

# WATER STRATEGIST

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Editors: Rodney T. Smith and Roger Vaughan

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## Rules of the River: BuRec's Proposed Regulations for the Lower Colorado

The Department of Interior's policy toward water transfers marches at the pace of one significant development per year. Consider:

**1988:** Interior issued its statement of general principles that acknowledged a key role for voluntary water transfers in meeting western water demands. Interior announced a chosen role of facilitating transactions among willing buyers and willing sellers.

**1989:** The Bureau of Reclamation issued "Criteria and Guidance" for the implementation of Interior's principles. These guidelines evidenced an intent to avoid burdening transactions with unreasonable restrictions or financial penalties, and to maintain the primacy of state law in water allocation decisions.

**1990:** The bureau's Boulder City office approved an assignment of a 15,878 af/yr water entitlement from Basic Management Inc. to the City of Henderson, Nevada. (For discussion of these events, see "Interior's Policy of Voluntary Water Transactions," *WS January 1991*).

The main event for 1991 is the "Proposed Regulations for Administering Entitlements to Colorado River Water in the Lower Colorado River Basin." The proposed regulations outline the criteria the Lower Colorado Regional Office will use in fulfilling the Interior Secretary's responsibility as water-master of the lower Colorado River. Originally, the bureau planned to publish the proposed regulations in the *Federal Register* in November 1991 -- which would have started a 60-day period for public comment on the regulations after which the bureau would publish final regulations. Recently, however, the publication date has been pushed back for several months after the bureau received many comments on a draft copy of the proposed regulations that was publicly-distributed last spring. Now, the bureau plans to convene a January 1992 meeting with the Lower Basin states to discuss the issues raised about the proposed regulations. After the meeting, the bureau will revise the proposed regulations before publication in the *Federal Register* for formal public comment.

The proposed regulations promise to have a far-reaching impact on the Colorado River system. They will affect existing holders of entitlements, and parties contemplating the acquisition of entitlements in the lower basin or interstate water trades.

In this article, *WS* examines the proposed regulations contained in the draft distributed last spring. The discussion reviews the regulations on: 1) the beneficial use of entitlements, 2) reductions in entitlements due to nonuse, 3) administrative procedures for final determination of nonuse, 4) water conservation; 5) water transactions, and 6) the wheeling of non-

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### In This Issue . . .

"The Rules of the River" examines the Bureau of Reclamation's proposed regulations for administering entitlements to Colorado River water in the Lower Colorado Basin. In their current form, the regulations portend water reallocation by regulatory fiat rather than voluntary transactions and state/federal conflicts over Colorado River water.

"The 1991 Annual Legislative Review" examines what has happened to the 184 major state water bills tracked by *WS* this year. Arizona finally resolved its long-standing dispute over groundwater transportation and municipal water farms. The fifth year of drought in California generated a flurry of legislative activity.

"Closing the Loop: Recycling Western Water" reviews how states and communities in the West are turning to reclaimed water to meet growing municipal demands.

"Finance Update" reviews the results from the 87 bonds issued to raise \$1.3 billion in the third quarter.

"Litigation Update" reviews the U.S. Supreme Court decision on the Canadian River Compact and a U.S. District Court decision declaring invalid the BuRec's 1987 acreage limitation rules.

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## Rules of the River

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### Box 1

#### Beneficial Use of Entitlements (Sec. 415.6)

**Beneficial use.** "The diversion and consumptive use of Colorado River water, except by federal establishments, must be for beneficial uses only."

**Nonuse of Entitlements.** "Nonuse, nonbeneficial use, non-reporting of use, and unauthorized use are . . . referred to singly or collectively as nonuse."

"The Regional Director will consult with the appropriate authorities within the States of California, Arizona, or Nevada in determining whether or not a user of Colorado River water is applying that water to beneficial use within that respective State and pursuant to that State's laws. If a State authority . . . determines that a user of Colorado River water (other than perfected rights for federal entities defined in the U.S. Supreme Court's decree in *Arizona v. California*) has not been applying water to a beneficial use, that determination may be respected by the Regional Director for enforcement purposes." (emphasis added)

"The Regional Director, independent of State authorities, may also make beneficial use determinations for all Colorado River water users where it is deemed appropriate. In determining whether a use is beneficial or nonbeneficial, the Regional Director generally will be guided by the laws of the State where the use occurs. The Regional Director may respect beneficial uses not recognized under State law." (emphasis added)

"Upon preliminary determination by the Regional Director or appropriate federal establishment the appropriate State authority that has occurred, a Colorado River water user may be subject to a . . . reevaluation of entitlement as provided in Section 415.10." (emphasis added)

project water. From the viewpoint of Interior's declared principles of policy toward voluntary water transactions and water allocation, the proposed regulations fall short of expectations. In their current form, the proposed regulations portend water reallocation by regulatory mandate rather than by voluntary transactions and state/federal conflicts over Colorado River water.

### THE CONTEXT

The bureau perceives that the management of the lower Colorado River has entered an "era of limits" because future requests for water are expected to exceed the annual 7.5 million af apportionment of water available to the lower basin states under normal conditions -- California (4.4 million af/yr), Arizona (2.8 million af/yr), and Nevada (0.3 million af/yr). The proposed regulations represent a formal statement of existing management and operational requirements. As such, they are not intended to add new regulatory or environmental obligations. Instead, the bureau intends to enhance its ability to eliminate illegal water diversions by unauthorized users and to ensure that Colorado River water used in lower basin states is put to beneficial use.

The proposed regulations involve the terms and conditions included in bureau contracts and agreements and the procedures to be used in the administration of contracts and agreements. With the exception of Indian holders of "Federal

establishments' PPRs" (perfected rights for federal entities defined in the U.S. Supreme Court's decree in *Arizona v. California*), no entity shall divert or use Colorado River water except by contract. (The bureau, however, recommends that Indians enter into agreements). For Non-Indian Holders of PPRs, the terms and conditions include specification of beneficial consumptive use associated with the entitlement, type and place of use, and "criteria for changes in type and place of use, criteria for forfeiture or reduction of right for failure to put the right to beneficial use." (emphasis added).

For non-federal entities receiving permanent service, water delivery contracts are required. Terms and conditions include specification of "the amount of the entitlement, the type and place of use, criteria for establishing the amount of the annual delivery entitlement during times when Colorado River water supplies are insufficient to fully satisfy all entitlements, the amount of charges and fees associated with the delivery of water, . . . a requirement for approval of assignments or transfers and inclusions and exclusions of land in and from a water user's service area before such actions become effective, criteria for forfeiture of or reduction in the contractual entitlement because of failure to put the water to beneficial use . . ." (emphasis added).

Surplus contracts are also available for unused basic apportionment or surplus water (water determined by the Secretary to be available for release to satisfy annual consumptive use in excess of 7.5 million af). Sources of water available for surplus contracts include: (1) unused basic apportionment, (2) surplus apportionment of water available for consumptive use in excess of 7.5 million af, and (3) waste, water that cannot be delivered to other water users in satisfaction of their entitlements, delivered to Mexico in satisfaction of the Mexico Treaty Obligation, or routed to storage for future delivery to entitlement holders. Surplus contracts may "be made available to users on an intermittent basis at the discretion of the Regional Director pursuant to a recommendation from appropriate State officials." Terms and conditions cover the same issues found in water delivery contracts.

### BENEFICIAL USE

Except for federal establishments, the diversion and consumptive use of Colorado River water must be put to beneficial use (for excerpts of proposed regulations, see Box 1). The determination of what constitutes beneficial use, however, raises possible conflicts between states and the bureau. Moreover, the bureau's criteria are either unclear or place agricultural users under greater scrutiny than municipal users. In the end, water users would be placed in a fast-paced administrative forum where they must justify their use of Colorado River water.

**State v. Federal Control.** The primacy of state law over water allocation has been a central tenet of western water

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**Table 3**  
Third Quarter Comparisons: Western States  
(Volumes in \$ millions)

	3rd Quarter 1990	3rd Quarter 1991
Number of Issues	73	87
Gross Volume	\$681	\$1287
% Revenue	83	60
% Competitive	44	34
% Insured	26	24
Average Net Interest Cost (%)	7.23	6.92
Bond Buyer G.O. Index (%)	7.54	6.93
Average Spread (\$)	18.56	15.36

Source: From Securities Data Co. listings supplemented by Stratecon, Inc.  
Water bonds include those sold for water, sewer and flood control.

16 issues smaller than \$1 million) than among larger borrowers (they accounted for only 8 of 35 issues above \$5 million).

As usual, spreads on revenue bonds, at \$14.24 per \$1,000, were below spreads on GOs, \$18.30. Also as usual, spreads on small revenue bond issues were larger than spreads on larger issues. Issues smaller than \$1 million averaged spreads of \$15.97 per \$1,000 of face value; issues above \$20 million averaged spreads of only \$10.91.

About one third of the issues (30 out of 87) accounting for one third of proceeds (\$462 out of \$1287 million) were issued competitively. Competitive issues averaged NICs of 6.87 percent—below the 7.03 percent average for negotiated issues. They averaged spreads of \$15.45, slightly above the \$15.36 for negotiated issues.

## Underwriting

Bear Stearns captured the No.1 position on the *WS Underwriter Top Ten* solely on the strength of its single \$300 million California issue. Merrill Lynch made No. 2 through three issues, and Smith Barney No. 3 with

four issues. No single underwriter dominates water bond markets from quarter to quarter. The specialized nature of water financings and the infrequency with which borrowers issue bonds keeps the market open to regional underwriters. □

**Table 4**  
Market Share of Top 10 Lead Underwriters  
Third Quarter 1991 (Percent)

Bear Stearns	23.3
Merrill Lynch Capital Markets*	14.1
Smith Barney Harris	10.0
Stone Young	9.0
Goldman Sachs	9.0
Rauscher Pierce Refnes	6.9
Chemical Securities	4.6
Prudential-Bache Securities	2.4
Paine Subsidiary	2.2
Dougherty, Dawkins, Strand & Yost	2.1

\*includes subsidiaries  
Source: Compiled by Stratecon, Inc. from SDC listings

## Rules of the River

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### Box 2

#### Reductions in Entitlement Due to Nonuse (Sec. 415.10)

**Evaluation Factors.** "In making a determination of nonuse, the Regional Director, in consultation with appropriate State agencies, will consider relevant facts, circumstances, and conditions that may be unique to each State, consistent with the following guidelines:"

(1) "The Regional Director shall consider the unique aspects of domestic and agricultural uses of water and allow consideration of future growth in water demands for *domestic uses*;" (emphasis added)

(2) "The Regional Director will ensure that entitlements are not reduced as a result of nonuse brought about by implementation of documented water conservation measures;" (emphasis added)

(3) "If the water user is able to show evidence to the satisfaction of the Regional Director that there will be a need for the entire entitlement within a reasonable time, the Regional Director will consider additional build-up of water use schedules as a basis for retaining entitlement to sufficient Colorado River water for the user's growth for a period of years, based upon an average historical growth rate for a like number of years, adjusted for *reasonable conservation* . . . The Regional Director, in consultation with appropriate State agencies, will review this projection every 5 years and make a new determination of need;" (emphasis added)

(4) "The greatest quantity of Colorado River water entitlement put to reasonable beneficial use, as reported by the water user over the previous 5 years . . . shall be considered to be the base use of the entitlement for that period;" (emphasis added)

(5) "The Regional Director may consider any Federal or State statutory authority for the allowance of nonuse;"

(6) "For municipal contract users, the Regional Director may take into account factors including, but not limited to, *current population, growth rate, market and economic fluctuations, current water use per capita and project use per capita, current industrial use, documented and future needs, other uses of water, the amount and sources of other water, and any other factors deemed to be relevant to the municipality's actual need for Colorado River water; and*" (emphasis added)

(7) "For agricultural contract users, the Regional Director may take into account factors including, but not limited to, *irrigable acres and acres irrigated, cropping patterns, return flow rates, diversions, evapotranspiration rates, irrigation efficiency, and type and condition of irrigation systems utilized.*"

**Determination of Nonuse and Reduction of Entitlement.** "Upon a final determination of nonuse by the Regional Director, . . . the Regional Director shall issue to the user, as appropriate, a cease and desist order reducing the user's entitlement." If the user disagrees with the Regional Director's determination, the user may appeal the decision to the Commissioner. If the Regional Director's determination is "not rescinded as a result of a successful appeal . . . the Regional Director will provide a contract amendment to the user for execution which shall reflect the reduced entitlement. If the user refuses to properly execute the contract amendment, the Regional Director may administratively reduce the user's contract entitlement and the user thereafter will be entitled to divert no more water than is allowed under the reduced entitlement."

**Disposition of Recaptured Entitlement.** "An entitlement to Colorado River water made available as a result of a reduction because of a finding of nonuse will be made available to other water user(s) within the appropriate State, as determined by the Secretary (of Interior)."

**Five-Year Review of Water Utilization.** "The water use of each water user may be reviewed by the Regional Director at 5-year intervals to verify that water is being used in accordance with terms of the contract. Use not in accordance with the terms of the contract or these regulations may result in an adjustment of the water user's Colorado River water entitlement."

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policy. Consistent with this view, the bureau proposes to consult with appropriate state authorities in determining whether a water user is putting Colorado River water to beneficial use. However, the Regional Director "may respect" (no expression of deference) any determination by state authorities. Moreover, the Regional Director may make determinations "independent of State authorities." Such determinations "generally will be guided" by state law, but "may recognize beneficial uses not recognized under State law."

**Criteria.** Failure to put Colorado River water to beneficial use may result in a reduction of contractual entitlements (see Box 2, p.7). In reaching his decision, the Regional Director, in consultation with state authorities, will consider relevant facts, circumstances, and conditions. Yet some of the proposed guidelines are problematic.

First, agricultural uses receive less protection against a finding of "nonuse" than domestic uses. Under guideline (1), the Regional Director may consider future growth in water demand for domestic uses, but not agricultural uses. Under guideline (6), the Regional Director may consider a multitude of factors for nonuse by municipal users, including "market and economic fluctuations" and "any other" relevant factors. Guideline (7), which pertains to agricultural users, does not include "market and economic fluctuations" nor "any other relevant factors."

Second, the guidelines provide water users with conflicting incentives to save water. Under guideline (2), the Regional Director will not reduce an entitlement if nonuse results from implementation of documented water conservation measures. Under guideline (4), however, "the greatest quantity" of Colorado River water put to reasonable beneficial use "over the previous 5 years" will become the basis for entitlements in circumstances where future build-up of water use is the basis for retaining original entitlements not fully utilized.

Finally, under guideline (3), the Regional Director will consider additional build-up of water use as the basis for retaining original entitlements if the water user can demonstrate a need for the entire entitlement "within a reasonable time." The amount of unused entitlements retained for this purpose is based on the user's growth, adjusted for "reasonable conservation." The criteria of what constitutes reasonableness is not specified.

**Procedure.** The director's final determination will be made in a fast-paced administrative process (see Box 3, p.12). The water user will have 90 days to show cause why the director should not order a cease and desist order. A request for hearing will not be granted "unless the respondent's answer demonstrates the existence of material issues of fact." The water user has the burden to prove that he has put his entitlement to beneficial use.

## WATER CONSERVATION

Following the Reclamation Reform Act of 1982, each district that has a repayment contract or a water service contract "shall develop a water conservation plan." The Regional Director will consult with each contractor for making annual recommendations for conservation measures and operating practices. "Each plan shall contain *reasonable and economically feasible* goals, measures, and time schedules" (emphasis added). Water users that irrigate less than 2,000 acres and domestic users with annual diversion entitlements of less than 5,000 af may be exempted from the preparation of plans. "Water users may submit or designate State-required water conservation plans for approval by the Regional Director."

Plans shall be updated at 5-year intervals and submitted to the Regional Director for review and approval. Water users shall submit the following information: "an evaluation of accomplishments in water conservation during the previous five years; a discussion of future water needs; water conservation opportunities, limitations, and goals; and time schedules for implementing new or modified water conservation measures."

Under the proposed regulations, the Regional Director may direct the water user to modify the water conservation plan if he (or the appropriate State authority) determines that the water user is applying Colorado River water to nonbeneficial or unreasonable use. "If a water user fails to take actions required to correct the nonbeneficial or unreasonable use of Colorado River water within the designated time period, the Regional Director may reduce the water user's diversion request, . . . , in amount equal to the amount of water that the Regional Director determines is nonbeneficially or unreasonably used. Any such reduction shall continue to be made until the water user has eliminated the nonbeneficial or unreasonable use. This reduction in diversions is separate from the reduction in entitlements (for nonuse)."

What constitutes "reasonable and economically feasible goals, measures, and time schedules?" The proposed regulations are silent. Should the value of water in municipal use guide what is taken to be reasonable conservation by agricultural water users, *in the absence of a actual proposed transfer agreement?* That is, does the bureau plan to follow California's practice of considering the value of water in hypothetical water trades when judging the reasonableness of water use by agriculture?

## WATER TRANSACTIONS

The proposed regulations allow assignment of contractual entitlements, transfers of entitlements, exchanges, and temporary sales of water (see Box 4, p. 13). The proposed regulations lack criteria for key administrative decision-making and con-

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### Box 3

#### Procedures for Final Determinations of Nonuse (Sec. 415.22)

**Order To Show Cause.** "Upon a preliminary determination of nonuse, the Regional Director shall cause to be issued an order to show cause. The order shall require the respondent to show cause within 90 days why the Regional Director should not issue a cease and desist order."

**Answer to Order to Show Cause.** The respondent's answer must include documentation of diversions for the following categories (beneficial use, nonbeneficial use, nonuse, non-reported use, unauthorized use), best estimate of reasonable maximum future diversion requirement, and relevant background and descriptive information in support of alleged nonuse, etc. Agricultural user shall provide information on acreage, fallow and idled lands, and cropping patterns. Municipal users shall provide information on number of service connections, population served (including documented seasonal population), and per capita use.

The answer shall also specify whether an evidentiary hearing is demanded. If a hearing is not requested, the matter will be decided on the basis of "written or other evidentiary materials and argument" submitted in the answer to an order to show cause. A request for hearing will not be granted "unless the respondent's answer demonstrates the existence of material issues of fact, supported by sworn affidavit, justifying such a hearing."

**Burden of Proof.** The respondent "shall bear the burden of going forward and the burden of proof by a preponderance of the evidence."

**Appeal.** Respondent has a right to appeal the decision of the Regional Director with the Commissioner of the Bureau of Reclamation. The decision of the Commissioner "shall constitute the final decision of the Department (of Interior) and no further administrative appeal shall be available."

flict in important ways with the "Criteria and Guidance" the Bureau of Reclamation issued in 1989 concerning the implementation of Interior's 1988 general statement of policy principles.

**Assignments.** An assignment occurs when an entitlement is conveyed from one entitlement holder to another "for the same purposes as, and at the same locations where, the entitlement was used prior to the assignment." The Regional Director "may impose new or additional contractual obligations as conditions of his approval." The criteria used to identify the purpose of new obligations are left unspecified. Transactions which involve a change in ownership and a change in the type or place of use shall also require an approved transfer of entitlement.

**Transfers of Entitlements.** The proposed regulations prohibit the transfer of entitlements across state lines. In considering requests for transfers, the Regional Director will consider, among other factors, "applicable Departmental, Reclamation, or other Federal regulations, policies, or guidelines in effect at the time of review." Presumably, applicable policies and guidelines include the Interior's 1988 principles and Reclamation's 1989 Criteria and Guidance." Yet, none of the key points in these documents are expressly incorporated into the proposed regulations (e.g. third party effects are identified as those that affect entities who may have an identifiable interest in the transaction and would have legal standing in an adjudi-

cation process in an appropriate state forum; terms negotiated by the parties do not concern Interior). In fact, there are problems.

First, the maximum amount of water that may be approved for a transfer "shall be based on the average beneficial consumptive use for the previous 5 years." No allowance is made for nonuse of water due to adverse market conditions. In effect, the bureau proposes to reintroduce a "use it or lose it" doctrine back into western water decisions.

Second, a transfer must mitigate or compensate for third party effects to the satisfaction of the Regional Director "and impacted third parties." Absent is the principle included in the "1989 Criteria and Guidance" that third parties are identified by their legal standing in an appropriate state forum. Moreover, third parties interests must be satisfied under the proposed regulations, not simply considered as is common under state law. Once again, the proposed regulations are silent on the criteria the Regional Director will use in reaching a decision.

**Exchanges and Temporary Sales.** The proposed regulations uses the same approach for exchanges and temporary sales (transactions not exceeding one year). Among the additional factors that may be considered, "a seller which is an agricultural water user must maintain lands and works in a condition whereby the lands could take and receive water at all times during the period of the exchange or temporary sale." Must a farmer incur *all* the expenses of irrigated agriculture even though land will not be irrigated? If so, this requirement will reduce the economic returns agricultural water users may earn from exchanges and temporary sales.

### WHEELING NONPROJECT WATER

The proposed regulations specify fifteen conditions that must be satisfied before the Regional Director will approve the wheeling of nonproject water through the lower Colorado River (see Box 5).

Among the conditions: (a) water to be wheeled must not otherwise reach (or have reached) the mainstream of the Colorado River; (b) the water must be of equal or greater quality than that of the mainstream at the point nonproject water would reach the mainstream; (c) the applicant must show that the wheeling would not injure other parties; (d) the party requesting the wheeling has no claim on the return flow generated by the use of nonproject water; (e) the nonproject water would be subject to conditions of accumulation, retention, release and withdrawal as prescribed by the Secretary of Interior, and share in Colorado River losses at the same rate established for Colorado River water losses; and (f) the applicant will receive no credit for energy generation as a result of the wheeled water passing through hydroelectric power generation facilities.

Nonproject water will have a junior priority of use for Colorado River storage and delivery system. "When river

## Box 4

## Water Transactions

## Assignment of Contract Entitlements (Sec. 415.8(c))

"Contract entitlements may be assigned from one entity to another . . . . In evaluating a request for approval of a proposed assignment, the Regional Director shall consider, among other things, the authority and the capability of the assignee to fulfill the contractual obligations. *The Regional Director may impose new or additional contractual obligations as conditions of his approval.* Transactions which involve a change in ownership and a change in the type or place or use shall require both an approved assignment and approved transfer." (emphasis added)

## Transfers of Entitlements (Sec. 415.8(d))

"*Transfers are permitted only within a State.* In considering requests for transfers, the Regional Director shall consider, among other relevant factors: (i) potential impacts on other water users, (ii) applicable law which may facilitate or constrain such transfers, (iii) applicable Departmental, Reclamation, or other Federal regulations, policies, or guidelines in effect at the time of the review, and (iv) appropriate input from authorities of the State within which the transfer is proposed." (emphasis added)

*Transfers limited to historical consumptive use.* "The maximum amount of water that may be approved for transfer shall be based upon the average beneficial consumptive use for the previous 5 years. . . . The transferee must meet the test of beneficial use as outlined in Sec. 415.6." (emphasis added).

*Mitigation or Compensation for Third-Party Impacts.* "Transfers will not be approved unless the acquiring party (transferee) commits in writing to mitigate or compensate for third-party impacts of such transfers to the satisfaction of the Regional Director and impacted third parties, including, but not limited to, the county of origin of the water user offering the transfer." (emphasis added)

*Management of Idled Lands Due to Transfer.* "In regard to transfers involving water currently used for agricultural production, the Regional Director shall require appropriate contractual commitments which provide for the permanent management of idled lands for purposes including, but not limited to, vegetative management, dust abatement, erosion control, and fire protection. Such commitments may include: (i) direct management by the parties to the transfer at their expense, with oversight by the Regional Director; or (ii) establishment of a non-revocable interest-bearing escrow account which will provide sufficient annual revenues for the Regional Director to manage the idled lands on a permanent basis."

## Exchange or Temporary Sale of Water (Sec. 415.9)

"A Lower Basin States water user may request the Regional Director to approve an exchange with or temporary sale to another Lower Basin States water user within the same State." Generally, the regulation of exchanges and temporary sales follows the regulation of transfers: limited to historical consumptive use, and mitigation or compensation for third-party impacts. Exchanges and temporary sales shall not exceed one year.

*Additional Factors.* In reviewing a request for an exchange or temporary sale, Reclamation may consider other factors including, but not limited to:

- (1) "a seller which is an agricultural water user must maintain lands and works in a condition whereby the lands could take and receive water at all times during the period of the exchange or temporary sale;"
- (2) "if an exchange or temporary sale is made by an agricultural user to a domestic user during the cost-repayment period for Hoover powerplant, Reclamation shall assess a charge of \$0.25 to \$0.50 per acre foot, as appropriate, for the quantity of water exchanged or sold, payable annually;"
- (3) "exchanges of water may be settled by monetary payment in lieu of return of water. An exchange of water may not include the banking of water in Federal reservoirs for later withdrawal."

## Box 5

## Wheeling Non-System Water (Sec. 415.15)

*Wheeling Requirements.* "The Regional Director may consider wheeling non-Colorado River water through the Colorado River if the following conditions are met:"

- (1) An entity that desires to wheel water must submit a request for approval;
- (2) The applicant agrees to pay all costs incurred by the United States to review the proposal;
- (3) The entity must enter into contract with the Regional Director prior to any wheeling of water;
- (4) The applicant shall indemnify and hold harmless the United States and other water users from any loss or property damage, or claims of damage by "any nature whatsoever and by whomsoever" arising from activities performed under the contract;
- (5) The Regional Director must determine that "the water to be wheeled could not have reached and that water from the source has never reached the mainstream" of the Colorado River;
- (6) "The water received into the Colorado River for wheeling shall at all times be of equal or better quality than that of the mainstream at the point where the non-Colorado River water enters the mainstream;"
- (7) "The applicant must show that wheeling will not adversely impact the rights of other parties;"
- (8) "The applicant must comply with all applicable laws and regulations of Federal, State, and local authorities that have jurisdiction over the location where the water is withdrawn;"
- (9) "Water that is wheeled in the Colorado River, diverted, and subsequently returned to the Colorado River shall be considered Colorado River water and shall not be available for further diversion return flow credit under the wheeling agreement to either the user or the State;"
- (10) "The Regional Director will not warrant the quality of the water delivered to a wheeling contractor;"
- (11) The applicant shall comply with the requirements for water conservation, the National Environmental Policy Act, the Endangered Species Act, and "other applicable environmental laws, regulations, and procedures;"
- (12) The applicant must install measurement devices applicable to the Regional Director;
- (13) "The non-Colorado River water shall be subject to such conditions as accumulation, retention, release, and withdrawal as the Secretary may prescribe and shall share in Colorado River losses at the same rate established or modified by the Regional Director for Colorado River water losses;"
- (14) "The applicant will receive no credit for energy generation as a result of wheeled water passing through hydroelectric power generation facilities of the United States; and"
- (15) "The applicant will obtain approval of the State or States from which the water is to be diverted and the State or States through and from which the water is wheeled and withdrawn."

*Priority of Use of Colorado River Storage and Delivery System.* "Colorado River water shall have priority over non-Colorado River water in the use of the Colorado River storage and delivery system. When river operations require flood control releases, whether through a hydroelectric power generator or a spillway, non-Colorado River water will be released before Colorado River water is released."

operations require flood control releases, whether through a hydroelectric power generator or a spillway, non-Colorado River water will be released before Colorado River water is released."

In effect, the bureau offers applicants a junior priority on storage and delivery systems. In exchange, the applicant pays all costs and implicitly pays an access fee consisting of two

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## Rules of the River

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elements; (1) applicant relinquishes claims on return flows, and (2) the bureau provides no credit for any generated

### Conclusion

For bureau policy toward the lower Colorado River, past may indeed be prelude to the future. By design, the proposed regulations represent a formal statement of existing management and operational policies. Their content does not expressly embrace key elements of Interior's general principles released in 1988 nor faithfully incorporate the Bureau of Reclamation's 1989 "Criteria and Guidance." Instead, the bureau has proposed a system for investigation into whether existing holders of entitlement put Colorado River water to beneficial use.

In their current form, the proposed regulations may create the following future for the allocation of Colorado River water. As rising water demands intensify the economic and political stakes in water allocation, the bureau will launch investigations into the reasonableness of water use. Rather than engage in voluntary transactions, municipalities can wait for the bureau's reallocation of agricultural water. In the end, the bureau may find that it has "facilitated" the mandatory reallocation of water through regulatory fiat, rather than promote voluntary water transfers among willing buyers and willing sellers. □



## Closing the Loop

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In the August 1991, Water Conservation Coalition report in California, the Task Force called for increases in both federal and state funding programs. Since 1984, the state has operated a fund of \$25 million to assist localities with loans at 50 percent of the interest rate paid by the state in its latest GO bond issue. The fund was expanded in 1988, but the legislature is debating several bills to provide even more state moneys from the proceeds of further GO bond issues (see "Annual Legislative Review," this issue).

To the extent that projects are undertaken for water quality rather than water supply reasons, some external funding may be appropriate. For example, Los Angeles Department of Water and Power (DWP) must quickly reduce its ocean discharges. To help meet this goal, DWP has sold up to 62.5 million gallons per day (of the total of 400 mgd) of secondary treated water from its Hyperion Treatment facility to West Basin Municipal Water District (see WIM, 7/91). West Basin will pay \$7.50/af and the capital costs of the necessary tertiary treatment and distribution facilities. It will supply 25,000 af/year to DWP at a price equal to its treatment costs and use the rest for greenbelt irrigation, process water for Chevron and Mobil oil refineries, and for groundwater replenishment (30,000 af/year). West Basin will charge its customers \$235/af for the treated water, only 10 percent less than its usual rate of \$261/af for potable water. Funding for the \$183 million project has not been decided: MWD has agreed to rebate West Basin \$50 million under its local projects program to help cover the costs of the project and some state funds may be available.

Although the costs of large scale projects may appear daunting, the rapidly rising costs of alternative water supplies means that, if they are properly designed, projects can yield large revenues. Many communities have demonstrated that recycling projects are competitive with other sources with no state or federal financial assistance. In Colorado, Aurora's long standing project delivers reclaimed water to a golf club at a cost of 43 cents per 1000 gallons--competitive with alternatives available to the club. In Arizona, strict targets to reduce groundwater overdrafts have created a strong financial incentive for communities to look for viable reclamation projects even without state funding (see "Arizona Rewrites Groundwater Law," WS, July 1991). The City of Tucson is in the process of completing a ten-year, \$63 million project (without state aid) that will deliver about 35,000 af/year of reclaimed water. The town of Gilbert (located within the Phoenix AMA) has been successfully delivering waste water to customers for over a year (see WIM 4/90). A water skiing park uses up to 200 af/year to fill two lakes and developers have been able to irrigate landscapes and create lakes in new developments.

The Irvine Ranch Water District in California finds using reclaimed water for landscape irrigation and for flushing toilets in its office developments is about 33 percent less expensive