DEPARTMENT OF THE INTERIOR

Bureau of Reclamation

43 CFR Part 414

RIN 1006–AA40

Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States

AGENCY: Bureau of Reclamation, Interior.

ACTION: Final rule.

SUMMARY: This rule establishes a procedural framework for the Secretary of the Interior (Secretary) to follow in considering, participating in, and administering Storage and Interstate Release Agreements among the States of Arizona, California, and Nevada (Lower Division States). The Storage and Interstate Release Agreements would permit State-authorized entities to store Colorado River water offstream, develop intentionally created unused apportionment (ICUA), and make ICUA available to the Secretary for release for use in another Lower Division State. This rule provides a framework only and does not authorize any specific activities. The rule does not affect any Colorado River water entitlement holder's right to use its full water entitlement, and does not deal with intrastate storage and distribution of water. The rule only facilitates voluntary interstate water transactions that can help satisfy regional water demands by increasing the efficiency, flexibility, and certainty in Colorado River management.

EFFECTIVE DATE: December 1, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Dale Ensminger, (702) 293–8659 or Ms. Erica Petacchi (202) 208–3368.

SUPPLEMENTARY INFORMATION:

I. Background

This final rule was preceded by a proposed rule that we published in the **Federal Register** on December 31, 1997 (62 FR 68491). The proposed rule provided for a public comment period that ran from December 31, 1997 through April 3, 1998. In addition to oral comments submitted at one public hearing and one public meeting, we received 47 letters during the comment period on the proposed rule. Two letters commented only on the draft programmatic environmental assessment (DPEA). The respondents included two irrigation districts, three water districts, two water authorities, two water user associations, three individuals, one municipal utility, one city, one farmer's organization, one safe drinking water organization, four environmental organizations, 11 State agencies, nine Indian tribes, and seven Federal agencies. We reviewed and analyzed all comments and revised the final rule based on these comments.

The DPEA provided for a comment period that ran from December 31, 1997 through April 3, 1998. Oral comments on the DPEA were submitted at the same public hearing and the same public meeting for the proposed rule. In addition to those oral comments, we received 25 letters from 26 respondents during the comment period. The respondents included one water district, one water authority, one individual, five environmental organizations, five State agencies, six Indian tribes, and seven Federal agencies. As with the rule, we reviewed and analyzed all comments and revised the final programmatic environmental assessment based on these comments.

As a result of receiving differing comments on the definition of authorized entity and several other technical matters, we reopened the comment period on September 21, 1998 (63 FR 50183) for a 30-day period ending October 21, 1998. We asked interested parties to comment on three specific questions. We received 10 letters from 11 respondents during the reopened comment period. The respondents included three State agencies, three water districts, one water authority, one water users association, and three environmental organizations. We reviewed and analyzed all comments and revised the final rule based on these comments.

Following the apportionment of water between the Upper and Lower Basins in the Colorado River Compact, Congress, by passing the Boulder Canyon Project Act of December 21, 1928 (BCPA), made a permanent apportionment of Colorado River water among the Lower Division States for use within those States. Congress also authorized the Secretary to allocate and distribute Colorado River water within these apportionments to users in the Lower Division States through contracts. Congress put the Secretary in charge of managing and operating the Colorado River in the Lower Basin of the Colorado River system (Lower Basin). This rule establishes a framework under which the Secretary will implement the contractual distribution of Colorado River water in the Lower Division States on an interstate basis.

If water apportioned for use in a Lower Division State is not consumed in that State in any year, the Secretary may release the unused water for use in another Lower Division State. Offstream storage of Colorado River water and release of intentionally created unused apportionment (ICUA) can help the Lower Division States use available Colorado River water more effectively. This rule establishes a process for the Secretary to release ICUA. The Secretary's authority to issue this final rule stems from various Federal laws and executive orders, court decisions, and decrees, particularly the BCPA, the Supreme Court opinion (Opinion) rendered June 3, 1963 (373 U.S. 546) and the decree entered March 9, 1964 (376 U.S. 340) (Decree), in *Arizona* v. *California*, as supplemented and amended. A thorough description of these authorities may be found in the Background section of the proposed rule published December 31, 1997, at 62 FR 68493.

Several State agencies commented that the narrative should be changed. In response to these comments, we are correcting two statements that were contained in the first paragraph of the preamble to the proposed rule under II. Background.

First, the statement that: ''The compact defined the Colorado River Basin and divided the seven States into two basins, an Upper Basin and a Lower Basin,'' was incorrect and should have read: ''The compact defined the Colorado River Basin and divided it into two sub-basins, an Upper Basin and a Lower Basin. The compact further specified which States are Upper Division States and which States are Lower Division States.''

Second, the proposed rule preamble cited the Colorado River Compact, approved August 19, 1921, as the source of the definition for ''consumptive use.'' The correct source of this definition is the Decree.

Several respondents, particularly State agencies, expressed concern that some of the terms in the preamble and the proposed rule could be interpreted in ways that are contrary to existing law because of imprecise wording. These respondents stated the rule should facilitate more efficient use of unused apportionment and surpluses within the existing authority of the Secretary under the Law of the River. We agree that this rule only formalizes the procedures for the Secretary to follow in considering, participating in, and administering Storage and Interstate Release Agreements and does not expand or

create authority to do so. The Secretary has the authority, under the Law of the River, to allocate and distribute waters of the mainstream of the Colorado River in the Lower Basin consistent with the Decree.

II. Final Rule as Adopted

Changes Made in This Final Rule

We have concluded that a number of changes from the proposed rule are necessary and appropriate to respond to comments. These revisions clarify the basic intent of the proposed rule and are summarized in the following paragraphs.

- *Restatement of Title and Purpose of the Rule.* We have clarified the purpose of this rule in § 414.1. This rule establishes a procedural framework for the Secretary to follow in considering, participating in, and administering Storage and Interstate Release Agreements among the Lower Division States that would permit State-authorized entities to store Colorado River water offstream, develop ICUA, and make ICUA available to the Secretary for release and use in another Lower Division State utilizing Storage and Interstate Release Agreements. Colorado River water stored in order to develop ICUA will always be put to use in the Storing State.

Under this rule, the authorized entity in the Storing State (storing entity) will not redeem storage credits for delivery to the Consuming State. For this reason, the terms ''storage credits'' and ''redemption'' are not necessary and have been deleted. Instead, when the authorized entity in the Consuming State (consuming entity) requests water under a Storage and Interstate Release Agreement, the storing entity will reduce the Storing State's consumptive use of Colorado River water, thereby developing ICUA. The Secretary will release the ICUA to the consuming entity for use in the Consuming State.

- *Definitions.* We added several definitions from the Compact, including ''Colorado River Basin,'' ''Colorado River System,'' and ''Upper Division States,'' and added, deleted, or modified several other definitions in this rule to clarify the intent where necessary. New definitions were also added for ''BCPA,'' ''consuming entity,'' ''storing entity,'' and ''water delivery contract.'' The following definitions were deleted: ''Contractor,'' ''Federal entitlement holder,'' ''Present perfected right or PPR,'' ''storage credit,'' and ''unused entitlement.'' The definition for ''Interstate Storage Agreement'' was revised and the term used in the rule was renamed ''Storage and Interstate Release Agreement.''

We redefined ''authorized entity'' creating a two-part definition. As to a Storing State, for purposes of this rule, an authorized entity is defined as an entity in the Storing State that is expressly authorized by the laws of that state to enter into Storage and Interstate Release Agreements and to develop ICUA. As to a Consuming State, for purposes of this rule, an authorized entity is defined as an entity in the Consuming State that has authority under the laws of that State to enter into Storage and Interstate Release Agreements and to acquire the right to use ICUA.

- *Storage of Water.* In the proposed rule, we did not clearly describe the type of water that is eligible to be stored under a Storage and Interstate Release Agreement. This rule, in § 414.3(a)(2), explains that the water stored within a Storing State for future use under a Storage and Interstate Release Agreement is water that would otherwise be unused in the Storing State, but that is within the Storing State's basic or surplus apportionment. It is important, as a policy matter, that water be offered to all entitlement holders in a Storing State before it is stored for interstate purposes so that, as one commenting State noted, a State-authorized entity will not be put in a position of ''competition with the legal right to deprive lower priority entitlement holders (in the Storing State) of their Colorado River water.'' Accordingly, in order to qualify as unused apportionment, the water within the Storing State's basic or unused apportionment that is stored for interstate transactions under this rule must be offered first to all entitlement holders within the Storing State.

The rule, in a new § 414.3(a)(3), explains that the Consuming State's unused basic or unused surplus apportionments may also be stored in the Storing State to support an interstate water transaction. We also clarified in this section that unused apportionment of the Consuming State may be made available for storage in the Storing State only in accordance with Article II(B)(6) of the Decree. If unused apportionment from the Consuming State is to be stored under a Storage and Interstate Release Agreement, the rule provides that the Secretary will make unused apportionment of the Consuming State available to the storing entity in accordance with the terms of a Storage and Interstate Release Agreement. This rule also has a new § 414.3(a)(6) that provides that a Storage and Interstate Release Agreement must identify a procedure for the Secretary to follow to verify and account for the quantity of water stored in accordance with the Storage and Interstate Release Agreement.

- *Development of ICUA.* We added a requirement in § 414.3(a)(9) that the Storage and Interstate Release Agreement must describe the notice given to entitlement holders, including Indian tribes, of opportunities to participate in the development of ICUA. We added a requirement in § 414.3(a)(10) that the storing entity must identify the quantity, the means, and the entity by which ICUA will be developed. We also added a paragraph in § 414.3(a)(11) to require the Storage and Interstate Release Agreement to specify the procedure for verification of the development of the ICUA. Both the means by which ICUA will be developed and the method of verification will be set forth in the Storage and Interstate Release Agreement and may vary according to the transaction. However, the means to develop ICUA must be consistent with the laws of the Storing State. Finally, under the final rule, nothing in the Storage and Interstate Release Agreement shall limit the Secretary's authority to use independent means to verify the existence of ICUA.
- *Release of ICUA.* We modified § 414.3(a) to reflect that the Secretary will be a party to Storage and Interstate Release Agreements. We added a new § 414.3(a)(12) that states that the Storage and Interstate Release Agreement will specify that the Secretary will only release ICUA to the consuming entity and will not release it to other entitlement holders. This section requires the release of ICUA be done in accordance with the terms of the Storage and Interstate Release Agreement, the BCPA, Article II(B)(6) of the Decree, and all other applicable laws and executive orders. We added a requirement in § 414.3(a)(13) that the Storage and Interstate Release Agreement specify that ICUA will be released to the consuming entity only in the year and to the extent that ICUA is developed by the storing entity. We added a requirement in § 414.3(a)(14) that the Secretary would only release ICUA after determining that all necessary actions have been taken under the rule. We added a requirement in § 414.3(a)(15) that the Secretary, before releasing ICUA, must first determine that the storing entity stored water in sufficient quantities to support the development of ICUA requested by the consuming entity and be satisfied that the storing entity either (i) has developed the quantity of ICUA requested by the

consuming entity, or (ii) will develop the quantity of ICUA requested by the consuming entity under § 414.3(f). We renumbered § 414.3(a)(9) as § 414.3(a)(16) and changed the indemnification to relate to actions of the non-Federal parties to a Storage and Interstate Release Agreement. We renumbered § 414.3(a)(10) as § 414.3(a)(17).

This final rule also includes a new § 414.3(e) that addresses the need for a valid contract with the Secretary in accordance with Section 5 of the BCPA. The release or diversion of Colorado River water for storage under this part must be supported by a Section 5 water delivery contract, except for the storage of Article II(D) (of the Decree) water by Federal or tribal entitlement holders. The release or diversion of Colorado River water that has been developed or will be developed as ICUA under this part must also be supported by a Section 5 water delivery contract. This section states that the Section 5 water delivery contract requirement of the BCPA may be satisfied by direct contracts with the Secretary, or by valid subcontracts with entitlement holders authorized to enter into subcontracts, or in the case of a consuming entity, by the Storage and Interstate Release Agreement itself. When a valid contract is in place to support the release or diversion of Colorado River water for storage, no additional authority will be required by the Secretary to authorize the storage, through a Storage and Interstate Release Agreement or otherwise.

We also have added a new § 414.3(f) that allows anticipatory releases of ICUA before the actual development of ICUA by the storing entity. This addition was made based on comments received that the demand patterns for Colorado River water in the lower basin vary widely. The times when the storing entity and the consuming entity demand water will not necessarily be concurrent. Thus, the consuming entity may have a need for ICUA before the storing entity would decrease its diversions of Colorado River water in order to develop the ICUA. We added § 414.3(f) to the rule to allow the consuming entity to have the use of ICUA before its development by the storing entity. These anticipatory releases can only be made in the same year in which ICUA will be developed. Additionally, before an anticipatory release, the storing entity must certify to the Secretary that ICUA will be developed before the end of the year in order to support an early release.

- *Financial considerations.* We added a new § 414.3(b) which states that the Secretary will not execute a Storage and Interstate Release Agreement that has adverse impacts on the financial interests of the United States. This section also provides that financial arrangements between and among non-Federal parties relating to the Storage and Interstate Release Agreement need not be included in the Storage and Interstate Release Agreement. Those financial arrangements can be set forth in separate agreements to which the Secretary will not be a party, should the parties so desire.
- *Involvement of the Secretary.* As noted above, we modified § 414.3(a) to provide that the Secretary will be a party to Storage and Interstate Release Agreements. We modified § 414.3(c) to specify:

(1) That the Regional Director for the Bureau of Reclamation's Lower Colorado Region (Regional Director) has the authority to execute a Storage and Interstate Release Agreement on behalf of the Secretary;

(2) That the Secretary will notify the public of the Secretary's intent to participate in negotiations to develop a Storage and Interstate Release Agreement and provide a means for public input;

(3) That the factors to be considered in reviewing a proposed Storage and Interstate Release Agreement include potential impacts on tribal interests, including trust resources, and potential impacts on the Upper Division States and comments from the State agency responsible for Colorado River matters; and

(4) That after consideration of the listed factors, the Secretary may execute or decide not to execute a Storage and Interstate Release Agreement.

- *Stored water.* We modified former § 414.3(c) to conform the wording to changes made in other parts of the rule and separated the concepts that now appear in § 414.3(a)(6) and § 414.3(a)(10).

Section-by-Section Analysis of the Rule

Section 414.1 Purpose

This section explains that part 414 contains the procedures for authorized entities in the Lower Division States to follow for entering into Storage and Interstate Release Agreements with the Secretary for offstream storage of Colorado River water and for the development and release of ICUA on an interstate basis in the Lower Division States. This rule is expected to be a first step toward improving the efficiency associated with management of the Colorado River in the Lower Basin. The rule is intended to be permissive in nature and facilitate voluntary water transactions.

Section 414.2 Definitions of Terms Used in This Part

This section defines terms that are used in part 414. The following terms are based on and are to be interpreted consistent with the Decree: basic apportionment, Colorado River water, consumptive use, Decree, mainstream, surplus apportionment, and unused apportionment. The terms Colorado River Basin, Colorado River System, Lower Division States, and Upper Division States are defined in the compact. Most of the other terms were defined for the purposes of this rule to establish a common understanding.

Section 414.3 Storage and Interstate Release Agreements

This section identifies the details that must be specified in a Storage and Interstate Release Agreement regarding the storage of Colorado River water off of the mainstream and the development and release of ICUA. This section provides for verification of the quantity of water stored under a Storage and Interstate Release Agreement and verification of the quantity of ICUA developed. It also commits the Secretary to release ICUA to the consuming entity after the storing entity has certified to the Secretary, and the Secretary has verified, that the quantity of ICUA requested by the consuming entity has been developed or will be developed in that year. The release must be in accordance with the terms of the agreement and as permitted by law.

This section also specifies the factors that the Secretary will consider in determining whether to execute a Storage and Interstate Release Agreement. This section allows the assignment of all or a portion of an authorized entity's interest in a Storage and Interstate Release Agreement to other authorized entities and provides for the satisfaction of the water delivery contract requirement of Section 5 of the BCPA.

This section prescribes the limited circumstances under which ICUA can be released to a consuming entity before the development of ICUA by the storing entity.

Section 414.4 Reporting Requirements and Accounting Under Storage and Interstate Release Agreements

This section specifies the reporting requirements that storing entities must follow and stipulates that this water will be accounted for in the records maintained under Article V of the Decree.

Section 414.5 Water Quality

This section states that the Secretary does not guarantee the quality of water released under Storage and Interstate Release Agreements and further states that the United States is not liable for damages that result from water quality problems. The section states that the United States is not responsible for maintaining or improving water quality unless Federal law provides otherwise. This section also states that any entity who diverts, uses, and returns Colorado River water must comply with all applicable water pollution laws and regulations of the United States and the Storing and Consuming States, and must obtain all applicable permits or licenses regarding water quality and water pollution matters.

Section 414.6 Environmental Compliance

This section states that the Secretary will ensure environmental compliance with the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and other applicable laws and executive orders. This section states that authorized entities must prepare and fund all necessary environmental compliance documents. This section also specifies that the authorized entities must fund the costs incurred by the United States in considering, participating in, and administering the proposed agreement.

III. Tribal Issues

As explained in more detail in the following section of the preamble (Responses to Comments), a number of Indian tribes have expressed reservations and/or opposition to this rule. In particular, the Colorado River Tribal Partnership, often referred to as the Ten Tribe Partnership, composed of ten Indian tribes (Chemehuevi Indian Tribe, Cocopah Indian Tribe, Colorado River Indian Tribes, Fort Mojave Indian Tribe, Jicarilla Indian Tribe, Navaho Nation, Quechan Tribe, Northern Ute Indian Tribe, Southern Ute Indian Tribe and Ute Mountain Indian Tribe) with decreed and/or claimed water rights in the Colorado River, has expressed opposition to this rule on the ground that it does not provide specific and express protection of the Tribes' interests both in making water transfers and developing tribal water on or off their reservations.

The Department believes that this rule should and will benefit Indian tribes, but it acknowledges that the rule has a limited scope. The final rule provides a framework under which State-authorized entities can request Secretarial approval to implement voluntary interstate water transactions. The rule does not address or preclude independent actions by the Secretary regarding Tribal storage and water transfer activities. With regard to the activities covered by this final rule, the Department encourages Lower Division States to enact measures and take actions that will allow Tribes to participate in opportunities covered by this rule. Also, the Secretary's approval of specific transactions under the rule will be based, in part, on an analysis of the impacts that such a transaction may have on the interests of Indian tribes. The Department provides a fuller discussion of these issues in the Responses to Comments section below.

IV. Responses to Comments

The following is a discussion of the comments received on the proposed rule and the DPEA, and our responses. First, we will address general comments and our responses. Second, we will address comments on specific provisions in the proposed rule. Third, we will address comments on the DPEA. Fourth, we will respond to specific comments received during the second comment period.

Public Comments on Proposed Rule and Responses on General Issues

The following section presents public comments on the proposed rule that are general in nature. This section includes comments on the scope of the rule, Secretarial discretion, eligibility to be an ''authorized entity,'' the method for development of ICUA, the timing for the completion of the rule, tribal water rights, ground water issues, subsidies, power issues, concerns of California entities, potential impacts on the Upper Division States, concerns over deliveries to Mexico, environmental concerns, and economic impacts of the rule.

Scope of the Rule

Comment: Reclamation did not hold public scoping meetings on the rule.

Response: We have conducted this rulemaking in accordance with the Administrative Procedure Act. The Department expanded the public comment period for the proposed rule from 61 to 93 days. In addition to oral comments submitted at one public hearing and one public meeting, we received 49 comment letters from 47 respondents. Of these letters, 24 commented only on the rule, 23 commented on both the proposed rule and the draft programmatic environmental assessment (DPEA), and 2 commented only on the DPEA.

As a result of receiving differing comments on the definition of authorized entity and several other technical matters, we reopened the comment period on September 21, 1998 (63 FR 50183) for a 30-day period ending October 21, 1998. We asked interested parties to provide comments on three specific questions. The Department received 10 letters from 11 respondents during the reopened comment period. The respondents included three State agencies, three water districts, one water authority, one water users association, and three environmental organizations. We reviewed and analyzed all pertinent comments and revised the rule based on these comments. Thus, the public has influenced the scope and formulation of this rule.

Secretarial Discretion

Comment: Does the Secretary of the Interior have the authority to enter into an agreement that binds future Secretaries to commit unused apportionment to a specific user in a particular State over a multiple-year period?

Response: Yes. The Secretary's release of ICUA in any year will be under Article II(B)(6) of the Decree. The Decree does not preclude the Secretary from releasing unused apportionment to a specific user in a particular State. The Secretary will agree to release ICUA only during the year in which it is developed by the storing entity. Moreover, under § 414.3(a)(12) of the rule, the Secretary will commit in the Storage and Interstate Release Agreement to release ICUA after the storing entity has certified to the Secretary, and the Secretary has verified in accordance with § 414.3(a)(15), that the quantity of ICUA requested by the consuming entity has been developed or will be developed in that year. Further, the ICUA released by the Secretary will be limited to the quantity developed by a storing entity during that year.

Eligibility To Be an Authorized Entity

Note: There is also a discussion on the contractual requirements necessary to qualify as an authorized entity in the section of this preamble addressing comments received during the reopened comment period.

Comment: The most frequently mentioned comment concerned the definition for the term ''authorized entity.'' Some thought ''authorized entity'' should be defined broadly to enable the widest possible participation and others thought the term should be defined very narrowly to limit participation to State agencies. Indian tribes commented that the definition

should be expanded to include the tribes pursuant to the Secretary's authority under the BCPA. Tribes further commented that the proposed definition of ''authorized entity'' will give State government a virtual monopoly on water marketing.

Response: We agree with the general suggestion made by a State agency that ''authorized entity'' should be a two-part definition. This concept was supported by several other State agencies and water districts. As to a Storing State, for purposes of this rule, an authorized entity is defined as an entity that is expressly authorized by the laws of that State to: (i) Enter into Storage and Interstate Release Agreements; and (ii) develop ICUA. As to a Consuming State, for purposes of this rule, an authorized entity is defined as an entity that has authority under the laws of that State to: (i) enter into Storage and Interstate Release Agreements; and (ii) acquire the right to use ICUA. In this way the rule is intended to be permissive in nature but consistent with State law. We believe this two part definition captures comments from several State agencies that while express authority is needed to store water for use in interstate water transactions and make ICUA available, express authority is not necessary for a consuming State to receive and use ICUA. We reiterate that we fully expect the Lower Division States to enact measures that will allow the tribes to participate in opportunities covered by this rule. Moreover, this rule does not specifically address or preclude independent actions by the Secretary regarding tribal storage and water transfer activities under other authorities.

We have also expanded this rule to require that non-Federal parties to the Storage and Interstate Release Agreement provide at the Secretary's request any additional supporting data necessary to clearly set forth the details of the proposed transaction and the eligibility of the parties to participate as State-authorized entities in the proposed transaction.

Comment: It is important to acknowledge that the apportionments of Colorado River water are made specifically to the individual States. Therefore, it is important for the States to specifically designate the authorized entities who are entitled to enter into Interstate Storage Agreements (now termed ''Storage and Interstate Release Agreements'') to ensure use of Colorado River water remains within a State's apportionment during any year.

Response: Apportionments of Colorado River water are made for use within each specific Lower Division State. This rule requires that the authorized entity in the Storing State be an entity that is expressly authorized under the laws of that State to: (i) enter into Storage and Interstate Release Agreements; and (ii) develop ICUA. As to an authorized entity in a Consuming State, the rule requires that it be an entity that has authority under the laws of that State to: (i) enter into Storage and Interstate Release Agreements; and (ii) acquire the right to use ICUA.

Method for Development of ICUA (Forbearance)

Comment: Several respondents commented on whether the final definition of ICUA should specify what types of measures or actions the Secretary will approve for the development of ICUA.

Response: The measures that will be used to develop ICUA are to be specified in each Storage and Interstate Release Agreement and must be verifiable. The method used to develop ICUA and the appropriate method of verification may vary according to the transaction.

The Timing for the Completion of the rule

Comment: Several respondents asked for additional time to review the proposed rule and DPEA and questioned why the completion of the rulemaking process appeared to be on a ''fast track.''

Response: In developing this rule we have followed the mandates of the Administrative Procedure Act. In fact, we extended the time for public review and comment from 61 to 93 days despite the fact that this rule only formalizes the existing authority of the Secretary to enter into Storage and Interstate Release Agreements and does not expand or create this authority. Moreover, we reopened the comment period for an additional 30 days to obtain further comments. This extended review period has given the public numerous opportunities to review this rule. In addition, we reviewed and analyzed the comments submitted during the reopened comment period and revised the rule as needed. Finally, the Secretary will notify the public of the Secretary's intent to participate in negotiations to develop a Storage and Interstate Release Agreement and give the public further opportunity to comment before any specific transaction is implemented.

Tribal Water Rights

Comment: The rule should include an introductory section that recognizes Indian holders of present perfected rights are not required to beneficially use their water, are not subject to a loss or reduction in their water for non-use or non-beneficial use, and are not subject to State law or State regulatory control for the on-reservation use of their entitlements.

Response: We recognize the unique status of present perfected rights holders under the Decree and agree that tribal present perfected rights holders are not subject to a loss or reduction in their water rights for non-use. The 1979 supplemental decree entered March 9, 1979 (439 U.S. 419) by the Supreme Court in *Arizona* v. *California* quantifies and prioritizes tribal rights to the use of Colorado River water. The 1979 supplemental decree states that: ''Any water right listed herein may be exercised only for beneficial uses.'' We do not believe it is necessary that the information be included in an introductory section for the rule. We agree that Indian holders of present perfected rights are not subject to State law or State regulatory control for the on-reservation use of their entitlements.

Comment: Indian tribes should be permitted to enter into intrastate or interstate agreements for offstream storage and marketing of their unused water off the reservation under the statutory and contractual authority vested in the Secretary.

Response: This rule does not apply to intrastate transactions. This rule applies only to interstate transactions. As explained in more detail below, we believe that Storage and Interstate Release Agreements under this rule can be implemented in a manner that will provide opportunities for tribes to benefit.

Comment: Several tribes commented that they have been unable to fully benefit from their water rights because of the Federal government's failure to provide the tribes with the necessary financial, technical, and political assistance to fully develop their water resources.

Response: We acknowledge this concern and recognize that a number of tribes have been unable to use their entitlement due to the lack of distribution and delivery systems. We are committed to making progress to help tribes make better use of their water rights. For example, a Central Arizona Project (CAP) distribution system has been built for the Ak-Chin Tribe. A distribution system for the Fort McDowell Tribe is under construction and we have entered into a repayment contract with the Gila River Indian Community for construction of a CAP distribution system. Five of the ten

Indian tribes with contracts for delivery of CAP water have utilized their statutory right to lease or transfer water. More specifically, the Ak Chin, Fort McDowell, Tohono O'odham, Salt River, and Yavapai Prescott tribes have leased or transferred CAP water.

Comment: Indian tribes should receive compensation for their unused or undeveloped tribal water resources because of the Federal government's failure to provide the tribes with the necessary assistance to fully develop their water resources.

Response: The issue of compensating the tribes in connection with the development of tribal water rights is beyond the scope of this rule.

Comment: The Department should permit tribal governments to market their Central Arizona Project allocations on the same basis as the State. Central Arizona Water Conservation District's (CAWCD) non-Indian subcontractors have the capability to take direct delivery of CAP water but have not taken delivery of substantial quantities, primarily for economic reasons. Tribes with CAP allocations, with the exception of the Ak-Chin Indian Community, are not able to take delivery or put to use any substantial quantity of CAP water because the distribution and delivery systems that are needed to allow the tribes to put this water to use have not been constructed.

Response: We reiterate that we are encouraging the Lower Division States to enact measures and take actions that will allow the tribes to participate in opportunities covered by this rule. One such example of tribal participation in a Storage and Interstate Release Agreement would be affording tribes the opportunity to develop underground storage facilities where Colorado River water could be stored. In addition, we note that the State of Arizona is exploring the use of facilities on tribal lands for storage of Colorado River water. Thus, tribes could participate by leasing the use of these facilities to the storing entity. Moreover, this rule does not specifically address or preclude independent actions by the Secretary regarding tribal storage and water transfer activities. As stated above, we feel that there has been progress in helping the tribes create irrigation infrastructure or otherwise put their CAP water to use and is committed to moving forward with this program. Only authorized entities can store water under this rule to support an interstate water transaction. No holders of CAP allocations have a right to store this water for an interstate transaction unless they can qualify as an authorized entity under this rule. Only unused water that is not requested by an entitlement holder (including tribes) can be stored to support a Storage and Interstate Release Agreement. With respect to the development of ICUA, the rule requires the Storage and Interstate Release Agreement to describe the notice given to entitlement holders, including Indian tribes, of opportunities to participate in the development of ICUA.

Ground Water Issues

Comment: Because banked water is fungible, the rule should address both intrastate and interstate water storage to preclude a Storing State from circumventing any restrictions that the Department might impose on the storage or recovery of water stored under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement''). Several respondents expressed concern that an authorized entity may store water in an aquifer that is hydraulically connected to an aquifer that holds tribal water.

Response: The rule specifies in § 414.3(c) that the Secretary will consider various factors in reviewing a proposed Storage and Interstate Release Agreement, including potential effects on trust resources, potential effects on entitlement holders, which includes Indian tribes, and environmental impacts. We reiterate that intrastate transactions are not covered under this rule.

Comment: One respondent stated that the rule should expressly address the legal status of banked CAP water. The respondent is concerned that the banked water will be considered CAP water under Federal law and non-Indian water users in Arizona will accrue millions of acre-feet of credits with the sanction of Reclamation. The subsequent recovery of the stored water will result in significant increases in ground water pumping over and above that currently authorized in accordance with State law and the tribes might be precluded from pumping the remaining ground water reserves because those reserves will increasingly take on the character of CAP water.

Response: As noted in § 414.3(c), the potential effects of the proposed measures on the environment, the economy, and trust resources are among the factors the Secretary will consider when reviewing the proposed Storage and Interstate Release Agreement.

Comment: Revise the rule to incorporate the acre-foot for acre-foot ground water pumping restrictions from the amended CAP master repayment contract and the CAP agricultural subcontracts. Reclamation has a trust responsibility to protect Indian ground water from continued ground water mining by non-Indian interests.

Response: Nothing in this regulation modifies the ground water protections found in the CAP contracts or limits the Department's ability to protect trust resources. Also, as noted in § 414.3(c), the potential effects of the proposed measures on the environment, the economy, and trust resources are among the factors the Secretary will consider when reviewing a Storage and Interstate Release Agreement.

Subsidies

Comment: Several respondents stated that the Department should not allow extra non-reimbursable expenses to occur in storing water or delivering it to a new location. There were also suggestions that, with respect to Arizona, revenue from the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') should be collected to help repay CAWCD's debt to the United States for the CAP.

Response: We agree that a proposed Storage and Interstate Release Agreement cannot obligate the United States to incur extra non-reimbursable expenses to store water or deliver it to new locations. The Secretary will review the provisions of every proposed Storage and Interstate Release Agreement for its financial impacts on the United States and will not execute any agreements that may have adverse financial impacts on the United States. In addition, the United States is currently seeking to resolve the recovery of CAWCD's debt to the United States.

Power Issues

Comment: Several respondents stated that Reclamation should analyze the impacts of the rule on power customers in the State of Arizona. When water passes through the Hoover and Davis generators on the way to storage in Arizona, there will be additional power production but CAWCD will incur increased pumping costs to move the water to storage. When stored water is withdrawn by a Nevada entity in the future, less water will pass through the Hoover and Davis generators, resulting in less power production at those dams. When Arizona ground water pumpers who take CAP water through in-lieu storage are required to go back to ground water pumping, they may require more power during years when stored water is withdrawn from the bank and generation is reduced at Hoover and Davis Dams. The rule should provide for compensation of power customers to protect them from subsidizing water banking.

Response: Under this rule, the offstream storage of Colorado River water and the Secretary's release of ICUA may influence the timing of power generation at the Hoover, Parker, and Davis powerplants. Reclamation conducted an analysis to evaluate the potential impacts of this rule on Hoover and Parker-Davis power customers. The analysis reflects that under this rule the quantity of energy foregone in any one year between 1998 and 2017 will result in a loss of less than 0.5 percent. Between 1998 and 2017, the quantity of Colorado River water released from mainstream reservoirs will be equivalent to the quantity that otherwise would have been released without the implementation of this rule.

Section 6 of the BCPA notes ''That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power.'' The Secretary manages and operates these reservoirs for multiple, often conflicting purposes, through powers vested by Congress. The principal source of the Secretary's power is the contract power under Section 5 of the BCPA to allocate and distribute mainstream water within the boundaries established by that Act. Each year, the Secretary develops and adopts an Annual Operating Plan (AOP) for the Colorado River reservoirs. During the AOP process, the Secretary consults with the Basin States and other interested parties, including the power users. The Secretary is mindful of the Federal contracts with power users for supply of electric service from hydroelectric powerplants on the Colorado River and will seek to minimize changes in power production that result from the Secretary's activities regarding river operations. However, because of Section 6 of the BCPA, power users are a junior priority for use of Colorado River water.

Concerns of California Entities

Comment: Several California entities expressed concern that the rule should acknowledge and be consistent with the comprehensive plan being developed by California water agencies to reduce California's future use of Colorado River water (California 4.4 Plan).

Response: The Department places great emphasis on the necessity for the implementation of a California 4.4 Plan. We do not, however, believe that this rule needs to address the California 4.4 Plan. This rule is intended to be of general application and to apply equally to each of the three Lower Division States.

Comment: Some respondents asked for assurance that the rule will provide for storage of conserved water, such as water that is anticipated to result from water conservation in the Imperial Irrigation District (IID) that is proposed to be transferred to the San Diego County Water Authority (SDCWA).

Response: The proposed transfer of water from IID to SDCWA is an intrastate transaction that is not covered by the rule. For conserved water to be stored by an authorized entity for purposes of an interstate water transaction under this rule, it must first be offered to all entitlement holders in the State in which it was conserved.

Comment: In years when surplus water is needed to keep Metropolitan Water District's Colorado River Aqueduct full, a conflict will arise among entities who claim surplus water if the Secretary does not make a sufficient level of surplus water available to satisfy both Metropolitan Water District's demand and diversions for offstream storage under Interstate Storage Agreements (now termed ''Storage and Interstate Release Agreements'').

Response: Surplus is divided among the Lower Division States under the Decree. Surplus apportioned to the State of California under the Decree, and thus available for use consistent with the priority system applicable to California, is not subject to storage under this rule by authorized entities in Nevada or Arizona unless entitlement holders in California choose not to exercise their rights to use surplus water.

Potential Impacts on the Upper Division States

Comment: The rule should not be allowed to impact the water supplies available to the Upper Basin and the Upper Basin should not lose any yield or take increased risks because of increased equalization that might occur as a result of interstate water storage agreements.

Response: We agree with this comment from a State agency and notes that this rule will not be used to justify more liberalized surplus determinations that will allow an increase in equalization releases from Lake Powell. Section 414.3(b) of this rule was modified to include potential impacts on the Upper Division States among the factors that the Secretary will consider in considering, participating in, and administering a Storage and Interstate Release Agreement.

Comment: The rule should be modified to include a statement that the rule does not change or expand the authorities under the Law of the River or the apportionments made to the individual States under the Law of the River. The rule should also state that its intent is to provide for efficient use of unused apportionment and surpluses but that each State should keep its consumptive use of Colorado River water within the apportionments made to it under the Law of the River.

Response: We agree with this comment from a State agency that this rule does not change or expand existing authorities under the Law of the River or change the apportionments for use of water within the individual States. We modified § 414.1 Purpose to state this. We also agree that each Lower Division State must operate within the limits of the apportionment of Colorado River water made for use within that State but do not believe it is necessary to include this statement in the rule.

Concerns over Deliveries to Mexico

Comment: The DPEA states that a minor reduction will occur in the quantity of surplus water available for delivery to Mexico over the long term without explaining what a minor reduction is or what studies have been done to quantify this.

Response: The quantity of water available for delivery to Mexico is expected to decrease by an average of 23 thousand acre-feet (kaf)/year from 1999–2015 when storage is occurring with the rule. This is about a one percent decrease annually in the total quantity of water projected to reach Mexico (2.487 million acre-feet (maf) without this rule and 2.464 maf with this rule). In addition, this decrease would affect flood control releases only during this same time and would have only a very minimal effect on projected surplus flow in years beyond 2015.

These projections are based on analysis completed by Reclamation using the Colorado River Simulation Model, which is used to project long-term conditions relating to water supply on the Colorado River from Lake Mead to Mexico. The analysis used historical virgin runoff data from 1906–1995 and water use or demand schedules that have been provided by the Colorado River Basin States for the simulated future period 1999–2015. In addition the model includes requirements in the long-range operating criteria for the Colorado River.

Environmental Concerns

Comment: Efficiency improvements in river management and the storage of

Colorado River water in underground aquifers means less water is available for environmental purposes, such as the riparian and aquatic ecosystems of the river, including the river and delta region in Mexico.

Response: Offstream storage of Colorado River water under Storage and Interstate Release Agreements should not have a measurable effect on riparian and/or aquatic ecosystems of the river or the delta region of Mexico. During the next few years, releases from Hoover Dam are expected to continue to be about 10 maf/year for downstream use in the United States and Mexico. In addition, flood control releases are projected to average 788 kaf/year during the period 1999–2015. Offstream storage could decrease flood control releases reaching Mexico by an average of 23 kaf/year.

At present, Reclamation has no authority or discretion over the type of use or location of use of Colorado River water once it reaches Mexico. The Mexican Water Treaty of 1944 and the Opinion and Decree control and limit Reclamation's releases from Hoover Dam to amounts that meet the conditions within each. Water delivered to meet Treaty requirements is diverted at Morelos Dam where Mexican law governs how it is put to use. In times of flood control operations, Colorado River water entering Mexico in excess of treaty requirements is under Mexico's jurisdiction. Once flows reach the Republic of Mexico, any uses for environmental purposes would have to be authorized by Mexico.

It is possible that implementation of this rule may create additional flexibility to potentially make water available for fish and wildlife purposes as part of the ongoing Lower Colorado River Multi-Species Conservation Program (MSCP). Under this concept, water stored offstream one year could potentially be used to meet fish and wildlife purposes in a later year.

Comment: The level of environmental compliance proposed by Reclamation is inadequate and Reclamation should complete a full environmental impact statement (EIS) on the proposed rule as well as the entire operation of the Colorado River.

Response: The programmatic environmental assessment (PEA) was prepared to identify and clarify issues, describe the level of environmental impacts associated with implementation of the proposed rule, and to determine whether to prepare a Finding of No Significant Impact (FONSI) or to prepare an Environmental Impact Statement (EIS). Compliance for each Storage and Interstate Release Agreement will reference and tier off from the PEA for this rule. Based on the analysis in the PEA, consultation and coordination with the Fish and Wildlife Service, and public input and comments, we have concluded that implementation of the proposed rule will not have a significant effect on the human environment. As a result, a FONSI has been prepared to complete NEPA compliance for the rule.

As explained previously, this rule develops a framework that the Secretary will utilize in reviewing and evaluating whether to execute a specific transaction for offstream storage of Colorado River water under a Storage and Interstate Release Agreement. This rule does not increase nor abrogate the existing authority of the Secretary. When the storing and consuming entities enter into negotiations with the Secretary for the development of a Storage and Interstate Release Agreement, the Secretary will have the specific details needed to determine the potential impacts of the proposed action and can then determine the appropriate level of NEPA compliance required for that action.

In addition, the Department believes the preparation of an EIS on the entire operation of the Colorado River is not required. Movement of water will be through existing facilities on the Colorado River and is within the current and projected routine operations of the lower Colorado River. Thus, it is not necessary to complete a comprehensive EIS on river operations.

Comment: Implementation of the rule may potentially impact fish and wildlife resources along the Colorado River downstream from Lake Mead.

Response: The DPEA evaluated the potential impact to fish and wildlife resources for a proposed scenario in which 1.2 maf would be stored in Arizona under a Storage and Interstate Release Agreement to allow an authorized entity in Nevada to meet its future water needs. The effects of placing Colorado River water in offstream storage were evaluated at two incremental storage rates, 100 kaf/year and 200 kaf/year with future development of ICUA and the associated release of water from Lake Mead limited to a maximum of 100 kaf, in accordance with Arizona law, in any year.

No significant impacts were identified on fish and wildlife resources as a result of this analysis. Consultation with the Fish and Wildlife Service concluded that fluctuations in water surface elevations associated with the most likely case storage and retrieval scenarios are not likely to adversely affect listed species or their designated critical habitat.

Economic Impacts of the Rule

Comment: The Initial Regulatory Flexibility Analysis states that the future cost burden of obtaining alternative supplies for Southern California water users is not attributable to or the result of the proposed rule. The rule may reduce the quantity of Colorado River water available for diversion to Southern California that is apportioned for consumptive use in Arizona and/or Nevada but not consumed in those States, making California expend funds sooner than planned to obtain alternative water supplies.

Response: Absent the rule, each Lower Division State may store its unused basic apportionment and surplus apportionment offstream for future intrastate use. Arizona is currently taking all of the 2.8 maf basic apportionment of Colorado River water available for use in Arizona. Therefore, the only water that California may no longer be able to use is Nevada unused basic apportionment. Nevada's consumptive use was 245.3 kaf in 1998, resulting in 54.7 kaf of unused apportionment. Projections show Nevada utilizing its full basic apportionment by 2007. This rule may impact southern California in that it enables Nevada to store its declining quantity of unused apportionment in Arizona for the short period it may be available. To the extent surplus is available during this time, impacts on California are lessened. In the long run, the rule should have little net impact on the expenditure of funds by California water users to obtain alternative water supplies.

We reiterate that California must reduce its reliance on the Colorado River by conserving water or obtaining alternative water sources. California must continue moving forward in its efforts to implement a California 4.4 Plan to live within the 4.4 maf of Colorado River water apportioned for use in California and this rule will add flexibility that may be of help in implementing the California 4.4 Plan.

Comment: Some tribes asserted that the rule allocates to the States water that is reserved to the tribes and has a disproportionate, significant, and detrimental economic impact on the tribes in the Lower Basin.

Response: We do not agree with this view. Under the rule, only water within a State's apportionment that is not used by entitlement holders within that State may be stored offstream for interstate purposes. Nothing in this rule precludes

any entitlement holder, including a Tribe, from using its Colorado River water entitlement. The potential effects of the proposed measures on the environment, the economy, and trust resources are among the factors the Secretary will consider when evaluating the Storage and Interstate Release Agreement. This review process will help ensure that tribal rights will be protected under this regulation.

Comment: The Benefit-Cost Analysis shows that the overall impact of the proposed rule is not significant. Please explain how this was determined and what the threshold was or refer the reader to a specific page of the Benefit-Cost Analysis for the information.

Response: The threshold for whether a proposed rule is significant is defined in both the Small Business Regulatory Enforcement Fairness Act and the Unfunded Mandates Reform Act of 1995. The Benefit-Cost Analysis reflects that the proposed rule is not a major rule (impacts are not significant) because the economic impact upon the regional and United States economy in any one year does not exceed the threshold; i.e., it is never greater than or equal to $100 million. However, even though the rule does not have a significant annual economic effect on the economy, it is still considered a significant rule because it raises novel legal or policy issues. See pages 38–42 and 44–46 of the Benefit-Cost Analysis to see the findings that led to the determination of no significant economic impact.

Comment: The Executive Summary of the Benefit-Cost Analysis refers to two water supply models, ''A70'' and ''P80.'' To better understand the potential effects of both A70 and P80 criteria, state the water supply benefits resulting from the P80 criterion and indicate the incremental quantity of additional surplus water made available under P80.

Response: The benefit-cost analysis shows that the benefits of AWBA's banking program are smaller under P80 (a more liberal surplus criterion that will tend to increase the risk of shortages) than A70 (a more conservative surplus criterion that will tend to reduce the risk of shortages). Under P80 surplus criteria, it is more likely that all valid water demands within the Lower Division States will be met from instream flows. Therefore, demand for ICUA by a Consuming State is lower than under A70. Total net economic benefits for the study period (1998–2017) at the regional level are shown at the bottom of page 2 of the executive summary for the Benefit-Cost Analysis. Because surplus conditions are likely to continue for several years, we did not further analyze that alternative in the Biological Assessment (BA) that we prepared for the proposed rule.

Comment: There were a number of editorial comments on the Benefit-Cost Analysis and the Initial Regulatory Flexibility Analysis.

Response: We have reviewed and considered the comments submitted by a water district and have adopted many of the suggestions into the text of the final Benefit-Cost Analysis and the final Regulatory Flexibility Analysis.

Comment: Some tribes commented that allowing States to use ''unused tribal water'' and imposing limitations on the tribes'' ability to use their reserved water potentially interfere with the tribes' protected property rights.

Response: We do not agree with this statement. All Colorado River water available to the Lower Division States is apportioned for use in the individual States. Any water within a State's apportionment that is unused by tribes or non-Indian entitlement holders is available to junior entitlement holders in that State under the Secretary's priority system for the Colorado River. Only water that is not used by entitlement holders is eligible to be used for an interstate transaction under this rule. Thus, there is no interference with tribal property rights.

Comment: One tribe asserted that the tribes' lack of opportunity to participate in interstate transactions on the same basis as the States under the rule violates Title VI of the Civil Rights Act of 1964, which states that ''No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.''

Response: We do not agree that the tribes will be denied an opportunity to participate under this rule or that this rule results in discrimination within the meaning of the Civil Rights Act. We will require that all entitlement holders, whether tribal or non-tribal, are treated equally under the rule. We will monitor efforts by the States and authorized entities to extend benefits to the tribes under this rule and will, in the future, assess whether we need to review or revise this rule to provide additional opportunities to the tribes.

Public Comments on Proposed Rule and Responses on Specific Provisions

The following section presents public comments on the proposed rule that apply to specific provisions in the rule.

Comments Concerning the Title of the Rule

Comment: The title of the rule should not mention the ''redemption of storage credits'' because this term lack clarity and is ambiguous. The rule should provide that Colorado River water stored offstream under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') will be used in the State in which the water is stored and that the Secretary will release ICUA rather than deliver storage credits.

Response: We agree with the concept suggested by several State agencies, a water district, and a water authority and have modified the title to read, ''Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States.''

Comments Concerning § 414.1—Purpose

Comment: The purpose section should not use terminology that is vague and implies that a Storing State will create and redeem storage credits because the Colorado River water that is stored offstream will always belong to the Storing State. Amend the language to establish the intent that Storage credits will be redeemed in the State in which water will be stored and the Secretary will release ICUA rather than deliver storage credits under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'').

Response: We have adopted the suggestions from several State agencies, a water district, and a water authority to describe the proposed transactions under this rule in terms that are clear and unambiguous. In lieu of developing and redeeming storage credits, we have changed this rule to reflect that the Secretary will release ICUA to consuming entities under Storage and Interstate Release Agreements.

Comment: Because the Secretary's approval of Interstate Storage Agreements (now termed ''Storage and Interstate Release Agreements'') could delay approvals, the Secretary's authority for the Department's responsibilities under the rule should be delegated to Reclamation, subject to the right to appeal the Regional Director's decisions through the Department.

Response: Under the rule, the Secretary will not approve the Storage and Interstate Release Agreement but will instead be a party to the agreement. The rule provides that the Regional Director for the Bureau of Reclamation's Lower Colorado Region (Regional

Director) shall have the authority to develop, negotiate, and execute a Storage and Interstate Release Agreement on behalf of the Secretary.

Comment: The rule should use precise terminology that cannot be interpreted in ways that are contrary to existing law. The rule should contain a narrative that states the actions contemplated under this rule are deemed within the authority of the Secretary under the Law of the River and that the rule does not change or expand the Secretary's authorities. This narrative should emphasize the intent of the rule is to provide for more efficient use of unused apportionment and surpluses within the ''Law of the River.''

Response: We revised this rule in several places to clarify the intent. In addition, we agree with the suggestion from several State agencies and clarified the rule to state that it does not change or expand the Secretary's authority under the Law of the River. This rule only formalizes the existing authority of the Secretary to develop, negotiate, and execute Storage and Interstate Release Agreements and does not expand or create this authority. As stated in the preamble to the proposed rule that was published on December 31, 1997, this rule will increase the efficiency, flexibility, and certainty in Colorado River management.

Comments Concerning § 414.2—Definitions

Comment: As addressed above in the discussion of general issues, the most frequently mentioned comment was regarding the definition for the term ''authorized entity.''

Response: As discussed previously under general issues, we have changed the definition of ''authorized entity'' to consist of two parts, with different definitions for Consuming States and Storing States. Please refer to that discussion. As a result of receiving differing comments on the definition of authorized entity and several other technical matters, we reopened the comment period for a 30-day period. We requested interested parties to provide comments on three specific questions. We received 10 letters from 11 respondents during the reopened comment period. The respondents included three State agencies, three water districts, one water authority, one water users association, and three environmental organizations. We reviewed and analyzed all comments and revised the rule based on these comments. Please refer to that discussion.

Comment: Modify the rule to include the definitions for ''Colorado River Basin'' and ''Colorado River System'' as defined and used in the Colorado River Compact.

Response: We have adopted these suggestions from a State agency and included these definitions in this rule.

Comment: Modify the definition of ''Consuming State'' to clarify that this means the State where ICUA is or will be used.

Response: This suggestion from several entities, including State agencies, was adopted to clarify the actual way the proposed water transactions will work.

Comment: The narrative in the preamble for the proposed rule incorrectly attributed the definition of ''consumptive use'' to the Colorado River Compact of November 24, 1922.

Response: We agree with several State agencies, a water authority, and a water district that the definition was incorrectly attributed to the Compact. As the respondents explained, the term ''consumptive use'' is defined by Articles I(A) and I(C) of the Decree.

Comment: Modify the definition of ''Interstate Storage Agreement'' (now termed a ''Storage and Interstate Release Agreement'') to delete reference to ''redemption of storage credits'' and make other changes consistent with the incorporation of changes to other definitions.

Response: We agree with the suggestions from several entities, including State agencies, that the definition should emphasize that the Storage and Interstate Release Agreement provides terms for offstream storage of Colorado River water by a storing entity, the subsequent development of ICUA by the Storing State consistent with the laws of the Storing State, a request by the storing entity to the Secretary to release ICUA to the consuming entity, and the release of ICUA by the Secretary to the consuming entity.

Comment: The definition for ''Interstate Storage Agreement'' (now termed a ''Storage and Interstate Release Agreement'') in the proposed rule states that the agreement may include other entities determined to be appropriate to the performance and enforcement of the agreement without indicating who those entities might be or who makes the determination that their inclusion is appropriate.

Response: This rule has been revised to clarify that the decision to include other entities will be determined by the consuming and storing entities and the Secretary during the negotiation of a Storage and Interstate Release Agreement.

Comment: Delete the term ''storage credit'' from the proposed rule as it lacks clarity.

Response: We have adopted this change, suggested by several entities, including State agencies, a water authority, and a water district.

Comment: Modify the definition of ''Storing State'' to clarify that water stored offstream under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') will be used in the Storing State in place of water within the Storing State's apportionment that the Storing State otherwise would have diverted from the mainstream.

Response: We have modified the definition of Interstate Storage Agreement and renamed it ''Storage and Interstate Release Agreement'' in this rule. The modified definition reflects that water stored offstream under a Storage and Interstate Release Agreement will be used in the Storing State.

Comment: Delete the definition of ''unused apportionment'' and in its place, insert definitions for ''unused basic apportionment'' and ''unused surplus apportionment.'' The intent of the suggestion is to clarify that, with the determination of a water supply condition by the Secretary, a State is receiving either a normal, surplus, or shortage apportionment. Also, revise the definition to clarify that to be unused, the water otherwise would not have been diverted and that water conserved or saved through an agreement between two entitlement holders is eligible for storage.

Response: The Department did not adopt these changes that were suggested by a water district. The AOP determines whether a State is receiving a normal, surplus, or shortage apportionment, and that decision is unaffected by this rule. Also, only water that is not used by entitlement holders in the applicable State's priority system for purposes other than storage for use in interstate transactions is eligible for storage for use in interstate transactions under this rule.

Comment: Delete the term ''unused entitlement'' from the proposed rule.

Response: We have adopted this change, suggested by several entities, including State agencies and a water district.

Comments Concerning § 414.3—Storage and Interstate Release Agreements and Redemption of Storage Credits

Comment: As discussed earlier under Purpose, there should be a statement that the actions contemplated under this rule are within the Secretary's authority

under the Law of the River and that it is not the intent of this rule to change or expand the Secretary's authorities. This narrative should also emphasize an intent to provide for more efficient use of unused apportionment and surpluses within the ''Law of the River'' but specify that water users in the Lower Division States must plan to live within the apportionments made to them under the ''Law of the River.''

Response: We agree with this suggestion from a State Agency to clarify that this rule is deemed to be within but does not expand the Secretary's authority. The preamble to this rule includes a section to provide further explanation of the purpose of this part. This rule is not intended to change or expand the Secretary's authorities under the ''Law of the River.'' This rule is intended to facilitate more efficient use of unused apportionment and surpluses within the ''Law of the River'' in the Lower Division States.

We also believe that this rule, in conjunction with the implementation of the California 4.4 Plan and the development of surplus criteria, will provide a framework for the Lower Division States to hold consumption within the apportionments available for use within those States.

Comment: Conform this section of the rule with previous changes that delete the reference to the term, ''redemption of storage credits.''

Response: We have adopted this change, suggested by several entities, including State agencies, a water authority, and a water district. As discussed previously, this rule will provide for offstream storage of Colorado River water in a Storing State, the subsequent development of ICUA by the storing entity for release by the Secretary to a consuming entity, and the recovery of the stored water for use in the Storing State.

Comment: Delete the reference to Article II(B)(6) of the Decree in the first sentence under § 414.3(a) because the Decree does not cite a legal authority for entering into Interstate Storage Agreements (now termed ''Storage and Interstate Release Agreements'').

Response: We agree that ''Storage and Interstate Release Agreements'' are not referenced in the Decree and have modified § 414.3(a) of the rule. However, Article II(B)(6) of the Decree provides authority for the Secretary to (1) make an annual determination under this rule of the availability of ICUA and (2) release any such water in accordance with the terms of a Storage and Interstate Release Agreement.

Comment: Delete the last sentence of § 414.3(a), that reads, ''An Interstate Storage Agreement (now termed an ''Storage and Interstate Release Agreement'') will allow a storing entity to store unused entitlement and/or unused apportionment for the credit of an authorized entity located in a Consuming State and will provide for the subsequent redemption of the credit.''

Response: We agree with this comment from a State agency and have modified this rule to incorporate this change.

Comment: A senior priority holder in California should not be allowed to agree to make available unused apportionment for storage in another State without first obtaining the agreement of California's junior priority holders.

Response: Under this rule, only water that is unused by all entitlement holders in the applicable State's priority system is eligible for storage by an authorized entity for use in an interstate transaction.

Comment: One respondent noted that its contract with the Secretary allows it to request Reclamation to approve an exchange, lease, or transfer of its water entitlement. The respondent further stated its intent to pursue interstate marketing opportunities and position its Colorado River water supply as an unused apportionment that may be released annually for use in the other Lower Division States under the Decree.

Response: The Department recognizes that the entitlement holder's contract allows it to request approval of an exchange, lease, or transfer and notes that any change in the place of use or type of use of the entitlement is subject to the Secretary's approval. The development of ICUA under a Storage and Interstate Release Agreement may involve the exchange, lease, or transfer of Colorado River water under an individual entitlement holder's contract. Any such exchange, lease, or transfer would be subject to Secretarial approval unless the entitlement holder's contract specifies otherwise. Moreover, to participate under this rule as an authorized entity in a Storing State, that entity must be expressly authorized under State law.

Comment: The rule should be modified to allow authorized entities in California and Nevada to have equal access to store that portion of Arizona's Colorado River apportionment that is not otherwise put to use by entitlement holders within Arizona. Also, authorized entities in California and Nevada should have equal access to the quantity of ICUA that Arizona will make available to consuming entities when those entities request it.

Response: We recognize these concerns expressed by a State agency and a water district but do not believe it is appropriate to establish an allocation method in this rule. Storage and Interstate Release Agreements are voluntary interstate water transactions. The Secretary will not require authorized entities of one State to enter into Storage and Interstate Release Agreements with authorized entities in another State. We encourage each storing entity to consider the needs of all consuming entities under prospective Storage and Interstate Release Agreements.

Comment: Modify § 414.3(a) to allow a more general description of the entities by which Colorado River water will be stored and the storage facilities in which it will be stored.

Response: We did not accept this recommendation. It is necessary to clearly identify the actual entity that will store Colorado River water under the Storage and Interstate Release Agreement and the facility where it will be stored so that a thorough review of the impacts of the storage on environmental and trust resources can be performed.

Comment: Specify in § 414.3(a) that the water to be stored will be within the basic apportionment or the surplus apportionment of the Storing State or unused basic apportionment or unused surplus apportionment of the Consuming State. Any unused apportionment of the Consuming State may only be made available by the Secretary to the Storing State under Article II(B)(6).

Response: We agree with this suggestion from several State agencies and a water district, and have modified this rule to incorporate this change.

Comment: Specify in § 414.3(a) the maximum quantity of ICUA that will be available for release to the consuming entity under the agreement.

Response: We agree with this suggestion from several State agencies, a water authority, and a water district. We have modified this rule to incorporate this change.

Comment: Specify in § 414.3(a), by January 31, the maximum quantity of ICUA that will be available for release and delivery to the consuming entity under the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') in that current year.

Response: We did not accept this suggestion from a water district. The rule leaves the determination of this detail to the Storage and Interstate

Release Agreement that will be negotiated among the parties to that agreement. Further, this subject involves accounting matters that are set forth in § 414.4.

Comment: Specify in § 414.3(a) that the consuming entity may not request ICUA in a quantity that exceeds the quantity of water then in storage under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') in the Storing State. Several respondents suggested deleting the statement from the proposed rule that water then in storage under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') may not be recovered within the same calendar year in which the water was stored offstream. Another respondent suggested retaining this statement.

Response: We agree with the suggestion from several State agencies, a water authority, and a water district that the Storage and Interstate Release Agreement must specify that the consuming entity may not request a quantity of ICUA in excess of the quantity of water then in storage under a Storage and Interstate Release Agreement. The quantity of water stored under a Storage and Interstate Release Agreement serves as the basis for the quantity of ICUA that may be developed under the Storage and Interstate Release Agreement. This rule allows Colorado River entitlement holders in the Storing State the option to use the water previously stored under a Storage and Interstate Release Agreement, under a direct contract with the Secretary, or under a valid subcontract with an entitlement holder authorized to enter into subcontracts. However, the rule also allows other means consistent with Storing State law to develop ICUA. We do not agree with the suggestion from a water district to retain the requirement that water stored under a Storage and Interstate Release Agreement may not be recovered within the same year the water is stored offstream. The parties may agree to permit the consuming entity to request and receive ICUA during the same year water is stored under a Storage and Interstate Release Agreement. However, the applicable law of the Storing State may not permit a consuming entity to request the delivery of a quantity of ICUA that exceeds the quantity of unused apportionment that was stored offstream for that consuming entity under a Storage and Interstate Release Agreement as of the end of the prior year.

Comment: Modify § 414.3(a) to specify that, by a date certain to be specified in the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement''), the consuming entity will provide notice to the Lower Division States and to the Secretary of its request for a specific quantity of ICUA in the following calendar year.

Response: We agree with this suggestion from two State agencies and a water authority and have modified this rule to incorporate this intent. The revised provision is now renumbered § 414.3(a)(7). The rule will allow the parties and the Secretary to reach a mutually acceptable date for the notice in the Storage and Interstate Release Agreement.

Comment: Modify § 414.3(a) to specify that the date when the consuming entity will provide notice to the Lower Division States and to the Secretary will be the later of (i) November 30 or (ii) within 45 days after the AOP has been transmitted to the Governors of the Colorado River Basin States. This change will allow more flexibility in case the AOP is not transmitted by the Secretary to the Governors before November 30, as has occurred sometimes in the past.

Response: We did not incorporate this suggestion from a water district into this rule. It is possible that the processes for the Secretary to send the AOP to the Governors and the Colorado River entitlement holders to complete their annual water orders may not be completed until late in the year, beyond November 30. However, we agree with several respondents that the date when the authorized entity is to provide notice is better incorporated into the Storage and Interstate Release Agreement.

Comment: Modify § 414.3(a) to clarify that a storing entity, after receiving a notice of a request for a specific quantity of ICUA, will take actions to ensure that the Storing State's consumptive use of Colorado River water will be decreased by a quantity sufficient to develop the requested quantity of ICUA to be released for use in the Consuming State.

Response: We agree with this suggestion from a State agency, a water authority, and a water district and have modified this rule to incorporate this change. The revised provision is now renumbered § 414.3(a)(8).

Comment: Modify § 414.3(a) to provide that the Interstate Storage Agreement (now termed a Storage and Interstate Release Agreement will specify which types of actions may be taken in the Storing State to develop ICUA.

Response: We agree with this suggestion from a State agency, a water authority, and a water district and have modified this rule to incorporate this change. The modified rule also requires the storing entity to specify the means by which the development of the ICUA will be enforceable by the storing entity. The revised provision is now renumbered § 414.3(a)(9).

Comment: The rule should be modified to specify that an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') will require the storing entity to certify that ICUA is developed that otherwise would not exist and to specify the quantity, the means, and the entity by which the unused apportionment will be developed.

Response: We agree with this suggestion by a State agency, a water authority, and a water district and have modified and renumbered this provision § 414.3(a)(10) to incorporate this change into this rule. We do not agree with the comment from a State agency that it is necessary to specify the procedure by which certification is provided to the Secretary. However, the Secretary and the authorized entities may specify the certification procedure in the Storage and Interstate Release Agreement if they so choose.

Comment: The rule should provide guidance as to how the development of ICUA will be verified.

Response: We agree with the suggestion from a State agency and a water authority that this rule should require a Storage and Interstate Release Agreement to specify a procedure for verification of the ICUA appropriate to the manner in which it is developed. This rule has been modified to incorporate this requirement into a new § 414.3(a)(11). In addition, a new § 414.3(a)(6) was included in this rule to require the Storage and Interstate Release Agreement to specify a procedure for verification of the quantity of water stored in the Storing State under a Storage and Interstate Release Agreement. Further, § 414.3(a)(10) specifies that the storing entity must certify to the Secretary that ICUA has been or will be developed that would not otherwise exist. The Secretary may use independent means to verify the existence of ICUA.

Comment: The Secretary should review the water orders and release the AOP before actions are taken to develop or release ICUA.

Response: We do not agree with this suggestion from a State agency. The respondent raised a concern that this rule might allow a storing entity to increase its water order to include the quantity of requested ICUA. The authorized entity could then decrease its order, pump ground water or release

surface water that it otherwise would have used anyway, claim credit for developing ICUA, and receive payment for actions it would not have taken. We do not believe it is necessary for the consuming entity to postpone its request for ICUA until after the annual water orders and the AOP are completed. We believe that information on water orders should be shared openly and up front in the interest of better regional cooperation. The open nature of these water schedules will help ensure that an initial water order is legitimate and that it is not intentionally increased in order that a Storing entity could get credit for ICUA without taking the actions necessary to develop that ICUA.

Comment: Modify § 414.3(a) to include a requirement for the storing entity to provide evidence that the stored water has not migrated out of the State, out of the United States, to a saline sink, or returned to the mainstream.

Response: We do not agree with the comment from a water district that this provision is necessary in this rule. We will require full environmental compliance on all Storage and Interstate Release Agreements and will consider the potential migration of ground water storage when evaluating the effects of storage on the environment and trust resources.

Comment: Modify § 414.3(a) to clarify that the parties to the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') other than the United States will indemnify the United States from actions taken by parties to the agreement other than the United States, not for the broader actions of the United States.

Response: We agree that the United States is covered by the Federal Tort Claims Act and other laws and have revised this paragraph, now designated § 414.3(a)(16), to incorporate this comment by a water district and an irrigation district.

Comment: The Department should protect the water in Indian tribes' ground water basins by not allowing the storage or recovery of water from ground water basins that are hydraulically connected to the tribes' ground water basins.

Response: The Department acknowledges its obligation to protect tribal resources. Section 414.3(b) provides that the Secretary will consider potential effects on trust resources and entitlement holders, which include Indian tribes with rights to the use of Colorado River water, in considering, participating in, and administering a Storage and Interstate Release Agreement.

Comment: Modify the following elements of § 414.3(b), now renumbered § 414.3(c), to require the Secretary to notify the public of a request to approve an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement''), provide a more definitive time for the Secretary to respond to the request, provide for execution of necessary contracts to authorize the diversion and use of Colorado River water, and provide an appeals process.

Response: We have modified the rule to provide in § 414.3(a) that the Secretary will be a party to a Storage and Interstate Release Agreement. We modified § 414.3(c) to specify that the Regional Director for the Bureau of Reclamation's Lower Colorado Region (Regional Director) shall have the authority to negotiate, execute, and administer a Storage and Interstate Release Agreement on behalf of the Secretary. The rule does not provide for an appeal of the Regional Director's decision whether to execute a particular Storage and Interstate Release Agreement. The necessity of contracts to authorize the diversion of water under a Storage and Interstate Release Agreement, except for storage of Article II(D) (of the Decree) water by Federal or tribal entitlement holders, is addressed in § 414.3(e) of the rule. The rule allows for the storage of Colorado River water either through a direct contract with the Secretary or through a valid subcontract with an entitlement holder authorized by the Secretary to enter into such subcontracts. The Storage and Interstate Release Agreement to which the Secretary will be a party satisfies the Section 5 requirement for the release or diversion of ICUA to the consuming entity in the Consuming State.

Comment: Amend § 414.3 (c) to conform the wording to other changes made that delete use of the term ''redemption of storage credits.''

Response: We agree with the suggestions from several State agencies, a water authority, and a water district, and have modified this rule to more clearly describe the intent of the Storage and Interstate Release Agreements. The revised wording specifies that, after receiving a notice of a request for release of ICUA, the storing entity will certify to the Secretary that sufficient water has been stored for the Storing State to support the development of the requested quantity of ICUA. The revised paragraph is designated § 414.3(a)(10).

Comment: Amend § 414.3(d) to conform the wording to other changes that delete use of the term redemption of storage credits. Also, specify that ICUA is available only for use by the consuming entity.

Response: We agree with the suggestions from several State agencies, a water authority, and a water district and has modified this rule to more clearly describe the intent of the Storage and Interstate Release Agreements. The revised wording substitutes the term ''intentionally created unused apportionment'' (''ICUA'') for the less definitive term ''redemption of storage credits.'' In addition, the revised rule clarifies that ICUA will be released only for use by the consuming entity.

Comment: The rule should provide for a contractual commitment by the Secretary to release to a consuming entity ICUA that exists as a consequence of implementation of the Interstate Storage Agreement.

Response: We modified the rule in § 414.3(a) to provide that the Secretary will be a party to Storage and Interstate Release Agreements. Sections 414.3(a)(12) through 414.3(a)(15) provide, among other things, that the Secretary will commit in the Storage and Interstate Release Agreement to release ICUA but only if all necessary actions are taken under the rule, if all laws and executive orders have been complied with, and if the Secretary has first determined that ICUA has been developed or will be developed by a storing entity.

Comment: A Federal agency has commented as to whether actual storage of Colorado River water must take place in those instances where both storage and recovery take place in the same year.

Response: The rule does allow for the release and delivery of ICUA in the same year in which it is developed. Consistent with the laws of the storing state, if recovery and development occur in the same year, and section 414.3(f) (Anticipatory Release of ICUA) is invoked, the Secretary will not require actual storage of water subsequent to the release of ICUA.

Comments Concerning § 414.4—Reporting Requirements and Accounting Under Storage and Interstate Release Agreements

Comment: Amend § 414.4 to provide more flexibility in the reporting date and to clarify the intent that water stored under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') will be recovered and used in the State in which water will be stored and it will be ICUA water rather than credits that the Secretary will release under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement''). The language should reference the Interstate Storage

Agreements (now termed ''Storage and Interstate Release Agreements'') that establish the basis for the accounting for the water to be released by the Secretary for use in the Consuming State.

Response: We agree with this suggestion from several State agencies, a water authority, and a water district, and have revised this rule to more clearly describe the intent of the Storage and Interstate Release Agreements. The reporting date was made more flexible by allowing the date to be agreed upon by the parties to the Storage and Interstate Release Agreement and specified in the Storage and Interstate Release Agreement. To be consistent with other changes made in this rule, this provision refers to the water stored under a Storage and Interstate Release Agreement as water that is available to the storing entity. The Secretary will account for water stored under a Storage and Interstate Release Agreement and available to support the development of ICUA. The Secretary will release ICUA for use by a consuming entity when the provisions of this rule and the Storage and Interstate Release Agreement have been satisfied.

Comment: It is not clear how the ''cut to the aquifer'' or losses from storage or transportation are determined or if they are arbitrary or based on actual data. It is not clear whether this detail is specific to a State's regulation or the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'').

Response: A storing entity will determine how much stored water must remain in an aquifer based on the Storing State's applicable law and/or the policy of the authorized entity. In Arizona, that decision is based on State law which requires that 5 percent of water placed in offstream storage remain in the ground to replenish the aquifer. The authorized entity will determine, consistent with applicable State law, how much stored water can be recovered when that authorized entity decreases its diversions and consumptive use of Colorado River water in the future to develop ICUA that the Secretary will release for use by a consuming entity.

Comments Concerning § 414.5—Water Quality

Comment: Modify § 414.5(a) to clarify that the interstate agreements referred to are Interstate Storage Agreements (now termed ''Storage and Interstate Release Agreements''). Clarify which water is being referred to and recognize the Secretary's responsibilities under the Colorado River Basin Salinity Control Act.

Response: We agree with these suggestions from several State agencies, a water authority, and a water district, and have modified § 414.5(a). This rule clarifies that the referenced agreements are Storage and Interstate Release Agreements. In addition, the last sentence of § 414.5(a) was modified to qualify that the United States has no obligation to construct or furnish water treatment facilities to maintain or improve water quality except as otherwise provided in relevant Federal law. Implementation of this rule will not modify the Secretary's responsibilities under the Colorado River Basin Salinity Control Act of June 24, 1974 (88 Stat. 266).

Comments Concerning § 414.6—Environmental Compliance and Funding of Federal Costs

Comment: Modify § 414.6(b) to clarify that the interstate agreements referred to are Interstate Storage Agreements (now termed ''Storage and Interstate Release Agreements'') and that the costs incurred by the United States in evaluating, processing, and approving an Interstate Storage Agreement (now termed a Storage and Interstate Release Agreement'') will be funded by the parties to that agreement.

Response: We agree with these suggestions from several State agencies, a water authority, and a water district, and have modified § 414.6(b) to require that the authorized entities that are parties to a Storage and Interstate Release Agreement must fund the United States costs of considering, participating in, and administering that agreement.

Public Comments on DPEA and Responses

The following is a discussion of the comments received on the DPEA and our responses. This section includes comments on the scope of the DPEA, Secretarial discretion, adequacy of the environmental assessment, potential effects on plants and wildlife, water available for instream flows and habitat enhancement, concerns over deliveries to Mexico, efficiency improvements, storage alternatives, consultations, sunset clause, economic impacts of the rule, effects on ground water storage, and general comments.

Scope of the DPEA

Comment: The description of proposed interstate transactions in the draft programmatic environmental assessment is overly broad and the draft environmental assessment is therefore unnecessarily broad in its scope.

Response: We recognize, from comments on the proposed rule and DPEA, that prospective transactions are not described the way prospective authorized entities will intend them to work. Colorado River water stored offstream under a Storage and Interstate Release Agreement will be available for use in the Storing State. When a consuming entity requests water stored under a Storage and Interstate Release Agreement, it will receive ICUA, not storage credits. The storing entity will take actions to reduce its State's consumptive use of Colorado River water, thereby developing ICUA. When the Secretary is satisfied that ICUA has been or will be developed, an equivalent quantity of ICUA will be released by the Secretary for use by the consuming entity. Based on a reformulation of the prospective transactions that may take place under the rule, we believe that the final programmatic environmental assessment (FPEA) is appropriate.

Secretarial Discretion

Comment: Several respondents commented that the rule should not be finalized or surplus water stored offstream before the Department clarifies exactly what discretion the Secretary has in providing water for habitat enhancement and how the proposed rule would affect that discretion.

Response: In the Lower Colorado River area (LCR), the Decree apportions surplus among the Lower Division States as follows: 50 percent to California, 46 percent to Arizona, and 4 percent to Nevada. Entities with surplus contracts are currently using surplus and may store it offstream for intrastate use without the proposed Rule. We recognize that the Secretary's management of the LCR to accommodate endangered and sensitive species and their critical habitat is being reviewed as part of the MSCP. FWS developed a Reasonable and Prudent Alternative (RPA) in the Biological and Conference Opinion (BCO) for the current and projected routine operations and maintenance of the LCR. The RPA contains a number of provisions, one of which, 13(a), addresses the type and extent of the Secretary's discretionary action flexibility for all operations and maintenance activities on the Colorado River. Reclamation has provided a summary of its discretion to FWS. Reclamation complied with RPA provision 13(b) by providing a report to FWS on December 30, 1998, that identifies opportunities to increase the Secretary's discretion in Colorado River operations in order to provide water for fish and wildlife purposes. We believe

that this rule can be implemented without compromising the MSCP process.

Adequacy of the Environmental Assessment

Comment: The level of environmental compliance proposed by Reclamation is inadequate and Reclamation should complete a programmatic EIS on the proposed rule and the entire operation of the Colorado River.

Response: Please refer to the previous discussion of adequacy of the environmental assessment under the Environmental Concerns section of the Public Comments on Proposed Rule and Responses on General Issues.

Potential Effects on Plants and Wildlife

Comment: Compliance with the ESA for the proposed rule was not accomplished through the biological opinions for Central Arizona Project (CAP) or Lower Colorado River Operations and Maintenance Activity and Reclamation cannot defer them until a later date.

Response: We do not agree with this view expressed by several environmental groups. Reclamation has prepared a biological assessment (BA) for the proposed rule and entered into informal consultation with FWS. Please refer to the response to the following comment for more details about those consultations. Reclamation has incorporated by reference into its BA for the proposed rule the 1996 Biological Assessment for Description and Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River (LCRBA). The LCRBA analyzed the potential effects to listed species and designated critical habitat from current and projected routine LCR operations and maintenance where Reclamation has discretionary involvement or control. Reclamation also incorporated by reference FWS's 1997 BCO based on the LCRBA. These documents provide the baseline for current and projected routine LCR operations. More information on the BA prepared for this rule is contained in the next few responses.

The BCO and prior consultations with FWS for physical facilities and water delivery contracts with the Central Arizona Water Conservation District and Southern Nevada Water Authority cover the effects of both mainstream and offstream areas that would be involved in the scope of proposed actions under the rule.

Comment: The offstream storage and retrieval of water under the proposed rule is likely to have adverse direct, indirect, and cumulative effects on wildlife and critical habitat, particularly for threatened and endangered species.

Response: We do not agree with the view by several environmental groups that proposed actions under the proposed rule will adversely affect threatened and endangered species and critical habitat. Reclamation has met with FWS and engaged in informal consultations under the ESA. In the course of those consultations, Reclamation prepared a BA that analyzed the potential effects of operations under the proposed rule on listed species and designated habitat in the LCR action area. This analysis was based upon the most likely storage and retrieval scenarios of water from Lakes Mead or Havasu and associated river reaches to obtain ICUA under the proposed rule. At the request of FWS, several worst case scenarios were formulated by Reclamation for purposes of comparison with Colorado River operations that are most likely to occur under the proposed rule. These worst case scenarios were given detailed analysis and discussed with FWS but were later eliminated because they are not realistic and will not be allowed under proposed Storage and Interstate Release Agreements.

The BA analyzed several scenarios, one of which was a proposed action in which 1.2 maf would be stored in Arizona under a Storage and Interstate Release Agreement to allow an authorized entity in Nevada to meet its future water needs. Maximum conveyance capacity expected to be made available on the CAP to store water for interstate water transactions is 200 kaf/year. An authorized entity in Nevada will make future diversions of water from Lake Mead, in addition to Nevada's normal basic and surplus apportionments, to use ICUA released by the Secretary. This additional diversion of ICUA will be limited, under Arizona law, to a maximum of 100 kaf in any year. The BA analyzed the effects of this and other scenarios for storage of Colorado River water and future release of ICUA on listed species and their designated habitat. Effects to each species were determined for the most likely and low probability case scenarios. Habitat requirements for breeding, nesting, and foraging of some species are not dependent on the LCR. Fluctuations in water surface elevations associated with most likely and low probability storage and retrieval scenarios on reservoirs and riverine reaches on the LCR are very small and are not likely to adversely affect bonytail chub, razorback sucker, Yuma clapper rail, or southwestern willow flycatcher. Based upon the available information regarding the critical habitats for the razorback sucker and bonytail chub, storage and release of ICUA under this rule will not adversely modify critical habitat for these fish species. Other listed and sensitive species will not be affected by implementation of the rule. Reclamation did not consult with FWS on species in Mexico because the United States has no authority or discretion regarding Mexico's use of its treaty water or flood control releases.

Reclamation has notified the National Marine Fisheries Service that a section 7 consultation for Mexican species under its administration is not required.

Water Available for Instream Flows and Habitat Enhancement

Comment: Concern was expressed that Colorado River stream flows downstream from Lake Mead would first increase when water is put into storage in Arizona and then decrease in the future as more water is diverted from Lake Mead when Nevada recovers stored water.

Response: No significant changes are expected in stream flows downstream from Lake Mead as a result of implementation of a Storage and Interstate Release Agreement between Arizona and Nevada under the rule. The Biological Assessment for this rule evaluated the effects of storage of 100 and 200 kaf/year of Colorado River water in Arizona and subsequent diversion in a later year of up to 100 kaf by Nevada from Lake Mead. Very small changes in water surface elevations would occur in the riverine and reservoir areas below Lake Mead. The largest increase or decrease in average monthly water surface elevation when storing or using water was 0.12 feet. These changes fall within the range of increases and decreases in water surface elevations below Lake Mead and Hoover Dam under current river operations.

Concerns over Deliveries to Mexico

Comment: The DPEA states that a minor reduction will occur in the quantity of surplus water available for delivery to Mexico over the long term without explaining what a minor reduction is or what studies have been done to quantify this.

Response: Please refer to the previous discussion of adequacy of the environmental assessment under the Environmental Concerns section of the Public Comments on Proposed Rule and Responses on General Issues.

Comment: Offstream storage of surplus water will decrease the likelihood that water from flood control releases will reach the Gulf of

California, thereby reducing the quantity of water that otherwise would be available for environmental restoration in the delta.

Response: Flood control releases are projected to average 788 kaf/year during the period 1999–2015. Offstream storage could decrease flood control releases reaching Mexico by an average of 23 kaf/year during this time. The probability of occurrence of flood control releases could decrease by 0.83 percent. These decreases fall within the range of flood control projections previously consulted on in the 1996 Biological Assessment of Operations, Maintenance, and Sensitive Species of the Lower Colorado River.

Please refer to the previous discussion of adequacy of the environmental assessment under the Environmental Concerns section of the Public Comments on Proposed Rule and Responses to General Issues.

Efficiency Improvements

Comment: Efficiency improvements in river management and the storage of Colorado River water in underground aquifers mean less water is available for environmental purposes, such as the riparian and aquatic ecosystems of the river, including the river and delta region in Mexico.

Response: Please refer to the previous discussion of efficiency improvements under Public Comments on Proposed Rule and Responses on General Issues.

Storage Alternatives

Comment: It is not clear what storage options are available under the rule, or how the rule would apply if there are changes in Arizona's laws or if California or Nevada enact conflicting laws.

Response: We have modified this rule in response to comments from several State agencies, a water district, and a water authority. This rule now provides in § 414.3(a)(2) and § 414.6(a)(3), respectively, for the storage of basic or surplus apportionment of the Storing State, not otherwise put to use by entitlement holders within the Storing State, or storage of the unused basic or surplus apportionment of the Consuming State. If unused apportionment from the Consuming State is to be stored under a Storage and Interstate Release Agreement, the rule provides that the Secretary will make that water available to the storing entity in accordance with the terms of a Storage and Interstate Release Agreement and will not make that water available to other entitlement holders. The rule has been drafted to apply uniformly to all three Lower Division States and the Department will not speculate about potential changes in Arizona's laws or whether California or Nevada may enact conflicting laws.

Comment: Banking in Lake Mead is illegal and it should not be listed as an alternative to the rule.

Response: We do not agree with the comment from a State agency that banking in Lake Mead is illegal. Moreover, under NEPA, Reclamation is charged with the responsibility to analyze reasonable alternatives, and the Department believes that it has appropriately complied with NEPA in this regard.

Comment: The DPEA misstates Arizona law with regard to the ability to create ICUA during a shortage year.

Response: We agree with the comment from a State agency that the statement in the DPEA that ''Interstate recovery of storage credits in Arizona for California and Nevada will not be allowed in a shortage year'' is not accurate. The FPEA has been revised to clarify that AWBA has discretion to decide whether it is in Arizona's best interests to enter into a Storage and Interstate Release Agreement that would require decreased diversions of mainstream water by Arizona during years when the Secretary has declared a shortage on the Colorado River.

Consultations

Comment: The requirement for consultation under the Fish and Wildlife Coordination Act is broader than described and consultation is required with the State wildlife agencies on an equal footing with FWS.

Response: We do not agree with this comment from a State agency that Reclamation is required to consult with State wildlife agencies. Reclamation's responsibility under the Fish and Wildlife Coordination Act is to coordinate with FWS who in turn is expected to interface and represent fish and wildlife concerns based on, among other things, coordination with State game and fish agencies. In addition, the Fish and Wildlife Coordination Act requirements will be met through both ESA and NEPA consultations. The Fish and Wildlife Coordination Act requires Reclamation to consider fish and wildlife resource needs in operation and management of water projects.

Sunset Clause

Comment: The need for a permanent rule was questioned and it was suggested that the rule should have a termination date, such as the end of the time that storage is anticipated. It was suggested that a sunset date will allow the Department an opportunity to do a programmatic reevaluation of how the rule is being used.

Response: We do not agree with the suggestion from a Federal agency that there should be a sunset date. Under this rule, a consuming entity will be able to enter into Storage and Interstate Release Agreements and pay for storage of water that the Storing State will use in the future when the consuming entity calls for ICUA. However, there is no way to accurately predict the future and unanticipated changes in the rate of population growth or the occurrence of droughts or surplus conditions will affect how much water can be stored or when ICUA will be needed. The parties to a Storage and Interstate Release Agreement would not agree to subject any water already in storage to new terms and conditions under new rules. A consuming entity that invests significant sums of money into funding water storage in a Storing State is not likely to agree to subject itself to limited term storage or revised terms and conditions for the right to receive ICUA under an already signed Storage and Interstate Release Agreement. The storage and retrieval period between Arizona and Nevada is projected to run from years 1999 to 2030 and may run longer if both California and Nevada enter into Storage and Interstate Release Agreements with Arizona. Under Arizona law no more than a total of 100 kaf of water stored in Arizona may be retrieved by California and Nevada in any given year. If Nevada is limited to retrieving a maximum of 50 kaf of ICUA from Arizona because California is also retrieving ICUA, the water stored under a Storage and Interstate Release Agreement could be retrieved at this rate beyond the year 2030.

Economic Impacts of the Rule

Comment: Some respondents commented that the proposed rule may impact the southern California water rates if less water that is apportioned to but unused by Arizona and Nevada is made available to California.

Response: Please refer to the previous discussion of potential economic impacts of the rule on southern California water rates that is included in the discussion of economic impacts of this rule under Public Comments on Proposed Rule and Responses on General Issues.

Comment: The DPEA provides little information regarding potential environmental justice concerns regarding minority and low-income communities, such as Indian tribes, communities along the Mexican border, and communities near the Gulf of California.

Response: We have reevaluated the section of the DPEA on environmental justice and has included additional analysis. Based on this additional analysis, we do not find that this rule will have an effect on minority or low-income communities. As discussed in previous responses, this rule is not intended as a mechanism to compensate tribes.

Because Mexico is a sovereign nation, we have no control over how Colorado River water is used once it reaches the international border. Thus while we have determined that there may be minimal effects of this rule on flood control deliveries to the international border, we cannot determine the potential effects that any potential reduction in the deliveries of flood control water may have within the Republic of Mexico.

Effects on Ground Water Storage

Comment: Some respondents, including Indian tribes, commented that the rule would result in a net loss in ground water over time to ''indirect storage'' and that this is a significant indirect effect of the rule but the DPEA shows no analysis of this effect.

Response: We do not agree that actions under this rule will result in a loss of ground water to indirect storage. The method by which Colorado River water is stored by indirect storage allows water to remain in the ground in lieu of being pumped. When Arizona is the Storing State, the development of ICUA is limited to only 95 percent of the water previously stored under a Storage and Interstate Release Agreement. Therefore, the ground water will gain by 5 percent of the water that would have been pumped anyway if it were left in the ground through in lieu storage actions. Further, although Arizona law currently does not allow the development of ICUA by any means other than pumping water that was stored under a Storage and Interstate Release Agreement, this rule allows additional flexibility. If Arizona changes its laws or policy in the future to allow other means of developing ICUA, it is possible that the alternative means could help preserve Arizona's ground water. Finally, as stated previously, this rule allows Colorado River entitlement holders in the Storing State the option to use the water previously stored under a Storage and Interstate Release Agreement or other means consistent with Storing State law to develop ICUA.

Comment: Reclamation should clarify how the rule fits within the regulatory framework for ground water protection in each State, as well as the federal role in ground water protection. The preamble to the proposed rule contains a statement that, ''Water quality will be monitored by the Environmental Protection Agency . . .'' It is not clear to what extent Reclamation expects the Environmental Protection Agency (EPA) to be involved in offstream storage authorized under the rule.

Response: We do not anticipate a need for EPA to evaluate data collected through any offstream storage of Colorado River water. The purpose of the statement was to declare that the Department, and more specifically Reclamation, does not have the responsibility to regulate ground water quality.

General Comments

Comment: There were a number of editorial comments on the DPEA that suggested clarification or additional explanation on various points.

Response: We have reviewed and considered the comments and has adopted many of the suggestions into the text of the FPEA. In addition, the previously mentioned informal consultations between Reclamation and FWS resulted in Reclamation's incorporation of numerous suggestions made by FWS into the BA and FPEA.

Public Comments on Definition of Authorized Entity and Several Other Technical Matters and Responses

As a result of receiving differing comments on the definition of authorized entity and several other technical matters, the Department reopened the comment period on September 21, 1998 (63 FR 50183) for a 30-day period ending October 21, 1998. We asked interested parties to provide comments on three specific questions:

Question 1: Should the definition of ''authorized entity'' be revised to clarify that an authorized entity, including a water bank, must hold an entitlement to Colorado River water in order to ensure consistency with the Law of the River, including specifically Section 5 of the BCPA as interpreted by the Decree?

Question 2: Should an approved Interstate Storage Agreement (now termed a Storage and Interstate Release Agreement) and a contract under Section 5 of the BCPA be combined into one document, thus making the parties entitlement holders upon execution of the agreement?

Question 3: If not combined, should the Interstate Storage Agreement (now termed a Storage and Interstate Release Agreement) and any separate Section 5 contract (or amendments to an existing contract) be processed and approved simultaneously to eliminate duplication of any administrative and compliance procedures?

The Department received 10 letters from 11 respondents during the reopened comment period. The respondents included three State agencies, three water districts, one water authority, one water users association, and three environmental organizations. We reviewed and analyzed all pertinent comments and revised the rule based on these comments. Four respondents, including one water users association and three environmental organizations, did not address the issues on which comments were solicited during the reopened comment period. One water users association resubmitted its comments from the original comment period. Three environmental organizations reiterated the same environmental concerns addressed in their respective responses in the original comment period. Two respondents jointly submitted a report that addresses potential effects of water flows from the United States on the riparian and marine ecosystems of the Colorado River delta in Mexico.

The remaining seven respondents provided comments on issues pertinent to the reopened comment period, although one State agency and one water district also resubmitted their respective comments from the original comment period.

The following is a discussion of the comments received on the issues pertinent to the reopened comment period and our responses.

Comments on Question 1

Comment: One State agency and two water districts cite the BCPA and the Decree to support their view that an authorized entity must have a contract with the Secretary. Two State agencies, one water district, and one water authority commented that an authorized entity need not be an entitlement holder to store water and make it available to a Consuming State under an Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement''). The latter group recognizes that the BCPA and the Decree require all diversions of Colorado River water from the mainstream to be based on an entitlement. However, these respondents believe there is no statutory requirement for the authorized entity to have a direct contract with the Secretary in order to fulfill its responsibilities to store its own State's unused apportionment. Under their reasoning, the authorized entity can arrange for storage and ensure the availability of unused apportionment in the future

through existing contractual arrangements with other parties that have entitlements through contracts with the Secretary.

Response: With the exception of Federal and tribal rights identified in Article II(D) of the Decree, all diversions of water from the Colorado River for use within the Lower Division States require a contract with the Secretary. This is specified in Section 5 of the BCPA and confirmed by the Decree in *Arizona* v. *California.* Under this rule diversions of Colorado River water will occur in two circumstances. The first is when water is taken from the river and stored off-stream by the storing entity and the second is when ICUA has been developed and that water is released by the Secretary for use by the consuming entity.

For authorized entities that do not hold a Federal or tribal entitlement recognized in Article II(D) of the Decree, the rule allows for the storage of Colorado River water either through a direct contract with the Secretary or through a valid subcontract with an entitlement holder. For the release or diversion of ICUA to the consuming entity, the Storage and Interstate Release Agreement, to which the Secretary will be a party, satisfies the Section 5 requirement.

Comments on Question 2

Comment: One State agency and one water district believe that sufficient statutory and contractual authorities exist to allow the authorized entity to take water for banking purposes that otherwise would be unused in that State. These parties believe the authorized entity does not need to hold its own entitlement because sufficient legal authority already exists under applicable laws and contracts. The State agency states that not all end users of Colorado River water are required to have entitlements or contracts with the Secretary. The State agency further contends that the Colorado River Basin Project Act [43 U.S.C. 1524(b)] makes a direct contract between the Secretary and end-users of Colorado River water in Arizona discretionary.

Response: The Department recognizes in new § 414.3(e) that storage of Article II(D) water by Federal or tribal entitlement holders or existing contracts may allow for the delivery of water under this rule. These include direct contracts between authorized entities and the Secretary. These also include subcontracts between authorized entities and an entitlement holder that has been authorized by the Secretary to enter into subcontracts for the delivery of Colorado River water. Authorized entities that are Federal or tribal entitlement holders identified in Article II(D) of the Decree are not subject to the Section 5 contract requirement in the Decree. Section 414.3(e) also provides that the Storage and Interstate Release Agreement, to which the Secretary is a party, can be a water delivery contract. We agree that when existing contracts or valid subcontracts provide for delivery of Colorado River water under this rule, there is no need to combine these contracts with the Storage and Interstate Release Agreement.

Comment: Another State agency and one water authority, in a joint response, believe an additional contract, beyond the contract necessary to fulfill the requirements of Section 5 of the BCPA, is necessary with the Secretary for the release of water based on the development of ICUA by a storing entity. However, those parties do not see a need for new and additional Section 5 contracts beyond those that now exist.

Response: The Department modified the rule in § 414.3(a) to provide that the Secretary will be a party to Storage and Interstate Release Agreements. Sections 414.3(a)(12) through 414.3(a)(15) provide, among other things, that the Secretary will commit in the Storage and Interstate Release Agreement to release ICUA but only if all necessary actions are taken under the rule, if all laws and executive orders have been complied with, and if the Secretary has first determined that ICUA has been developed or will be developed by a storing entity.

Comment: One State agency and two water districts commented that whether or not the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') and Section 5 contract are combined is discretionary and that this should be determined by the particular situation.

Response: We have modified § 414.3(a) to provide that the Secretary will be a party to the Storage and Interstate Release Agreement. The Storage and Interstate Release Agreement can serve as a water delivery contract within the meaning of Section 5 of the BCPA. We recognize in § 414.3(e) that, in certain circumstances, existing contracts or subcontracts can satisfy the requirements of Section 5 for the delivery of water under a Storage and Interstate Release Agreement. In such circumstances, the rule does not anticipate the need for the execution of any further Section 5 contracts in order to implement a Storage and Interstate Release Agreement. Storage of water by authorized entities that hold Article II(D) of the Decree entitlements will not be subject to a Section 5 contract requirement.

Comment: One water district suggested that while there is no legal requirement for the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') and Section 5 contract to be combined, it was suggested that such an action would have the effect of making the Secretary a party to the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement''). It was asserted that making the Secretary party to the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') may give the authorized entities a greater sense of security that future obligations will be performed.

Response: The Department recognizes in new § 414.3(e) that existing contracts may allow for the delivery of water under this rule. These include direct contracts between authorized entities and the Secretary. These also include subcontracts between authorized entities and an entitlement holder that has been authorized by the Secretary to enter into subcontracts for the delivery of Colorado River water. Section 414.3(e) also provides that the Storage and Interstate Release Agreement, to which the Secretary is a party, can serve as a water delivery contract. We agree that when existing contracts or valid subcontracts provide for delivery of Colorado River water under this rule, there is no need to combine these contracts with the Storage and Interstate Release Agreement.

Comment: Another water district stated that if one of the parties to the Interstate Storage Agreement (now termed a ''Storage and Interstate Release Agreement'') already holds an entitlement for delivery of Colorado River water under a BCPA Section 5 contract, a new or amended water delivery contract may not be necessary.

Response: The Department recognizes in the new § 414.3(e) that in certain circumstances existing contracts may satisfy the Section 5 requirement of the BCPA so that additional Section 5 authority would be unnecessary to perform activities under a Storage and Interstate Release Agreement. Section 5 authority is also unnecessary for the storage of Article II(D) of the Decree water by Federal or tribal entitlement holders. In circumstances where additional Section 5 authority is unnecessary, the Storage and Interstate Release Agreement would only cover the specific details of a transaction between the Secretary and the other parties to the Storage and Interstate Release Agreement.

Comments on Question 3

Comment: One State agency and one water district stated that sufficient statutory and contractual authorities already exist under applicable laws and contracts to allow the authorized entity to take water for banking purposes. Therefore there would be no need for a new or amended contract. Another State agency and one water authority believe that an additional contract is necessary with the Secretary to ensure the Secretary's commitment to release water based on the development of ICUA by a storing entity. That contract could be executed concurrently with an Interstate Storage Agreement. However, as noted under comments on Question 2, those parties do not see a need for new and additional Section 5 contracts beyond those that now exist. One State agency responded that if there are two separate agreements, they should be processed, reviewed, and approved simultaneously. The two water districts commented that any necessary Section 5 contract, whether or not combined with an Interstate Storage Agreement, should be processed and approved simultaneously with the Interstate Storage Agreement.

Response: Question 3 asked whether Storage and Interstate Release Agreements and Section 5 contracts, if not combined, should be processed simultaneously. We have modified the rule in § 414.3(a) to provide that the Secretary will be a party to a Storage and Interstate Release Agreement. The Department also recognizes in § 414.3(e) that, in certain circumstances, existing contracts or subcontracts satisfy the requirements of Section 5 for the delivery of water under a Storage and Interstate Release Agreement. The rule does not anticipate the need for the execution of any further Section 5 contracts in order to implement a Storage and Interstate Release Agreement. Question 3 is moot in light of these modifications to the rule. Comments by the parties in response to Question 3 primarily address issues raised by Questions 1 and 2 and are responded to above.

V. Procedural Matters

- Environmental Compliance
- Paperwork Reduction Act
- Regulatory Flexibility Act
- Small Business Regulatory Enforcement Fairness Act (SBREFA)
- Unfunded Mandates Reform Act of 1995
- Executive Order 12612, Federalism Assessment
- Executive Order 12630, Takings Implications Analysis
- Executive Order 12866, Regulatory Planning and Review
- Executive Order 12988, Civil Justice Reform

Environmental Compliance

We prepared a DPEA and placed it on file in the Reclamation Administrative Record. We received comments on the DPEA (discussed above in III. Responses to Comments), and carefully considered those comments in preparing the final programmatic environmental assessment (FPEA). We have accepted many of these comments and incorporated them into the FPEA, which is on file in the Reclamation Administrative Record. Based on the FPEA, we have determined that a Finding of No Significant Impact is warranted.

We have also, under the ESA, consulted with FWS on potential impacts of this rule on listed species and designated habitat. Based on the analysis contained in the BA that we prepared for the rule, we have determined that operations under this rule are not likely to adversely affect listed species or designated habitat in the action area. FWS has concurred with this finding. We have also determined that we have no Section 7 obligations for species within Mexico due to our inability to control the use of water once it reaches Mexico.

Compliance with NEPA, the ESA, and other relevant statutes, laws, and executive orders will be completed for future Federal actions taken under this rule to ensure that any action authorized or carried out by the Secretary does not jeopardize the continued existence of any threatened or endangered species, does not adversely modify or destroy critical habitat, and is analyzed by an appropriate environmental document. Consultation and coordination between Reclamation, FWS, other agencies, and interested parties will be completed on a case-by-case basis.

Paperwork Reduction Act

This rule is geographically limited to the States of Arizona, California, and Nevada. The collection of information contained in the rule covers storing entities that would store Colorado River water off the mainstream of the Colorado River. The information we would collect would be compiled by these storing entities in the course of their normal business, and the annual reports to the Secretary will not impose any significant time or cost burden. We will submit the information collection requirements in this rule to the Office of Management and Budget for approval as required by the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* We will not require collection of this information until the Office of Management and Budget has given its approval.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This rule will not impose any direct cost on small entities. Financial costs associated with the development and release of intentionally created unused apportionment will be borne by the parties who voluntarily enter into offstream storage and release agreements. A benefit-cost analysis was completed and concludes that this rule does not impose significant or unique impact upon small governments (including Indian communities), small entities such as water purveyors, water districts, or associations, or individual entitlement holders. From a financial perspective, since the rule may provide an opportunity for authorized entities in the Lower Division States to secure additional supplies of Colorado River water, Colorado River water users may experience a cost savings. The rule will not affect any Colorado River entitlement holder's right to use its full water entitlement. Further, in times of shortage on the Colorado River, numerous small water users with senior water rights, which are determined by an earlier priority date, will retain their seniority and will be served before less senior users regardless of size.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the SBREFA. This rule:

(1) Does not have an annual effect on the economy of $100 million or more. The Department prepared a benefit-cost analysis, which estimated that this rule would cause net economic benefits on a State and regional level using different water supply models and discount rates. Under a conservative water supply scenario characterized by 19 years of normal conditions on the Colorado River and one surplus year, discounted net economic benefits at the regional level ranged from $12.8 to $61.2 million at 5.75 per cent and $9.5 to $47.7 million at 8.27 per cent. Under a water supply scenario characterized by 10 years of surplus conditions on the Colorado River, the net economic benefits range from $550,255 to $4.8 million at 5.75 per cent and $350,789 to $3.1 million at 8.27 per cent. Under the scenario characterized by 10 surplus

years, demand for banked water is relatively low because water users in the Lower Division States can meet most of their water needs with diversions from the mainstream within the basic and surplus apportionments for use within those States.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

This rule facilitates the creation of an additional alternative for water agencies to secure water supplies. However, entering into Storage and Interstate Release Agreements for the offstream storage of Colorado River water and the release of ICUA provided for in this rule is voluntary. Should the costs of the procedures to facilitate these transactions, provided for in the rule, be greater than the cost of other alternative water supplies, the States would probably select the cheaper alternatives.

This rule may create an opportunity for the total cost of alternative water supplies to decrease, thereby reducing the cost burden on all water users in southern California.

Water users in southern Nevada are just now approaching use of the entire 300 kaf basic annual apportionment of Colorado River for use in Nevada. Like California, Nevada will also need alternative water supplies to satisfy the increasing demands of economic development and population growth. The cost of securing alternative supplies will be greater than the cost of obtaining Colorado River water under the State's basic or surplus apportionment. This rule may provide an opportunity for Colorado River water users in Nevada to experience a cost savings in securing additional supplies of Colorado River water.

(3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This rule is facilitating voluntary water transactions that may confer benefits on a national basis in many economic sectors.

(i) Voluntary water transactions can promote economic efficiency gains. These gains accrue to the parties in a given transaction and to the wider regional and national economy. The gains result due to greater flexibility in how and where water is used.

(ii) Voluntary water transactions offer a cost effective way to increase water supplies without constructing new mainstream facilities such as dams.

(iii) Voluntary water transactions may stimulate investment and development in conservation technology that is currently economically infeasible given the returns to water in its present use.

Unfunded Mandates Reform Act of 1995

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The range of benefits and costs associated with the rule are constrained because the amount of water that can be released under an offstream storage agreement in any one year is constrained by State law and immediate demand. This rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. The rule provides a framework under which authorized entities could voluntarily store Colorado River water offstream for future interstate use. The publication of this rule does not authorize specific activities, and will not impose costs on any State, local, or tribal government, or the private sector. A statement (benefit-cost analysis) containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) has been prepared and is summarized below in the section relating to Executive Order 12866.

We received comments on the benefit-cost analysis that were editorial in nature or asked for clarification or revision of information in the analysis. We accepted approximately 85 percent of the comments and revised the text or footnotes as necessary to include those changes where requested.

The benefit-cost analysis concluded that this rule does not impose significant or unique impact upon small governments (including Indian communities), small entities such as water districts, or individual entitlement holders. The rule will not affect the priority of water use on the Colorado River. Therefore benefits received by water users, regardless of size, associated with the right to divert Colorado River water will remain. Costs of storage and release of unused apportionment water will be borne by authorized entities in the Storing State and the Consuming State who voluntarily enter into storage and release agreements. All Colorado River water users may experience a decrease in water costs since the rule will enable authorized entities in the Lower Division States to secure additional water supplies. The adoption of 43 CFR part 414 will not result in any unfunded mandate to State, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more in any one year.

Executive Order 12612, Federalism Assessment

In accordance with Executive Order 12612, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. A Federalism Assessment is not required. This rule does not alter the relationship between the Federal Government and the States under the Decree nor does it alter the distribution of power and responsibilities among the various levels of government.

Executive Order 12630, Takings Implications Analysis

In accordance with Executive Order 12630, this rule does not have significant takings implications. A takings implication assessment is not required. This rule does not represent a government action capable of interfering with constitutionally protected property rights. This rule does not impose additional fiscal burdens on the public and would not result in physical invasion or occupancy of private property or substantially affect its value or use. This rule would not result in any Federal action that would place a restriction on a use of private property and does not affect a Colorado River water entitlement holder's right to use its full water entitlement. Under this rule, an authorized entity may store unused Colorado River water available from an entitlement holder's water rights only if the water right holder does not use or store that water on its own behalf. When the Storing State must reduce its diversions to develop ICUA, an entity that reduces its consumptive use of Colorado River water to develop that unused apportionment will do so voluntarily under an appropriate agreement. Therefore, the Department of the Interior has determined that this rule would not cause a taking of private property or require further discussion of takings implications under this Executive Order.

Executive Order 12866, Regulatory Planning and Review

This rule is a significant regulatory action under section 3(f)(4) of Executive Order 12866 because it raises novel legal or policy issues. Executive Order 12866 requires an assessment of potential costs and benefits under section 6(a)(3). The Department's benefit-cost analysis determines that this rule does not impose significant or unique impacts upon small governments (including Indian communities), small entities such as water purveyors or associations, or even individual water entitlement holders.

California and Nevada are looking for alternative water supplies to satisfy the increasing demands of economic development and population growth. This rule may provide an opportunity for Colorado River water users in Nevada to experience a marginal cost savings in securing alternative supplies. Offstream storage of Colorado River water and making available ICUA are voluntary actions. Should the costs of the procedures in this rule to facilitate these transactions be greater than the costs of other alternative water supplies, California and Nevada would probably select the lower cost alternatives.

The benefit-cost analysis estimated net economic benefits of this rule on a State and regional level using different water supply models and discount rates. The different water supply models represent potential water supply conditions on the Colorado River that affect interstate demand for water from an Arizona water bank and the magnitude of economic benefits obtained from that water. The discount rates used in the analysis were 5.75 per cent (the average rate on municipal bonds in 1996, which is a rate faced by major water purveyors in California and Nevada) and 8.27 per cent (the prime rate in 1996, which more accurately represents the cost of money).

Under a conservative water supply scenario characterized by 19 years of normal conditions on the Colorado River and one surplus year, discounted net economic benefits at the regional level ranged from $12.8 to $61.2 million at 5.75 per cent and $9.5 to $47.7 million at 8.27 per cent. Under a water supply scenario characterized by 10 years of surplus conditions on the Colorado River, the net economic benefits range from $550,255 to $4.8 million at 5.75 per cent and $350,789 to $3.1 million at 8.27 per cent. Under the scenario characterized by 10 surplus years, demand for banked water is relatively low because water users in the Lower Division States can meet most of their water needs with diversions from the mainstream within the basic and surplus apportionments for use within those States.

We have placed the full analysis on file in the Reclamation Administrative Record at Bureau of Reclamation, Administrative Record, Lower Colorado Regional Office, P.O. Box 61470, Boulder City, NV 89006–1470, Attention: BC00–4451.

Executive Order 12988, Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

List of Subjects in 43 CFR Part 414

Environmental compliance, Public lands, Water bank program, Water resources, Water storage, Water supply, and Water quality.

Dated: October 26, 1999.

Patricia J. Beneke,

Assistant Secretary—Water and Science.

For the reasons stated in the preamble, the Bureau of Reclamation adds a new part 414 to title 43 of the Code of Federal Regulations as follows:

PART 414—OFFSTREAM STORAGE OF COLORADO RIVER WATER AND DEVELOPMENT AND RELEASE OF INTENTIONALLY CREATED UNUSED APPORTIONMENT IN THE LOWER DIVISION STATES

Sec.

Authority: 5 U.S.C. 553; 43 U.S.C. 391, 485 and 617; 373 U.S. 546; 376 U.S. 340.

Subpart A—Purposes and Definitions

§ 414.1 Purpose.

(a) *What this part does.* This part establishes a procedural framework for the Secretary of the Interior (Secretary) to follow in considering, participating in, and administering Storage and Interstate Release Agreements in the Lower Division States (Arizona, California, and Nevada) that would:

(1) Permit State-authorized entities to store Colorado River water offstream;

(2) Permit State-authorized entities to develop intentionally created unused apportionment (ICUA);

(3) Permit State-authorized entities to make ICUA available to the Secretary for release for use in another Lower Division State. This release may only take place in accordance with the Secretary's obligations under Federal law and may occur in either the year of storage or in years subsequent to storage; and

(4) Allow only voluntary interstate water transactions. These water transactions can help to satisfy regional water demands by increasing the efficiency, flexibility, and certainty in Colorado River management in accordance with the Secretary's authority under Article II (B) (6) of the Decree entered March 9, 1964 (376 U.S. 340) in the case of *Arizona* v. *California,* (373 U.S. 546) (1963), as supplemented and amended.

(b) *What this part does not do.* This part does not:

(1) Affect any Colorado River water entitlement holder's right to use its full water entitlement;

(2) Address or preclude independent actions by the Secretary regarding Tribal storage and water transfer activities;

(3) Change or expand existing authorities under the body of law known as the ''Law of the River';

(4) Change the apportionments made for use within individual States;

(5) Address intrastate storage or intrastate distribution of water;

(6) Preclude a Storing State from storing some of its unused apportionment in another Lower Division State if consistent with applicable State law; or

(7) Authorize any specific activities; the rule provides a framework only.

§ 414.2 Definitions of terms used in this part.

Authorized entity means:

(1) An entity in a Storing State which is expressly authorized pursuant to the laws of that State to enter into Storage and Interstate Release Agreements and develop ICUA (''storing entity''); or

(2) An entity in a Consuming State which has authority under the laws of that State to enter into Storage and Interstate Release Agreements and acquire the right to use ICUA (''consuming entity'').

Basic apportionment means the Colorado River water apportioned for use within each Lower Division State when sufficient water is available for release, as determined by the Secretary of the Interior, to satisfy 7.5 million acre-feet (maf) of annual consumptive use in the Lower Division States. The United States Supreme Court, in *Arizona* v. *California,* confirmed that the annual basic apportionment for the Lower Division States is 2.8 maf of consumptive use in the State of Arizona, 4.4 maf of consumptive use in the State of California, and 0.3 maf of consumptive use in the State of Nevada.

BCPA means the Boulder Canyon Project Act, authorized by the Act of Congress of December 21, 1928 (45 Stat. 1057).

Colorado River Basin means all of the drainage area of the Colorado River System and all other territory within the United States to which the waters of the Colorado River System shall be beneficially applied.

Colorado River System means that portion of the Colorado River and its tributaries within the United States.

Colorado River water means water in or withdrawn from the mainstream.

Consuming entity means an authorized entity in a Consuming State.

Consuming State means a Lower Division State where ICUA will be used.

Consumptive use means diversions from the Colorado River less any return flow to the river that is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation.

(1) Consumptive use from the mainstream within the Lower Division States includes water drawn from the mainstream by underground pumping.

(2) The Mexican treaty obligation is set forth in the February 3, 1944, Water Treaty between Mexico and the United States, including supplements and associated Minutes of the International Boundary and Water Commission.

Decree means the decree entered March 9, 1964, by the Supreme Court in *Arizona* v. *California,* 373 U.S. 546 (1963), as supplemented or amended.

Entitlement means an authorization to beneficially use Colorado River water pursuant to:

(1) The Decree;

(2) A water delivery contract with the United States through the Secretary; or

(3) A reservation of water from the Secretary.

Intentionally created unused apportionment or ICUA means unused apportionment that is developed:

(1) Consistent with the laws of the Storing State;

(2) Solely as a result of, and would not exist except for, implementing a Storage and Interstate Release Agreement.

Lower Division States means the States of Arizona, California, and Nevada.

Mainstream means the main channel of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs behind dams on the main channel, and Senator Wash Reservoir off the main channel.

Offstream storage means storage in a surface reservoir off of the mainstream or in a ground water aquifer. Offstream storage includes indirect recharge when Colorado River water is exchanged for ground water that otherwise would have been pumped and consumed.

Secretary means the Secretary of the Interior or an authorized representative.

Storage and Interstate Release Agreement means an agreement, consistent with this part, between the Secretary and authorized entities in two or more Lower Division States that addresses the details of:

(1) Offstream storage of Colorado River water by a storing entity for future use within the Storing State;

(2) Subsequent development of ICUA by the storing entity, consistent with the laws of the Storing State;

(3) A request by the storing entity to the Secretary to release ICUA to the consuming entity;

(4) Release of ICUA by the Secretary to the consuming entity; and

(5) The inclusion of other entities that are determined by the Secretary and the storing entity and the consuming entity to be appropriate to the performance and enforcement of the agreement.

Storing entity means an authorized entity in a Storing State.

Storing State means a Lower Division State in which water is stored off the mainstream in accordance with a Storage and Interstate Release Agreement for future use in that State.

Surplus apportionment means the Colorado River water apportioned for use within each Lower Division State when sufficient water is available for release, as determined by the Secretary, to satisfy in excess of 7.5 maf of annual consumptive use in the Lower Division States.

Unused apportionment means Colorado River water within a Lower Division State's basic or surplus apportionment, or both, which is not otherwise put to beneficial consumptive use during that year within that State.

Upper Division States means the States of Colorado, New Mexico, Utah, and Wyoming.

Water delivery contract means a contract between the Secretary and an entity for the delivery of Colorado River water in accordance with section 5 of the BCPA.

Subpart B—Storage and Interstate Release Agreements

§ 414.3 Storage and Interstate Release Agreements.

(a) *Basic requirements for Storage and Interstate Release Agreements.* Two or more authorized entities may enter into Storage and Interstate Release Agreements with the Secretary in accordance with paragraph (c) of this section. Each agreement must meet all of the requirements of this section.

(1) The agreement must specify the quantity of Colorado River water to be stored, the Lower Division State in which it is to be stored, the entity(ies) that will store the water, and the facility(ies) in which it will be stored.

(2) The agreement must specify whether the water to be stored will be within the unused basic apportionment or unused surplus apportionment of the Storing State. For water from the Storing State's apportionment to qualify as unused apportionment available for storage under this part, the water must first be offered to all entitlement holders within the Storing State for purposes other than interstate transactions under proposed Storage and Interstate Release Agreements.

(3) The agreement must specify whether the water to be stored will be within the unused basic apportionment or unused surplus apportionment of the Consuming State. If the water to be stored will be unused apportionment of the Consuming State, the agreement must acknowledge that any unused apportionment of the Consuming State may be made available from the Consuming State by the Secretary to the Storing State only in accordance with Article II(B)(6) of the Decree. If unused apportionment from the Consuming State is to be stored under a Storage and Interstate Release Agreement, the Secretary will make the unused apportionment of the Consuming State available to the storing entity in accordance with the terms of a Storage and Interstate Release Agreement and will not make that water available to other entitlement holders.

(4) The agreement must specify the maximum quantity of ICUA that will be developed and made available for release to the consuming entity.

(5) The agreement must specify that ICUA may not be requested by the consuming entity in a quantity that exceeds the quantity of water that had been stored under a Storage and Interstate Release Agreement in the Storing State.

(6) The agreement must specify a procedure to verify and account for the quantity of water stored in the Storing State under a Storage and Interstate Release Agreement.

(7) The agreement must specify that, by a date certain, the consuming entity will:

(i) Notify the storing entity to develop a specific quantity of ICUA in the following calendar year;

(ii) Ask the Secretary to release that ICUA; and

(iii) Provide a copy of the notice or request to each Lower Division State.

(8) The agreement must specify that when the storing entity receives a request to develop a specific quantity of ICUA:

(i) It will ensure that the Storing State's consumptive use of Colorado River water will be decreased by a quantity sufficient to develop the requested quantity of ICUA; and

(ii) Any actions that the storing entity takes will be consistent with its State's laws.

(9) The agreement must include a description of:

(i) The actions the authorized entity will take to develop ICUA;

(ii) Potential actions to decrease the authorized entity's consumptive use of Colorado River water;

(iii) The means by which the development of the ICUA will be enforceable by the storing entity; and

(iv) The notice given to entitlement holders, including Indian tribes, of opportunities to participate in development of this ICUA.

(10) The agreement must specify that the storing entity will certify to the Secretary that ICUA has been or will be developed that otherwise would not have existed. The certification must:

(i) Identify the quantity, the means, and the entity by which ICUA has been or will be developed; and

(ii) Ask the Secretary to make the ICUA available to the consuming entity under Article II(B)(6) of the Decree and the Storage and Interstate Release Agreement.

(11) The agreement must specify a procedure for verifying development of the ICUA appropriate to the manner in which it is developed.

(12) The agreement must specify that the Secretary will release ICUA developed by the storing entity:

(i) In accordance with a request of the consuming entity;

(ii) In accordance with the terms of the Storage and Interstate Release Agreement;

(iii) Only for use by the consuming entity and not for use by other entitlement holders; and

(iv) In accordance with the terms of the Storage and Interstate Release Agreement, the BCPA, Article II(B)(6) of the Decree and all other applicable laws and executive orders.

(13) The agreement must specify that ICUA shall be released to the consuming entity only in the year and to the extent that ICUA is developed by the storing entity by reducing Colorado River water use within the Storing State.

(14) The agreement must specify that the Secretary will release ICUA only after the Secretary has determined that all necessary actions have been taken under this part.

(15) The agreement must specify that before releasing ICUA the Secretary must first determine that the storing entity:

(i) Stored water in accordance with the Storage and Interstate Release Agreement in quantities sufficient to support the development of the ICUA requested by the consuming entity; and

(ii) Certified to the satisfaction of the Secretary that the quantity of ICUA requested by the consuming entity has been developed in that year or will be developed in that year under § 414.3(f).

(16) The agreement must specify that the non-Federal parties to the Storage and Interstate Release Agreement will indemnify the United States, its employees, agents, subcontractors, successors, or assigns from loss or claim for damages and from liability to persons or property, direct or indirect, and loss or claim of any nature whatsoever arising by reason of the actions taken by the non-federal parties to the Storage and Interstate Release Agreement under this part.

(17) The agreement must specify the extent to which facilities constructed or financed by the United States will be used to store, convey, or distribute water associated with a Storage and Interstate Release Agreement.

(18) The agreement must include any other provisions that the parties deem appropriate.

(b) *How to address financial considerations.* The Secretary will not execute an agreement that has adverse impacts on the financial interests of the United States. Financial details between and among the non-Federal parties need not be included in the Storage and Interstate Release Agreement but instead can be the subject of separate agreements. The Secretary need not be a party to the separate agreements.

(c) *How the Secretary will execute storage and interstate release agreements.* The Regional Director for the Bureau of Reclamation's Lower Colorado Region (Regional Director) may execute and administer a Storage and Interstate Release Agreement on behalf of the Secretary. The Secretary will notify the public of his/her intent to participate in negotiations to develop a Storage and Interstate Release Agreement and provide a means for public input. In considering whether to execute a Storage and Interstate Release Agreement, the Secretary may request, and the non-Federal parties must provide, any additional supporting data necessary to clearly set forth both the details of the proposed transaction and the eligibility of the parties to participate as State-authorized entities in the proposed transaction. The Secretary will also consider: applicable law and executive orders; applicable contracts; potential effects on trust resources; potential effects on entitlement holders, including Indian tribes; potential impacts on the Upper Division States; potential effects on third parties; potential environmental impacts and potential effects on threatened and endangered species; comments from interested parties, particularly parties who may be affected by the proposed action; comments from the State agencies responsible for consulting with the Secretary on matters related to the Colorado River; and other relevant factors, including the direct or indirect consequences of the proposed Storage and Interstate Release Agreement on the financial interests of the United States. Based on the consideration of the factors in this section, the Secretary may execute or decide not to execute a Storage and Interstate Release Agreement.

(d) *Assigning interests to an authorized entity.* Non-Federal parties to a Storage and Interstate Release Agreement may assign their interests in the Agreement to authorized entities. The assignment can be in whole or in part. The assignment can only be made if all parties to the agreement approve.

(e) *Requirement for contracts under the Boulder Canyon Project Act.* Release or diversion of Colorado River water for storage under this part must be supported by a water delivery contract with the Secretary in accordance with Section 5 of the BCPA. The only exception to this requirement is storage of Article II(D) (of the Decree) water by Federal or tribal entitlement holders. The release or diversion of Colorado River water that has been developed or will be developed as ICUA under this part also must be supported by a Section 5 water delivery contract.

(1) An authorized entity may satisfy the requirement of this section through a direct contract with the Secretary. An authorized entity also may satisfy the Section 5 requirement of the BCPA, for purposes of this part, through a valid subcontract with an entitlement holder that is authorized by the Secretary to subcontract for the delivery of all or a portion of its entitlement.

(2) For storing entities that do not otherwise hold a contract or valid subcontract for the delivery of the water to be stored, the Storage and Interstate Release Agreement will serve as the vehicle for satisfying the Section 5 requirement for the release or diversion of that water.

(3) For consuming entities that do not otherwise hold a contract or valid subcontract for the delivery of the water to be released by the Secretary as ICUA, the Storage and Interstate Release Agreement will serve as the vehicle for

satisfying the Section 5 requirement for the release or diversion of that water.

(f) *Anticipatory release of ICUA.* The Secretary may release ICUA to a consuming entity before the actual development of ICUA by the storing entity if the storing entity certifies to the Secretary that ICUA will be developed during that same year that otherwise would not have existed.

(1) These anticipatory releases will only be made in the same year that the ICUA is developed.

(2) Before an anticipatory release, the Secretary must be satisfied that the storing entity will develop the necessary ICUA in the same year that the ICUA is to be released.

(g) *Treaty obligations.* Prior to executing any specific Storage and Interstate Release Agreements, the United States will consult with Mexico through the International Boundary and Water Commission under the boundary water treaties and other applicable international agreements in force between the two countries.

§ 414.4 Reporting requirements and accounting under Storage and Interstate Release Agreements.

(a) *Annual report to the Secretary.* Each storing entity will submit an annual report to the Secretary containing the material required by this section. The report will be due on a date to be agreed upon by the parties to the Storage and Interstate Release Agreement. The report must include:

(1) The quantity of water diverted and stored during the prior year under all Storage and Interstate Release Agreements; and

(2) The total quantity of stored water available to support the development of ICUA under each Storage and Interstate Release Agreement to which the storing entity is a party as of December 31 of the prior calendar year.

(b) *How the Secretary accounts for diverted and stored water.* The Secretary will account for water diverted and stored under Storage and Interstate Release Agreements in the records maintained under Article V of the Decree.

(1) The Secretary will account for the water that is diverted and stored by a storing entity as a consumptive use in the Storing State for the year in which it is stored.

(2) The Secretary will account for the diversion and consumptive use of ICUA by a consuming entity as a consumptive use in the Consuming State of unused apportionment under Article II(B)(6) of the Decree in the year the water is released in the same manner as any other unused apportionment taken by that State.

(3) The Secretary will maintain individual balances of the quantities of water stored under a Storage and Interstate Release Agreement and available to support the development of ICUA. The appropriate balances will be reduced when ICUA is developed by the storing entity and released by the Secretary for use by a consuming entity.

Subpart C—Water Quality and Environmental Compliance

§ 414.5 Water quality.

(a) *Water Quality is not guaranteed.* The Secretary does not warrant the quality of water released or delivered under Storage and Interstate Release Agreements, and the United States will not be liable for damages of any kind resulting from water quality problems. The United States is not under any obligation to construct or furnish water treatment facilities to maintain or improve water quality except as may otherwise be provided in relevant Federal law.

(b) *Required water quality standards.* All entities, in diverting, using, and returning Colorado River water, must:

(1) Comply with all applicable water pollution laws and regulations of the United States, the Storing State, and the Consuming State; and

(2) Obtain all applicable permits or licenses from the appropriate Federal, State, or local authorities regarding water quality and water pollution matters.

§ 414.6 Environmental compliance and funding of Federal costs.

(a) *Ensuring environmental compliance.* The Secretary will complete environmental compliance documentation, compliance with the National Environmental Policy Act of 1969, as amended, and the Endangered Species Act of 1973, as amended; and will integrate the requirements of other statutes, laws, and executive orders as required for Federal actions to be taken under this part.

(b) *Responsibility for environmental compliance work.* Authorized entities seeking to enter into a Storage and Interstate Release Agreement under this part may prepare the appropriate documentation and compliance document for a proposed Federal action, such as execution of a proposed Storage and Interstate Release Agreement. The compliance documents must meet the standards set forth in Reclamation's national environmental policy guidance before they can be adopted.

(c) *Responsibility for funding of Federal costs.* All costs incurred by the United States in evaluating, processing, and/or executing a Storage and Interstate Release Agreement under this part must be funded in advance by the authorized entities that are party to that agreement.

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