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California Energy Commission
Docket Unit
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Subject: **GENESIS SOLAR, LLC BRIEF IN SUPPORT OF COMMITTEE SCOPING ORDER**
DOCKET NO. (09-AFC-8)

Enclosed for filing with the California Energy Commission is the original of **GENESIS SOLAR, LLC BRIEF IN SUPPORT OF COMMITTEE SCOPING ORDER,** for the Genesis Solar Energy Project Docket No. (09-AFC-8).

Sincerely,

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of: Application for Certification for the Genesis Solar Energy Project	**DOCKET NO. 09-AFC-8** **GENESIS SOLAR, LLC BRIEF IN SUPPORT OF COMMITTEE SCOPING ORDER**

On December 24, 2009, Genesis Solar, LLC (Genesis) filed a motion requesting the Committee adopt a Scoping Order that would provide direction to the parties relating to the environmental evaluation of the proposed Genesis Solar Energy Project (GSEP).

On January 7, 2010, the Committee issued an order setting forth a briefing schedule and hearing date to rule on the motion. That order specifically requests the following questions be addressed in this Opening Brief.

1. What is the Commission's Policy on use of water for power plant cooling purposes?
2. What is the legal affect of the US Bureau of Reclamation's Accounting Surface Methodology on groundwater pumping in the Chuckwalla Valley Groundwater Basin?
3. What is the legal standard for including future projects in the cumulative impact analysis under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA)?
4. Does the Commission have a policy of conserving water for use by projects that are not yet identified?

Staff and CURE filed opposition to the motion.

This motion was precipitated by Staff's position articulated at a recent data request workshop that because of the alleged complexity of the issues surrounding water, it is likely that Staff cannot complete its analysis in time for the GSEP to qualify for stimulus funding under the American Reinvestment and Recovery Act (ARRA) funding. We believe (a) much of the alleged of complexity is manufactured by staff by their ignoring well settled water policy and (b) five similarly situated solar thermal projects currently before the CEC

and relying on ARRA funding urgently require clarity as to the precise water policy as all plan to use water.

We wholeheartedly thank the Committee for scheduling the briefing and hearing of these important policy questions.

Below, we answer the listed questions and include a discussion of why these issues should not delay processing of the GSEP AFC and Request for a Right-of-Way.

I. COMMISSION POLICY ON WATER FOR POWER PLANT COOLING

In its 2003 Integrated Energy Policy Report (IEPR), the California Energy Commission (Commission) conducted hearings, performed research and evaluated the various water laws and policies in the State that would apply to the use of various types of water for power plant cooling. The purpose of the review was to develop a specific water policy that could be applied fairly and consistently to all projects.[1] Prior to the 2003 IEPR the Commission adjudicated water use for power plant cooling in every siting case and the results were not always consistent. The primary purpose of adopting a uniform water policy was to avoid the exact inconsistent application of policies and standards that is occurring in the GSEP proceeding. During the 2003 IEPR proceedings the Commission considered extensive comments from Staff, industry and the public and after careful review and distillation of various legal and policy requirements, the CEC adopted the following policy (2003 IEPR Water Policy).

> ***Consistent with the Board policy*** and the Warren-Alquist Act, the Energy Commission will approve the use of ***fresh water*** for ***cooling purposes*** by power plants which it licenses only where alternative water supply sources and alternative cooling technologies are shown to be "environmentally undesirable" or "economically unsound"[2] (***Emphasis added)***

A. Consistent with Board Policy

In adopting this policy, the Commission reviewed and relied upon its own statutory mandate as outlined in the Warren Alquist Act to conserve resources including water.[3] The Commission also considered the California State Constitution and policies articulated by the State Water Resources Control Board (Board) including Board Policy 75-58 (see Attachment A) among others. Board Policy 75-58 is the

[1] Blythe Energy Project Phase I (99-AFC-8) Commission Decision Pages 207 and 208, "The Commission continues to be concerned over the use of fresh water, a scarce resource in California, for power plant cooling purposes. The poor quality of the groundwater BEP will be using mitigates some of the concerns on this issue for this particular project. We note that the Commission s Energy Facility Siting and Environmental Committee is currently holding hearings on power plant siting constraints in California. One of the topics covered to date is the availability and use of water. The Commission intends to examine this issue further with the intention of providing clearer policy guidance to prospective applicants in the future."

[2] CEC 2003 Integrated Energy Policy Report, page 41

[3] Public Resources Code Section 25008

only policy articulated by the Board that is applicable to the use of fresh water for power plant cooling. Specifically, Principle 2 outlined in Board Policy 75-58 states:

> Where the Board has jurisdiction[4], use of ***fresh inland waters*** for ***powerplant cooling*** will be approved by the Board only when it is demonstrated that the use of ***other water supply sources*** or other methods of cooling would be environmentally undesirable or economically unsound. (***Emphasis added***)

It is clear from the use of similar language in the 2003 IEPR Water Policy that the CEC relied upon and adopted Board Policy 75-58 as its own. Indeed the Commission explicitly acknowledges the 2003 IEPR's reliance on 75-58,

> The Commission views Section 5 of the 2003 IEPR as a restatement of *existing* State water policy. We did not create new, substantive water policy in the 2003 IEPR.[5]

That the Commission's current water policy is a restatement of the water policies in 75-58 is made clear in the recently released *Best Management Practices And Guidance Manual: Desert Renewable Energy Projects, Revised Draft Staff Report*, December 2009 (the "Manual"). In the Manual, the Commission identifies specific action items that Applicants should consider in order to streamline processing and approval of proposed renewable projects in the California desert. The second action item directs the applicants to avoid using fresh groundwater or surface water for power plant cooling and includes reference to Board Policy 75-58's definition of "fresh water".[6]

Since the 2003 IEPR did not provide specific examples or further guidance on how its policy should be applied, a closer reading of Board Policy 75-58 is warranted and provides such guidance upon which the CEC relied when it crafted the CEC 2003 IEPR Policy.

B. Fresh Water

The 2003 IEPR Water Policy restricts only the use of "fresh" water for power plant cooling. Use of water that is not "fresh" water for power plant cooling is consistent with Commission water policy. Since the 2003 IEPR Policy was a restatement of Board Policy, it is important to examine Board Policy 75-58 more closely as it contains other guidance and specific definitions which are helpful in applying the principles to specific power plant siting cases.

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[4] If the Committee agrees that the SWRCB has jurisdiction over the use of surface water only, then the Policy would be inapplicable to GSEP's proposed use of groundwater.

[5] Blythe Energy Project Phase II (02-AFC-1) Commission Decision, Page 248

[6] Best Management Practices And Guidance Manual: Desert Renewable Energy Projects, Revised Draft Staff Report, December 2009, Page 3 including Footnote 1.

The First Principle outlined by the Board provides an order of water use for cooling.

> It is the Board's position that from a water quantity and quality standpoint the source of powerplant cooling water should come from the following sources in this order of priority depending on site specifics such as environmental, technical and economic feasibility consideration: (1) wastewater being discharged to the ocean, (2) ocean, (3) ***brackish water from natural sources or irrigation return flow,*** (4) inland wastewaters of low TDS, and (5) other inland waters.

So under 75-58 it is clear the Board prohibited the use of "fresh" inland water for cooling unless economically infeasible or otherwise environmentally unsound and permitted the uses of "other water supply sources" like brackish groundwater. Policy 75-58 defines "fresh inland water" and "brackish waters" as follows:

> Fresh Inland Waters – those inland waters which are suitable for use as a source of domestic, municipal, or agricultural water supply and which provide habitat for fish and wildlife.
>
> Brackish Waters – includes all waters with a salinity range of 1,000 to 30,000 mg/l and a chloride concentration range of 250 to 12,000 mg/l. The application of the term "brackish" to a water is not intended to imply that such water is no longer suitable for industrial or agricultural purposes.

In order for the GSEP to be using Fresh Inland Water, that water must provide habitat for fish and wildlife ***and*** must not be other waters as defined by the policy. The First Principle of the Board Policy specifically authorizes the use of brackish waters as the first type of non-ocean water that should be used for power plant cooling. Specifically brackish water has a salinity range as measured in total dissolved solids (TDS) of greater than 1000 mg/l. Since the Board Policy seeks to limit the use of "fresh water" and specifically authorizes the use of "brackish water", it is clear that the Board intended that brackish water be in that category of "other water supply sources" that would be allowed under the policy and therefore did not intend to include "brackish waters" as a subcategory of "fresh water" that could only be used when "other water supply sources or other methods of cooling would be environmentally undesirable or economically unsound."

The CEC 2003 IEPR, which was based upon Board Policy 75-58 and includes the term "fresh water", should be interpreted in the same manner as Board Policy 75-58. Therefore, where a power plant is using water for cooling purposes that has a salinity of greater than 1000 mg/l TDS, it is using brackish water and not fresh water. The use of this brackish water therefore avoids the use of fresh water and is consistent with the plain language and intent of both CEC 2003 IEPR Policy and Board Policy 75-58. This interpretation is also consistent with following Staff Assessment and CEC Decisions where the issue of water for power plant cooling was adjudicated and decided by the Commissioners.

1. RECENT CEC STAFF INTERPRETATIONS

Recently, the CEC Staff have asserted that "brackish water" must have a salinity of 3000 mg/l or greater to be consistent with the CEC 2003 IEPR Policy and Board Policy 75-58. Staff appears to support this assertion by inappropriately applying Board Policy 88-63. Board Policy 88-63 provides planning guidance to the Regional Water Quality Control Boards (RWQCB) within the State to include groundwater with a salinity range of less than 3000 mg/l to be potential sources of potable water in its planning decisions. In other words, when a RWQCB is preparing plans to protect against the degradation of water sources within its jurisdiction, it should adopt and implement policies to protect against the further degradation of groundwater with salinity as high as 3000 mg/l. This is a water *quality*-based policy, not a water *use* policy.

The distinction is straightforward and importantly the two policies are not mutually exclusive. Water of 3000 TDS or more has (a) immediate agricultural or industrial use and at the same time (b) is not so far degraded that it should be ignored from a long term planning perspective. To combine these two policies is an unwarranted extension of water use restriction by staff without legally mandated Policy and/or regulatory adoption hearings. Further, this flies in the face of the extensive hearings underpinning the policy of the 2003 IEPR Proceedings. CEC Staff's attempt to apply it to water use in power plant siting cases, when the Commission and Board have adopted specific decisions directly applicable to power plant water use, is inappropriate, not supported by any law and should be rejected.

Beacon Solar Energy Project, Final Staff Assessment

Most troubling to Genesis is that the Commission Staff issued a Final Staff Assessment in the Beacon Solar Energy Project (BSEP) in September 2009, less than 4 months ago. With respect to interpretation of the 2003 IEPR Water Policy, the Commission Staff stated the following:

> California Code of Regulations (CCR), Title 23, Division 3, Chapter 15, specifies Primary and Secondary Drinking Water Standards in terms of Maximum Contaminant Levels (MCLs). These MCLs include total dissolved solids (TDS) ranging from a recommended level of 500 mg/L or less to an upper level of 1,000 mg/L. Staff considered groundwater with TDS concentrations greater than or equal to 1,000 mg/L or more degraded relative to potential drinking water supplies. Groundwater ***TDS concentrations greater than or equal to 1,000 mg/L*** are therefore preferred as potential water supplies for power plant use ***because they comply with State Board and Energy Commission water use policies.***" Beacon FSA, Page 4.9-59 (***emphasis added***)

Staff therefore, in its final testimony, stated a position different from the position they have recently espoused for the GSEP. This determination by Staff is not fact dependant. Either 1000 mg/L TDS and greater water is not fresh water and complies with the 2003 IEPR Policy or it does not.

Staff further articulates in the Beacon FSA that application of the 1000 mg/L TDS standard produces a viable alternative water supply for power plant cooling.

> Evaluation of the test results indicate that an area of relatively high salinity groundwater (***groundwater with TDS concentrations equal to or greater than 1,000 mg/L***) occurs approximately 5 miles to the northeast of the BSEP site (Arciero Ranch well #33, which was a former high capacity agriculture well). A water sample from another well (#58 in **Soil and Water Table 5**) also had TDS concentrations greater than 1,000 mg/L. In the past, well 58 provided an agricultural water supply and its large casing diameter (20 inches) suggest it was likely a high producing well. Driller logs for wells constructed in this portion of the Koehn sub-basin report well pumping rates greater than 2,000 gpm, and these wells presumably can meet BSEP water requirements.
>
> ***Based on staff's review of existing information and on the well sampling program discussed above, staff believes that a viable source of degraded groundwater exists in the BSEP site vicinity that could be developed for project use***. Although the specific site where degraded groundwater is available in sufficient volume has not been identified, staff believes it is likely available and could be further investigated. If this alternative is selected, BSEP would have to provide additional information on project design and alignment of conveyance facilities so potential environmental impacts can be analyzed, and provide a copy of an agreement that would allow BSEP access to pump and use groundwater from this area. Additionally, BSEP would need to assess the groundwater storage and water level changes that could occur as a result of moving the project's pumping center to an alternative site. Beacon FSA; page 4.9-61 and 62. (***Emphasis added***)

Staff's selective application of the definition of "fresh" water is clearly arbitrary and capricious, unsupported by law or appropriate policy, and made even more so by the simple fact that not only has Staff applied different requirements for two different projects in less than four months, but did so for the same applicant.[7]

[7] Nextera Energy Resources is the parent company of the Applicant in both the Beacon and GSEP siting cases.

2. **COMMISSION DECISIONS**

The Commission has considered testimony and conducted extensive evidentiary hearings on power plant siting cases which considered the use of fresh water for power plant cooling for at least a decade. In fact, it was this extensive adjudicatory process that culminated in the CEC adopting the 2003 IEPR Policy to provide specific guidance and to avoid adjudicating water issues for each and every power plant siting case. A brief history of some of these Decisions is illustrative and supports the contention that CEC Staff should be prohibited from again attempting to rewrite State water policy as it applies to power plant siting cases.

Blythe Energy Project Phase I (BEP I)

The Blythe Energy Project Phase I (BEP I) decision was issued in March 2001 and prior to the issuance of the CEC 2003 IEPR Policy. Staff did, however, contend that the BEP should be prohibited from using "brackish water" with an average salinity of 1000 mg/l. Staff would not conclude the water was "brackish water" because the salinity was not as high as the 3000 mg/l level outlined as potential potable water in Board Policy 88-63 and therefore, would not support the applicant's use of such water for cooling. While Staff did concede that the use of water would be required to conform to Board Policy 75-58, Staff would not conclude the project did conform because the salinity was not great enough to be considered "brackish". The Commission considered testimony and legal argument and concluded:

> It is important to note that BEP is not using fresh water for cooling purposes in its strictest sense. The quality of the groundwater to be used is very poor as it is high in total Dissolved Solids (TDS). Applicant recognizes this and listed the poor water quality as one of the reasons the project site was selected. Staff also found the quality to be poor, although they declined to use the word brackish. The appropriate inquiry on this project is not whether applicant *could* use an alternative cooling technology, but rather whether it *must*. The use of a dry or hybrid wet/dry cooling system at BEP is technically feasible but is not necessary to reduce any direct, indirect, or cumulative environmental impacts to below a level of significance. SWRCB policy 75-58 is not a prohibition on the use of inland waters but rather direction on consideration of cooling alternatives, particularly when projects have the potential to cause a significant adverse impact. After review of alternative cooling technologies and their associated costs and benefits, and consideration of the lack of any potentially significant adverse impacts associated with BEP s proposed use of resources, we

conclude that the water supply as proposed by the applicant is acceptable..[8]

The Commission Decision held that the Project would therefore comply with Board Policy 75-58 and specifically authorized the use of the groundwater with ***a TDS ranging from 1160 to 1230 mg/L***[9] for cooling purposes.

Blythe Energy Project Phase II (BEP II)
In 2004 and 2005 the Commission considered similar arguments relating to water use for cooling for the BEP II. The BEP II is immediately adjacent to BEP I and was nearly identical including its proposal for use of the same groundwater being used by BEP I for cooling. However, when considering the water testimony and legal argument for BEP II, the Commission relied on its recent 2003 IEPR Policy. The groundwater proposed and permitted for the BEP II project was estimated to have a TDS between ***920 to 1100 mg/L*** and after extensive evidentiary hearings where the Staff argued again that the water was not "brackish"; the Commission concluded the project groundwater was "marginally brackish" and "conformed to California Water Policy on waters for power plant cooling."[10]

The Commission did find the "groundwater beneath the BEP II site has a TDS marginally greater than the 1000 ppm TDS categorized as 'brackish' by the State Water policy" and that the question placed the Commission in the same position as in BEP I. In the Decision the Commission again found the project would not be using "fresh water for cooling purposes as defined by law and policy."[11] The proposed use of groundwater for the BEP II project cooling was found to be in conformance with 75-58 and the 2003 IEPR Water Policy.

C. Cooling Purposes

Genesis requests that the Committee include in its order that the 2003 IEPR applies only to power plant cooling and Staff should not apply the policy to other power plant uses including construction, dust suppression, process water, steam cycle make-up or other non-cooling purposes.

Based on the analysis above, the Committee should issue an Order directing Staff to apply the 2003 IEPR Water Policy in the following manner:

1. The 2003 IEPR Water Policy is consistent with Board Policy and therefore there is no reason for Staff to wait or require consultation with the Board.

[8] Blythe Energy Project Phase I (99-AFC-8) Commission Decision, Page 207
[9] Blythe Energy Project Phase I, (99-AFC-8) Final Staff Assessment, Page 329
[10] Blythe Energy Project Phase II (02-AFC-1) Commission Decision Page 245
[11] Blythe Energy Project Phase II (02-AFC-1) Commission Decision Page 256

2. With respect to the quality of water that may be used for Power Plant Cooling Purposes, Fresh Water is defined as any water that has a TDS less than 1000 mg/L.
3. The 2003 IEPR Water Policy is only applicable to Fresh Water used for Power Plant Cooling Purposes and not other uses including but not limited to construction, dust suppression, process water, and steam cycle make-up.
4. A project that is not using Fresh Water for Power Plant Cooling Purposes complies with the 2003 IEPR and Board Policies.
5. If a Project complies with the 2003 IEPR and Board Policies, there is no reason for the Commission Staff to evaluate other cooling methods or other water supplies unless there are unmitigatable significant impacts identified under the California Environmental Quality Act (CEQA) associated with the use of groundwater.

II. **ACCOUNTING SURFACE METHODOLOGY**

Staff contends that the Accounting Surface Methodology should be applied to the GSEP's proposed use of groundwater in the Chuckwalla Valley. Section 1744 (a) of the Commission Regulations require the Commission Staff to evaluate the applicant's proposal to determine whether it complies with " all applicable federal, state, regional, and local laws, regulations, standards, and plans". Therefore, a threshold question is whether the Accounting Surface Methodology is such an applicable law. Section 1748 (e) provides,

> The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision.

Therefore, Staff has the burden of producing any applicable law that contains the Accounting Surface Methodology which proves that it is applicable to the Chuckwalla Valley. As discussed below, no such law exists.

To lawfully use water from the mainstream of the lower Colorado River[12], a person or entity must have an entitlement. An entitlement authorizes a person or entity to use water from the lower Colorado River for beneficial use. An entitlement can be obtained as a decreed right as described in the Consolidated Decree entered by the United States Supreme Court in *Arizona v. California*, 547 U.S. 150 (2006) (Supreme Court Decree); a contract with the Secretary of the Interior (Secretary) managed by the United States Bureau of Reclamation (Bureau), or a Secretarial Reservation of Colorado River water.

Pursuant to the Supreme Court Decree, the Bureau accounts for all mainstream Colorado River water use in the Lower Basin. As part of that accounting, the Bureau collected data that persons with wells located very near the Colorado River bank were actually pumping groundwater from the Colorado River or groundwater that was replaced by Colorado River

[12] Lower Basin, defined as water use downstream of the Hoover Dam

water. To address that situation, the Bureau proposed a method for accounting for use of those wells. The Bureau requested USGS to develop a method to identify wells that pump water that is replaced by water drawn from the lower Colorado River. The USGS identified a River Aquifer that has been refined over time and included a model that identified a theoretical "Accounting Surface". The Accounting Surface is an elevation that is intended to represent a division between groundwater and Colorado Surface Water. Using this Accounting Surface, wells within the Colorado River Floodplain itself were considered to be pumping Colorado River water directly and wells outside the Colorado River Floodplain but within the River Aquifer could be pumping groundwater that could be replaced by Colorado River Water.

In 2006, the Bureau published an Advanced Notice of Proposed Rulemaking in the Federal Register[13], which was followed in 2008 by publication of the Official Notice of Proposed Rulemaking in the Federal Register.[14] The Proposed Rulemaking would formally adopt the Accounting Surface Methodology for regulation of wells and groundwater that would be pumping groundwater that could be replaced by Colorado River Water. The Proposed Rulemaking would have added the Accounting Surface Methodology to 43 Code of Federal Regulations Section 415. The Proposed Rule was never adopted and in fact was withdrawn from consideration in 2009. A simple search of the Code of Federal Regulations indicates that Section 415 was never adopted or added to Title 43. Therefore, the Accounting Surface Methodology is not a law, regulation, standard, or plan that the Commission should apply to any project, including the Genesis Solar Energy Project (GSEP). It is undisputed that the GSEP, located many miles from the Colorado River is not in the Colorado River Floodplain and therefore, without a regulation which is entirely within the domain of the federal government, it cannot be determined that projects within the Chuckwalla Valley Basin are pumping Colorado River Water. The Accounting Surface Methodology should not, and cannot legally, be applied to the GSEP.

Recently, the Bureau filed a comment letter in response to the Notice of Intent to prepare an Environmental Impact Statement for the Blythe Solar Power Project and the Palen Solar Power Project (see Attachment A). In that letter, the Bureau states it has used the Accounting Surface Methodology since 1994 to determine whether or not a new well will pump from the mainstream of the Colorado River and therefore require an entitlement. However, the letter does not say that the Accounting Surface Methodology extends to the Chuckwalla Valley Basin. This letter alone does not establish the legal right of the federal government to regulate California groundwater as Colorado Surface Water. If it did, it would not have been necessary for the Bureau to propose and attempt to formally adopt the Accounting Surface Methodology as a regulation. If that regulation was adopted, then the Accounting Surface would have the legal effect Staff asserts.

This exact issue was adjudicated twice before in the BEP I and BEP II Projects referenced above. During 2000 and 2001, in the BEP I case, Staff took the position that the Accounting Surface applied to the project and that the project's proposed use of groundwater needed to be accounted as part of either the Palo Verde Irrigation District's Colorado River allocation or needed an entitlement from the Bureau. The applicant in BEP

[13] 71 FR 47763, Regulating Non-Contract Use of Colorado River Water in the Lower Basin
[14] 73 FR 40916, Regulating the Use of Lower Colorado River Water Without an Entitlement

I articulated the same position in that case as Genesis asserts for the GSEP. However, in order to provide protection against the Bureau adopting the Accounting Surface Methodology in a future regulatory proceeding, the BEP I applicant proposed a Water Conservation Offset Plan (WCOP) which the Bureau believed would comply with its future policy. As described in the BEP I Final Decision:

> In addition, as noted by Applicant, the Bureau of Reclamation does not presently exert jurisdiction over groundwater use, and does not control any area wells or account for groundwater use in the Palo Verde Valley or Mesa. (Ex. 2, p.61.) The Bureau of Reclamation, in conjunction with the USGS, has developed a model, referred to as the Accounting Surface, in an attempt to determine the relationship of regional groundwater to surface water in the lower Colorado River Basin. This model is the basis on which the Bureau's future policy is being formulated, and they have been working with PVID and other water users on the river for more than a decade on this policy, without resolution. The Bureau believes they are within about two years of actually developing a policy whereby they would regulate groundwater users relative to the surface water. In simple terms, the Accounting Surface model defines a linkage between groundwater in the regional aquifer and surface water in the Colorado River. On that basis, withdrawals from the regional aquifer would be accounted for as part of the surface water entitlements. Since groundwater pumping for the Blythe Energy Project will take place within the Accounting Surface as defined by the Bureau, the Bureau has determined that this use of water may be accounted for in the future as a part of PVID s Priority 3 surface water entitlement. For that reason, and to ensure that the power plant project does not impact PVID, BEP has voluntarily agreed to enter into the Water Conservation Offset Program. (Ex, 2, p. 62.)
>
> The Bureau does not currently account for other wells on the Mesa or anywhere in the Palo Verde Valley in this fashion, or any other groundwater activity for any use, but has indicated that it may regulate this groundwater in the future, and is developing policy to that end. The Bureau also has no jurisdiction over PVID water use practices or conservation actions. In addition, PVID has no policy to govern groundwater use, and at present does not regulate any groundwater user, or actively account for groundwater use as a part of its Priority 3 entitlement.[15]

After careful consideration and extensive evidentiary hearings, the Commission made the following ultimate conclusions:

> The need for a Water Conservation Offset Program is ***not driven by a*** finding of adverse environmental impact, or ***need to mitigate under existing LORS***. Therefore, the WCOP, in this case, is sufficient to satisfy the Commission's concerns. BEP I Final Decision, page 208, (***emphasis added***)

[15] Blythe Energy Project Phase I (99-AFC-8) Commission Decision Pages 205 and 206

The Commission in BEP I agreed that the Accounting Surface Methodology was not a LORS with which the BEP I needed to comply.

Again during the BEP II proceedings in 2004 and 2005, Staff took the position that the Accounting Surface Methodology would require the BEP II's use of groundwater to obtain an entitlement from the Bureau. The Commission Final Decision states

> The Commission finds that Palo Verde mesa groundwater and Colorado River water are legally distinct. The overland owner has rights under California law to use groundwater. Other than the few cases of underflow, the USBR has not asserted jurisdiction to directly regulate groundwater use from wells that are known to be in aquifers that are recharged by Colorado River water.
>
> Currently, however, the USBR *indirectly* regulates such groundwater through the allocation and accounting system for providers such as PVID. PVID's allocation of Colorado River water receives a "credit" for all return water returned to the River. However, that "credit" is reduced by irrigation water and canal water that percolates into and recharges the underlying aquifer. BEP II's use of groundwater from on-site wells is not an unauthorized use under state or Federal law.[16]
>
> Therefore, the proposed use of groundwater for project cooling does not violate any applicable federal law or policy and conforms to applicable California laws and water policy.[17]

It is important to note that the Committee can take administrative notice of the undisputed fact that GSEP is many miles farther away from the Colorado River than the BEP I and the BEP II.

The Commission has spent the resources and time to consider very closely the legal effect of the Accounting Surface Methodology on the use of California groundwater and in both cases determined that legally the Accounting Surface Methodology was inapplicable to the use of groundwater for power plant cooling. Staff has not presented any change in law that would require the Commission to adjudicate the issue a third time. In fact, as a matter of public record, the only proposed change in law since the Commission's Decisions in BEP I and BEP II was the Bureau's attempted to adopt the Accounting Surface Methodology as law, which was withdrawn. This only strengthens the argument that such methodology is not law and should not be applied to the GSEP. Genesis urges the Committee to reject Staff's assertions that the Accounting Surface Methodology applies to the GSEP and direct its resources to evaluating the real issues in a timely manner to support a Decision in time for the project to qualify for ARRA funding. The BLM, Secretary of Interior and the Commission have agreed that the GSEP should be processed expeditiously. It is inexplicable and inexcusable for Staff to spend the time/resources

[16] Blythe Energy Project Phase II (02-AFC-1) Commission Decision Page 254
[17] Ibid, Page 255

reopening issues that have been soundly resolved in prior cases. Staff simply ignores the fact that the Bureau has not legally adopted the Accounting Surface Methodology.

Based on the analysis above, the Committee should issue an Order directing Staff as follows:

1. The Accounting Surface Methodology is not an applicable LORS and therefore should not be applied to the GSEP's use of groundwater.
2. Because the Accounting Surface Methodology is not a LORS applicable to the GSEP, Staff need not obtain evidence or correspondence from the Bureau to complete its analysis.
3. Since the Accounting Surface Methodology is not applicable to the GSEP's use of groundwater, it should not be used as a threshold for determining significant direct, indirect or cumulative impacts under CEQA or NEPA.

III. **CUMULATIVE IMPACTS**

Genesis and Staff are disputing which other solar projects should be included in a cumulative impact analysis. In order to resolve that dispute, Genesis Solar is requesting the Committee articulate the standard by which Staff should include a project in its analysis, rather than identify each project that should be included.

The analysis of the GSEP will comply with both CEQA and NEPA. Both laws require evaluation of cumulative impacts in any environmental documentation. Since the environmental document for the GSEP will be jointly prepared by the Commission and BLM, any cumulative impact analysis should comply with both agency's regulatory requirements.

A. **CEQA Cumulative Impact Requirements**

As the Commission's Licensing Process is deemed to be the functional equivalent of a CEQA analysis, it technically does not prepare an Environmental Impact Report (EIR). However, the principles applicable to the analysis contained in an EIR are applicable to the analysis the Commission should conduct in evaluation of the impacts associated with a proposed project. CEQA requires that when performing an EIR on a proposed project, the EIR must take into account the cumulative impacts of that project in connection "with the effects of past projects, the effects of other current projects, and the effects of probable future projects."[18] The CEQA Guidelines direct cumulative impact assessment to only include "related past, present, and reasonably foreseeable probable future projects."[19]

CEQA case law has consistently held that a "project which has progressed far enough to be under environmental review must be considered in a cumulative impacts analysis."[20] However, projects which have not begun the environmental

[18] Public Resources Code section 21083
[19] CEQA Guidelines section 15355 Cumulative Impacts
[20] *Friends of the Eel River v. Sonoma County Water Agency*, 108 Cal.App.4th 859, at 870 (2003)

review process, and furthermore have not identified or formalized a project are not reasonably foreseeable probable future projects. In *Lake County Energy Council v. County of Lake*[21], Magma Energy, Inc. (Magma) applied for a use permit to drill three exploratory geothermal wells in the area of Mt. Konocti, and subsequently prepared an EIR which analyzed the effects of the exploratory drilling. The EIR did not take into account the impact of a potential geothermal production unit in the event the exploratory drilling was successful. Upon appeal of the EIR certification the court held, "where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences."[22] The court supported this conclusion and found, "no one knows whether the exploratory wells will uncover a reservoir of geothermal energy, whether the energy resource will consist of steam or hot water, whether that resource will prove of sufficient quality, quantity or temperature pressure so as to justify development, or how extensive such development will be."[23] In short, Magma possessed "no reliable data to permit preparation of a meaningful and accurate report on the impact of commercial production."[24] Such reliable data would be contained in an application for authorization to construct or operate a project. Therefore, Genesis contends that for a Project to be considered in a cumulative impact analysis under CEQA, it must both have filed an application to a lead agency that has been deemed complete and environmental review must have begun.

B. **NEPA Cumulative Impact Requirements**

BLM has a developed a Handbook H-1790.1, to assist its Staff in administering NEPA. As described in that Handbook, NEPA requires a cumulative impacts analysis in a similar manner as CEQA.[25]

Under NEPA, the rule regarding what is reasonably foreseeable probable future project which should be included in a cumulative impact analysis has been succinctly defined as a "proposed action" because "NEPA focuses on proposed not contemplated actions."[26] In addition, the Ninth Circuit held the federal agency should "defer detailed analysis until a concrete development proposal crystallizes the dimensions of a project's environmental consequences."[27] A cumulative impact analysis under NEPA should only take into account a proposed action which has reached the "stage of development of an action when an agency … has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effect can be meaningfully evaluated."[28] This rule of law has been followed in the more recent *Lands Council v. Powel,* where the court held reasonably foreseeable probable projects "include only proposed actions"

[21] Lake County Energy Council v. County of Lake, 70 Cal.App.3d 851 (1977)
[22] Id. at page 855
[23] Id. at 856
[24] Id. at 856
[25] 40 CFR 1508.7
[26] *Montana Ecosystems Defense Council v. ESPY*, 15 F.3d 1087 (9th Cir. 1994) (See also; *Kleppe v. Sierra Club*, 427 U.S. 390 (1976)
[27] Id.
[28] Id.

and for "any project that is not yet proposed, and is more remote in time, however, a cumulative effects analysis would be both speculative and premature."[29] A proposed action does not exist until "an agency … has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effect can be meaningfully evaluated."[30] Therefore a cumulative impact "is defined in terms of cumulative actions" and a "[c]umulative action" is defined as a "proposed action." "NEPA focuses on proposed, not contemplated actions."

This guidance has been incorporated into BLM's Handbook as follows:

> You must include reasonably foreseeable future actions within the geographic scope and the timeframe of the analysis (40 CFR 1508.7). You cannot limit reasonably foreseeable future actions to those that are approved or funded. On the other hand, you are not required to speculate about future actions. Reasonably foreseeable future actions are those for which there are existing decisions, funding, formal proposals, or which are highly probable, based on known opportunities or trends. Reasonably foreseeable development scenarios may be valuable sources of information to assist in the BLM's cumulative effects analysis. When considering reasonably foreseeable future actions, it may be helpful to ask such questions as:
>
> - Is there an existing proposal, such as the submission of permit applications?
> - Is there a commitment of resources, such as funding?
> - If it is a Federal action, has the NEPA process begun (for example, publication of an NOI)?

Genesis contends that a federal agency does not have a goal or actively prepare to make a meaningful decision on a proposed action until a Notice of Intent has been published. The Notice of Intent triggers and symbolizes the federal agency's review and notices the proposed action. A party who has merely filed an application under the Federal Land Policy Management Act for a Right-of-Way does not commit any resources or provide any information on a particular proposal enabling meaningful review.

With these principles in mind, in its response to Staff and CURE's opposition to Genesis' Motion For Scoping Order, Genesis presented a proposal for the parties to consider developing a stipulation of the legal standard for evaluating cumulative impacts. Since that time, and after working with BLM, Genesis proposes the following modification to our original proposal for stipulation:

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[29] *Lands Council v. Powell*, 379 F.3d 738, at 746 (9th Cir. 2004) (The quoted paragraphs were later deleted in *Lands Council v. Powel*, 395 F.3d 1019, at 1023 (9th Cir. 2004) because the parties came to agreement, and the court found they "need not address these issues) (See also; *Natural Resource Council v. Marsh*, 832 F.2d 1489 (9th Cir. 1987) which was reversed on other grounds in 490 U.S. 360)

[30] *Montana Ecosystems Defense Council,* 15 F.3d 1087 (9th Cir. 1994)

In order for a project to be included in a cumulative impact analysis the project must be reasonably foreseeable as evidenced by all of the following:

1. *The project must have filed an application with a lead agency for a permit to construct and operate the project;*

2. *The application must have been accepted as complete; and*
    a. *For a project on land managed by the Bureau of Land Management that must mean that a Plan of Development* ***(POD)*** *must have been accepted as complete* ***or the BLM has determined that significant investment and progress toward completion of the POD has been made (e.g., detailed environmental field studies are under way)****.*
    b. *For a project within the jurisdiction of the Commission, the Commission must have found the AFC "data adequate".*
    c. *For a project within the jurisdiction of another state agency or County, an application should have been accepted as complete*

3. *Environmental review has begun.*
    a. *For a project on federal land, a Notice of Intent (NOI) to prepare a NEPA document should have been noticed in the Federal Register* ***or BLM has determined that an NOI is imminent.***
    b. *For a project within the jurisdiction of the Commission, the Commission must have found the AFC "data adequate".*
    c. *For a project within the jurisdiction of another state agency or County, the lead agency shall have published a Notice of Determination to prepare an Environmental Impact Report or Negative Declaration or a Notice of Exemption under CEQA.*

Genesis requests the Committee Order Staff to apply the legal principles above in developing its cumulative impact analysis for the GSEP.

COMMISSION POLICY ON WATER CONSERVATION

Staff explained to the Genesis team at a data request workshop that, notwithstanding its cumulative impact analysis, it was concerned that the GSEP would violate some requirement by using water that could be used for future energy development that is not currently planned or contemplated. First and foremost, the CEC Staff does not have the authority to independently plan for the State's energy infrastructure let alone apply such planning in individual siting cases. Energy infrastructure planning rests with the Commission, the California Public Utilities Commission, the utilities and the California Independent System Operator. Since the majority of land along the I-10 Corridor is managed by BLM, BLM is the land manager with the authority to plan for future use of its lands. The Commission has not adopted any policy that would allow the Staff to conclude that the GSEP should not use degraded groundwater for cooling because it would interfere with future energy development along the I-10 corridor. GSEP requests the Committee Order Staff to refrain from such policy analysis and strictly evaluate the GSEP by limiting consideration of future development to those projects that would qualify under the legally

established principles articulated above for inclusion in a cumulative impacts analysis under NEPA and CEQA.

CONCLUSION

Genesis thanks the Committee for providing early direction concerning these legal questions. Genesis believes that early resolution is necessary to keep the GSEP on schedule for a Decision in time support ARRA funding. The Committee should reject any assertion by Staff that the GSEP poses difficult and complex issues that would prevent it from meeting the Committee Scheduling Order deadlines. Specifically, the Staff points to the complexity of issues surrounding groundwater modeling and cumulative impacts to justify its predicted failure to meet the Committee Scheduling Order deadline. However, Staff fails to point out that it is conducting the same analysis for all projects because all of the solar projects that are seeking ARRA funding are using groundwater. Staff must conduct a cumulative impacts analysis for each project, must review modeling of potential effects on the groundwater basin for each project, and must evaluate whether such water use complies with the Commission Water Policy for each project. This is clearly shown by the fact that the Staff-issued data requests concerning groundwater use for GSEP are identical to data requests issued for the Blythe Solar Power Project and the Palen Solar Power Project even though those projects have elected to use an Air Cooled Condenser. The Committee should understand that it is not the amount of water that a project uses that determines the level of Staff effort, but the fact that it is proposing the use of groundwater at all that dictates the level of effort necessary for evaluation. GSEP should not be penalized as if it has created more work for Staff because it has not. In fact, the GSEP has filed numerous data responses and has participated in a minimum of seven workshops to date.

Further it is important for the Committee to consider that any principles concerning applicability of the Accounting Surface would apply to all projects which may be within the theoretical Accounting Surface area and are proposing to use groundwater for any purpose. Similarly, the decisions by the Committee relating to the legal standard for inclusion of projects in a cumulative impacts analysis and development of any new water planning policy would apply to all projects before the Commission.

Genesis respectfully requests the Committee issue a Scoping Order as requested in this Brief and direct Staff to meet the deadlines outlined in the Committee Scheduling Order.

Dated: January 19, 2010

/original signed/

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Scott A Galati
Counsel to Genesis Solar, LLC

ATTACHMENT A

STATE WATER RESOURCES CONTROL BOARD
POLICY 75-58

WATER QUALITY CONTROL POLICY

on the

USE and DISPOSAL of INLAND WATERS

USED for POWERPLANT COOLING

ADOPTED JUNE 19, 1975

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CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 75-58

WATER QUALITY CONTROL POLICY ON THE USE
AND DISPOSAL OF INLAND WATERS USED FOR
POWERPLANT COOLING

WHEREAS:

1. Basin Planning conducted by the State Board has shown that there is presently no available water for new allocations in some basins.

2. Projected future water demands, when compared to existing developed water supplies, indicate that general freshwater shortages will occur in many areas of the State prior to the year 2000.

3. The improper disposal of powerplant cooling waters may have an adverse impact on the quality of inland surface and groundwaters.

4. It is believed that further development of water in the Central Valley will reduce the quantity of water available to meet Delta outflow requirements and protect Delta water quality standards.

THEREFORE, BE IT RESOLVED, that

1. The Board hereby adopts the "Water Quality Control Policy on the Use and Disposal of Inland Waters Used for Powerplant Cooling".

2. The Board hereby directs all affected California Regional Water Quality Control Boards to implement the applicable provisions of the policy.

3. The Board hereby directs staff to coordinate closely with the State Energy Resources Conservation and Development Commission and other involved state and local agencies as this policy is implemented.

CERTIFICATION

The undersigned, Executive Officer of the State Water Resources Control Board, does hereby certify that the forgoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 19, 1975.

Bill B. Dendy
Executive Officer

WATER QUALITY CONTROL POLICY ON THE USE AND DISPOSAL OF INLAND WATERS USED FOR POWERPLANT COOLING

Introduction

The purpose of this policy is to provide consistent statewide water quality principles and guidance for adoption of discharge requirements, and implementation actions for powerplants which depend upon inland waters for cooling. In addition, this policy should be particularly useful in guiding planning of new power generating facilities so as to protect beneficial uses of the State's water resources and to keep the consumptive use of freshwater for powerplant cooling to that minimally essential for the welfare of the citizens of the State.

This policy has been prepared to be consistent with federal, state, and local planning and regulatory statutes, the Warren-Alquist State Energy Resources Conservation and Development Act, Water Code Section 237 and the Waste Water Reuse Law of 1974.

Section 25216.3 of the Warren-Alquist Act states:

"(a) The commission shall compile relevant local, regional, state, and federal land use, public safety, environmental, and other standards to be met in designing, siting, and operating facilities in the State: except as provided in subdivision (d) of Section 25402, adopt standards, except for air and water quality,...."

Water Code Section 237 and Section 462 of the Waste Water Reuse Law, direct the Department of Water Resources to:

237. "...either independently or in cooperation with any person or any county, state, federal, or orhter agency, including, but not limited to, the State Energy Resources Conservation and Development Commission, shall conduct studies and investigations on the need and availability of water for thermal electric powerplant cooling purposes, and shall report thereon to the Legislature from time to time...."

462. "...conduct studies and investigations on the availability and quality of waste water and uses of reclaimed waste water for beneficial purposes including, but not limited to ... and cooling for thermal electric powerplants."

Decisions on waste discharge requirements, water rights permits, water quality control plans, and other specific water quality control implementing actions by the State and Regional Boards shall be consistent with provisions of this policy.

The Board declares its intent to determine from time to time the need for revising this policy.

Definitions

1. Inland Water – all waters within the territorial limits of California exclusive of the waters of the Pacific Ocean outside of enclosed bays, estuaries, and coastal lagoons.

2. Fresh Inland Waters – those inland waters which are suitable for use as a source of domestic, municipal, or agricultural water supply and which provide habitat for fish and wildlife.

3. Salt Sinks – areas designated by the Regional Water Quality Control Boards to receive saline waste discharges.

4. Brackish Waters – includes all waters with a salinity range of 1,000 to 30,000 mg/l and a chloride concentration range of 250 to 12,000 mg/l. The application of the term "brackish" to a water is not intended to imply that such water is no longer suitable for industrial or agricultural purposes.

5. Steam-Electric Power Generating Facilities – electric power generating facilities utilizing fossil or nuclear-type fuel or solar heating in conjunction with a thermal cycle employing the steam-water system as the thermodynamic medium and for the purposes of this policy is synonomous with the word "powerplant".

6. Blowdown – the minimum discharge of either boiler water or recirculating cooling water for the purpose of limiting the buildup of concentrations of materials in excess of desirable limits established by best engineering practice.

7. Closed Cycle Systems – a cooling water system from which there is no discharge of wastewater other than blowdown.

8. Once-Through Cooling – a cooling water system in which there is no recirculation of the cooling water after its initial use.

9. Evaporative Cooling Facilities – evaporative towers, cooling ponds, or cooling canals, which utilize evaporation as a means of wasting rejected heat to the atmosphere.

10. Thermal Plan – "Water Quality Control Plan for Control of Temperature In the Coastal and Interstate Waters and Enclosed Bays and Estuaries of California".

11. Ocean Plan – "Water Quality Control Plan for Ocean Waters of California".

Basis of Policy

1. The State Board believes it is essential that every reasonable effort be made to conserve energy supplies and reduce energy demands to minimize adverse effects on water supply and water quality and at the same time satisfy the State's energy requirements.

2. The increasing concern to limit changes to the coastal environment and the potential hazards of earthquake activity along the coast has led the electric utility industry to consider siting steam-electric generating plants inland as an alternative to proposed coastal locations.

3. Although many of the impacts of coastal powerplants on the marine environmental are still not well understood, it appears the coastal marine environment is less susceptible than inland waters to the water quality impacts associated with powerplant cooling. Operation of existing coastal powerplants indicate that these facilities either meet the standards of the State's Thermal Plan and Ocean Plan or could do so readily with appropriate technological modifications. Furthermore, coastal locations provide for application of a wide range of cooling technologies which do not require the consumptive use of inland waters and therefore would not place an additional burden on the State's limited supply of inland waters. These technologies include once-through cooling which is appropriate for most coastal sites, potential use of saltwater cooling towers, or use of brackish water where more stringent controls are required for environmental considerations at specific sites.

4. There is a limited supply of inland water resources in California. Basin planning conducted by the State Board has shown that there is no available water for new allocations in some basins. Projected future water demands when compared to existing developed water supplies indicate that general fresh-water shortages will occur in many areas of the State prior to the year 2000. The use of inland waters for powerplant cooling needs to be carefully evaluated to assure proper future allocation of inland waters considering all other beneficial uses. The loss of inland waters considering all other beneficial uses. The loss of inland waters through evaporation in powerplant cooling facilities may be considered an unreasonable use of inland waters when general shortages occur.

5. The Regional Boards have adopted water quality objectives including temperature objectives including temperature objectives for all surface waters in the State.

6. Disposal of once-through cooling waters from powerplants to inland water is incompatible with maintaining the water quality objectives of the State Board's "Thermal Plan" and "Water Quality Control Plans."

7. The improper disposal of blowdown from evaporative cooling facilities may have an adverse impact on the quality of inland surface and ground waters and on fish and wildlife.

8. An important consideration in the increased use of inland water for powerplant cooling or for any other purpose in the Central Valley Region is the reduction in the available quantity of water to meet the Delta outflow requirements necessary to protect Delta water quality objectives and standards. Additionally, existing contractual agreements to provide future water supplies to the Central Valley, the South Coastal Basin, and other areas using supplemental water supplies are threatening to further reduce the Central Valley outflow necessary to protect the Delta environment.

9. The California Constitution and the California Water Code declare that the right to use water from a natural stream or watercourse is limited to such water as shall be reasonably required for beneficial use and does not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion. Section 761, Article 17.2, Subchapter 2, Chapter 3, Title 23, California Administrative Code provides that permits or licenses for the appropriation of water will contain a term which will subject the permit or license to the continuing authority of the State Board to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of said water.

10. The Water Code authorizes the State Board to prohibit the discharge of wastes to surface and ground waters of the State.

Principles

1. It is the Board's position that from a water quantity and quality standpoint the source of powerplant cooling water should come from the following sources in this order of priority depending on site specifics such as environmental, technical and economic feasibility consideration: (1) wastewater being discharged to the ocean, (2) ocean, (3) brackish water from natural sources or irrigation return flow, (4) inland wastewaters of low TDS, and (5) other inland waters.

2. Where the Board has jurisdiction, use of fresh inland waters for powerplant cooling will be approved by the Board only when it is demonstrated that the use of other water supply sources or other methods of cooling would be environmentally undesirable or economically unsound.

3. In considering issuance of a permit or license to appropriate water for powerplant cooling, the Board will consider the reasonableness of the proposed water use when compared with other present and future needs for the water source and when viewed in the context of alternative water sources that could be used for the purpose. The Board will give great weight to the results of studies made pursuant to the Warren-Alquist State Energy Resources Conservation and Development Act and carefully evaluate studies by the Department of Water Resources made pursuant to Sections 237 and 462, Division 1 of the California Water Code.

4. The discharge of blowdown water from cooling towers or return flows from once-through cooling shall not cause a violation of water quality objectives or waste discharge requirements established by the Regional Boards.

5. The use of unlined evaporation ponds to concentrate salts from blowdown waters will be permitted only at salt sinks approved by the Regional and State Boards. Proposals to utilize unlined evaporation ponds for final disposal of blowdown waters must include studies of alternative methods of disposal. These studies must show that the geologic strata underlying the proposed ponds or salt sink will protect usable groundwater.

6. Studies of availability of inland waters for use in powerplant cooling facilities to be constructed in Central Valley basins, the South Coastal Basins or other areas which receive supplemental water from Central Valley streams as for all major new uses must include an analysis of the impact of such use on Delta outflow and Delta water quality objectives. The studies associated with powerplants should include an analysis of the cost and water use associated with the use of alternative cooling facilities employing dry, or wet/dry modes of operation.

7. The State Board encourages water supply agencies and power generating utilities and agencies to study the feasibility of using wastewater for powerplant cooling. The State Board encourages the use of wastewater for powerplant cooling where it is appropriate. Furthermore, Section 25601(d) of the Warren-Alquist Energy Resources Conservation and Development Act directs the Commission to study, "expanded use of wastewater as cooling water and other advances in powerplant cooling" and Section 462 of the Waste Water Reuse Law directs the Department of Water Resources to "...conduct studies and investigations on the availability and quality of waste water and uses of reclaimed waste water for beneficial purposes including, but not limited to... and cooling for thermal electric powerplants."

Discharge Prohibitions

1. The discharge to land disposal sites of blowdown waters from inland powerplant cooling facilities shall be prohibited except to salt sinks or to lined facilities approved by the Regional and State Boards for the reception of such wastes.

2. The discharge of wastewaters from once-through inland powerplant cooling facilities shall be prohibited unless the discharger can show that such a practice will maintain the existing water quality and aquatic environment of the State's water resources.

3. The Regional Boards may grant exceptions to these discharge prohibitions on a case-by-case basis in accordance with exception procedures included in the "Water Quality Control Plan for Control of Temperature In the Coastal and Interstate Waters and Enclosed Bays and Estuaries of California.

Implementation

1. Regional Water Quality Control Boards will adopt waste discharge requirements for discharges from powerplant cooling facilities which specify allowable mass emission rates and/or concentrations of effluent constituents for the blowdown waters. Waste discharge requirements for powerplant cooling facilities will also specify the water quality conditions to be maintained in the receiving waters.

2. The discharge requirements shall contain a monitoring program to be conducted by the discharger to determine compliance with waste discharge requirements.

3. When adopting waste discharge requirements for powerplant cooling facilities the Regional Boards shall consider other environmental factors and may require an environmental impact report, and shall condition the requirement in accordance with Section 2718, Subchapter 17, Chapter 3, Title 23, California Administrative Code.

4. The State Board shall include a term in all permits and licenses for appropriation of water for use in powerplant cooling that requires the permittee or licensee to conduct ongoing studies of the environmental desirability and economic feasibility of changing facility operations to minimize the use of fresh inland waters. Study results will be submitted to the State Board at intervals as specified in the permit term.

5. Petitions by the appropriator to change the nature of the use of appropriated water in an existing permit or license to allow the use of inland water for powerplant cooling may have an impact on the quality of the environment and as such require the preparation of an environmental impact statement or a supplement to an existing statement regarding, among other factors, an analysis of the reasonableness of the proposed use.

6. Applications to appropriate inland waters for powerplant cooling purpose shall include results of studies comparing the environmental impact of alternative inland sites as well as alternative water supplies and cooling facilities. Studies of alternative coastal sites must be included in the environmental impact report. Alternatives to be considered in the environmental impact report, including but not limited to sites, water supply, and cooling facilities, shall be mutually agreed upon by the prospective appropriator and the State Board staff. These studies should include comparisons of environmental impact and economic and social benefits and costs in conformance with the Warren-Alquist State Energy Resources Conservation and Development Act, the California Coastal Zone Plan, the California Environmental Quality Act and the National Environmental Policy Act.

ATTACHMENT B

FEDERAL REGISTER NOTICE
JULY 16, 2008
73 FR 40916
US BUREAU OF RECLAMATION PROPOSED REGULATION 43 CFR 415
Regulating the Use of Lower Colorado
River Water Without an Entitlement;
Proposed Rule

Federal Register

Wednesday,
July 16, 2008

Part II

Department of the Interior

Bureau of Reclamation

43 CFR Part 415

Regulating the Use of Lower Colorado River Water Without an Entitlement; Proposed Rule

DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 415

RIN 1006–AA50

Regulating the Use of Lower Colorado River Water Without an Entitlement

AGENCY: Bureau of Reclamation, Interior.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Bureau of Reclamation (Reclamation) proposes to address and eliminate the use of Colorado River water from the mainstream in the lower Colorado River basin (Lower Basin) without an entitlement. For the last eight years, the upper and lower Colorado River basins have experienced the worst drought conditions in approximately one hundred years of recorded history. This drought is the first sustained drought to be experienced on the Colorado River when all major storage facilities are in place and when Arizona, California, and Nevada (Lower Division States) are fully utilizing their basic Colorado River water apportionment of 7.5 million acre-feet per year. Reclamation believes that development of such a rule will help ensure the long-term sustainability of the lower Colorado River and in doing so will protect the water rights of lower Colorado River water entitlement holders. The rule establishes procedures that Reclamation will follow in making determinations of unlawful use of lower Colorado River water. The rule includes notice and appeal procedures for those persons or entities whose use of lower Colorado River water is identified as unlawful.

Reclamation is seeking comments on the proposed rule including comments that identify any specific economic impacts to members of the public and to small businesses located within the boundary of the river aquifer. The comments should include any identified or potential economic impacts and the estimated costs of the impacts.

DATES: Submit comments on the rule by September 15, 2008.

ADDRESSES: You may submit comments on the rule, identified by number 1006–AA50, by one of the following methods:

—Use of the Federal e-rulemaking Web site: *http://www.regulations.gov*. The notice has been assigned Docket ID: BOR–2008–0001. Follow the instructions for submitting comments using this Docket ID number.

—By mail to: Bureau of Reclamation, P.O. Box 61470, Boulder City, NV 89006–1470, Attention: Area Manager, Boulder Canyon Operations Office, Mail Code BCOO–1000. Please include the number 1006–AA50 and the Docket ID (BOR–2008–0001) in your correspondence.

FOR FURTHER INFORMATION CONTACT: Margot Selig, 702–293–8192.

SUPPLEMENTARY INFORMATION:

I. Background

Legal System for Use of Colorado River Water in the Lower Basin. The Colorado River is the primary source of water for irrigation, municipal, and industrial uses in the Lower Basin within 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 which addresses the use of the Colorado, Rio Grande, and Tijuana Rivers.

To lawfully use water from the mainstream of the lower Colorado River, a person or entity must have an entitlement. An entitlement authorizes a person or entity to use water from the lower Colorado River for beneficial use and exists in one of three forms: (a) A decreed right as described in the Consolidated Decree entered by the United States Supreme Court in *Arizona* v. *California*, 547 U.S. 150 (2006) (Supreme Court Decree), (b) a contract with the Secretary of the Interior (Secretary), or (c) a Secretarial Reservation of Colorado River water. An entitlement to use lower Colorado River water specifies the quantity of water which may be used, the purpose for which the water may be used, and the location where the use may occur. Any diversion or consumptive use of lower Colorado River water without an entitlement is unlawful.

The BCPA and the Supreme Court Decree require a Colorado River water user in the Lower Basin to have a contract with the Secretary for the storage, delivery, and use of such water. The Regional Director of Reclamation's Lower Colorado Region enters into water delivery contracts with water users in Arizona, California, and Nevada on behalf of the Secretary. The BCPA and the Reclamation Act of 1902 authorize the Secretary to prescribe such rules and regulations necessary to carry out provisions of law.

The Supreme Court Decree requires the United States to account for all mainstream 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 an entitlement. All reported Colorado River water use in a state 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. The Supreme Court Decree specifies that consumptive use of Colorado River water in the Lower Basin includes water drawn from the mainstream by underground pumping.

Technical Issues To Be Addressed. Current data show that Colorado River water used in the Lower Basin without an entitlement outside of existing lower Colorado River water delivery service areas ranges between 9,000 and 15,000 acre-feet per year. The amount of lower Colorado River water pumped by wells and river pumps within service areas that is not accounted for under existing entitlements is unknown. The largest amount of water being unlawfully used from the Colorado River in the Lower Basin occurs via underground pumping for irrigation use from wells located on the floodplain. The majority of water users who are using lower Colorado River water without an entitlement consist of households which pump small amounts of water for domestic use from wells located on the floodplain.

At Reclamation's request, the United States Geological Survey (USGS) has developed a method to identify wells that pump water that is replaced by water drawn from the lower Colorado River. The USGS method identifies a River Aquifer and a theoretical accounting surface within the River Aquifer. The River Aquifer extends outward from the Colorado River until encountering a geologic barrier to groundwater flow and encompasses the water bearing materials from which water can move to and from the lower Colorado River. The accounting surface was developed with a groundwater model and represents the elevation and extent of the river aquifer that is in hydraulic connection with the lower Colorado River. The accounting surface extends outward from the exterior boundary of the Colorado River floodplain to the exterior limit of the River Aquifer. Several thousand wells are located within the boundary of the River Aquifer. The USGS is performing a well inventory within the boundary of

the River Aquifer to identify river pumps and wells that can draw water directly from the lower Colorado River or pump water that would be replaced by water drawn from the lower Colorado River. Wells in the floodplain pump water directly from the lower Colorado River. The accounting surface is the area within which Reclamation will apply the USGS method to determine whether water pumped from a well is replaced with water drawn from the lower Colorado River. Reclamation will also evaluate whether unique hydrologic circumstances in some areas along the lower Colorado River merit an exception to the USGS methodology.

Need to Curtail Unlawful Use of Colorado River Water in the Lower Basin. One of Reclamation's legal obligations and administrative priorities is to ensure that all Colorado River water use in the Lower Basin is covered by an entitlement and correctly accounted for within each Lower Division State's apportionment. Each Lower Division State's apportionment of Colorado River water is limited; thus, unlawful use harms that state's entitlement holders by using water that those entitlement holders could legally use otherwise. This fact leads Reclamation to conclude that this rulemaking is necessary and appropriate. Additionally, each Lower Division State is fully utilizing its respective apportionment and the prolonged period of drought in the Colorado River Basin has reduced the amount of water stored in Colorado River reservoirs.

Content of Rule. The rule provides a framework for identifying and curtailing the use of mainstream Colorado River water in the Lower Basin without an entitlement. The rule will: (a) Establish the methodology that Reclamation will use to determine if a well pumps water that is replaced with water drawn from the lower Colorado River; (b) establish the criteria a water user must satisfy to demonstrate that his or her well does not pump water that is replaced with water drawn from the lower Colorado River; and (c) establish a process for a water user to appeal a determination that a specific well pumps water that would be replaced by water drawn from the lower Colorado River.

In the rule, Reclamation will inform unlawful users about the existence of various options to bring their use of Colorado River water in the Lower Basin into compliance with Federal law. Below are several options that Reclamation will consider:

(a) Some water may be available under the three Lower Division States' apportionments.

(1) Arizona: Some lower Colorado River water may be available for allocation in Arizona. Reclamation intends to consult with Arizona Department of Water Resources (ADWR) to determine if some of Arizona's Colorado River water could be committed for use by persons or entities in Arizona whose Colorado River water use is found to be unlawful. For the purposes of this rule, a water delivery 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 water users.

(2) California: All Colorado River water apportioned 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). Unlawful users in California who are eligible for domestic use in California and who wish to participate under the LCWSP must 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 LCWSP beneficiaries.

(3) Nevada: All Colorado River water apportioned 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.

(b) A water user may be able to obtain an entitlement through an assignment, transfer, or lease from an existing entitlement holder within that state. An assignment, transfer, or lease must be approved by Reclamation.

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

(d) A water user may be able to acquire a different source of water that is not hydraulically connected to the lower Colorado River.

The rule emphasizes the options for bringing one's use of lower Colorado River water into compliance with Federal law. However, under the rule, individuals or entities who continue to use lower Colorado River water without an entitlement will be reported to the United States Supreme Court by the Regional Director. The Regional Director will work with the United States Department of Justice to seek Federal court orders requiring these users to cease using water from the lower Colorado River without an entitlement.

The proposed rule was preceded by an Advance Notice of Proposed Rulemaking (ANPR), published in the **Federal Register** on August 18, 2006 (71 FR 47763), under the title, "Regulating Non-Contract Use of Colorado River Water in the Lower Basin." The ANPR provided for a public comment period that ran from August 18, 2006, through October 17, 2006. Reclamation received 21 letters during the comment period. Nine letters were requests to be placed on a mailing list. Twelve letters contained comments on the ANPR. The commentators included one Indian tribe, three state agencies, one interstate agency, one farmers' organization, one commercial business, two private individuals, one irrigation and electrical district organization, one water authority, and one municipality. Reclamation reviewed and analyzed all comments. The commentators generally support the development of a rule to address the use of Colorado River water in the Lower Basin without an entitlement. However, one commenter questioned the need for a rule since existing law is sufficient to bring unlawful users into compliance; this commenter requests further evaluation of the accounting surface around Lake Mead. One commenter desires a monitoring process, determination of required frequency for field data collection, updates to the USGS accounting surface model, and peer review of the USGS accounting surface methodology; this commenter is also concerned about the timing related to the replacement of water by Colorado River water when pumped by a well. For example, in certain areas of the River Aquifer in Arizona, the accounting surface boundary is 30 miles from the mainstream. One commenter said that unlawful users must have a means to bring their use into compliance with Federal law. One commenter said the rule should identify the point at which tributary water becomes part of the mainstream and address water from lakes and ponds fed from the mainstream through the subsurface. This commenter further added that the rule must provide for due process, and establish some type of enforcement ability to cause unlawful users to cease and desist from using mainstream water. Several commentators stated the necessity for

Reclamation to recognize the existence of unique hydrological circumstances in some areas of the lower Colorado River which could merit exemption to the River Aquifer/accounting surface methodology. All of the comments received on the ANPR are addressed in the proposed rule.

The rulemaking process provides an opportunity to (a) provide for public review and comment on the River Aquifer/accounting surface methodology; (b) adopt the River Aquifer/accounting surface methodology; (c) establish procedures for determining unlawful use; (d) develop notice and administrative appeal procedures; and (e) provide options for unlawful users to legalize their lower Colorado River water use. Reclamation is seeking comments on the proposed rule including comments that identify any specific economic impacts to members of the public and to small businesses located within the boundary of the river aquifer. The comments should include any identified or potential economic impacts and the estimated costs of the impacts.

USGS reports WRIR 94–4005 and WRIR 00–4085 were extensively reviewed through the USGS peer review and report publishing process. The frequency of field data collection for the well inventory is not predetermined. Field data collection is expected to be a continuous process to ensure that all wells are identified and inventoried, including those that have been drilled after the initial field data collection was completed for a given area. Also, the frequency for field data collection for any given area will be determined by Reclamation dynamically, based upon such parameters as significant changes in river conditions, development, population, political considerations, and availability of funding and staff. The timing of depletions from wells distant from the lower Colorado River has been addressed cooperatively by Reclamation and the USGS using numerical modeling techniques. The USGS is expected to produce a peer-reviewed "Scientific Investigations Report" concerning this matter in July 2008.

The only area Reclamation currently considers unique enough to warrant exemption from the River Aquifer/accounting surface method is the Yuma, Arizona area near the City of Yuma and south to the Southerly International Boundary (SIB) between the United States and Mexico. The Yuma area is hydrologically unique because it is a river delta environment, not a river environment. In the deltaic environment of the Yuma area, much of the water diverted from the Colorado River and applied to the ground for irrigation does not naturally return to either the Colorado River above the Northerly International Boundary (NIB) between the United States and Mexico or the Limotrophe section (the section of the lower Colorado River which forms the international boundary between the United States and Mexico from the NIB to the SIB) as surface water. Water which does not return to either the Colorado River above the NIB or the Limotrophe section as surface water is not available for diversion in the United States or for satisfaction of the Mexican water treaty. In the Yuma area, much of the water diverted from the Colorado River and applied to the ground for irrigation flows underground across the SIB and Limitrophe section boundaries into Mexico. A unique set of criteria governing this area is included in this rule at section 415.12. Should unique hydrological circumstances be identified elsewhere within the River Aquifer, Reclamation will likewise consider whether or not these circumstances would merit an exception to the USGS methodology. Information regarding the geographical applicability of the rule can be found in Subpart B of the rule and Figures 1 through 7.

II. Procedural Requirements

1. Regulatory Planning and Review (Executive Order (E.O.) 12866)

The Office of Management and Budget (OMB) has determined that this rule is not a significant rule and has not reviewed it under the requirements of E.O. 12866. We have evaluated the impacts of this rule as required by E.O. 12866 and have determined that it is not a significant regulatory action. The results of our evaluation follow:

(a) This rule will not have an annual effect of $100 million or more on the economy. It will not adversely affect in any material way the economy, productivity, competition, jobs, environment, public health or safety, or State, local, and tribal governments or communities. This rule will protect lawful entitlements to use water from the lower Colorado River by providing a method for identifying and reporting persons and entities unlawfully using such water.

Reclamation will incur ongoing administrative costs to monitor and address unlawful use of lower Colorado River water. Activities related to monitoring and addressing unlawful use of lower Colorado River water must be performed with or without promulgation of the rule for Reclamation to remain in compliance with Colorado River law. The Federal cost incurred to monitor and address unlawful use of lower Colorado River water is not incremental to the rule.

Water users who are using lower Colorado River water without an entitlement may incur costs to bring their lower Colorado River water use into compliance with Federal law. The type and amount of costs will vary among water users depending upon the state in which their well or river pump is located, the manner in which a water user chooses to acquire an entitlement if appropriate, whether or not their well or river pump is located within the boundaries of an entitlement holder's service area, and the fees assessed by the entitlement holder.

(b) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Under the BCPA, the United States Congress allocated among the Lower Division States the mainstream water in the lower Colorado River to which they were entitled under the Colorado River Compact of 1922. Through the BCPA, the Congress uniquely authorized the Secretary to accomplish the allocation of Colorado River water among the Lower Division States by empowering the Secretary to enter into contracts for the delivery of water and by providing that no person shall have or be entitled to have the use of Colorado River water without a contract. The United States Supreme Court validated these and other provisions of the BCPA in the June 3, 1963 United States Supreme Court Opinion in *Arizona* v. *California* (376 U.S. 546) and the Supreme Court Decree. In the Supreme Court Decree the Secretary is charged with, among other things, accounting for and reporting the consumptive use of Colorado River water diverted directly from the mainstream and/or through underground pumping. Reclamation performs water contracting and water accounting responsibilities on behalf of the Secretary. No other agency in the United States performs these functions on the lower Colorado River.

(c) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients; all of these will continue unaffected by the issuance of this rule.

(d) This rule does not raise any novel legal or policy issues. This rule will not implement requirements upon users of lower Colorado River water that do not already exist.

2. Regulatory Flexibility Act

The Department of the Interior (Interior) certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*). This rule imposes no requirements upon small governments (including Native American communities), small entities such as water purveyors or associations, individual lower Colorado River water entitlement holders or lawful water users that are not already imposed by the BCPA and the Supreme Court Decree concerning the use of lower Colorado River water. This rule does not impose a requirement for small entities to report or keep records on any of the requirements contained in this rule other than the type of recordkeeping regarding lower Colorado River water use that is already required by water delivery contracts with the Secretary. You may obtain a copy of the Initial Regulatory Flexibility Analysis by contacting us at the address in the Addresses section. Development of a Small Entity Compliance Guide is not required.

3. Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under the Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2)). This rule:

(a) Does not have an annual effect on the economy of $100 million or more. Under the Benefit-Cost Analysis/Unfunded Mandates Reform Act Analysis performed to evaluate the potential economic impacts of this rule the estimated net present value of the impact to the economy from 2008 through 2027 ranges between $256,313 to $3,742,363 under a real discount rate of 7.0 percent and $340,804 to $5,375,118 under a real discount rate of 3.0 percent. The estimated economic impacts over the 20-year period of the study are associated with costs that may be incurred when unlawful users of lower Colorado River water incur costs to either obtain a lower Colorado River water entitlement or become a customer of a lower Colorado River water entitlement holder. Federal costs related to oversight of unlawful use of lower Colorado River water will be incurred with or without the rule in fiscal years 2008 through 2010.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The estimated economic impacts are not significant. This rule does not impose new requirements regarding the lawful use of lower Colorado River water.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises. The potential economic impacts incurred by lower Colorado River water users who are unlawfully using lower Colorado River water are not significant. This rule establishes procedures that Reclamation will use to determine if a well pumps water that is replaced by water drawn from the lower Colorado River.

4. Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of $100 million or more annually. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. This rule imposes no requirements regarding the lawful use of lower Colorado River water that are not already imposed by the BCPA and the Supreme Court Decree. You may obtain a copy of the Benefit-Cost Analysis/Unfunded Mandates Reform Act Analysis for Proposed Rulemaking by contacting us at the address in the **ADDRESSES** section. Therefore, a statement containing information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531, *et seq.*) is not required.

5. Takings (E.O. 12630 and E.O. 13406)

Under the criteria in E.O. 12630 and E.O. 13406, this rule does not have any significant takings implications. A Takings Implication Assessment is not required. This rule will protect valid water rights and help to ensure the long-term sustainability of the resource. For water users far from the river channel or reservoirs and who are pumping groundwater outside of the lower Colorado River floodplain, this rule provides for a test which can determine if water pumped by a well is replaced by water drawn from the mainstream of the lower Colorado River. The test is based upon the lower Colorado River accounting surface developed by the USGS. If, according to the test, the well is drawing water from the mainstream of the lower Colorado River, the well user must have an entitlement to use the water. This rule provides information explaining how to acquire an entitlement to use lower Colorado River water. This rule also explains the steps that Reclamation will take against a person or entity for failure to stop using lower Colorado River water unlawfully.

6. Federalism (E.O. 13132)

Under the criteria in E.O. 13132, the proposed rule does not have any federalism implications to warrant the preparation of a Federalism Assessment. The rule is not associated with, nor will it have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. A Federalism Assessment is not required.

7. Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of E.O. 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

8. Consultation With Indian Tribes (E.O. 13175)

Under E.O. 13175, Reclamation has evaluated this rule and determined that it would have no substantial effects on federally recognized Indian tribes. Reclamation consulted with the Indian tribes that are located on the mainstream of the lower Colorado River on November 1, 2006, to discuss the objectives of this rule and to hear questions and concerns on the part of Indian tribes.

9. Paperwork Reduction Act

This rule does not require collection of new or additional information from the public other than what is already required from Colorado River water entitlement holders regarding their water use. A submission under the Paperwork Reduction Act is not required.

10. National Environmental Policy Act of 1969 (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. An environmental assessment consistent with NEPA requirements has been prepared and is summarized below. This rule does not require construction of water diversion, delivery, treatment, or storage facilities. This rule does not impact cultural resources or threatened or endangered species. This rule may improve the long-term sustainability of the lower Colorado River by establishing

procedures which enable Reclamation to identify unlawful users of lower Colorado River water. You may obtain a copy of the environmental assessment by contacting us at the address in the **ADDRESSES** section or you may find the environmental assessment on Reclamation's Web page at *http://www.usbr.gov/lc/*.

11. Information Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Information Quality Act (Pub. L. 106–554).

12. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in the E.O. 13211. A Statement of Energy Effects is not required.

13. Clarity of This Regulation

We are required by E.O. 12866 and E.O. 12988, and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you believe these requirements have not been met, please send comments to Reclamation as instructed in the **ADDRESSES** section. Please make your comments as specific as possible, referring to specific sections and how they could be improved. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you believe lists or tables would be useful, etc.

14. Public Availability of Comments

Before including your name, address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 43 CFR Part 415

Water resources, Water supply.

Dated: July 9, 2008.

Timothy R. Petty,

Acting Assistant Secretary for Water and Science.

For the reasons stated in the preamble, the Bureau of Reclamation proposes to add a new part 415 to Title 43 of the Code of Federal Regulations to read as follows:

PART 415—REGULATING THE USE OF LOWER COLORADO RIVER WATER WITHOUT AN ENTITLEMENT

Subpart A—Purpose, Definitions, and Applicability

Sec.
415.1 What is the purpose of this part?
415.2 What terms are used in this part?
415.3 What is the difference between lawful and unlawful use of lower Colorado River water?
415.4 How do I know if the water I use is subject to this part?
415.5 How will the river aquifer/accounting surface methodology be applied?

Subpart B—Determining the Status of a Well

415.10 How do I determine if my well is in the floodplain?
415.11 How do I determine if my well is outside the floodplain but drawing water out of the lower Colorado River?
415.12 How do I determine the status of my well if it is located in the Yuma accounting area?

Subpart C—Adjustments to the River Aquifer, Floodplain, or the Accounting Surface

415.20 What conditions may cause adjustments to the river aquifer boundaries and the elevation values which define the accounting surface?
415.21 How will Reclamation make adjustments to the Yuma accounting area?

Subpart D—Notification of Well Status

415.30 What is the procedure for determining the status of my well and how will I be notified?
415.31 How may I challenge the determination of my well status?

Subpart E—Bringing Your Use of Lower Colorado River Water Into Compliance With Federal Law

415.40 How may I lawfully use water from the lower Colorado River?
415.41 Will compliance with Federal law incur any cost for which I will be responsible?
415.42 What is the role of an existing entitlement holder under this part?
415.43 Is this part applicable to existing lower Colorado River water delivery contracts?

Subpart F—Penalty for Noncompliance

415.50 What if I continue to use water from the lower Colorado River without an entitlement?

Illustrations to Part 415

Authority: 5 U.S.C. 552; 43 U.S.C. 373, 485, 617.

Subpart A—Purpose, Definitions, and Applicability

§ 415.1 What is the purpose of this part?

This part protects lawful entitlements to use water from the lower Colorado River by providing a method for identifying persons and entities unlawfully using such water.

§ 415.2 What terms are used in this part?

Accounting surface means the elevation and slope of the unconfined static water table in the river aquifer outside the floodplain and the reservoirs of the lower Colorado River that would exist if the lower Colorado River were the only source of water to the river aquifer. The accounting surface extends outward from the edges of the floodplain or a reservoir to the subsurface boundary of the river aquifer from the mouth of the Grand Canyon to just north of the Southerly International Boundary (SIB). In the Yuma accounting area, the use of the accounting surface is superseded as determined by Reclamation.

Accounting year means January 1 through December 31.

Boulder Canyon Project Act of 1928 (BCPA) means the act which established the responsibilities of the Secretary of the Interior to direct, manage, and coordinate the operation of Colorado River dams and related works in the Lower Basin.

Colorado River water means water in or withdrawn from the mainstream of the Colorado River, including the following:

(1) Water in the surface channels and reservoirs of the Colorado River;

(2) Water in the floodplain drains;

(3) Water beneath the Colorado River floodplain; and

(4) Water withdrawn from beneath the accounting surface.

Domestic use means the use of Colorado River water for household, stock, municipal, mining, milling, industrial and other like purposes, excluding the generation of electrical power.

Floodplain means that part of the lower Colorado River valley that has been covered by floods of the modern lower Colorado River as it meandered prior to construction of Hoover Dam. The floodplain commonly is bounded by terraces and alluvial slopes that rise to the foot of the mountains that rim the valley. In the Yuma area, the floodplain includes the floodplain of the Gila River from the Laguna and Gila Mountains to

the confluence with the lower Colorado River.

Lower basin means the lower Colorado River basin, which includes those parts of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River below Lee Ferry. The lower basin also includes parts of those same states that are located outside the drainage area of the Colorado River that are or can be beneficially served by waters diverted from the Colorado River below Lee Ferry.

Lower Colorado River water means mainstream water.

Lower Division States means Arizona, California, and Nevada.

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

Mainstream water means

(1) Water drawn or diverted from the main channel of the lower Colorado River, exclusive of tributaries, within the United States downstream from Lee Ferry (including the areas covered by reservoirs, wetlands, lakes, ponds, and backwaters);

(2) Water withdrawn by a well within the boundary of the floodplain portion of the lower Colorado River aquifer; and

(3) Within the boundary of the accounting surface portion of the lower Colorado River aquifer, water withdrawn from a well with a static water level indistinguishable from or less than the elevation of the accounting surface at the well site.

NIB means the Northerly International Boundary with Mexico.

Normal flow conditions mean that releases from Hoover Dam are made in accordance with downstream requirements to satisfy 7.5 million acre-feet of consumptive use in the United States and a delivery of 1.5 million acre-feet to Mexico.

Regional Director means the Regional Director, Lower Colorado Region, Bureau of Reclamation, Boulder City, Nevada.

River aquifer means the unconfined aquifer that consists of the saturated, permeable sediments and sedimentary rocks that are hydraulically connected to the lower Colorado River so that water can move between the lower Colorado River and the aquifer in response to withdrawal of water from the aquifer or differences in water level elevations between the lower Colorado River and the aquifer. The river aquifer consists of the aquifer underlying the lower Colorado River's floodplain and the accounting surface. The river aquifer has been delineated from the mouth of the Grand Canyon to SIB.

SIB means the Southerly International Boundary with Mexico.

Static water elevation means the non-pumping elevation of the water in a well, measured as the elevation of the ground, or other appropriate elevation reference, less the depth to water in the well with the pump turned off and the water elevation in the well recovered to the non-pumping elevation.

Tributary water is water that enters the mainstream or the river aquifer from a source other than the Colorado River.

USGS means the United States Geological Survey of the Department of the Interior.

Wells with a static water elevation that cannot be distinguished from the accounting surface means wells that have a static water elevation which is within ± 0.84 feet from the accounting surface elevation in the area of the well.

Yuma accounting area means the area in Arizona generally downstream from the confluence of the Gila River, on the Yuma Mesa, and the Yuma Valley. This area is delineated in Figure 7 of this part.

§ 415.3 What is the difference between lawful and unlawful use of lower Colorado River water?

(a) A person or entity may lawfully use water from the lower Colorado River only under an entitlement. An entitlement means an authorization to use water from the lower Colorado River water as described in:

(1) The Consolidated Decree entered by the United States Supreme Court in *Arizona* v. *California* in March of 2006, as supplemented or amended;

(2) A water delivery contract with the Secretary of the Interior; or

(3) A reservation of water by the Secretary of the Interior.

(b) If you are using water from the lower Colorado River without an entitlement, you are using water unlawfully. You must obtain an entitlement or you must stop using water from the lower Colorado River.

§ 415.4 How do I know if the water I use is subject to this part?

(a) This rule applies to you if you use water from the mainstream of the lower Colorado River within the States of Arizona, California, or Nevada. The lower Colorado River begins at Lee Ferry, Arizona, which is located 17.3 miles downstream from Glen Canyon Dam. The mainstream of the lower Colorado River includes all water in the river channel and all water in any reservoir on the lower Colorado River. Water in the mainstream of the lower Colorado River originates from many sources both above and below the ground. When surface water from tributary valleys reaches the mainstream of the lower Colorado River, it becomes Colorado River water. When tributary water commingles with Colorado River water beneath the floodplain, it becomes mainstream water. Tributary water that commingles with groundwater beneath the accounting surface, where the elevation of the water table is below or cannot be distinguished from the elevation of the accounting surface, is considered mainstream water.

(b) You are using mainstream water from the lower Colorado River if you divert any water out of the river channel; for example, by a diversion dam, a river pump, or a hose. You are using mainstream water from the lower Colorado River if you are diverting water out of a reservoir, such as Lake Mead, Lake Mohave, or Lake Havasu. You are using mainstream water from the lower Colorado River if you operate a well located in the river's floodplain, because that well draws water directly from the mainstream. You are using mainstream water from the lower Colorado River if you operate a well located outside the floodplain and your well pumps water that is replaced by water drawn from the lower Colorado River, as determined by the river aquifer/accounting surface methodology.

§ 415.5 How will the river aquifer/accounting surface methodology be applied?

(a) Your well must be located within the exterior boundary of the river aquifer to potentially pump water from the lower Colorado River. The river aquifer extends from Lake Mead downstream to SIB and laterally into adjacent areas generally until encountering a barrier to subsurface flow. The river aquifer contains two smaller areas called the floodplain and the accounting surface. The accounting surface exists within the river aquifer and extends laterally from edges of the floodplain (or edges of a reservoir) to the extent of the river aquifer from Lake Mead downstream to just north of SIB.

(b) Surface water from tributary valleys is considered Colorado River water when it reaches the mainstream of the lower Colorado River. When tributary water commingles with groundwater beneath the floodplain, it becomes mainstream water. Tributary water beneath the accounting surface, where the elevation of the water table is below or cannot be distinguished from

the elevation of the accounting surface, is considered mainstream water.

(c) If your well is located in the floodplain portion of the river aquifer, you are pumping lower Colorado River water. If your well is located in the accounting surface portion of the river aquifer, you are pumping water that is replaced by water drawn from the lower Colorado River unless the static water elevation in your well is above the elevation of the accounting surface in the area of your well.

(1) *Lee Ferry to the mouth of the Grand Canyon.* The river aquifer, floodplain, and accounting surface have not been delineated from Lee Ferry to the mouth of the Grand Canyon as of the writing of this part. The determination of whether a well is pumping water from the lower Colorado River or water that is replaced by water drawn from the lower Colorado River will be made on a case-by-case basis for wells in this area using criteria determined by the Regional Director.

(2) *Lake Mead area.* In the area surrounding Lake Mead, the river aquifer/accounting surface methodology will be used to determine if a well will be considered to pump lower Colorado River water or water replaced by water drawn from the mainstream of the lower Colorado River. The accounting surface in the area surrounding Lake Mead requires unique treatment in this part. The water surface elevation of Lake Mead fluctuates significantly on an annual basis in response to variations in the natural water supply. This fluctuation is unlike the other reservoirs of the lower Colorado River which correspond to monthly operational targets. The accounting surface in the area surrounding Lake Mead will vary annually and will be set at the high end-of-month elevation of Lake Mead for the accounting year. Information regarding the elevation and lateral extent of the accounting surface surrounding Lake Mead will be provided every 5 years via publication of a notice in the **Federal Register**. Figures 2 and 3 of this part show the outer-most boundary of the accounting surface surrounding Lake Mead.

(3) *Downstream from Lake Mead to the Yuma accounting area.* Accounting surface elevations in the areas surrounding Lake Mohave and Lake Havasu are set at the annual high end-of-month water surface elevation targets used to operate these reservoirs under normal flow conditions. The accounting surface elevations elsewhere are determined by water surface profiles of the lower Colorado River and by water surface elevations in drainage ditches where they exist in irrigated floodplain areas under normal flow conditions.

(d) Though the accounting surface has been defined to just north of SIB, the river aquifer/accounting surface methodology will be utilized to identify wells which pump water that is replaced by water drawn from the lower Colorado River only in the portion of the river aquifer upstream of the Yuma accounting area as shown in Figure 6. The method described in § 415.12 will be used in the Yuma accounting area to determine whether or not a well pumps lower Colorado River water or groundwater which otherwise would have returned to the lower Colorado River upstream of NIB.

Subpart B—Determining the Status of a Well

§ 415.10 How do I determine if my well is in the floodplain?

Use the following guidelines to determine if your well is in the floodplain.

(a) Generalized maps (not drawn to scale) of the floodplain of the lower Colorado River from Davis Dam to the northern boundary of the Yuma accounting area are provided at the end of this part in Figures 4 through 6. If your well is located in the floodplain shown in Figures 4 through 6, you are pumping water from the lower Colorado River and you must have an entitlement to lawfully use that water.

(b) The floodplain of the area in northern Arizona between Lee Ferry, Arizona, and the mouth of the Grand Canyon has not yet been determined. If your well is between Lee Ferry and the mouth of the Grand Canyon, Reclamation will consider the facts on a case-by-case basis to determine if your well withdraws water from the lower Colorado River.

(c) If you need help to determine whether your well is located within the floodplain, you may contact the Bureau of Reclamation, P.O. Box 61470, Boulder City, NV 89006–1470, *Attention:* Area Manager, Boulder Canyon Operations Office (BCOO–1000).

§ 415.11 How do I determine if my well is outside the floodplain but drawing water out of the lower Colorado River?

(a) A well located within the accounting surface portion of the river aquifer will be considered to pump water that is replaced by water drawn from the lower Colorado River if the static water elevation in the well is less than or cannot be distinguished from the elevation of the accounting surface at the well site.

(1) The accounting surface is the elevation at which underground water would be expected to occur in a particular area of the river aquifer if the lower Colorado River was the only source of groundwater in the area. Therefore, water pumped below or from an elevation indistinguishable from the elevation of the accounting surface in the location of your well will be replaced by water drawn from the lower Colorado River. Generalized maps (not drawn to scale) of the accounting surface from the mouth of the Grand Canyon to the northern boundary of the Yuma accounting area outside the floodplain are provided at the end of this part as Figures 2 through 6. If your well is located outside the floodplain but within the boundary of the river aquifer, the USGS will be required to measure the static water elevation in your well to determine if it is pumping water replaced by water drawn from the lower Colorado River.

(2) The static water elevation in your well is compared by Reclamation to the elevation of the accounting surface at your well site. If the static water elevation in your well is indistinguishable from or lower than the elevation of the accounting surface where your well is located, you are pumping water that is replaced by water drawn from the mainstream of the lower Colorado River. You must have an entitlement to lawfully use water from the lower Colorado River. The USGS will provide advance notice to you before measurements are made by the USGS. If the static water level has never been measured in your well, you may contact the Bureau of Reclamation, P.O. Box 61470, Attention: Area Manager, Boulder Canyon Operations Office, Mail Code BCOO–1000, Boulder City, NV 89006–1470 to schedule the measurement of the static water level in your well. No other data or method are available to determine if your well is pumping water that is replaced by lower Colorado River water. Thus, if a well user denies an employee, agent, or contractor of Reclamation or the USGS access to a well to make the required measurements, Reclamation will presume that the well pumps water that is replaced by water drawn from the lower Colorado River. If the USGS is physically unable to make the required measurements due to well construction, Reclamation will presume that the well pumps water that is replaced by water drawn from the lower Colorado River. Such a presumption about your well is made, absent the measurement of the static water elevation in your well, to maintain compliance with the BCPA.

The BCPA requires all persons using lower Colorado River water to have a contract for the storage and delivery of Colorado River water with the Secretary of the Interior or a perfected water right under state law which existed prior to June 25, 1929, the effective date of the BCPA.

§ 415.12 How do I determine the status of my well if it is located in the Yuma accounting area?

(a) This section defines the boundaries of the Yuma accounting area and describes criteria for determining when water withdrawn by a well is lower Colorado River water or groundwater that is flowing to the lower Colorado River upstream of NIB. The Yuma accounting area is delineated in Figure 7 of this part.

(b) The Yuma accounting area is hydrologically unique because much of the water diverted from the lower Colorado River and applied for irrigation generally flows underground across the SIB or under the Colorado River south of the NIB and does not return to the lower Colorado River in the United States through natural hydrologic processes. Water which does not return to the Colorado River above the NIB, or which does not return to the Limotrophe section (the section of the lower Colorado River which forms the international boundary between the United States and Mexico from the NIB to the SIB) as surface water is not available to satisfy consumptive use in the United States or delivery obligations to Mexico by the United States under the Mexican Treaty. Reclamation determined that wells within the Yuma accounting area deserve separate consideration due to the direction of groundwater flow and the deltaic nature of the Yuma area. Reclamation developed an accounting method to determine whether or not wells in this area pump lower Colorado River water, or water previously diverted from the lower Colorado River which would otherwise return to the lower Colorado River. In the Yuma accounting area, unmeasured return flow credit is calculated and credited to Arizona assuming there are no intervening wells or depletions from the time the flows leave an irrigation district to the time the flows return to the lower Colorado River. Therefore, in the Yuma accounting area, wells which pump groundwater which otherwise would have returned to the lower Colorado River upstream of the NIB are considered to be using lower Colorado River water.

(c) Figure 7 of this part depicts a groundwater divide at the northern end of the Yuma accounting area. In the Yuma accounting area, north of the groundwater divide, groundwater flows north to the lower Colorado River above the NIB as of the adoption of this part. Reclamation will determine that your well pumps lower Colorado River water if your well is located in an area where groundwater flows toward the lower Colorado River upstream of the NIB, as depicted in Figure 7 of this part.

(d) Your well is exempt from this rule if your well is located south of the groundwater divide depicted in Figure 7 of this part where groundwater does not flow toward the lower Colorado River upstream of the NIB.

Subpart C—Adjustments to the River Aquifer, Floodplain, or the Accounting Surface

§ 415.20 What conditions may cause adjustments to the river aquifer boundaries and the elevation values which define the accounting surface?

(a) Physical evidence to support adjustment to the geographic boundary of the river aquifer would include, but are not limited to, information derived from geologic studies, geophysical studies, well drilling, or the result of an extreme hydrologic event.

(b) Changes in conditions that define the lower Colorado River profile may cause Reclamation to adjust the accounting surface elevation contours. Such changes in conditions may include, but are not limited to, changes in development or growth which may increase or decrease groundwater pumping in the Yuma accounting area, changes in water deliveries and/or uses, changes in reservoir operations, or changes in hydraulic conditions or other conditions that may result in significant water surface elevation changes in the lower Colorado River channel, reservoirs, and drainage ditches of the lower Colorado River.

(c) The USGS and Reclamation will document the basis for any adjustments to the accounting surface elevations or the geographic boundary of the river aquifer and/or the accounting surface in a report which will be made available to the public. This part would be amended to reflect changes in the accounting surface elevations and/or the geographic boundary of the river aquifer.

§ 415.21 How will Reclamation make adjustments to the Yuma accounting area?

(a) The method described in § 415.12 will be used in the Yuma accounting area unless or until groundwater gradients in the Yuma accounting area change so as to require a re-evaluation of the areas from which groundwater flows toward the Colorado River upstream of NIB. Such a change could occur due to increased groundwater pumping and/or a redistribution of groundwater pumping in the Yuma accounting area.

(b) In the event of a re-evaluation, Reclamation will review the method for the Yuma accounting area and modify it, as needed, following consultations with the Lower Division States. Reclamation's review will be conducted in coordination with the Lower Division States. Changes in the Yuma accounting area will be formalized by revising this part.

Subpart D—Notification of Well Status

§ 415.30 What is the procedure for determining the status of my well and how will I be notified?

(a) The Regional Director will consider information relating to §§ 415.10 through 415.12 to determine whether or not you are using water from the lower Colorado River without an entitlement. If your well is located within the accounting surface, the USGS will ask permission to measure the static water elevation in your well and the elevation of the land surface (or other appropriate elevation datum) at your well site to determine if the water pumped from your well is lower Colorado River water or water replaced by water drawn from the lower Colorado River. After the USGS measures the static water elevation in your well, the Regional Director will inform you about the status of your well in writing. If you do not give the USGS permission to measure the static water elevation in your well, the Regional Director will assume that water pumped from your well is lower Colorado River water or water replaced by water drawn from the lower Colorado River.

(b) The Regional Director will establish a file for each determination that you dispute. This file is an administrative record and will contain all relevant information regarding the status of your well or other means of using water from the lower Colorado River. You are entitled to review the administrative record. All of the information considered by the Regional Director will be included in the administrative record.

(c) If the Regional Director determines you are using water from the lower Colorado River without an entitlement, the Regional Director will notify you of the determination in writing by certified mail, return receipt requested, and provide the basis for the determination. The Regional Director's determination is final unless, within 60 days of the receipt of the notice, you file an

objection with the Regional Director. The Regional Director will make reasonable attempts to locate you to send the notice of determination and will document these attempts. If the Regional Director is unable to locate you, the determination will be final 60 days after the first attempt to deliver the notice.

§ 415.31 How may I challenge the determination of my well status?

(a) If you file a challenge to the Regional Director's determination, you must include information to support your challenge. The Regional Director will review your challenge and any supporting information and will notify you in writing by certified mail, return receipt requested, whether the determination has been changed.

(b) If the Regional Director does not change the determination, you may file an appeal with the Commissioner of Reclamation in writing within 30 days after receiving the notice that the determination was not changed. If you do not file an appeal with the Commissioner, the decision of the Regional Director is final 30 days after you received notice that the determination was not changed.

(c) It is not necessary to include your supporting information in the appeal to the Commissioner. The Regional Director will send the administrative record to the Commissioner and will include the challenge you filed with the Regional Director and any supporting information you filed with the challenge. The Commissioner's determination will be made solely on the administrative record. The Commissioner's determination is the final determination of the Department of the Interior.

(d) Determinations by the Regional Director that may or may not be challenged:

You may challenge	You may not challenge
(1) That your well is, or is not, located within the river aquifer	That your well in the floodplain is diverting lower Colorado River water.
(2) That your well is, or is not, located within the floodplain portion of the river aquifer.	That the entire amount of water pumped from a well should be accounted for as a diversion of lower Colorado River water regardless of the hypothesized ratio of non-Colorado River water to lower Colorado River water.
(3) That your well is, or is not, located within the accounting surface portion of the river aquifer.	Whether or not Reclamation will use the method described in this part to determine if a well pumps lower Colorado River water or water replaced by water drawn from the lower Colorado River.
(4) That the static water elevation in your well in the accounting surface portion of the river aquifer is, or is not, below or cannot be distinguished from the accounting surface (new measurements will be made by the USGS; measurements made by any other person or entity will not be accepted).	

Subpart E—Bringing Your Use of Lower Colorado River Water Into Compliance With Federal Law

§ 415.40 How may I lawfully use water from the lower Colorado River?

You may be able to bring your use of water from the lower Colorado River into compliance with Federal law through one of the options provided below:

(a) *Arizona.* If you are using water from the lower Colorado River in Arizona, you may be able to acquire an entitlement through a contract with the Secretary of the Interior. You may contact the Arizona Department of Water Resources, Attention: Arizona Department of Water Resources, Colorado River Management, 3550 North Central Avenue, Phoenix, Arizona 85012 for information about acquiring an entitlement under Arizona's lower Colorado River apportionment through a contract with the Secretary of the Interior.

(b) *California.* All Colorado River water apportioned for use in California is already under permanent contract. However, if you are using water from the lower Colorado River in California, some water is available for domestic use in California through the Lower Colorado Water Supply Project (LCWSP). Unlawful users in California who are eligible as domestic users in California and who wish to participate under the LCWSP must 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 apportioned 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.

(d) *Any Lower Division State.* If you are using water from the lower Colorado River in Arizona, California, or Nevada, you may be able to acquire an entitlement through an assignment, transfer, or lease from an existing entitlement holder within your state. The assignment, transfer, or lease must be approved by Reclamation.

(1) You may also be able to obtain a right to use water as a customer of an existing entitlement holder even if your well or river pump is not located within the entitlement holder's service area. At the consent of the entitlement holder, your well or river pump and place of water use must be included within the entitlement holder's service area through a change in the service area boundary and the inclusion must be approved by Reclamation. If your well or river pump is already located within the entitlement holder's service area, you must contact the entitlement holder to inquire about reporting your use of lower Colorado River water under the entitlement holder's entitlement. If you do not know if your well or river pump is near or within an entitlement holder's service area, you may refer to a map of service area boundaries within the river aquifer on Reclamation's Web page at *http://www.usbr.gov/lc/.*

(2) You may contact Reclamation at the Bureau of Reclamation, P.O. Box 61470, Boulder City, NV 89006–1470, Attention: Area Manager, Boulder Canyon Operations Office, Mail Code BCOO–1000, for information relating to the possibility of acquiring an entitlement to use water from the lower Colorado River or becoming a customer of an existing water entitlement holder.

§ 415.41 Will compliance with Federal law incur any costs for which I will be responsible?

(a) You may be required to pay for certain costs when you bring your lower

Colorado River water use into compliance with Federal law. The type and amount of costs will vary among water users. The type and amount of costs you may be required to pay will depend upon:

(1) *The state in which your well or river pump is located.* If you are using water from the lower Colorado River in Arizona, and you are not within an entitlement holder's service area, you may be able to acquire an entitlement through a contract with the Secretary for a nominal charge. In California, if you are not within an entitlement holder's service area, and you wish to enter a LCWSP water delivery subcontract with the City of Needles, you will be required to pay the initial and annual fees charged by the City of Needles to its LCWSP subcontractors. If your well is in Nevada, you would be required to comply with SNWA policies.

(2) *Whether or not your well or river pump is located within the boundaries of a contract holder's service area.* In Arizona and California, if your well or river pump is not located within the boundaries of an entitlement holder's service area, your well or river pump may be close enough to an entitlement holder's service area so that inclusion of your well or river pump by modification of the service area boundary is possible. If the entitlement holder agrees to modify its service area boundaries to include your well or river pump, you will be required to pay for the costs incurred by Reclamation to review and approve the inclusion. The entitlement holder may or may not pass on its costs, if any, to you. Once you are a customer of the entitlement holder, you may be required to pay regular fees assessed by the entitlement holder.

(b) In Arizona and California, if your well or river pump is already within an entitlement holder's service area, your use of lower Colorado River water should be reported to the entitlement holder as determined by the entitlement holder. Your lower Colorado River water use will be accounted for by the entitlement holder with all such uses within its service area. The entitlement holder will report the total use of lower Colorado River water occurring within its service area under its entitlement to Reclamation. Reclamation will account for lower Colorado River water use reported by the entitlement holder against the entitlement holder's entitlement on an annual basis. Depending upon the policies and pricing structure of the entitlement holder who is accounting for your use of lower Colorado River water, you may be subject to fees assessed by the entitlement holder.

§ 415.42 What is the role of an existing entitlement holder under this part?

Any lower Colorado River water use occurring within your service area must be accounted for within your entitlement in accordance with the Consolidated Decree entered by the United States Supreme Court in *Arizona* v. *California* (547 U.S. 150 (2006)). Reclamation will assist you by providing you with information identifying the location and type of use for all of the wells inventoried in your service area which pump lower Colorado River water or water replaced by water drawn from the lower Colorado River.

§ 415.43 Is this part applicable to existing lower Colorado River water delivery contracts?

Yes, the delivery of lower Colorado River water under existing lower Colorado River water delivery contracts is subject to Federal rules and regulations promulgated by the Secretary of the Interior under Reclamation law.

Subpart F—Penalty for Noncompliance

§ 415.50 What if I continue to use water from the lower Colorado River without an entitlement?

If you do not stop using water from the lower Colorado River without an entitlement after the notice, determination, and appeal procedures (if pursued) have been completed, then the Regional Director will report you as unlawfully using Colorado River water in an annual report filed with the United States Supreme Court. The Regional Director will then work with the United States Department of Justice to seek Federal court orders requiring you to stop using water from the lower Colorado River without an entitlement.

BILLING CODE 4310–MN–P

Illustrations to Part 415

Figure 1 -- Index Map

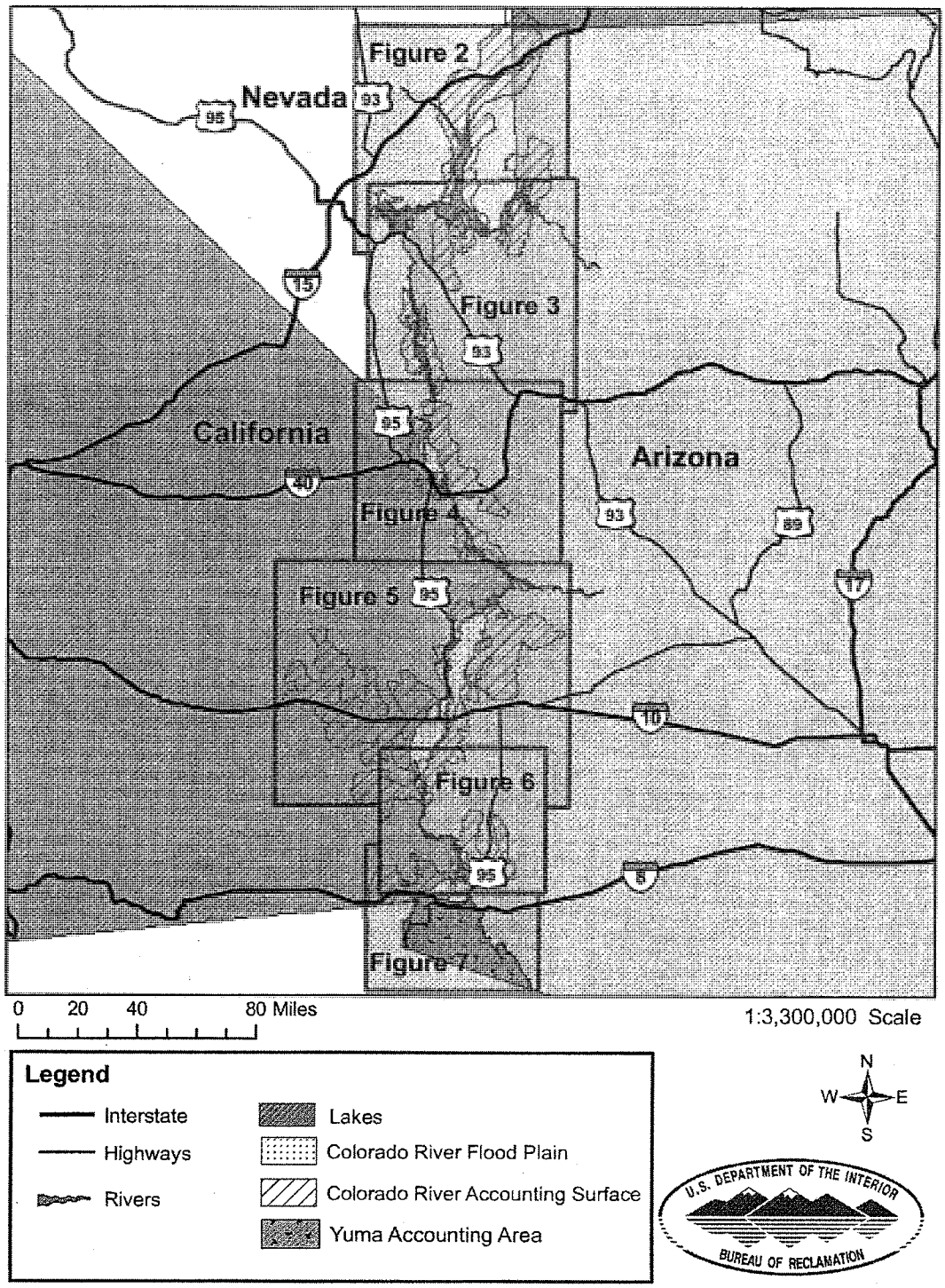


Figure 2 -- Lower Colorado River Accounting Surface: Mouth of the Grand Canyon to Hoover Dam

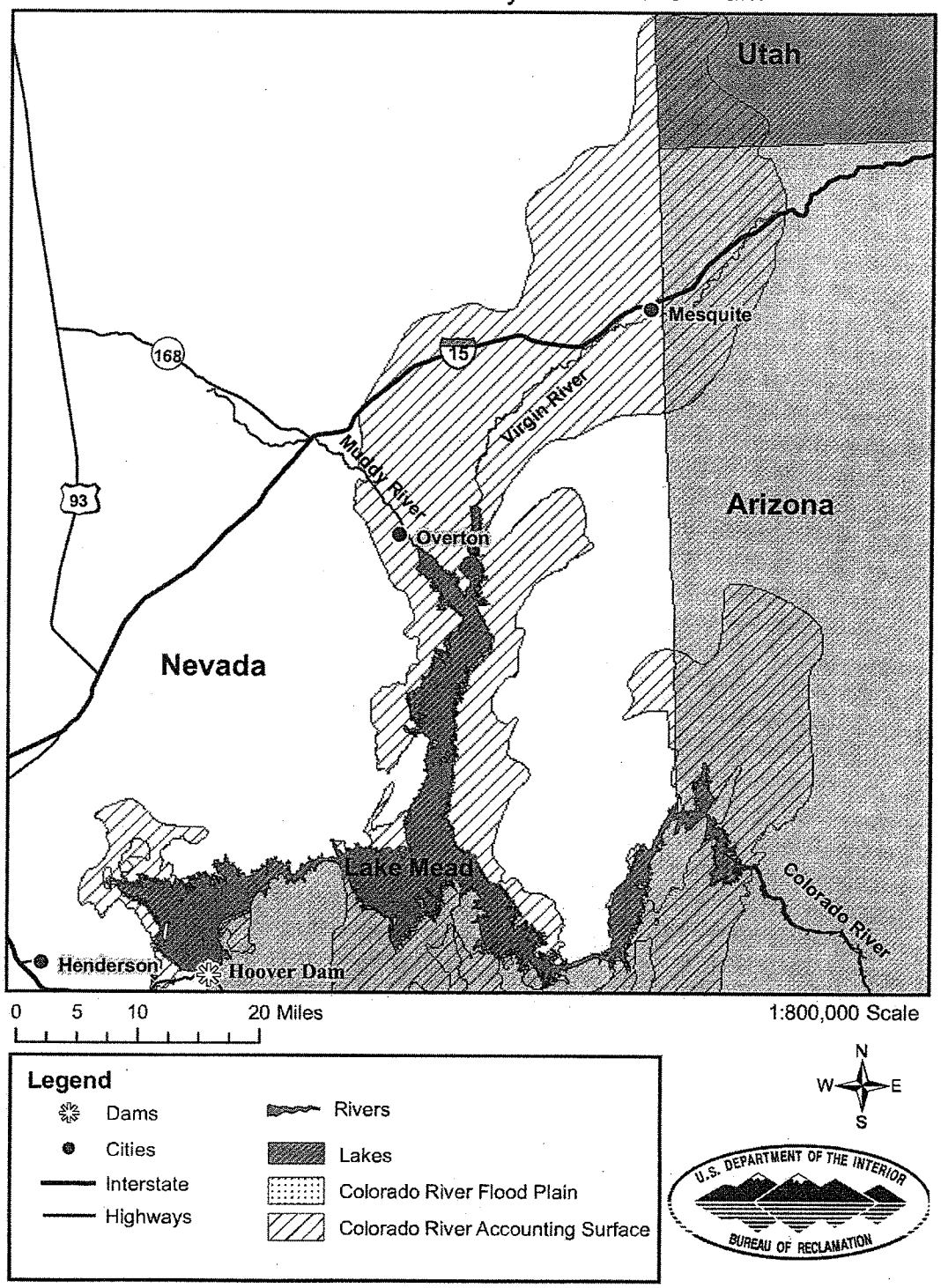


Figure 3 – Lower Colorado River Accounting Surface: Lake Mead to Davis Dam

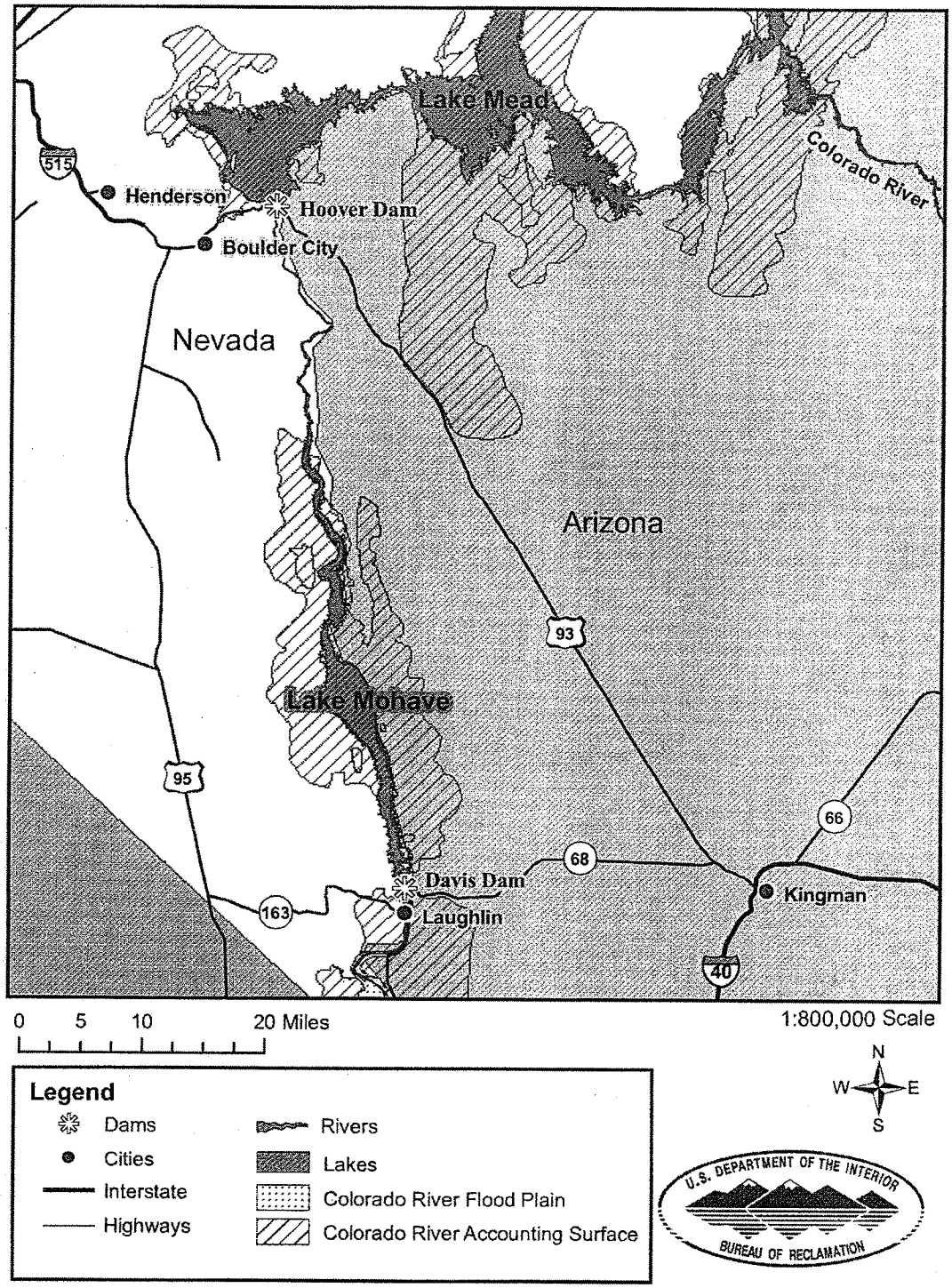


Figure 4 – Lower Colorado River Floodplain and Accounting Surface: Davis Dam to Parker Dam

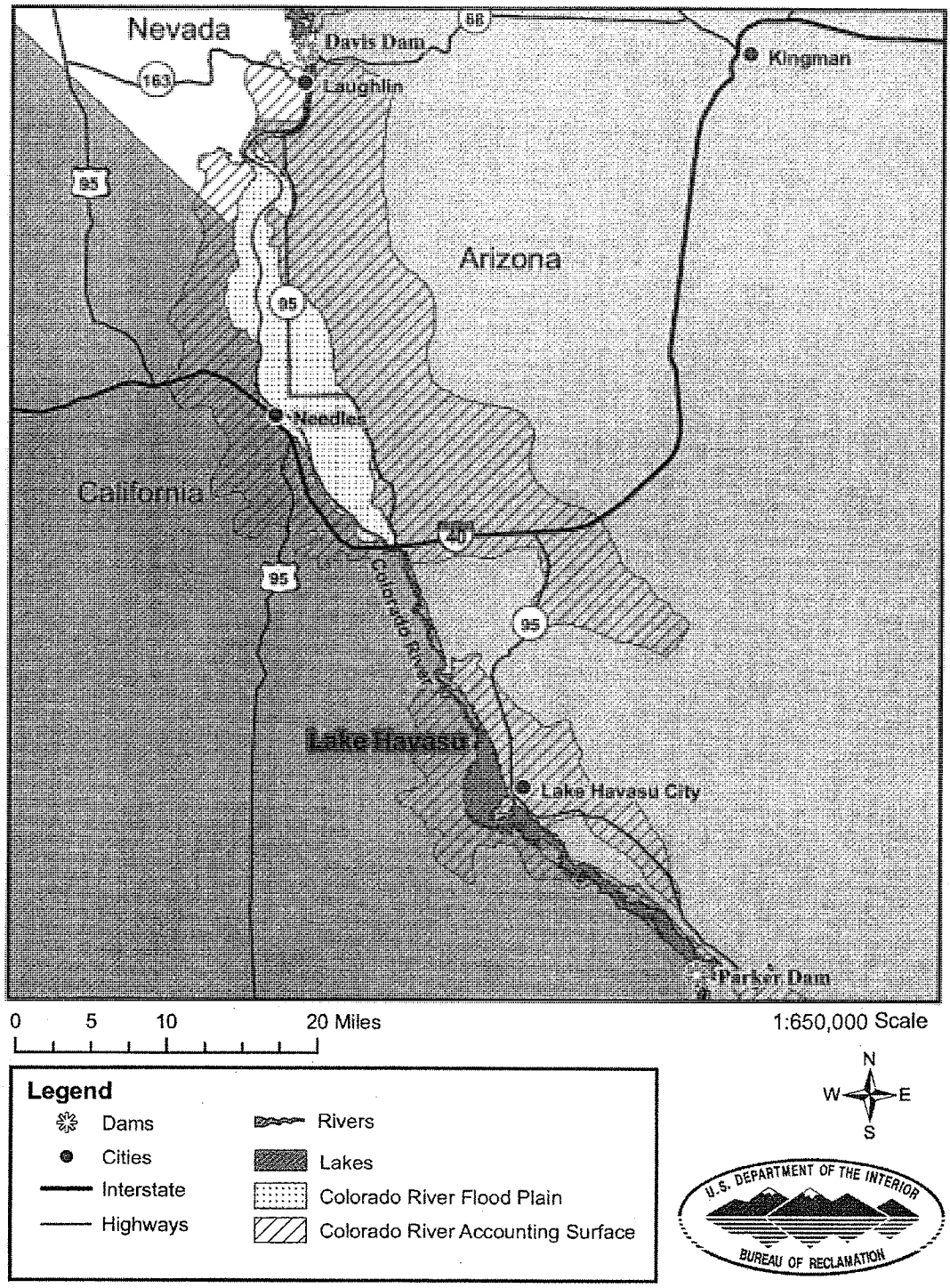


Figure 5 -- Lower Colorado River Floodplain and Accounting Surface: Parker Dam to Southern Boundary of Palo Verde Irrigation District

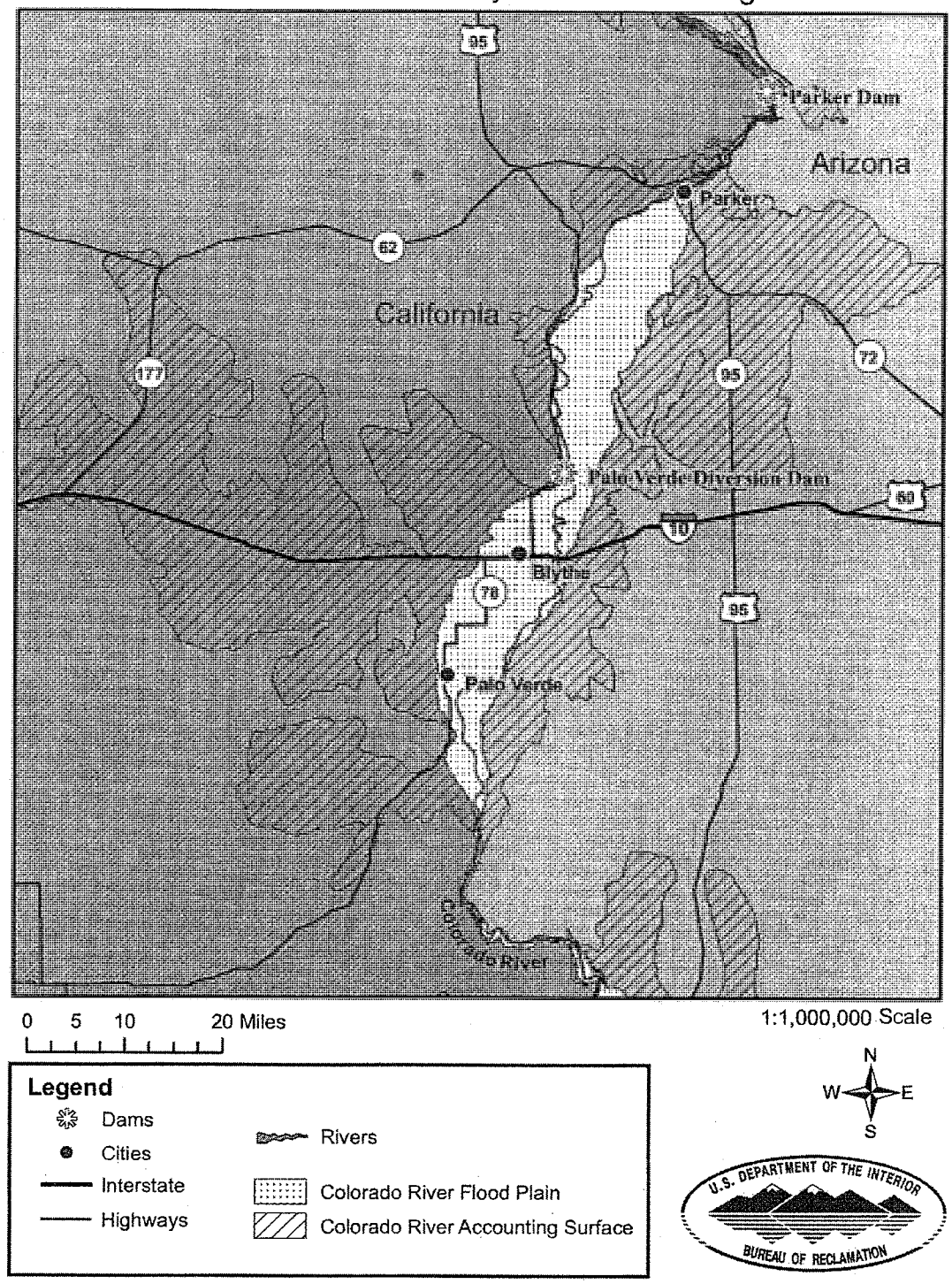


Figure 6 -- Lower Colorado River Floodplain and Accounting Surface: Southern Boundary of Palo Verde Irrigation District to Northern Boundary of Yuma Accounting Area

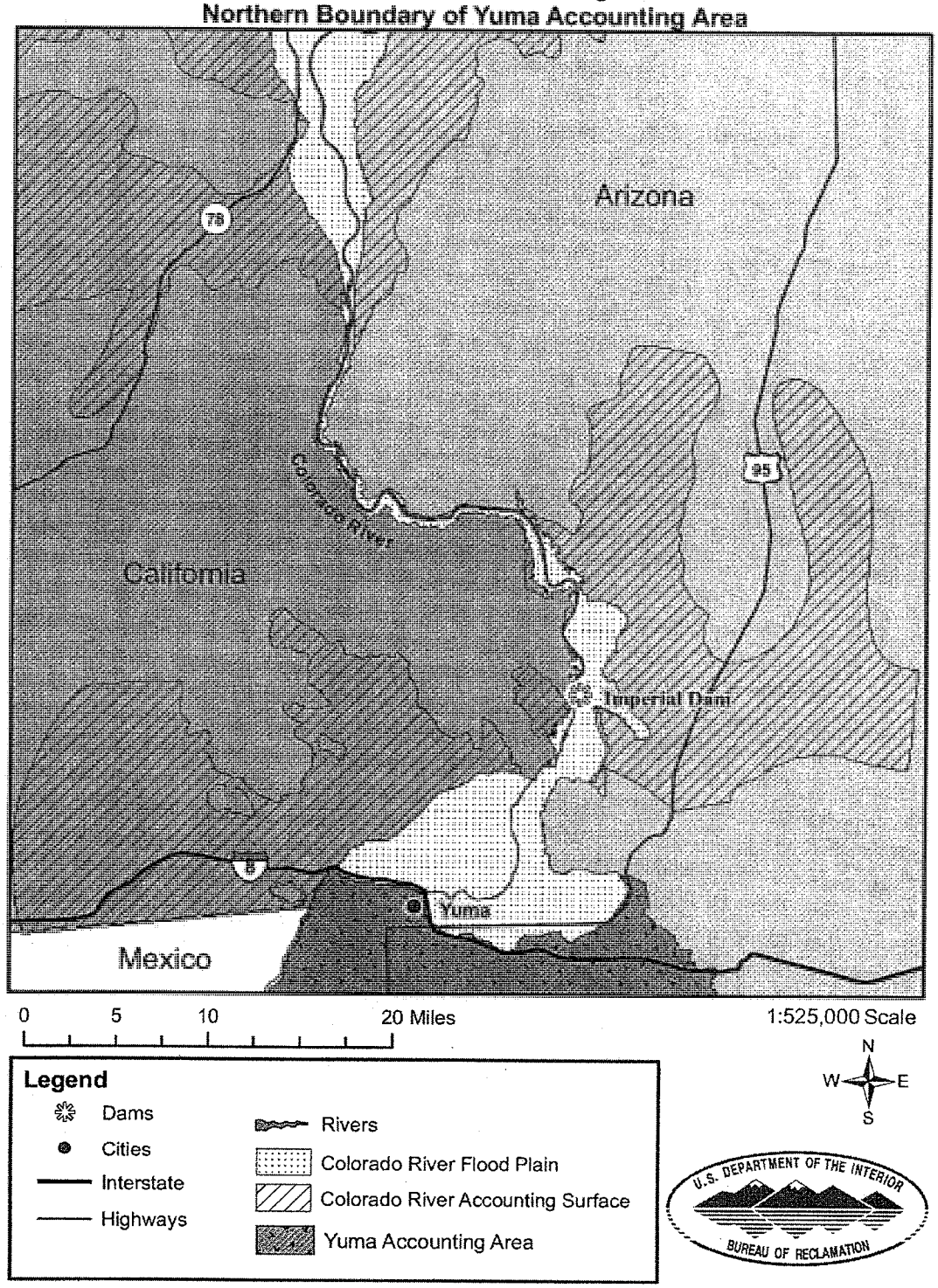
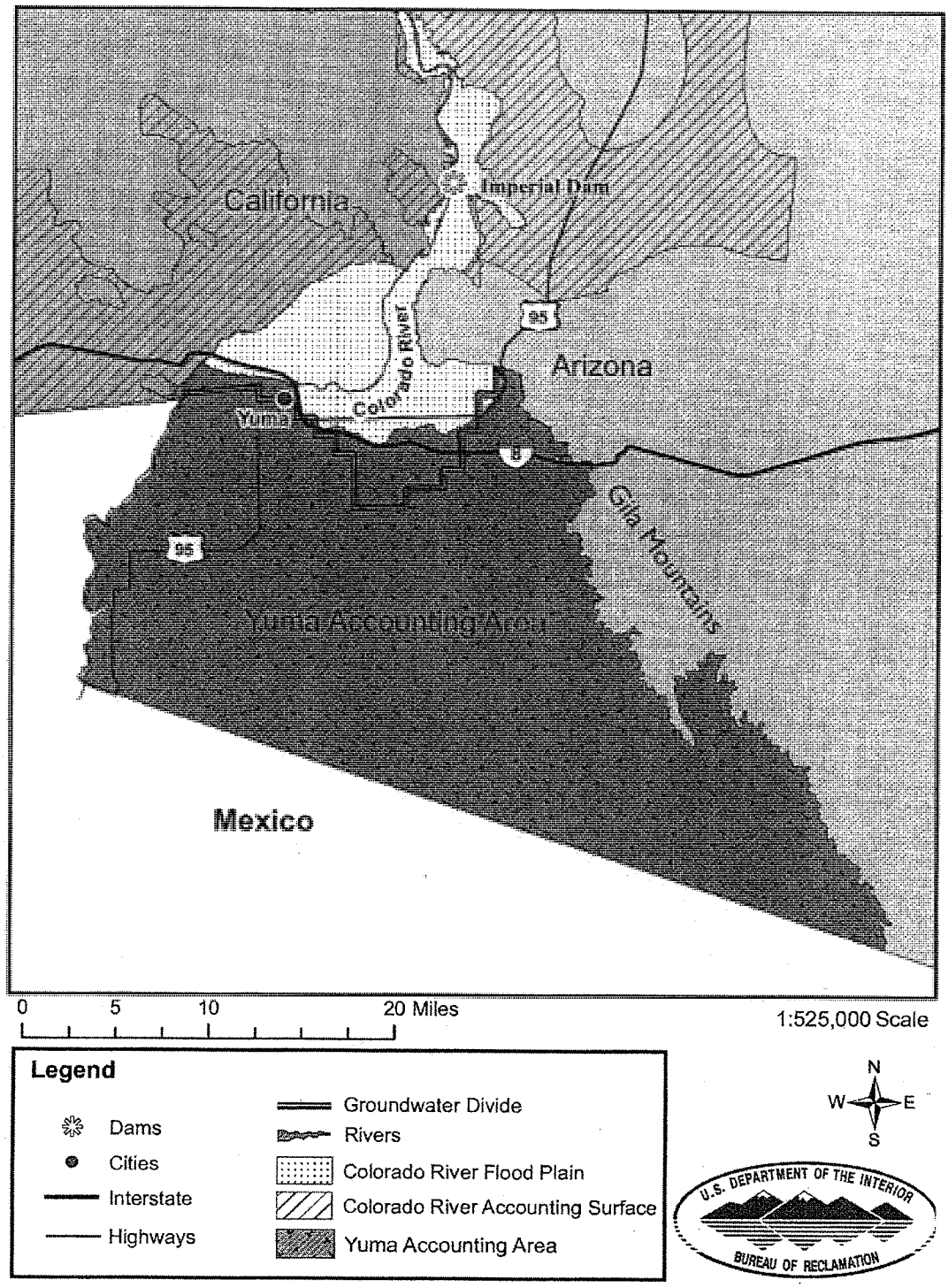


Figure 7 -- Yuma Accounting Area



[FR Doc. E8–16001 Filed 7–15–08; 8:45 am]
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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT

Docket No. 09-AFC-8

PROOF OF SERVICE
(Revised 1/04/10)

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*indicates change

DECLARATION OF SERVICE

I, Ashley Y. Garner, declare that on January 19, 2010, I served and filed copies of the attached **GENESIS SOLAR, LLC BRIEF IN SUPPORT OF COMMITTEE SCOPING ORDER** dated **January 19, 2010**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
[http://www.energy.ca.gov/sitingcases/genesis_solar].

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(***Check all that Apply***)

For service to all other parties:

__X__ sent electronically to all email addresses on the Proof of Service list;

__X__ by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-8
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct.

Ashley Y. Garner

Ashley Y. Garner