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Does the Upper Basin Have a Delivery Obligation or an Obligation Not to Deplete the Flow of the Colorado River at Lee Ferry?

Colorado River Governance Initiative

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COLORADO RIVER GOVERNANCE INITIATIVE, DOES THE UPPER BASIN HAVE A DELIVERY OBLIGATION OR AN OBLIGATION NOT TO DEplete THE FLOW OF THE COLORADO RIVER AT LEE FERRY? (Natural Res. Law Ctr., Univ. of Colo. Law Sch. 2012).

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Does the Upper Basin have a Delivery Obligation or an Obligation Not to Deplete the Flow of the Colorado River at Lee Ferry?

A product of the Colorado River Governance Initiative¹

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Table of Contents

Introduction.....	2
The Colorado River Compact (1922)	3
The Meaning of Article III(d)	4
Equity and Equitable Apportionment	5
The Upper Colorado River Basin Compact (1948)	8
The Colorado River Storage Project Act (1956).....	12
Arizona v. California (1963).....	16
The Colorado River Basin Project Act (1968).....	17
Colorado River Basin Salinity Control Act (1974).....	21
Conclusion	23

¹ This research was primarily led and conducted by CRGI researchers Britta Beckstead and Cory Hoerner in collaboration with the full CRGI research team. It is a “working document,” subject to revision, and is not offered as a definitive legal opinion, but rather an assemblage of relevant ideas and source materials. Comments are welcomed. <http://waterpolicy.info/projects/CRGI/>

Introduction

In 1927 Arizona Governor George Hunt, one of the most vigorous opponents of the Colorado River Compact, opined: “Water is the life blood of the western states, and without it, they die . . . even human life itself is no more jealously guarded by our laws in the semi-arid states of the west than is the use of water.”² Nearly a century later, this statement is as true as ever, in large part because the Colorado River is overallocated and its flow is declining, thereby ensuring that some users will not receive waters promised to them in the basinwide water apportionment scheme.³ Determining which states will be shorted (and by how much) is a highly contentious legal, political, and scientific issue.

At the heart of the legal issue are those rules describing how water is to be shared between the states of the Upper Basin (Colorado, New Mexico, Utah and Wyoming) and Lower Basin (Arizona, California and Nevada), the primary focus of the seminal 1922 Colorado River Compact. The language of the Compact (specifically Article III(a) and (d)) supports different interpretations as to the priority of water rights between the Upper and Lower Basins. Traditionally, the prevailing interpretation has been that the Upper Basin has the obligation to deliver 75 million-acre feet every ten years (an average of 7.5 million acre-feet/year) downstream to the Lower Basin, and if this leaves insufficient water for the Upper Basin to consume the 7.5 million acre-feet promised in Article III(a), then the Upper Basin must bear that shortage in its entirety. However, a counter interpretation more favorable to the Upper Basin is that they do not have a delivery obligation, but rather an “obligation not to deplete” the flow of the river below an average of 7.5 million acre-feet/year based on the language used in Article III(d) of the Compact. The basis for this interpretation comes from the actual use of the word “depletion” in the Compact, defined in one Bureau report as “the reductions in virgin stream flow of the Colorado River at Lee Ferry and at the international boundary resulting from *man-made improvements*” (emphasis added).⁴ Therefore, to the extent that climate change and variability (whether anthropogenic or not) are responsible for flows insufficient to fulfill all

² George Hunt, Governor of Arizona, *Speech at the Conference of Governors Commissioners and Advisors of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming on the Colorado River* (Aug. 22 1927) (transcript published by the Arizona Commission on the Colorado River on Sept. 24, 1927).

³ For a summary of this issue, see the CRGI report: *Rethinking the Future of the Colorado River* (December, 2010).

⁴ BUREAU OF RECLAMATION, *THE COLORADO RIVER: A NATURAL MENACE BECOMES A NATIONAL RESOURCE* 107 (1946).

promised allocations, this is a problem that cannot be attributed to the actions of Upper Basin water users, and Upper Basin water users thus cannot be expected to bear the full burden of any such flow deficiencies.

There are two important aspects to determining the correct interpretation of the Colorado River Compact on this matter: (1) the text of the document itself and subsequent legislation built upon it (the so-called “Law of the River”); and (2) the intent of the Compact’s negotiators and later legislators involved in crafting the Law of the River.⁵ This material is reviewed in the following pages, focusing on the following documents: the Colorado River Compact (1922), the Upper Colorado River Basin Compact (1948), the Colorado River Storage Act (1956), *Arizona v. California* (1963), the Colorado River Basin Project Act (1968), and the Colorado River Basin Salinity Control Act (1974). This examination of the text of key Law of the River elements and their legislative history reveals statements supportive of both interpretations, thereby putting a premium on the issue of legislative intent. However, determining the intent of the parties is complicated by the fact that those involved often used the terms “delivery” and “deplete” in relation to Article III(d) interchangeably, sometimes even adjusting the wording based on whichever side needed more convincing to accept the proposal at issue. Given these complications, this paper does not pretend to offer a definitive answer to this seminal “delivery-or-deplete” question, but rather serves to highlight key issues, data, and arguments associated with this controversy.

The Colorado River Compact (1922)

The Compact provides two interwoven threads contributing to the “delivery-or-deplete” question, namely: the practical meaning of the language in Article III(d); and the role of equity and equitable apportionment in the allocation of risk among the basins.

⁵ *Hearings on S. 75 and S.J. Res. 4 Before the Comm. On Interior and Insular Affairs*, 81st Cong. 1 (1949) (statement of James H. Howard, General Counsel for Metropolitan Water District of Southern California: “The primary rule of compact interpretation – and a compact is a contract – is to ascertain the intent of the parties at the time they made the deal...of course, the words they use are the primary indication of their intent”).

The Meaning of Article III(d)

The strongest argument for interpreting the Upper Basin’s responsibility as an obligation not to deplete (rather than a delivery obligation) is in the language of the Colorado River Compact’s Article III(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.”⁶ This Article explicitly uses the term deplete rather than deliver—in contrast to Article III(c), which uses “deliver” when describing the Upper Basin’s obligation to fulfill its share of the Mexican Treaty obligation.⁷ In fact, regarding Article III(d), the merits of the term “delivery” were discussed, with a majority of the commissioners⁸ concluding the word should not be used in the Article:

Judge Clifford Sloan: I think the word “delivery” ought to be eliminated.

Herbert Hoover: This refers to 75,000,000 feet. It is in the sense of a delivery.

New Mexico Commissioner, Stephen Davis, Jr.: I don’t like the word delivery very much.

Herbert Hoover: You could change it to flow.

Colorado Commissioner, Delph Carpenter: I don’t know how the upper states could withhold the use of water on its way.

Stephen Davis, Jr.: I think ‘flow’ is better than ‘delivery.’

Judge Clifford Sloan: That changes the whole meaning.

Stephen Davis, Jr.: The word ‘delivery’ is not the right word. I think either one of two things: either strike out those words or put in “a flow of water.” I think it is better to strike out the words.⁹

The plain meaning of the language of Article III(d) is crucial to its interpretation, because each word was presumably chosen by the Commission for a reason and to avoid

⁶ Colorado River Compact, art. III(d), 70 Cong. Rec. 324, 324-25 (1928).

⁷ Colorado River Compact, art. III(c), 70 Cong. Rec. 324, 324-25 (1928).

⁸ Five Commissioners, Frank Emerson (WY), R.E. Caldwell (UT), W.F. McClure (CA), Stephen Davis, Jr. (NM), and J.G. Scrugham (NV) voted to strike the term. Interestingly, much of the opposition to taking out the word “delivery” came from Delph Carpenter (CO), an Upper Basin representative Colorado River Compact negotiations, Session 25 in Sante Fe, 245, 256 (Nov. 23, 1922). W.S. Norviel of Arizona also supported this opinion.

⁹ Colorado River Compact negotiations, Session 25 in Sante Fe, 245, 256 (Nov. 23, 1922).

misinterpretation.¹⁰ While the language selected did not include the phrase “delivery obligation,” the question remains whether a *de facto* delivery obligation exists? As noted earlier and discussed in subsequent sections, several commentators at the time, and many more since, interpret III(d) as a delivery obligation. Perhaps most influential at the time was the interpretation offered by Herbert Hoover, the federal commissioner in the Compact negotiations. Responding to a question in 1923 from Arizona Congressman Carl Hayden regarding the practical meaning of Article III(d), Hoover remarked: “[I]n the improbable event of a deficiency, the Lower Basin has the first call on the water up to a total of 75,000,000 acre-feet each 10 years.”¹¹ But even this seemingly definitive statement comes with a caveat, as the statement may have been shaped by Hoover’s efforts to convince a skeptical Arizona to ratify the Compact.

Equity and Equitable Apportionment

A second (and related) argument in favor of the “not deplete” interpretation is that the purpose of the Colorado River Compact was to divide the waters equitably between the two basins.¹² The purposes of the Compact set forth in Article I include “the equitable division and apportionment of the use of the waters of the Colorado River System.”¹³ This provision, as well as the Compact itself, was made in response to the holding of *Kansas v. Colorado* in which the court rejected both the riparian and prior appropriation doctrines in favor of equitable

¹⁰ FRANK C. EMERSON, IN RE COLORADO RIVER COMPACT 13 (1923), available at <http://digitool.library.colostate.edu/webclient/DeliveryManager?pid=63647> (accessed July 11, 2011). Note that according to Webster’s 1913 Revised Unabridged Dictionary, the definition of deplete is “to empty or unload,” while deliver means “to give, or transfer; to put into another’s hand or power; to commit; to pass from one to another.” To not empty is a very different obligation than to transfer, but the other definition of deplete, “unload,” is much more similar to the definition of deliver. This similarity between the two definitions at the time the compact was written could have led to some of the confusion faced today. *Webster’s Revised Unabridged Dictionary*, 1913 ed., THE ARTFL PROJECT, <http://machaut.uchicago.edu/websters> (accessed July 14, 2011).

¹¹ John U. Carlson & Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries between the Upper and Lower Basins*. 32 Rocky Mt. Min. L Inst. §21.02(1) (1986).

¹² John U. Carlson & Alan E. Boles, Jr., *Contrary View of the Law of the Colorado River: An Examination of Rivalries between the Upper and Lower Basins*. 32 Rocky Mt. Min. L Inst. §21.03(2) (1986). “The current presupposition that the Upper Basin should be subordinated to the needs of the Lower violates the principles upon which the law of the River was founded.”

¹³ Colorado River Compact, art. I, 70 Cong. Rec. 324, 324-25 (1928).

apportionment of waters between states.¹⁴ Thus, the members of the Commission used Article III(a) to divide the water believed to flow through the Colorado River equally between the two basins.¹⁵ The “not deplete” interpretation views Article III(a) as overriding all the provisions that follow it because it allocates 7.5 million acre-feet equally to each basin and is stated “so prominently and emphatically.”¹⁶ Carpenter himself viewed Article III(a) as being the clearly superior provision and thought of the Compact’s distribution of the water supply definitively as:

1) 7,500,000 acre feet beneficial consumptive use each year is permanently allocated to the Upper Basin; 2) 7,500,000 acre feet plus 1,000,000 acre feet beneficial consumptive use each year is allocated to the Lower Basin, irrespective of where used or whether diverted from the Gila and other tributaries or from the main stream; 3) Mexico is to receive whatever amount shall be fixed by treaty; 4) any residue remaining at the end of forty years shall be equitably apportioned among the seven states.¹⁷

Furthermore, the similarity between the numbers described in Article III(a) and Article III(d) could have been merely a coincidence. According to a letter by Delph Carpenter to Northcutt Ely, the Secretary of the Interior in 1950, the delivery of 75,000,000 acre feet of water every ten years “bears no direct relation” to the 7.5 million acre-feet allocated to the Lower Basin by Article III(a).¹⁸ There is a good chance that time has blurred the distinction between these two Articles – as one academic quipped “the commissioners understood the difference between III(a) and III(d), but some of their successors in public office did not.”¹⁹

The argument in favor of equity as a controlling premise of the allocation further rests on the idea that the Upper Basin would never had agreed to a “delivery obligation” framework that required it to completely shoulder the burden of any persistent drought or permanent change in the flow regime.²⁰ In fact, during the negotiations Delph Carpenter stated just that:

¹⁴ Gregory J. Hobbs, Jr., *Colorado River Compact Entitlements Clearing Up Misconceptions*, 28 J. Land Resources & Envtl. L. 83, 84 (2008).

¹⁵ Colorado River Compact, art. III(a), 70 Cong. Rec. 324, 324-25 (1928).

¹⁶ John U. Carlson & Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries between the Upper and Lower Basins*. 32 Rocky Mt. Min. L Inst. §21.05ii(a)(1986).

¹⁷ Papers of Delph E. Carpenter and Family, December 4, 1950 Letter to Northcutt Ely ¶4, available at <http://lib.colostate.edu/archives/findingaids/water/wdec.html> (accessed July 8, 2011).

¹⁸ Papers of Delph E. Carpenter and Family, December 4, 1950 Letter to Northcutt Ely ¶1, available at <http://lib.colostate.edu/archives/findingaids/water/wdec.html> (accessed July 8, 2011).

¹⁹ Daniel Tyler, *Delphus Emory Carpenter and the Colorado River Compact of 1922*, U. Denv. Water L. Rev. 251, 267 (1997).

²⁰ John U. Carlson & Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries between the Upper and Lower Basins*. 32 Rocky Mt. Min. L Inst. §21.05(1)(b)(i) (1986). “The question remains, though, whether the parties believed that the Upper Basin had been allocated the risk of

[I]t seems to me incumbent upon the lower states to be reasonable in the demand of guarantee. . . an absolutely preferred delivery should not run wholly to the lower states. . . in making a division of the water it should rather be the disposition to lay the burden of water shortage, a drouth, upon the whole territory.²¹

In a later session, Carpenter again stressed the inequity of requiring a delivery obligation:

[The Lower Basin is] unfettered in the entire absorption of the lower streams, to the extent of absolute dominion thereof, while there is imposed upon [the Upper Basin] the burden, whether an abundance of water is supplied by Nature or not, of meeting this guaranty. . . the burden of saying that we will do such a thing, and if we fail, then we violate the compact, leaves upon us the burden of opening our structures, and perhaps utterly depriving ourselves of water, to comply with the contract.”²²

Also, the commissioners may have wanted the quantity in Article III(d) to be adjustable if the amount proved too much.²³ Above all, one of the main reasons for the Upper Basin even entering into the Compact was their fear that the Lower Basin would gain a legal right to more water through faster development under the doctrine of prior appropriation.

The argument against this line of reasoning is that the delivery obligation was part of the agreement between the Basins and was designed to allay each of their respective fears. The Upper Basin was afraid that under prior appropriation the Lower Basin would seize all of the water²⁴, a concern exacerbated by the decision in *Wyoming v. Colorado* where the Court upheld the use of the prior appropriation doctrine in controversies over interstate waters.²⁵ The Lower Basin, on the other hand, wanted to be guaranteed water in a drought²⁶ and have the ability to

shortages of water by committing to Article III(d) not to deplete the flow of the River below 75 m.a.f. Probably not. It is significant that after November 15 the word ‘guaranty’ effectively disappeared from the Record of negotiations.”

²¹ Colorado River Compact negotiations, Session 13 in Santa Fe, 95, 117 (Nov. 13, 1922).

²² Colorado River Compact negotiations, Session 17 in Santa Fe, 89, 97 (Nov. 15, 1922).

²³ Colorado River Compact negotiations, Session 22 in Santa Fe, 136, 143 (Nov. 22, 1922) (statement of Frank Emerson, “...if it were found 75,000,000 were in excess of the amount needed there would want to be a reconsideration of that, surely”).

²⁴ Eric Kuhn, *The Colorado River: The Story of a Quest for Certainty on a Diminishing River* (Roundtable Edition), Colorado River Water Conservation Board 23 (May 8, 2007).

²⁵ *Wyoming v. Colorado*, 259 U.S. 419 (1922).

²⁶ Papers of Delph Carpenter and Family, December 5, 1935 Letter to Northcutt Ely ¶1, <http://lib.colostate.edu/archives/findingaids/water/wdec.html> (accessed July 8, 2011). “The paragraph [Article III(d)] originated solely out of a fear entertained by Commissioners for California and Arizona, that the Upper States would exceed their allocation and would unduly deplete the supply to the Lower Basin in a period of extreme drought.”

develop it without Upper Basin opposition.²⁷ As a compromise, the Upper Basin agreed to ensure an average annual delivery at Lee Ferry of 7.5 million acre-feet and a cap was put on the amount of water available to the Lower Basin (7.5 million acre-feet plus an additional 1.0 million acre-feet per year).²⁸ By their very nature, compacts require compromise and instances of give and take.²⁹ The Colorado River Compact commissioners may have viewed this agreement as equitable apportionment in a more figurative sense:

This is a guaranty on the part of the upper states to deliver to the lower states. . . this figure is an expression of an equitable apportionment under the circumstances that now exist and will exist on the river, as a whole, so you have got those two things - equitable apportionment and a guaranty of filling the lower states' requirements.³⁰

The text of Article III(b)—awarding an additional 1 million acre-feet to the Lower Basin—also supports the idea that an “equitable” division of water does not necessarily mean an “equal” division in volume or, presumably, risk of curtailment.³¹ Similarly, Article III(e) specifies that the Upper Basin cannot “withhold water. . . which cannot reasonably be applied to domestic and agricultural uses.”³²

²⁷ James S. Lochhead, Colorado Commissioner to the Upper Colorado River Compact Commission, *Statement before the House of Representatives Resource Committee Concerning the Proposal to Drain Lake Powell*, (September 23, 1997), available at <http://www.lakepowell.org/testimony/lochhead.htm> (accessed on July 7, 2011)

²⁸ Colorado River Compact, art. III(d) and (b), 70 Cong. Rec. 324, 324-25 (1928).

²⁹ *Hearings on S. 728 and S. 1274 before the Committee on Irrigation and Reclamation*, 70th Cong. 280 (1st Session 1927) (statement of Mulford Winsor, Secretary of the Arizona Colorado River Commission, “in the very nature of cases calling for treaties there must be compromises: there must be a yielding here and there”).

³⁰ Colorado River Compact Negotiations, Session 17 in Santa Fe, 89, 90-4 (Nov. 15, 1922); see generally Charles J. Meyers, *The Colorado River*, 19 Stanford Law Review 1, 11-12 (1966) (describing of the motivations behind the two Basins agreeing to the Compact).

³¹ John U. Carlson & Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries between the Upper and Lower Basins*. 32 Rocky Mt. Min. L Inst. §21.05(1)(b)(i) (1986). “There is a general misconception that the intent of the compact was to split the use of the water 50/50. As you can see with Article III(b), that is not the case.”

³² Colorado River Compact, art. III(e), 70 Cong. Rec. 324, 324-25 (1928); argued by Lawrence J. MacDonnell, David H. Getches, & William H. Hugenberg, Jr. *The Law of the Colorado River: Coping with Severe Sustained Drought*. 31 Water Res. Bulletin 825, 829 (1995).

The Upper Colorado River Basin Compact (1948)

By the 1940s, the commissioners negotiating the Upper Colorado River Basin Compact were well aware of the fact that there was far less than 17.5 million acre-feet of water in the river (the total amount allocated in Article III of the 1922 Compact). This was a major point of concern, especially since the *de facto* delivery obligation interpretation of Article III(d) dominated most of the negotiations, the text of the enacted Upper Basin Compact, and many subsequent meetings.³³ The 1948 Upper Colorado River Basin Compact served two main purposes: (1) apportioning the Upper Basin’s allocation among the states (Colorado, New Mexico, Utah and Wyoming)³⁴; and (2) dividing the responsibility of each state for the delivery of water to the Lower Basin.³⁵ While the language of Article IV in the Upper Basin Compact uses the word “deplete” and not “deliver,”³⁶ the majority of the provisions use delivery in reference to the Upper Basin’s obligation.³⁷

During the negotiations of the Upper Colorado River Basin Compact, the overwhelming majority of the Upper Colorado River Commissioners acknowledged that the Upper Basin had a delivery obligation. As an illustration, Colorado’s Commissioner Judge Clifford Stone provided the following metaphor for the other commissioners:

These states in signing the Colorado River Compact have already pledged themselves – and it is the purpose of these states I know to observe the Colorado River Compact – to deliver 75,000,00 acre feet of water over continuing ten-year periods at Lee Ferry. . . figuratively we are given a pail of water. . . we have got to

³³ Upper Colorado River Basin Compact negotiations, Meeting No. 3, Public Hearing in Grand Junction, Volume I, 51 (Oct. 30, 1946) (statement by Judge White: “[Delph Carpenter] assured me at the time [of the Colorado River Compact], and he meant it, that we were certainly protected in the Upper Basin States by agreeing to furnish only 7,500,000 acre feet at Lee Ferry. With the figures today, I think the engineers will find that maybe Delph Carpenter was mistaken at that time and it is going to be a job to furnish that amount of water or ten times that amount of water averaged in the ten year period”).

³⁴ A small quantity (50,000 acre-feet) was also allocated to Arizona in recognition of northeastern Arizona’s location in the Upper Basin. Upper Colorado River Compact, C.R.S.A. §37-62-101, art. III(a)(1).

³⁵ Upper Colorado River Compact, C.R.S.A. §37-62-101, art. I(a).

³⁶ “[I]n 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.” Upper Colorado River Basin Compact, C.R.S.A. §37-62-101, art. IV.

³⁷ Upper Colorado River Basin Compact, C.R.S.A. §37-62-101:

art. I(a): “The major purposes of this Compact are...to establish the obligations of each State of Upper Division with respect to the deliveries of water required to be made at Lee Ferry by the Colorado River Compact...”

art. III(c): “delivery at Lee Ferry”

art. V(b)(1) and (c): “obligations to deliver water at Lee Ferry,” “assure deliveries at Lee Ferry”

art. IX(a): “the obligation of the States of the Upper Division to make deliveries of water at Lee Ferry”

empty out half of that pail of water for the Lower Basin, and then we allocate among ourselves, among five states, what is left.³⁸

The permanence of the 7.5 million acre-feet that must be delivered to the Lower Basin was echoed in both the studies of the Engineering Advisory Committee and the interpretations of the legal staff. One Colorado Engineer reminded the Commission that the obligation was a “fixed, static quantity of water” and an amount “upon which the Lower Basin [were] basing their plans for the future.”³⁹ The legal counsel for Wyoming, W.J. Wehrli, claimed that if the Colorado River Compact Commission had really intended to create an obligation “not to deplete,” that they would have worded Article III(a) in the following way:

‘There is hereby apportioned from the Colorado River system in perpetuity to the Upper Basin an amount of water which will deplete the flow at Lee Ferry not to exceed 7,500,000 acre feet and an amount of water to the Lower Basin which will deplete the flow at the International boundary not to exceed 7,500,000 acre feet.’⁴⁰

Throughout the committee hearings on the ratification of the Upper Colorado River Basin Compact and the early years of the Upper Colorado River Commission’s meetings, the sentiment supporting a delivery obligation continued. In one congressional hearing, Royce Tipton, a Reclamation Engineer, described the seniority of the Lower Basin water rights in commenting that while the Upper Basin had the right to withdraw from the river 7.5 million acre-feet, this amount was first subject to the delivery at Lee Ferry and any other treaty obligations.⁴¹ During that same session, this question was posed to him: “Are you convinced that by proper engineering the Upper Basin will ultimately be able to use its apportionment of 7,500,000 acre feet of water annually, and, at the same time, be able to deliver according to their contract an average of 7,500,000 acre feet for the Lower Basin?” Tipton coyly responded: “the Upper Basin can utilize the 7 ½ million acre-feet if it in turn also can make its required delivery at Lee

³⁸ Upper Colorado River Basin Compact negotiations, Meeting No. 3, Public Hearing in Farmington, Volume I, 163 (Nov 2, 1946) (statement by Colorado Commissioner Judge Clifford Stone).

³⁹ Upper Colorado River Basin Compact negotiations, Meeting No. 5 in Denver, Volume I, 80 (Dec. 1-4, 1946) (statement by Mr. Patterson, Colorado Engineer).

⁴⁰ Upper Colorado River Basin Compact negotiations Meeting No. 7 in Vernal, Volume I, 57-8 (July 7-21, 1948) (statement by W.J. Wehrli, Special Counsel for Wyoming). He went on to say that he did not believe one could interpret Article III(d) of the Colorado River Compact as the Upper Basin’s obligation not to deplete without also construing it as meaning depletion at the International Boundary for the Lower Basin and that this question of interpretation would ultimately reach the Supreme Court.

⁴¹ *Bills to Grant the Consent of the United States to the Upper Colorado River Basin Compact, H.R. 2325-2334: Hearing Before Subcomm. on Irrigation and Reclamation, 81st Cong. 38-9 (1949), available at http://www.colorado.edu/colorado_river/docs/ucrbc_1949.pdf (accessed July 1, 2011)*

Ferry...it will always make its required delivery at Lee Ferry,”⁴² and therefore stated that the Lower Basin rights to 7.5 million acre-feet are senior to the Upper Basin’s 7.5 million acre-feet allocation. Similarly, in remarks to the newly established Upper Colorado River Commission in 1953, Senator Clinton Anderson (D-NM) discussed the potential consequences of Article III(d) for the Upper Basin:

I think it is too bad that the Upper Basin states always get the residue...they have their obligations to fulfill and they can have what is left under the Compact, and I think it is going to pose a very serious problem...when you are in a position of taking what is left and the other people are guaranteed full amounts, and the river doesn’t have the full amount in it you are counting on, somebody gets short changed. I would give a lot if it could be switched so the Lower basin could guarantee us our part and they could have all that is left over, so far as I am concerned.⁴³

Only a small minority of Upper Basin interests appeared to grasp the significance of conceding to the delivery obligation interpretation. One of the strongest voices came from Judge Jean S. Breitenstein, a legal advisor for Colorado throughout the Compact negotiations, during a 1951 Upper Colorado River Commission meeting:

The obligation by III(d) in the Compact is not to deliver 75,000,000 acre feet of water in any ten-year period. . . I think it would be well to read that: ‘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 10 consecutive years. . .’ it is that we will not cause the flow to be depleted; not that we will deliver.⁴⁴

Perhaps even more telling than the statements of the commissioners and other representatives is the fact that the Upper Colorado River Basin Compact used percentages instead of fixed quantities to allocate water among the Upper Basin states because of uncertainty over the total amount of water that would be available to the Upper Basin after satisfying the

⁴² *Bills to Grant the Consent of the United States to the Upper Colorado River Basin Compact, H.R. 2325-2334: Hearing Before Subcomm. on Irrigation and Reclamation, 81st Cong. 49 (1949), available at http://www.colorado.edu/colorado_river/docs/ucrbc_1949.pdf (accessed July 1, 2011)*

⁴³ Upper Colorado River Commission Official Record, Meeting No. 22 in Washington, D.C., Volume V, 12-3 (March 7, 1953).

⁴⁴ Upper Colorado River Commission Official Record, Meeting No. 9 in Denver, III, 34-5 (Jan. 20, 1951) (statement by Jean Breitenstein, Colorado Legal Advisor).

downstream delivery obligation.⁴⁵ Colorado was allocated 51.75 percent, New Mexico 11.25 percent, Utah 23 percent, and Wyoming 14 percent.⁴⁶

The Colorado River Storage Project Act (1956)

The Colorado River Storage Project Act of 1956 (CRSP) authorized a number of storage projects throughout the Upper Colorado River Basin, including, most notably, the Glen Canyon Dam, which is located only 16 miles upstream from Lee Ferry, the division point between the Upper and Lower Basins. The operation of Glen Canyon Dam has since become the Upper Basin's most direct method of regulating the flow of water through Lee Ferry and to the Lower Basin.

The relevant text from the Colorado River Storage Project Act of 1956 addresses Article III(d) of the Colorado River Compact only in generalities, likely due to the heated debates during committee meetings over the interpretation of the article. The existence of a delivery obligation is perhaps alluded to in the introduction of the Colorado River Storage Project Act itself, explaining that the project is necessary for the purposes, among others, of “making it possible for the states of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Basin Compact, respectively.”⁴⁷ If the Upper Basin were subject only to the Article III(a) apportionment of 7.5 million acre-feet per year, the language “consistently with the provisions of the Colorado River Compact” would seem unnecessary, as the apportionment itself is referred to in the following phrase.

The acceptance of the delivery obligation interpretation of Article III(d) is expressed much more directly in the testimony associated with the CRSP legislation. Generally, the consensus among both the Upper and Lower Basins during the negotiations seemed to be that the Colorado River Storage Project Act of 1956 was necessary in order to combat the enormous fluctuations in annual flow on the Colorado River, and to provide the physical mechanism

⁴⁵ James S. Lohead. *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River*. 4 U. Denv. Water L. Rev. 290, 319 (2001).

⁴⁶ Upper Colorado River Compact, C.R.S.A. §37-62-101, art. III(a)(2).

⁴⁷ Colorado River Storage Project Act, 43 U.S.C. § 620 (Sec. 1) (1956).

needed for the Upper Basin to satisfy its downstream delivery obligation. Senator Frank Barrett for Wyoming went so far as to condition delivery of the 75 million acre-feet per decade upon the completion of the storage projects in the Upper Basin, stating:

I read into [the Colorado River Compact] this language, that the Upper Basin states are entitled to an equitable share of the water of the Colorado River and it was intended at that time that both the Upper Basin and the Lower Basin intended that we get storage projects in the Upper Basin so that we would not interfere with your 75 million acre-feet at Lee Ferry over a 10-year period. If you will let us get those projects constructed up there so that we can store the water, you will have your 75 million acre-feet.⁴⁸

Many other statements, while not explicitly trading a delivery obligation for CRSP authorization like Barrett, acknowledged the central role of Upper Basin storage in fulfilling the *de facto* delivery obligation. For example, F.C. Merreill, Chief Engineer for the Colorado River Water Conservation District, explained the history of Article III(d)'s obligation on the Upper Basin in his statement:

During the negotiations which preceded the drafting of the 1922 compact by the Colorado River Commission, one member of that commission had a fixed determination to secure for the people of the Lower Basin a firm guaranty of Colorado River flow to the Lower Basin. Mr. Norviel of Arizona, did not at any time desist from his determination to secure such a guaranty and he was, in the end, successful. The primary reason the upper-basin people feel they must have the storage project is to counteract the deleterious effect of that guaranty in the 1922 compact upon the Upper Basin.⁴⁹

The role of new storage in meeting the delivery obligation was also articulated by Wyoming Governor Milward L. Simpson, who argued:

The proposed storage units are essential elements of the overall Upper Colorado River Basin development project. They are part and parcel of a program to permit the use by the Upper Basin states of the water allocated to them under the 1922 Colorado River compact. They are necessary to the Upper Basin states in

⁴⁸ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs, 84th Cong. 248 (February 28, 1955) (statement of Frank Barrett, Senator for Wyoming).*

⁴⁹ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs, 84th Cong. 435 (March 9, 1955) (statement of F.C. Merreill, Chief Engineer for Colorado River Conservation District).*

connection with meeting the water-delivery obligation at Lee Ferry imposed by the 1922 Colorado River compact.⁵⁰

The Governor of Colorado at the time, Edwin Johnson, a former Senator for Colorado, expressed one of the most definitive pro-delivery obligation interpretations of the Colorado River Compact:

My belief is, and I get that belief from reading the compact very carefully, that the first priority is the existing water rights at the time when the compact was signed. That is the first priority. The second priority in the 10-year cycle is that the lower states are entitled to have delivered at Lee Ferry 75 million acre-feet of water. The third priority is that the upper states then get 75 million acre-feet of water. I should have been talking about years because I am running into difficulty now. Then the fourth priority is the million acre-feet of water that has been given to the lower states per annum.⁵¹

A similar sentiment can be found in a Senate Joint Memorial (No. 8) stressing the necessity of the storage projects in meeting the required delivery to the Lower Basin, explaining, “the states of the Upper Colorado River Basin under the Colorado River Compact of 1922 are required to deliver to the Lower Basin a specified amount of water which cannot be assured without holdover storage.”⁵²

Although the delivery obligation interpretation offered by Governor Johnson and others was roundly endorsed by several Lower Basin interests,⁵³ not all Upper Basin interests were willing to fully concede to the delivery obligation interpretation. For example, Senator Clinton Anderson from New Mexico argued that the Article III(a) apportionment to the Upper Basin would be a nullity if the Article III(d) obligation took priority. In describing the compact, he explains:

⁵⁰ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs*, 84th Cong. 622 (March 9, 1955) (statement of Milward L. Simpson, Governor of Wyoming).

⁵¹ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs*, 84th Cong. 247 (February 28, 1955) (statement of Edwin Johnson, Governor of Colorado). In spite of his interpretation of the Compact, Governor Johnson further admitted, “As I say, I hope that I am wrong. I wish there was some way that I could rub out all reference to paragraph (d) in Article III.”

⁵² S.J. Res. 8, 84th Cong. (1955).

⁵³ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs*, 84th Cong. 248 (February 28, 1955) (statement of Thomas Kuchel, Senator for California: “It does seem to me that the interpretation that has been put on [Article III(d)] by the Governor [Johnson] of Colorado is the only one that can be.”).

It starts off by trying to say that it is to divide the waters. If you take the position that certain peoples' rights are firm and all other rights are subject to that, that we are only the residuary legatees, we get whatever might be left, then they should never have started off by saying in Article III: There is hereby apportioned from the Colorado River Basin in perpetuity to the Upper Basin and the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum. If they were not going to do that they should have started off by saying the Lower Basin should be given 7.5 million acre-feet; the Upper Basin has everything that is left and everything above that.⁵⁴

In addition to the above arguments from Senator Anderson, some Upper Basin state senators asserted that their representatives to the Colorado River Compact in 1922 were skilled negotiators who would not have settled with secondary water rights, or those already assured under their present perfected rights. Senator Barrett from Wyoming summarized:

In this respect I cannot understand how you could conclude that the fine people from the Upper Basin states who negotiated this compact at Santa Fe attempted to get a fair and equitable share of the waters of the Colorado River, yet the only guaranty they came out with was the vested water rights which they didn't need anybody at the Santa Fe compact to guarantee. They had them.⁵⁵

Nonetheless, while not all parties were willing to concede to the delivery obligation interpretation of Article III(d), the prevailing reasoning across the basin for the necessity of the Colorado River Storage Project Act of 1956 seems to rest on the "delivery obligation" argument. The delivery obligation interpretation seemed to be the prevailing one among Department of the Interior officials as well. The sentiment expressed by Elmer Bennett, Legislative Counsel for the Department of the Interior, was typical:

There is some difference of opinion on that, but I believe it is conceded by us - I would not want to say that flatly - but it is my understanding that the Department takes the view that the 75 million is a guaranty which probably assumes priority over and above Upper Basin uses of water.⁵⁶

⁵⁴ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs, 84th Cong. 240 (February 28, 1955) (statement of Clinton Anderson, Senator for New Mexico).*

⁵⁵ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs, 84th Cong. 247 (February 28, 1955) (statement of Frank Barrett, Senator for Wyoming).*

⁵⁶ *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Affairs, 84th Cong. 267 (March 9, 1955) (statement of Elmer Bennett, Legislative Counsel for the Department of the Interior).*

Arizona v. California (1963)

The Supreme Court decision in *Arizona v. California* finalized the Boulder Canyon Project Act's distribution of Colorado River water among the Lower Basin states, and as such, did not directly affect or discuss the Upper Basin's obligation at Lee Ferry. However, in light of the Upper Basin's previous decision (in the Upper Basin Compact) to divide their apportionment according to percentages due to the varying flow of the river, the Court's decision to allocate the Lower Basin apportionment between the states in concrete numbers, measured in million acre-feet, could be indicative of the Court's interpretation of Article III(d) of the Colorado River Compact.

In outlining the plan for allocating the Lower Basin waters, Justice Hugo Black was careful to note that the supply in question was based solely upon the waters flowing through Lee Ferry. Referring to the water provided by the Upper Basin, Justice Black explained, "these allocations were to come only out of the mainstream, that is, as stated by the Governors, out of 'the average annual delivery of water to be provided by the states of the upper division at Lee Ferry, under the terms of the Colorado River Compact.'"⁵⁷

In addition to using concrete numbers,⁵⁸ the Court included in its division of the lower Colorado River waters a plan for splitting up any surplus flows from the Upper Basin, but no method for the Lower Basin's dealing with shortages, indicating an assumption that the Upper Basin would always deliver the obligatory 7.5 million acre-feet, regardless of the total flow of the river. The Supreme Court decree, published almost one year after the decision in *Arizona v. California*, does include a plan for dealing with shortages, but does not indicate whether the shortage is due to naturally occurring low flows or to the Upper Basin's withdraws.⁵⁹

⁵⁷ *Arizona v. California*, 373 U.S. 546, 569 (1963).

⁵⁸ *Arizona v. California*, 373 U.S. 546, 565 (1963). "Congress decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California would each get one-half of any surplus."

⁵⁹ *Arizona v. California*, 376 U. S. 376, Section III(B)(3) (1964). "If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre feet in the aforesaid three states, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective states may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre feet be apportioned for use in California including all present perfected rights."

Additionally, the plan for dealing with Lower Basin shortages is for those situations when insufficient water is released to support 7.5 million acre-feet of consumptive use downstream, which due to evaporation and system losses, requires annual releases from the Upper Basin of approximately 1 million acre-feet higher than the average 7.5 million acre-feet described in Article III(d). Thus, even though a plan for managing Lower Basin shortages was devised, the assumption still may have been that Upper Basin releases of 7.5 million acre-feet would be maintained.

The Colorado River Basin Project Act (1968)

In response to *Arizona v. California* and several proposed projects in the Lower Basin, in 1965 the Upper Basin states commissioned a report on the water supplies of the Colorado River.⁶⁰ In analyzing the water supply on both the Upper and Lower Basins of the Colorado River, Royce Tipton, then President of the Upper Colorado River Commission, utilized a delivery obligation interpretation of Article III(d) of the Colorado River Compact in making his analysis, requiring a minimum delivery obligation of 7.5 million acre-feet per year in his scenarios.⁶¹ In fact, Tipton (and co-author Kalmbach) used the presumed delivery obligation

Ed Johnson, the Colorado Commissioner for the Upper Colorado River Commission described the decree this way:

If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid states, then – don’t overlook that word ‘then,’ that is the key word to this whole situation – ‘then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada.

Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. 569 (1967) (statement by Ed Johnson, Colorado Commissioner for the Upper Colorado River Commission).

⁶⁰ Royce Tipton, WATER SUPPLIES OF THE COLORADO RIVER 2 (Tipton and Kalmbach, Inc. 1965). “If it is assumed that the operating capacity of the Upper Colorado River Storage Project is 29.0 million acre-feet, and if the delivery at Lee Ferry amounted to 7.5 million acre-feet per year, the depletions (beneficial consumptive use) in the States of the upper division of the Colorado River Basin would be limited to 6.3 million acre-feet per annum. The net depletion, excluding evaporation from the reservoirs of the Upper Colorado River Storage Project, would be 5.6 million acre-feet. If deliveries at Lee Ferry were 8.25 million acre-feet per year, the limit of depletions in the States of the upper division would be 5.6 million acre-feet including reservoir evaporation, and a net of 4.7 million acre-feet excluding reservoir evaporation.”

⁶¹ Royce Tipton, WATER SUPPLIES OF THE COLORADO RIVER 21 (Tipton and Kalmbach, Inc. 1965).

(from Article III(d)) to quantify the potential practical diminishment of the Upper Basin apportionment (from Article III(a)):

Without importation of water, and such modifications in the required delivery of water at Lee Ferry as would be necessary for the Upper Basin to benefit from the importation of water, it is assumed that the total net beneficial consumptive use in the states of the upper division cannot be more than 5.6 million acre-feet per year, and might not be more than 4.8 million acre-feet per year.⁶²

Tipton's report made the Upper Basin representatives wary of the Colorado River Basin Project Act (CRBPA). While authorizing several projects in both basins, the CRBPA is most notable for approving the Central Arizona Project (CAP) (but making CAP's priority junior to California's water allocations) and instructing the Secretary of the Interior to develop long-term operating criteria for the Colorado River system.⁶³ Section 602(a) of CRBPA listed the priority for releases from Lake Powell in the following order: 1) to supply one-half the deficiency of the Mexican Treaty obligation; and 2) to comply with Article III(d) of the Colorado River Compact.⁶⁴ While this language appears to suggest a delivery obligation perspective, section 602(a)(3) also directs the Secretary to take into account "all relevant factors" (such as historic stream-flows, the most critical period of record, and probabilities of water supply) to determine what is "reasonably necessary to assure deliveries under clauses (1) and (2) *without impairment of annual consumptive uses in the Upper Basin* pursuant to the Colorado River Compact."⁶⁵ This provision can be interpreted to mean that the Upper Basin would not be subject to a compact call during a shortage.⁶⁶

⁶² Royce Tipton, WATER SUPPLIES OF THE COLORADO RIVER 21 (Tipton and Kalmbach, Inc. 1965).

⁶³ The Colorado River Basin Project Act, Pub. L. No. 90-537, §602, 43 U.S.C.A. §1552 (1968), available at <http://www.usbr.gov/lc/region/g1000/pdfiles/crbproj.pdf>.

⁶⁴ The Colorado River Basin Project Act, Pub. L. No. 90-537, §602, 43 U.S.C.A. §1552 (1968), available at <http://www.usbr.gov/lc/region/g1000/pdfiles/crbproj.pdf>.

Commenting on the CRBPA, one academic article views the priorities established by the Law of the River in the following order:

1. Water rights perfected by use prior to November 24, 1922.
2. Upper basin's Mexican Treaty Obligation under Article III(c).
3. Upper basin's 75 million acre-feet every ten years obligation under Article III(d).
4. Upper Basin's post-1922 Compact depletions.

Lawrence MacDonnell, David Getches, William Hugenberg, Jr., The Law of the Colorado River: Coping with Severe Sustained Drought, October 1, 1995, p. 828-29.

⁶⁵ The Colorado River Basin Project Act, Pub. L. No. 90-537, §602, 43 U.S.C.A. §1552 (1968), available at <http://www.usbr.gov/lc/region/g1000/pdfiles/crbproj.pdf>.

⁶⁶ James S. Lochead. *An Upper Basin Perspective on California's Claims to Water from the Colorado River*, 4 U. Denv. Water L. Rev. 290, 314 (2001).

In the committee hearings regarding this Act, it was routinely presented that the Upper Basin could not use its full allocation while releasing 7.5 million acre-feet/year to the Lower Basin, resulting in practicably available supplies for the Upper Basin between 5.56 and 6.2 million acre-feet.⁶⁷ Not surprisingly, much of the opposition to the legislation came from the Upper Basin, who advocated a more basin-wide approach to shortages and worried that Arizona would be permanently taking a portion of their allocation.⁶⁸ As an illustration, Utah Senator Frank Moss cautioned: “that much water simply is not there. . . . What the administration’s central Arizona project will do is borrow water from the Upper Basin states.”⁶⁹ At the same time, Upper Basin representatives also tried to emphasize that any legislation should permit states in the Upper Basin to deliver water at Lee Ferry without impairment of their own uses and refused to concede that “the first 7.5 million acre-feet available necessarily must go to the Lower Basin.”⁷⁰ This viewpoint was reinforced by comments from Edward Weinberg, the Deputy Solicitor of the Department of the Interior, who emphasized that “the Upper Basin has no hard-and-fast obligation to make a delivery of water that Nature does not put in the river.”⁷¹ The following interaction between Colorado’s Senator Gordon Allot and Wyoming’s State Engineer, L.C. Bishop, illustrates the confusion between the intent of the negotiators and the way that Article III(d) is presumed to function:

Senator Allott: [A]s far as the Upper Basin states, the error if it as made, was not in the attempt to ascertain the amount of waters then available in the Colorado River, but rather while the broad implication was that they were dividing the waters of the river equally, with the diminishing water supply we have been caught on the horns of the absolute flat guarantee of delivery at Lee Ferry. . . . I think [the mistake] was made in this respect of not dividing the waters equally, rather than putting us, the upper states, in the position of delivering a specified flat

⁶⁷ *Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. 98-9 and 167 (1967).*

⁶⁸ See generally, *Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. (1967).*

⁶⁹ *Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. 105 (1967).*

⁷⁰ *Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. 115 (1967).* (statement by Colorado Senator Peter Dominick).

⁷¹ *Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. 792 (1967).*

amount which was based upon an assumption of water available which has not proven out in subsequent years.

Bishop: Yes, sir. I would only add to that that I really think it was their intent to divide the water equally at that time. Their assumption that there was more water in the river than has proven to be the actual case led them to include this provision whereby we are required to deliver a certain minimum amount to the Lower Basin.

Senator Allott: They might have been thinking in those terms, but unfortunately you know as well as anyone that isn't what the compact said.

Bishop: Only in this way can there be a meaningful assurance that the slower developing areas will be able in future years to utilize the water which is granted to them by the compacts. Such assurance was the original intent of these documents and it is unthinkable that the Congress would now consider taking any action which might nullify or circumvent the protection granted the individual states through these agreements.⁷²

The CRBPA also required the Secretary of the Interior to develop operating guidelines for the Colorado River reservoirs, establishing the Glen Canyon objective release value at 8.23 million acre-feet—the quantity, assuming a 20,000 acre-foot contribution from the Paria River, presumably sufficient to satisfy the Upper Basin's obligations to the Lower Basin (7.5 million acre-feet) and Mexico (0.75 million acre-feet).⁷³ In this way, “a minimum release of 8.23 million acre-feet [was] required regardless of the water conditions in the Upper Basin.”⁷⁴ Although the Upper Basin argued that this quantity was an “objective release” and not an obligation, this operation essentially created an inflexible annual delivery obligation of 8.23 million acre-feet instead of the 75,000,000 every ten years as Article III(d) Colorado River Compact requires.⁷⁵ While the Secretary of the Interior does have the authority to adjust the amount required for Lake Powell releases, in 2005, Secretary of the Interior Gale Norton decided for that year, even in the face of a drought, the Upper Basin could not reduce its annual delivery

⁷² *Bills to Authorize the Construction, Operation and Maintenance of the Central Arizona Project, Colorado River Project, and for other purposes, S. 1013, S. 861, S. 1242, and S. 1409: Hearings Before the Subcomm. on Water and Power Resources, 19th Cong. 412-3 (1967).*

⁷³ Review of Existing Coordinated Long-Range Operating Criteria for Colorado River Reservoirs (Operating Criteria) 70 Fed. Reg. 59, 15875 (Mar. 29, 2005).

⁷⁴ Lawrence J. MacDonnell, David H. Getches, & William H. Hugenberg, Jr. *The Law of the Colorado River: Coping with Severe Sustained Drought*. 31 Water Res. Bulletin at 829 (1995).

⁷⁵ Lawrence J. MacDonnell, David H. Getches, & William H. Hugenberg, Jr. *The Law of the Colorado River: Coping with Severe Sustained Drought*. 31 Water Res. Bulletin at 831 (1995).

to the Lower Basin.⁷⁶ Some of this flexibility was restored in 2007 in the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (“Interim Guidelines”) which provides for releases less than 8.23 million acre-feet when storage in Lake Powell is unusually low.⁷⁷

Colorado River Basin Salinity Control Act (1974)

During the negotiations for the Colorado River Basin Salinity Control Act of 1974, most parties seemed wary of directly discussing the water apportionments between the Upper and Lower Basins. However, much of the commentary leading up to the legislation was based on the delivery obligation interpretation. For example, one federal report cautioned:

Using current estimates of long-term average flows of the Colorado River, it is believed that the Upper Basin is assured the use of approximately 5.8 million acre-feet annually of the Colorado River while still meeting its Compact obligation for deliveries to the Lower Basin. The Upper Basin’s current water use is approximately 3.3 million acre-feet annually.⁷⁸

In this excerpt, as in many others from previous decades, the assumption is that the Upper Basin is entitled to the difference between the total flow of the river and the “Compact obligation for deliveries to the Lower Basin,” and nothing more. Under the parameters used in this particular study, that number is approximately 5.8 million acre-feet annually, significantly less than the 7.5 million acre-feet allotted in Article III(a).

To the extent that the conversation has changed at all, the new element was to question the rationality of supporting additional Upper Basin development not only due to a lack of available water, but due to downstream environmental impacts. For example, Jack O. Horton,

⁷⁶ Brian D. Poulsen, Jr. *Reduce? A Look at the Upper Colorado River Basin’s Annual Delivery Obligation to the Lower Basin in Light of Secretary Norton’s Mid-year 2005 AOP Decision*. 26 J. Land, Resources, Envtl. L. 207, 207 (2005).

⁷⁷ Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lakes Powell and Mead (Interim Guidelines) 66 Fed. Reg. 7772 (December 13, 2007). According to Karen Kwon, the Assistant Attorney General for Denver, the Interim Guidelines “allow the burden of low reservoir conditions to be shared equally between the Upper and Lower Basins.” Karen Kwon, Assistant Attorney General Denver, CO, “Challenges Facing Grand Canyon,” Before the Subcomm. On National Parks, Forests, and Public Lands. (April 8, 2010).

⁷⁸ Report of the President’s Special Representative for Resolution of the Colorado River Salinity Problem with Mexico, from Senate Committee Meeting for the Salinity Control Act, April 26, 1974, p. 154

Assistant Secretary of the Interior for Land and Water Resources, cautioned about the dangers of full Upper Basin development:

Salinity will affect future development of Upper Basin resources. While Lower Basin development is nearly completed, considerable Upper Basin development remains possible. Further development may, however, lead to salinity levels which would do unacceptable damage, primarily in the Lower Basin. The problem cannot be divorced from planned future development of the basin's water resources and the resulting water demands.⁷⁹

The Sierra Club took this caution about the effects of full development one step further, as John A. McComb, the Southwest Representative, stated:

The existing compacts and other legal measures which apportion the water among the various states should not be regarded as a license for development at any cost. The alternative of limiting development has many political, economic, and environmental ramifications, but it should definitely not be casually dismissed.

The only mention of the apportionment issue in the actual Act is found in Section 207, which states the commonly used boiler plate language from previous acts:

Except as provided in section 205(b) and 205(d) of this title, with respect to the Colorado River Basin Project Act and the Colorado River Storage Project Act, respectively, nothing in this title shall be construed to alter, amend, repeal, modify, interpret, or be in conflict with the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Water Treaty of 1944 with the United Mexican States, the decree entered by the Supreme Court of the United States in Arizona against California and others, the Boulder Canyon Project Act, Boulder Canyon Project Adjustment Act, section 15 of the Colorado River Storage Project Act, the Colorado River Basin Project Act, section 6 of the Fryngpan-Arkansas Project Act, section 15 of the Navajo Indian irrigation project and initial stage of the San Juan-Chama Project Act, the National Environmental Policy Act of 1969, and the Federal Water Pollution Control Act, as amended.⁸⁰

⁷⁹*Colorado River Basin Salinity Control Act: Hearings Before the Subcomm. on Water and Power Resources, 93rd Cong.* 127 (April 26, 1974).

⁸⁰ Colorado River Basin Salinity Control Act, 43 U.S.C. 1571, § 207 (1974).

Conclusion

The interpretation of Article III(d) remains a contested and increasingly significant issue, especially with forecasts of future Colorado River flows showing insufficient water to supply both the Upper Basin and the Lower Basin with their full Article III(a) apportionments while meeting the Mexican Delivery obligation. The Upper Basin finds itself in the difficult position of not wanting to concede to the prevailing delivery obligation interpretation, while also not wanting to provoke a fight on the issue. As observed by Colorado Senator Ben Nighthorse Campbell in 1994:

Although the Upper Basin disagrees with this interpretation, it illustrates the fact that the Upper Basin may be stuck with considerably less than it bargained for in 1922. Nevertheless, the Upper Basin does not desire to renegotiate that or any other compact. The Upper Basin will, however, vigorously protect its entitlements, and its right to develop in the future, because it does not enjoy the same level of certainty enjoyed by the Lower Division states...⁸¹

It has not been the intent of this paper to handicap any potential lawsuit among the basins regarding this issue, but rather to map out the major arguments that would be featured. In summary, those in favor of the “obligation not to deplete” interpretation of Article III(d) would likely rely on the actual language of the Compact, which uses the word deplete in lieu of any mention of a delivery. Additionally, the “obligation not to deplete” proponents would likely rely on the nullity argument, that Article III(a) would have no purpose for being included in the Compact were Article III(d) to be interpreted as a concrete delivery obligation. The third argument most likely to be made by those in favor of the “obligation not to deplete” interpretation would be that the Upper Basin commissioners present during the negotiation of the 1922 Compact would not have settled with their already-protected rights, and that these skilled arbitrators would have fought to secure a more equitable division of the water than ceding to the Lower Basin the first priority on the river.

In contrast, the arguments used by those in favor of the “delivery obligation” interpretation of Article III(d) would likely be based upon the understanding of legislators, engineers and lawyers both during and after the Compact negotiations. First, that the Lower Basin’s priority was an intentional concession made by the Upper Basin in order to secure a

⁸¹ Congressional Testimony of Colorado Senator Ben Nighthorse Campbell at Oversight Hearing on Water Quality and Quantity, Problems and Opportunities Facing the Lower Colorado River Basin (June 9, 1994).

“cap” on the Lower Basin’s water use, to protect the remaining water for future Upper Basin use. Second, the “delivery obligation” proponents would likely argue that the Upper Basin Storage Project of 1956, including Glen Canyon Dam, was authorized as a way for the Upper Basin to meet this delivery obligation to the Lower Basin, as argued by the Upper Basin itself during the negotiations. Finally, the “delivery obligation” proponents would likely use the interstate apportionments as further proof that the Lower Basin was to receive a fixed amount of water, as their interstate apportionments are concrete numbers, as compared to the Upper Basin’s percentage-based interstate apportionments.

While the “obligation not to deplete” argument appears compelling when looking at only the text of the 1922 Compact, the “delivery obligation” interpretation is consistently articulated in the statements of decision-makers responsible for building the Law of the River, and in the writings of academics that have carefully tracked this evolution. Depending on how the conflict is settled, either by negotiation or in court, either interpretation—or some compromise position—could conceivably prevail, casting tremendous uncertainty over a basin already burdened with climbing demands, persistent drought, and the specter of climate change.