

**EXECUTIVE DIRECTOR'S MONTHLY REPORT
TO THE
COLORADO RIVER BOARD OF CALIFORNIA**

April 8, 2003

ADMINISTRATION

CRB Budget Hearing

On March 19th, the Assembly Budget Subcommittee No. 3 on Resources held a hearing on various agency budgets, including the Colorado River Board. The CRB's budget was pulled from the consent calendar due to the lack of any budget reduction in the proposed expenditures. The Committee requested that I return at a later date to explain why the CRB's budget should not be reduced, consistent with other state agencies.

In the State Senate, Budget and Fiscal Review Subcommittee No. 2 continues to have the CRB's budget as a consent agenda item.

AGENCY MANAGERS MEETING

The Agency Managers have not met since the January Board meeting.

PROTECTION OF EXISTING RIGHTS

Colorado River Water Report

As of April 3, 2003, storage in the major Upper Basin reservoirs decreased by 251,000 acre-feet and storage in the Lower Basin reservoirs decreased by 356,000 acre-feet during March. Total System active storage as of April 3rd was 35.501 million acre-feet (maf) or 60 percent of capacity, which is 7.621 maf less than one year ago.

March releases from Hoover, Davis, and Parker Dams averaged 15,570, 15,940 and 11,840 cubic feet per second (cfs), respectively. Planned releases from those three dams for the month of April 2003 are 18,500, 19,300, and 13,400 cfs, respectively. The March releases represent those needed to meet downstream water requirements including those caused by reduced operation of Senator Wash reservoir.

The preliminary April 1, 2003, projected April through July 2003 unregulated inflow into Lake Powell was 5.200 maf, which is 66 percent of the 30-year average for the period 1961-1990. The preliminary April 1, 2003, projected unregulated inflow into Lake Powell for the 2003-04 water year was 7.861 maf, or 65 percent of the 30-year average.

The Lower Division States' consumptive use of Colorado River water for calendar year 2003, as calculated by Board staff, totals 7.813 maf and is distributed as follows: Arizona, 2.891 maf; California, 4.648 maf; and Nevada, 0.274 maf. Unmeasured return flow credits of 0.264 maf would reduce the total amount of projected consumptive use to 7.549 maf. For calendar year 2003, it is estimated the Central Arizona Project (CAP) will divert 1.586 maf, of which 0.175 maf is to be credited to the Arizona Water Bank. The Metropolitan Water District of Southern California (MWD) is projected to divert 0.708 maf.

The preliminary end-of-year estimate for 2003 California agricultural consumptive use of Colorado River water under the first three priorities and the sixth priority of the 1931 *California Seven Party Agreement* is 3.882 maf. This estimate is based on the collective use through February 2003 by the Palo Verde Irrigation District, the Yuma Project Reservation Division (YPRD), the Imperial Irrigation District, and the Coachella Valley Water District. Figure 1, found at the end of this report, depicts the historic projected end-of-year agricultural use for the year.

Colorado River Operations

Yuma Desalting Plant Report to Congress

Included in the Board folder are copies of the State of Arizona and Colorado's comment letters concerning Reclamation's report to Congress on the operation of the Yuma Desalting Plant. Both letters support the restart and operation of the facility to salvage water currently being bypassed to the Cienega de Santa Clara. To further this discussion, as well as other issues, regarding management of the water resources in the Yuma area, a meeting among representatives of the Lower Division states has been scheduled for April 25th.

Reclamation's Study of 602(a) Storage Criteria

Included in the Board folder is a copy of the Board's letter to Reclamation in response to a notice in the Federal Register concerning adoption of interim 602(a) storage guidelines. In the Board's letter, it was requested that Reclamation conduct additional modeling studies and that those studies be shared with the Basin States prior to submission for technical comments.

Arizona Water Settlement Act (S. 437)

On February 25, 2003, Arizona's Senator Kyl introduced S.437 (the "Arizona Water Settlement Act") into the 108th Congress to provide adjustments to the Central Arizona Project, to authorize the Gila River Indian Community water rights settlement, to authorize and amend the Southern Arizona Water Rights Settlement Act of 1982, and for other purposes.

The Central Arizona Project's basic entitlement is limited to 1,415,000 acre-feet annually under normal conditions. The waters diverted by the CAP were originally allocated as follows:

<u>Indian Use</u>	<u>M&I Use</u>	<u>Non-Indian Agriculture</u>
309,828 AF	640,000 AF	465,172 AF

Senator Kyl's proposed settlement agreement reallocates CAP water as follows:

<u>Indian Use</u>	<u>M&I Use</u>	<u>Non-Indian Agriculture</u>
667,724 AF	747,276 AF*	0

*Includes non-Indian agricultural entities

Navajo Nation vs. Department of the Interior, Norton et al

On March 14, 2003, the Navajo Nation filed an action in the United States District Court for the District of Arizona alleging that the Department of the Interior in its management of the Lower Colorado River and by its actions, including but not limited to establishment of the Interim Surplus Guidelines, failed to consider the water rights of the Navajo Nation or to protect the interests of the Navajo Nation.

In its action, the Navajo Nation is seeking relief for: 1) breach of fiduciary trust responsibility in implementation of the Interim Surplus Guidelines; 2) breach of fiduciary trust responsibility in the adoption of the FEIR Implementation Agreement, Inadvertent Overrun and Payback Policy and Related Federal Actions; 3) breach of fiduciary trust responsibility in the implementation of the Interstate Banking Regulations; 4) breach of fiduciary trust responsibility in refusing to contract for delivery of Central Arizona Project water to the Navajo Nation; 5) violation of NEPA and the Administrative Procedures Act; and 6) a breach of fiduciary trust responsibility by failing to provide Colorado River water to meet the needs of the Navajo people.

SNWA Storage and Interstate Release Agreement

For your information, included in the Board folder is an executed copy of the *Storage and Interstate Release Agreement* (SIRA), signed on December 18, 2002, between the Secretary of the Interior; Arizona Water Banking Authority; Southern Nevada Water Authority; and the Colorado River Commission of Nevada.

The SIRA allows for the State of Nevada to accumulate up to 1,200,000 acre-feet of Long-Term Storage Credits in the Arizona Water Bank; and to recover up to 100,000 acre-feet of water in any year through Intentionally Created Unused Apportionment.

MWD staff continue to work with the Arizona Water Banking Authority with the desire of entering into a similar water banking arrangement.

USBR's Outreach Program

As part of Reclamation's intention of "Managing the Colorado River in an Era of Limits," it has announced plans to hold a conference on April 15th, in Las Vegas, at the Tropicana Inn Resort and Casino to begin a dialogue with Colorado River water users about managing the Lower Colorado River in a time of diminished water supplies. Reclamation will begin this outreach effort entitled "An Era of Limited Water Supply" with managers of Colorado River water contractor agencies, Native American Tribes, environmental organizations, and other interested parties. A copy of the tentative agenda is included in the Board folder. Reclamation will be scheduling follow-on public meetings in Arizona, Southern California, and Southern Nevada to allow any interested individual the opportunity to speak on, and hear, Reclamation's view of the future use and management of the River. Topics that will be discussed during these meetings include: an overview of key legislation, current and proposed water use in the Colorado River Basin, Article V Decree accounting from the 1964 U.S. Supreme Court Decree in *Arizona v. California*, the annual operating plan for the Colorado River System reservoirs, reviewing and monitoring water orders and use in the Lower Basin, contracting for water use in the Lower Basin, Part 417 water conservation, unauthorized use of Colorado River water, and future directions in River management.

USBR Request for Information

On March 18, 2003, Reclamation published a Notice in the *Federal Register*, that it was soliciting comments from its stakeholders related to its responsibility for collecting data related to diversions, return flow, and consumptive use of Colorado River water. This information will be submitted to the Office of Management and Budget in support of continuing this effort. Comments are due by May 19, 2003. The Board has requested additional information from Reclamation and is in the process of preparing a response to the notice.

Water Use for Calendar Year 2003

Included in the Board folder is a handout that I received entitled *Lower Colorado River Operations-Normal Year versus Full Domestic Surplus*. This is a very useful reference document as it shows the water delivery schedule to various entities along the River under a Full Domestic Surplus condition and a Normal condition.

Decree Accounting

Yuma Area

Last November, the Board wrote a letter to Reclamation expressing its concerns with the water use accounting issues related to Yuma Island in light of the indefinite delay in completing the Yuma Island Independent Panel process.

Reclamation in response to the Board's letter, has committed to certain changes in preparing Decree Accounting Reports, and further indicated that no change in the methodology for determining consumptive use will take place prior to consultation with all affected parties.

Consumptive Use of Colorado River Water

As we have discussed at prior Board meetings, Board and agencies staff are working closely with Reclamation and representatives in Arizona and Nevada on the development of a consistent policy associated with mainstream water use accounting and riparian and marsh vegetation. You may recall that issues related to the use of mainstream water by riparian and marsh vegetation and surface water evaporation has been long identified as an issue requiring resolution by Reclamation in its development of the Lower Colorado River Accounting System (LCRAS). These issues have taken on more meaning with the continuing development of the LCR MSCP. The proposed habitat restoration and maintenance activities will likely require annual supplies of mainstream water. It is important to clarify how that mainstream water will be utilized by the LCR MSCP and how that associated water use will be accounted for, pursuant to Article V of the Supreme Court Decree in *Arizona vs. California* (376 U.S. 340).

The Board's proposed policy addressing these issues has been the topic of discussion and the focus of several meetings since early in 2003. Board and agency staff have met with Reclamation staff and representatives of Arizona and Nevada in an effort to develop an understanding of the issues and reach consensus on potential solutions. Generally, Nevada is supportive of the Board's current proposal. Reclamation and Arizona are still concerned that the proposed policy does not fully comport with the tenets of the Decree.

California's Colorado River Water Use Plan

State Senate Hearing on QSA

Included in your handout material is a letter from State Senator Machado, chairman of the Senate Committee on Agriculture and Water Resources, inviting Director Tom Hannigan and others, to a informational hearing before the Committee on April 29th, to discuss the proposed QSA that was announced on March 12, 2003.

Interior's Proposed Solution to Mitigate Salton Sea

On April 4th, Assistant Secretary Bennett Raley presented a proposal to the Basin State representatives intending to address issues related to the potential environmental impact to the Salton Sea due to the transfer of water to the SDCWA. In his proposal, Mr. Raley proposed a paper exchange of water between the Imperial Irrigation District and the MWD so that environmental mitigation water might be delivered to the Salton Sea without coming from the Colorado River. The proposal entails that IID swap some of its Colorado River water with an equal amount of water that MWD buys from somewhere else, thus creating a paper exchange or accounting transaction. The net effect would be that Interior and the other Basin States would be assured that the 4.4 maf diverted by California is put to beneficial use and that water from other than the Colorado River would be used to mitigate potential impacts to the Salton Sea.

Various Senate & Assembly Bills Associated with the QSA

The following bills have been introduced into the State legislature:

Assembly Bill No. 1484 by Assembly Member Pavley
Assembly Bill No. 1770 by the Committee on Water, Parks and Wildlife
Senate Bill No. 21 by Senator Machado
Senate Bill No. 117 by Senator Machado and Kuehl
Senate Bill No. 317 by Senator Kuehl
Senate Bill No. 411 by Senator Ducheny
Senate Bill No. 623 by Senator Ducheny
Senate Bill No. 994 By Senator Hollingsworth

AB 1484

On February 21, 2003, State Assemblyman Pavley introduced A.B. 1484 which appropriates an unspecified amount of Proposition 50 bond funds to the Resources Agency to finance (1) projects that facilitate water transfers pursuant to the Quantification Settlement Agreement and that contribute to achieving benchmarks of the Interim Surplus Guidelines and (2) restoration activities at the Salton Sea or the lower Colorado River, or to assist in the development of a natural community conservation plan.

AB 1770

On March 11, 2003, the Committee on Water, Parks and Wildlife introduced A.B. 1770 which proposes to revise eight sections to the Fish and Game Code. Item 7 of the proposed legislation extends the deadline, from June 30, 2003 to January 30, 2005, for the Resources Agency and the Technology, Trade, and Commerce Agency to report to the Governor and the Legislature, on matters pertaining to the implementation of the Salton Sea Quantification Settlement Agreement(sic).

SB 21

On December 2, 2002, Senator Machado introduced S.B. 21 which adds various sections to the Water Code requiring various state agencies to adopt regulations for the purpose of implementing projects using Proposition 50 funding. Specifically, the bill would require state agencies to award grants pursuant to certain provisions of the act on a competitive statewide basis and would require the State Department of Health Services to allocate certain grant money available to Southern California water agencies on a competitive basis for projects to reduce Colorado River water use, including projects undertaken jointly with other entities.

SB 117

On February 3, 2003, State Senators Machado and Kuehl introduced S.B. 117 which declares it is the intent of the Legislature that the Coachella Valley Water District, the Imperial Irrigation District, and the Metropolitan Water District of Southern California approve the Quantification Settlement Agreement so that certain federal guidelines relating to the Colorado River may be reinstated by the United States Department of Interior and that the transfer of water from the Imperial Irrigation District to the San Diego County Water Authority be implemented. The bill further declares that it is the intent of the Legislature that the QSA be consistent with the state's commitment to the restoration of the Salton Sea.

SB 317

On February 19, 2003, State Senator Kuehl introduced S.B. 317 which addresses various sections of the California Fish and Game Code related to "fully protected" species, and the California Water Code related to the Salton Sea.

The proposed legislation makes legislative findings concerning the Salton Sea and the Quantification Settlement Agreement (QSA). Additionally, the legislation provides the California Department of Fish and Game with the authority to provide incidental take authorization for species currently classified as "fully protected."

Major provisions of the proposed legislation include the following: (1) Provides \$50 million to assist in the implementation of restoration activities and the preferred alternative related to implementation of the QSA, and QSA-related activities; (2) Amends the California Fish and Game Code to provide incidental take authorization for fully protected species potentially affected by QSA-related activities; (3) Proclaims that restoration of the Salton Sea is in the State and national interest; (4) Provides for execution of the QSA to be extended indefinitely; (5) Requires that implementation of the QSA will not materially increase the salinity of the Salton Sea, or foreclose Salton Sea reclamation activities; (6) Provides for the Secretary of Resources to develop a Memorandum of Understanding between the Resources Agency, Governor, and Secretary of the Department of the Interior for the purpose of developing alternatives to meet the objectives of the Salton Sea Reclamation Act of 1998 (P.L. 105-372); (7) provides for the

Secretary of Resources to establish an advisory committee and for the Resources Agency to consult with the Advisory Committee while developing Salton Sea reclamation alternatives; and (8) Releases the liability of the Imperial Irrigation District for effects to the Salton Sea or bordering areas related to implementation of water conservation measures related to the QSA.

SB 411

On February 20, 2003, State Senator Ducheny introduced S.B. 411 which appropriates an unspecified amount of bond funds to the Resources Agency to finance restoration activities at the Salton Sea or the lower Colorado River, or to assist in the development of a natural community conservation plan.

SB 623

On February 21, 2003, State Senator Ducheny introduced S.B. 623, which amends existing law. Existing law requires the Secretary of the Resources Agency to enter into a memorandum of understanding between the Secretary of the Interior, the Salton Sea Authority, and the Governor, for the purposes of developing, selecting, and implementing alternatives for projects that realize the objectives of the Salton Sea Reclamation Act of 1998, and prepare a final report on or before January 1, 2007. This bill would change the date of that final report to January 1, 2005.

SB994

On February 21, 2003, State Senator Hollingsworth introduced S.B. 994 establishing the Imperial Valley Water Quality Protection Account in the State Treasury.

The proposed legislation would require the Department of Water Resources, upon appropriation by the Legislature, to expend the funds from the account only to acquire water to prevent a material increase in salinity of the Salton Sea. The bill authorizes the department to receive funds from public and private sources for deposit into the account. The department would be allowed to expend these funds in proportion to the amount of water transferred in accordance with the terms of the Quantification Settlement Agreement.

Imperial Irrigation District vs. United States of America; Gale Norton, et al.

On March 18, 2002, U.S. District Court Judge Thomas Whelan issued a preliminary injunction blocking a decision by Interior Secretary Gale Norton from reducing Imperial Irrigation District's allocation of Colorado River water. Judge Whelan's order does not affect Secretary Norton's decision to limit the total amount of Colorado River water, but Judge Whelan found that Secretary Norton failed to follow procedure and breached the 1931 Seven Party Agreement when she cut IID's water order and redistributed it to the Coachella Valley Water District and MWD.

In rendering his opinion, Judge Whelan stated that the issue of how efficiently water is used by farmers in the Imperial Valley was a major issue raised by attorneys for the federal government, CVWD, and MWD. He indicated that this issue of usage should be challenged under federal guidelines, or 43 Code of Federal Regulation, Part 417. As I understand, settlement discussions between IID and Reclamation are occurring in an attempt to settle this case.

Basin States/Tribes Discussions

Colorado River Basin States' Meeting

A meeting of the Colorado River Basin States Technical Committee on the Colorado River Delta was held on March 13, 2003, in Las Vegas, Nevada. A number of people from the Governor's office including the Secretary for Resources and the Secretary of Agriculture were in attendance.

Mr. Tom Hannigan briefed the Basin States representatives on the status of execution of the QSA and the revised 2003 QSA. A copy of the executed signature page has been included in the Board folder. He explained that the revised 2003 package accomplishes the original objective of the 1999 Key Terms of Agreement; it provides a peace treaty among the four water districts; it provides state funding and guarantees totaling \$350 million; local funding of \$243 million; and no new federal legislation or appropriations are required. It also achieves all of the benchmarks contained in the Interim Surplus Guidelines. The effective date of the QSA is expected to be July 30, 2003, but no later than October 30, 2003.

During the meeting a complete set of the QSA related documents were distributed to the Basin States representatives.

Colorado River Environmental Activities

Lower Colorado River Multi-Species Conservation Program

As has been discussed at previous Board meetings, the LCR MSCP Coordinating Team is continuing to meet and refine the draft Conservation Proposal. Currently, there is general consensus on the amount and type of habitat restoration that is being proposed through the LCR MSCP. This includes the following:

Cottonwood-willow restoration	5,940 acres
Honey mesquite restoration	1,320 acres
Backwater restoration	360 acres
Marsh habitat restoration	512 acres

Additionally, the LCR MSCP participants have tentatively agreed to provide measures contributing the maintenance of existing riparian, marsh, and aquatic habitat within the planning area.

The current draft Conservation Proposal contains a description of proposed performance standards related to conservation measure implementation, adaptive management measures, and monitoring program elements. Additionally, the participants have defined what constitutes changed circumstances and what types of remedial measures may be necessary to correct any deficiencies.

The Coordinating Team met on Friday, April 4, 2003, in Las Vegas, Nevada, to discuss the latest version of the draft proposal. At the meeting, the USFWS indicated their tentative approval associated with the Reclamation and States proposed package. The USFWS also stated that they appreciated the overall quality of the package and the efforts of all the parties in the development of the proposal.

The Coordinating Team hopes to reach closure, with a consensus-based agreement, on the draft proposal by mid-April. The intent is to then turn the documentation over to the LCR MSCP Technical Consulting Team to utilize as technical and policy guidance while preparing the draft biological assessment for Reclamation and the draft habitat conservation plan for the non-federal participants. The Technical Consultants are on track to have these draft documents prepared by mid-May 2003.

The Coordinating Team is also working diligently to continue to refine and clarify the total long-term costs associated with implementation of the proposed Conservation Plan. Currently the costs are estimated to be approximately \$614 million over the 50-year period. It is likely that the costs will continue to be adjusted as assumptions are reviewed and modified based upon receipt of additional information.

In a related process, the California LCR MSCP agencies have developed a proposed mesquite mitigation package which was submitted to the California Department of Fish and Game on April 1, 2003. This package was a response to the February 17, 2003, assessment by CDFG that flow-related impacts to mesquite required over 2,600 acres of mitigation above the amount requested by the USFWS. Based upon a technical analysis, the California MSCP participants have determined that there is little to no direct impact to existing mesquite habitat within California. Additionally, the California agencies reviewed the proposed covered species and have determined that there is no likelihood of taking these species related to the future transfers and changes in points-of-diversions of mainstream water. Consequently, the California agencies have developed a proposal which provides an additional ten percent (10%) mesquite habitat to the total 1,320 acres proposed for restoration through the LCR MSCP. It should be pointed out that the MSCP Impact Assessment, prepared by the Technical Contractors, identified no impact to mesquite relative to flow-related covered projects, and that non-flow covered activities resulted in only 590 acres of affected mesquite habitat. The parties have suggested a 2:1 mitigation ratio for mesquite. During the Coordinating Team process, the USFWS indicated a concern that continued degradation of existing mesquite habitat could require additional mitigation. Based upon this concern, the agencies then added an additional 10% more mesquite, for a total of 1,320 acres. The California agencies proposal results in an additional 10% on top of the 1,320 acres, or a total of greater than a 20% increase in mesquite mitigation

acres. Therefore, the total mesquite acreage being proposed is 1,452 acres, of which 132 acres would be the responsibility of the California MSCP agencies. The California MSCP agencies have submitted the mesquite mitigation package to CDFG and are awaiting its response.

Defenders of Wildlife v. Norton, et al.

On March 31, 2003, U.S. District Court Judge James Robertson issued his order and opinion in the *Defenders of Wildlife, et al. vs. Babbitt, et al.* This lawsuit revolved around the allegations, by several American environmental organizations in the United States and Mexico, that the government had failed to properly consult under the Endangered Species Act regarding potential impacts to federally listed species in Mexico associated with Reclamation's actions in the United States along the Lower Colorado River. In his decision, the Court denied the plaintiff's motions for summary judgement and granted the defendant's cross-motions for summary judgement.

In the Court's opinion, he addressed the following issues: (1) plaintiff's standing; (2) *res judicata*; (3) mootness; and (4) Endangered Species Act consultation requirements. The Court reached interesting conclusions associated with these issues, and they are briefly discussed in the following.

Standing Issues

After a lengthy discussion, the Court ruled that the plaintiffs did possess adequate standing to bring the suit against the government. The Court determined that the plaintiffs could show "the invasion of a legally protected interest which is concrete and particularized, and actual or imminent, rather than conjectural or theoretical." The Court determined that the potential impacts to the species could have led to a direct effect on the plaintiffs aesthetic, scientific, recreational, and economic interests. The plaintiffs had all submitted declarations stating that they traveled to the Delta and studied, worked, and recreated in the region. The plaintiffs had asserted that "a proper [Section 7] consultation would help abate the endangerment to the species by requiring stronger protective measures." Even though the Court concluded that Reclamation could not make additional releases, and that Mexico was not compelled to utilize the excess releases for species and habitat conservation, the Court concluded that the plaintiff's had standing to pursue the suit.

Res judicata

The government and amici had alleged that the Center for Biological Diversity should be barred from relitigating issues that were raised in the Lake Mead lawsuit (*Southwest Center for Biological Diversity vs. U.S. Bureau of Reclamation*, 6 F. Supp. 2d 1119, D. Ariz. 1997). The Court concluded that this was correct, but that the Center was not precluded from pursuing the case against the National Marine Fisheries Service (NMFS).

Mootness

The government alleged that the case was moot because Reclamation had reinitiated Section 7 consultation in 2002 for Lower Colorado River operations and maintenance activities. The Court stated that while the “reinitiated consultation, indeed, preserves and sharpens the controversy,” an actual controversy still remained associated with Reclamation’s non-discretionary actions and extraterritorial effects on listed species. The Court noted that Reclamation had not changed the action area or the analysis of endangered and threatened species in Mexico from the 1997 consultation process to the one performed in 2002.

Endangered Species Act Consultation

The Court, in its opinion, reviewed Reclamation’s ESA Section 7 consultation processes in the administrative record. The Court made several interesting observations which are worth highlighting.

First, the Court stated that “there is a general presumption against extraterritorial application of American statutes in the absence of an ‘affirmative intention of the Congress clearly expressed’ to extend their scope to extraterritorial conduct.” However, the Court went on, “the presumption is inapplicable, to federal agency actions within the United States that have extraterritorial effects.”

The Court stated that the definition of extraterritorial effects was,

“By definition, an extraterritorial application of a statute involves the recognition of conduct beyond U.S. borders. Even when significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States” (*Environmental Defense Fund vs. Massey*, 986 F.2d 528, 531, D.C. Circuit, 1993).

The government had alleged, in its briefs, that “even if Reclamation’s actions have extraterritorial effects on the protected species in the delta, the consultation requirements of Section 7(a)(2) have no application to non-discretionary actions.” The Court agreed that the ESA regulations are clear on this point, “Section 7 [of the ESA] and the requirements of this Part apply to all actions in which there is discretionary Federal involvement or control.”

The Court also concludes that “the formulas established by the Law of the River strictly limit Reclamation’s authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation’s authority.” Further, the Court refers to a case involving the Platte River and the whooping crane and quotes, “Section 7 directs agencies to ‘utilize their authorities’ to carry out the ESA’s objectives; it does not expand the powers conferred on an agency.”

The plaintiffs alleged that Reclamation had discretion related to “river regulation, improvement of navigation, and flood control” which could benefit the listed species in a beneficial fashion. The Court disposed of this notion with the following statement; that “Reclamation does not have the discretion to manipulate water delivery in the United States in order to create excess releases for the delta.”

The Court also stated that Reclamation’s water deliveries and reservoir system management relative to the interim surplus guidelines, inadvertent overrun and payback policy, and Quantification Settlement Agreement were irrelevant and had no bearing on whether Reclamation could release excess water to Mexico.

Finally, the Court addressed deference to agency decision-making and interpretation of its authorities. The Court conferred deference to Reclamation associated with its interpretation of the tenets of the Law of the River. It stated that “acknowledging such deference in this case may give rise to a concern that agencies will increasingly rely on 50 C.F.R. §402.03 to avoid ESA consultation duties, but it seems unlikely that any case will present facts that more clearly make any agency’s actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water.”

In conclusion, it seems likely that the plaintiffs will appeal this case to the D.C Circuit Court of Appeals. Also, it should be pointed out that the issue of the states’ intervention is still before the D.C. Circuit on interlocutory appeal. Board staff recently checked the website of the Defenders of Wildlife and located a press release describing the Court’s opinion. Additionally, Defenders and the Center for Biological Diversity have indicated that they will file an appeal of the Court’s decision with the D.C. Circuit Court of Appeals.

WATER QUALITY

Colorado River Basin Salinity Control Forum

2002 Review-Water Quality Standards for Salinity

On April 1st, the State Water Resources Control Board held a public hearing, in Sacramento, California, to receive comments on the 2002 Review. No oral comments were presented at the meeting, however, one letter in support of approval of the 2002 Review was received from the Metropolitan Water District. The SWRCB will consider final adoption at its meeting on April 30, 2003, as a consent item.

Gerald R. Zimmerman
Executive Director