

FILED
MAY 21 1993
STATE ENGINEER'S OFFICE

IN THE OFFICE OF THE STATE ENGINEER OF THE STATE OF NEVADA

In the Matter of Application)
Number 58589 Filed by the Southern)
Nevada Water Authority on)
March 9, 1993, to Appropriate)
Waters of the Muddy River)
_____)

Protest of the
Central Arizona Water
Conservation District

The Central Arizona Water Conservation District ("CAWCD"), whose address is 23636 North 7th Street, Phoenix, Arizona 85024, hereby protests the granting of application number 58589, filed on March 9, 1993, by the Southern Nevada Water Authority to appropriate the waters of the Muddy River and its tributaries, situated in Clark County, State of Nevada.

CAWCD is a political subdivision of the State of Arizona, organized and existing under A.R.S. §§ 48-3701, et seq. CAWCD has been organized for the purposes of, inter alia, contracting with the Secretary of the Interior for the repayment of the costs and for the delivery of the water supply of the Central Arizona Project ("CAP") in accordance with the provisions of the Colorado River Basin Project Act, 43 U.S.C. §§ 1501, et seq.

The Secretary of the Interior, pursuant to his authority under Section 301(b)(1) of the Basin Project Act, 43 U.S.C. § 1524(b)(1), and the CAWCD pursuant to the above referenced authorities, have entered into a contract for the repayment of CAP costs and delivery

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of CAP water supplies. Repayment Contract (Contract No. 14-06-W-245), December 1, 1988 is attached hereto as Exhibit A. Under Article 8.1 of the Repayment Contract, the United States has agreed to delivery Project water to CAWCD, and during such periods as the United States operates and maintains the Project water supply system, the United States has also agreed to transport and deliver Project water to CAP subcontractors. After the transfer of operation and maintenance responsibility to CAWCD, deliveries of Project water will be made to CAWCD as the operating agency, which will in turn make deliveries of Project water to CAP subcontractors. "Project water" is defined to include Colorado River mainstream water and all other water conserved and developed by CAP dams and reservoirs. Repayment Contract, Article 5.27. Deliveries of Colorado River water by the United States pursuant to the Repayment Contract are charged to the State of Arizona's apportionment of Colorado River water under the United States Supreme Court's decree in Arizona v. California, 376 U.S. 340 (1964), and discharge to that extent the obligation of the United States to deliver 2.8 million acre-feet of Colorado River water annually to the State of Arizona under the contract between the United States and the State of Arizona dated February 9, 1944. Repayment Contract, Article 8.3(b).

The Central Arizona Project is the major junior right holder on the Lower Colorado River. The CAP and its water users will absorb most of the mainstream shortages occurring in the future, and therefore, would be the first users harmed and users most harmed by any significant diminution of the water supplies of the Colorado River.

CAWCD protests the granting of Southern Nevada Water Authority's ("SNWA") application to appropriate no. 58589 (the "Application") because the proposed point of diversion listed in the Application is the mainstream of the Colorado River, specifically, Lake Mead at the existing Saddle Island pumping station. The Nevada State Engineer ("State Engineer") must deny the Application for the following reasons:

1. THE STATE ENGINEER HAS NO JURISDICTION TO, AND INDEED IS ENJOINED FROM, AUTHORIZING ANY DIVERSIONS FROM THE MAINSTREAM OF THE COLORADO RIVER.

The proposed point of diversion under the Application is Lake Mead at the existing Saddle Island diversion facilities. The Application proposes to use the mainstream of the Colorado River (specifically Lake Mead) as a conduit to transport tributary water from the Muddy River to the diversion facilities at Saddle Island.

The Application is predicated on the faulty premise that Muddy River water can retain its identity as tributary water even after it flows into the mainstream of the Colorado River. However, it is well established under the Law of the River that once tributary water commingles with mainstream water of the Colorado River, the tributary water becomes mainstream water.

The State Engineer has no jurisdiction over the mainstream of the Colorado River, such jurisdiction rests exclusively with the United States. See Arizona v. California, 373 U.S. 546 (1963). Indeed, the Decree entered by the United States Supreme Court in Arizona v. California, 376 U.S. 340 (1964) (the "Decree"), permanently enjoins Nevada and the other Lower Basin States from: (1) purporting to authorize any diversions from the mainstream of

the Colorado River; and (2) purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under the Decree. Articles III.(C) and (D) of the Decree provide in pertinent part:

"III. The States of Arizona, California and Nevada, . . . their officers, attorneys, agents and employees, be and they are hereby severally enjoined:

* * *

(C) From diverting or purporting to authorize the diversion of water from the mainstream¹ the diversion of which has not been authorized by the United States for use in the respective state; . . .

(D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this Decree. [300,000 acre-feet per year for use in Nevada, during a normal water supply year.]" 376 U.S. 340 (1964).

Granting the Application would violate both of the above-cited injunctions imposed by the Decree. The Application asks the State Engineer to authorize the diversion of water from Lake Mead. However, under the Decree, the State Engineer is prohibited from authorizing any diversion from the mainstream absent prior approval from the United States. The United States has not authorized these proposed diversions from Lake Mead. In fact, upon information and belief, the United States is opposed to and will protest these proposed diversions. Accordingly, the State Engineer cannot grant the Application without violating Article III.(C) of the Decree.

Furthermore, the State Engineer cannot grant the Application without violating Article III.(D) of the Decree which prohibits

¹ The term "mainstream" is defined in Article I.(B) of the Decree as ". . . [T]he mainstream of the Colorado River downstream from Lee's Ferry within the United States, including the reservoirs thereon."

Nevada, its officers, agents and employees, from purporting to authorize the consumptive use of water from the mainstream in excess of Nevada's 300,000 acre-feet entitlement to Colorado River water. Because the point of diversion under the Application is the mainstream of the Colorado, the source of the proposed appropriation is the Colorado River not the Muddy River. The Application seeks authorization to appropriate mainstream water in an amount over and above Nevada's 300,000 acre-feet entitlement. Accordingly, the State Engineer is enjoined by Article III.(D) of the Decree from granting the Application.

2. EVEN IF THE STATE ENGINEER WERE TO GRANT THE APPLICATION, SUCH ACTION WOULD BE WITHOUT FORCE AND EFFECT.

As explained above, despite the wording of the Application, the Application, in reality, seeks to appropriate Colorado River water, not tributary water. Article II.(B)(5) of the Decree provides that no one may use Colorado River unless they have a valid contract for such use with the Secretary of the Interior. SNWA does not have a contract with the Secretary of the Interior to use the water sought in the Application. Without such a contract, a state issued permit to appropriate is useless. Furthermore, Article II.(B)(4) of the Decree provides that "[a]ny mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released." Therefore, any water diverted pursuant to the Application and permit would be charged to Nevada's Colorado River entitlement. Granting the application would and could not increase the water supplies available to Nevada from the Colorado River.

For all the reasons stated above, CAWCD requests that the Application be denied.

Respectfully submitted this 20th day of May, 1993.

CENTRAL ARIZONA WATER
CONSERVATION DISTRICT

By Suzanne Ticknor
Douglas K. Miller
General Counsel
Suzanne K. Ticknor
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Phoenix, Arizona 85024

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Suzanne K. Ticknor, being first duly sworn, deposes and says, that she has read the foregoing protest and knows the contents thereof and that the same is true of her own knowledge, except as to the matters which are therein stated on information and belief, and as to those matters she believes them to be true.

Suzanne Ticknor
Suzanne K. Ticknor

Subscribed and sworn to before me this 20th day of May, 1993.

Donna J. Mcetic
Notary Public

My commission expires:

April 25, 1994

W. Nevada. Pld