

# **Appendix W**

## **Copies of Unique Comment Letters**

### **W.5 Local Agency Letters (L)**



## City of Phoenix

OFFICE OF THE CITY MANAGER

August 30, 2005

Mr. Robert W. Johnson  
Regional Director  
Bureau of Reclamation  
Lower Colorado Region, Attention: BCOO-1000  
P.O. Box 61470  
Boulder City, NV 89006-1470

**Re Colorado River Reservoir Operations: Development of Management Strategies for Lake Powell and Lake Mead under Low Reservoir Conditions**

Dear Mr. Johnson,

The City of Phoenix (City) submits its response to the notice to solicit public comments on the development of management strategies for Lake Powell and Lake Mead, including Lower Basin shortage guidelines, under low reservoir conditions (70 Fed. Reg. 34794, dated June 15, 2005) (Notice). Colorado River water delivered to Phoenix through the Central Arizona Project (CAP) is a vital component of the City's water resources portfolio. Over 1.4 million people in the City rely on this resource to supply over 35% of the City's current total water demand. The City holds CAP subcontracts for Municipal, Industrial and non-Indian agricultural priority water and leases Indian priority water. Thus, the City has a unique perspective due to opportunities to manage Lake Powell and Lake Mead and also on Lower Basin shortage guidelines.

As you are well aware, the CAP has a junior priority under the Law of the River. Therefore, the State of Arizona, the CAP, and the City are the most vulnerable water users in the Lower Basin if shortages are declared by the Secretary of the Interior (Secretary). Because Arizona faces the greatest risks, the City urges the Bureau to give great weight to the comments provided by the State of Arizona, the CAP and its water users.

The City strongly supports the comments and balanced strategies enunciated by the State of Arizona, along with the six Basin states, in the August 25, 2005 letter to the Secretary submitted by the Governor's Representatives on Colorado River Operations. The City urges continued support from the Secretary and the Department of the Interior as the Basin states further analyze and address the issues raised in the letter as part of a comprehensive package for operating and managing the Colorado River.

Sincerely,

Thomas Buschatzke  
Water Advisor

**Kucera, Cindy**

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**From:** spollack [spollack@navajo.org]  
**Sent:** Wednesday, August 31, 2005 4:02 PM  
**To:** strategies@lc.usbr.gov  
**Cc:** smcelroy@greenelawyer.com  
**Subject:** 70 FR 34794  
**Attachments:** NN comments on 70 FR 34794.pdf

Attached are the comments of the Navajo Nation in response to 70 FR 34794 - Colorado River Reservoir Operations: Development of Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions. The original will be mailed tomorrow. A separate copy is also sent via fax.

Please do not hesitate to contact me if you have any questions concerning this matter.

Stanley Pollack

*This message may contain confidential information. If you are not the intended recipient, please delete the email and inform the sender immediately. Thank you.*

Stanley M. Pollack  
Navajo Nation Department of Justice  
P.O. Box 2010  
Window Rock, AZ 86515

928.871.6192 (P) / 928.871.6200 (F)

L.002

9/6/2005



# THE NAVAJO NATION

P.O. Box 9000 • WINDOW ROCK, ARIZONA 86515 • (928) 871-6000

JOE SHIRLEY, JR.  
PRESIDENT

FRANK J. DAYISH, JR.  
VICE PRESIDENT

August 31, 2005

VIA U.S. Mail & email

Robert W. Johnson, Regional Director  
Bureau of Reclamation  
Lower Colorado River Region  
Attention: BCOO-1000  
P.O. Box 61470  
Boulder City, NV 89006

Re: Comments on Development of Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions; 70 Federal Register 34794 (June 15, 2005)

Dear Mr. Johnson:

I am writing on behalf of the Navajo Nation regarding the Department of the Interior's ("Department") current effort to develop management strategies for Lake Powell and Lake Mead under low Reservoir conditions. In developing such strategies, the United States must account for the outstanding needs of the Navajo Nation for water from the Lower Basin and take all steps necessary to secure a firm and reliable supply of water from the Colorado River for the benefit of the Navajo Nation and its 60,000+ members who live on the Arizona portion of the Navajo Reservation in the Lower Basin. The federal government's failure to ensure a water supply to meet the present and future needs of the Navajo Nation not only jeopardizes the future of the Navajo Nation but also leaves all other water users on the Colorado River under a substantial cloud with regard to their ability to continue to use water which is currently allocated to them. The adverse effect of this uncertainty is greatly exacerbated in times of shortage – precisely the issue now before the Department.

Historically, the Secretary of the Interior ("Secretary") has failed to account for the water rights and needs of the Navajo Nation as she implemented her duties to manage the waters of the Lower Basin under the *Decree in Arizona v. California*, 376 U.S. 340, 353 (1964) and other authorities. Pursuant to the Boulder Canyon Project Act of 1928, 45 Stat. 1057 (codified as amended at 43 U.S.C. §§ 617-617u), the Secretary entered into a contract with Arizona in 1944 for delivery of 2.8 million acre-feet per year ("maf") of the water from the Colorado River. *Arizona v. California*, 373 U.S. 546, 562 (1963). As the Supreme Court has noted, the Secretary, while exercising physical control over the water

diverted from Lake Mead in satisfaction of Arizona's contractual rights, must also "charge [Arizona] for diversions from the mainstream between Lee Ferry and the damsite . . ." *Id.* at 591.

Although the Navajo Reservation borders the Colorado River below Lee Ferry and above Lake Mead, the Secretary has never sought to secure water from the Lower Basin of the Colorado River to maintain the Navajo Reservation as a permanent homeland for the members of the Navajo Nation. The Arizona Supreme Court recently explained that "[i]n its role as trustee of [Indian] lands, the government must act for the Indians' benefit." *In re the Gen. Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 74 (Ariz. 2001) (citing *United States v. Mitchell*, 463 U.S. 206, 225-26 (1983)). The Arizona Court agreed "with the Supreme Court that the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' . . . that is, a 'livable' environment." *Id.* (citing *Winters v. United States*, 207 U.S. 564, 565 (1908)); *Arizona v. California*, 373 U.S. at 599). There is no question but that the Navajo Reservation requires water from the Lower Basin above Lake Mead if the present and future needs of its members are to be met. Indeed, every recent study examining the needs of the Navajo Nation in the Lower Basin has concluded that water from the main stem is required to meet the long term needs of the members of the Navajo Nation. Accordingly, as she carries out her other duties on the Colorado River, the Secretary, as trustee for the Navajo Nation, must also take the necessary steps to protect such a water supply for the benefit of the Navajo Nation. See *Pyramid Lake Paiute Tribe v. Morton*, 354 F. Supp. 252, 256 (D.D.C.) ("The Secretary was obliged to formulate a closely developed regulation that would preserve water for the Tribe. He was further obliged to assert his statutory and contractual authority to the fullest extent possible to accomplish this result."), *supplemented on other grounds*, 360 F. Supp. 669 (D.D.C. 1973), *rev'd on other grounds*, 499 F.2d 1095 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 962 (1975). In short, the Secretary's failure to set aside water to meet the needs of the Navajo Nation is detrimental to the interests of the Navajo Nation and severely undercuts the certainty of the water supplies available for use by other parties relying on the Colorado River to meet their communities' needs.

In stark contrast to the neglect of Navajo interests for which the Secretary has a trust responsibility, the Secretary and her predecessors have aggressively sought to implement their responsibilities to manage the waters of the Lower Basin below Lake Mead for the benefit of other water users. Among the actions taken by the Department is the promulgation of the Offstream Storage of Colorado River Water in Development and Release of Intentionally Created Unused Apportionment in the Lower Division States, 64 Fed. Reg. 58,986, 59,006 (Nov. 1, 1999) (codified as 43 C.F.R. pt. 414) ("Interstate Banking Regulations). Those regulations allow Southern Nevada Water Authority ("SNWA") and Metropolitan Water District of Southern California to obtain water in excess of their states' basic apportionments. Under the Interstate Banking Regulations, the Arizona Water Banking Authority will seek to store in central Arizona groundwater basins as much as 1.2 maf of water for SNWA's benefit. The stored water will be taken from

Lower Basin water supplies available to Nevada and Arizona. When SNWA ultimately needs the water, the Secretary will deliver Colorado River water to that entity and the Arizona Water Banking Authority will retrieve the water stored underground in Arizona for use by the Arizona entities who otherwise would have been entitled to use Colorado River water. *Id.* There is already more water in storage in Arizona for SNWA's benefit than the Navajo Nation is likely to require from the Colorado River.

The Secretary also has been actively involved in the allocation of Arizona's 2.8 mafy of Lower Basin water to Arizona entities. The Secretary, in collaboration with the State of Arizona and the Central Arizona Water Conservation District has committed all but approximately 13,000 acre-feet per year ("afy") of the approximately 1.3 mafy of water set aside for Arizona uses along the Colorado River. Included in that amount are various contracts and the present perfected rights held by Arizona water users. Admirably, the Secretary has fought to provide water from the Central Arizona Project for tribes in central Arizona with no claim to the waters of the Colorado River. Unfortunately, under the recent legislation settling the claims of the Gila River Indian Community, the water supply expressly set aside for the settlement of other tribal claims is minimal, given the outstanding claims within the State and the substantial needs of the Navajo Nation.

The Surplus Guidelines further reflect the Secretary's continuing efforts to implement her obligations under the 1964 Decree in *Arizona v. California* while neglecting her obligation to protect the interests of the Navajo Nation. The Surplus Guidelines establish rules for the determination of when surpluses may be available under the 1964 Decree and when to allocate those surpluses to California and Nevada. The Secretary negotiated the guidelines with the seven basin states. Significantly, the Secretary committed to use any surplus that would be allocated to Arizona under the 1964 Decree for the benefit of Nevada and California without regard to the outstanding needs of the Navajo Nation. Because the interests of the Navajo Nation were not adequately considered in the environmental compliance documents for that process, the Secretary's implementation of those guidelines is subject to judicial challenge in *Navajo Nation v. Norton*, No. CIV 03 0507 PCT PGR (D. Ariz. filed Mar. 14, 2003). Certainly, it is not adequate as trustee for the Navajo Nation for the Secretary to advise the Navajo Nation that its interests in the waters of the Colorado River will be adequately protected by the Decree in *Arizona v. California* when neither that decree or any other court order or executive document determines and protects the interests of the Navajo Nation.

To conclude, the Secretary must account for the needs of the Navajo Nation as she undertakes the difficult task of developing guidelines to deal with Lake Powell and Lake Mead in times of shortage. Absent forceful action by the Secretary to secure an adequate water supply for the Navajo Nation, the stated objective of providing certainty about the quantities of water available to other users cannot be achieved because those supplies will always be at risk from the outstanding and un-quantified Navajo claims. While it is not surprising that the Department is concerned over whether water supplies from the Colorado River can continue to fill the pipelines of heavily subsidized federal projects to

Robert W. Johnson, Regional Director, BOR  
Re: Development of Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions  
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deliver water to cities far distant from the Colorado River such as Albuquerque and Phoenix, members of the Navajo Nation living within a stone's throw of the River continue to haul water to their homes to meet their most basic needs. In sum, the Department's long neglect of Navajo needs for water from the Colorado River is doubly defective since it is both grossly unfair to the Navajo Nation and cannot be reconciled with the Department's stated objective of providing certainty to its management of the Colorado River.

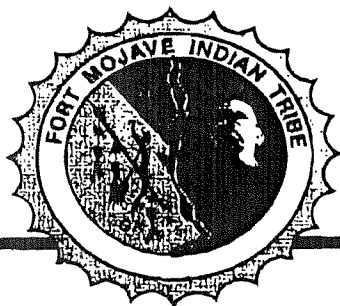
Sincerely,

THE NAVAJO NATION

s/signed on original  
Joe Shirley, Jr.  
President

cc: Michael A. Gheleta, USDOJ  
Vanessa Boyd Willard, USDOJ

L.002



# Fort Mojave Indian Tribe

NORA McDOWELL - Chairperson  
 SHAN LEWIS - Vice Chairman  
 DEBBIE JACKSON - Secretary  
 COLLEEN GARCIA - Member • BRUCE WILLIAMS - Member  
 MARTHA McCORRIGAN - Member • NICHOLE GARCIA - Member  
 500 Merriman Avenue • Needle, CA 92363  
 (760) 629-4591 • FAX (760) 629-5767

August 26, 2005

Robert Johnson, Regional Director  
 United States Bureau of Reclamation  
 Lower Colorado River Region  
 PO Box 61470  
 Boulder City, Nevada 89006-1470

Dear Mr Johnson:

The Fort Mojave Indian Tribe appreciates the opportunity to comment on the development of low reservoir management strategies for the Colorado River System and comments to the Bureau for undertaking this timely but controversial effort.

The Tribe is really not in the position of needing to be directly involved in the development of shortage criteria but we would like to make a few general comments.

The Colorado River has probably been over-allocated since the time of the Colorado River Compact and certainly since the Mexican Treaty added 1.5 million acre feet of non-existent water. We have been able to get by with this for all these years. But now, with consumption exceeding production by a million acre feet per year, the major reservoirs less than half full and considerable unused but senior entitlement still out there, it seems we have arrived at crunch time.

The Fort Mojave Indian Tribe's feeling toward the Colorado River is somewhat different than many other water users. We do rely entirely on the River for our water supply as do many others but the living river itself is equally important yet the Tribe would support shortage criteria when storage is 50% or less based on the actual annual yield of the River. A reduced river is not a good thing but it is better than having to live with a "run of the river" situation that would almost certainly occur without planned delivery reductions.

The Tribe's concern is not really water supply. Our rights are senior enough and will be defended vigorously enough to assure the water that we were allocated in the 1964 Arizona v. California Supreme Court Decree.

The concern is really the state of the River itself. We draw nearly all of our water supply from pumps on the bank of the flowing mainstem and our beaches and marinas are based on nine million acre feet per year flowing through the Reservation.

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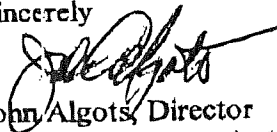
Robert Johnson 8/26/05

Page 2

We will adapt, but adapting takes time, planning and money. It also involves some modifications to the river channel. As we hope you would agree, the Fort Mojave Indian Tribe's diversions have been the least disruptive of all major users but it also leaves us the most vulnerable in the situation we now face. We also hope that the relatively minor modifications we now must make will be as welcomed by those agencies having jurisdiction over the water and bed of the Colorado River as have the dams and structures of others.

Again, we appreciate the opportunity to comment. We have long enjoyed an open dialog with the Bureau of Reclamation and look forward to continuing it.

Sincerely



John Algots, Director  
Department of Physical Resources

cc

Nora McDowell, Chairperson

**SPARKS, TEHAN & RYLEY, P. C.**

Attorneys  
7503 First Street  
Scottsdale, Arizona 85251  
(480) 949-1339  
FAX (480) 949-7587

Joe P. Sparks  
John H. Ryley  
Robyn L. Interpreter  
Susan B. Montgomery

**FAXED**  
8/31/05  
JPR

August 31, 2005

*Via Facsimile (702) 293-8156 and  
U.S. Mail Certified - Return Receipt Requested  
7005 0390 0005 5431 5517*

Regional Director, Lower Colorado Region  
BUREAU OF RECLAMATION  
ATTN: BCOO-1000  
P.O. Box 61470  
Boulder City, Nevada 89006-1470

*Via Facsimile (801) 524-3858 and  
U.S. Mail Certified - Return Receipt Requested  
7005 0390 0005 5431 5524*

Regional Director, Upper Colorado Region  
BUREAU OF RECLAMATION  
ATTN: UC-402  
125 South State Street  
Salt Lake City, Utah 84318-1147

**Re: Comments on the Development of Management Strategies for Lake Powell and Lake Mead, Including Lower Basin Shortage Guidelines, Under Low Reservoir Conditions - TONTO APACHE TRIBE**

Dear Regional Directors:

This Firm serves as Legal Counsel to the Tonto Apache Tribe ("Tribe") and submits the following comments related to the development of management strategies for Lake Powell and Lake Mead, including Lower Basin shortage guidelines, under low reservoir conditions, on the Tribe's behalf, pursuant to 70 Fed. Reg. 114, 34794 (2005).

The Tonto Apache Tribe is located in eastern Arizona on the Tonto Apache Reservation ("Reservation") near Payson, Arizona. The Reservation is 85 acres and does not have an adequate water supply to serve the Reservation.

The Tribe has a Central Arizona Project Indian Water Delivery Contract Between the United States and the Tonto Apache Tribe dated December 11, 1980 ("CAP Contract"). See CAP Contract enclosed. This CAP Contract provides 125 acre-feet of CAP water to the Tribe.

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## SPARKS, TEHAN & RYLEY, P. C.

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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," must be avoided. 1

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") carefully consider and reject any proposed management strategies for Lake Powell and Lake Mead that would breach the Tribe's CAP Contract or breach the Secretary's trust responsibility to properly manage and protect the Tribe's CAP water. It is apparent that representatives from the Upper and Lower Basin States have been meeting regularly to propose management strategies to the Secretary. The Tribe is concerned that adoption of these proposed strategies will interfere with the delivery of CAP water to the Tribe and breach the Tribe's CAP Contract. For instance, if the Secretary adopted a management strategy where a shortage is artificially declared in order to benefit an arrangement by the States, such a strategy would interfere with the Tribe's reasonable contractual expectation for delivery of its CAP water under the CAP Contract. In fact, such an arrangement would also violate Section 301(b) of the Basin Project Act.

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 where 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 expectation of delivery of CAP water under its CAP Contract.

The Tribe also continues to be concerned with declarations of "surplus" conditions on the Colorado River by the Secretary to accommodate, *inter alia*, the "insatiable" thirst of Southern California and Las Vegas, Nevada. Withdrawals from the Colorado River to satisfy these entities, reduces the cumulative storage in the Colorado River reservoirs, thus making the long-term water supply for the Tribe less reliable.

The Tribe requests the Secretary to assign a representative or team of representatives to act as the United States' trustee for the Tribe and provide for direct participation by the Tribe in all future discussions of this matter. The Tribe also requests that the Secretary arrange to regularly consult with 2

**SPARKS, TEHAN & RYLEY, P. C.**

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August 31, 2005  
Page 3

the Tribe during the development of the proposed strategies so that the Secretary can avoid making a decision which would breach the Tribe's CAP Contract and/or her trust responsibility to the Tribe to manage and protect the Tribe's CAP water. 3

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

Yours Truly,

**SPARKS, TEHAN & RYLEY, P.C.**

  
Joe P. Sparks

Enclosure  
JPS/rli

cc: Ivan Smith, Chairman  
Kenny Davis, Vice-Chairman  
Council Members

L:\INDIAN\TONTON\CAP\tr to sec.wpd

UNITED STATES  
DEPARTMENT OF THE INTERIOR  
OFFICE OF THE SECRETARY

CENTRAL ARIZONA PROJECT INDIAN WATER DELIVERY CONTRACT  
BETWEEN THE UNITED STATES AND THE TONTO APACHE TRIBE

1. PREAMBLE:

THIS CONTRACT, made this 11 day of DECEMBER 1980,

in pursuance generally of the Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof and supplementary thereto, the Boulder Canyon Project Act, 45 Stat. 1057, 43 USC s614 et seq (1928), the Colorado River Basin Project Act, 82 Stat. 885, 43 USC s1501 et seq. (1968), and the various authorities and responsibilities of the Secretary of the Interior (hereinafter "Secretary") in relation to Indians and Indian Tribes as contained in Title 25 USC and 43 USC s1457; and is between the United States of America (hereinafter "United States") and the Tonto Apache Tribe (hereinafter "Contractor") located on the Tonto Apache Reservation, Arizona.

WITNESSETH, THAT:

2. EXPLANATORY RECITALS:

WHEREAS, the Colorado River Basin Project Act provides, among other things, that the Secretary of the Interior shall construct, operate and maintain the Central Arizona Project for the purpose of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and Western New Mexico and for other purposes; and

WHEREAS, Contractor is in need of Central Arizona Project water to sustain its agricultural base and for other tribal homeland purposes; and

WHEREAS, upon completion of the Central Arizona Project, water will be available for delivery to Contractor for such purposes in accordance with the Secretarial notice of December 1, 1980, 45 FR 81265 ;

NOW, THEREFORE, in consideration of the mutual and dependent covenants herein contained, it is agreed as follows:

3. DEFINITIONS:

When used herein, unless otherwise distinctly expressed or manifestly incompatible with the intent hereof, the terms:

3.1 "Basin Project Act" shall mean the Colorado River Basin Project Act, 82 Stat. 885, dated September 30, 1968.

3.2 "Secretary" shall mean the Secretary of the Interior of the United States.

3.3 "Contracting Officer" shall mean the Secretary or his authorized designee acting in his behalf.

3.4 "Central Arizona Project" or "Project" shall mean the dams, reservoirs, aqueducts, canals, distribution and drainage works and appurtenant works authorized by Section 301(a) of the Basin Project Act and constructed by the United States pursuant to the provisions of said Act.

3.5 "Main System" shall mean those principle works of the Project listed as follows: Granite Reef Division, Drme Division (or suitable alternative), Salt-Gila Division, Tuscon Aqueduct (Colorado River Source), Buttes Dam and Navajo Project, together with all appurtenances thereto and all lands, interests in lands and rights-of-way for such works and appurtenances.

3.6 "OM&R" shall mean the care, operation, maintenance, and replacement of the Main System, or any part thereof.

3.7 "Operating Agency" shall mean the entity or entities authorized to assume OM&R responsibility of all or any part of the Main System and approved for that purpose by the Contracting Officer.

3.8 "Project Water" shall mean (a) Colorado River mainstream water, (b) all other water conserved and developed by Central Arizona Project dams and reservoirs and available for delivery by the United States, and (c) Return Flow captured by the Secretary for Project use.

3.9 "Notice of Availability of Project Water" shall mean the notice or notices which the Contracting Officer issues to Contractor to announce the availability of water for delivery to Contractor.

3.10 "Agricultural Water" or "Irrigation Water" shall mean Project Water used primarily in the commercial production of agricultural crops or livestock, including domestic use incidental thereto.

3.11 "Miscellaneous Water" shall mean water delivered from the Project for recreational and fish and wildlife purposes at other than Project facilities.

3.12 "Municipal and Industrial Water" hereinafter referred to as "M&I Water" shall mean water other than Agricultural Water or Miscellaneous Water delivered by means of the Main System.

3.13 "Return Flow" shall mean waste water, seepage, and ground water which originates or results from Agricultural Water, M&I Water, and Miscellaneous Water contracted for from the Central Arizona Project.

3.14 "Contractor's Reservation" shall mean the lands within the legal boundaries of Contractor's reservation(s).

3.15 "Distribution Works" shall mean those facilities constructed or financed by the United States for the primary purpose of distributing Project Water to the Delivery Point(s) within the Contractor's Reservation after said Project Water has been transported or delivered through the Main System.

3.16 "Water Right(s)" shall mean all those water rights which Contractor or the United States owns or holds for the benefit of the lands of the Contractor's Reservation(s) and the people thereon.

3.17 "Nonproject Water" shall mean water acquired by Contractor's other than from the Central Arizona Project.

3.18 "Year" shall mean the twelve month period between January 1 through the next succeeding December 31.

3.19 "Delivery Point(s)" is defined as the point(s) on Contractor's Reservation that are reasonably required, by agreement by the Contracting Officer and the Contractor, or selected by the Secretary to permit the Contractor to put the Project Water to its intended use.

3.20 "Substantial Completion" shall mean that degree of completion which, in the determination of the Contracting Officer, will enable the transportation of Project Water to Contractor's Delivery Points.

3.21 "Time of Shortage" shall mean 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.

3.22 "Exchange Water" shall mean water to be delivered to Contractor hereunder from a local source pursuant to an exchange as provided in section 304(d) of the Basin Project Act.



4. DELIVERY OF WATER:

4.1 Obligations of the United States. Subject to the terms, conditions, and provisions set forth in this contract during such periods as it operates and maintains the Project, the United States will deliver Project Water to the Contractor. The United States will use reasonable diligence to make available to the Contractor the quantities of water specified in the schedule submitted by Contractor and shall make deliveries of Project Water to Contractor to meet Contractor's water requirements within the constraints of and in accordance with Section 4.6. After transfer of OM&R to Operating Agency the United States will make deliveries of Project Water to the Operating Agency for subsequent delivery to Contractor as provided herein; the Secretary shall require a Subcontractor or other Indian Contractor to accept Project Water in exchange for or in replacement of existing supplies other than the mainstream of the Colorado River so that Contractor may receive the water to be delivered to it pursuant to this contract from a local source, all pursuant to Sec. 304(d) of the Basin Project Act (43 USCA 1524(d)).

4.2 Term of Contract. This Contract shall become effective upon its execution and shall remain in effect for a period of 50 years beginning with the year following Substantial Completion of the Project; Provided, that this Contract may be renewed upon written request by Contractor upon terms and conditions of renewal to be agreed upon not later than one year prior to the expiration of this Contract.

4.3 Conditions Relating to Delivery. Contractor hereby agrees that:

(a) The obligation of the United States to deliver water under this contract is subject to:

(1) The availability of such water for use in Arizona under the provisions of the Colorado River Compact, executed November 24, 1922; the Boulder Canyon Project Act, 45 Stat. 1057, dated December 21, 1928; the Colorado River Basin Project Act, dated September 30, 1968, 82 Stat. 885; the contract between the United States and the State of Arizona dated February 9, 1944; the Opinion of the Supreme Court of the United States in the case of Arizona v California et al., 373 U.S. 546, rendered June 3, 1963; and the March 9, 1964, Decree of that Court in said case, 376 U.S. 340, as now issued or hereafter modified.

(2) Executive A, Seventy-eighth Congress, Second Session, a treaty between the United States of America and the United Mexican States, signed at Washington, D.C., on February 3, 1944, relating to the utilization of the waters of the Colorado River and Tijuana River and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico, and Executive H, Seventy-eighth Congress, Second Session, a protocol signed at Washington, D.C., on November 13, 1944, supplementary to the Treaty, all hereinafter referred to as the Mexican Water Treaty.

(3) The express understanding and agreement by the Contractor that this contract is subject to the condition that Hoover Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of the Colorado River Compact approved by Section 13(a) of the Boulder Canyon Project Act; and third, for power; and furthermore, that this contract is made upon the express condition and with the express covenant that all rights hereunder shall be subject to and controlled by the Colorado River Compact and that the United States and the Contractor shall observe and be subject to and controlled by

said Colorado River Compact and Boulder Canyon Project Act in the construction management, and operation of Hoover Dam, Lake Mead, canals and other works and the storage, diversion, delivery, and use of water to be delivered to Contractor hereunder.

(4) The right of the United States temporarily to discontinue to reduce the amount of water to be delivered hereunder whenever such discontinuance or reduction is made necessary for purposes of investigations, inspections, replacements, maintenance, or repairs or any works whatsoever affecting, utilized for, in the opinion of the Secretary, necessary for delivery of water hereunder, its being understood that so far as feasible the United States will (1) do so during periods of low water demands and (2) give reasonable notice in advance of such temporary discontinuance or reduction.

(b) There be in effect measures, adequate in the judgment of the Secretary, to provide for the internally integrated management and control of surface and groundwaters within Contractor's Reservation to the end that groundwater withdrawals are managed on a responsible basis.

(c) The canals and Distribution Works through which Project Water is conveyed after its delivery to the Contractor shall be maintained with linings adequate in the Secretary's judgment to prevent excessive conveyance losses: Provided, the Contractor shall be relieved from this obligation if the United States does not make funds for this purpose available to Contractor following a timely request for such funds.

(d) The Contractor shall not pump nor permit others to pump groundwater from within the exterior boundaries of Contractor's Reservation for use outside said Reservation unless the Secretary and the Contractor agree, or shall have previously agreed, that a surplus of groundwater exists and drainage is required; Provided however, that where such pumping is presently permitted pursuant to contract, said pumping may continue throughout the life of said contract; Provided further, that such pumping may be permitted in other and additional cases subject to the approval of the Secretary.

(e) The Contractor shall not sell or permit the sale or other disposition of any Project Water for use outside the Contractor's Reservation except:

(1) The Contractor may exchange Project Water and may change times and places of delivery of Project Water, subject to the approval of the Secretary; and

(2) The Contractor may dispose of Project Water credited against finally determined Water Rights to the same extent that said Water Rights may then be subject to disposition by Contractor.

#### 4.4 Delivery of Project Water Prior to Completion of Project

Prior to completion of the Project works, water may be temporarily available for delivery to Contractor. When such water is available, the Contracting Officer will so notify Contractor and the water will be delivered on a "when available" basis at such terms as agreed upon between the Contractor and the Contracting Officer.

4.5 Delivery Entitlements and Obligations. The United States or the Operating Agency will not be required to deliver to the Contractor under this contract in excess of 128 acre-feet of Project Water yearly during the life of the Project.

4.6 Procedure for Ordering Water.

Following notice of Substantial Completion of the Project, Contracting Officer will issue a Notice of Availability of Project Water to Contractor. The Contractor will, in accordance with the procedures hereinafter set out, submit written schedules to the Contracting Officer showing the quantities of water requested for delivery. If the Notice of Availability of Project Water is given by Contractor prior to July 1 of any year, the first schedule for the balance of the current year shall be submitted to the Contracting Officer within 30 days. If said Notice is given after July 1 of any year, the first schedule shall cover the balance of the then current year and the next succeeding full year. Thereafter, the amounts, times, and rates of delivery of Project water to the Contractor during any year shall be in accordance with a water delivery schedule for that year, such schedule to be determined in the following manner:

(a) On or before October 1 of each year, the Contractor shall submit in writing to the Contracting Officer a water delivery schedule indicating the amounts of Project Water desired by the Contractor during each month of the following year along with a preliminary schedule of water desired for the succeeding two years.

(b) Upon receipt of a schedule the Contracting Officer shall review it and, after consultation with the Operating Agency and the Contractor, shall make only such modifications in it as are necessary to insure that the amounts, times, and rates of delivery to the Contractor will be consistent with the provisions of section 4.3(a). On or before December 1 of each year, the Contracting Officer shall determine and furnish to the Contractor the water delivery schedule for the next succeeding year which shall show the amounts of water to be delivered to the Contractor during each month of that year.

(c) A water delivery schedule may be amended by the Contracting Officer upon the Contractor's written request. Proposed amendments shall be submitted by the Contractor within a reasonable time before the desired change is to become effective, and shall be subject to review and modification by the Contracting Officer in like manner as the schedule itself.

4.7 Points of Delivery - Measurement and Responsibility for Distribution of Water.

(a) The Exchange Water to be furnished to the Contractor pursuant to this Contract will be delivered at the point(s) to be agreed upon in writing by the Contracting Officer and the Contractor, or in the event they are unable to agree, to be selected by the Secretary.

(b) All water delivered to the Contractor shall be measured with equipment furnished and installed by the United States and operated and maintained by the United States or the Operating Agency. Upon request of the Contractor, the accuracy of such measurements will be investigated by the Contracting Officer or the Operating Agency and Contractor, and any errors appearing therein adjusted.

(c) Neither the United States nor the Operating Agency shall be responsible for the control, carriage, handling, use, disposal, or distribution of water beyond the turnout point(s) from the Main System to the Distribution Works serving the Contractor, and the Contractor shall hold the United States and the Operating Agency harmless on account of damage or claim of damage of any nature whatsoever for which there is legal responsibility, including property damage, personal injury or death arising out of or connected with the Contractor's control, carriage, handling, used, disposal, or distribution of such water beyond said turnout point(s).

4.8 Water Acquired by Contractor Other than from the United States.

The provisions of the Contract shall not be applicable to or affect Non-project Water or water rights now owned or hereafter acquired by the Contractor.

4.9 Priority in Time of Shortages.

In Time of Shortage, deliveries of Project Water to miscellaneous and non-Indian agricultural uses will have been terminated; available Project Water shall be delivered to Indian contractors (including Contractor) and to non-Indian contractors for municipal and industrial uses according to the following formula:

$$IP = I / (I + MI) \text{ where:}$$

- IP is the Indian Share of Project Water;
- I is the Project Water used on Indian lands during the most recent calendar year which was not a Time of Shortage, up to a limit of 309,810 acre feet, less ten (10%) percent of the amount allocated to Indian Contractors for agricultural purposes;

provided that, for the purposes of this formula, such ten (10%) percent reduction shall not operate to reduce the amount of Project Water used for Indian agricultural purposes to less than ninety (90%) percent of the Indian agricultural allocation. (Included in I is any water delivered under a Substitute Water Contract; Provided that, where substitutions occur at a ratio greater than one-to-one, the ratio shall be considered as if it were one-to-one for the purposes of this section.)

MI is the aggregate Project Water used by Subcontractors for municipal and industrial purposes during the most recent calendar year which was not a Time of Shortage up to a limit of 510,000 acre feet. (Excluded from MI is Project Water obtained under a Substitute Water Contract.)

The non-Indian M&I water supply in Time of Shortage shall be the difference between Project Water and IP.

4.10 Secretarial Control of Return Flow. The Secretary reserves

the right to capture all Return Flow flowing from the exterior boundaries of the Contractor's Reservation as a source of supply and for distribution to and use of the Central Arizona Project to the fullest extent practicable. Contractor may recapture and reuse or sell Return Flow ~~within~~ within the exterior boundaries of Contractor's reservation Provided however, that such Return Flow may not be sold for use outside the Contractor's Reservation unless the Secretary has given prior written approval.

4.11 Exchange Water. Where the Secretary determines that Contractor is physically able to receive Project water in exchange for or in

replacement of existing supplies of water from surface sources other than the Colorado River to provide water supplies for water users unstream from



the confluence of the Salt and Verde Rivers and Buttes Dam site, if such dam is then existent, the Secretary may require and Contractor agrees to accept said Project water in exchange for or in replacement of said existing supplies pursuant to the provisions of Section 304(d) of the Basin Project Act.

5. OTHER WATER:

Nothing in this contract shall prevent Contractor from agreeing with a water user to receive water from an off-reservation source where the water user does not condition delivery upon substitution for Project Water.

6. Payment of Costs:

(a) Repayment of construction costs associated with Contractor's of Project Water shall be subject to the provisions of 43 U.S.C 1542 and 25 U.S.C. 386a.

(b) The Secretary shall fix O&M charges payable by Contractor pursuant to 25 U.S.C. s385 and regulations promulgated pursuant thereto (25 C.F.R. Part 191). Project Water will not be delivered to Contractor unless the annual O&M assessment is paid in advance, except where such payment is deferred, adjusted, or cancelled pursuant to 25 CFR 191.17.

(c) In the event the Contractor fails or refuses to accept delivery at the Deliveries Point(s) of the quantities of water available for delivery to and required to be accepted by it pursuant to this Contract, or in the event the Contractor in any year fails to submit a schedule for delivery as provided in Section 4.6 hereof, said failure or refusal shall not relieve the Contractor of its obligation to make the payments required in this Section. Contractor agrees to make payment therefor in the same

manner as if said water had been delivered to an accepted by it in accordance with this Contract; Provided however, if Contractor fails or refuses to accept delivery of Project Water, Operating Agency is then able to sell that portion of Contractor's allotment of Project waters to another contractor that would not have otherwise received the additional increment of Project Water, then the Contractor's financial responsibility will be decreased by a like amount. The Secretary shall require Operating Agency to use due diligence to secure a reasonable price for said water. Provided further that Contractor shall be relieved from the obligation to pay for refusal to accept delivery if the United States does not make funds available to Contractor to construct Distribution Works and said Distribution Works are not in place to accept delivery.

(d) It is anticipated by both parties that a separate agreement will be entered into concerning the operation, maintenance, and replacement of the Distribution Works, the appointment of a Distribution Works Operating Agent and the setting and collection of appropriate charges for the care operation, maintenance and replacement of the Distribution Works.

7. DISTRIBUTION SYSTEM - ENVIRONMENTAL REVIEW: Notwithstanding any other provision of this contract, the United States will not deliver Project Water through Distribution Works to the Contractor's Reservation until additional environmental analyses as necessary, relating to the Distribution Works have been completed by the United States in accordance with the National Environmental Policy Act, and the design of Distribution Works suitable for delivery of Project Water to the Contractor pursuant to the terms of this contract is thereafter approved by the Secretary, it being the intent of the parties hereto that such approval is to be based on environmental considerations related only to the Distribution Works.

B. GENERAL PROVISIONS:

8.1 Water and Air Pollution Control. The Contractor, in carrying out this contract, shall comply with all applicable water and air pollution laws and regulations of the United States and shall obtain all required permits or licenses from the appropriate Federal authorities.

8.2 Quality of Water. The operation and maintenance of project facilities shall be performed in such manner as is practicable to maintain the quality of raw water made available through such facilities at the highest level reasonably attainable as determined by the Contracting Officer. The United States does not warrant the quality of water and is under no obligation to construct or furnish water treatment facilities to maintain or better the quality of water.

8.3 Rules, Regulations, and Determinations.

(a) The Contracting Officer shall have the right to make, after an opportunity has been offered to the Contractor for consultation, rules and regulations consistent with the provisions of this contract and the laws of the United States and to add to or to modify such rules and regulations as he may deem proper and necessary to carry out this contract, and to supply necessary details of its administration which are not covered by express provisions of this contract. The Contractor shall observe such rules and regulations..

(b) Where the terms of this contract provide for action to be based upon the opinion or determination of either party to this contract, whether or not stated to be conclusive, said terms shall not be construed as permitting such action to be predicated upon arbitrary, capricious, or

unreasonable opinions or determinations. In the event that the Contractor questions any factual determination made by the Contracting Officer, the findings as to the facts shall be made by the Secretary only after consultation with the Contractor.

**8.4 Books, Records, and Reports.** The Contractor shall establish and maintain accounts and other books and records pertaining to its financial transactions, land use and crop census, water supply, water use, changes of project works, and to other matters the Contracting Officer may reasonably require. Reports thereon shall be furnished to the Contracting Officer in such form and on such date or dates as he may require. Subject to applicable Federal laws and regulations, each party shall have the right during office hours to examine and make copies of each other's books and records relating to matters covered by this contract.

**8.5 Notices.** Any notice, demand, or request authorized or required by this contract shall be deemed to have been given, on behalf of the Contractor when mailed, postage prepaid, or delivered to the appropriate agent of the United States, or when mailed, postage prepaid, or delivered to the Tonto Apache Tribe, P.O. Box 1440, Payson, Arizona 85541. The designation of the addressee or the address may be changed by notice given in the same manner as provided in this article for other notices.

**8.6 Contingent on Appropriation or Allotment of Funds.** The expenditure or advance of any money or the performance of any work by the United States hereunder which may require appropriation of money by the Congress or the allotment of funds shall be contingent upon such appropriation or allotment being made. The failure of the Congress to appropriate funds or the absence of any allotment of funds shall not relieve the Contractor from any obligations under this Contract. No liability shall accrue to the United States in case such funds are not appropriated or allotted.

8.7 Assignment Limited--Successors and Assigns Obligated. The provisions of this contract shall apply to and bind the successors and assigns of the parties hereto but no assignment or transfer of this contract or any part or interest therein shall be valid until approved by the Contracting Officer.

8.8 Officials Not to Benefit.

(a) No Member of or Delegate to Congress or Resident Commissioner shall be admitted to any share or part of this contract or to any benefit that may arise herefrom. This restriction shall not be construed to extend to this contract if made with a corporation or company for its general benefit.

(b) No official of the Contractor shall receive any benefit that may arise by reason of this contract other than as a landowner within the project and in the same manner as other landowners within the project.

8.9 Equal Opportunity Clause. During the performance of this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination;

rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or a understanding, a notice to be provided by the Agency Contracting Officer, advising the labor union or workers' representative of the Contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(e) The Contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the non-discrimination clauses of this contract or with any of such rules, regulations or orders, this contract may be canceled, terminated, suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246, of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(g) The Contractor will include the provisions of paragraphs (a) through (g) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor.

The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance; Provided however, that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States.

8.10 Title VI, Civil Rights Act of 1964.

(a) The Contractor agrees that it will comply with Title VI of the Civil Rights Act of July 2, 1964 (78 Stat. 241), and all requirements imposed by or pursuant to the Department of the Interior Regulation (43 CFR 17) issued pursuant to that title, to the end that, in accordance with Title VI of that Act and the Regulations, no person in the United States shall, on the grounds of race, color, religion, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Contractor receives financial assistance from the United States and hereby gives assurance that it will immediately take any measures to effectuate this agreement.

(b) If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Contractor by the United States, this assurance obligates the Contractor, or in the case of any transfer of such property, any transferee for the period during which the real property or structure is used for a purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance obligates the Contractor for the period during which it retains ownership or possession of the property. In all other cases, this assurance obligates the Contractor for the period during which the federal financial assistance is extended to it by the United States.



(c) This assurance is given in consideration of and for the purpose of obtaining any and all federal grants, loans, contracts, property, discounts, or other Federal financial assistance extended after the date hereof to the Contractor by the United States, including installment payments after such date on account of arrangements for Federal financial assistance which were approved before such date. The Contractor recognizes and agrees that such federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall reserve the right to seek judicial enforcement of this assurance. This assurance is binding on the Contractor, its successors, transferees, and assignees.

9. CREDIT AGAINST WATER RIGHTS:

At such time as Contractor's Water Rights, are finally determined, the Project Water delivered to the Contractor under this contract will be credited against those Water Rights on such terms and conditions as may be agreed upon between the Secretary and Contractor at that time. Thereafter Contractor may use that Project Water for any and all uses consistent with such Water Rights or the uses described in this contract. Until such time as Contractor's Water Rights are finally determined the Project Water delivered to Contractor is supplemental water and is not credited against, or in any way related to, Contractor's Water Rights.

10. ALLOCATION NOT TO RELEASE RIGHTS

Neither the allocation of Project Water to the Contractor or otherwise, nor the execution of this contract shall constitute a taking, either directly or by implication of any water rights of the tribes, nor shall it be construed to alter or release the right of any person or entity, including the Contractor, to assert rights to water all without limitation as to whether the water is surface or groundwater, nor will it constitute the Department's opinion as to the legal rights of the tribe.

11. EXCEPTIONS TO APPLICATION OF CIVIL RIGHTS AND OTHER ACTS:

The provisions of Subarticles 7.1, 7.9, and 7.10 apply except where they conflict with Sections 701(b)(1) and 703(i) of Title VII of the Civil Rights Act of 1964, 73 Stat. 253-257, 42 U.S.C. s200e, which pertains to Indian Tribes and to preferential treatment given to Indians residing on or near a reservation or other applicable laws which exclude applicability to Indians or Indian reservations.

IN WITNESS WHEREOF, the parties hereto have executed this contract the day and year above written.

THE UNITED STATES OF AMERICA

BY

*David B. Beauf*  
Office of the Secretary

Tonto Apache Tribe

ATTEST:

BY

*Marta Campbell*  
Chairman

ATTEST:

BY

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SECRETARIAL ORDER NO.

Delegation of authority: Central Arizona Project

1. Purpose. The purpose of this Order is to delegate authority to execute water delivery contracts with the 12 Indian Tribes and Communities allocated Central Arizona Project water on December 1, 1980. (45 Fed. Reg. 81265, December 10, 1980)
2. Authority. 43 U.S.C. §§ 614 et seq. (1928); 43 U.S.C. §§ 1501 et seq. (1968); 43 U.S. § 1457; Title 25, U.S. Code; 5 U.S.C. § 301.
3. Delegation. There is hereby delegated to Daniel P. Beard, Deputy Assistant Secretary, Land and Water Resources, the authority to execute contracts with the 12 Indian Tribes and Communities named in 45 Fed. Reg. 81265, December 10, 1980, for delivery of the Central Arizona Project water allocated to them on December 1, 1980.
4. Effective date. This Order is effective immediately, to remain in effect until February 1, 1981, unless first rescinded or modified.

*Daniel P. Beard*  
Secretary of the Interior

12-11-80  
Date

