

environmental statement. The issues expressed in those written statements will be restated and responded to in the final environmental statement in the same manner as the oral testimony. Hearing transcripts and records will be available for public inspection at the address below and at the Kansas Reclamation Office, Landmark Plaza Building, 103 East 10th Street, Topeka, Kansas 66612, telephone (913) 234-8661.

Organizations or individuals desiring to present statements at the hearing should contact Regional Director Joe D. Hall, Bureau of Reclamation, Lower Missouri Region, Building 20, Denver Federal Center, Denver, Colorado 80225, telephone (303) 234-3779, and announce their intention to participate. Written comments from those unable to attend, and from those wishing to supplement their oral presentation at the hearing should be received by November 28, 1976, for inclusion in the hearing record.

Dated: October 12, 1976.

G. G. STAMM,  
Commissioner of Reclamation.  
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Office of the Secretary  
CENTRAL ARIZONA PROJECT, ARIZ.  
Allocation of Project Water for Indian  
Irrigation Use

INTRODUCTION

On April 15, 1975, the Secretary of the Interior gave notice of a proposed allocation of Central Arizona Project (CAP) water for Indian irrigation use. The notice was published in the FEDERAL REGISTER (40 FR 17297) on April 18, 1975.

The notice of proposed allocation invited written comments, suggestions, and/or objections from interested persons and stated that all relevant materials received before June 17, 1975, would be considered. About 20 letters of comment were received before or shortly after June 17, 1975. In addition to those comments, about 70 letters were received some time after June 17 that were not directly in response to the notice of proposed allocation. Most of those appeared to have been inspired by an article on the Pima Indians in a newsletter of the Association of American Indian Affairs, Inc. (No. 89, June-August 1975), reporting unfavorably on the proposed allocation.

The approximately 70 letters that were received as a result of the article in the newsletter were principally expressions of attitude rather than discussions of issues. However, most of the approximately 20 letters that were received directly in response to the published notice of proposed allocation did discuss the issues in one or more respect and did raise a number of relevant points. Those points are summarized below. Following that discussion, the departmental decisionmaking procedure is described and the final allocation is set forth.

I. SUMMARY OF COMMENTS RECEIVED ON  
PROPOSED ALLOCATION

The comments received in response to the notice published in the FEDERAL REGISTER on April 18, 1975, covered the administrative rulemaking procedures; statutory provisions, legislative history, and congressional intent; Indian water rights and needs; impacts on non-Indian interests; and suggested revisions to the proposed allocation. Summarized below are statements representative of those comments:

A. *Administrative rulemaking procedures.* Correspondents complained that they had been unable to obtain copies of materials used in making the proposed allocation. (All requests have been met.) They requested a public hearing on the record and the right to cross-examine the Secretary of the Interior and other officials who have participated in the administrative process of making the allocation, and they objected because written comments had not similarly been invited prior to the publication on December 20, 1972, 37 FR 28082, of the earlier Secretarial decision of December 15, 1972, entitled "Water-Use Priorities and Allocations of Irrigation Water."

B. *Statutory provisions, legislative history, and congressional intent.* Correspondents challenged the proposed allocation on the grounds that it was contrary to express provisions in the Colorado River Basin Project Act, 43 U.S.C. 1501 (herein referred to as the "Basin Act"), or to the intent of Congress as reflected in the legislative history. They suggested that the failure to use the term "industrial" along with "municipal" makes it inappropriate to give a priority to industrial uses over Indian needs. They also suggested that, notwithstanding the declining nature of the project water supply, a continuing fixed allocation of water be provided for Indian agricultural use. Agricultural interests expressed concern that the contingent nature of project supply in the later years would make it difficult to justify and finance distribution facilities; and agricultural interests have complained that under the municipal and industrial (M&I) priority, water could be wasted on nonessential purposes such as irrigating golf courses and filling swimming pools while crops are being lost for lack of irrigation water.

C. *Indian water rights and needs.* Correspondents claimed that the Indians would be deprived of their water rights by the proposed allocation. They contended that the Gila River tribe should be given CAP water to irrigate lands that could have been irrigated with water said to have been taken by the United States for the use of others.

They also contended that the proposed allocation would result in the abandonment of Indian agriculture in the later years of the project. Finally, they stated that basing the allocation on the criterion of lands presently developed for irrigation contravenes Section 304 of the Basin Act. Non-Indian correspondents contended that there is no basis in law

for the Indian preference included in the proposed allocation.

D. *Impacts on non-Indian interests.* Correspondents contend that the priority granted to the Indians is inconsistent with the priority for M&I use established under the 1972 decisions, 37 FR 23082, and that the Indian use is detrimental to both M&I and non-Indian agricultural uses. They contend that competing uses will place a disproportionate financial burden on non-Indian agriculturalists.

E. *Suggested revisions to the proposed allocation.* Some correspondents suggested that a significantly larger—others a significantly smaller—quantity of water be allocated for Indian agricultural use; significant quantities of M&I water be allocated to the Indians; an allocation be made for the Fort McDowell tribe; and the amount of water to be marketed for M&I purposes be limited to preserve the agricultural functions of the project.

II. DEPARTMENTAL DECISIONMAKING  
PROCESS

The departmental decisionmaking process included the opportunity for comment by the interested parties and the general public, analysis and consideration of the comments received, evaluation of alternatives, evaluation of possible environmental impacts, and Secretarial meetings with Indian and non-Indian interests.

A. *Analysis and Consideration of the Comments Received*—1. *Rulemaking procedures.* Some of the correspondents complained that they had been unable to obtain copies of materials used in making the proposed allocation. To obviate that problem, an administrative record of significant meetings, correspondence, and factual data relied upon in making the proposed allocation was assembled in the Arizona Projects Office of the Bureau of Reclamation in Phoenix, and its availability for inspection by the public was announced in the notice published on April 18, 1975. Duplicate sets of those documents were made available to the Phoenix office of the Bureau of Indian Affairs and to the Washington office of the Bureau of Reclamation. A number of requests for complete sets or portions thereof were received both in Phoenix and in Washington. All requests for copies of those and any other materials that were received have been complied with and the materials have been furnished.

Some of the correspondents have requested a public hearing on the record and the right to cross-examine the Secretary of the Interior and other officials who have participated in the administrative process of making the allocation. Although it has been the practice during the extended course of the deliberations leading up to the allocation to meet with representatives of interested groups who have requested such meetings, formal public hearings on the record, including cross-examination, are not required by law for this kind of a decision, and the benefits to be expected from such pro-

ceedings would not be commensurate with the costs to the parties, the delay in implementation, and the exacerbation of conflicts. The comments that have been received have been carefully assessed and taken into consideration in the allocation.

There was some objection because written comments had not similarly been invited prior to the publication on December 20, 1972, 37 FR 28082, of the earlier Secretarial decisions of December 15, 1972, entitled "Water-Use Priorities and Allocation of Irrigation Water." The earlier decisions announced, among other things, the principle of a priority for municipal and industrial uses. However, the earlier decisions were an integral part of the notice of proposed allocation published April 18, 1975, having been referred to and incorporated therein. Interested parties, therefore, had the opportunity to and did submit relevant comments.

**2. Statutory Provisions and Legislative History.** A number of the comments challenged the proposed allocation on the grounds that it was contrary to express provisions in the Basin Act or to the intent of Congress as reflected in the legislative history. These challenges were made by both the Indian and non-Indian interests, but usually with respect to different statutory provisions or different portions of the legislative history. Therefore, it has been decided to set forth, in some detail, those statutory provisions and portions of the legislative history that are considered to be significant and that were relied upon in making the final allocation. By discussing the statutory provisions and the legislative history now, in advance of discussing some of the other issues that were raised in the comments, a better understanding of the latter issues will be possible.

**a. Priority for M&I.** Section 301(a) of the Basin Act states that the Central Arizona Project is authorized for the purpose, among others, "of furnishing irrigation water and municipal water supplies to the water-deficient areas of Arizona and western New Mexico through direct diversion or exchange of water." It has been suggested in some of the comments that the failure to use the term "industrial" along with "municipal" makes it inappropriate to give a priority to industrial use. However, an authorization for municipal purposes includes industrial uses, since municipal water systems routinely provide water to industrial users within their service area.

"Municipal" is used in section 301(a) to distinguish from irrigation uses, not from industrial uses,<sup>1</sup> as is made explicit

<sup>1</sup>In the Colorado River Compact, for example, the term that is used to make the distinction between irrigation and M&I uses is "domestic" use, defined to include "the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of [hydro] electrical power." The use of water for hydro generation is not a consumptive use and, therefore, is not given priority under the Compact; whereas, the use of water for thermal generation is a consumptive use and has priority as an industrial use.

in subsequent sections of the Basin Act. Section 304, authorizes master contracts with a State water user organization for "irrigation and municipal and industrial water supply" and further provides that "[c]ontracts relating to municipal and industrial water supply under the Central Arizona Project may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(c) \* \* \* [Emphasis added.] The last sentence of section 9(c) of the Reclamation Act establishes a priority for irrigation over M&I uses."<sup>2</sup>

In canceling the priority for irrigation use under Reclamation law, Section 304 implements the congressional intent reflected in the legislative history that M&I purposes would take priority in the Central Arizona Project.<sup>3</sup>

Page 26 of the Report of the Senate Committee on Interior and Insular Affairs (S.R. 408, 90th Cong., 1st Sess.), describes the use of project water as follows:

The committee feels that the transition from an agricultural economy dependent on irrigation to a strong, diversified industrial economy is inevitable. It is also desirable, because industrial and municipal uses of water will, in the long run, support a large and more affluent population than will predominantly agricultural uses of water. And this is a very important consideration in an area which will probably always have to live within definite constraints on availability of water supplies. Basic changes such as these in the structure and fabric of a region's economy and way of life do not normally occur overnight; however, and when they do, they are usually accompanied by tragic dislocations which disrupt the economy of the area, the well-being of its institutions and the security and the aspirations of its people.

The committee's approval and endorsement of S. 1004 is in part based on a recognition of the need for a gradual transition toward a predominantly municipal and industrial use of water. Accordingly, water supplied under the project is to supplement existing supplies and no new lands are to be irrigated. Water supplied by the Central Arizona Project will allow Arizona to utilize its share of Colorado river water awarded and decreed by the Supreme Court. It will also provide time to diversify the economy, to plan, and to implement procedures which will avoid the crises which too often accompany a region's realization that economic growth must take place within the confines of a limited water supply. [Emphasis added]

Congress had in mind that without the Central Arizona Project, the supply of ground water for agriculture would be "drastically depleted" because of the present rate of overdraft and because of the increasing preemption of the ground-water supply by M&I users. It viewed the project as prolonging the availability of water for agriculture, but not as a permanent solution to the water dilemma.

<sup>2</sup>"No contract relating to municipal water supply or miscellaneous purposes \* \* \* shall be made unless, in the judgment of the Secretary, it will not impair the efficiency of the project for irrigation purposes."

<sup>3</sup>Otherwise, under Section 604 of the Basin Act, the Secretary would be governed by the Federal Reclamation laws in constructing, operating, and maintaining the Central Arizona Project.

Ultimately, the project would provide an additional firm supply of M&I water, while in the interim the existing agricultural uses would be maintained as much as possible. Thus, on page 27 of the Senate Report:

Because of pumping costs, poor water quality, and the physical limitations imposed by the variable nature of the underground storage, the entire volume of underground water cannot be considered available for use. The present net rate of overdraft of about 2 million acre-feet per year will drastically deplete this largely nonreplenishable resource before adequate water is available to bring supply and demand in balance.

Water use in Arizona in the past has been predominantly for agriculture. As late as 1960 more than 90 percent of the water used in central Arizona was used for agricultural purposes. As the urban areas of Phoenix and Tucson expand, this relationship of water use is changing rapidly. The rate of change is expected to accelerate in the future as the population continues to expand and as industrial development increases.

Central Arizona Project water will be marketed through qualified contracting agencies, principally municipalities and irrigation districts. The chief immediate result of purchases of project water by either of these two types of users will be a reduction in present overdrafts on the ground water, which in turn will result in prolonged availability of water for all uses. The use of project water to satisfy the growing urban needs will slow the pace of the preemption of agricultural water which is now taking place.

In brief, the Central Arizona Project is needed to—

1. Reduce a dangerous overdraft upon ground water reserves.
2. Maintain as much as possible of the area's 1,250,000 acres of irrigated farm land.
3. Provide a source of additional water for municipal and industrial use that will be required during the next 30 years.

Similar statements appear on pages 54 and 55 of the Report of the House Committee on Interior and Insular Affairs (H.R. 1312, 90th Cong., 2nd Sess.).

Page 32 of the Senate Report states that the Committee adopted the Bureau of Reclamation's water studies, and a "Summary of Bureau of Reclamation Reservoir Operation and Water Supply Studies" appears on page 35. Those studies showed a declining supply of project water from the year 1975 through the year 2030. In the year 1975, about 1.7 million acre-feet were expected to be available for irrigation purposes; whereas only 82,000 acre-feet were expected to be used for M&I purposes. The former figure gradually reduced through the years, and the latter figure gradually increased; until by the year 2000, project deliveries for M&I purposes were estimated to be 312,000 acre-feet per year.

Thus, the curtailment of the project supply of irrigation water to provide a dependable M&I supply is an integral feature of the act. As footnote 3 on page 34 of the Senate Report states: "Although the average yield under the year 2030 conditions would be 723,000 acre-feet, the assured yield would be less than 1/2 of this figure and would be devoted to municipal and industrial use." (Emphasis added.)

As planned and enacted by Congress, the variable project yield was to be used

for agricultural purposes and was to diminish over the years; whereas the bulk of the assured yield was ultimately to be used for M&I purposes. Subsequent studies by the Bureau of Reclamation have resulted in some changes in the hydrologic estimates with respect to average and assured yield<sup>4</sup> and some changes in the demand for M&I water, but the relationship between the use of project water for agricultural purposes and for M&I purposes remains essentially the same.

The allocation of project water for Indian irrigation use gives recognition to the foregoing principle.

b. *Need for Augmentation.* In the words of then Secretary of the Interior Udall, quoted on page 27 of the Senate Report, the project would only alleviate the most immediately urgent water supply deficiencies. In order to meet fully the future agricultural and M&I needs of the region, the supply of water from the Colorado River would have to be augmented. On page 40 of the House Report:

It is inevitable that water requirements will exceed the supply. This condition will occur with or without a Central Arizona Project.

And on page 41 the need and prospects for augmentation are further discussed. Section 201 of the Basin Act provides authority to make the necessary studies.

c. *Allocation for Indian Irrigation Use.* There are no express provisions in the Basin Act respecting the amount of water that should be allocated for Indian irrigation use, although there are provisions that indicate a congressional expectancy that some water would be allocated for that purpose. For example, in Section 304 of the Basin Act, Indian lands are exempt from the prohibition against using project water for irrigation of lands not having a recent irrigation history and do not require master repayment contracts. Under Section 402 of the Basin Act, construction costs allocated to irrigation of Indian lands are, in effect, non-reimbursable.

On page 27 of the Senate Report, it is stated that one of the purposes of the project is to "[m]aintain as much as possible of the area's 1,250,000 acres of irrigated farm land." The farm lands irrigated by Indians are included in this figure, along with all farm lands irrigated by non-Indians.

Further, as has been noted in some of the comments, the approximately \$832 million authorized to be appropriated for project construction in Section 309 of the Basin Act, includes an authorization

<sup>4</sup> Studies made during authorization assumed that aqueduct conveyance losses would be about 10 percent of the total water diverted from the Colorado River. More recent analyses indicate that the annual conveyance losses will be fairly constant. Thus, less water will be available during shortage years while more water will be available during years of normal and above-normal supply. Recently updated estimates of lower Colorado River channel losses and of increased water use by the other Colorado River Basin States have been taken into account in estimating the availability of project water.

of about \$20 million for an Indian distribution system (page 36 of Senate Report). However, we do not find any reliable evidence that the amount of the authorization was related to the amount of water the Indians would receive from the project. In this respect it should be noted that there is also authorized in Section 309 of the Basin Act the sum of \$100 million for construction of distribution and drainage systems for non-Indian lands. If the respective figures were assumed to be relevant to the allocation of project water between Indian and non-Indian lands, the ratio would be 1 to 5.

Another possible clue in the legislative history is the extent to which the irrigation costs were allocated to Indians and, therefore, excluded from the project economic and financial analyses. Although all of the approximately \$20 million authorized for Indian distribution systems was excluded from such analyses, none of the costs allocated to irrigation were excluded (page 37 of the Senate Report). It could be supposed that if any substantial amount of project water had been expected to be used for Indian irrigation, the amounts allocated thereto would have been excluded from the project economic and financial analyses.

3. *Indian water rights and needs.* A number of the comments have mistakenly complained that the Indians are being deprived of their water rights by the proposed allocation. However, the five central Arizona tribes which are within the service area of the Central Arizona Project do not have rights to the Colorado River water to be made available by the project. The project diverts water from the mainstream of the Colorado River at Lake Havasu and by aqueduct transports that water more than 300 miles to the project service area; whereas under the doctrine of reserved Indian water rights set forth in *Winters v. United States*, 207 U.S. 564 (1908), rights are reserved to Indian tribes only in waters that are on or adjacent to their reservations.

Therefore, although some of the five central Arizona tribes that will receive project water may have adjudicated rights in the waters indigenous to central Arizona, they have no such rights to the waters that the project will transport from the mainstream of the Colorado River. Consistent with this view, no rights on the mainstream of the Colorado River were decreed for the five central Arizona tribes in *Arizona v. California*, 373 U.S. 548 (1936); Decree—376 U.S. 340 (1964).

Some of the comments have also alleged that the proposed allocation to Indian irrigation would result in the destruction of Indian agriculture in the later years of the project and would take away the Indian's livelihood. However, the project takes nothing from the Indians that they might otherwise have if the project were never built. The project water that is allocated to Indian agriculture supplements whatever water sources the Indians might have.

The regrettable fact is that if the project is never built, both Indian and non-Indian agriculture will experience the crisis of a disappearing water supply within an earlier period of time than would be the case with the project. The effect of the project is to prolong the period during which an adequate supply of water will be available and to moderate the shortages during the later critical periods.

In Docket 236-C and Docket 236-D, United States Court of Claims, the Gila River tribe is seeking compensation for a taking by the United States of certain of its water rights on the Gila River in central Arizona. The tribe argues that it should be given water from the Central Arizona Project to irrigate the lands that could have been irrigated by the water that has been taken from it. However, the taking has already occurred; the tribe's right to indemnification has already vested; and a remedy in the Court of Claims is available to and is being actively pursued by the tribe.

Any attempt to allocate project water to the tribe in compensation for the taking would present insoluble complications in terms of reconciling such an allocation with the Court of Claims proceedings and with the congressional intent in authorizing the Central Arizona Project. For one thing, the project water supply for irrigation is at best only a supplemental one, and after the first 20 years even that supply will be highly contingent; whereas the tribe's claim would be based on a water right of the first priority. Further, although there is authority under the Basin Act to contract for the sale of project water to non-Indians and authority to make a reasonable allocation of project water for Indian irrigation use on a nonreimbursable basis, there is no authority to use project water to pay or compromise claims of the Gila River tribe or anyone else.

Moreover, the water the tribe claims has been unlawfully taken would have been used to irrigate lands that are not now developed for irrigation. The tribe would have to make substantial capital investments in those lands to develop them for irrigation before it could take advantage of project water, an investment which would be questionable in view of the contingent nature of the project water supply for irrigation use after the first 20 years.

It was because of this contingency in the water supply for irrigation after the first 20 years that it was decided that one of the criteria for determining the allocation of project water for Indian irrigation use should be to restrict the supply of project water to those Indian lands which are presently developed for irrigation. In this way the Indians would be able to prolong the irrigation of such lands and would not be encouraged to make investments in the development of the lands for which the water supply was contingent.

The comments submitted in behalf of the five central Arizona tribes argue that basing the allocation on the criterion of

lands presently developed for irrigation contravenes section 304 of the Basin Act. The latter provision prohibits making project water available directly or indirectly for the irrigation of lands not having a recent irrigation history,<sup>6</sup> but expressly exempts Indian lands from the prohibition.

In using presently developed lands as a criterion for determining the allocation of project water for Indian irrigation use, no effort is made to restrict the use of such water by the tribes for the irrigation of other lands. The criterion does not, accordingly, conflict with section 304, of the Basin Act, although it is assumed that the irrigation of presently developed lands will be more feasible than would the development of new lands.

The point is that the criterion is a reasonable guideline for allocating a limited and contingent supply of water. It was determined that to the extent water was available from the project for irrigation purposes, it should be allocated on the basis of servicing 100 percent of the presently developed Indian lands during the early years of the project.<sup>7</sup> This would permit the Indians to maintain their agricultural capability as long as possible; whereas the non-Indian agricultural interests would be able, without overdrafting of ground water, to irrigate only about one-third of their lands having a recent irrigation history.<sup>7</sup>

The non-Indian irrigation interests complain in their comments that there is no basis in the law for such a preference for Indian irrigation. However, in making an allocation of this kind, there are no hard and fast rules which can be referred to. It is a process of evolving equitable and reasonable guidelines for determining how the supply of project water should be allocated between the Indian and non-Indian agricultural interest, and some discretion is available to the Secretary of the Interior.

As the Supreme Court pointed out in *Arizona v. California*, 373 U.S.C. 546 (1963), when Congress confers on the Secretary the authority to contract for the disposition of project water, as it has done in Section 304 of the Basin Act, it intends for the Secretary "to decide which users within each State would get

<sup>6</sup> "Lands presently developed for irrigation" is not the same as "lands not having a recent irrigation history." In the criterion used for the allocation of project water for Indian irrigation use, all lands that were presently developed for irrigation were taken into account, notwithstanding that such lands may not have had a recent irrigation history.

<sup>7</sup> The acreage of presently developed Indian land is about twice the number of acres of Indian land presently being farmed.

<sup>8</sup> In the notice of proposed allocation, it was stated that the non-Indian agricultural interests would be able to continue irrigation of about 50 percent of their lands. In their comments, the non-Indian interests contended that the figure was too high and that they could continue irrigation of only about 30 percent of their lands. A further review of the data leads us to conclude that about one-third would be more accurate.

water. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made." Later in the opinion, the Court states that in apportioning limited water supplies, the Secretary is not required to prorrate the supply. To so require would "strip him of the very power of choice which we think Congress, for reasons satisfactory to it, vested in him and which we should not impair or take away from him." Decisions that the Secretary may make as to the allocation of a limited supply of water, the Court notes, would have significant public welfare consequences, and the Secretary should have the discretion to take those consequences into account in making the allocation.

A moderate advantage for Indian over non-Indian agricultural interests is a reasonable exercise of the Secretary's discretion because of underdevelopment in the Indian communities and because the Secretary traditionally has a special concern for their welfare. The theme of special concern for Indian interests is a recurrent one in the entire fabric of law and court decisions relating to Indians and is part of the Basin Act itself—in the provisions, for example in section 304 of the Basin Act (canceling the restriction against Indian irrigation of new lands) and Section 402 (relieving Indians of obligation to repay construction costs for project irrigation water).

Notwithstanding the Secretary's special concern for Indian welfare, project water could not reasonably be allocated predominantly for Indian irrigation use. As is clear from the legislative history, Congress did not regard the project as an Indian irrigation project, in the sense that the Navajo Indian Irrigation Project in New Mexico, 43 U.S.C. 1615h, is exclusively for the benefit of the Navajo tribe.

Although an advantage has been given to Indian irrigation use of project water, the tribes will be expected to contract for M&I water on terms and conditions comparable to those that apply to non-Indian M&I users. The Indian exemption from reimbursing the Government for the cost of providing project water in section 402 of the Basin Act, applies only to the irrigation of Indian lands. The one variation on this requirement will be the traditional practice of the tribes dealing directly with the Secretary rather than with the State or with a subdivision of the State such as the Central Arizona Water Conservation District.

In the notice of proposed allocation that was published in the *FEDERAL REGISTER* on April 18, 1975, the tribes were invited to express their interest to the Secretary if they wished to contract for project M&I water like any other entity in central Arizona. At the time of that announcement, the conservation district deadline had already expired for prospective M&I subcontractors to commit themselves, but in their comments responding to the notice of proposed allocation, the five central Arizona tribes have expressed an interest for M&I water in the amount of 188,000 acre-feet an-

nually through the year 2005 and the difference thereafter between 445,000 acre-feet and the amount of irrigation water received in every year. Since it has been determined to treat Indian requests for M&I water on the same footing as all other requests, the Indian requests will be reconciled as to amounts terms, conditions, and projected uses with the requests for M&I water that have been made by non-Indians, and a reasonable allocation will be made to them for M&I uses, for which repayment contracts with the Secretary will be expected.

4. *Impacts on non-Indian interests.* Non-Indian agricultural interests have expressed apprehension in their comments that the allocations of project water for Indian irrigation and M&I use will produce a disproportionate financial burden on non-Indian agriculturalists. There is, however, no basis for such apprehension since, pursuant to the contract with the conservation district, the cost allocated for repayment by non-Indian water users would be reduced in proportion to the amount of water that is allocated to Indian water users. Also, as provided in Section 304 of the Basin Act, the repayment obligation of non-Indian agriculturalists will be commensurate with their ability to pay, pursuant to the Reclamation Project Act of 1939, 43 U.S.C. 485. Moreover, amounts received from Indian M&I uses will be credited to the Lower Colorado River Basin Development Fund to assist in repaying project costs.

The non-Indian agricultural interests have also expressed a concern that because of the M&I priority, the supply of project water after the first 20 years for non-Indian irrigation uses will be contingent, and it will be difficult for any of them to finance the construction of the distribution facilities necessary to take advantage of the project water supply. Unfortunately, this problem is inherent in the fact that the Central Arizona Project was not planned to nor can it provide a total solution to all of the water-user problems in the region.

The Central Arizona Project is a complex and costly system for diverting and pumping water from the Colorado River and transporting it by aqueduct more than 300 miles to central Arizona. Priority has been given to M&I uses both because they are traditionally regarded as the more urgent uses and because they are able to economically justify the high cost associated with providing such service. Although the cost for project M&I water is comparable to or even less than the cost for an M&I water supply in some of the other water-short areas, it is too high to economically justify the use of such water for agriculture in central Arizona.

Non-Indian agricultural interests will nonetheless benefit substantially from the Central Arizona Project. Even though the supply of project water after the first 20 years for irrigation use will be contingent, there will be years in which a generous supply of project water will be available for that purpose. When used by irrigators who are able to arrange for

distribution facilities, such use will significantly reduce the drain on the ground water and thereby facilitate pumping of ground water by agricultural interests who cannot arrange for the necessary distribution facilities. The project water supplied for M&I uses similarly will reduce the drain on the ground-water supply, and agricultural interests will for this reason indirectly benefit from the project even if all project water were made exclusively available for M&I use. Additionally, agricultural interests may be better able to arrange for distribution facilities than may now seem apparent if they cooperate with each other in constructing joint distribution systems or in working out water exchanges.

The non-Indian M&I interests have also complained that the allocation to the Indian tribes for irrigation use of a guaranteed amount of 257,000 acre-feet annually for the first 20 years and 10 percent of all project water annually thereafter constitutes a priority for Indian irrigation use that is inconsistent with the priority for M&I use established under the 1972 decisions, 37 FR 28082. Among other things, it was there stated:

All contracts and other arrangements for Central Arizona Project water shall contain provisions that in the event of shortages, deliveries shall be reduced pro rata until exhausted, first for all miscellaneous uses and next for all Central Arizona Project agricultural uses, before water furnished for municipal and industrial uses is reduced.

However, that condition was established by the Secretary of the Interior on December 15, 1972, concurrently with his execution of a contract with the Central Arizona Water Conservation District for non-Indian irrigation and M&I uses. Although the latter contract reiterates the same schedule of priorities in Article 8.11, it also expressly states that those priorities do not apply to Indian uses and that the relative priority between Indian and non-Indian uses is to be determined by the Secretary.<sup>5</sup> There should be no misunderstanding that the final allocation as set forth below establishes certain rights in the tribes to use project water for irrigation use irrespective of the priorities established for M&I uses in the 1972 decisions.

Agricultural interests have also complained that under the priority for M&I uses set forth in the 1972 decisions, water could be wasted on nonessential purposes such as irrigating gardens and golf courses and filling swimming pools, while crops were being lost for lack of irrigation water. To obviate this risk the 1972 decisions contained the following condition:

In times of water shortages the Secretary will exercise his rulemaking authority to

<sup>5</sup> The contract with the conservation district has not been validated under State law as is required by its terms, but we have no doubt that the conservation district will do this soon now that the final allocation has been made.

require assurances satisfactory to him that appropriate water conservation measures have been adopted by project water using entities.

The intention to impose appropriate water conservation measures to avoid wasteful M&I uses is reaffirmed.

5. *Revisions to the proposed allocation.* Congress intended the Central Arizona Project to benefit everyone in the region, both Indian and non-Indian, and any allocation of project water to Indian irrigation use that would make the project of little or no benefit to non-Indian interests could not be reconciled with that intent. Both Indian and non-Indian interests are in dire need of water. An allocation of project water for Indian irrigation use so disproportionately large as to make the benefit to the non-Indian community meaningless would be outside the congressional intent, no less than would be an allocation to the non-Indian agricultural interests or to M&I users that would have made the benefit to the Indians meaningless. The Department's task, therefore, is to evolve a formula for allocating project water for Indian irrigation use that will at the same time be generous to the Indians but not so disproportionately as to vitiate the benefit of the project to the non-Indians.

A number of alternatives to the proposed allocation were proposed and considered as to their potential to equitably distribute project benefits while remaining consistent with the congressional intent in authorizing the project. Of all the alternatives that were proposed and considered, only the proposed allocation seems to offer a fair and equitable distribution of project benefits among Indian and non-Indian interests while remaining consistent with the intent of Congress.

However, in the final allocation appearing below, in addition to a number of editorial revisions, one substantive revision has been made in the proposed allocation that was published on April 18, 1975.

It was stated in the proposed allocation that the Fort McDowell tribe had an ample supply of surface water to satisfy all of its onfarm requirements. Therefore, no project water was allocated to that tribe, although it had requested an allocation of 5,000 acre-feet annually.

Based on the guidelines adopted for allocating project water for Indian irrigation use, the other four tribes would have been entitled to 252,700 acre-feet per year. Since the distribution of project water for Indian irrigation use in the later years of the project would be made on a percentage basis, the 252,700 acre-feet was rounded out to 257,000 acre-feet annually so as to equal 20 percent of the estimated irrigation water available in years of normal supply.<sup>6</sup> This permitted the allocation to the other four tribes to

<sup>6</sup> This estimate was based on the assumption that no more than the dependable annual supply would be marketed for M&I use.

be increased by 4,300 acre-feet annually. The other four central Arizona tribes have supported the request by the Fort McDowell tribe and have questioned why the approximately 4,300 acre-feet annually that was added to the combined allocation of 252,700 acre-feet annually for the other four tribes was not instead made available to the Fort McDowell tribe.

Since the other four tribes support the request of the Fort McDowell tribe, and with the expectancy that that water would be used by the Fort McDowell tribe on the new in-lieu lands which it may receive pursuant to section 302 of the Basin Act, said 4,300 acre-feet will be allocated to the Fort McDowell tribe. The adjustments required in the allocation to the five tribes are set forth in the final allocation included herewith.

B. *Evaluation of Environmental Impacts.* The NEPA (National Environmental Policy Act of 1969) process has been considered in connection with the Central Arizona Project from the beginning. The programmatic CAP environmental impact statement (EIS) was done in 1972 and the subsequent site-specific EIS's which have been completed and are underway all show that the Department has complied, and continues to comply, with the NEPA procedures. The Bureau of Reclamation recently completed an Environmental Assessment Report (EAR) on the proposed allocation of April 18, 1975. The EAR concludes that the proposed allocation does not significantly affect the quality of the human environment, and it is the Solicitor's opinion that the EAR is legally sufficient.

C. *Meetings with Indian and Non-Indian Interests.*

1. *Congressional Hearings.* On October 23 and 24, 1975, the Senate Committee on Interior and Insular Affairs conducted oversight hearings on the water requirements and related water rights issues relating to the five central Arizona Indian tribes. The public record, established as a result of those hearings, provided a valuable overview of the water supply and needs of all Arizona interests, particularly of the Indian interests.

2. *Secretarial Meetings.* To assure that the Secretary was aware of all relevant viewpoints and therefore able to make an informed decision, the Acting Secretary, in September 1975, made a commitment that the Secretary would hear additional comments from both M&I users and Indian and non-Indian agriculturalists prior to making the final decision on the allocation of water for Indian agricultural use.

The Secretary met on April 13, 1976, with representatives of the five central Arizona tribes and on April 14, 1976, with representatives of State and local governmental bodies and private water users. During those meetings, the Secretary heard the arguments of the various interests and invited the submission of any additional information relevant to the decision at hand. In addition to the statements presented at the meetings, a letter was received from the

Arizona Water Commission outlining that agency's preliminary views on possible priorities and allocations among non-Indian interests.

Dated: October 12, 1976.

**KENT FRIZZELL,**  
*Acting Secretary of the Interior.*

**CENTRAL ARIZONA PROJECT, ARIZONA**  
**ALLOCATION OF PROJECT WATER FOR**  
**INDIAN IRRIGATION USE**

Pursuant to the authority vested in the Secretary of the Interior by the Colorado River Basin Project Act of September 30, 1968 (82 Stat. 885, 43 U.S.C. 1501), (herein referred to as the "Basin Act") and the Act of June 17, 1902, as amended (32 Stat. 388, 43 U.S.C. 391), certain Secretarial decisions made on December 15, 1972, concerning the priorities for water use and the allocation of irrigation water between Indian reservation lands and non-Indian lands within the Central Arizona Project, were published on December 20, 1972, 37 FR 28082. The publication also announced Secretarial execution on December 15, 1972, of a contract with the Central Arizona Water Conservation District for delivery of project water and repayment of project costs.

The Secretarial decisions of December 15, 1972, and the concurrently executed contract with the District contemplated a future Secretarial allocation of irrigation water from the Central Arizona Project for Indian use within established reservation boundaries. Pursuant to the authorities cited above, such an allocation is set forth below.

Before describing the procedure used to determine the allocations set forth below to the five central Arizona Indian tribes for irrigation use within the boundaries of their respective reservations, a critical feature of the Central Arizona Project should be understood. The project was not planned to nor did Congress intend in authorizing it that it would—provide a total solution to the water requirements of central Arizona.

This is arid country with a limited supply of surface and ground water. Both agricultural and municipal and industrial uses have to depend on ground-water pumping, but the ground-water level has been dropping at an alarming rate so that the expense of pumping may soon make irrigated farming in this region uneconomical. Moreover, the ground-water supply is not expected to be adequate to support the demand for municipal and industrial water accompanying estimated future population growth and industrial development.

The Central Arizona Project is designed to alleviate the agricultural drain on the ground-water supply in the early years of the project and to provide a dependable supply of municipal and industrial water on a permanent basis. The early years of the project are about the first 20 years during which time waters not being used by the other Colorado River Basin States will be diverted through the project to central Arizona and used in lieu of or to replenish the ground-water supply. It is during this period of time that the project will make its greatest contribution to irrigation. During the first 20 years, two developments will converge to reduce significantly the water available from the project for irrigation. One will be the increasing utilization of the Colorado River by the other Basin States, and the other will be the increasing demand in central Arizona for municipal and industrial water.

It is clear, based on the legislative history, the hydrologic studies, and the financial realities, that the Central Arizona Project

was not intended by the Congress to be used primarily for irrigation after the first 20 years, nor would it be reasonable to use such costly water for that purpose. That was the reason municipal and industrial uses were assigned a first priority in the decisions of December 15, 1972, 37 FR 28082.

After the first 20 years all irrigators in central Arizona, Indian and non-Indian alike, will have to look to sources other than the watersupply which is now being allocated between Indian and non-Indian irrigation to supplement their ground-water supply. The authorizing legislation contemplates that such future water needs of Arizona and other arid States in the West will be met by augmentation of the natural flows of the Colorado River. It is hoped that by the time the need becomes critical, the technical means for accomplishing augmentation will have been developed. However, since there are no specifically authorized augmentation programs at the present time, the possibility of augmentation was not taken into account in locating project water for Indian irrigation use.

Therefore, with the understanding that the water supply from the Central Arizona Project, which is hereby being allocated between Indian and non-Indian agricultural users, will not be a total solution to their respective needs, it has been determined to make the allocation in two successive time frames. One will cover the project water that will be available during the first 20 years, and the other will cover that to be available thereafter.

During the deliberative process, the Secretary and his representatives met with the Indian tribes and their representatives and with officials of the State of Arizona to explore Indian expectations and needs and to sort out the conflicting claims and facts. During those meetings, a consensus developed as to an acceptable approach for determining the amount of water to be allocated to Indian irrigation use during the early years of the project. In the final decision-making process, a number of alternatives were proposed and

considered but none seemed to offer as fair and equitable a distribution of project benefits to Indian and non-Indian interests, while at the same time remaining consistent with the congressional intent in authorizing the Central Arizona Project.

As a result thereof, it has been determined that sufficient project water should be made available to the Indian tribes so that 100 percent of lands presently developed for irrigation on the Indian reservations can be irrigated. The amount of project water that would be made available would take into account the estimated available surface water and the estimated current ground-water yield that is available for irrigation without overdrafting. The Bureau of Reclamation was requested to make a technical study of the water requirements under those assumptions in cooperation with the Indian tribes and the State officials and to provide the Secretary with a report. The Bureau's findings and the supporting technical material have been reviewed and have been determined to be reliable and accurate.

In outline, the Bureau of Reclamation used the following procedure: (1) The total acreage of presently developed lands on each reservation was determined, (2) The total water requirement for each reservation was computed on the basis of 4.59 acre-feet per acre, (3) The number of acre-feet of nonproject surface and ground water available to each reservation was estimated, (4) The number of acre-feet of project water required for each reservation was then obtained by subtracting the available surface and ground water from the total water requirement, (5) The number of acre-feet to be delivered to each tribe at the turnout points on the project canals (canalside) was the amount as determined in No. 4 multiplied by 1.176 (which is the same as dividing by 0.85) to allow for a 15-percent loss in the distribution systems from the amount delivered canalside.

A summary of the Bureau of Reclamation's findings are presented in the following table (units in 1,000's of acres or acre-feet):

Reservation	Presently developed acreage	Multiply by 4.59 for total onfarm acre-ft required	Subtract available water		Multiply by 1.176 for acre-ft of project water canalside
			Surface	Ground	
A.K. Chin.....	10.8	49.6	0	0	58.3
Gila River.....	02.1	28.5	77.3	60.6	173.1
Papago.....	1.7	7.8	0	1.0	8.0
Salt River.....	13.0	59.7	33.6	14.8	13.3
Fort McDowell.....	1.3	6.0	6.0	0	0
Total.....	88.9	408.1	116.9	76.4	252.7

There were one or more respects in which the tribes' figures and the State's figures were in disagreement with those of the Bureau of Reclamation. In general, the tribes' figures tended to increase the amount of project water which should be allocated to them, as compared with the amount supported by the Bureau of Reclamation's figures, and the State's figures tended to diminish such amount. To give an illustration of the range, the respective totals of the amounts of project water which should be allocated to the tribes were as follows (1,000 acre-feet):

State .....	194.3
Bureau of reclamation.....	252.7
Tribes .....	395.0

A principal area of disparity among the three groups was in the estimate of the ground-water supply available for irrigation use. The State's ground-water estimate, for example, would have credited the Gila River tribe with 114.8 thousand acre-feet of ground water to be deducted from the tribe's total water requirement; whereas the Bureau of

Reclamation's estimate was 60.6 thousand acre-feet and the tribe's 28.3 thousand acre-feet. The State used a least-cost analysis (cost of ground-water pumping versus cost of project water) in evaluating ground-water availability, but that approach would not be appropriate for Indian irrigation water since project water will be made available to the tribes on a nonreimbursable basis.

The tribe's estimate was also rejected because it would have eliminated from the ground water available for irrigation use an amount which the tribe plans to use in the future for municipal and industrial purposes. Under the Bureau of Reclamation's estimate, which has been adopted, deductions from the ground water available for irrigation use would be permitted for present municipal and industrial uses, but not for anticipated municipal and industrial uses since the Tribes will be expected to contract for M&I water, as other M&I users do.

The Papago and the Salt River tribes each similarly claimed less ground water available for irrigation uses than that estimated by

the Bureau of Reclamation, but there is no convincing support for their claims.

There were also differences in the respective estimates in matters other than ground water. The Gila River tribe, for example, requested water for the irrigation of reservation lands that had figured in litigation involving a claim by the tribe for a taking by the United States of some of its water rights on the Gila River (29 Ind. Cl. Comm. 144). The tribe is now pursuing a remedy for money damages against the United States in connection with those Gila River water rights. For the reasons set forth in the introduction to this allocation, those lands were not taken into account under the foregoing approach.

The Salt River tribe, on the other hand, claimed a water duty of 6.25 acre-feet per acre, instead of the normal water duty of 4.59 acre-feet. This claim was predicated on a more intensive use of water due to double cropping and other practices. In making an allocation of project water to the Salt River tribe for irrigation use, it is not intended to prescribe how the tribe should conduct its agricultural enterprises nor to prevent the tribe from continuing those practices requiring the larger water duty of 6.25 acre-feet per acre. However, in determining what supplemental supply of water should be made available to the tribe in addition to the surface and ground water now available to it, it was determined to use the normal water duty of 4.59 acre-feet applied to each of the other four tribes. In this way, nothing is being taken away from the Salt River tribe that it would otherwise have without the project. However, as to the benefits that will be made available from the project, the same guidelines will be used for the Salt River tribe as apply to each of the other tribes.

The Fort McDowell tribe has an adequate supply of surface water to satisfy all of its present onfarm requirements. The tribe will be receiving new in-lieu lands pursuant to Section 302 of the Basin Act, and each of the four other tribes has supported the request of the Fort McDowell tribe for an allocation of 5,000 acre-feet annually of project water. Since the other four tribes are of the view that it would be better to give to the Fort McDowell tribe the 4,300 acre-feet annually that was added to their entitlement under the procedures used in arriving at the proposed allocation, said 4,300 acre-feet annually are hereby allocated to the Fort McDowell tribe.

Accordingly, the allocation will be made on the basis of the Bureau of Reclamation's findings. The total of 252,700 acre-feet annually for Indian irrigation use which is supported by the foregoing findings, plus the 4,300 acre-feet for the Fort McDowell Indian Reservation, amounts to about 257,000 acre-feet annually. For the first 20 years, the tribes will receive a fixed amount of 257,000 acre-feet annually, subject, of course, to the capability of the project to supply that amount of water.

Such an allocation for Indian irrigation will give the tribes an advantage which they would not otherwise have were the allocation made solely on the basis of population (2 percent) or presently developed acreage (8 percent) on the reservations. Moreover, whereas such deliveries to the tribes would amount to sufficient project water when used with estimated available surface and ground-water supplies to irrigate 100 percent of their presently developed lands, non-Indians would be receiving only enough water, when used with estimated available surface and ground-water supplies, to irrigate only about one-third of their lands with a recent irrigation history. This preference is provided based on my concern for the well being of the five central Arizona tribes.

On the foregoing basis, each tribe will be entitled to the following canal-side delivery of

irrigation water in acre-feet annually for the first 20 years:

AK Chin .....	58,300
Gila River .....	173,100
Papago .....	8,000
Salt River .....	13,300
Fort McDowell .....	4,300
Total .....	257,000

As a further advantage to the tribes, it has been determined that the delivery of the foregoing amounts to the tribes will be on a guaranteed annual basis, whereas the irrigation water deliveries to non-Indians will fluctuate from year to year, depending on hydrologic conditions. However, because of the combination of hydrologic and other factors described earlier, it will not be possible to continue these deliveries after the year 2005. As the project is expected to be operational in 1985, this will allow for a full 20 years; but if the project is unduly delayed, the guaranteed amount may be available for less than 20 years through the year 2005.

After the year 2005, there will still be water available in some years for the irrigation of Indian and non-Indian lands after meeting municipal and industrial needs, but it will not be in such dependable annual quantities as to guarantee the delivery of water in the specific amounts determined above. However, irrigation water shall continue to be delivered to the tribes on the basis of 20 percent of the total irrigation water available each year. Under the priorities set out in the December 15, 1972, decisions, water used for municipal and industrial purposes would have priority over irrigation.<sup>10</sup> Since it is presently estimated that more than the dependable annual supply may be sold by the Central Arizona Water Conservation District for M&I purposes, no water would be available for delivery to the tribes for irrigation in half or more of the years from the 20th to the 50th year. To avoid such a possibility, it has been determined that at least 10 percent of all project water supply will be allocated to the tribes following the year 2005, so that the tribes will have either 20 percent of all irrigation water or 10 percent of all project water each year, whichever is to their advantage. Although this water is to be used by the tribes for irrigation, it will have the same priority as M&I water under the decisions of December 15, 1972. As such, during the years of minimum project water supply, the tribes will receive 10 percent of all project water annually for irrigation, whereas non-Indians will receive no irrigation water. In years of normal supply based on present estimates, the tribes can expect to receive from 150,000 to 200,000 acre-feet. After the year 2005, the water available for Indian agriculture use is to be prorated among them in proportion to their entitlements during the first 20 years, as follows:

	Percent
AK Chin .....	22.7
Gila River .....	67.3
Papago .....	3.1
Salt River .....	5.2
Fort McDowell .....	1.7
Total .....	100.0

Water allocated for agricultural use to each tribe by this decision is required to be used

<sup>10</sup> The priority is, of course, subject to the statutory "first priority" in section 304(e) of the Basin Act, for water users who have yielded water from other sources in exchange for project water. This priority would apply to present water users voluntarily exchanging water from other sources for project water; it would not apply to persons like the Gila River Tribe, some of whose water rights may have previously been taken from them.

on the reservation of the tribe to which it is allocated. This restriction is consistent with Section 304 of the Basin Act. If water allocated to a tribe by this decision is used for the irrigation of Indian lands on the reservation, the capital costs of the project attributable to such water shall be either nonreimbursable or deferred, pursuant to the provisions of section 402 of the Basin Act, and contracts for Indian irrigation water service shall so provide.

The allocation of project irrigation water made to the tribes by this decision is not intended to preclude their right to contract for project M&I water like any other entity in central Arizona. So long as such water has not been contracted to other users, such contracts may be made through the Secretary of the Interior. To enable the Central Arizona Water Conservation District to proceed expeditiously to enter into contracts for project M&I water, each tribe should express to this Department, on a timely basis, its interest in receiving M&I water and the expected uses thereof. The tribes should be prepared to execute a repayment contract for M&I water with the Secretary at the same time as other M&I users contract with the conservation district.

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[Int DES 76-40]

## EAST DECKER AND NORTH EXTENSION MINES, BIG HORN COUNTY, MONTANA

### Availability of Draft Environmental Statement

Pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 and to section 69-6504(b)(3) R.C.M. 1947 of the Montana Environmental Policy Act, the Department of the Interior and the Montana Department of State Lands have jointly prepared a draft environmental impact statement on the proposed surface mining of coal in the East Decker and North Extension areas in Big Horn County, Montana. The draft statement assesses the environmental impacts of the lessee's plan for the strip mining of the Federal, State, and privately owned coal and for the concurrent reclamation and revegetation of lands disturbed by mining and related activities. The proposed action in the East Decker area is on Federal coal lease Montana 073093, on State coal leases Nos. 531, 822, 823, and 918, and on fee coal owned by Gregg H. and Charles V. Pearson and by George B. Holmes. These leases and holdings include all or parts of secs. 1, 11, 12, 13, and 14, T. 9 S., R. 40 E. and secs. 7, 8, 17, and 18, T. 9 S., R. 41 E., Montana Prin. Mer. The proposed action in the North Extension area is on Federal coal leases Montana 057934, Montana 057934A, Montana 061685, and Montana 06770, and on fee coal owned by Rosebud Coal Sales Co. These leases and holdings include all or parts of secs. 33 and 34, T. 8 S., R. 40 E., and secs. 3, 4, 9, and 10, T. 9 S., R. 40 E., Montana Prin. Mer.

The draft environmental statement is available for public review in the U.S. Geological Survey Public Inquiries Office, Room 1012, Federal Building, Denver, Colorado 80202; the U.S. Geological Survey Library, Denver West Office Park,