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METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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EXECUTIVE SECRETARY

July 1, 1994

To: Board of Directors (Water Problems Committee--Information)

From: General Manager and General Counsel

Subject: Proposed Regulations for Administering Entitlements to Colorado River Water in the Lower Basin

Report

The United States Bureau of Reclamation (Reclamation) recently circulated to interested parties, including Metropolitan, a proposed set of regulations for administering entitlements to the Colorado River in the lower basin. This has been a continuing effort on the part of Reclamation which had circulated an earlier proposed set of such regulations in 1992. Reclamation has not requested comments on the proposal at this time, but has indicated its intention to publish these proposed regulations in the federal register in the summer of 1994 for formal comment. The draft regulations are now under review by the Department of the Interior and must be reviewed by the Office of Management and Budget prior to publication.

The proposed regulations cover a wide range of topics including: (1) the elimination of prohibited uses; (2) determining the source of water pumped from wells near the Colorado River; (3) voluntary water transfers, leases, and exchanges; (4) wheeling of non-Colorado River System water; (5) banking and marketing of banked water; (6) imposition of administrative fees; (7) off-reservation leasing or marketing of Indian water rights; and (8) criteria for evaluation of water conservation plans. The following is a brief description of some of the major areas covered by the proposed regulations and highlights of potential issues which must be resolved:

A. Transfers

Of critical importance to Metropolitan's future are the provisions relating to transfers and leases of Colorado River water. The proposed regulations distinguish between "transfers," which are defined as a permanent transfer of a

water right and "leases" which would be a temporary, although potentially long-term, supply of water. With regard to transfers, the proposed regulations would allow for transfers to occur only within the state in which the holder of the entitlement is located. This limitation we assume is to provide assurances to the states that since the nature of a transfer is a permanent alienation of the right, the water right remains within the state of origin as the United States Supreme Court decree in Arizona v. California apportioned water in a certain manner for use within Arizona, California, and Nevada. The proposed regulations limit transfers to the average historical consumptive use for the previous five years or other appropriate period as determined by Reclamation, and requires that the transferee meet the test of reasonable beneficial use. Transfers will not be approved unless the parties commit in writing to mitigate or compensate for third-party impacts, as required by the Regional Director. Safeguards must be provided to insure that a potential transferor does not increase its uses in the five-year period prior to transferring, solely to have that water available for transfer. During the initial five-year period, this could deprive a lower priority user of water which would have otherwise remain unused.

B. Leasing

Reclamation has stated that the regulations on leasing are intended to "recognize the developing market in this area and to facilitate transactions which will result in the highest and best use of this limited resource." (Proposed § 415.8.) With regard to the provisions relating to leasing of entitlements, the proposed regulations provide that water may be leased interstate for a term not to exceed 50 years, with renewals which may not exceed 50 years, if the water is not expected to be needed for beneficial use within the lessor's state during the term of the renewal. The regulations provide that public comment is to be afforded with regard to the need for water during the renewal period. Leases are not allowed of unused apportionment water, rather the water which may be leased is to come from water conservation measures or land fallowing. However, Reclamation plans to request comments on the viability and legality of deferral agreements and whether the regulations should be revised to address such transactions. With respect to leases, the availability of water must be confirmed by a majority determination of a verification committee. For non-Indian tribe lease proposals,

the verification committee would consist of one representative from each state and one representative from Reclamation. For Indian tribe lease proposals, the verification committee would consist of one representative from the Bureau of Indian Affairs, two Indian tribal representatives, and one representative from Reclamation. The regulations also provide that during the term of the agreement to lease, the entitlement holder must retain ownership of the land. This appears to be an impractical requirement since the holder of the entitlement may not be the landowner. In many cases, it is the irrigation district which holds the contractual right. The draft regulations state that no water service contract with the lessee will be required. This raises an issue as the Boulder Canyon Project Act requires that water from the Colorado River is to be served only through contract with Reclamation and a question as to the enforceability of a lease could result. However, the draft regulations do require that parties to the lease commit to mitigate or compensate for third party impacts to the satisfaction of Reclamation's Regional Director, which may perhaps reduce the concerns of nonparties to the transaction. Water is to be charged against the state's apportionment in which it is conserved. This in effect allows for a reallocation of water without changing the fundamental basic apportionments to each state of 4.4 million acre-feet to California, 2.8 million acre-feet to Arizona, and 300,000 acre-feet to Nevada. Thus, California's 4.4 million acre-foot entitlement would be charged for water conserved in the Imperial Valley, even if the water were to be transferred to Nevada. These provisions raise the issue of whether Colorado River water service contractors in the state of origin of the water should be allowed a right of first refusal or some other protection before water is moved from the state. With respect to water transfers, as an example, the Central Valley Project Improvement Act provides a right of first refusal for entities within the Central Valley Project service area.

Additional clarifications will be required with regard to the transfer of Indian water rights. The proposed regulations contain Reclamation's legal analysis with regard to the ability of Indian reservations to lease water off the reservation, but invite comment on the analysis.

C. Wheeling

Wheeling through the Colorado River is to be allowed, as long as the water is not hydrologically connected to the river or its tributaries, and so long as the water received into the river for wheeling does not significantly increase the total dissolved solids concentration unless mitigated. The regulations presently do not address other individual water quality constituents.

D. Banking

The regulations propose to allow the establishment of a water banking system which would permit water to be made available by extraordinary conservation measures or through land fallowing, stored in Lake Mead, and subsequently used or marketed intrastate or interstate. Water from a non-Colorado River source may also be banked. Reclamation's Regional Director, in consultations with the authorized state representatives, would establish guidelines for the bank for entitlement holders other than Indian tribes. For Indian tribes, the Regional Director would consult with the affected tribes and the Bureau of Indian Affairs to establish such guidelines.

Water which is proposed to be banked must be approved by the verification committee. As with leased water, banked water is accounted as "used" in the year in which it is banked and charged to the apportionment of the state of origin. Water which is banked is the first water which will be spilled in the event Reclamation determines that excess releases from Lake Mead are necessary and such releases result in excess deliveries to Mexico. Banked water would be spilled in the reverse order that it was deposited, that is, the last water banked would be the first water spilled.

Issues which remain would include whether water conservation measures implemented prior to these regulations becoming effective, would qualify, such as the water conserved in accordance with Metropolitan's Conservation Agreement with the Imperial Irrigation District, and what constitutes extraordinary as opposed to ordinary conservation or land fallowing measures. As presently drafted, the regulations would allow non-entitlement holders to purchase water from the bank, without providing a preference to existing entitlement holders who may be short of water.

E. Reasonable Beneficial Use of Entitlement

The proposed regulations also provide a process to determine if water is being put to reasonable beneficial use and the consequences of the failure to so use the water, which could include at the extreme, a reduction in the entitlement of a user. Of greatest interest in this section is the deference accorded to state determinations. Thus, the proposed regulations provide that if the Regional Director determines that the state authority has made a determination of unreasonable use in a process which complies with due process and considers the relevant factors, the Regional Director may accept the state determination without further proceedings. This could mean, that proceedings conducted by the State Water Resources Control Board could be considered under the appropriate circumstances by the Regional Director as final determinations of unreasonable use. Then the Regional Director would proceed directly to the enforcement provisions.

Several other provisions are included in the proposed regulations which cover such subjects as defining of beneficial use, a procedure for extinguishment of unauthorized uses, water operations, and accounting issues. Additionally, the proposed regulations would impose a number of fees: (1) a general fee upon all users; (2) a fee for diversions deviating from water orders; (3) a fee for wheeling water; (4) a fee on a specific entitlement holder for expenses associated with enforcement; and (5) specific user fees associated with the specific entitlements and specific facilities from which direct benefits are received. With respect to the general user fee, Reclamation is considering three alternatives: (1) a higher fee on the urban users than on the agricultural users considering the value of the water; (2) a fee that increases the further downstream the river that a user's diversion facilities are located; or (3) a fee that does not vary from user to user. Under the first alternative, an agricultural user would pay approximately \$.55 per acre-foot and an urban user would pay about \$4 per acre-foot. Under the third alternative, each user would pay \$1.50 per acre-foot.

These regulations are complex and deal with a number of fundamental issues within the law of the river. As such, it is anticipated that Metropolitan will coordinate, to the extent possible, its comments with other California agencies through

the Colorado River Board and also with the Western Urban Water Coalition. These regulations would significantly affect Metropolitan's Colorado River supplies and staff will be reporting to your Board periodically, as positions are developed and discussions with other interested parties take place.

Board Committee Assignment

This letter is referred to the Water Problems Committee for information because of its authority to study, advise, and make recommendations on policies, sources, and means of importing water required by Metropolitan, pursuant to Administrative Code section 2481, subdivision (a).

Recommendation

For information only.

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Concur:

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