

DEPARTMENT OF THE INTERIOR**Bureau of Reclamation****43 CFR Part 414**

RIN 1006-AA40

Offstream Storage of Colorado River Water and Interstate Redemption of Storage Credits in the Lower Division States

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: Under this proposed rule Colorado River water may be stored offstream in the Lower Basin to permit future interstate use of Colorado River water in the Lower Division States (Arizona, California, or Nevada). This proposed rule would establish the procedural framework under which authorized entities (for example, a State-authorized water bank) in any Lower Division State could store offstream Colorado River water to develop storage credits associated with that water, and redeem those water storage credits within the Lower Division. This rule would increase the efficiency, flexibility, and certainty in Colorado River management.

DATES: Comments:

Any comments must be received by Reclamation at the address below on or before March 2, 1998.

Request for Public Hearings

Upon request, Reclamation will hold public hearings on the proposed rule in Las Vegas, Nevada, Phoenix, Arizona and Ontario, California. Reclamation will accept requests for public hearings until 4:00 p.m. Pacific time on January 30, 1998.

ADDRESSES:**Comments**

If you wish to comment, you may submit your comments by any one of several methods. You may mail comments to Bureau of Reclamation, Administrative Record, Lower Colorado Regional Office, P.O. Box 61470, Boulder City, NV 89006-1470. You may also comment via the Internet at bjohnson@lc.usbr.gov (see Electronic Access and Filing Addresses under **SUPPLEMENTARY INFORMATION**).

In addition, you may hand-deliver comments to Bureau of Reclamation, Administrative Record, Lower Colorado Regional Office, 400 Railroad Avenue, Boulder City, Nevada.

Comments, including names and street addresses of respondents, will be available for public review at this

address during regular business hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, Pacific time, except holidays. If you wish to request that Reclamation consider withholding your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comment. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

Public Hearings

If Reclamation receives a request to schedule public hearings in Las Vegas, Nevada; Phoenix, Arizona; or Ontario, California, Reclamation will hold such hearings at the following locations: McCarran International Airport, 5757 Wayne Newton Boulevard, Commissioner's Meeting Room, 5th Floor, Terminal 1, Las Vegas, Nevada; Bureau of Indian Affairs conference room, 2 Arizona Center, 400 North 5th Street, 12th Floor, Phoenix, Arizona; Red Lion Hotel, 222 North Vineyard, Ontario, California. Upon request, Reclamation will consider holding public hearings in other locations, at times and on dates that Reclamation will announce prior to the hearings.

Request for public hearings and request to participate in public hearings

Submit requests for public hearings and requests to participate in public hearings orally or in writing to Mr. Dale E. Ensminger, Boulder Canyon Operations Office, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006-1470, telephone (702) 293-8659.

FOR FURTHER INFORMATION CONTACT: Mr. Dale Ensminger, telephone (702) 293-8659.

SUPPLEMENTARY INFORMATION: This section provides the following information:

- I. Public Comment Procedures
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I. Public Comment Procedures*Written Comments*

Written comments on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason for any recommended change. Where possible, comments should reference the specific section or paragraph of the proposed rule that the commenter is addressing. Reclamation will not necessarily consider or include in the Administrative Record for the final rule comments which Reclamation receives after the close of the comment period (see **DATES**) or comments delivered to an address other than those listed above (see **ADDRESSES**).

Electronic Access and Filing Addresses

If you comment via the Internet at bjohnson@lc.usbr.gov (see **ADDRESSES**), please submit comments as an ASCII file avoiding the use of special characters and any form of encryption. Please also include "attn: AC1006-AA40" and your name and return address in your Internet message. If you do not receive a confirmation from the system that we have received your Internet message, contact us directly at (702) 293-8411.

Public Hearings

Individuals who wish to attend but not testify at any hearing should contact the person identified under **FOR FURTHER INFORMATION CONTACT** beforehand to verify that Reclamation will hold the hearing. Reclamation will hold public hearings on the proposed rule as specified above if a member of the public requests a public hearing. Any person who desires to participate at a hearing at a particular location should inform Mr. Dale E. Ensminger under **FOR FURTHER INFORMATION CONTACT** either orally or in writing of the desired hearing location by 4:00 p.m. Pacific time January 30, 1998. If no one has contacted Mr. Dale E. Ensminger to express an interest in participating in a hearing at a given location by that date, Reclamation will not hold that hearing. If only one person expresses an interest, Reclamation may hold a public meeting rather than a hearing, and Reclamation will include the results in the Administrative Record.

If Reclamation holds a hearing, Reclamation will continue the hearing until all persons wishing to testify have

had an opportunity to do so. In order to assist the transcriber and to ensure an accurate record, Reclamation requests that each person who testifies at a hearing give the transcriber a copy of that testimony. In order to assist Reclamation in hearing preparation, Reclamation also requests that each person who plans to testify submit to Reclamation at the address previously specified (see ADDRESSES) an advance copy of that testimony.

II. Background

The Colorado River serves as a source of water for irrigation, domestic, and other uses in the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and in the Republic of Mexico. The initial apportionment of water from the Colorado River was made by an interstate compact, the Colorado River Compact, dated November 24, 1922 (Compact). The Compact became effective in 1929 following ratification by six states and approval by the Congress of the United States. The State of Arizona became the final State to ratify the Compact in 1944. The Compact defined the Colorado River Basin and divided the seven States into two basins, an Upper Basin and a Lower Basin. The Compact apportioned to each basin, in perpetuity, the exclusive beneficial consumptive use of 7.5 million acre-feet (maf) of water. Under the Compact, "consumptive use" means diversions of water from the mainstream of the Colorado River, including water drawn from the mainstream by underground pumping, less return flow to the river.

The Lower Basin includes those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River system below Lee Ferry (Arizona), a point in the mainstream of the Colorado River 1 mile below the mouth of the Paria River. The Compact also grouped the seven States into two divisions, the Upper Division and the Lower Division. The Lower Division consists of the States of Arizona, California, and Nevada. All mainstream Colorado River water apportioned by the Compact to the Lower Basin is divided among the three Lower Division States. All mainstream Colorado River waters apportioned to the Lower Basin, except for a few thousand acre-feet apportioned to the State of Arizona, have been allocated to specific entities and, except for certain Federal establishments, placed under permanent water delivery contracts with the Secretary for irrigation or domestic use. These entities include irrigation

districts, water districts, municipalities, Federal establishments including Indian reservations, public institutions, private water companies, and individuals.

The Supreme Court of the United States, in its Opinion of June 3, 1963, (373 U.S. 546) and Decree entered March 9, 1964 (376 U.S. 340) (Decree), in the case of *Arizona v. California, et al.*, confirmed that the Secretary was vested with sufficient authority and charged with the responsibility to direct, manage, and coordinate the operation of dams and related works on the Colorado River in the Lower Basin. The Supreme Court concluded, among other things, that the Secretary derives significant authority from the contract authority under section 5 of the Boulder Canyon Project Act of 1928 (45 Stat. 1057, 43 U.S.C. 617) (BCPA) that requires water users in the Lower Basin to have a contract with the Secretary. The Supreme Court further concluded that Congress intended the Secretary, principally through the Secretary's section 5 contract power, to carry out the allocation of the waters of the mainstream of the Colorado River among the Lower Basin States and to decide which water users within each State would get water and on what terms. Accordingly, the Secretary acts as water master of the Colorado River in the Lower Basin.

The Decree excludes Federal establishments from the BCPA requirement for a contract with the Secretary, but the water allocated to a Federal establishment is included within the apportionment of the Lower Division State in which the Federal establishment is located. Waters available to a Lower Division State within its apportionment but with a priority date later than June 25, 1929, have been allocated by the Secretary to water users within that State after consultation with the State.

Many Colorado River water rights originated as "perfected rights" that are specified in the Decree as rights acquired in accordance with State law and exercised by the actual diversion of a specific quantity of water for beneficial use on a defined area of land or to definite municipal or industrial works, and in addition will include water rights created by the reservation of mainstream water for the use of Federal establishments under Federal law whether or not the water has been applied to beneficial use. The highest priority Colorado River water rights are present perfected rights (PPR's) that the Decree defines as those perfected rights existing on June 25, 1929 (the effective date of the BCPA). The Decree also recognizes Federal Indian reserved

rights for the quantity of water necessary to irrigate all the practically irrigable acreage on five Indian reservations along the Colorado River. The Decree defines the rights of Indian and other Federal reservations to be Federal establishment PPR's. PPR's are important because in any year in which there is less than 7.5 maf of Colorado River water available for consumptive use in the Lower Basin States, PPR's will be satisfied first in the order of their priority without regard to State lines.

In 1996, Arizona enacted a State-authorized program establishing an Arizona State Water bank that would allow offstream storage of Colorado River water and subsequent interstate delivery of such stored water through redemption of credits pursuant to Interstate Storage Agreements. In the future, other Lower Division States may enact comparable measures.

III. Purpose of this Rule

Arrangements that facilitate more efficient use of the limited Colorado River water resource are beneficial to all water users. This proposed rule addresses offstream storage of Colorado River water and development of storage credits by authorized entities within the Lower Division States. Authorized entities include a State water banking authority, or other entity of a Lower Division State holding entitlements to Colorado River water, expressly authorized pursuant to applicable laws of Lower Division States to: (1) Enter into Interstate Storage Agreements; (2) develop intentionally created unused apportionment; (3) acquire the right to use intentionally created unused apportionment; or (4) develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State.

The rule will establish a framework for the Secretary to follow in approving and administering interstate agreements to allow offstream storage and contractual distribution of Colorado River water, and thereby encourage voluntary interstate water transactions among the Lower Division States. Such voluntary water transactions, including interstate contractual distribution of Colorado River water consistent with the BCPA and the requirements of the Supreme Court of the United States in its Decree entered March 9, 1964 (376 U.S. 340) (Decree) in *Arizona v. California, et al.*, can help to satisfy regional water demands. The proposed rule does not deal with intrastate storage and distribution of water.

The proposed rule will foster prudent water management in the Lower Division States by allowing authorized

entities of Consuming States, pursuant to an interstate agreement, to store Colorado River water offstream, to receive storage credits for the stored water, and to recover this water for future use. The offstream storage will be accomplished through an authorized entity of the Storing State. The water to be stored will be basic apportionment from the Storing State or unused basic apportionment or unused surplus apportionment of the Consuming State. The proposed rule is based on the understanding that this type of offstream storage is a beneficial consumptive use of Colorado River water. The rule is permissive in nature and is intended to encourage and facilitate these voluntary water transactions.

The proposed rule is designed to improve the Secretary's ability to fulfill his responsibilities to manage the Lower Basin of the Colorado River on a more efficient basis. This proposed rule is expected to be a first step toward improving the efficiency associated with management of the Colorado River in the Lower Basin.

While taking action in the form of this proposed rule to assist the States of the Lower Division of the Colorado River to meet their water needs, the Department also acknowledges its responsibilities to the Indian Tribes in the Lower Division. The Department is interested in finding ways that the Tribes may more fully benefit from the water rights they hold in the Lower Basin, and in protecting the availability of water supplies to which these rights attach.

The focus in the proposed rule is on the use of State-authorized entities, including water banks, as a vehicle for authorizing interstate storage and redemption of storage credits associated with Colorado River water. The Department believes that the interstate water storage and deliveries permitted by these rules can be implemented without compromising its responsibilities toward, and in fact may lead to benefits to, the Indian Tribes. The Department's proposed reliance on State-authorized entities is predicated, in part, on its expectation that these entities will be operated in a fashion that provides an opportunity for Indian Tribes to participate in storage and similar activities. In this regard the Department notes that the State of Arizona is examining "mechanisms that will enable Indian communities that hold entitlements to Colorado River water to participate in water banking with the Arizona Water Banking Authority." Arizona Laws 1996, ch. 308, § 27. The Department encourages Arizona and the other Lower Division

States to implement programs within the existing Law of the River that will allow the Tribes to more fully benefit from their water rights.

In addition, the Department will be mindful of the need to protect local tribal water resources when fulfilling its role as set forth in these interstate water banking rules. Tribes as well as other water rights holders may, for example, have concerns regarding the potential impacts of future groundwater withdrawals from a water bank on their water rights. The Department wants to work with Lower Division States and authorized entities banking Colorado River water to ensure that water stored and recovered for interstate delivery does not adversely impact those local tribal water resources. Under the proposed rule the Secretary will, when determining whether to approve a proposed interstate transaction, take into account, among other things, the potential impacts of a proposed transaction on water rights holders, including Indian Tribes. See § 414.3(b).

Finally, this proposal does not address, and is not intended to govern the exercise of, whatever authority the Secretary of the Interior has to consider and implement, in appropriate situations, tribal storage and water transfer activities.

Except as described below, the Secretary, in reviewing an Interstate Storage Agreement, will not focus on the price associated with utilization of storage credits or other financial details agreed to by the authorized entities as willing sellers and willing buyers. The transaction must leave the United States in no worse a financial position than if the transaction had not occurred. When it is operationally feasible to do so, United States facilities may be available for use in storing, delivering, and distributing Colorado River water offstream under the proposed rule to the extent that the United States is fully reimbursed for relevant capital, interest, and operation and maintenance costs. Approval to deliver Colorado River water cannot obligate the Federal Government to incur extra non-reimbursable expenses to store water or deliver it to a new location. Further, existing Reclamation law requires adjustment in repayment terms when use of the water shifts from a non-interest bearing category to an interest-bearing category, such as from agriculture use to municipal and industrial use. Additionally, if pumping power is needed to affect a given transaction, the parties to the transaction must provide or pay for such power, and may have to secure it from non-Federal sources.

The actions and transactions contemplated in the proposed rule are within the current authority of the Secretary, the BCPA, and the Decree. Under BCPA, with the exception of Federal Establishments PPR's, no authorized entity may receive Colorado River water except in accordance with a contract with the Secretary. Where appropriate to implement the Interstate Storage Agreement, the Secretary will contract for water deliveries under Section 5 of the Boulder Canyon Project Act. In accordance with specific approvals, offstream storage and development of storage credits for interstate purposes have already taken place on a limited basis. The proposed rule will provide a standard set of procedures to be used in place of the ad hoc processes that have been used for previous interstate water transactions. These procedures will provide greater flexibility, certainty, and assurance to all parties potentially interested in entering into interstate transactions for storage of Colorado River water and use or redemption of storage credits. This increased certainty is expected to promote more efficient management of the Colorado River and facilitate additional voluntary water transactions of this type among Lower Basin water users.

The Secretary will consider the implications of the proposed Interstate Storage Agreement for the financial interests of the United States and the United States will require the parties who benefit from the transactions to fund the United States' reasonable costs to evaluate, process, and/or approve transactions entered into under this rule. In considering a request for approval of an Interstate Storage Agreement for offstream storage of Colorado River water and use or redemption of storage credits, the Secretary will consider, among other relevant factors: applicable law; applicable contracts; potential effects on trust resources; potential effects on contractors or Federal entitlement holders, including Indian and non-Indian PPR holders and other Indian tribes; potential effects on other third parties; environmental impacts and effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; and other relevant factors, including the implications of the proposed Interstate Storage Agreement for the financial interests of the United States.

IV. Prior Rulemaking Proceedings

In 1991, 1992, and 1994, Reclamation developed draft rules for administering

Colorado River water entitlements and distributed drafts to known interested parties. Among other things, those drafts included provisions that would have allowed instream storage of water saved, interstate transfer of conserved water, reductions in entitlements due to nonuse, and proposed water conservation criteria. Because of the controversy associated with these proposals, Reclamation suspended further work on the rule in late 1994 to allow the Lower Division States time to develop a consensus on storage and interstate transfer issues. While a consensus on all of these issues has not been achieved, it appears that there is strong support and demand for a new, more narrowly focused rule that will facilitate offstream water storage and interstate water delivery programs in the Lower Basin.

V. Section by section analysis of the Proposed Rule

Section 414.1. Purpose

Under this proposed rule Colorado River water may be stored offstream to permit future interstate use of Colorado River water. This proposed rule would establish the procedural framework under which authorized entities of any of the Lower Division States (Arizona, California, or Nevada) could store offstream through another authorized entity (for example, State-authorized water banks) in any Lower Division State, Colorado River water allocated but not taken by water entitlement holders within the State where the storage occurs, or unused basic apportionment, or surplus apportionment of the Consuming State. The authorized entity of the Storing State would develop, on behalf of the authorized entity in the consuming state, storage credits associated with that water. When unused apportionment is intentionally created to satisfy a request for delivery of water from storage credits, the authorized entity must ensure that its State's consumptive use is decreased by a quantity sufficient to offset the quantity of storage credits that are to be made available as unused apportionment by the Secretary and delivered for use in another Lower Division State in accordance with Article II(B)(6) of the Decree. This rule would increase efficiency, flexibility, and certainty in Colorado River management.

The proposed rule establishes procedures for interstate contractual distribution derived from credits for Colorado River water stored offstream. These procedures will apply to all holders of entitlements to use Colorado

River water in the Lower Division States. The proposed rule allows authorized entities of any Lower Division State to enter into agreements with authorized entities of another Lower Division State to store Colorado River water offstream, develop storage credits, and redeem storage credits associated with that water, subject to the approval of the Secretary.

Section 414.2. Definitions

This section of the rule defines terms that are used in the rule. The following terms are defined by or derived from the Decree: basic apportionment, Colorado River water, consumptive use, mainstream, surplus apportionment, and unused apportionment. Most of the other terms were defined for the purposes of this rule to establish a common understanding of terms relating to storage of water.

All Interstate Storage Agreements for offstream storage of Colorado River water and the interstate redemption of storage credits under this proposed rule would be executed by a State water banking authority, or other entities holding entitlements to Colorado River water, expressly authorized pursuant to applicable laws of Lower Division States to: (1) enter into Interstate Storage Agreements; (2) develop intentionally created unused apportionment; (3) acquire the right to use intentionally created unused apportionment; or (4) develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State. States are encouraged to define the term "authorized entity" broadly so as not to exclude appropriate entities potentially interested in entering into arrangements to develop or acquire water storage credits on an interstate basis. Constraints placed on "authorized entities" will have the likely effect of reducing the net benefits associated with the proposed rule.

The proposed rule includes a definition of intentionally created unused apportionment of Colorado River water. As proposed, it does not specify what measures or actions may be used to create such apportionment. In Section 414.3, the Secretary specifies the information that he will consider in approving any proposed Interstate Storage Agreement. Subparagraph (a)(7) of Section 414.3 directs that any request for approval of a proposed Interstate Storage Agreement, "specify which action the authorized entity will take to create intentionally created unused apportionment." The Department seeks comment on the issue of whether the final definition of intentionally created unused apportionment should specify

what types of measures or actions the Secretary would approve as intentionally created unused apportionment. Comments should identify actions that would be adequate to demonstrate the development of intentionally created unused apportionment.

Section 414.3. Interstate Storage Agreements and Redemption of Storage Credits

The proposed rule would authorize offstream storage of Colorado River water in the Lower Division States by State-authorized entities on the basis of approved Interstate Storage Agreements. Under this section of the proposed rule, a Lower Division State authorized entity could establish a water bank and store Colorado River water on behalf of authorized entities in the other two Lower Division States. Such water banks could store water consisting of water allocated but not taken by water entitlement holders within the Storing State, or unused basic apportionment, or surplus apportionment of the Consuming State.

The proposed rule assumes that there are two ways to "store" water in offstream storage: direct storage or indirect storage. Direct storage can be accomplished by putting water into an underground aquifer at an underground water storage facility or in a surface reservoir located off the mainstream of the Colorado River. Indirect storage can be accomplished through groundwater savings that result from replacing established groundwater use with Colorado River water.

A central feature of the procedures in the proposed rule is the Interstate Storage Agreement. Under this section of the proposed rule, the authorized entities of two or more Lower Division States may enter into an agreement to store Colorado River water offstream. To become effective, these agreements require approval by the Secretary. To obtain the approval of the Secretary, each Interstate Storage Agreement must contain a description of the following: quantity of water to be stored; location of storage; type and source of water; accounting, reporting and use of storage credits associated with water to be stored; end use of water to be stored; and the extent to which Federal facilities or resources will be used to deliver or store Colorado River water stored offstream.

Under the proposed rule, the Secretary has 120 days to approve or disapprove such agreements unless the Secretary determines that additional time is necessary to review the agreement because the proposal

involves significant environmental compliance activities or other issues. In reviewing any proposed Interstate Storage Agreement, the Secretary will consider the following: applicable law; applicable contracts; potential effects on trust resources; potential effects on contractors or Federal entitlement holders, including Indian and non-Indian present perfected rights (PPR) holders and other Indian tribes; potential effects on third parties; environmental impacts and effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; and other relevant factors, including the implications of the proposed Interstate Storage Agreement for the financial interests of the United States.

Under this section of the proposed rule, storage credits are developed for the benefit of the authorized entity for which Colorado River water is placed in offstream storage. The storage credits entitle the entity to recover water at a later date. The authorized entities involved in the transaction will account for the water diverted and stored offstream under an Interstate Storage Agreement, and prior to any redemption of storage credits certify to the Secretary that water associated with storage credits has been stored. The Secretary must be satisfied that necessary actions have been taken to develop intentionally created unused apportionment. Once this determination has been made, the Secretary will make available this intentionally created unused apportionment for use by the authorized entity of the Consuming State consistent with the BCPA, Article II(B)(6) of the Decree, and all other applicable laws. Also, under this section, Interstate Storage Agreements may be assigned in whole or in part to authorized entities upon the agreement of the parties to the Interstate Storage Agreement and approval of the Secretary.

Section 414.4. Reporting Requirements and Accounting for Storage Credits

Under this section of the proposed rule, each authorized entity that has stored Colorado River water offstream for interstate purposes must submit a report to the Secretary by January 31 of each year. The report will specify the quantity of Colorado River water that was stored during the previous year and is recoverable in future years and the number of storage credits associated with that water. Under this proposed rule, the Department has assumed that storage credits would be equal to the quantity of water stored less deductions

and losses from storage that includes losses attributable to evaporation or percolation or water required by State law to remain in an aquifer. Such reports will also specify the balance of Colorado River storage credits redeemed during the previous year and the balance of such credits that remain recoverable as of December 31 of the previous year. This reporting requirement will not impose a burden on the authorized entity of a Storing State because the authorized entity will need to maintain these records for its own purposes.

Under the proposed rule, the United States will continue to fulfill the requirements of the Decree that requires the Secretary to prepare and maintain, at least annually, complete, detailed, and accurate records of diversions of water from the mainstream, return flow of such water to the mainstream, and consumptive use of such water. Under the proposed rule, the water diverted and stored offstream will be accounted for as consumptively used in that same year in the Storing State, in accordance with Article V of the Decree. The accounting records would also reflect an equivalent quantity of storage credits in the Storing State. When unused apportionment is intentionally created to satisfy a request for delivery of water from storage credits, the authorized entity must take action to ensure that its State's consumptive use is decreased by a quantity sufficient to offset the quantity of water made available as unused apportionment by the Secretary and delivered for use in another Lower Division State. After the authorized entity confirms in writing to the Secretary the quantity of water to be delivered for use in the Consuming State and includes documentation of actions taken to intentionally create a like quantity of unused apportionment, the Secretary will declare unused apportionment available within the Storing State and allocate that unused apportionment to the Consuming State to allow recovery of the storage credits. The intentionally created unused apportionment so made available to the Consuming State by the Secretary will be accounted for as consumptively used when Colorado River water in the amount of the intentionally created unused apportionment is released for use in the Consuming State, in accordance with Article V of the Decree.

Under the proposed rule and in accordance with Article II(B)(6) of the Decree, the Secretary may release in any one year any Colorado River water that is apportioned for consumptive use in a Lower Division State but which will be unused in that State for consumptive

use in another Lower Division State in that same year. The water so released for consumptive use in the other Lower Division State is unused apportionment.

For example, under the proposed rule, when storage credits are redeemed, Colorado River water that would otherwise be supplied to a water user in a Storing State could be supplied from offstream storage in that State. The Storing State will reduce its Colorado River water use in accordance with the approved Interstate Storage Agreement. Then the Secretary, in accordance with the terms of Article II (B)(6) of the Decree, will make the Colorado River water available to the Consuming State. No other Lower Division State or other user in the Storing State will be able to claim the water since the Secretary is authorized under Article II (B)(6) of the Decree to make such water available, and the Secretary will have agreed to implement the terms of the Interstate Storage Agreement. No other Lower Division State will be eligible to receive water made available to the Consuming State under that Interstate Storage Agreement.

Section 414.5. Water Quality

This section of the rule is a disclaimer which states that except for specific water quality responsibilities that are established for the Secretary by Federal law, the Secretary does not guarantee the quality of water released or delivered through Federal facilities. Water quality will be monitored by the Environmental Protection Agency and the Army Corps of Engineers and will be subject to State or Tribal jurisdiction, as appropriate, in accordance with the Clean Water Act.

Section 414.6 Environmental Compliance

Under the proposed rule, the Secretary is responsible for ensuring the actions taken under the rule comply with the National Environmental Policy Act of 1969, as amended (NEPA), the Endangered Species Act of 1973, as amended (ESA), and will integrate the requirements of other statutes, laws, and executive orders as required for Federal actions taken under this proposed rule.

Federal actions requiring environmental compliance may include, but are not limited to, approval of transactions that entail changes in the place or quantity of water diversions necessary to store a Lower Division State's water. In evaluating a proposed Federal action taken under this part for compliance with the National Environmental Policy Act, the Secretary will consider effects on natural and

other resources as identified in the Bureau of Reclamation's National Environmental Policy Act (NEPA) Handbook and other relevant environmental laws and regulations. The parties to a proposed transaction would be responsible for completing environmental compliance documentation in accordance with the standards set forth in the Bureau of Reclamation's NEPA Handbook and subject to Reclamation approval prior to the Secretary's approval of the proposed action.

The Department, through Reclamation, will collect in advance the estimated costs incurred by the United States in evaluating, processing, or approving the action from the persons or entities who would benefit from a proposed action under this rule.

VI. Procedural Matters

Environmental Compliance

Reclamation has prepared a draft environmental assessment (DEA). Reclamation has placed the DEA on file in the Reclamation Administrative Record at the address specified previously. The public is invited to review the DEA by contacting Reclamation at the addresses listed above (see **ADDRESSES**) and suggests that anyone wishing to submit comments in response to the DEA do so in accordance with the *Written Comments* section above.

Compliance with NEPA, the ESA, and other relevant statutes, laws, and executive orders will be completed for future Federal actions taken under this rule to ensure that any action authorized or carried out by the Secretary does not jeopardize the continued existence of any threatened or endangered species, does not adversely modify or destroy a critical habitat, and is analyzed by an appropriate environmental document. Consultation and coordination between Reclamation, the Fish and Wildlife Service, other agencies, and interested parties will be completed on a case-by-case basis.

Paperwork Reduction Act

The Department believes that this rule does not contain information collection requirements that the Office of Management and Budget (OMB) must approve under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* This proposed rule is geographically limited to the States of Arizona, California and Nevada. The proposed rule covers authorized entities that would store Colorado River water off the mainstream of the Colorado River. The information to be reported will be compiled by the

authorized entities in the course of their normal business and the annual reports to the Secretary will not impose any significant time or cost burden. It is estimated that each respondent would need one hour at an estimated cost of \$20 to complete the annual reporting requirement. Moreover, the Department assumes that there will never be an industry-wide collection of information and assumes that there will always be fewer than 10 entities required to report information. Notwithstanding these circumstances, the Department intends to seek information collection approval from the OMB, pursuant to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

Regulatory Flexibility Act

Congress enacted The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.*, to ensure that Government regulations do not unnecessarily or disproportionately burden small entities. The RFA requires a regulatory flexibility analysis if a rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities. An initial RFA analysis has been completed. This rule will not impose any direct cost on small entities. A benefit-cost analysis was completed and concludes that the proposed rule does not impose significant or unique impact upon small governments (including Indian communities), small entities such as water purveyors, water districts, or associations, or individual entitlement holders.

Unfunded Mandates Reform Act of 1995

The adoption of 43 CFR part 414 will not result in any unfunded mandate to State, local, or tribal governments in the aggregate, or to the private sector, of \$100 million or more in any one year.

Executive Order 12612, Federalism Assessment

The proposed rule does not alter the relationship between the Federal Government and the States under the Decree nor does it alter the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, the Secretary has determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Executive Order 12630, Takings Implications Analysis

The proposed rule does not represent a government action capable of interfering with constitutionally

protected property rights. This rule does not impose additional fiscal burdens on the public. This rule would not result in physical invasion or occupancy of private property or substantially affect its value or use. The rule would not result in any Federal action that would place a restriction on a use of private property. The rule does not affect a Colorado River water entitlement holder's right to use its full water entitlement. Under the proposed rule, an authorized entity may store unused Colorado River water available from an entitlement holder's water rights only if the water right holder does not use or store that water on its own behalf. Under the proposed rule, the only water that can be used to satisfy storage credits is unused apportionment created by the forbearance of a use which otherwise would have occurred. Therefore, the Department of the Interior has determined that the rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 12866, Regulatory Planning and Review

This proposed rule is a significant regulatory action under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Executive Order 12866 requires an assessment of potential costs and benefits under section 6(a)(3) of that Executive Order. Reclamation's benefit-cost analysis determines that the proposed rule does not impose significant or unique impacts upon small governments (including Indian communities), small entities such as water purveyors or associations, or even individual water entitlement holders.

The proposed rule authorizes the distribution of Colorado River water storage credits created by off stream storage on an interstate basis.

California and Nevada are looking for alternative water supplies to satisfy the increasing demands of economic development and population growth. The proposed rule may provide an opportunity for Colorado River water users in Nevada to experience a marginal costs savings in securing alternative supplies. Off stream storage of Colorado River water and interstate distribution of Colorado River water storage credits are voluntary actions. Should the costs of the procedures proposed in the rule to facilitate these transactions be greater than the costs of other alternative water supplies, California and Nevada would probably select the lower cost alternatives.

The benefit-cost analysis estimated net economic benefits of the proposed rule on a State and regional level using different water supply models and discount rates. The different water supply models represent potential water supply conditions on the Colorado River that affect interstate demand for water from an Arizona water bank and the magnitude of economic benefits obtained from that water. The discount rates used in the analysis were 5.75% (the average rate on municipal bonds in 1996, which is a rate faced by major water purveyors in California and Nevada) and 8.27% (the prime rate in 1996, which more accurately represents the cost of money).

Under a conservative water supply scenario characterized by 19 years of normal conditions on the Colorado River and one surplus year, discounted net economic benefits at the regional level ranged from \$12.8 to \$61.2 million at 5.75% and \$9.5 to \$47.7 million at 8.27%. Under a water supply scenario characterized by 10 years of surplus conditions on the Colorado River, the net economic benefits range from \$550,255 to \$4.8 million at 5.75% and \$350,789 to \$3.1 million at 8.27%. Under the scenario characterized by 10 surplus years, demand for banked water is relatively low because the Lower Division States can meet most of their water needs with diversions from the mainstream.

Reclamation has placed the full analysis on file in the Reclamation Administrative Record at the address specified previously (see **ADDRESSES**).

Author

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List of Subjects in 43 CFR Part 414

Administrative practice and procedure, Environmental protection, Public lands, Reporting and recordkeeping requirements, Water bank program, Water resources, Water storage, Water supply, Water quality.

Dated: December 22, 1997.

Patricia J. Beneke,

Assistant Secretary—Water and Science.

For the reasons stated in the preamble, the Bureau of Reclamation proposes to add a new part 414 to title 43 of the Code of Federal Regulations as follows:

PART 414—OFFSTREAM STORAGE OF COLORADO RIVER WATER AND INTERSTATE REDEMPTION STORAGE CREDITS IN THE LOWER DIVISION STATES

Sec.

414.1 Purpose.

414.2 Definitions.

414.3 Interstate storage agreements and redemption of storage credits.

414.4 Reporting requirements and accounting for storage credits.

414.5 Water quality.

414.6 Environmental compliance.

Authority: 43 U.S.C. 617; 43 U.S.C. 391; 43 U.S.C. 485; 43 U.S.C. 1501; 5 U.S.C. 553; 373 U.S. 546; 376 U.S. 340.

§ 414.1 Purpose.

This part sets forth the procedural framework for approval by the Secretary of the Interior of interstate agreements for the offstream storage of Colorado River water in the Lower Division States by State-authorized entities consistent with State law. In accordance with the Secretary's authority under Article II (B) (6) of the Decree entered March 9, 1964 (376 U.S. 340), in the case of *Arizona v. California, et al.* as supplemented and amended, this part also includes the procedural framework to develop and redeem storage credits associated with Colorado River water stored offstream by authorized entities consistent with State law. This part does not address intrastate storage or distribution of water not subject to an Interstate Storage Agreement.

§ 414.2 Definitions.

The following definitions, listed alphabetically, apply to this part:

Authorized entity means a State water banking authority, or other entity of a Lower Division State holding entitlements to Colorado River water, expressly authorized pursuant to applicable laws of Lower Division States to:

(1) Enter into Interstate Storage Agreements;

(2) Develop intentionally created unused apportionment;

(3) Acquire the right to use intentionally created unused apportionment; or

(4) Develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State.

Basic apportionment means the Colorado River water apportioned to each Lower Division State when sufficient water is available for release, as determined by the Secretary of the Interior, to satisfy 7.5 million acre-feet (maf) of annual consumptive use in the Lower Division States. The annual basic apportionment for the Lower Division

States is 2.8 maf of consumptive use for the State of Arizona, 4.4 maf of consumptive use for the State of California, and 0.3 maf of consumptive use for the State of Nevada.

Colorado River water means water in or withdrawn from the mainstream.

Consuming State means a Lower Division State where water made available by redeeming storage credits is or will be used.

Consumptive use means diversions from the Colorado River less such return flow to the river as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation. Consumptive use from the mainstream within the Lower Division States includes all consumptive use of water from the mainstream, including water drawn from the mainstream by underground pumping. The Mexican treaty obligation is set forth in the February 3, 1944, Water Treaty between Mexico and the United States, including supplements and associated Minutes of the International Boundary and Water Commission.

Contractor means any person or entity in the States of Arizona, California, or Nevada who has a valid contract or agreement with the United States for the delivery of Colorado River water.

Decree means the decree entered March 9, 1964, by the Supreme Court in *Arizona v. California, et al.*, 373 U.S. 546 (1963), as supplemented or amended.

Entitlement means an authorization to beneficially use Colorado River water pursuant to:

- (1) A decreed right,
- (2) A contract with the United States through the Secretary, or
- (3) A reservation of water from the Secretary.

Federal entitlement holder means a Federal agency or Indian tribe identified in Article II(D) of the Decree as having an entitlement for the beneficial use of Colorado River water.

Intentionally created unused apportionment means unused apportionment that is created solely as a result of an agreement within a Storing State for the purposes of making Colorado River water available for use in a Consuming State in fulfillment of a request for redemption of storage credits pursuant to an Interstate Storage Agreement.

Interstate storage agreement means an agreement, consistent with this part, that provides for offstream storage of Colorado River water in a Storing State for authorized entities in Consuming States and for the recovery of the stored water. An Interstate Storage Agreement will be among authorized entities of two

or more Lower Division States and may include other entities that are determined to be appropriate to the performance and enforcement of the agreement under Federal law and the respective laws of the Storing State and the Consuming State.

Lower Division States means the States of Arizona, California, and Nevada.

Mainstream means the main channel of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs behind dams on the main channel, and Senator Wash Reservoir off the main channel.

Offstream storage means storage in a surface reservoir off of the mainstream or in a groundwater aquifer. Offstream storage also includes indirect recharge when mainstream water is exchanged for groundwater that otherwise would be pumped and consumed.

Present perfected right or PPR means perfected rights defined by the Decree, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act (45 Stat. 1057, 43 U.S.C. 617) (BCPA). All present perfected rights are listed in the supplemental decrees entered January 9, 1979, and April 16, 1984, by the United States Supreme Court in *Arizona v. California, et al.*, as amended or supplemented.

Secretary means the Secretary of the Interior or an authorized representative.

Storage Credit refers to an accounting device to reflect a quantity of Colorado River water that is stored offstream.

Storing State means a Lower Division State in which water is stored off the mainstream.

Surplus apportionment means the Colorado River water apportioned to each Lower Division State when sufficient water is available for release, as determined by the Secretary, to satisfy in excess of 7.5 maf of annual consumptive use in the Lower Division States.

Unused apportionment means Colorado River water within a Lower Division State's basic or surplus apportionment, or both, which is not put to beneficial consumptive use during that year within that State.

Unused entitlement means any Colorado River water that is made available to but not scheduled and used by an entitlement holder during the year for which it is made available.

§ 414.3 Interstate storage agreements and redemption of storage credits.

(a) *Interstate storage agreements.* In accordance with Article II(B)(6) of the Decree, authorized entities of two or more Lower Division States may enter into Interstate Storage Agreements

subject to the approval of the Secretary in accordance with paragraph (b) of this section. An Interstate Storage Agreement will allow an authorized entity in a Storing State to store unused entitlement and/or unused apportionment for the credit of an authorized entity located in a Consuming State and will provide for the subsequent redemption of the credit. Such an agreement must:

(1) Specify the quantity of Colorado River water to be stored, by which authorized entity it will be stored, the Lower Division State in which it is to be stored, and the storage facility(ies) in which it will be stored.

(2) Specify whether the water to be stored will be basic apportionment from the Storing State or unused basic apportionment or unused surplus apportionment of the Consuming State. If it is to be unused apportionment, it may only be made available from the Consuming State and the agreement must so specify.

(3) Specify the quantity of storage credits associated with water stored offstream that will be available to the authorized entity in the Consuming State at the time water is actually stored under the agreement.

(4) Specify that accumulated storage credits may not be redeemed within the same calendar year in which the water that generated those credits was stored offstream.

(5) Specify that the authorized entity in the Consuming State will provide notice to the Lower Division States and to the Secretary no later than November 30 of its intention to request delivery of a specific quantity of Colorado River water by redeeming accumulated storage credits in the following calendar year.

(6) Specify that the authorized entity of a Storing State, after receiving a notice of intention to redeem offstream storage credits, will take actions to ensure that the Storing State's consumptive use of Colorado River water will be decreased by a quantity sufficient to develop intentionally created unused apportionment to offset the delivery of Colorado River water for use in the Consuming State in fulfillment of the storage credits.

(7) Specify which actions the authorized entity will take to develop intentionally created unused apportionment.

(8) Specify that the authorized entity of the Storing State must certify to the Secretary that intentionally created unused apportionment has been developed that would not otherwise exist and that the authorized entity will request the Secretary to make available

that quantity of Colorado River water for use in the Consuming State pursuant to Article II(B)(6) of the Decree to redeem storage credits.

(9) Indemnify the United States, its employees, agents, subcontractors, successors, or assigns from loss or claim for damages and from liability to persons or property, direct or indirect, and of any nature whatsoever arising by reason of the actions taken by the United States in accordance with this part.

(10) Identify the extent to which facilities constructed or financed by the United States will be used to store, convey, or distribute water associated with an Interstate Storage Agreement.

(b) *Approval by the Secretary.* A request for approval of an Interstate Storage Agreement should be made in writing to the Secretary. The request will be acknowledged in writing by the Secretary within 10 business days of receipt. The request should include copies of the proposed interstate agreement and any additional supporting data that clearly set forth the details of the proposed transaction. In reviewing the proposed interstate agreement, the Secretary will consider, among other relevant factors: applicable law; applicable contracts; potential effects on trust resources; potential effects on water rights holders, including contractors, Federal entitlement holders, Indian and non-Indian PPR holders, and other Indian tribes; potential effects on third parties; environmental impacts and effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; and other relevant factors, including the direct or indirect consequences of the proposed Interstate Storage Agreement on the financial interests of the United States. The Secretary will respond to the request within 120 days. However, if the proposal involves significant environmental compliance activities or other issues such that 120 days is an insufficient period in which to respond, the Secretary will communicate this to all parties to the proposed request and set out a schedule by which such work will be completed or such issues resolved. In that case, the Secretary will render a decision within 90 days of completion of the environmental compliance activities and resolution of other issues (if applicable). Where appropriate to implement the Interstate Storage Agreement, the Secretary will contract for water deliveries under Section 5 of the Boulder Canyon Project Act.

(c) *Stored water.* The authorized entity of the Storing State will account for the water diverted and stored offstream under an Interstate Storage Agreement, and prior to any redemption of storage credits will certify to the Secretary that water associated with storage credits has been stored.

(d) *Redemption of storage credits.* The Secretary must be satisfied that necessary actions have been taken to develop intentionally created unused apportionment for redemption of storage credits. Once this determination has been made, the Secretary will make available a quantity of Colorado River water to redeem those credits consistent with the BCPA, Article II(B)(6) of the Decree, and all other applicable laws. Intentionally created unused apportionment that is developed by the authorized entity of the Storing State will be made available to the authorized entity of the Consuming State and will not be made available to other contractors or Federal entitlement holders.

(e) *Assignment.* Interstate Storage Agreements may be assigned in whole or in part to authorized entities upon the agreement of the parties to the Interstate Storage Agreement and upon the approval by the Secretary consistent with the requirements of paragraph (b) of this section.

§ 414.4 Reporting requirements and accounting for storage credits.

Each authorized entity will annually report to the Secretary, by January 31, the quantity of water it diverted and stored on behalf of authorized users in other Lower Division States and the balance of storage credits remaining in

interstate storage for each entity as of December 31 of the prior calendar year. This water will be accounted for, in the records maintained by the Secretary under Article V of the Decree, as a consumptive use in the Storing State for the year in which it is stored. The Secretary will maintain individual balances of storage credits established by the offstream storage of water under Interstate Storage Agreements. The balances will be reduced when intentionally created unused apportionment is developed by the authorized entity in a Storing State and made available for use in a Consuming State. In the records maintained by the Secretary under Article V of the Decree, the taking of unused apportionment for use in a Consuming State by an authorized entity in redemption of its storage credits will be accounted for as consumptive use by the Consuming State of unused apportionment in the year the water is used, the same as with any other unused apportionment taken by that State.

§ 414.5 Water quality.

(a) *No guarantee of water quality.* The Secretary does not warrant the quality of water released or delivered under interstate agreements, and the United States will not be liable for damages of any kind resulting from water quality problems. The United States will not be under any obligation to construct or furnish water treatment facilities to maintain or improve water quality standards.

(b) *Water quality standards.* All contractors or Federal entitlement holders, in diverting, using, and returning Colorado River water, must

comply with all relevant water pollution laws and regulations of the United States, the Storing State, and the Consuming State, and must obtain all applicable permits or licenses from the appropriate Federal, State, or local authorities regarding water quality and water pollution matters.

§ 414.6 Environmental compliance.

(a) *Ensuring environmental compliance.* The Secretary will ensure that environmental compliance is completed. The Secretary will be responsible for ensuring compliance with the National Environmental Policy Act of 1969, as amended, and the Endangered Species Act of 1973, as amended, and will integrate the requirements of other statutes, laws, and executive orders as required for Federal actions taken under this part.

(b) *Responsibility for environmental compliance work.* Authorized entities requesting Secretarial approval of an interstate transaction pursuant to this part may prepare the appropriate documentation and compliance document for a proposed Federal action such as approving a proposed interstate transaction. Such compliance documents must meet the standards set forth in Reclamation's National Environmental Policy Act Handbook before they can be adopted. All costs incurred by the United States in evaluating, processing, and/or approving transactions entered into under this part must be funded by the parties that propose the transaction.

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