

**PROCESS AND PROCEDURES FOR
OBTAINING A SUBCONTRACT FOR WATER
UNDER
THE LOWER COLORADO WATER SUPPLY ACT OF 1986**

Background

California's use of Colorado River water is subject to laws, judicial rulings and decrees, contracts, agreements and an international treaty collectively known as the "Law of the River". Consumptive use of Colorado River water is defined as diversions from the mainstream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation. The body of law provides that water from the Colorado River downstream of Lee Ferry, Arizona, including reservoirs on the Colorado River, shall be released or delivered to water users, including but not limited to public and municipal corporations and other public agencies in Arizona, California, and Nevada only pursuant to valid water contracts made with such users by the Secretary of the Interior ("Secretary") pursuant to Section 5 of the Boulder Canyon Project Act of 1928 (45 Stat. 1057) or any other applicable federal statute. This contract requirement applies to all diversions made from the Colorado River, whether made directly from the River or via groundwater wells withdrawing water that would be replaced by water from the Colorado River.

The Boulder Canyon Project Act of 1928 apportioned to California the consumptive use of 4.4 million acre-feet (maf) of water from the Colorado River each year plus one-half of any surplus water that may be available collectively for use in Arizona, California, and Nevada. In the past, the Secretary has made available to California water that was apportioned to, but not used by, Arizona and Nevada, on a year-to-year basis. Also, the Supreme Court of the United States ("Supreme Court") has quantified "present perfected rights" in California for the annual diversion of nearly 3.0 maf. "Present Perfected Rights" ("PPRs") as defined by the Supreme Court means perfected water rights, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act. All PPRs are listed in the Supplemental Decrees entered January 9, 1979, and April 16, 1984, by the Supreme Court in Arizona v. California, as amended or supplemented. In addition, the Secretary has executed surplus water delivery contracts for the diversion of over 291,300 acre-feet of Colorado River water to be made available to entities in California.

For many years, California has been diverting more than its normal 4.4 maf apportionment. Prior to 1996, California utilized unused apportionments of Arizona and Nevada that were made available by the Secretary. Since 1996, California has also utilized surplus water made available by Secretarial determination. California is in the process of developing the means to meet its water needs from within its annual apportionment of Colorado River water. As the amount of Colorado River water made available to California may be reduced in any future year, some entities currently using Colorado River water may be required to limit or cease their diversions from the Colorado River.

In recognition of the future limitation on the amount of Colorado River water available to California, and the fact that several persons and entities are diverting water from the Colorado

River without a contractual entitlement or present perfected right or with an insufficient right, Congress on November 14, 1986, enacted the Lower Colorado Water Supply Act of 1986 ("Act"). This Act authorized and appropriated funds for the Bureau of Reclamation ("Reclamation") to construct the Lower Colorado Water Supply Project ("Project"). The Project consists of well field facilities in the Sand Hills along the All-American Canal in Imperial County. As authorized by Congress, the Project is to "...supply water for domestic, municipal, industrial, and recreational purposes only." Water for agricultural uses is not available under the Act. The Act limits the eligible Project beneficiaries "to persons or Federal or non-Federal governmental agencies whose lands or interests in lands are located adjacent to the Colorado River in the State of California, who do not hold rights to Colorado River water or whose rights are insufficient to meet their present or anticipated future needs as determined by the Secretary."

Under a May 22, 1992 contract with Reclamation, the Imperial Irrigation District ("IID") and the Coachella Valley Water District ("CVWD") have agreed to exchange a portion of their rights to divert water from the Colorado River for an equivalent quantity and quality of groundwater ("exchange water") to be withdrawn from a well field located in the Sand Hills along the All-American Canal in Imperial County. IID and CVWD would reduce their diversions from the Colorado River in an amount equal to the volume of groundwater discharged into the All-American Canal up to a maximum of 10,000 acre-feet per year. An amount of Colorado River water equal to the amount of water that would have otherwise been diverted by IID and CVWD would be made available for beneficial consumptive use by Project beneficiaries. The Project facilities are being developed in stages: Stage 1 has a capacity to provide 5,000 acre-feet of exchange water per year. Stage 1 was declared substantially complete on October 1, 1996, and was officially turned over to the IID for operation and maintenance on January 1, 2000.

The City of Needles, on September 10, 1992, executed a contract with Reclamation providing for the construction and repayment of costs of Stage 1 of the Project and also provided that the City of Needles would assume the administrative responsibility for other Project beneficiaries in San Bernardino County except for federally administered and Indian lands. The City of Needles and Reclamation are in the process of amending that contract to extend the City of Needles' administrative responsibility to include other Project beneficiaries in Imperial County and Riverside County with the exception of federally administered and Indian lands. Thus a Project beneficiary will need to execute a subcontract for Project water with the City of Needles, subject to Reclamation's approval. These subcontracts for Project water will provide for the repayment of the cost to construct the Project facilities plus interest, the costs of Project administration, and the operation, maintenance and replacement costs of that portion of the Project that is used to provide the contracted amount of Project water.

Notice of Subcontract Availability

The Colorado River Board of California ("CRB") will conduct a process for determining eligibility of an applicant for Project water and provide its recommendation to Reclamation as to whether or not the applicant should be offered a Project subcontract.

Existing owners of land in California located within the flood plain of the Colorado River or overlying the accounting surface area, as delineated by the U.S. Geological Survey in its Water-Resources Investigations Report Nos. 94-4005 and 00-4085, will be formally notified by the CRB of

the eligibility requirements to become a Project water user. A formal public notice will be made in conjunction with these individual notices.

The CRB will follow a multi-step process in evaluating each application in order to make a recommendation (affirmative or negative) to Reclamation as to whether the applicant should be offered a subcontract for Project water. The evaluation process will be the same for all applications. However, applicants whose diversions from the Colorado River predate the enactment of the Act will be given a priority over those applicants whose diversions began after the enactment of the Act. Whatever recommendation the CRB makes, Reclamation has sole discretion to determine whether or not an applicant shall be offered the opportunity to become a Project beneficiary. Once the CRB completes its evaluation and sends its recommendations to Reclamation, Reclamation will consider the CRB's recommendations and notify the City of Needles of the successful applicants. The City of Needles will then initiate the subcontracting process with successful applicants.

Evaluation of Eligibility

The following multi-step process will be used by the CRB in evaluating applications for a subcontract for Project water.

(1) Priority: Applicants will be placed in either one or both priorities based on the initiation date of the applicant's diversions from the Colorado River. These priorities will determine the order in which applications are processed.

Priority 1: Applicants who diverted Colorado River mainstream water on or before November 14, 1986. Priority 1 applicants must comply with the time requirements specified hereinafter in items 2 and 5 of the section entitled "Process for Applying for and Obtaining a Project Beneficiary Recommendation from the CRB" in order to maintain their Priority 1 status. The volume of Project water that may be requested under a Priority 1 application shall be limited to the applicant's historical annual consumptive use of Colorado River water on or before November 14, 1986.

Priority 2: Applicants in any of the following five categories, all of equal standing: a) those Priority 1 applicants desiring a volume of Project water that exceeds their historical annual consumptive use of Colorado River water on or before November 14, 1986; b) those applicants who diverted Colorado River mainstream water after November 14, 1986; c) those applicants who have never diverted Colorado River mainstream water, but wish to reserve project water for future development; d) those applicants who have entered into a subcontract and subsequently seek to amend that subcontract to increase the amount of Project water available under said subcontract; and e) those potential Priority 1 applicants who fail to comply with the aforementioned time requirements.

Priority 1 applicants will be afforded a 60 calendar day "priority period" within which to submit an application for evaluation by the CRB before it considers any Priority 2 applications. This "priority period" will begin on September 14, 2001, the date property owners were notified concerning the availability of Project water.

(2) Diversion of Colorado River Water: The CRB will determine whether (i) the applicant is diverting directly from the Colorado River, (ii) the applicant's well or wells are potentially withdrawing water that is replaced by water from the Colorado River, or (iii) the applicant is not diverting water from the Colorado River. Water withdrawn from wells located within the flood plain of the Colorado River will be considered to be replaced by water from the Colorado River and, therefore, such users will be deemed to be diverting water from the Colorado River. CRB's determination for wells located outside of the flood plain of the Colorado River but within the accounting surface area will follow the method described by the U.S. Geological Survey in its Water-Resources Investigations Report Nos. 94-4005 and 00-4085, each of which includes maps delineating the extent of the accounting surface. The accounting surface represents the extent of the unconfined static water table in the aquifer adjacent to and outside the Colorado River flood plain and the reservoirs of the Colorado River that would exist if the Colorado River and its reservoirs were the only source of water to the aquifer. Wells not located within the flood plain of the Colorado River and outside the accounting surface will be determined as not diverting water from the Colorado River.

(3) Type of Use: The CRB will consider whether the applicant is consumptively using, or proposing to consumptively use, Colorado River water for a domestic, municipal, industrial or recreational purpose, which are the only uses of Project water permitted under the Act. Use of Project water for agricultural purposes is not permitted under the Act.

(4) Place of Consumptive Use: The CRB will consider the place of consumptive use for the purpose of determining the applicant's eligibility for a subcontract for Project water:

- (a) Priority 1 and 2 applicants who are consumptively using, or propose to consumptively use, Colorado River water on lands in California that are either within the flood plain, overlying the accounting surface area, or on lands contiguous to the parcel of land within the flood plain or overlying the accounting surface area from which the water is diverted. Such diverters will qualify for a subcontract;
- (b) Priority 1 applicants who are consumptively using Colorado River water on specific lands in California that are not within the flood plain nor overlying the accounting surface and are not contiguous to the parcel of land within the flood plain or overlying the accounting surface area from which the water is diverted. Such diverters will qualify for a subcontract of equal standing with those in category (a) above, but only up to the quantity of their maximum historic annual consumptive use on said specific lands on or before November 14, 1986;
- (c) Applicants who are consumptively using Colorado River water on specific lands that are not within the flood plain nor overlying the accounting surface area and are not contiguous to the parcel of land within the flood plain or overlying accounting surface area from which the water is diverted who initiated such diversion after November 14, 1986. Such applications may be eligible to subcontract for Project water on a temporary, as-available basis. The availability of Project water under such subcontracts would be subject to the availability of the use of Project capacity allocated under subcontracts entered by applicants in categories (a) and (b) above. The availability of

Project capacity to a category (c) applicant would be further limited to the quantity of its maximum historic annual consumptive use on said specific lands up to the date of formal public notice of availability of Project water. As demand for Project water by applicants in categories (a) and (b) above force the termination of the temporary, as-available subcontracts, priority will be given in the order of the date applications are received by the CRB from category (c) applicants. That is, the applicant whose application is received last by the CRB would be the first applicant whose temporary, as-available subcontract would be recommended for termination.

Any applicant not classified under category (a), (b), or (c) above will not be recommended by the CRB as eligible for a subcontract.

(5) Beneficial Use: The CRB will consider the intended use of the water and determine whether it is a beneficial use.

(6) Reasonable Use: If the use is determined to be beneficial, the CRB will determine whether the quantity used, or proposed for use, is a reasonable amount necessary to accomplish the designated purpose.

(7) Other Factors: The CRB will also consider other factors including, but not limited to, the point of return flow(s) to the mainstream and the effect that the subject diversion has on existing Colorado River mainstream users holding a valid entitlement for the use of Colorado River water.

Preferences Under Conditions of Insufficient Supply of Exchange Water

Evaluations will generally be limited to consideration of the factors listed in the above "Evaluation of Eligibility" section. In the event there is more than one applicant receiving a favorable recommendation from the CRB for a subcontract for Project water, but the remaining supply of Project water then available under the Act is insufficient to meet the demands of all such applicants, preference will be given in the order that the applications are received by the CRB.

The allocation of the available Project capacity under the Act will be carried out separately and independently for each stage of construction of the Project facilities. The City of Needles has contracted for 3,500 acre-feet of Project water per year from the completed Stage 1 capacity of 5,000 acre-feet per year for itself and other Project beneficiaries. The U.S. Bureau of Land Management ("BLM") has entered into an intra-agency agreement for 1,150 acre-feet per year of Project water for consumptive use on BLM-administered lands in California. To date, there remains 350 acre-feet of first stage capacity that is not under a repayment contract. The administration of the BLM intra-agency agreement for Project water for BLM administered lands in California will be the responsibility of BLM.

Construction of additional facilities to produce the remaining 5,000 acre-feet of exchange water authorized by the Act will be carried out at the time when there is a demonstrated need and funding for additional facilities. Funding for construction of the additional facilities must be from non-federal funds.

Contract Obligations

The Project is not designed to be subsidized by, nor produce a profit for, any of the governmental entities involved. Under the Act, Project beneficiaries will be required to repay: 1) the Project capital construction costs plus interest during construction, 2) the fixed and variable operation, maintenance, and replacement (“OM&R”) costs of the facilities and 3) certain administration expenses. The terms and provisions of the subcontracts for Project water shall be governed by the provisions of the Water Supply Act of 1958 which were in effect on January 1, 1986. These cost elements are explained in detail below and could vary depending on the actual use of Project water.

- 1) Total Project capital costs plus interest during construction for Stage I facilities is \$983,565.83, which will be allocated among each Project beneficiary in proportion to its contracted amount of exchange water. Project beneficiaries will reimburse the City of Needles for its share of the costs plus interest at the time of subcontract execution, which will be charged as a one-time charge of approximately \$300 per acre-foot. (Note: one acre-foot is the minimum amount for each subcontract and should be sufficient to supply a standard single family residence.)
- 2) Each Project beneficiary’s annual fixed Project OM&R charges will be paid in advance, based on the operating agent’s (IID) cost estimate and shall be allocated in proportion to the respective contracted amount of Project water. An additional charge per acre-foot of Project water used will be assessed to reflect actual pumping and variable OM&R costs as well as annual administrative costs. These costs are estimated to be approximately \$250 per acre-foot per year. This cost will depend on the number of subcontractors, and may be lower.
 - 1) A Project beneficiary who does not have plans to develop the property in the near term, can pay the one-time charge of \$300 plus an additional annual “readiness to serve” charge. This “readiness to serve” charge of approximately \$15 per acre-foot per year could change and will depend on the number of actual subcontractors.

During those years in which Reclamation makes a determination that there is sufficient water available to California in excess of the reasonable beneficial use requirements of contractual entitlements enumerated in the California Seven Party Agreement, California present perfected rights not encompassed by the Seven Party Agreement, and surplus water contracts, the Project well field will not be operated and the Project beneficiaries will be permitted to utilize Colorado River water without exchange. However, Project beneficiaries’ annual obligation for fixed OM&R charges for Project facilities and annual administration charges will continue during these periods.

Project beneficiaries that consume in excess of one acre-foot per year shall be required to submit to the City of Needles estimates of monthly use one year in advance, and report, on a monthly basis, the amount of water actually pumped or diverted including any measured return flows to the Colorado River. All Project beneficiaries will also be required to have a measuring device at the well or point of diversion which will be furnished, installed and maintained at the Project beneficiary’s expense. At the discretion of Reclamation, Project beneficiaries may be required to develop a water conservation plan.

Water Delivery

The availability of Project water will be contingent upon the ability of the Project well field to pump water into the All-American Canal in sufficient quantity and of acceptable quality in accordance with the Act and the *Contract Among the United States, Imperial Irrigation District, and Coachella Valley Water District for Exchange Water From The Lower Colorado Water Supply Project Well Field for Colorado River Water* dated May 22, 1992 ("All-American Canal Exchange Contract"). None of the parties to the All-American Canal Exchange Contract assumes responsibility with respect to the quantity or quality of the water pumped from Project wells for discharge into the All-American Canal and are under no obligation to construct or furnish facilities except those expressly authorized under the Act.

Process for Applying for and Obtaining a Project Beneficiary Recommendation from the CRB

1. CRB will formally notify all owners of land in California located within the flood plain of the Colorado River and overlying the accounting surface area delineated in the U.S. Geological Survey's Water-Resources Investigations Report Nos. 94-4005 and 00-4085 of the eligibility requirements for obtaining a CRB recommendation to become a Project beneficiary. Also notified will be those potential applicants that have indicated an interest in obtaining a future Colorado River water supply under the Act and/or other means. Simultaneously, a public notice of Project water availability will be made through local publications.
2. Priority 1 applicants, described above under "Evaluation of Eligibility", shall have a 60 calendar day "priority period" within which to submit an application, along with supporting documentation, to the CRB requesting a recommendation. Priority 1 applicants may request an extension of up to an additional 60 calendar days within which to submit supporting documents. If a Priority 1 applicant fails to request and submit an application within the priority period, that applicant will relinquish its Priority 1 status and any subsequent application will be considered by the CRB as a Priority 2 request. All applications shall include supporting documents identifying (a) the date on which diversions from the Colorado River commenced, (b) the historical, present and anticipated future annual use of Colorado River water, (c) the location and method of past, present, and/or future diversion, (d) the manner in which water is returned to the Colorado River, if any, (e) the past, present and future type of use (which must be either domestic, municipal, industrial, and/or recreational), and (f) the existence of or proposal to install a measuring device for metering diversions from the Colorado River and subsequent returns thereto, if any.
3. Priority 2 applicants are encouraged to submit an application, along with supporting documents described in step 2 above, to the CRB requesting an evaluation. To the extent deemed appropriate, the processing of Priority 2 applications will commence when it is determined that sufficient Project water is available to meet all Priority 1 applications received during the priority period. For those Priority 2 requests received prior to the end of the "priority period", the CRB will treat the request as if it was received at the end of the "priority period." Those received after the "priority period" will be processed as they are received.

4. CRB will notify Imperial, Riverside, and San Bernardino Counties of the number of applications received within each county under Paragraphs 2 and 3, above.
5. Within 30 calendar days after the receipt of an application requesting an evaluation, the Executive Director of the CRB will notify the applicant of any deficiencies in its supporting documents, and will identify any additional information necessary for the CRB to complete the evaluation. An applicant that would otherwise qualify for Priority 1 status will not receive that preferential priority unless said applicant supplies that additional necessary information to the CRB within 30 days of the CRB's notification.
6. Within 60 calendar days after the receipt of an application requesting an evaluation, or the supplemental information subsequently requested, the CRB's staff will complete its review of the application and the CRB's Executive Director will submit his findings and recommendations for consideration by the CRB.
7. Within 90 calendar days after the receipt of an application requesting an evaluation and any supplemental information subsequently requested, the CRB shall consider the findings and recommendation submitted by the Executive Director and will take one of the following actions: a) recommend to Reclamation that the applicant be offered a subcontract for Project water, b) recommend to Reclamation that the applicant be offered a temporary, as-available subcontract, or c) determine that the applicant is not eligible to receive Project water. Notice of the CRB action will be sent to the applicant, each of the three concerned counties, Reclamation, and the City of Needles.

Once the CRB completes its evaluation and sends its recommendation to Reclamation, and Reclamation approves the recommendation, the applicant may then initiate the contracting process with the City of Needles.

Applicants for Project water in excess of the Stage 1 capacity who have received a favorable recommendation from the CRB may initiate the contracting process for Project water with Reclamation under a subsequent stage of the Project. Reclamation's schedule for processing contracts will depend on the need for and timing of construction of additional facilities as evidenced by the need for water and the ability of Reclamation to construct the additional facilities with contributed funds. Full financing of the construction of the additional facilities may be required of those applicants for the additional facilities since federal funds may not be available. The CRB will maintain a list of applications receiving a favorable recommendation in the interests of keeping Reclamation informed of the need, if any, for construction of additional facilities to increase the capacity to produce exchange water up to the amount authorized under the Act.

Those applicants who do not agree with the CRB's recommendation are not bound by that recommendation, since said recommendation is made in its advisory capacity. Reclamation has the discretion to determine whether or not an applicant is entitled to a subcontract for Project water.