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DEPARTMENT OF THE INTERIOR**Bureau of Reclamation****43 CFR Part 415****RIN 1006-AA50****Regulating Non-Contract Use of Colorado River Water in the Lower Basin****AGENCY:** Bureau of Reclamation, Interior.**ACTION:** Advance notice of proposed rulemaking.

SUMMARY: The Bureau of Reclamation (Reclamation) is providing advance notice and is seeking public input on its plans to develop a rule to address and reduce the use of Colorado River water in the lower Colorado River basin (Lower Basin) without a contract (Non-Contract Use). Reclamation believes that development of such a rule would help prevent Non-Contract Use from depleting the Colorado River and taking water from holders of Colorado River water entitlements. Reclamation intends that any rule would establish the procedure that Reclamation would follow in making determinations of potential Non-Contract Use including notice and administrative appeal procedures for those entities whose use of Colorado River water falls within the category of Non-Contract use.

DATES: Submit comments regarding whether a rule is needed and, what should be in any rule that is developed, to Reclamation at the address below on or before October 17, 2006.

ADDRESSES: You may submit comments identified by the number 1006-AA50, by any of the following methods:

- Federal rulemaking portal <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: proposedrule@lc.usbr.gov.
- Fax: (702) 293-8042, attention: Ms. Margot Selig.
- Mail: Regional Director, Lower Colorado Region, Attention: Ms. Margot Selig, Bureau of Reclamation, P.O. Box 61470, Boulder City, NV 89006.

FOR FURTHER INFORMATION CONTACT: Ms. Margot Selig, telephone (702) 293-8192, or e-mail at proposedrule@lc.usbr.gov.

SUPPLEMENTARY INFORMATION: This section provides the public with information as to why Reclamation

currently believes development of a Non-Contract use rule is appropriate at this time.

Legal System For Use of Colorado River Water in the Lower Basin: The Colorado River is a primary source of water for irrigation, municipal, and industrial uses in the Lower Basin within Arizona, California, and Nevada (the Lower Division States). Colorado River water is stored behind Hoover Dam, authorized by the Boulder Canyon Project Act of 1928 (BCPA), for delivery and beneficial use in the United States. In addition, water stored by Hoover Dam is released pursuant to the United States' 1944 Treaty with Mexico addressing use of the Colorado, Rio Grande, and Tijuana Rivers.

The BCPA requires any person in the United States using this water to have a contract for such water with the Secretary of the Interior (Secretary). The Regional Director of Reclamation's Lower Colorado Region (Regional Director) enters into water delivery contracts with water users in Arizona, California, and Nevada on behalf of the Secretary. A valid water delivery contract constitutes an authorization by the Secretary, or an entitlement, to divert and consume Colorado River water in the Lower Basin. In addition to water delivery contracts, other entitlements to use Colorado River water are based on a United States Supreme Court Decree in *Arizona v. California* (Supreme Court Decree) or federal reservations of water. An entitlement to use Colorado River water (Entitlement) specifies how much water may be used, the purpose for which the water may be used, and where the use may occur. Reclamation considers any diversion or consumptive use of Colorado River water without a contract or other form of Entitlement to be a Non-Contract Use.

The Supreme Court Decree requires Reclamation to account for all mainstem Colorado River water use in the Lower Basin. Pursuant to this requirement, Reclamation prepares and maintains complete, detailed, and accurate records of all known diversions, return flow, and consumptive use of Colorado River water in the Lower Basin on an annual basis. These accounting records include all diversions and use of Colorado River water in Arizona, California, and Nevada, whether or not currently authorized by a water delivery contract or other form of Entitlement. All reported Colorado River water use in a state—whether authorized by an entitlement or not—is required by the Supreme Court Decree to be accounted for against the amount of Colorado River

water available in that state during that year.

Technical Issues Anticipated To Be Addressed by Rule: As part of the anticipated rule, Reclamation anticipates identifying technical considerations that Reclamation would use to determine if a particular entity is using Colorado River water. Reclamation's current assessment of the situation on the Colorado River is that most Non-Contract Use consists of water withdrawn from wells located within the hydraulically-connected aquifer of the Colorado River (River Aquifer) or from river pumps. The Supreme Court Decree specified that the consumptive use of Colorado River water in the Lower Basin includes water drawn from the mainstream by underground pumping.

At Reclamation's request the United States Geological Survey (USGS) has developed a technical method to identify wells that pump water that is replaced by Colorado River water. The method is based on the existence of a River Aquifer and an accounting surface within the River Aquifer. The accounting surface extends outward from the exterior boundary of the Colorado River floodplain until encountering a geologic barrier to groundwater flow. Several thousand wells are located within the River Aquifer. The USGS is performing a well inventory within the boundary of the River Aquifer to identify wells and river pumps that can potentially divert water that would be replaced by Colorado River water. As part of the anticipated rule, Reclamation would utilize this accounting surface to define the area within which Reclamation would apply the USGS method to determine whether water withdrawn from a well is replaced with Colorado River water. Reclamation would also evaluate whether unique hydrologic circumstances in some areas along the Colorado River would merit an exception to the USGS methodology.

Need for Rule To Regulate Non-Contract Use of Colorado River Water in the Lower Basin: Reclamation's goal in its management of the lower Colorado River is to ensure that all Colorado River water use is covered by an Entitlement and correctly accounted for within each Lower Division State's apportionment. Because each Lower Division State's apportionment of Colorado River water is a limited amount, Non-Contract Use harms that state's Entitlement holders by taking water the Entitlement holders otherwise could legally use. This fact leads Reclamation to conclude that the proposed rulemaking is necessary and appropriate. Reclamation believes that development of the proposed rule is

necessary for a number of reasons, including particularly (1) the fact that each Lower Division State is fully utilizing its respective apportionment and (2) the recent prolonged period of drought in the Colorado River Basin which has reduced water saved in the Colorado River reservoirs in recent years.

Reclamation anticipates that the rule would also address several other situations where Colorado River water use is not in accordance with an Entitlement, such as using more Colorado River water than is allowed by an Entitlement, using Colorado River water for a purpose the contract does not authorize, or using Colorado River water outside an approved service area for the Entitlement. Reclamation has authority to enforce its written contracts to prevent water use (i) in excess of an Entitlement, (ii) for a purpose not approved by the Entitlement, or (iii) outside the approved service area for the Entitlement. Reclamation anticipates proposing methods to modify the Entitlements to allow the current uses to continue with the approval of Reclamation or cease the use.

Reclamation's Current Assessment of Content of Proposed Rule: Reclamation believes that the proposed rule is needed to provide a framework for identifying and controlling Non-Contract Use. Pending review of public comments, Reclamation expects the proposed rule to:

1. Establish the methodology developed by the USGS as the tool that Reclamation will use to determine if a well pumps water that is replaced with Colorado River water;
2. Establish the criteria a water user must satisfy to demonstrate that his or her well does not pump water that is replaced with Colorado River water; and
3. Establish a process for a water user to appeal a finding that a well pumps water that would be replaced by Colorado River water.

The proposed rule is also anticipated to address Colorado River water use that is not in accordance with an Entitlement. Pending review of public comments, Reclamation expects the proposed rule to:

1. Document the process Reclamation will use to notify a water user if Reclamation makes an initial determination that the water user is using Colorado River water in a way that is not in accordance with an Entitlement.
2. Document the process a water user must follow to challenge the accuracy of the information on which Reclamation's preliminary determination is made.

In the proposed rule, Reclamation anticipates including provisions that would serve to legalize Non-Contract Use, where possible, by working with Non-Contract Users to obtain a legal right to use Colorado River water. Here are several options that Reclamation will consider:

1. Some water may be available under the three Lower Division States' apportionments.

(a) *Arizona:* Some Colorado River water may be available for allocation in Arizona. After Reclamation consults with Arizona Department of Water Resources (ADWR), some of Arizona's unobligated Colorado River water could be committed for use by Non-Contract Users in Arizona. A possible contract between ADWR and Reclamation may satisfy the contract requirement for multiple individual water users and eliminate the need for contracts between the United States and the individual Non-Contract water users.

(b) *California:* All Colorado River water available for use in California is already under permanent contract. However, a small amount of water is available for domestic use in California through the Lower Colorado Water Supply Project (LCWSP). Non-Contract Users in California who are eligible for domestic use in California and who wish to participate under the LCWSP would need to enter into a water delivery subcontract with the City of Needles. The City of Needles is the only entity authorized to enter into a standard form subcontract for delivery of this water supply to project beneficiaries.

(c) *Nevada:* All Colorado River water available for use in Nevada is already under permanent contract. Any commitment to recognize new uses of Colorado River water in Nevada would be subject to terms established by the Southern Nevada Water Authority (SNWA). SNWA has an existing Entitlement to the delivery and use of any Colorado River water not previously committed for use by other Nevada water users.

2. A water user may be able to acquire an Entitlement through an assignment, transfer, or lease from an existing Entitlement holder within that state. However, an assignment, transfer, or lease is not valid unless it is approved by Reclamation.

3. A water user may be able to obtain a right to use water as a customer of an existing contract holder. The place of water use must be included within the contract holder's service area and the inclusion must be approved by Reclamation.

4. A water user may be able to acquire a different source of water that is not hydraulically connected to the mainstream of the Colorado River.

Directives in the BCPA and the Supreme Court Decree provide that all delivery and use of Colorado River water must be under a valid contract or other form of entitlement with the United States. Implementation of the anticipated rule would protect Entitlement holders by documenting appropriate steps to terminate a Non-Contract Use. Thus, Reclamation anticipates that the proposed rule would provide that if Reclamation determines a water user is making a Non-Contract Use and the water user is unable to acquire a legal right to use Colorado River water, Reclamation would order that water user to cease the Non-Contract Use and pursue available legal options to stop the Non-Contract Use.

Submitting Comments

Reclamation's practice is to make comments, including names and home addresses of respondents, available for public review. Individual respondents may request that we withhold their home address from public disclosure, which we will honor to the extent allowable by law. There may be other circumstances in which we would withhold a respondent's identity from public disclosure, as allowable by law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public disclosure in their entirety.

If you comment via the Internet, please submit comments in plain text, using the characters available on a standard typewriter or computer keyboard. Avoid using special characters and any form of encryption. Please include your name and e-mail or postal address in your Internet message. If you do not receive a confirmation via e-mail that Reclamation has received your Internet message, please contact us directly at (702) 293-8192.

Dated: August 8, 2006.

Mark Limbaugh,

Assistant Secretary—Water and Science.

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