MEMORANDUM

TO: Members, CWCB
FROM: Bill McDonald
DATE: November 9, 1984
SUBJECT: Agenda Item 18, November 15, 1984, Board Meeting—Proposed Lease of Water to the San Diego County Water Authority

Introduction

On August 29th, the San Diego County Water Authority, California (the Authority), executed an "option agreement" with the Galloway Group, Limited (Galloway), a Colorado corporation, which agreement purports to give the Authority the right to "lease" water from sources in the Upper Colorado River System. At the same time, Galloway also offered to "lease" water from each of the states of Colorado, Utah, and Wyoming.

This memo briefly describes each of these proposed transactions and their current status and discusses certain issues concerning the proposed lease to the Authority. I have also requested the Attorney General's staff to review this matter. They will report to the Board at the meeting. The memo concludes with my recommendation as to the position which I believe the Board should take on this matter. I have also attached copies of the positions and resolutions thus far adopted by other Colorado River Basin states.

Lease Agreements Between the States and Galloway

In the week immediately prior to the execution of the option agreement between Galloway and the Authority, Galloway presented to the governors of Colorado, Utah, and Wyoming documents styled "option agreements," which documents are identical to each other except that the one offered to Utah includes a clause giving Utah "preferred nation" status in the exercise of its option. These options, which were offered to each governor for the sum of
$10,000, purport to give a state the right to enter into a "lease agreement" by which the signatory state would lease 50,000 to 100,000 acre-feet per year of "its" water to Galloway for delivery by Galloway to unspecified entities in the Lower Colorado River Basin. In exchange, a state would receive $10 per acre-foot or, at a minimum, $1 million per year.

David Getches has informed the attorney for Galloway that Governor Lamm will not sign the option agreement which was offered to him. David's October 25th letter to John Musick, which was forwarded to you previously, sets forth the reasons for that decision.

It is my understanding that the governors of Utah and Wyoming have not signed the option agreements proffered to them. I do not know if they have reached final decisions not to sign the documents.

Proposed Lease to the Authority

The "option agreement" entered into between Galloway and the Authority, for which the Authority paid Galloway $10,000, purports to give the Authority the right, upon the exercise of the option, to enter into a "Water Service Agreement" with Galloway. Pursuant to such agreement, Galloway would purport to "lease" to the Authority a minimum of 300,000 and a maximum of 500,000 acre-feet of water per year. The lease would be for a minimum period of 40 years, with provision for termination then or at any time thereafter upon 15 years prior notice.

The water which Galloway would allegedly "lease" to the Authority would come from unspecified reservoirs to be constructed by Galloway within Colorado on the Yampa and/or White Rivers. The water would be delivered to the Authority by means of the natural channel of the Colorado River and its tributaries. The Authority would take delivery at Lake Havasu.

Water "leased" to the Authority by Galloway would, under the terms of the proposed "Water Service Agreement," be counted against the apportionment of the beneficial consumptive use of the Colorado River System which is made to the Upper Basin by the Colorado River Compact. In turn, Galloway apparently takes the position that the water "leased" to the Authority would be counted against Colorado's apportionment from the Upper Colorado River System unless Wyoming or Utah "leased" to Galloway "their" water for storage in a reservoir located in Colorado, in which event the water "sub-leased" to the Authority by Galloway would apparently be charged against Wyoming's or Utah's apportionment.

Galloway has taken the position that it can "lease" water to the Authority whether or not Colorado, Utah, or Wyoming "lease" water to Galloway. Furthermore, Galloway has taken the position
that it does not need permission or approval from any Colorado River Basin state in order to proceed. Finally, it has been reported in the press that Mr. Musick has stated that the "lease" can be accomplished even if a state objects to it.

The option agreement which the Authority signed was to have been exercised by October 15th. However, the Authority requested, and was granted, an extension for the exercise of the option until January 15, 1985. To date, the option has not been exercised.

Discussion

The proposed lease of water to the Authority raises a host of very complicated questions covering a wide variety of issues. However, it seems to me that interstate compact considerations and the state's export statute are dispositive of the matter. Thus, I will make no effort to review and discuss issues concerning Galloway's lack of adjudicated water rights, the need for FERC licenses and over filings on sites for which the River District is already seeking licenses, endangered fish species and other regulatory problems, etc., etc., etc.

With respect to interstate compact considerations, I have attached the Colorado River Compact and the first few articles of the Upper Colorado River Basin Compact. In the former, I would draw your attention to the definitions in article II and to the provisions of article III (a), (b), (d), and (e) and of article VIII. In the latter, note the definitions in article II and the provisions of article III (a) and (b)(1) and of article VI.

With respect to Colorado's export statute, a copy of which is also attached, note especially the requirements of section 37-81-101(3). Note also section 37-81-103(1). It is important to read the export statute together with the compacts.

It is my conclusion that there are serious legal obstacles to the proposed lease. The Attorney General's Office will be prepared to discuss these in the context of the compacts, export statute, and other key laws which bear on the legal issues raised by the proposed lease. In view of the potential for litigation in this matter, I will recommend that the Board go into executive session to discuss these issues with the Attorney General and his staff.

One other item bears brief mention. This is the assertion being made by Galloway and the Authority that existing compacts and laws should not be the focus of discussion. Rather, they argue, laws are only expressions of policy and they can and should be changed if the proposed lease is a desirable transaction.

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Setting aside for the moment the insurmountable practical problems of amending the compacts and relevant laws to accommodate the proposed lease, I would agree that laws are expressions of policy and that they can be amended if the involved parties wish to do so. However, after a thorough review of the proposed lease, I am firmly convinced that Colorado has no reason whatsoever to even raise the possibility of changes in existing laws in order to enable the proposed lease to be perfected. Relative to the benefits which the proposed lease would allegedly yield, Colorado is far better served by the policies, protections, institutional arrangements, and interstate relationships fostered by and embodied in current laws. Thus, the Board should take any and all steps necessary to oppose the proposed lease and otherwise protect the state's interests.

Positions of Other Basin States

Several of the other Colorado River Basin states have taken positions opposing the proposed "lease" of water to the Authority. Attached you will find the following:

1) resolution of the Colorado River Board of California,
2) motion passed by the New Mexico Interstate Stream Commission,
3) resolution of the Arizona Water Commission, and
4) a letter from Governor Babbitt of Arizona to the Authority.

Recommendations

I recommend that the Board:

1) by letter to Governor Lamm, express its support for and concurrence in his decision not to sign the option agreement offered to him by Galloway, and

2) pass the attached, draft resolution which states that the Board is opposed to the proposed lease of water to the Authority by Galloway.

Attachments: as stated

cc: Felix Sparks

/bvm
**Interstate Compacts**

Editor's note: The numbering system within the compacts in articles 61 to 69 of this title, inclusive, are those of the original compacts and are not to be confused with the numbering system of C.R.S. 1973.

**ARTICLE 61**

**Colorado River Compact**

37-61-102. Compact effective on approval.
37-61-103. Approval waived.
37-61-104. Certified copies of compact.

37-61-101. Colorado River compact. The General Assembly hereby approves the compact, designated as the "Colorado River Compact", signed at the City of Santa Fe, State of New Mexico, on the 24th day of November, A.D. 1922, by Delph E. Carpenter, as the Commissioner for the State of Colorado, under authority of and in conformity with the provisions of an act of the General Assembly of the State of Colorado, approved April 2, 1921, entitled "An Act providing for the appointment of a Commissioner on behalf of the State of Colorado to negotiate a compact and agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming and between said States and the United States respecting
the use and distribution of the waters of the Colorado River and the rights of said States and the United States thereto, and making an appropriation therefor,". the same being Chapter 246 of the Session Laws of Colorado, 1921, and signed by the Commissioners for the States of Arizona, California, Nevada, New Mexico, Utah, and Wyoming, under legislative authority, and signed by the Commissioners for said seven States and approved by the Representative of the United States of America under authority and in conformity with the provisions of an Act of the Congress of the United States, approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes.", which said compact is as follows:

Colorado River Compact

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact, under the Act of the Congress of the United States of America approved August 19, 1921, (42 Statutes at Large, page 171), and the Acts of the legislatures of the said states, have through their Governors appointed as their commissioners:

W. S. Norviel, for the State of Arizona;
W. F. McClure, for the State of California;
Delph E. Carpenter, for the State of Colorado;
J. G. Scrugham, for the State of Nevada;
Stephen B. Davis, Jr., for the State of New Mexico;
R. E. Caldwell, for the State of Utah;
Frank C. Emerson, for the State of Wyoming;

who, after negotiations participated in by Herbert Hoover appointed by the President as the representative of the United States of America, have agreed upon the following articles:

Article I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

Article II

As used in this Compact:

(a) The term 'Colorado River System' means that portion of the Colorado River and its tributaries within the United States of America.
(b) The term 'Colorado River Basin' means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.
(c) The term "States of the Upper Division" means the States of Colorado, New Mexico, Utah and Wyoming.

(d) The term "States of the Lower Division" means the States of Arizona, California and Nevada.

(e) The "Lee Ferry" means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term "Upper Basin" means those parts of the States of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term "Lower Basin" means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

Article III

(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a) the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States or Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the Upper Division shall not withhold water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b) and (c)
may be made in the manner provided in paragraph (g) at any time after Octo-
ber first, 1963, if and when either basin shall have reached its total beneficial
consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in
paragraph (f) any two signatory States, acting through their Governors, may
give joint notice of such desire to the Governors of the other signatory States
and to the President of the United States of America, and it shall be the
duty of the Governor of the signatory states and of the President of the
United States of America forthwith to appoint representatives, whose duty
it shall be to divide and apportion equitably between the Upper Basin and
Lower Basin the beneficial use of the unapportioned water of the Colorado
River System as mentioned in paragraph (f), subject to the Legislative ratifi-
cation of the signatory States and the Congress of the United States of Amer-
ica.

Article IV

(a) Inasmuch as the Colorado River has ceased to be navigable for com-
merce and the reservation of its waters for navigation would seriously limit
the development of its Basin, the use of its waters for purpose of navigation
shall be subservient to the uses of such waters for domestic, agricultural and
power purposes. If the Congress shall not consent to this paragraph, the other
provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River
System may be impounded and used for the generation of electrical power,
but such impounding and use shall be subservient to the use and consumption
of such water for agricultural and domestic purposes and shall not interfere
with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the
regulation and control by any state within its boundaries of the appropriation,
use and distribution of water.

Article V

The Chief Official of each signatory State charged with the administration
of water rights, together with the Director of the United States Reclamation
Service and the Director of the United States Geological Survey shall co-
operate, ex officio:

(a) To promote the systematic determination and coordination of the facts
as to flow, appropriation, consumption and use of water in the Colorado
River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the
Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent
of the signatories from time to time.

Article VI

Should any claim or controversy arise between any two or more of the
signatory States: (a) with respect to the waters of the Colorado River System
not covered by the terms of this compact; (b) over the meaning or perform-
ance of any of the terms of this compact; (c) as to the allocation of the
burdens incident to the performance of any article of this compact or the
delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

Article VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

Article VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of waters in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

Article IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

Article X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

Article XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

In Witness Whereof, The Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.
ARTICLE 62
Upper Colorado River Compact

37-62-101. Upper Colorado River compact. The general assembly hereby ratifies the compact among the states of Colorado, New Mexico, Utah, Wyoming, and Arizona, designated as the "Upper Colorado river basin compact" and signed in the city of Santa Fe, state of New Mexico, on the 11th day of October, A. D. 1948, by Clifford H. Stone, commissioner for the state of Colorado, Fred E. Wilson, commissioner for the state of New Mexico, Edward H. Watson, commissioner for the state of Utah, L. C. Bishop, commissioner for the state of Wyoming, Charles A. Carson, commissioner for the state of Arizona, and approved by Harry W. Bashore, representative of the United States of America. Said compact is as follows:

Article I

(a) The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado river system, the use of which was apportioned in perpetuity to the upper basin by the Colorado river compact; to establish the obligations of each state of the upper division with respect to the deliveries of water required to be made at Lee ferry by the Colorado river compact; to promote interstate comity; to remove causes of present and future controversies; to secure the expeditious agricultural and industrial development of the upper basin, the storage of water and to protect life and property from floods.

(b) It is recognized that the Colorado river compact is in full force and effect and all of the provisions hereof are subject thereto.

Article II

As used in this compact:

(a) The term "Colorado river system" means that portion of the Colorado river and its tributaries within the United States of America.

(b) The term "Colorado river basin" means all of the drainage area of the Colorado river system and all other territory within the United States of America to which the waters of the Colorado river system shall be beneficially applied.

(c) The term "states of the upper division" means the states of Colorado, New Mexico, Utah and Wyoming.
(d) The term "states of the lower division" means the states of Arizona, California and Nevada.

(e) The term "Lee ferry" means a point in the main stream of the Colorado river one mile below the mouth of the Paria river.

(f) The term "upper basin" means those parts of the states of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado river system above Lee ferry, and also all parts of said states located without the drainage area of the Colorado river system which are now or shall hereafter be beneficially served by waters diverted from the Colorado river system above Lee ferry.

(g) The term "lower basin" means those parts of the states of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado river system below Lee ferry, and also all parts of said states located without the drainage area of the Colorado river system which are now or shall hereafter be beneficially served by waters diverted from the Colorado river system below Lee ferry.

(h) The term "Colorado river compact" means the agreement concerning the apportionment of the use of the waters of the Colorado river system dated November 24, 1922, executed by commissioners for the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, approved by Herbert Hoover, representative of the United States of America, and proclaimed effective by the President of the United States of America, June 25, 1929.

(i) The term "Upper Colorado river system" means that portion of the Colorado river system above Lee ferry.

(j) The term "Commission" means the administrative agency created by Article VIII of this compact.

(k) The term "water year" means that period of twelve months ending September 30 of each year.

(l) The term "acre-foot" means the quantity of water required to cover an acre to the depth of one foot and is equivalent to 43,560 cubic feet.

(m) The term "domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial and other like purposes, but shall exclude the generation of electrical power.

(n) The term "virgin flow" means the flow of any stream undepleted by the activities of man.

Article III

(a) Subject to the provisions and limitations contained in the Colorado river compact and in this compact, there is hereby apportioned from the upper Colorado river system in perpetuity to the states of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

(1) To the state of Arizona the consumptive use of 50,000 acre-feet of water per annum.

(2) To the states of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum appropriated in perpetuity to and available for use each year by upper basin under the Colorado river compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the state of Arizona.
(b) The apportionment made to the respective states by paragraph (a) of this article is based upon, and shall be applied in conformity with, the following principles and each of them:

1. The apportionment is of any and all man-made depletions;
2. Beneficial use is the basis, the measure and the limit of the right to use;
3. No state shall exceed the apportioned use in any water year when the effect of such excess use, as determined by the commission, is to deprive another signatory state of its apportioned use during the water year; provided, that this subparagraph (b) (3) shall not be construed as:
   i. Altering the apportionment of use, or obligations to make deliveries as provided in article XI, XII, XIII or XIV of this compact;
   ii. Purporting to apportion among the signatory states of such uses of water as the upper basin may be entitled to under paragraphs (f) and (g) of article III of the Colorado river compact; or
   iii. Countenancing average uses by any signatory state in excess of its apportionment.
4. The apportionment to each state includes all water necessary for the supply of any rights which now exist.

(c) No apportionment is hereby made, or intended to be made of such use of water as the upper basin may be entitled to under paragraphs (f) and (g) of article III of the Colorado river compact.

(d) The apportionment made by this article shall not be taken as any basis for the allocation among the signatory states of any benefits resulting from the generation of power.

Article IV

In the event curtailment of use of water by the states of the upper division at any time shall become necessary in order that the flow at Lee ferry shall not be depleted below that required by article III of the Colorado river compact, the extent of curtailment by each state of the consumptive use of water apportioned to it by article III of this compact shall be in such quantities and at such times as shall be determined by the commission upon the application of the following principles:

(a) The extent and times of curtailment shall be such as to assure full compliance with article III of the Colorado river compact;

(b) If any state or states of the upper division, in the ten years immediately preceding the water year in which curtailment is necessary, shall have consumptively used more water than it was or they were, as the case may be, entitled to use under the apportionment made by article III of this compact, such state or states shall be required to supply at Lee ferry a quantity of water equal to its, or the aggregate of their, overdraft or the proportionate part of such overdraft, as may be necessary to assure compliance with article III of the Colorado river compact, before demand is made on any other state of the upper division:

(c) Except as provided in subparagraph (b) of this article, the extent of curtailment by each state of the upper division of the consumptive use of
water apportioned to it by article III of this compact shall be such as to result in the delivery at Lee ferry of a quantity of water which bears the same relation to the total required curtailment of use by the states of the upper division as the consumptive use of the upper Colorado river system water which was made by each such state during the water year immediately preceding the year in which the curtailment becomes necessary bears to the total consumptive use of such water in the states of the upper division during the same water year; provided, that in determining such relation the uses of water under rights perfected prior to November 24, 1922, shall be excluded.

Article V

(a) All losses of water occurring from or as the result of the storage of water in reservoirs constructed prior to the signing of this compact shall be charged to the state in which such reservoir or reservoirs are located. Water stored in reservoirs covered by this paragraph (a) shall be for the exclusive use of and shall be charged to the state in which the reservoir or reservoirs are located.

(b) All losses of water occurring from or as a result of the storage of water in reservoirs constructed after the signing of this compact shall be charged as follows:

(1) If the commission finds that the reservoir is used, in whole or in part, to assist the states of the upper division in meeting their obligations to deliver water at Lee ferry imposed by article III of the Colorado river compact, the commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir capacity allocated for that purpose. The whole or that proportion, as the case may be, of reservoir losses as found by the commission to be reasonably and properly chargeable to the reservoir or reservoir capacity utilized to assure deliveries at Lee ferry shall be charged to the states of the upper division in the proportion which the consumptive use of water in each state of the upper division during the water year in which the charge is made bears to the total consumptive use of water in all states of the upper division during the same water year. Water stored in reservoirs or in reservoir capacity covered by this subparagraph (b) (1) shall be for the common benefit of all of the states of the upper division.

(2) If the commission finds that the reservoir is used, in whole or in part, to supply water for use in a state of the upper division, the commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir or reservoir capacity utilized to supply water for use and the state in which such water will be used. The whole or that proportion, as the case may be, of reservoir losses as found by the commission to be reasonably and properly chargeable to the state in which such water will be used shall be borne by that state. As determined by the commission, water stored in reservoirs covered by this subparagraph (b) (2) shall be earmarked for and charged to the state in which the water will be used.

(c) In the event the commission finds that a reservoir site is available both to assure deliveries at Lee ferry and to store water for consumptive use in a state of the upper division, the storage of water for consumptive use shall be given preference. Any reservoir or reservoir capacity hereafter used to assure deliveries at Lee ferry shall by order of the commission be
used to store water for consumptive use in a state, provided the commission finds that such storage is reasonably necessary to permit such state to make the use of the water apportioned to it by this compact.

Article VI

The commission shall determine the quantity of the consumptive use of water, which use is apportioned by article III hereof, for the upper basin and for each state of the upper basin by the inflow-outflow method in terms of man-made depletions of the virgin flow at Lee ferry, unless the commission, by unanimous action, shall adopt a different method of determination.

Article VII

The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in another shall be charged to such latter state.
37-81-101. Diversion of water outside state - application required - special conditions - penalty. (1) (a) The general assembly hereby finds and declares that the location and availability of water in this state varies greatly from place to place and that the state as a whole suffers a shortage of water. The general assembly further recognizes that because of Colorado’s unique location at the headwaters of four of the nation’s major western rivers and because all the major river systems in Colorado flow out of the state, and that in order to insure the availability of these scarce water resources for the use of citizens of the state of Colorado, compacts have been entered into with the downstream states on all the major rivers originating in Colorado.

(b) It is also recognizes that it has been the continuing historical policy of the state of Colorado to conserve and prevent waste of its water resources to provide adequate supplies of water necessary to insure the continued health, welfare, and safety of all of its citizens. Accordingly, the general assembly hereby determines that, for the purpose of conserving the scarce water resources of this state and to thereby insure the continuing health, welfare, and safety of the citizens of this state, it is unlawful for any person, including a corporation, association, or other entity, to divert, carry, or transport by ditches, canals, pipes, conduits, natural streams, watercourses, or any other means any of the water resources found in this state into any other state for use therein without first complying with this section.

(2) To effectuate the purposes of subsection (1) of this section, no person may divert, carry, or transport any surface or ground water from this state by ditches, canals, pipes, conduits, natural streams, watercourses, or other means without meeting the requirements for obtaining a permit to construct a well if the source of water is to be ground water or if a well permit is not required without first obtaining an adjudication from the water court for the right to use water outside the state. In the case of a well for which a permit has been issued for a use of ground water within Colorado, a change of use for a use outside the state must be approved by the water court or,
if it is designated ground water, the change must be approved by the Colorado
ground water commission. A person desiring to divert, carry, or transport
any water outside Colorado shall file an appropriate application therefor and
comply with the requirements of this section in addition to any other require­
ments, terms, and conditions provided or authorized by law pertaining to such
application.

(3) Prior to approving an application, the state engineer, ground water
commission, or water judge, as the case may be, must find that:
(a) The proposed use of water outside this state is expressly authorized
by interstate compact or credited as a delivery to another state pursuant to
section 37-81-103 or that the proposed use of water does not impair the ability
of this state to comply with its obligations under any judicial decree or inter­
state compact which apportions water between this state and any other state
or states;
(b) The proposed use of water is not inconsistent with the reasonable con­
servation of the water resources of this state; and
(c) The proposed use of water will not deprive the citizens of this state
of the beneficial use of waters apportioned to Colorado by interstate compact
or judicial decree.

(4) Any diversion of water from this state which is not in compliance with
this section shall not be recognized as a beneficial use for purposes of per­
fected a water right to the extent of such unlawful diversion or use.

Source: Amended, L. 79, p. 1364, § 1; R & RE, L. 83, p. 1410, § 1.

Law reviews.
For article, "Intergovernmental Relations and Energy Taxation", see 58 Den. L.J. 141
Rev. 655 (1982).

37-81-102. Officials charged with enforcement. It is the duty of the state
engineer, the division engineers, and the water commissioners of this state
to see that the waters of the state are available for the use and benefit of
the citizens and inhabitants of the state for its growth, prosperity, and general
welfare, and it is the further duty of said officials to prevent the waters
thereof from being diverted, carried, conveyed, or transported by ditches,
canals, pipes, conduits, natural streams, watercourses, or other means into
other states for use therein unless there is specific authorization therefor,
as provided in section 37-81-101. Upon its being brought to the knowledge
of the state engineer of Colorado that any person, corporation, or association
is unlawfully carrying or transporting any of such waters into any other state
for use therein, or is intending so to do, it is his duty to immediately call
the matter to the attention of the attorney general, in behalf of and in the
name of the state, who shall apply to any district court or to the supreme
court of the state of Colorado for such restraining orders or injunctions, both
preliminary and final, as may be necessary to enforce the provisions of this
section and section 37-81-101, and jurisdiction is conferred upon said courts
for such purposes.

37-81-103. Effect of apportionment credits upon diversions of water from state. (1) For the purpose of evaluating applications made pursuant to section 37-81-101, no water occurring in any aquifer or being a part of or hydraulically connected to any interstate stream system may be diverted or appropriated in Colorado for a use which contemplates or involves the transportation of such water into or through another state or states through which such interstate stream system flows, for use of such diverted water in such other state or states whether as a vehicle or medium for the transportation of another substance, or for any other use, unless the amount of water so diverted or appropriated and transported through or into such other state or states is credited as a delivery to such other state or states by Colorado, of water to which such other state or states may be of claim to be entitled from such interstate source under an existing interstate compact or otherwise. Water mixed with other substances in the process of forming a slurry for the purpose of transporting any substance as a suspended solid shall not be deemed to have lost its character as water.

(2) The burden shall be upon the claimant or other person seeking to divert or appropriate water or seeking a water right based upon a claimed diversion or appropriation coming within the provisions of subsection (1) of this section to prove that a means exists and is accepted by each state, including Colorado, through which said stream system and said diverted water flows or will flow by which the credit required in this section will be entered and recognized by each such state.

(3) This article shall not be applicable to water contained in agricultural crops, animal and dairy products, beverages, or processed or manufactured products or to products transported in cans, bottles, packages, kegs, or barrels.

Source: Added, L. 77, p. 1694, § 1; R & RE, L. 83, p. 1412, § 3.
RESOLUTION
of
COLORADO RIVER BOARD OF CALIFORNIA
concerning
Purchase or Lease of Upper Colorado River Basin Water Rights

The Colorado River Board of California opposes any attempt to amend the "Law of the River" in order to utilize Upper Colorado River Basin water rights which would try to circumvent the agreements heretofore made and relied upon by the Basin states for their water supplies. Such attempts would act to destroy the on-going cooperative activities of the Colorado River Basin states to the serious detriment of California's interests.

State of California )
County of Los Angeles ) ss.

I, DENNIS B. UNDERWOOD, Executive Secretary of the Colorado River Board of California, do hereby certify that the foregoing is a true copy of a resolution adopted by said Board at a Regular Meeting thereof, duly convened and held in Los Angeles, California, on the 10th day of October 1984, at which a quorum of said Board was present and acting throughout.

Dated this 10th day of October 1984.

DENNIS B. UNDERWOOD
Executive Secretary
INTERSTATE STREAM COMMISSION MOTION

I move that the Interstate Stream Commission find that any lease, for use outside the boundaries of the Upper Basin states of the Colorado River system, of the beneficial consumptive use of water apportioned to the Upper Basin of that system by the Colorado River Compact of 1922 would be not only detrimental to the interests of those states but also in violation of the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1948.
RESOLUTION OF ARIZONA WATER COMMISSION
CONCERNING SAN DIEGO WATER AUTHORITY'S
PROPOSED CONTRACT WITH THE GALLOWAY GROUP

WHEREAS, in 1968, in exchange for the commitment of southern California interests to support the Central Arizona Project, Arizona agreed to a priority senior to CAP for California's consumption of 4.4 million acre-feet per annum of Colorado River water and,

WHEREAS, said priority forces Arizona to rely for a substantial portion of the CAP supply on unused Upper Basin entitlements and,

WHEREAS, the San Diego Water Authority has entered into an option and is considering execution of a contract with the Galloway Group to purchase 300,000 acre-feet per annum of unused Upper Basin entitlements and,

WHEREAS, such a purchase, if implementable, would decrease the supply available to the CAP in like amount and,

WHEREAS, the proposed sale or lease is contrary to the Colorado River Compact, the decree in Arizona v. California and other elements of the "law of the Colorado River."

NOW, THEREFORE, BE IT RESOLVED that the Arizona Water Commission oppose the proposed sale by Galloway of unused Upper Basin entitlements and,
BE IT FURTHER RESOLVED that the Arizona Water Commission remind the San Diego Water Authority of the commitment of southern California water interests to support the CAP and that the Commission respectfully ask the Authority to abandon its efforts to contract with Galloway.

STATE OF ARIZONA
COUNTY OF MARICOPA

I, Patricia Jakolat, Secretary of the Arizona Water Commission do hereby certify that the foregoing is a true copy of a resolution adopted by said Commission at a regular meeting thereof, duly convened and held in Phoenix, Arizona on the 24th Day of October, 1984, at which a quorum of said Board was present and acting throughout.

Dated this 24th Day of October, 1984.

[Signature]
Patricia Jakolat
Secretary to the Commission
Mr. Nat Eggert
Chairman
San Diego County Water Authority
2750 Fourth Avenue
San Diego, California 92103

Dear Mr. Eggert:

I write to express my concern over the recent attempts by the Galloway Group to "sell" Upper Basin Compact rights to the San Diego Water Authority.

In the sixty years since the Colorado River Compact initiated the process of Basin development, our states have worked cooperatively to construct a series of laws and agreements, known as "The Law of the River" to share and use Colorado River water for the benefit of all. In recent years, Southern California and Arizona have worked together to authorize and construct the Central Arizona Project and to modify the Supreme Court's decree in Arizona v. California to assure California a priority for 4.4 million acre feet per annum of water. Both these agreements and the Law of the River are premised on unused Upper Basin allocations being available to the Central Arizona Project pending full development in the Upper Basin. Both the Metropolitan Water District of Southern California and Arizona have a strong interest in preserving these agreements for the benefit of both California and Arizona users.

Any decision by the Authority to contract with the Galloway group would be immediately countered by a lawsuit by the state of Arizona. Litigation would be expensive, prolonged and would ultimately vindicate the Law of the River and the illegality of any such contract. I expect
that such a lawsuit would be joined by other basin states and many California users who have a big stake in the current allocation laws and regulations.

Most important, a dispute of this type could undermine or destroy the teamwork that has brought so many benefits to all the basin states. I urge the Authority to reject the Galloway proposal and to continue working with us to develop future supplies for all.

Sincerely,

Bruce Babbitt
Governor

BB:dt

cc: Wes Steiner
WHEREAS, the San Diego County Water Authority, California (Authority), has executed an option agreement with the Galloway Group, Limited (Galloway), a Colorado corporation; and

WHEREAS, said option agreement gives the Authority the right to enter into a water service agreement with Galloway; and

WHEREAS, said water service agreement would purport to provide for Galloway to lease to the Authority a minimum of 300,000 acre-feet of water per year, which water would be delivered by Galloway from sources in the Upper Colorado River System by means of the natural channel of the Colorado River and its tributaries; and

WHEREAS, the water which would purportedly be leased to the Authority would be charged against the beneficial consumptive use of the Colorado River System which is apportioned in perpetuity to the Upper Basin by the Colorado River Compact; and

WHEREAS, the delivery of water outside of the state must conform to the requirements of Colorado's export statute (37-81-101, et seq., CRS); and

WHEREAS, the use of water from the Colorado River System is governed by and must be accomplished in accordance with the Colorado River Compact, the Upper Colorado River Basin Compact,
the decree of the United States Supreme Court in Arizona v. California, and numerous other laws which are commonly referred to as the "Law of the River;" and

WHEREAS, serious legal obstacles to the proposed lease exist under the compacts, other elements of the "Law of the River," and Colorado's export statute.

NOW, THEREFORE, BE IT RESOLVED by the Colorado Water Conservation Board in regular session assembled on the 15th day of November, 1984, in Denver, Colorado, that the Board opposes the proposed lease of water from Galloway to the Authority.

BE IT FURTHER RESOLVED that the Board, pursuant to its statutory authorities and duties, shall take, and urges the Governor, the Attorney General, and the State Engineer to also take, any and all steps necessary to prevent the proposed lease and to otherwise protect the state's interests.

BE IT FURTHER RESOLVED that the Secretary of the Board is directed to forward certified copies of this resolution to the Governor, the Attorney General, the State Engineer, the Colorado General Assembly, the responsible water officials of the other Colorado River Basin states, the United States Commissioner of Reclamation, the Upper Colorado River Commission, the Authority, and Galloway.