition to adding the proposed metric, future work on the Basin Study should also involve an in-depth analysis of the tribal implications of metric 5.6 (Metrics for the Impact on Basin Funds Attribute of Interest) on page D-14 of Technical Report D.

This involves an analysis on payments to tribes and for tribal facilities as provided in the amendments related to the Lower Colorado River Basin Development Fund made by the Arizona Water Settlements Act. Tribes rely on this Fund for payment of certain costs for the delivery of water to which they have rights and for payment of costs for the construction of facilities needed to access that water.

Any shortfall in the funds available through this mechanism will have a devastating impact on tribes.