41929

MWD
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Office of the General Counsel

June 10, 1996

VIA MESSENGER

Gerald R. Zimmerman
Executive Director
Colorado River Board of California
770 Fairmont Avenue, Suite 100
Glendale, California 91203-1035

Dear Jerry,

In response to your request to all the agencies for assistance regarding the legal opinions prepared for Arizona's Department of Water Resources regarding banking, enclosed is a copy of an opinion prepared for Metropolitan by Jerry Muys. If we can be of additional assistance, please feel free to contact me.

Very truly yours,

N. Gregory Taylor
General Counsel

Karen L Tachiki

Karen L. Tachiki
Assistant General Counsel

KLT:mg
kartac\zim.doc
Encl.

BOGLE & GATES P.L.L.C.

A Professional Limited Liability Company

LAW OFFICES

JEROME C. MUYS

The Warner Building
Suite 875
1299 Pennsylvania Avenue N.W.
Washington, D.C. 20004-2421

Main Office: (202) 293-3600
Facsimile: (202) 293-5825

Seattle
Anchorage
Bellevue
Olympia
Portland
Tacoma
Vancouver, B.C.

91488/00001

November 13, 1995

N. Gregory Taylor, Esq.
General Counsel
Metropolitan Water District
of Southern California
P.O. Box 54153
Los Angeles, CA 90054

Re: Secretary of the Interior's Authority to "Bank" Conserved Water at Lake Mead for Metropolitan's Subsequent Use

Dear Greg:

The Secretary of the Interior's ("Secretary") "Draft Regulations for Administering Entitlements to Colorado River Water in the Colorado River Basin" circulated on May 6, 1994 propose a system for "Water Banking and Marketing of Banked Water" (§ 415.23).[1] The draft regulations would permit the banking of water "actually conserved by extraordinary conservation measures or made available through land fallowing within the Lower Division States or imported into the Lower Division States from a non-Colorado River Basin source." "Conserved water" is defined as water "which has been put to historical beneficial use [i.e., "wet" water in the jargon that has been used in recent interstate discussions] that either would have been consumptively used or lost from availability for beneficial consumptive use in the absence of . . . specific conservation measures which are identifiable, quantifiable, and verifiable." Such conservation measures "may include the use of non-Colorado River water in lieu of Colorado River water which otherwise would have been used."

[1] The draft regulations were prepared and circulated by the Bureau of Reclamation. Unless otherwise noted herein, references to the "Secretary" and the "Bureau" are used interchangeably.

§ 415.23(d)(2). Informal comments on the draft regulations have been solicited, but initiation of formal rulemaking on them is currently being held in abeyance while Arizona, California, Nevada, the Secretary and certain Indian Tribes pursue agreement on a "regional solution" to the water supply problems of the three states.

Metropolitan has submitted a proposal to the Bureau of Reclamation ("Bureau") setting forth the terms under which Metropolitan will assist the Secretary in implementing the San Luis Rey Indian Water Rights Settlement Act of 1988 (P.L. 100-675, Tit. I, 102 Stat. 4000). That proposal would require the Secretary to "bank" to Metropolitan's account the following categories of water for future use pursuant to Metropolitan's 1931 water delivery contract with the Secretary:

> All-American Canal Lining Project Water - The amount of conserved water made available to MWD in any calendar year from the lining of the All-American Canal.
>
> Imperial Irrigation District Water Conservation Program Water - All water conserved by the MWD-Imperial Water Conservation Program since the inception of the program.
>
> PVID Test Land Fallowing Program Water - The 186,000 acre-feet of water saved by the MWD/PVID Land Fallowing Program that is currently in storage at Lake Mead to MWD's account.
>
> Salinity Management Water - The amount of Colorado River water conserved by increasing MWD's California State Water Project diversions and decreasing by a like amount MWD's Colorado River diversions to manage water quality within MWD's distribution system for enhancing reclamation and conservation opportunities.

This opinion addresses the Secretary's authority to implement the requested banking in Lake Mead without issuance of further regulations. That authority necessarily must stem from the Boulder Canyon Project Act ("BCPA") (43 U.S.C. §§ 617-617u) as refined by the decision and decree in Arizona v. California, 373 U.S. 546 (1963) (decision), 376 U.S. 340 (1964) (decree), as amended, 439 U.S. 418 (1979) and 466 U.S. 144 (1984), the Colorado River Basin Project Act of 1968 (43 U.S.C. §§ 1501-1556) and Title II of P.L. 100-675, 102 Stat. 4000, 4005 (1988),

providing for the lining of the All-American Canal. Anything the Secretary does must also not violate the Colorado River Compact[2] or impair his duty to satisfy the United States' delivery obligations under the 1944 Mexican Water Treaty.[3] The applicability of the referenced portions of the "Law of the River" to MWD's banking proposals is discussed below.

1. Boulder Canyon Project Act ("BCPA") of 1928

Section 5 of the BCPA authorizes the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in [Lake Mead] and for the delivery thereof at such points . . . as may be agreed upon, for irrigation and domestic uses. . . ." 43 U.S.C. § 617d (emphasis added). Under this authority the Secretary promulgated "general regulations" in 1930 and 1931[4] and has stored water at Lake Mead and made it available on an annual basis pursuant to contracts ("entitlements") with public agencies in the States of Arizona, California or Nevada within the respective "apportionments" of those states.[5] Although "storage of water" clearly includes "banking" in general, "banking" of water in the context of this analysis means permitting the accumulation of water in storage for subsequent delivery in addition to an agency's annual entitlement for that year absent such banking. The BCPA does not directly address the details of how the Secretary may bank various categories of water for subsequent use by a contractor in addition to its annual entitlement.

Under long accepted principles of statutory construction and administrative law, a statute authorizing a federal program impliedly authorizes the administering agency to utilize any "necessary and proper" procedures appropriate to implement or fill gaps in its express management authority conferred by the Act that are not inconsistent with its basic purpose or other

---

[2] The text of the Compact is set out in Nathanson, Updating the Hoover Dam Documents (1978) (GPO 1980) at App. p. 1B.4.

[3] Id. at App. p. 1F.1.

[4] Wilbur and Ely, The Hoover Dam Documents, H.R. Doc. No. 717, 80th Cong., 2d Sess. App. 1005, pp. A485, A487 (GPO 1948).

[5] The Secretary has executed "master" contracts with the States of Arizona and Nevada for the delivery of water for the satisfaction of 2,800,000 acre-feet and 300,000 acre-feet of beneficial consumptive use annually in those states, respectively. There is no similar contract with the State of California.

provisions.[6] The Secretary's contemporaneous construction of the Act that contracts for the long term banking of unused annual contractual entitlements are authorized under section 5 is reflected in the Secretary's "General Regulations: Contracts for the Storage of Water in Boulder Canyon Reservoir, Boulder Canyon Project, and the Delivery Thereof," issued September 28, 1931, adopting as federal law the Seven Party Agreement among the California agricultural and urban agencies as to their respective priorities under water delivery contracts with the Secretary.[7] Sections 8 and 9 of the Agreement provide as follows:[8]

> "Sec. 8. So far as the rights of the allottees named above are concerned, the Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre-feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations be-

---

[6] Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837 (1984); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980).

[7] In Udall v. Tallman, 38 U.S. 1, 16 (1965), the Supreme Court emphasized that the customary deference it shows the interpretation of a statute by an agency charged with its administration is particularly due "when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" . . . [Citations omitted, emphasis added].

[8] Wilbur and Ely, n. 4 supra, App. 1003 at pp. A488-489.

> tween said District and/or said City and such users resulting therefrom.
>
> Sec. 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said City and/or said County (not exceeding at any one time 250,000 acre-feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other States without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom."

The same "banking" provisions are contained in section 6 of the "Supplementary Contract for Delivery of Water" between MWD and the Secretary dated September 28, 1931,[9] and section 7 of the "Contract for Delivery of Water" between the City of San Diego and the Secretary dated February 15, 1933,[10] which heretofore have only been utilized on a very limited basis.[11] Such author-

---

[9] Id. at App. 1008, pp. A507, A509-510. It should be noted that MWD's contract permits it to bank water "by reason of reduced diversions" without regard to whether such reduced diversions result from extraordinary conservation measures or land fallowing, as required by § 415.23(d)(2) of the Secretary's draft regulations.

[10] Id. at App. 1009, pp. A513, 514-516. The MWD and San Diego contracts were merged in 1946. Id. at App. 1012, p. A535.

[11] MWD has made a number of emergency deliveries of Mexican Treaty water to Tijuana, Mexico over the years pursuant to a 1972 contract (which expired in 1983) and 1992 and 1993 letter agreements with the Secretary. Those arrangements provided that when

(continued...)

ity continues to be assumed in section 415.23 of the Secretary's draft regulations providing for banking of "conserved water." In such a situation, the Supreme Court's oft-cited decision in Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843, 44 (1984), states the general rule:

> "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. . . . In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

As to limitations on the Secretary's authority because of other provisions in the BCPA, MWD's proposals would not be permitted to interfere with the Secretary's obligations under section 6 (43 U.S.C. § 617e) or his authority to balance the first priority in the operation of Hoover Dam and Lake Mead for "river regulation, improvement of navigation, and flood control" with the second and third priorities for "irrigation and domestic uses and satisfaction of present perfected rights," and "power."[12] The Act also directs the Secretary to operate the dam and reservoir in conformity with the Colorado River Compact. Id. at 617g.

---

[11](...continued)
such deliveries preempted aqueduct capacity that would have been used for MWD deliveries the Secretary would defer MWD's preempted deliveries to the following year, if necessary, and not charge them against MWD's subsequent annual entitlement. This arrangement for deferred deliveries necessarily involved carryover banking for at least one year, presumably pursuant to MWD's 1931 contract.

[12] Laughlin River Tours, Inc. v. Bureau of Reclamation, CV-5-87-823 HDM (D. Nev. 1989). Consistent with section 415.23(e) of the Secretary's draft regulations, MWD's "first spill" banking proposal would require "an acre-foot for acre-foot reduction [of MWD's banked water] for increased flood control releases over and above that which would have occurred had the water not been in storage," thus eliminating any impact on the flood control capacity of Lake Mead or on conservation storage capacity of the reservoir necessary for "river regulation."

2. Colorado River Compact

Articles III(a) and (b) of the Compact make apportionments "in perpetuity" of 16 million acre-feet (MAF) of "beneficial consumptive use" of the waters of the Colorado River System to the Upper and Lower Basins as follows:

> (a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.
>
> (b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

Article III(c) of the Compact allocates between the Upper and Lower Basins the burden of satisfying any obligations to Mexico (later established in the 1944 Mexican Water Treaty) as follows (emphasis added):

> If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, <u>such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)</u>; and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

Article III(d) imposes on the Upper Division states the following minimum delivery obligation at Lee Ferry:

> The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000

> acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

The Upper Basin states may complain that banking of conserved water in Lake Mead might increase their potential Mexican Treaty obligations under Article III(c) by committing stored water to future beneficial uses in the Lower Basin beyond "normal" year mainstream apportionments by the Secretary that could otherwise be delivered to Mexico. This possible contention is noted only because of the Upper Basin's relatively longstanding argument that those states should never be obligated to deliver more than 75 MAF at Lee Ferry over a ten year period pursuant to Article III(d), inasmuch as the Lower Basin is already consuming about 12 MAF annually (including tributary uses) against its Compact apportionment of 8.5 MAF. They claim that the water used to satisfy Lower Basin uses above 8.5 MAF constitute "waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b)" referred to in Article III(c) and that such uses should be curtailed to satisfy the Mexican Treaty obligation before any call in excess of the minimum Article III(d) deliveries can be made on the Upper Basin.[13]

The Upper Basin's attempt to limit the Article III(c) definition of "surplus" to the Lower Basin flies in the face of the language of that article's reference to the "aggregate" quantities apportioned by Articles III(a) and (b) and has no basis in the record of the 1922 deliberations of the Colorado River Compact Commission.[14] Consequently, in light of the plain language

---

[13] Senator Campbell of Colorado presented a version of this argument in his testimony on Colorado River issues before the Senate Energy and Natural Resources Committee last year. Hearings on Water Problems Facing the Lower Colorado River Area before the Subcommittee on Water and Power of the Senate Energy and Natural Resources Committee, 103rd Cong., 2d Sess. 128 (1994).

[14] Indeed, a leading Upper Basin advocate and water scholar, the late John U. Carlson of Denver, conceded that "there is virtually nothing in the Record of the Compact, the provisions or legislative history of the Boulder Canyon Project Act, or elsewhere that either confirms or refutes this argument. . . . Unfortunately also, the Upper Basin's position in this respect contravenes the express language of Article III(c). . . ." Carlson and Boles, Contrary Views of the Law of the Colorado

(continued...)

of Article III(c), which I view as fatal to the Upper Basin argument, and the fact that the transcript of the Compact Commission negotiations apparently provides no basis for overriding that plain meaning, I have not undertaken an independent review of the Compact background materials. In any event, and most importantly, whatever the merits of the Upper Basin's Article III(c) argument,[15] the Upper Basin's current situation will not be worsened by MWD's banking proposals because no more water will be consumed in the Lower Basin than if MWD's conservation projects producing the banked water had not been undertaken.

In conclusion, suffice it to say that the Upper Basin states successfully resisted being joined as parties in Arizona v. California and therefore did not present any of their Compact arguments to the Court, and none of the Compact interpretation issues raised by the parties to the case, including the meaning of Article III(c), were resolved by the Special Master[16] or the

---

[14](...continued)
River: An Examination of Rivalries Between the Upper and Lower Basins, 32 R.M.M.L.I. 21-1, 21-64 (1986).

[15] The Secretary's Operating Criteria published pursuant to section 602 of the Colorado River Basin Project Act of 1968 (43 U.S.C. § 1552(a)), discussed at pages 10-11 infra, do not accept the Upper Basin argument and provide for deliveries of 8.25 MAF annually at Lee Ferry, which includes 750,000 AF as the Upper Basin's share of the Mexican Treaty obligation of 1.5 MAF. As noted earlier, this administrative construction of the Compact (which became a federal statute by virtue of its approval by Congress) would normally be given substantial deference by the Court. However, section II(5) of the Operating Criteria may negate that possibility by providing that "[r]eleases from Lake Powell pursuant to these criteria shall not prejudice the position of either the upper or lower basin interests with respect to required deliveries at Lee Ferry pursuant to the Colorado River Compact." The Operating Criteria are set out in Nathanson, n. 1 supra, at App. VII.

[16] Special Master Rifkind declined to address Article III(c) arguments on the following rationale:

> Several questions arise regarding the effect of Article III(c), and the parties have offered various suggestions regarding its interpretation. These questions include: (1) what is the meaning of the word "surplus"?

(continued...)

Court. In any event, nothing in the Compact expressly or impliedly prohibits banking and, as noted above, I see no way that MWD's banking proposals could conceivably require additional Upper Basin deliveries at Lee Ferry for Mexico.

3. The Colorado River Basin Project Act of 1968

This Act, inter alia, authorized the Central Arizona Project ("CAP") and provided that administration of Article III(B)(3) of the decree in Arizona v. California (dealing with annual apportionments to the Lower Division States by the Secretary of less than 7.5 MAF) should afford priority to California's 4.4 MAF apportionment and existing uses in Arizona and Nevada as against the requirements of the CAP. Section 602(a) also directs the Secretary to develop criteria for the operation of federal reservoirs in the Colorado River Basin in accordance with the following order of priority (43 U.S.C. § 1552):

> Sec. 602(a) . . . [T]he criteria shall make provision for the storage of water in storage units of the Colorado RIver storage project and releases of water from Lake Powell in the following listed order of priority:
>
> (1) releases to supply one-half the deficiency described in article III(c) of the Colorado River Compact, if any such deficien-

---

[16](...continued)
(2) if surplus is not sufficient to supply Mexico, how should the Upper Basin's further delivery obligation be measured under the language of Article III(c)? In my judgment, the various questions advanced by the parties concerning construction of this subdivision ought not to be answered in the absence of the states of the Upper Basin; nor need they be answered in order to dispose of this litigation affecting only Lower Basin interests. Under the interpretation which I propose of the Boulder Canyon Project Act and the water delivery contracts made by the Secretary of the Interior pursuant thereto, it is unnecessary to predict the supply of water in the mainstream, in the Lower Basin, in order to adjudicate the present controversy.

Report of Special Master Simon H. Rifkind (December 5, 1960) at pp. 145-46.

> cy exists and is chargeable to the States of the Upper Division. . . .
>
> (2) releases to comply with article III(d) of the Colorado River Compact, less such quantities of water delivered into the Colorado River below Lee Ferry to the credit of the States of the Upper Division from other sources; and
>
> (3) storage of water not required for the releases specified in clauses (1) and (2) of this subsection to the extent that the Secretary, . . . shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant to the Colorado River Compact: *Provided*. That water not so required to be stored shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.

The Upper Basin has generally opposed any action by the Secretary that would require or accelerate releases from Lake Powell beyond those required by the Compact. However, MWD's banking proposals would actually lessen the likelihood of requiring releases from Lake Powell to the Lower Basin under section 602(a)(3)(i) and (ii) by causing higher storage volumes at Lake Mead over a longer period than would be the case without MWD's conservation projects or salinity management operations.[17]

---

[17] The Secretary's 1994 draft banking regulations provide that "in determinations regarding equalization, banked water will be considered as part of Lake Mead content to the extent necessary to avoid excess release of water from Lake Mead as a result of equalization releases from Lake Powell." § 415.23(e)(2).

4. The Arizona v. California Decree

The Secretary's banking authority under the BCPA is now subject to the provisions of the 1964 decree in Arizona v. California, 376 U.S. 340, as amended, 439 U.S. 418 (1979) and 466 U.S. 144 (1984). The decree continues the statutory priorities for the use of Lake Mead and other federal facilities downstream noted above and disclaims any interpretation of the Colorado River Compact. Of significance for purposes of this analysis, however, the interstate apportionments to Arizona, California and Nevada authorized by Articles II(B)(1)-(3) of the decree and the provision in Article II(B)(4) for chargeability of all mainstream "consumptive uses" in each state to its apportionment on its face appear to place a critical legal constraint on the later use of banked water conserved within the same state, while Article II(B)(6) appears to limit banking of conserved water within one state for later use in another state to an annual basis. MWD's banking proposals do not involve interstate transactions and therefore do not implicate Article II(B)(6).

Although the BCPA provided for apportionments to the States in terms of "consumptive use", it did not define that term. Article I(A)(1) of the decree, however, does define it as "diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation." Article II(B)(4) provides that "any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released."[18] (Emphasis added). The impact of a literal reading of Article II(B)(4) would seem to be that in a "normal" year in which only 7.5 MAF is apportioned for use in the Lower Division States by the Secretary under Article II(B)(I), MWD's use of its banked water would impermissibly exceed the 4.4 MAF apportionment to California. The genesis of Article II(B)(4) was the conference on the proposed decree in Arizona v. California before Special Master Rifkind in August 1960. California

[18] 376 U.S. at 343. The Secretary has consistently taken a strict view of the definition of "mainstream" water in the decree, as illustrated by the draft regulations which permit "wheeling," i.e., use of the mainstream for transporting water, only of "nonsystem" water, defined as water "from a source that is not hydrologically connected to the Colorado River or its tributaries." § 415.18(a). All other water that is physically located within the mainstream is subject to the Secretary's exclusive jurisdiction and control.

proposed the addition of the following definition of "water released" and accompanying explanation:[19]

> ARTICLE I(K)--Definition of "Water Released"
>
> Suggested Addition:
>
> "Water is released to satisfy consumptive use when it is passed through a control structure used by the United States for storage in response to the order of a water user, or when it is diverted from a storage reservoir controlled by the United States. Water released only for river regulation, improvement of navigation, flood control, or generation of power is not water released to satisfy consumptive use."
>
> Comment:
>
> This is a definition added to serve two purposes.
>
> (1) It makes clear that water released only for purposes other than consumptive use (e.g., flood control, power, etc.) is not "apportioned" within the meaning of article II(B), paragraphs (1), (2), and (3). It would promote conservation in a situation like the following: A flood control release is made in January, and water is available for use which would otherwise pass to Mexico in excess of treaty requirements. Water can be diverted and stored underground by a main stream project, but the project which could do so is reluctant to take and conserve the water if doing so would reduce the apportioned water available later in the year.
>
> (2) The definition makes clear that water pumped from a reservoir (e.g., by Nevada, which pumps from Lake Mead, or the Metropolitan Water District, which pumps from Havasu Lake) is within the allocations.

---

[19] Comments, Suggestions, and Motions of the California Defendants re the Special Master's Draft Report (Dated May 5, 1960), Submitted June 10, 1960 at pp. 3C-12 and 13.

The proposed new definition was supplemented by California's proposed addition of the following qualifying language to draft Article II(B)(6):[20]

> ARTICLE II(B)(6)--Uses Permitted in Excess of Apportionments
>
> Suggested Change:
>
> "If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that users therein do not have delivery contracts for the full amount of the state's apportionment, or that they cannot apply all of such water to beneficial uses, or for any ~~another~~ other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. Neither such water, nor any other water which would otherwise flow to Mexico in excess of scheduled deliveries under the Mexican Water Treaty, shall be charged to the apportionment of the state in which it is used, but no rights to the recurrent use of such water shall accrue by reason of the use thereof."

The United States objected to both amendments, making a rather garbled argument that seemed to not object to the principle underlying the amendments so long as the uses were made pursuant to a contract with the Secretary.[21] Special Master Rifkind had difficulty with the United States' argument, but was apparently persuaded by it (perhaps because he made liberal provision for the use of potentially substantial quantities of unused state apportionments by other needy states (i.e., California) in Article II(b)(6)). Unfortunately, the decree language he crafted in response was broader than it needed to be. Nevertheless, apparently no one contemplated the problem it might present with respect to banking and therefore did not file exceptions to it or seek modification. A strong argument can be made, based on the record of the decree conference before Special Master Rifkind, that Article II(B)(4) had a relatively narrow

---

[20] Id. at p. 3C-16.

[21] Transcript of Recommended Decree Conference (New York, August 19, 1960) at pp. 45-48, 122-34.

purpose, i.e., simply to require that all uses in a state, not just uses made pursuant to state apportionments, must be authorized by a contract with the Secretary, and that it should not be construed to prohibit MWD's subsequent use of banked water without charge to California's apportionment or MWD's entitlement as long as such uses are made pursuant to a contract with the Secretary. Whether the present Court would go behind the language of Article II(B)(4) to explore its intent is problematical, although the Court did so in Arizona II in 1983 in interpreting the scope of Article IX of the decree. 460 U.S. 605, 621-24 (1983).

The Secretary, however, took another approach in approving the 1992 MWD/PVID land fallowing agreement over Nevada's and Arizona's objections to its banking provisions.[22] The Bureau articulated its rationale as to why the banking provisions did not violate the decree as follows:[23]

> A future Annual Operating Plan may call for using saved water which will result in use by the Lower Basin States of more than 7.5 million acre-feet in a normal year. However, the delivery of the stored saved water in a future normal year would not be in violation of the Decree. The saved water will be accounted for as utilization of a portion of California's Colorado River apportionment in the year it is saved and stored. In the year the saved water is withdrawn from storage, it will be accounted for as water which has been stored for the exclusive future use of MWD.

Nevada had argued that MWD would really be banking "unused apportionment" received under Article II(B)(6) of the decree, not conserved water, and that the Secretary lacks authority to permit water "conserved" within a state to be banked for later use in that same state if the state is consuming "unused apportionment" in that same year. The Secretary did not see it that way, presumably considering that investment-backed conservation measures taken to save water that would otherwise be consumed or wasted

---

[22] See Letter of April 8, 1992 from the Director of the Arizona Department of Water Resources to MWD and letter of May 22, 1992 from the Director of the Colorado River Commission of Nevada to the Bureau's Regional Director.

[23] Letter of July 17, 1992 from LeGrand Neilson to the Director of the Arizona Department of Water Resources (p. 2).

add to the normal available supply and provide a reasonable basis for the Secretary, in his broad discretion under the BCPA, to recognize and reward such conservation efforts. Nothing in the decree requires the Secretary to reduce the amount of unused apportionment he makes available to a state by the amount of water saved and banked as a result of conservation projects in that state. In this respect provision for banking provides an important and, with respect to the All American Canal lining project, essential incentive to costly conservation projects.

The MWD/PVID contract rationale was reiterated in the Bureau's subsequent accounting report for consumptive use by California projects in calendar 1993, which states that for the PVID program "water is accounted as used in the year saved and stored for the exclusive future use of MWD and not to be additive to current year MWD diversions." Similarly, the Secretary's draft banking regulations (§ 415.23) permit the use of banked water for any reasonable beneficial use and provide that "[u]se of banked water for this purpose shall not be viewed as an intentional excess use beyond the entitlement holder's entitlement or the State's apportionment, but shall be viewed as banked water made available pursuant to these regulations." (Emphasis added.) Article II(B)(4) is also the focus of the discussion of "Decree Compliance" in section 415.23(h) of the Secretary's draft regulations (emphasis added):

> For purposes of Decree compliance, the act of conserving and banking water . . . shall be viewed as a beneficial consumptive use. Accordingly, water conserved and banked . . . shall be charged against the entitlement of the conserving entity . . . as consumptively used in the year in which the conservation activity is carried out . . . and the Regional Director's records maintained pursuant to article V of the Decree shall reflect the use, showing that the water was deposited in the bank pursuant to these regulations. Once water is charged against the apportionment of the State where the water was conserved . . . it shall no longer be subject to any Lower Basin priority system or the Decree apportionment of any State. In maintaining these Decree records, the Regional Director shall note the use of banked water in the year of use with sufficient explanation in order to distinguish the use of such banked water from water apportioned for use in that year under basic or surplus apportionments.

That analysis finds the Secretary's obligation under Article II(B)(4) to charge "water consumptively used within a state" to that state's apportionment satisfied by (1) equating the conservation and banking of water as the "constructive" beneficial consumptive use of such water in that same year and (2) not again charging the subsequent "actual" use of the conserved water to the user or state, because it would be double counting. The equation of conservation with consumptive use apparently is patterned after California law that recognizes conservation as a "beneficial use." Calif. Water Code § 1011. Although the issue has not yet been decided,[24] in my opinion the Secretary is probably not obligated to follow state law with respect to conservation of "mainstream" water in light of the exclusive federal authority vested in him by the BCPA. Nevertheless, the fact that California law arguably provides a precedent for this federal rule should enhance the reasonableness of his construction if the Court decides that the Chevron rule, which is a rule of statutory interpretation, is also applicable to the Secretary's construction of its decree. Similarly, the Court will have to be convinced that the Secretary's approach of treating "non-use" in the year of conservation or forbearance not only as "beneficial" use, but "consumptive" use as well, and "consumptive use" in the year of actual use as "non-use" is reasonable. Consequently, given the penchant of a number of the members of the present Court to insist on adherence to the plain, customary language of a statute or other instrument, I am optimistic, but not wholly confident that the Court would consider the Secretary's interpretation of Articles I(A)(1) and II(B)(4) permissible. But assuming the Secretary's interpretation of "consumptive use" is sustained, it also appears reasonable to avoid double counting when the conserved water is later put to actual use. Nevertheless, the Central Arizona Water Conservation District disagreed with this same rationale with respect to the Secretary's draft regulations governing interstate leasing of "conserved water", and threatened to sue the Secretary if the current version of the regulations was promulgated.[25]

An alternative way to comply with the literal language of Article II(B)(4) and the related provisions of the decree would be to treat the banked water as mainstream "surplus" in the year in which it is later used, thereby permitting it to be charged against California's larger "surplus" apportionment under Article II(B)(2). This would require a Secretarial determination for the

---

[24] See California v. United States, 438 U.S. 645, 675 n. 29 (1978).

[25] Letter of July 15, 1994 from CAWCD Board President Samuel P. Goddard, Jr. to Secretary of the Interior Babbitt.

year of such use that surplus is available at least in the amount of the banked water MWD proposes to use. This would be a "surplus" limited by the amount of the conserved, banked water, i.e., a "banked water surplus" which is qualitatively and quantitatively different from the "surplus" determined by criteria based on long term water supply and demand estimates that the Lower Division States' Technical Committee has been discussing as part of a regional water supply solution, which can be characterized as an "operational surplus." It would be mandatory upon MWD's call, even if the long term criteria might not otherwise trigger an "operational surplus" determination. The two different bases for a surplus determination seem consistent with the Secretary's draft banking regulations that provide that the Bureau "will not consider banked water as part of the Lake Mead content for making determinations regarding shortage or surplus conditions. . . ." § 415.23(e)(2). This approach seems to me a more plausible and defensible basis for the Secretary to use in justifying banking than Reclamation's current explanation because it is clearly tied to the express apportionment provisions of the decree. Again, looking to analogous state law, the fact that section 383(b) of the California Water Code defines "surplus" water subject to disposition by a water agency as "[w]ater . . . which any water user agrees with the agency, upon mutually satisfactory terms, to forego use [of] for the duration of the transfer" lends support to this approach.

Here is how a "banked water surplus" approach might work. The three Lower Division states would inform the Secretary of their requirements for the following year. The Secretary would then announce whether he is proposing a "normal", "operational surplus", or "shortage" determination for that year. Based on that information MWD would decide whether to request a "banked water surplus" determination, which the Secretary would be obligated to honor. Presumably MWD would not make such a request in any year when there is adequate water from unused Nevada and Arizona "normal" apportionments or California's "operational surplus" apportionment available to meet MWD's requirements. MWD's "banked water surplus" request should be for the full amount necessary to meet the deficiency in its supply.[26] Since under Article II(B)(2) of the decree any water made available in excess of 7.5 MAF is "surplus" of which Arizona and Nevada are entitled to one-half, those states should be required to inform

[26] MWD's requirements for a full Colorado River Aqueduct will remain at 1.3 MAF annually. Its shortfall when the annual requirements of Arizona and Nevada reach 3.1 MAF appears to be about 600,000 AF, assuming that about 175,000 AF is made available annually by the Imperial and All American Canal conservation programs.

the Secretary whether they will require any surplus, and that election should be binding on them absent an emergency situation so that MWD would know with reasonable certainty how much banked water to withdraw.

If Arizona and Nevada indicate no need for surplus, MWD would use the entire "banked water surplus" apportionment, which would all be charged to its bank account.[27] When the time arrives that Arizona and Nevada begin to need more than their basic apportionments and want to share in a "banked water surplus," they should be required to reimburse MWD for the amount of banked water they consume, as the California contractors will be required to do in a similar situation with respect to the water conserved by the All American Canal lining project. In this situation, MWD would have to request that enough banked water be made available to cover its requirements as well as Arizona's and Nevada's. Under any scenario I can envisage, MWD would always be assured of retrieving all of its banked water on an acre-foot for acre-foot basis (less evaporation and flood control releases not diverted) or a monetary equivalent.

With respect to possible litigation challenging this approach, inasmuch as there is no guidance in the BCPA or the Supreme Court's decision or decree in Arizona v. California as to how "surplus" should be determined for purposes of the Secretary's annual mainstream apportionments, the Court almost certainly would apply the Chevron test and defer to the Secretary's decision, particularly on a highly technical issue such as this. This is especially likely since the water banked as a result of the IID, PVID and AAC projects is indisputably "conserved" water that would not otherwise be available for apportionment by the Secretary and provides a reasonable, justifiable basis for a "surplus" declaration. In essence conserved water augments the "normal" Lake Mead supply that would otherwise be available for apportionment without the conservation projects and therefore is "surplus" to that supply. This concept tracks the western state law doctrines of "salvaged" and "developed" waters[28] and the Secretary possesses ample authority under the BCPA to implement

---

[27] MWD might argue that it should be permitted to use Nevada's and Arizona's unused surplus apportionments without charge against California's apportionment or MWD's entitlement or bank account, just as it currently does with respect to the unused normal year apportionments of those states under Article II(B)(6).

[28] Clark, Background and Trends in Water Salvage Law, 15 RMMLI 421 (1969).

such principles as federal law. Moreover, inasmuch as no state or entitlement holder is any worse off than if the conserved water had been put to use, a state or agency objecting to banking it would have an exceedingly difficult, if not impossible burden to show that it had suffered any injury from the Secretary's action, which ought to discourage any litigation challenging such action. But even if litigation did ensue, I am convinced that it would not be successful.

The proposed banking of "salinity management" water as "conserved" water presents somewhat different considerations. My limited research of relevant state law indicates that "conserved water" status has usually been applied to water saved by affirmative, investment backed conservation projects generally like the IID, PVID and AAC projects. Nevertheless, MWD should attempt to justify this proposal on the ground that its substitution of other substantially higher priced water supplies from the State Water Project for its Colorado River supply would constitute "conservation" under California law and also meets the Secretary's "extraordinary conservation" standard. Of course, it must be recognized that this rationale would also seem to justify treating other expensive conservation efforts, such as MWD's subsidy to consumers for more efficient water use facilities or CAWCD's use of Central Arizona groundwater, both of which involve significant investments and reduce demand on the mainstream, as producing conserved water, which presents a challenging "where to draw the line" issue. In any event, since the Secretary's draft regulations define "extraordinary conservation" to include "the use of non-Colorado River water in lieu of Colorado River water which otherwise would have been used" (§ 415.23(d)(2)) he should have no difficulty with MWD's proposal, although other parties might object or seek similar treatment.[29] However, MWD would be in a unique position to rely on the Secretary's general regulations and its 1931 supplementary contract which already permits it to bank water resulting simply from "reduced diversions," not limited by "extraordinary conservation" as provided in the Secretary's draft regulations. MWD's proposal to "back off" its Colorado River diversions when it is increasing its State Water Project deliveries for salinity management purposes certainly meets that standard.

As to whether the Secretary may afford a "retroactive" banking credit to MWD for the water saved to date by the MWD/IID conservation project, it is a well established principle of administrative law that retroactive application of an agency

---

[29] This issue highlights the need to develop a defensible definition of "extraordinary conservation", which has been a controversial topic in the "regional solution" discussions.

adjudicatory decision is proper unless "manifest injustice" results to an affected party. See, e.g., Stein, Mitchell & Mezines, Administrative Law ¶ 14.01(3). Consequently, this principle should apply to a Secretarial order adjudicating MWD's rights under the MWD/IID agreement as encompassing banking,[30] provided no third party interests would be injured, a possibility that needs to be carefully evaluated. MWD's task will be to convince the Secretary that there is no such present or prospective harm, as was done in connection with Coachella's unsuccessful objection to the 1992 MWD/CAWCD groundwater storage agreement and the 1994 amendments to that agreement.

If the Secretary should wait to make that decision until after the pending regulations are finalized and based his decision on those regulations, it may be more difficult to sustain his decision. This is because the Supreme Court has made it clear that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988). Neither the BCPA nor the Administrative Procedure Act (5 U.S.C. § 553) contain such express authority.

5. Public Law 100-675, 102 Stat. 4000 (1988)

Section 106(a) and (b) of the San Luis Rey Indian Water Rights Settlement Act authorizes the Secretary, in order "to provide a supplemental water supply for the benefit of the Bands and the local entities, [to] utilize existing programs and authorities. . . ." 102 Stat. 4002 (emphasis added). Title II of P.L. 100-675, authorizing the lining of the All American Canal, acknowledges the Secretary's authority under the BCPA "to contract for the storage of water in [Lake Mead]," but provides that "the rights of all California Contractors are defined by the Project Act, their contracts, and decisions and decrees of the United States Supreme Court." § 201, 102 Stat. 4005. Consequently, neither of these related Acts can reasonably be construed to enlarge the Secretary's existing banking authority in order to accomplish their objectives.

---

[30] Section 3.4 of the 1988 MWD/IID conservation agreement, approved by the Secretary and the other California contractors, provides that "any portion of the water conserved and made available for use by MWD in any year, which MWD banks in Lake Mead or any other reservoir pursuant to any valid banking agreement, shall be deemed to have been received and used by MWD during the year such water is credited to a bank." (Emphasis added).

6. Applicability of the California Seven Party Agreement to MWD's Use of Banked Water

As noted at page 16 supra, the Secretary's draft regulations provide that the depositor shall have the exclusive use of its banked water without regard to any priority system in the state of actual use, tracking a similar provision in MWD's 1931 water delivery contract (page 4 supra). This proposed federal rule comports with Calif. Water Code Section 1011, which permits the marketing of conserved water to other parties without regard to intervening junior users and makes no distinction depending on whether the purchaser uses it in the same year it is made available or banks it for later use. The rationale in each case presumably is that the use of conserved water that would not otherwise have been available for use by junior users causes such users no harm. However, it has been suggested in some quarters that if conservation makes water available that was not being put to reasonable beneficial use, i.e., was being "wasted", such water is subject to claim by junior users. No such distinction is made under Calif. Water Code Section 1011 or the Secretary's draft regulations. Moreover, limitations on waste under state law or the BCPA and the contracts and regulations thereunder are not self enforcing, but are meaningful only if enforced by successful administrative or judicial action triggered by the state, the Secretary or an aggrieved junior user. Absent such successful action, the conserved water would not have been available for use "but for" the voluntary action of the senior user individually or in conjunction with a third party that would not be undertaken if the conserving parties could not reap the benefits of their investment and effort. Calif. Water Code Section 1011 and the Secretary's draft regulations are a recognition of that reality. Consequently, it is difficult to ascertain any legal basis for a claim of right of any kind by a junior user to water made available even by ordinary, let alone extraordinary conservation, including any asserted need to obtain that user's consent to bank and use the conserved water.

With specific reference to the Seven Party Agreement, Articles 8 and 9 grant MWD, "so far as the [priority] rights of the allottees named above are concerned . . . the exclusive right to withdraw and divert" (emphasis added) up to 5 million acre-feet of banked water without any reservation of rights of any kind to those other agencies or any qualification related to the impact of such use on them. Although MWD's banking right is "subject to such conditions as to accumulation, retention, release and withdrawal" as the Secretary may prescribe, which he has not done to date, whatever conditions the Secretary might impose on MWD's exercise of its banking right would presumably be designed to avoid adverse impacts on reservoir management or other obliga-

tions imposed by the BCPA, as the Secretary's draft regulations provide (§ 415.23(e)). However, any assertion that the banked water must percolate down through the first three priorities would fly in the face of the regulation and contract declaration that it is for MWD's "exclusive" use. It should be noted that the Secretary also reserved "the right to make similar arrangements with users in other states without distinction in priority, and to determine the correlative relations between [MWD] and such users resulting therefrom." No mention is made of similar arrangements with other California users.

But even if some kind of "no harm" rule applied to MWD's banking right, the banking and use of conserved water that would not otherwise be available for use does not adversely impact any other water user in California. Furthermore, even if any "sign offs" by other agencies were required for MWD to use the water conserved by the MWD/IID conservation program and the MWD/PVID land fallowing test program, they have already been obtained. As to the water to be conserved by the All American Canal Lining Project, section 204(b)(1) of P.L. 100-675 provides that the conserved water "shall be made available . . . for consumptive use by California Contractors within their service areas according to their priorities under the Seven Party Agreement." This directive is qualified by section 204(b)(2), which provides that such priority rights may be asserted only on condition that such user provide appropriate reimbursement to the participating parties who funded the conservation works. It does not otherwise require that a junior user consent to the use of any conserved water that may be banked. In short, the Act permits the funder or funders of the conservation works to use the conserved water, subject only to other agencies having a right to proportional participation upon appropriate contribution to the project cost, not an unqualified right to use as much as they want within their priority.

7. Conclusion

The Secretary has the authority under the BCPA to implement MWD's banking proposals independent of the issuance of further regulations. The literal language of Articles I(A)(1) and II(B)(4) of the Arizona v. California decree would appear to require MWD's use of its banked water in later years to be charged to its entitlement and California's apportionment in that same year, thus effectively precluding its use in years of normal 7.5 MAF apportionments to the Lower Division States. Nevertheless, in approving the MWD/PVID land fallowing agreement Reclamation construed the decree to permit such later use without it being charged to California's apportionment and proposes a similar rule for future banking in the 1994 draft banking regulations. My opinion proposes another approach which will fully

comply with the language of the decree (pages 17-19 supra). A third option is to amend the decree to remove any doubts about the Secretary's authority.[31]

Each of the three options for dealing with the decree might stimulate opposition, even litigation. Consequently, whatever option MWD may choose, it should hedge against possible litigation or delay by making any sale of water to the United States at a discount or payments to the Indian bands to facilitate implementation of the San Luis Rey Indian water rights settlement conditional on the Secretary being able to actually implement and maintain MWD's banking proposals in a timely fashion. The three options are discussed below in reverse order of their certainty to achieve MWD's banking goals, all other things being equal.

(1) Reliance on the Secretary's Rationale for the MWD/PVID Agreement and the Draft Regulations

The Secretary could promptly approve MWD's banking proposals on the same rationale as the MWD/PVID agreement was approved and as is proposed in the draft regulations. The result of any litigation that might result is a close question, for the reasons detailed at pages 15-17 supra, and would turn on whether the Court would apply its Chevron rationale, developed for statutory interpretation, to its own decree. I think it would because the same principle is involved, i.e., the "law giver" has not expressly addressed the issue. The question then becomes whether the Secretary's construction is "reasonable." I believe that the Court would probably sustain the Secretary's rationale, particularly if it was buttressed by demonstrating that the genesis of Article II(B)(4) shows that it was not intended to preclude

[31] Although legislation is another option that would provide maximum certainty by elaboration of the structure of an interstate marketing and banking system and the criteria for implementing it, there are several disadvantages to this approach. The principal ones are the vicissitudes of the legislative process and the likelihood that a relatively modest proposal might emerge (if it does emerge at all, given the ability of dissident Senators to stymie legislation) only after having been treated as a "Christmas tree" vehicle on which various amendments have been hung. This "Pandora's box" risk is a serious one that could unduly delay, wholly frustrate, or significantly alter the proposal. Moreover, inasmuch as the field of water marketing policy, particularly water banking, is currently still evolving, it may be preferable to leave to the Secretary the flexibility to adapt to changing concepts and conditions, rather than locking him into a legislative formula that might be difficult to change if needed.

the use of banked water pursuant to a contract without charge-ability to a state's apportionment, as discussed at pages 12-15 supra.

(2) Secretarial Designation of Banked Water as "Surplus"

The Secretary could promptly approve MWD's banking proposals and stay fully within the letter of Article II(B)(4) and related decree provisions by making special "banked water surplus" determinations in years when depositors want to use their banked water, as discussed at pages 17-19 supra. Here again, although there is some risk of possible litigation, I am confident that its chances of success are negligible for the reasons discussed at pages 19-20 supra.

(3) Amend the Arizona v. California Decree

The Secretary could promptly approve MWD's banking proposals on either or both of the two rationales described above and, concurrently with that action, the Secretary and one or more of the other parties to Arizona v. California could file a petition to amend the decree to expressly provide comprehensive authority for water marketing and banking. This approach obviously would remove any risks associated with interpretation of the BCPA or the decree, and it is almost certain that the Court would promptly approve an amendment with unanimous support. But even if there was not unanimity among the parties, there do not appear to be any arguments on the horizon that would defeat the proposed amendment, unless the Secretary did not join in the petition and opposed it, which does not seem likely since it would provide explicit authority for what is currently proposed in the draft regulations. However, there would undoubtedly be some delay, perhaps substantial, involved in resolving any challenges that might surface to it.

It is also possible that seeking to reopen the decree for a banking amendment might cause parties with other amendments to attempt to secure support for them as the price of obtaining their support. We know, for example, that the Fort Mojave Indian Tribe would like to change the decree provisions relating to the effect of conservation efforts on tribal water rights. There are also several other components of a "regional solution" which have been discussed by the Lower Division States Technical Committee that would require decree amendments, e.g., a new formula for allocating "surplus" among the states. If such "leveraging" efforts should surface, they could also cause substantial delay. As a practical matter, however, any delay involved in obtaining a decree amendment would probably not be any greater than that

involved in litigating a challenge to the Secretary's action under either of the other two options.

Please let me know if you have any questions about any aspect of this opinion.

Sincerely yours,

BOGLE & GATES P.L.L.C.

Jerome C. Muys

C:\DOCS\MWD\TAYLOR.003