Arizona Water Banking Authority
500 North Third Street, Phoenix Arizona 85004
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Web Page: www.awba.state.az.us

Public Notice of Arizona Water Banking Authority Commission Meeting

Wednesday, January 26, 2000

10:00 a.m.

Arizona Department of Water Resources
500 North Third Street
Phoenix Arizona 85004
Third Floor Conference Room B

FINAL AGENDA

I. Welcome/Opening Remarks

II. Principles of Negotiation for Interstate Agreements for the Offstream Storage of Colorado River Water

III. Discussion of the Central Arizona Project's Recharge Site Condemnation Authority

IV. Call to the Public

Future Meeting Dates:
March 15, 2000

Persons with a disability may request a reasonable accommodation, such as a sign language interpreter, by contacting the Arizona Water Banking Authority at (602) 417-2418. Requests should be made as early as possible to allow time to arrange the accommodation.

ARIZONA DEPARTMENT OF WATER RESOURCES
Office of Legal Services
500 North Third Street, Phoenix, Arizona 85004
Telephone (602) 417-2420
Fax (602) 417-2415

JANE DEE HULL
Governor

RITA P. PEARSON
Director

January 25, 2000

Rita P. Pearson
Director
Arizona Department of Water Resources
500 North Third Street
Phoenix, Arizona 85004

Re: Regulations for Offstream Storage of Colorado River Water, 43 CFR § 414

Dear Ms. Pearson:

The Arizona Water Banking Authority (AWBA) is authorized to engage in interstate banking of Colorado River water in cooperation with other states of the Lower Division of the Colorado River Basin. AWBA's authority is limited by the following requirements:

> The authority [AWBA] shall not enter into contracts with agencies in California and Nevada for the storage of water on their behalf until both of the following occur:
>
> 1. Regulations are in effect, promulgated by the secretary of the interior of the United States, that facilitate and allow the contractual distribution of unused entitlement under article II(B)(6) of the decree.
>
> 2. The director [of the Department of Water Resources] finds that the rules promulgated by the secretary of the interior adequately protect this state's rights to Colorado river water, as those rights are defined by the decree.

A.R.S. § 45-2427(C). As Director of the Department of Water Resources (ADWR), you have requested a legal opinion on whether these statutory criteria have been met.

The State of Arizona's rights to the waters of the Colorado River are defined by a body of laws, treaties and agreements known as the Law of the River. A principal component of the Law of the River is the United States Supreme Court's opinion in *Arizona v. California*, 373 U.S. 546 (1963) and the decree entered in support of that opinion, 376 U.S. 340 (1964)(hereinafter "decree"). The *Arizona v. California* decree, as amended and supplemented, is the "decree" referred to in the statute quoted above.

Are Regulations in Effect?

The first question is whether "Regulations are in effect, promulgated by the secretary of the interior of the United States, that facilitate and allow the contractual distribution of unused entitlement under article II(B)(6) of the decree." There are two parts to this question. First, are regulations in *effect*? Second, do those regulations facilitate and allow contractual distribution of unused entitlement under article II(B)(6)?

On November 1, 1999, the Secretary of the Interior, through the Bureau of Reclamation, adopted a final rule entitled Offstream Storage of Colorado River Water and Development of Intentionally Created Unused Apportionment in the Lower Division States. 43 CFR Part 414, 64 Federal Register 58986 (hereinafter the "Offstream Storage Rule"). This rule declares that the regulations shall become effective on December 1, 1999. Nevertheless, federal rules are subject to the provisions of the Congressional Review of Agency Rulemaking Act, 5 U.S.C. § 801 *et seq.*, which is part of the Small Business Regulatory Enforcement Fairness Act of 1996. This act requires a report to each House of Congress and the Comptroller General describing the rule and its proposed effective date. All covered rules are subject to disapproval by Congress for at least 60 days after this report is filed, and longer if the report is filed within 60 days of the adjournment of Congress. In this case, this provision may extend the disapproval deadline well into calendar year 2000.

The Congressional Review of Agency Rulemaking Act draws a distinction between "major" rules and all other rules. Major rules cannot take effect until 60 days after the date of final promulgation. Other rules may take effect "as provided by law" which, under the Administrative Procedure Act, is 30 days after the date the rule is published in the Federal Register in final form. 5 U.S.C. § 553(d). In the declaration of final adoption of the Offstream Storage Rule, the Secretary of the Interior found that the rule was not a major rule under 5 U.S.C. § 804(2). This finding is supported by the economic analysis included in the declaration. *See* 64 Fed. Reg. at 59005. Thus, this rule may take effect 30 days after reported to Congress and published in the Federal Register. It is still subject to disapproval by Congress, but that does not toll the effective date. *See generally* Rosenberg, *Congressional Review of Agency Rulemaking: A Brief Overview and Assessment after Three Years*, Congressional Research Service, March 31, 1999.

We have requested written confirmation from the Solicitor of the United States Department of the Interior that all conditions of the Congressional Review of Agency Rulemaking Act have been met. The Solicitor has responded, indicating that the rule is fully in force. A copy of this letter is attached. Therefore, it is my conclusion that the Offstream Storage Rule is in effect as of December 1, 1999, and has the force and effect of law thereafter, notwithstanding the continuing legal right of Congress to disapprove this rule when it reconvenes in 2000.

Do the Regulations Facilitate and Allow the Contractual Distribution of Unused Entitlement under Article II(B)(6) of the Decree?

The second part of the first question is very specific, and was intended by the Legislature to ensure that any regulation purporting to allow interstate banking of Colorado River water would rely on Arizona's interpretation of the authority of the Secretary of the Interior under Article II(B)(6) of the decree. Because of its importance, this provision of the decree is quoted here:

> If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that delivery contracts for the full amount of the state's apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

376 U.S. 340, Article II(B)(6). Article II(B)(6) is unique, because it is the only authority in the decree by which the Secretary may release water within the apportionment of one Lower Division State for use in another Lower Division State. Arizona has based its interstate banking proposal on the idea that one Lower Division State can intentionally create unused apportionment by forbearing from the consumptive use of a certain authorized quantity. Once created, this unused apportionment may be released by the Secretary to another Lower Division State, even if that release causes the receiving state to exceed its otherwise lawful apportionment. Arizona has consistently maintained that the Secretary may only deliver water to a Lower Division state in excess of its decreed apportionment (including its percentage of declared surplus) under the authority of Article II(B)(6). From this historical interpretation of the decree, it is evident why the State Legislature required that regulations be in effect which *facilitate and allow contractual distribution of unused entitlement under article II(B)(6) of the decree.*

The preliminary draft of the Proposed Rule on Offstream Storage of Colorado River Water and Interstate Redemption of Storage Credits in the Lower Division States, 62 Fed. Reg. 68492 (December 31, 1997)(hereinafter "draft rule") did reference Article II(B)(6) in its discussion of the authority under which the Secretary would administer offstream banking, but both AWBA and ADWR expressed concern in their comments that the draft regulations could be construed as either misunderstanding or expanding the Secretary's authority under that Article. In fact, the draft rule seemed to misapprehend the significance of the storing state intentionally creating unused apportionment that could *then be delivered by the Secretary under Article II(B)(6).* Instead, the draft rule focused on the storing state creating "credits" which could then be "redeemed" by the consuming state under the supervision of the Secretary. There is no authority under the decree for the Secretary to create a system of "credits" for water to be delivered in the future. The express terms of Article II(B)(6) prohibit such a scheme.

The final Offstream Storage Rule corrects this misapprehension by expressly acknowledging in § 414.3(a)(10) that the Storage and Interstate Release Agreement shall identify the quantity, the means, and the entity by which intentionally created unused apportionment (ICUA) has been or will be developed. The storing entity shall then ask the Secretary to make that ICUA available to the consuming entity under Article II(B)(6) of the decree. This correction is noted throughout the final Offstream Storage Rule, and each mention of "credits" and "redemption" has been deleted and replaced with reference to the creation of ICUA by a storing entity and the delivery of that ICUA by the Secretary under the terms of the Storage and Interstate Release Agreement.

More specifically, the final Offstream Storage Rule provides that the *agreement* must specify that the Secretary will release ICUA in accordance with the request of a consuming entity and only for use by the consuming entity and not for use by other entitlement holders. § 414.3(a)(12). Thus, the regulation facilitates and allows the *contractual* distribution of unused entitlement under Article II(B)(6) as required by state law. A.R.S. § 45-2427(C).

For the foregoing reasons, it is determined here that the first question has been answered in the affirmative; namely, that there are regulations in effect, promulgated by the Secretary of the Interior, that facilitate and allow the contractual distribution of unused entitlement under Article II(B)(6) of the decree.

Do the Regulations Adequately Protect Arizona's Rights to Colorado River Water as Those Rights are Defined by the Decree?

Arizona has zealously defended its rights in the Colorado River and has been successful in maintaining its rights to this important resource in the development of the Law of the River. There are, however, inherent risks in defending rights to a scarce and valuable water supply. The Law of the River is complex and is subject to varying interpretations.

Undoubtedly, there will be challenges to Arizona's rights in the coming years. Arizona cannot isolate itself from these challenges by the adoption of this rule. The relevant inquiry with respect to the new Offstream Storage Rule is whether anything contained in that rule compromises Arizona's position on its interpretation of the Law of the River.

The principal point of focus on this issue is the definition of "Authorized Entity." The decree implements a congressional allocation of Colorado River water to the *states* of the Lower Division. This has been interpreted by our Legislature as a sovereign right of the State. Any contract purporting to affect this sovereign right is not valid unless approved by a concurrent resolution of the Legislature. A.R.S. § 45-106. Thus, at least in Arizona, only an entity expressly authorized by *state statute* can "forbear" a portion of Arizona's apportionment, because that entity is effectively forbearing water apportioned to the state. Arizona has been particularly insistent that the Offstream Storage Rule recognize this important principle, and make clear that this rule will only permit contractual distribution of unused entitlement by a *state authorized entity.*

Definition of Authorized Entity

The draft rule defined "Authorized Entity" as

> "[A] State water banking authority *or other entity of a Lower Division State holding entitlements to Colorado River water*, expressly authorized pursuant to the applicable laws of Lower Division States to:
>
> * * *
>
> (4) Develop or redeem storage credits for the benefit of an authorized entity in another Lower Division State.

The draft rule also defined a Colorado River "entitlement" as an authorization to beneficially use Colorado River water, and suggested that an entitlement holder could have "unused entitlement" available for storage. Moreover, the preamble to the draft rule stated that the term "Authorized Entity" should be "defined 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." Such a broad definition was unacceptable to Arizona, and ADWR commented strongly that the statement in the preamble should be deleted and the definition of Authorized Entity amended so as to make clear that the entity was authorized by the State to forbear a portion of the State's apportionment.

These comments were accepted in large part. The definition of "Authorized Entity" was amended and split into two definitions, one for a "storing entity" and one for a

"consuming entity." The "storing entity" must be "expressly authorized by the laws of that State to enter into Storage and Interstate Release Agreements and develop ICUA." The reference to the broad construction of Authorized Entity in the preamble was deleted and replaced with the following comment:

> We reiterate that we fully expect the Lower Division States to enact measures that will allow the tribes to participate in opportunities covered by this rule. Moreover, this rule does not specifically address or preclude independent actions by the Secretary regarding tribal storage and water transfer activities under other authorities.

64 Fed. Reg. at 58990. Although the definition of "entitlement" was not materially changed, the definition of "federal entitlement holder" was deleted and the emphasis on authorized entity in a storing state was correctly shifted from that of an entity authorized to use Colorado River water to that of an entity empowered by state law to forbear a state's apportionment.

With these changes, it is concluded that the final Offstream Storage Rule adequately acknowledges that Colorado River water apportionments under the decree are apportionments to the individual states. Thus, forbearance of that apportionment in the implementation of an Interstate Storage and Release Agreement requires express authority under state law.

Creation of ICUA

Arizona has always believed that the essence of the interstate banking agreement was not the storage of water but the eventual forbearance from future diversions and the commitment by the Secretary to deliver the intentionally created unused apportionment to the consuming entity. Nevertheless, Arizona has also always believed that the actual storage of water under an interstate banking agreement was critical. In Arizona, this is beneficial because the state has physical possession of the stored water, thus protecting our water users from shortage. Also, requiring actual storage of water in an interstate transaction precludes sham transactions where water is allegedly "stored" but in reality is paid back only by curtailing a future use.

This reasoning led the AWBA to comment on the draft rules that the only allowable method of creating ICUA should be the physical recovery of previously stored water. This suggestion was not adopted in the final rule. Instead, the final rule requires that the Storage and Interstate Release Agreement contain certain basic elements, including the method by which ICUA will be created:

(8) The agreement must specify that when the storing entity receives a request to develop a specific quantity of ICUA:

(i) It will ensure that the Storing State's consumptive use of Colorado River water will be decreased by a quantity sufficient to develop the requested quantity of ICUA; and
(ii) Any actions that the storing entity takes will be consistent with its State's laws.

(9) The agreement must include a description of:

(i) The actions the authorized entity will take to develop ICUA;
(ii) Potential actions to decrease the authorized entity's consumptive use of Colorado River water;
(iii) The means by which the development of the ICUA will be enforceable by the storing entity; and
(iv) The notice given to entitlement holders, including Indian tribes, of opportunities to participate in development of this ICUA.

Offstream Storage Rule § 414.3(a)(8) and (9). Thus, it is clear that an arrangement other than the recovery of stored water may suffice under the final rule for the development of ICUA. While this is not the preferred limitation advocated by the AWBA, the latitude allowed is not overly detrimental to Arizona's interests for two reasons.

First, the final rule does appear to require the actual storage of water as a component of the Storage and Interstate Release Agreement. Particularly, § 414.3(a)(1) provides that the agreement "must specify the quantity of Colorado River water to be stored, the Lower Division State in which it is to be stored, the entity(ies) that will store the water, and the facility(ies) in which it will be stored." Because the agreement is dependent upon the initial storage of water, which entails expense and the use of physical infrastructure, the likelihood of a sham transaction is greatly diminished.

Second, the final rule does require explicit description of the methods of creating ICUA at the time the agreement is formed. § 414.3(a)(9). The rule also requires certification to the Secretary that ICUA has been developed in accordance with the agreement. §414.3 (a)(15). Arizona will be able to comment on any Storage and Interstate Release Agreement prepared under this rule as part of the Secretary's mandatory environmental

review. It is likely that any agreement that allowed or sanctioned a sham transaction would be defeated either through comment during the review or legal action after the fact.

For the foregoing reasons, I conclude that the final Offstream Storage Rule adequately protects Arizona's interests against sham storage transactions based on the mere forbearance of a use without actual storage of water and creation of ICUA.

Decree Accounting and Administration

As quoted above, Article II(B)(6) of the decree allows the Secretary to release apportioned but unused water for consumptive use in other states. It does not on its face either allow or prohibit the release of apportioned but unused water to a particular state or a particular user within a state. The traditional use of Article II(B)(6) has been for the Secretary to release water for consumptive use within the State of California under the California Seven Party Agreement of 1931, because it has been the only state with excess demand. In an interstate banking transaction, however, it is very important that the Secretary exercise the discretion granted under Article II(B)(6) to release water to a *certain* state and, perhaps more importantly, to release water to a certain *entity* within that state. This constraint on the Secretary's discretion is a modification to the Law of the River[1] and is the principal reason why Arizona believed that a rule was necessary to make interstate banking transactions feasible.

The specific release of water under Article II(B)(6) in support of an interstate transaction may occur on the storing end of the transaction, and certainly will occur on the recovery end of the transaction. For example, on the storing end, the rule provides:

> If the water to be stored will be unused apportionment of the Consuming State, the agreement must acknowledge that any unused apportionment of the Consuming State may be made available from the Consuming State by the Secretary to the Storing State only in accordance with Article II(B)(6) of the Decree. If unused apportionment from the Consuming State is to be stored, the Secretary will make the unused apportionment available to the storing entity in accordance with the terms of a Storage and Interstate Release Agreement and will not make that water available to other entitlement holders.

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[1] The final rule specifically provides that this "[P]art does not . . . Change or expand existing authorities under the body of law known as the 'Law of the River'. . . ." The rule itself is a regulation that has the force and effect of law, however, and directly expands the body of law known as the Law of the River by prescribing certain limitations on the Secretary's discretion under Article II(B)(6).

Offstream Storage Rule § 414.3(a)(3). In a typical transaction, Nevada may wish to store some of its currently unused apportionment in Arizona under this rule. If the Secretary agreed to such a transaction, he would effectively be binding himself to release "such apportioned but unused water" to the State of Arizona, as opposed to perhaps releasing that water to the State of California or, derivatively, other entitlement holders in the State of California. But can he agree to release such unused water directly to the AWBA as the storing entity? The rule appears to sanction this type of release when it indicates that the Secretary will make the unused apportionment of the Consuming State available to the storing entity. To the extent that the rule does purport to grant the Secretary this authority, the rule may be inconsistent with existing contractual rights of Colorado River entitlement holders within any given Lower Division state.

In Arizona, it is doubtful that a Storage and Interstate Release Agreement will ever be structured so that another state's unused apportionment is made available directly to AWBA. Instead, it is likely that the agreement will specify that any water to be used for interstate banking, which may include another state's unused apportionment, shall be diverted by the Central Arizona Water Conservation District (CAWCD) under CAWCD's fourth priority Section 5 contract[2] and delivered to AWBA under the CAWCD/AWBA/ADWR Intergovernmental Agreement (IGA).[3] Reciprocally, we may insist that any water to be delivered to a consuming entity be released by the Secretary to the Consuming State. Water so released may then be diverted by the appropriate consuming entity under its Section 5 contract in accordance with internal state priorities.

By avoiding the issue in our own contracts, Arizona will reserve its rights to challenge a Storage and Interstate Release Agreement that purports to allow the Secretary to pass over existing entitlement holders in priority and deliver water to a specific entity without first offering that water to the senior users. Meanwhile, Arizona may take the rule at its face value, which indicates that any release of water shall be in accordance with Article II(B)(6) of the decree.

Anticipatory Release

The draft rule provided that a consuming state would be entitled to recover water in years when unused apportionment had been created by the storing state. AWBA commented that the rule should be amended to allow the storing state to certify to the Secretary that ICUA has been *or will be* created, thus allowing the creation of ICUA and the delivery of banked water to occur in the same year. This suggestion was adopted in the final rule,

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[2] Section 5 contracts refer to contracts for the delivery of Colorado River water from the reservoirs operated by the Secretary of the Interior, issued under authority of Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617d.

[3] The IGA was executed by the AWBA, CAWCD and ADWR in December, 1996 and filed with the Arizona Secretary of State on December 30, 1996.

which allows the Secretary to release ICUA before actual development if the storing entity certifies to the Secretary's satisfaction that the ICUA will in fact be developed in the same year as the anticipatory release. Offstream Storage Rule § 414.3(f).

As a practical matter, the anticipatory release of ICUA may have an additional benefit to Arizona. It prevents a situation where the storing entity creates ICUA in anticipation of a request by the consuming entity, but for whatever reason, such as an unanticipated surplus on the system, the consuming entity does not request delivery. Under the accounting procedures in the final rule, the Secretary's records of the quantity of water stored will only be reduced when the ICUA is *released* to the consuming entity. Offstream Storage Rule § 414.4(b)(3). Thus, it may behoove Arizona to utilize anticipatory release of ICUA as the principal means by which ICUA is released to the consuming entity.

Requirement of a Contractual Entitlement for AWBA

During the course of comments between the draft rule and final rule, one of the major issues that arose was the concern expressed by the Secretary that AWBA would need a contract with the Secretary for delivery of Colorado River water under Section 5 of the Boulder Canyon Project Act. In fact, the Secretary reopened the comment period on the rule by announcement in the Federal Register on September 21, 1998 to address this specific issue. AWBA commented that it did not need a contract with the Secretary, because it was legally receiving its water from CAWCD under the IGA. Furthermore, AWBA indicated that it would not accept a Section 5 contract from the Secretary for interstate banking purposes and thereby draw a distinction between AWBA's *intrastate* and interstate transactions.

The comments received by the Secretary during the reopening eventually led to a modification of the rule, but the final rule still contains the requirement that any release or diversion of Colorado River water for storage must be supported by a Section 5 contract. Offstream Storage Rule § 414.3(e). In response to Arizona's concerns, the rule now also provides:

> An authorized entity may satisfy the requirement of this section through a direct contract with the Secretary. An authorized entity also may satisfy the Section 5 requirement of the BCPA, for purposes of this part, through a valid subcontract with an entitlement holder that is authorized by the Secretary to subcontract for the delivery of all or a portion of its entitlement.

Offstream Storage Rule § 414.3(e)(1). Arizona believes that CAWCD does have the right to subcontract for water deliveries under its Section 5 contract, but there has been a

dispute with the Secretary during the last several years whether certain such subcontracts are valid under the requirements of CAWCD's 1988 Master Repayment Contract and the Colorado River Basin Project Act, 43 U.S.C. § 1501 *et seq.* There are currently negotiations underway that would resolve this dispute, and it is hoped by all parties concerned that the negotiations will be successful. If they are not, it is anticipated that the Secretary will continue to maintain that certain contracts issued by CAWCD are invalid. It remains to be seen whether the Secretary will assert that the IGA is also invalid.

A decision by the Secretary will be required if a proposed Storage and Interstate Release Agreement is negotiated, because the Secretary must be a party to that agreement and, by the rule, must determine whether AWBA meets the Section 5 requirement. If the negotiations fail and the Secretary refuses to acknowledge that the IGA is a valid subcontract from CAWCD, it is doubtful that Arizona will participate in interstate banking under the Offstream Storage Rule.

Conclusion

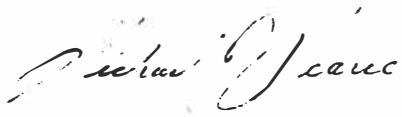
Overall, the final Offstream Storage Rule authorizes the creation of an interstate banking agreement along the same conceptual lines proposed by AWBA in 1996. The changes made in the draft rule in response to ADWR and AWBA comments have removed significant ambiguity and have returned the rule to the concept of a *contractual* distribution of unused entitlement under Article II(B)(6) of the decree. This fundamental change insures that Arizona will be able to maintain its historic interpretation of the Secretary's authority under the decree.

Undoubtedly, there are issues that Arizona would have liked to see resolved by adoption of this rule that are not in fact resolved. Similarly, there are statements in the preamble and the rule with which Arizona may disagree. The critical question, however, is whether the pursuit and eventual execution of a Storage and Interstate Release Agreement under this rule will require Arizona to compromise its legal position on the interpretation of the Law of the River. The legal opinion offered here is that it will not, if the agreement is carefully drafted.

. . . . .
. . . . .
. . . . .

For the foregoing reasons, I conclude that the statutory requirements of A.R.S. § 45-2427(C) are satisfied. If AWBA so desires, it is statutorily authorized to negotiate and execute a Storage and Interstate Release Agreement under 43 C.F.R. Part 414, Offstream Storage of Colorado River Water; Development and Release of Intentionally Created Unused Apportionment in the Lower Division States, as effective December 1, 1999.

Sincerely,



Michael J. Pearce
Chief Counsel

c: Arizona Water Banking Authority
Mr. Tim Henley, AWBA Manager

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

November 29, 1999 DEC - 7 1999

Mr. Michael J. Pearce
Chief Counsel
Arizona Department of Water Resources
500 North Third Street
Phoenix, Arizona 85004

Re: Effective Date of regulations entitled *Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States* (rule), 43 C.F.R. Part 414 .

Dear Mr. Pearce:

This is in response to your letter of November 12, 1999, inquiring as to whether there is an additional waiting period beyond December 1, 1999, before the Secretary can approve a transaction under the rule. The rule is fully effective as of December 1, 1999, and the Secretary may execute transactions under the rule as of this date. Your letter correctly states that under the Congressional Review of Agency Rulemaking Act, 5 U.S.C. § 801, *et seq*., all federal regulations are subject to congressional review. This congressional review period does not, however, affect the date upon which a regulation becomes effective. Thus, although the rule remains subject to congressional review, it is fully in force as of December 1, 1999.

We hope that this alleviates your concerns over the effective date of the rule. If there are any other questions or concerns about the rule that arise during your review, please do not hesitate to let me know.

Sincerely,

John D. Leshy
Solicitor

PRINCIPLES OF NEGOTIATION (BLUE REQUIRED BY ARS – Authority members reaction to issues)

- **Agreements**

STORAGE AND INTERSTATE RELEASE AGREEMENTS (required by Rule)

Three party agreement between AWBA, USBR and Authorized Entity in the Consuming State

INTERSTATE STORAGE AGREEMENT (business arrangements)

Two party agreement between the AWBA and an authorized entity in the consuming state

ADDITIONAL AGREEMENTS between AWBA and OTHER ARIZONA ENTITIES (as required)

Water Delivery Agreement -- existing CAWCD/ADWR/AWBA Inter-governmental Agreement

Storage Facility Agreements -- existing or new agreements with storage facility operators

Recovery Facility Agreement -- new agreement to be negotiated

Intentionally Created Unused Apportionment Agreement -- new agreement -- potentially a three party agreement between the AWBA, CAWCD and another Arizona entitlement holder

- **Issues**

Term

Provisions requiring the consuming state to transition from Intentionally Created Unused Apportionment to other supplies.

Authority members agree with this position.

Storage Capacity

In-state first vs. scheduled use

Authority members felt that Arizona needs have to be met first.

Annual capacity vs. total capacity

Priority among consuming states

First come first serve vs. shared availability

They had no position on priority between consuming states.

Recovery Capacity

Agreements

AWBA agreement with CAP vs. CAP subcontractor

AWBA agreement with storage facility operator with exchange agreement with CAP

Authority members are undecided on this issue.

Normal or Surplus years

100,000 AF

Authority members not ready to support changing statute, wait see if change needed.

Priority among consuming states

First come first serve vs. shared availability

Authority members had no position on priority between consuming states

- Shortage years
  - Is recovery for interstate available?
  - Authority members felt that Arizona needs have to be met first.
  - Quantity
    - Meet shortage reduction vs. demand
  - Priority among consuming states
    - First come first serve vs. shared availability

Storage Facilities

- Existing facilities vs. new facilities
- All facilities vs. specific facilities
- Authority members felt separate new facilities best option.

Recovery Facilities

- Specific facilities
- Authority members felt separate new facilities best option.
- AWBA agreement with CAWCD vs. others

Cost

- Based on water diverted vs. water stored
- Acquiring Colorado River water -- approximately $0.25/af
- Delivery through CAP-- approximately $130/af includes the following
  - Capital Charge -- $54/af
  - Fixed OM&R -- approximately $28/af
  - Pumping Energy -- approximately $39/af
  - In-lieu payment -- approximately $9/af (water protection fund)
- Storage Facility
  - AWBA average vs. facility specific
  - Underground Storage Facilities -- approximately $10 to $20
  - New storage facility -- greater than $20
  - Recovery of capital cost at State Demo Facilities
- Creation of ICUA
  - Recovery
    - Up front vs. at time of recovery
    - Future environmental cost
- AWBA Administration
  - Rate per acre-foot vs. annual fee
  - CAWCD/ADWR administration vs. additional AWBA staff
  - Water management costs
  - Other cost

Authority members gave no specific direction on cost issues saw them as business arrangements to be worked out, they did indicate that Arizona should not be at risk for any costs.

Billing and Payments

- Billing
  - In advance of storage and recovery
  - Monthly vs. annual
- Payments
  - Storage
    - In advance of storage and recovery
    - Monthly vs. annual
- AWBA Administration
  - Monthly vs. annual

Authority members gave no specific direction on billing and payment issues.

PRINCIPLES OF NEGOTIATION (BLUE REQUIRED BY ARS)

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Storage Capacity

In-state first vs. scheduled use

Annual capacity vs. total capacity

Priority among consuming states

First come first serve vs. shared availability

Recovery Capacity

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Normal or Surplus years

100,000 AF

Priority among consuming states

First come first serve vs. shared availability

Shortage years

Is recovery for interstate available?

Quantity

Meet shortage reduction vs. demand

Priority among consuming states

First come first serve vs. shared availability

- Storage Facilities
  - Existing facilities vs. new facilities
  - All facilities vs. specific facilities
- Recovery Facilities
  - Specific facilities
  - AWBA agreement with CAWCD vs. others
- Cost
  - Based on water diverted vs. water stored
  - Acquiring Colorado River water -- approximately $0.25/af
  - Delivery through CAP-- approximately $130/af includes the following
    - Capital Charge -- $54/af
    - Fixed OM&R -- approximately $28/af
    - Pumping Energy -- approximately $39/af
    - In-lieu payment -- approximately $9/af (water protection fund)
  - Storage Facility
    - AWBA average vs. facility specific
    - Underground Storage Facilities -- approximately $10 to $20
    - New storage facility -- greater than $20
    - Recovery of capitol cost at State Demo Facilities
  - Creation of ICUA
    - Recovery
      - Up front vs. at time of recovery
      - Future environmental cost
  - AWBA Administration
    - Rate per acre foot vs. annual fee
    - CAWCD/ADWR administration vs. additional AWBA staff
    - Water management costs
    - Other cost
- Billing and Payments
  - Billing
    - In advance of storage and recovery
    - Monthly vs. annual
  - Payments
    - Storage
      - In advance of storage and recovery
      - Monthly vs. annual
  - AWBA Administration
    - Monthly vs. annual

NEGOTIATION PROCESS

January 26, 2000 AWBA meeting

ADWR Director's determination

Discuss principles for negotiation

Direction to negotiate Storage and Interstate Release Agreements

Establish negotiating team

Recommendation -- Tim Henley (AWBA Manager)
-- Mike Pearce (ADWR Chief Legal)
-- With assistance from ADWR legal staff as required

- Press Release Announcing the ADWR Director's determination concerning the Rule and the decision of the AWBA to negotiate Storage and Interstate Release Agreements pursuant to the Rule.
- AWBA draft and send letter to the Governors of the other two Lower Division States and the Regional Director for the Bureau of Reclamation's Lower Colorado River Regional Office. The letter would indicate that the AWBA is prepared to negotiate Storage and Interstate Release Agreements with Authorized Entities within their states and with the Secretary of the Interior.

February 2000

- Meet with CAWCD to discuss their role and begin discussion on the mechanism for developing Intentionally Created Unused Apportionment.
- Negotiating team meets with interested Authorized Entities from the consuming states. Jointly develop preliminary principles of agreement.
- Jointly meet with Reclamation to discuss preliminary principles of agreement and develop final principles of agreement.

March 15, 2000 AWBA meeting

Identify interested Authorized Entities

Discuss CAWCD role

Discuss principles of agreement

- The negotiating team meets with each interested Authorized Entity and Reclamation to negotiate specific agreements based on principles.
- Continue meeting with CAWCD to develop mechanism for developing Intentionally Created Unused Apportionment.

June 21, 2000 AWBA meeting

Further review and direction, possible approval of agreements if available.

REFERENCE TITLE: multi-county water conservation districts; condemnation

State of Arizona
Senate
Forty-fourth Legislature
Second Regular Session
2000

SB 1364

Introduced by
Senators Bowers, Arzberger, Guenther, Cirillo: Bennett, Brown, Hamilton

AN ACT

AMENDING SECTION 48-3713, ARIZONA REVISED STATUTES; AMENDING TITLE 48, CHAPTER 22, ARTICLE 1, ARIZONA REVISED STATUTES, BY ADDING SECTION 48-3719; PROVIDING FOR THE DELAYED REPEAL OF SECTION 48-3719, ARIZONA REVISED STATUTES; RELATING TO MULTI-COUNTY WATER CONSERVATION DISTRICTS.

(TEXT OF BILL BEGINS ON NEXT PAGE)

1

Be it enacted by the Legislature of the State of Arizona:

Section 1. Section 48-3713, Arizona Revised Statutes, is amended to read:

48-3713. Powers of district

A. The district, acting through its board, shall:

1. Enter into a contract or contracts with the secretary to accomplish the purposes of this chapter.

2. Provide for the repayment of construction costs, interest and annual operation, maintenance and replacement costs allocated to the district and payment of administrative costs and expenses of the district.

3. Levy an annual tax to defray district costs and expenses and to effect repayment of a portion of the district's obligation to the United States. Such tax levy shall not exceed ten cents per each one hundred dollars of assessed valuation of the taxable property within the district.

4. Establish and cause to be collected charges for water consistent with federal reclamation law and contracts entered into between the district and the secretary pursuant to this chapter.

5. Cooperate and contract with the secretary to carry out the provisions of the reclamation act of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto, including the Colorado river basin project act (82 Stat. 885).

6. Establish and maintain reserve accounts in amounts which may be required by any contract between the district and the secretary and in such additional amounts as may be deemed necessary to accomplish the purposes of this chapter.

7. Coordinate and cooperate with the Arizona water banking authority.

B. The district, acting through its board, may:

1. Contract with the United States to be the operating agent of the central Arizona project and to maintain all or portions of the project and subcontract with others for the operation or maintenance of portions of the project.

2. Acquire in any lawful manner real and personal property of every kind necessary or convenient for the uses and purposes of the district.

3. Acquire electricity or other forms of energy necessary for the operation of the central Arizona project.

4. Contract for or perform feasibility studies of water storage, storage facilities and recovery wells.

5. Acquire, develop, construct, operate, maintain and acquire permits for water storage, storage facilities and recovery wells pursuant to title 45, chapter 3.1 using surplus central Arizona project water.

6. Enter into contracts to acquire, permit, develop, construct, operate and maintain water storage, storage facilities and recovery wells with any person pursuant to title 45, chapter 3.1. Such projects may utilize water, including central Arizona project water, which such persons have the right to store pursuant to title 45, chapter 3.1.

7. Plan, analyze, propose, apply for, construct, operate, maintain and dismantle state demonstration projects for water storage and recovery under title 45, chapter 3.1, article 6.

8. Acquire real property for state demonstration projects for water storage and recovery under title 45, chapter 3.1 by purchase, lease, donation, dedication, exchange, CONDEMNATION AS PRESCRIBED BY SECTION 48-3719 or other lawful means in areas suitable for demonstration projects for water storage and recovery of state water in counties in which the district has water transportation facilities.

9. Advance monies necessary for the installation, construction, repair, maintenance or replacement of capital improvements related to any water storage, storage facilities and recovery wells or any other replenishment activities of the district undertaken pursuant to article 4 of this chapter. Monies advanced under this paragraph bear interest as determined by the board. Repayment of the advances shall be amortized over the useful life of the capital improvements, as determined by the board. Utilization of excess capacity in a state demonstration project for replenishment purposes pursuant to section 48-3772, subsection B, paragraph 8 does not constitute the advancement of monies under this paragraph.

10. Advance monies for the payment of the operation and administrative costs and expenses of the district relating to performance of the groundwater replenishment obligations under article 4 of this chapter and including reasonable reserves. Monies advanced under this paragraph shall bear interest as determined by the board. Repayment of the advances may be amortized over a reasonable period, as determined by the board.

11. Assign to the account of the district at fair value long-term storage credits, as defined in section 45-802.01, held by the district.

12. Provide technical and operational support to the Arizona water banking authority and shall be reimbursed by the Arizona water banking authority for providing that support.

C. The authority granted under title 45, chapter 3.1, article 6 does not authorize the district to withdraw and use groundwater that exists naturally in the basin in which the stored water is located. The authority provided in subsection B, paragraph 7 of this section is in addition to and distinct from any authority granted to the district by subsection B, paragraphs 5 and 6 of this section.

D. The functions of the district under subsection B, paragraph 5 of this section may be performed on behalf of the district by other persons under contract with the district.

E. The district may enter into and carry out subcontracts with water users for the delivery of water through the facilities of the central Arizona project. Such contracts as may be entered into between the district and the secretary and between the district and water users shall be subject to the provisions of the Colorado river basin project act (P.L. 90-537; 82 Stat. 885). Before entering into such contracts the district shall determine that

the proposed contract or proposed amendment, and all related exhibits and agreements, have been submitted to the director as required by section 45-107, subsection D.

F. The district may not sell, resell, deliver or distribute electricity to others. ~~However,~~ The district may~~,~~ in conjunction with any other marketing entity or entities~~,~~ be a marketing entity under section 107 of the Hoover power plant act of 1984 (P.L. 98-381; 98 Stat. 1333) solely for the limited purposes of establishing and collecting the additional rate components authorized by that act and may enter into contracts for that purpose. This subsection does not limit the authority of the district under subsection B, paragraph 3 of this section and does not prohibit the United States western area power administration or the Arizona power authority from making incidental disposition of power acquired by the district for purposes of operating the central Arizona project but not needed by the district for such purposes.

Sec. 2. Title 48, chapter 22, article 1, Arizona Revised Statutes, is amended by adding section 48-3719, to read:

48-3719. Eminent domain; demonstration projects; order for possession

A. THE DISTRICT MAY ACQUIRE REAL PROPERTY THROUGH AN EMINENT DOMAIN ACTION UNDER TITLE 12, CHAPTER 8 FOR PURPOSES OF A DEMONSTRATION PROJECT AUTHORIZED PURSUANT TO TITLE 45, CHAPTER 3.1, ARTICLE 6 AND AS PRESCRIBED BY THIS SECTION.

B. THE DISTRICT SHALL NOT FILE A COMPLAINT IN EMINENT DOMAIN UNTIL AFTER THE DISTRICT HAS FILED AN APPLICATION FOR A PERMIT PURSUANT TO SECTION 45-893.01 WITH THE DEPARTMENT OF WATER RESOURCES AND AFTER THE DISTRICT BOARD BY RESOLUTION HAS DECLARED THAT THE PROPERTY TO BE ACQUIRED IS NECESSARY FOR THE PUBLIC PURPOSE OF THE DEMONSTRATION PROJECT. THE DISTRICT'S POWER OF EMINENT DOMAIN IS LIMITED TO REAL PROPERTY THAT IS LOCATED WITHIN TEN MILES OF THE CENTRAL ARIZONA PROJECT AQUEDUCT AND WITHIN THOSE COUNTIES THAT COMPRISE THE DISTRICT.

C. THE DISTRICT MAY NOT HAVE POSSESSION OF THE REAL PROPERTY UNTIL AN ORDER FOR POSSESSION HAS BEEN ENTERED PURSUANT TO SECTION 12-1116 AND THE DISTRICT HAS PAID ALL MONIES DUE UNDER THE ORDER.

Sec. 3. Delayed repeal

Section 48-3719, Arizona Revised Statutes, as added by this act, is repealed from and after December 31, 2005.

COVER SHEET

FAX

DATE: January 27, 2000

FROM: Nannette Flores

TO: Water Banking Authority Members

Tom Griffin - Vice Chairman	520-754-4622
Bill Chase - Secretary	602-495-5650
George Renner -	623-931-9250
Dick Walden -	520-791-2853
Representative Gail Griffin -	602-542-4030
Senator Ken Bennett -	602-542-3429

COMMENTS:

Arizona Water Banking Authority meeting has been re-scheduled. Please note that the meeting date and time will be Tuesday, March 14, 2000 at 10:00 a.m. at the Department of Water Resources, third floor conference room.

Major item of discussion will be interstate agreements.

If you have any questions please let me know.

Nan

From the desk of...
Nannette Flores
Administrative Assistant
Arizona Water Banking Authority
500 North Third Street
Phoenix AZ 85004

602-417-2418
Fax: 602-417-2401
Web Page: www.awba.state.az.us

COVER SHEET

FAX

DATE: January 27, 2000

FROM: Nannette Flores
Arizona Water Banking Authority

TO: **Interested Parties**

Larry Geare	480-905-8077
Mark Stratton	520-575-8454
David Mulkey	520-763-0180
Shane Leonard	480-988-9589
Bob Barrett	623-869-2678
Greg Bushner	480-517-9049
Tom McLean	480-966-9450
Karen LaMartina	520-791-3293
Maureen George	520-680-5430
Rock Cramer	520-669-2335

PLEASE NOTE:

The **Arizona Water Banking Authority meeting has been re-scheduled**.

The NEW meeting date and time will be Tuesday, March 14, 2000 at 10:00 a.m. at the Department of Water Resources, third floor conference room.

Major item of discussion will be interstate agreements.

If you have any questions please let me know.

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From the desk of...
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Administrative Assistant
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