Testimony of Bennett W. Raley

Assistant Secretary - Water and Science

U.S. Department of the Interior

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on

Implementation of the California Plan for the Colorado River: Opportunities and Challenges

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My name is Bennett Raley. I am the Assistant Secretary of the Interior for Water and Science at the Department of the Interior.

Mr. Chairman. It is a pleasure to be here today representing the Department of the Interior to offer testimony with respect to the status of Colorado River management initiatives designed to provide water management stability to the State of California and to all who share in the benefits of the Colorado River throughout the Colorado River Basin. I will focus my remarks today on the history and progress of the California 4.4 Plan, the critical importance to southern California of the implementation of the Plan, and the potential results if key components of the Plan fail to fall into place.

The progress that has been made in over the last decade towards the goal of resolving serious and long-standing issues relating to California=s use of Colorado River water has been nothing short of phenomenal. All of the California Colorado River Water Users as well as the other Colorado River Basin States worked together to develop a water management strategy that achieves the water use reductions that are mandated by the Law of the River. All the parties are commended for their efforts in developing this essential plan, which implements the findings of the Supreme Court in *Arizona v. California* some 38 years ago.

However, while we remain hopeful and resolute in our desire to implement the California Plan, we are increasingly concerned that California water management entities will not meet one of the critical milestones for implementation of the California 4.4 Plan. In particular, we are concerned that California water management entities may not execute the draft Quantification Settlement Agreement by December 31, 2002/

The Department understands that complex legal, policy, and economic issues relating to the Salton Sea have created an unexpected challenge for implementation of the California 4.4 Plan. From a federal perspective, the existence of this challenge does not obviate or modify the requirements of the Secretary=s Interim Surplus Guidelines. Under the Guidelines, the Secretary must make certain determinations with respect to the availability of surplus water in the Lower Colorado River basin. These determinations are to be implemented in the context of the Annual Operating Plan for the Colorado River, which is required, by statute, to be finalized by the Secretary by January 1, 2003.

We understand and are sensitive to the concerns of Imperial County residents regarding some of the options that have been discussed in the context of the search for a solution to the complex issues relating to the future of the Salton Sea. In this regard, I have transmitted a letter dated May 31, 2002 to the President of the Board of Directors of the Imperial Irrigation District, Ms. Stella Mendoza. A copy of this letter is attached to this testimony, and is submitted for the formal record of this hearing.

While achieving consensus among all interested parties has been the goal and practice of the Secretary in matters relating to Colorado River management, the federal role is deeply affected by the dictates of the numerous legal authorities which bear on the management of the Colorado River. These authorities, collectively known as the ALaw of the River,@ include, for example, the 1922 Compact, the Boulder Canyon Project Act of 1928, the water delivery contracts entered into under Section 5 of that Act, the federal reserved rights of Indian tribes, the Mexican Treaty of 1944 and the Minutes which apply its terms, the Colorado River Storage Project Act of 1956, the opinion and Decree in *Arizona v. California*, the Colorado River Basin Project Act of 1968, the Colorado River Basin Salinity Act of 1974, and other federal statutes.

The Department understands the seriousness of these issues to the State of California and California water management agencies. However, under the Law of the River the Secretary must also consider the rights and interests of the other States in the Colorado River Basin, and the obligation to comply with the requirements of the Mexican Treaty of 1944. The history and nature of these responsibilities provides the context for an understanding of the consequences of a failure of the California 4.4 Plan.

The California 4.4 Plan; Background

The California 4.4 Plan is a bold attempt by the urban and farming interests of southern California to work together to overcome countless obstacles to achieve a common goal: to reduce the State of California=s present dependence on the waters of the Colorado River.

The amount of Colorado River water available to the State of California is variable. First and foremost is the question of available water supply within the Colorado River system. Second is the question of demand, both in California and in the other Basin States of Colorado, Utah, Wyoming, New Mexico, Nevada and Arizona.

In the past California benefitted from ample water supplies in Lake Mead and from the more gradual development of water uses in the other Basin States. California put to use the waters apportioned to it by the Secretary under the Decree in *Arizona v. California*. California also put to use water legally available to but not used by the other Basin States, water then made available to California by the Secretary under the provisions of the Decree.

The State of California has for decades received water in excess of the baseline quantity of 4.4 million acre-feet available to it in a normal, non-surplus year. The 4.4 million acre-feet of water available to California in a normal year is sufficient to meet the needs of agricultural interests such as the Palo Verde Irrigation District (PVID), the Yuma Project, the Imperial Irrigation District (IID) and the Coachella Valley Water District (CVWD) each year, and still fill a good portion of the Colorado River Aqueduct which helps to fuel the economy of coastal California.

The remainder of the Colorado River Aqueduct has been filled in past years with additional water not used by the States of Nevada and Arizona or water made available in years of surplus. Neither the historical fact of the repeated, and lawful, release to California of water not taken by Nevada or Arizona, nor the present reality of the dependency of California on this additional water, can alter the terms of the

Decree. California has no legal right to the continued use of water in excess of 4.4 million acre-feet in a normal year. Nor does California=s use of additional water during times of surplus alter the immutable laws of nature. The Colorado River will have periods of surplus, periods of normal flow and periods of drought.

The history of California=s water use is not complete without a reference to concerns about the farming efficiencies of senior priority holders. For decades concern has been expressed about IID=s water use. In 1984, the California State Water Resources Control Board found in Decision 1600 that IID could achieve additional farming efficiencies, in particular, reducing tailwater practices (embodied in Order 88-20). Many of the concerns raised in the 1980's continue to exist today. Neither the Decree in *Arizona v. California* nor federal Reclamation law permit Colorado River water to be wasted.

The Secretary, the State of California, and the other Basin States have long recognized that with the increased uses of Colorado River water by Nevada and Arizona and with the unpredictability of water supplies in the Colorado River system, California would have to develop a plan to reduce its use of Colorado River water. California has done so. In an intrastate cooperative effort of enormous magnitude, the water agencies in California have worked together to develop the California 4.4 Plan.

The California 4.4 Plan

On May 11, 2000, the Colorado River Board of California issued California=s draft Colorado River Water Use Plan (the California 4.4 Plan). Developed over the course of years through the painstaking efforts of numerous parties, the California 4.4 Plan is an ambitious multi-faceted undertaking.

The California 4.4 Plan contemplates a number of elements and benefits:

$ the conservation of water through the lining or replacement of unlined portions of the All American and Coachella Canals,

$ conjunctive groundwater use through additional groundwater storage to provide reserves in years of normal or shortage water supply,

$ the adoption of reservoir operating criteria to provide greater certainty of availability of surplus waters for urban uses during the phased-in reduction of Colorado River water use,

$ the settlement of the water rights of the San Luis Rey Bands,

$ the reduction in Colorado River water use in PVID and IID, with appropriate compensation, and the transfer of this water to coastal urban areas for a limited but substantial period of time.

Tremendous progress has been made in recent years in the development and implementation of each of these critical components of the California Plan. I will now focus on a couple of these components which will require attention in the coming months.

Reservoir Operation Criteria (Interim Surplus Guidelines)

A critical element to the California 4.4 Plan was the adoption of reservoir operation criteria designed to ensure MWD a measure of certainty with respect to the availability of surplus water to fill the Colorado River Aqueduct during the years in which, under the California 4.4 Plan, California=s water use is ratcheted down.

This component of the California 4.4 Plan was completed in January of 2001 when the Secretary of the Interior signed the Record of Decision approving the adoption of the Colorado River Interim Surplus Guidelines. These Guidelines were constructed upon a commitment by California water agencies to achieve a settlement of issues relating to the transfer of Colorado River water through a Quantification Settlement Agreement (QSA) by December 31, 2002.

The Colorado River Interim Surplus Guidelines set forth specific elevation levels in Lake Mead which trigger surplus declarations of varying size. These Guidelines are a delicate balance of competing and diverse interests and would not exist except for the herculean efforts of the representatives from all of the Basin States and the Bureau of Reclamation whose combined sustained effort overcame seemingly insurmountable obstacles. It is because of these Guidelines that the Colorado River Aqueduct is full in the Year 2002. Likewise, the requirements of these Guidelines define the consequences of a failure to meet the agreed-upon milestones that are the essence of the California 4.4 Plan.

Water Transfers

Perhaps the most visible, most complex, and single most important feature of the California 4.4 Plan is the voluntary transfer of large quantities Colorado River water from irrigation to municipal and industrial uses. I emphasize that these are voluntary transfers. The California 4.4 Plan, including the water transfer components, is one of the finest examples to date of Colorado River management through consensus.

A recent and excellent example of such a voluntary water transfer is the effort MWD is undertaking with PVID. An agreement in principle was reached in July of 2001 in which varying numbers of acres in PVID would not be farmed, at the request of MWD and with the payment of substantial sums to participating PVID landowners, with the resulting water savings flowing through the quantified entitlements defined in the QSA to MWD. The certainty of this valuable program, of course, depends on the completion of the QSA. Absent the QSA (or some other form of quantification) there is no guarantee that any water transfer program, including the PVID program, will actually result in reductions in Colorado River water use by California. A draft Environmental Impact Report for this Palo Verde Irrigation District Land Management, Crop Rotation and Water Supply Program was issued last month and negotiations continue on the details of the arrangement.

The most ambitious of the water transfers instrumental to the California 4.4 Plan is that of the transfer of water from IID to the San Diego County Water Authority (SDCWA). The IID water transfer is encapsulated in a contract entered into with SDCWA in 1998. This contract contemplated that water uses within IID would be reduced so that a portion of IID=s Colorado River entitlement could then be made available to the SDCWA and possibly to others. The reduction in water use would be achieved though the implementation of conservation measures, with the costs for such measures to be paid for by the SDCWA. This voluntary IID/SDCWA water transfer agreement was a landmark achievement, for which the IID Board received much-deserved praise.

The IID/SDCWA agreement did not, however, fit easily within the existing contracts with the Secretary of the Interior for the delivery of Colorado River water to California water agencies. These contracts establish a shared priority for IID and CVWD, with CVWD entitled to water IID does not put to beneficial use. These contracts also limit the area within which the water may be put to use. Concerns were raised about the legal framework necessary to accomplish the IID/SDCWA water transfer and a period of intense negotiations began.

The first major breakthrough in bringing California parties together to support the IID/SDCWA water

transfer was the Key Terms for Quantification Settlement Among the State of California, IID, CVWD and MWD (Key Terms), signed in October of 1999. The Key Terms agreement outlined water budget components for IID, CVWD and MWD, some of which would require that a portion of the water to be developed through conservation measures in accordance with the 1988 IID/SDCWA agreement would be provided to CVWD and to MWD.

The Quantification Settlement Agreement (QSA) and the Implementation Agreement.

Negotiations continued as the details of the Key Terms were fleshed out. After countless hours of negotiations in many locations, the dedicated efforts of negotiating teams from IID, CVWD, MWD, SDCWA, and the Department of the Interior bore fruit and two additional agreements were drafted: the Quantification Settlement Agreement (QSA) and the Implementation Agreement.

The effort devoted to the development of the draft QSA has been in many ways the twenty-first century equivalent of the effort devoted to the development of the Seven Party Agreement, in which the California water agencies, through difficult negotiations, reached consensus on recommendations to the Secretary of the Interior relating to entitlements and priorities to the use of Colorado River water. Environmental compliance was not, however, a hurdle facing the negotiators of the Seven Party Agreement.

The draft QSA is a cornerstone of the California 4.4 Plan. It represents an agreement among IID, CVWD, and MWD with respect to the use and transfer of Colorado River water for a period of up to seventy-five years. This is an agreement which will firm up existing water supplies for SDCWA and which will permit CVWD to reduce its use of diminishing groundwater supplies. The draft QSA contemplates that water from the canal lining projects will be used for the purposes of the San Luis Rey Indian Water Rights Settlement Act.

The development of the draft Implementation Agreement arose from the desire to fit the draft QSA into the existing Law of the River. Numerous legal issues surround the delivery of water in the manner contemplated by the draft QSA. Without relinquishing their various and differing legal positions, IID, CVWD, and MWD agreed to enter into the Implementation Agreement with the Secretary of the Interior.

The Implementation Agreement has as its primary purpose the effectuation of the water delivery arrangements contemplated by the QSA. The Implementation Agreement alters for a period of time the water delivery arrangements set forth in IID, CVWD, and MWD contracts with the Secretary, entered into in the 1930's pursuant to Section 5 of the Boulder Canyon Project Act. Thus, in the Implementation Agreement the Secretary agrees that for the term of the QSA, a portion of the water which otherwise would have been delivered to Imperial Dam for use within IID may now be delivered, either at Imperial Dam or at Lake Havasu, for use by CVWD, MWD, and SDCWA.

Hundreds of thousands of acre-feet could be transferred under the QSA when implemented through the Implementation Agreement. Such a substantial movement of water cannot proceed without an equally substantial commitment to environmental compliance. As difficult as the development process was for the water budget components in the draft QSA, the challenges the parties have faced in achieving environmental compliance now appear to be equally difficult.

Environmental Compliance, and the Salton Sea

A draft EIS has been developed for the IID water transfer and a separate draft EIS for the

Implementation Agreement. ESA requirements for the IID water transfer are being addressed through IID=s proposed Habitat Conservation Plan (HCP). ESA consultation for the Implementation Agreement has been completed through a Section 7 consultation which addressed potential impacts of water transfers to the mainstream of the Colorado River.

The draft HCP proposed by IID focuses considerable attention on the Salton Sea. The Salton Sea provides habitat for a variety of species, several of which are listed as either endangered or threatened species. The IID water transfers will result in less water draining to the Salton Sea. Complicating the environmental compliance is the scientific fact that with or without the IID transfers, the Salton Sea will become more and more saline and thus less and less hospitable to threatened and endangered species.

Congress provided an independent means to address Salton Sea issues in the Salton Sea Reclamation Act of 1998. The Department believes that the IID/San Diego transfer, as part of the California 4.4 plan, should not be delayed by deliberations about the future of the Salton Sea. A fundamental step in determining which course of action Congress will take with respect to the Salton Sea is a complete understanding of the Salton Sea=s hydrology and of the alternatives available, together with associated costs, for prolonging its existence. The Salton Sea Authority and the Bureau of Reclamation are developing an Alternatives Report to address these issues.

Publication of the Alternatives Report will occur once Interior is satisfied that it is accurate and complete. Cost estimates presented in the report are being refined to ensure that the data presented for each alternative is not misleading. The future long term existence of the Salton Sea is a monumental issue which rests with Congress and the State of California.

IID=s proposed HCP, intended to satisfy both the requirements of ESA and CESA for the water transfers envisioned by the QSA, has raised concern because of the potential impact on Salton Sea. Two mitigation options were proposed in IID=s HCP, the Apond option@ and the Afallowing option.@

The Pond concept consist of constructing and operating a fish hatchery to stock fish in the Salton Sea and constructing up to 5,000 acres of ponds to produce or receive hatchery received fish to feed fish-eating birds. The California Department of Fish and Game (CDFG) notified IID and SDCWA in late May of this year that in the judgment of CDFG the pond option did not Aminimize and fully mitigate the impacts of the transfer as required by the California Endangered Species Act.@ This CDFG notification brings the second option identified in IID=s HCP out into the spotlight: the fallowing option.

The fallowing option does not use system or on-farm water efficiency measures. The fallowing option would instead involve the voluntary fallowing of a substantial number of acres within IID, with the water savings to be available for transfer in accordance with the QSA as implemented through the Implementation Agreement.

Fallowing is an option, developed to obtain approval for an HCP, not a requirement. Fallowing involves retiring farm land for a period of time and has raised concerns among residents of Imperial County with respect to its potential adverse effects on the local economy. Various approaches may be available to address these economic concerns, including approaches within the water transfer framework agreed to by IID and San Diego. We are committed to working with IID and the residents of Imperial County to address their concerns. Fallowing was not the original approach contemplated for the IID/SDCWA transfer agreement and has not yet been fully analyzed nor discussed within IID.

An HCP will, however, provide substantial benefits to IID. For example, if IID elects to continue with

the HCP process, IID may ultimately receive valuable assurances with respect to the impacts of its future water use on threatened and endangered species. Habitat conservation plans provide assurances that the mitigation measures set forth in the plan will be all that is required with respect to the needs of species currently identified as threatened or endangered and with respect to the needs of those yet to be listed. The decision to go forward with a fallowing option - a voluntary decision - is a decision to work through the difficult issues associated with fallowing in order to reap the significant benefits of long-term protection under the environmental laws. If the decision is made to adopt the fallowing option, the HCP assurances may be tied to implementing this decision.

If an HCP cannot be developed, we believe that the requirements of the federal ESA can be met through Section 7 of the ESA so that the IID water transfers can proceed. However, because a Section 7 consultation focuses only upon threatened and endangered species presently listed under federal law, fewer species will be addressed than in a Section 10 HCP process. Although we prefer to complete an HCP, Interior intends to move forward with a Section 7 consultation if it becomes clear that the HCP process will not conclude in sufficient time to permit the execution of the QSA by December 31, 2002.

For years now, in efforts which have bridged two administrations, Interior has devoted enormous resources to working with the California water agencies in a cooperative process to develop water budgets and water transfers acceptable to all to bring California=s use of Colorado River water within the 4.4 million acre-feet limitation decreed for a year of normal water supplies. To abandon these cooperative efforts at a time when drought conditions currently exist in the Colorado River system is to invite disaster.

River Management in the Absence of a California 4.4 Plan

If the QSA is not executed by December 31, 2002, the Interim Surplus Guidelines provide that surplus determinations will be made on a much more restrictive standard. Specifically, section 5(B) of the Guidelines provides:

It is expected that the California Colorado River contractors will execute the Quantification Settlement Agreement (and its related documents) among the Imperial Irrigation District (IID), Coachella Valley Water District (CVWD), MWD, and the San Diego County Water Authority by December 31, 2001. In the event that the California contractors and the Secretary have not executed such agreements by December 31, 2002, the interim surplus determinations under Sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended and will instead be based upon the 70R Strategy, for either the remainder of the period identified in Section 4(A) or until such time as California completes all required actions and complies with reductions in water use reflected in Section 5(C) of these Guidelines, whichever occurs first. 66 Fed. Reg. 7782 (Jan. 25, 2002)

The Department has not made a final decision regarding the exact nature and timing of actions or combinations of actions that it will take regarding California=s use of Colorado River water in the event that the QSA is not executed by December 31, 2002 and the Guidelines are suspended according to its terms. However, as we have stated repeatedly in the past, the Department is fully committed and prepared to take whatever steps are necessary to ensure that California=s use of Colorado River water fully complies with the requirements of the Decree of the United States Supreme Court in *Arizona v. California*. As fifteen members of California=s Congressional delegation stated in a May 23, 2002 letter to Secretary Norton, AThe Interior Department is responsible for enforcing the deadlines built into the Federal Interim Surplus Guidelines, which are intended to keep the California Plan on schedule.@ The

Department acknowledges and accepts this responsibility. Due to the complexity and importance of these issues, the Department will be publishing a Federal Register notice that will identify concerns that the Department has received from lower basin users outside California in the event that the Interim Surplus Guidelines are suspended according to the provision cited above.

We all know that California=s use of Colorado River must comply with the Law of the Colorado River. This obligation includes both the requirement that California=s use of Colorado River water may not exceed the quantity of water available to it under the Law of the River, and the independent requirement that any and all water available to California be placed to beneficial uses in accordance with applicable provisions of state and federal law.

Conclusion

Absent completion of the Quantification Settlement Agreement, the contemplated water transfers cannot proceed. Absent these water transfers, the California 4.4 Plan will fail. If the Quantification Settlement Agreement is not signed by December 31, 2002, the interim surplus determinations, which currently permit the Colorado River Aqueduct to remain full, will be suspended. In such an event, the Secretary of the Interior will enforce the Decree in *Arizona v. California* and California may well suffer an abrupt and major reduction in Colorado River water supplies. While we believe that an HCP under section 10 of the ESA is the preferred approach to avoiding these alternatives, we also believe that section 7 consultation provides an appropriate mechanism for compliance with the federal ESA. Under either approach, we must all work together in this critical year for the interests served by the Colorado River.

This concludes my testimony. I would be pleased to answer any questions you may have.

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