

## THE LAW OF THE COLORADO RIVER: AN OPPORTUNITY FOR CHANGE

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*This article is part of Snell & Wilmer's series covering current issues affecting Arizona's water supply.*

The U.S. Department of the Interior announced on May 22, 2023, an agreement with the Lower Basin States to conserve 3 million acre-feet (MAF) of water in Lake Mead for the next four years, with 2.3 MAF paid for with funding from the Inflation Reduction Act. The balance of 700,000 acre-feet will need to be conserved voluntarily by Arizona, California, and Nevada. In addition, it appears likely that this agreement will be added as an “action alternative” to the draft supplemental environmental impact statement (SEIS) released last month, so that it is more fully vetted by the Basin States, stakeholders, and the public. The SEIS is, essentially, a bridge to new operation guidelines that will be developed in the Post-2026 Colorado River Reservoir EIS process. These processes are all within the framework of the “Law of the River,” a complex system of legal decisions, agreements, compacts, and policy that guides how the Colorado River system is managed. This article, Part 4 in our series, attempts to provide some much-needed context to these agreements.

Following the troubles of the Colorado River over the last several years has often felt like a slow ride to impending doom. In August 2022, the U.S. Bureau of Reclamation (USBR) projected that the water levels at Lake Mead had a 3% chance of reaching the “minimum power pool” (the minimum water level needed to continue generating power through the turbines) by the year 2027. And in the more recent draft SEIS released last month, USBR stated that “it is foreseeable that without appropriate responsible actions and under a continuation of poor hydrologic trends, major Colorado River reservoirs could continue to decline to “dead pool” in coming years.”

What a difference a good winter makes. Snowpack in the Upper Colorado River Basin reached 152.43% of average on April 8, 2023, and USBR now projects that the level of Lake Mead will reach 1,067.32 feet by the end of December 2023, 22.5 feet higher than it was at the same time last year. Similarly, Lake Powell is forecasted to rise 70.6 feet between March 2023 and September 2024. But by no means does this positive circumstance resolve shortages on the river. The Upper Basin would likely need at least a decade of wet years to fill Lake Powell. Still, the relief of a wet winter with above-normal snowpack has provided an opportunity to make critical adjustments within the Law of the River framework that will help protect critical water and power resources for the southwestern United States.

### **The Law of the River**

The Law of the River is comprised of court decisions, decrees, laws, policies, and agreements, so numerous as to be impractical to discuss them all here. But at the foundation of the Law of the River are the following:

- **1922 Colorado River Compact.** The Compact divides the Colorado River into the Upper Basin (Utah, New Mexico, Wyoming, and Colorado), and the Lower Basin (Arizona, Nevada, and California). Under the Compact, each basin is entitled to 7.5 MAF annually.

- **1928 Boulder Canyon Project Act.** The Boulder Canyon Project Act apportions the Lower Basin's 7.5 MAF in the amounts of 2.8 MAF to Arizona, 0.3 MAF to Nevada, and 4.4 MAF to California.
- **1948 Upper Basin Compact.** The Upper Basin Compact apportions the Upper Basin's 7.5 MAF on a percentage basis, in the amounts of 51.75% to Colorado, 11.25% to New Mexico, 23% to Utah, and 14% to Wyoming.
- **1964 U.S. Supreme Court Decree in *Arizona vs. California*, 376 U.S. 340.** This case confirmed the Boulder Canyon Project Act's congressional allocation of Lower Basin waters among Arizona, California, and Nevada. The Court also held that the Act's allocations of water were from the "mainstream" of the river and did not include each state's in-state tributaries to the river (e.g., Arizona's Gila River), that the river is under federal regulatory control by the Secretary of the Interior (delegated to USBR), and that Colorado River water may only be used pursuant to a contract with the USBR.
- **1968 Colorado River Basin Project Act.** The Colorado River Basin Project Act authorized construction of the Central Arizona Project (CAP) Canal. As part of a political compromise to gain congressional approval of the CAP, Arizona agreed to subordinate the priority of CAP's water and other post-1968 Colorado River water to California.

In addition to the division of 15 MAF to the Basin States, there are also entitlements that belong to other sovereign nations. There are 22 federally recognized tribes in the Colorado River Basin that are entitled to 3.2 of the 15 MAF. Outside of the 15 MAF, Mexico is entitled to 1.5 MAF of Colorado River water per year under the Mexican Water Treaty of 1944.

The problem with all these allocations is that at the time the Colorado River Compact was developed, it was believed that the average flows were as much as 16.4 MAF. River flows have proven to be much less than that over time. According to the Congressional Research Service, annual flows between 1906 and 2022 were approximately 14.6 MAF, and as low as 12.1 MAF since 2000. Thus, even before any withdrawals are made and before the climate or drought reduces the flows on the river and the ability to fulfill entitlement deliveries, there already is not enough water to go around. This is what is commonly referred to as the "structural deficit." The structural deficit makes the priority system especially important for understanding how deliveries might be curtailed when there is a shortage of water on the river.

USBR recognizes a six-tiered priority system of rights to Colorado River water:

- **First Priority: Present Perfected Rights.** These are rights that were established (or perfected) prior to adoption of the Boulder Canyon Project Act on June 25, 1929. Tier 1 Rights include several tribes, irrigation districts, towns/cities, and individual landowners on the river.
- **Second Priority.** Second priority rights satisfy several federal reservations and perfected rights, including wildlife refuges, that were established prior to September 30, 1968, the date that U.S. President Lynden Johnson signed the Colorado River Basin Project Act into law, which authorized the CAP.

- **Third Priority.** Third priority right holders include many irrigation districts and other water users along the river, satisfying contracts between the U.S. and water users that were executed before September 30, 1968.
- **Fourth Priority.** Fourth priority rights satisfy entitlements established after September 30, 1968. Fourth priority right holders are comprised of entities that have Section 5 contracts, including the Central Arizona Water Conservation District (which controls the CAP canal), which are contracts with the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act, 43 U.S.C. § 617, et. seq.
- **Fifth Priority.** These are Section 5 contracts that are satisfied with unused entitlements or apportionments.
- **Sixth Priority.** These are Section 5 contracts that are only satisfied by any surplus water in the system.

As we mentioned above, many of the Arizona water rights prioritized in this system are also subservient to California due to the grand bargain achieved to win congressional approval of the Colorado River Basin Project Act. Still, these entitlements are highly valuable, especially those that are higher in priority and may be less likely to be reduced when supplies are low. As water supplies continue to grow scarce elsewhere, or where needs for additional supplies are greater, entitlement holders may be tempted to transfer their entitlements. For some, the prospect of water being transferred away from the river to distant users such as cities and towns raises a concern about the loss of agriculture throughout the Colorado River Basin. But transfers also provide an opportunity for growing communities that need water while promoting a market-based solution to allocating water resources.

### **Drought in the 21<sup>st</sup> Century**

The Colorado River Basin has been in a significant drought since 2000, and the effects of the developing drought were quickly realized. In 2007, USBR issued the *December 2007 Record of Decision on Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations of Lake Powell and Lake Mead* (Interim Guidelines), which prescribed cuts of water deliveries to some of the states in the Colorado River Basin when the water at Glen Canyon Dam (Lake Powell) and Hoover Dam (Lake Mead) reach certain levels, or *tiers*. If Lake Mead falls past tiers at 1,075, 1,050, or 1,025 feet, water allocations are significantly reduced for both Arizona and Nevada, with the cuts to water deliveries increasing at each tier. The Interim Guidelines also created the Intentionally Created Surplus Program, allowing Lower Basin States to earn water credits in Lake Mead by implementing certain conservation measures in their states, and then take delivery of those credits at a later date.

Despite the interim measures, conditions on the river continued to worsen. In 2019, Congress passed the Colorado River Drought Contingency Plan Authorization Act, a law authorizing the Secretary of the Interior to execute agreements with the Upper and Lower Basin States for managing the Colorado River. For their part, the Lower Basin States (Arizona, California, Nevada) voluntarily adopted the Lower Basin Drought Contingency Plan (DCP), which added an additional tier, Tier Zero, to the Interim Guideline tiers to provide even greater protection in shortage conditions. The DCP also makes the cuts deeper when the tiers are reached, and even California takes cuts to their deliveries in the higher tiers (California was not required to take cuts under the Interim Guidelines). The Upper Basin States (Colorado, New Mexico, Utah, and Wyoming) created a Drought Response Operations Plan and adopted the

Drought Response Operations Agreement (DROA), which allows for the temporary movement of water from certain reservoirs in the Upper Basin—Aspinall, Flaming Gorge, and Navajo—to Lake Powell to help ensure that the water level does not drop below the level needed to generate power at Glen Canyon Dam. There is also an exploratory program to pay for demand reductions in the Upper Basin, which is in the midst of feasibility study.

These measures have bought the Basin some time, but time may be running out. The plan announced yesterday to keep an additional 3 MAF in Lake Mead is intended as a bridge to the post-2026 operating guidelines that are under development. An EIS Notice of Intent for post-2026 operations is anticipated to be published in the coming weeks.

## **Conclusion**

The Colorado River is a critical resource for the entire Basin, and an essential component of Arizona's water supplies. The flexibility of the Law of the River and the ability of the Basin States to effectively adapt to change has been critical to successfully protecting the Colorado River as a resource we can use to generate power, grow food, provide drinking water to communities, and support wildlife. To successfully navigate an uncertain future on the Colorado River, stakeholders must continue to cooperate to reach consensus and move forward together with bold solutions.

This concludes Part 4 of our series discussing the challenges and opportunities presented by Arizona's diverse water supplies. Over the next two weeks we will focus our attention on long-term storage credits and the growing importance of reclaimed water (treated wastewater recycled for new uses).