

September 20, 2010

Gerald R. Zimmerman, Executive Director
Colorado River Board of California
770 Fairmont Avenue, Suite 100
Glendale, California 91203-1068

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Re: Response to Colorado River Board's Letter to Alan H. Solomon, California Energy Commission, regarding Presiding Member's Proposed Decision (PMPD) for the Blythe Solar Power Project, September 14, 2010

Dear Mr. Zimmerman:

We were very disappointed by the content of the Colorado River Board's (CRB) last minute letter to the California Energy Commission (CEC) concerning the Blythe Solar Power Project (BSPP). We feel compelled to reply directly for the record to correct your unfounded claims.

At the outset, we want to ensure that CRB understands the BSPP has been designed for maximum water efficiency. BSPP is a dry-cooled project and has – at significant expense – incorporated water conservation BMPs and water-efficient technology. Thus, with regard to your reference to the August 12, 2010 letter from three Lower Colorado River Basin states suggesting that BLM require use of best management practices and water use efficient technologies (paragraph 6), such considerations are ingrained into the project design. Further, the CEC has independently reviewed and conditioned BSPP specifically with a view to ensuring all feasible water efficiency measures.

With respect to the bulk of your letter, it appears to be predicated on the assertion that the BSPP involves "Colorado River water use due to the groundwater pumping at this project site" (paragraph 2). This assertion is based on water law and policy that do not exist.

Although contemplated and previously noticed in the Federal Register (with a comment period that expired over two years ago), the Bureau of Reclamation (BOR or Reclamation) has not adopted an Accounting Surface Rule. It is our understanding that Reclamation is presently in the process of substantially reformulating the concept. Unless and until the Accounting Surface identified in the two USGS papers you reference (USGS Water Investigation Reports, WRI 94-4005 and WRI 00-4085) is afforded legal status (if such ever occurs), it does not provide a valid basis for claims concerning the BSPP pumping from the Palo Verde Mesa Groundwater Basin (Mesa Basin).

Nor do the two USGS papers separately provide a basis for the claims in your letter. As you are well aware, USGS papers do not establish water law, groundwater regulation, or federal policy with regard to Colorado River surface water accounting. In fact, the USGS papers did not make any determination regarding an "Accounting Surface area" as you imply; rather, they made an "assumption" regarding an extensive Colorado River Aquifer and presented an Accounting Surface "concept." The USGS assumptions were predicated on very simplistic geologic assessments and two-dimensional modeling, with no analysis or recognition of physical conditions specifically existing in and relevant to the Mesa Basin – notably including an absence of analysis of the physical conditions in the Palo Verde Valley Groundwater Basin (Valley Basin) that lies between the Mesa Basin and the Colorado River.

For example, the USGS papers assume hydraulic connection between the distant aquifers and the River but ignore the presence of 104,500 irrigated acres on the Palo Verde Valley, and the deep percolation recharge of applied irrigation water that adds approximately 65,000 to 95,000 acre-feet of recharge water annually to the groundwater basin that lies between the River and the Mesa Basin. The presence of this groundwater renders movement of water from the River to the Mesa Basin essentially impossible. Indeed, the introduction of that volume of water over more than a century has created a saturated soil condition that has required the installation of an elaborate drainage system to convey water out of the Valley Basin so as to keep groundwater levels in the Valley below the root zone.

Since the Valley Basin sits between the Mesa Basin and the Colorado River, and is oversaturated from deep percolation of irrigation water applied over more than a century, the USGS's assumption that water from the River is hydraulically connected in a free flowing manner with the Mesa Basin cannot be supported.

Although you cite to the Consolidated Decree, the definition of "consumptive use" has not changed since the original 1964 decree, and has always included "*water drawn from the mainstream by underground pumping.*" Nowhere else in California or western water law has the notion of underground pumping from a surface water system extended to groundwater pumping many miles from the surface watercourse. It is unprecedented in more than a century of western water law to interpret the Supreme Court's use of the term "mainstream" as meaning any and all connected aquifer systems irrespective of their distance from the River channel. Indeed, we note that your letter glosses over the substantial difference between the phrase "hydraulically connected with the Colorado River" (even were such connection to exist in the case of the Colorado River and Mesa Basin) and the legal standard of "water drawn from the mainstream by underground pumping" as used in the Law of the River. We are aware of no legal support for the implied assertion that these phrases mean the same thing.

To the contrary, we do not believe the Law of the River has or will be interpreted by a court to mean that pumping of groundwater from the Mesa Basin – or from any other location except in the immediate proximity of the River – falls within the meaning of the phrase "water drawn from the mainstream by underground pumping." Accordingly, the assertion in your letter that groundwater pumped from the Mesa Basin requires "a valid contract between the Secretary of the Interior and the water user for such use" is without legal support.

Further, throughout its development, the Law of the River has always involved the allocation of the annual quantity of diversions from the Colorado River, and the management of water releases to satisfy the annual quantity of diversions allocated to each of the states and others. In contrast, percolating groundwater does not move at a speed that can be related to annual diversion allocations. Even if the irrigation practices in the Palo Verde Valley were ignored completely, the BSPP water that the CRB would treat as water withdrawn from the Colorado River and subject to the Law of the River allocation would take upwards of several decades to migrate from the surface water system to the groundwater system in the location of the BSPP wells, approximately 10 miles from the closest point of the Colorado River. There is no legal basis for considering pumping of decades old groundwater as constituting surface water of the Colorado River subject to diversion control under the annual allocation methodology of the Law of the River.

The groundwater proposed to be used for the BSPP is presently governed as groundwater subject only to California groundwater law, as it has been for over a century.

If adopted as originally proposed, Reclamation's Accounting Surface policy would result in federalizing millions of acre-feet of State of California groundwater, and could ultimately adversely affect thousands of landowners and groundwater users, potentially resulting in many millions of dollars of economic impacts – obviously a radical change in water law.

Your implied assertion that the CRB can impose a requirement for any groundwater user to obtain an entitlement to Colorado River water (paragraphs 4 and 5) is equally erroneous, since your agency does not grant entitlements to Colorado River allocations or control rights to use of California groundwater. Such a claim also appears to be an arbitrary and unprecedented treatment of the proposed solar power projects, since neither the CRB nor Reclamation has to our knowledge ever asserted that any other groundwater user on the Palo Verde Mesa or the Chuckwalla Valley must have such an entitlement, or ever attempted to account for their water use as a part of consumptive use of River water on an annual accounting basis. (There are approximately 581 water supply wells that exist on the Mesa Basin.)

CRB's contentions have caused confusion for the agencies that do not have expertise concerning the Law of the River, and they have had a detrimental effect on the permitting and financing of solar projects which are using minimal water (all are dry cooling) and are attempting to lead California towards producing the most renewable energy in the world and reducing greenhouse gas emissions.

As you may know, the PMPD was adopted by the full CEC at its September 15 meeting. We expect to proceed with the BSPP and look forward to making a substantial contribution to California's greenhouse gas emission reduction goals with this renewable generation project. We trust that this letter serves to correct the claims you have made. Please feel free to contact the undersigned should you have any further concerns.

Sincerely,



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Alice L. Harron
Sr. Director, Development and Permitting

Cc: Ms. Lorri Gray-Lee, Regional Director, U.S. Bureau of Reclamation
Ms. Holly Roberts, Associate Field Manager, Palm Springs-South Coast Field Office, BLM
Mr. Allan H. Solomon, California Energy Commission
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