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Present Perfected Rights: The Most Senior Undefined Water Rights on the Colorado River

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PRESENT PERFECTED RIGHTS: THE MOST SENIOR UNDEFINED WATER RIGHTS ON THE COLORADO RIVER

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I. INTRODUCTION

Present perfected rights (“PPRs”) are water rights on the Colorado River that predate the compacts, making them the most senior water rights on the river. While on the surface PPRs are well-defined, high-priority water rights on the Colorado River, they quickly become less certain in the details. This article describes PPRs, sets forth how courts and legislation have defined PPRs, and then raises issues that are still unresolved.

II. HISTORY OF PRESENT PERFECTED RIGHTS

Water rights of the Colorado River are governed by the “Law of the River”—a system made up of interstate compacts, federal law, and several United States Supreme Court cases.³ One component of the Law of the River is PPRs.⁴

As a general matter, PPRs are the most senior rights on the Colorado River and are the last rights subject to curtailment in times of shortage.⁴ PPRs are

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1. *Colorado River Storage Project, The Law of the River and Related Legislation*, US Dep’t of Interior Bureau of Reclamation, Upper Colorado Region (last visited Mar. 2, 2013) <http://www.usbr.gov/uc/rm/crsp/lor.html>.

2. Many of these documents can be found on the US Department of Interior Bureau of Reclamation’s website for the Upper Colorado Region. *See id.*

3. *See, e.g.*, Colorado River Compact of 1922 art. VIII (establishing that “[p]resent perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact.”), available at <http://www.usbr.gov/lc/region/pao/pdfiles/crcompct.pdf>.

4. *Rethinking the Future of the Colorado River, Draft Interim Report of the Colorado River Governance Initiative*, 46 UNIV. OF COLO. W. WATER POLICY PROGRAM (2013) <http://www.waterpolicy.info/archives/docs/CRGI-Interim-Report.pdf> [hereinafter CRGI DRAFT INTERIM REPORT]; *see also* ERIC KUHN, THE COLORADO RIVER: THE STORY OF A QUEST FOR CERTAINTY ON A DIMINISHING RIVER 4, 22-23 (roundtable ed. 2007), available at http://www.crwcd.org/media/uploads/How_Much_Water_05-15-07.pdf.

water rights that originate under state law, and state law must be consulted in determining the exact nature of the particular PPR(s).⁵ However, even though the source of PPRs is state law, "the question of whether rights provided by state law amount to present perfected rights . . . is obviously one of federal law."⁶

The term "present perfected rights" first appeared in the Law of the River in Article VIII of the Colorado River Compact, executed on November 24, 1922. Article VIII states:

Present perfected rights to the beneficial use of water 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 water 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.

PPRs were also addressed in section VI of the Boulder Canyon Project Act of December 21, 1928, 43 U.S.C. § 617e:

The dam and reservoir provided for by [Section 1] of this title shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact; and third, for power

Later, the Report of the Special Master in *Arizona v. California* (1960), stated that neither the Compact nor the Boulder Canyon Project Act defined PPRs, but that "it seems clear, however, that the term was not used in either of these enactments to refer to notices of appropriation which had not yet become the foundation of a going economy—mere paper filings on the River."⁷ Finally, the Supreme Court in *Arizona v. California* (1964) defined PPRs in Article I(G)-(H) of its decree:

(G) 'Perfected right' means a water right acquired in accordance with State law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by reservation of mainstream water for the use of [F]ederal establishments under [F]ederal law whether or not the water has been applied to beneficial use;

5. *Bryant v. Yellen*, 447 U.S. 352, 370-71 (1980).

6. *Id.* at 371 n.22.

7. SIMON H. RIFKIND, SPECIAL MASTER REPORT 307 (Dec. 5, 1960) (received by the Court in *Arizona v. California*, 364 U.S. 940 (1961)). The Court's opinion is at 373 U.S. 546, and the Court's decree is at 376 U.S. 340.

(H) 'Present perfected rights' means perfected rights as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act.⁸

The Upper Colorado River Basin Compact states that, to avoid being considered in curtailment calculations under the compact, rights in the Upper Basin must have been perfected prior to November 24, 1922, when the Colorado River Compact was signed.⁹ This creates some ambiguity over whether November 24, 1922 or June 25, 1929 is the priority date for PPRs and whether the 1929 date established by *Arizona v. California* (1964) applies to states that were not involved in the litigation.¹⁰

PPRs can also refer to land that the federal government withdraws from the public domain for a certain federal purpose because the land is deemed to contain a reservation of unappropriated appurtenant water necessary to accomplish the purpose of the reservation.¹¹ This federal reserved right "is a 'present perfected right' and is entitled to priority."¹² Under this reasoning, Tribal reserved water rights for reservations created before 1929 qualify as PPRs.¹³

III. SIGNIFICANCE OF PRESENT PERFECTED RIGHTS

PPRs are significant because they are the most senior rights on the Colorado River and are not subject to curtailment in the case of compact shortages.¹⁴ Article II(B)(3) of the 1964 Supreme Court Decree states that, in any year

8. *Arizona v. California*, 376 U.S. 340, 341 (1964); see also *Arizona v. California*, 547 U.S. 150, 154 (2006); *Mohave Valley Irr. & Drainage Dist. v. Norton*, 244 F.3d 1164, 1165 (9th Cir. 2001).

9. Upper Colorado River Basin Compact art. IV(c), 1948. The Upper Colorado River Basin Compact was signed on October 11, 1948, ratified by all five states, and then ratified by Congress on April 6, 1949.

10. CRGI DRAFT INTERIM REPORT, *supra* note 4, at 46-47. It is uncertain when the Compact became effective. Some argue November 24, 1922, when it was signed; others argue June 25, 1929 when the BCPA became effective by declaration of President Hoover. ERIC KUHN, RISK MANAGEMENT STRATEGIES FOR THE UPPER COLORADO RIVER BASIN 9-10 (Jan. 2 2012), available at http://www.crwcd.org/media/uploads/Kuhn_on_Risk_Mgt_Strategies_of_the_UCRB.pdf; see also *Arizona v. California*, 373 U.S. 546, 557, 561-62 (1963).

11. *High Country Citizens' Alliance v. Norton*, 448 F. Supp. 2d 1235, 1239 (D. Colo. 2006) (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

12. *Id.* (citing *Arizona v. California*, 460 U.S. 605, 610 (1983)).

13. *Arizona v. California*, 373 U.S. 546, 600 (1963).

14. COLO. 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* 14 (Apr. 2012) (quoting former Colorado Governor Edwin Johnson as stating in 1955:

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.

Id.; see also CRGI DRAFT INTERIM REPORT, *supra* note 4, at 46; KUHN, *supra* note 4, at 4, 23.

where there is fewer than 7.5 million acre-feet available for use in California, Nevada, and Arizona, the Secretary of the Interior must first supply water to PPRs in order of priority, regardless of state lines.¹⁵ Later, section 301(b) of the Colorado River Basin Project Act modified Article II(B)(3), stating Article II(B)(3) must be administered to give PPRs, users with existing contracts, and federal reservations priority before the Central Arizona Project.¹⁶ In short, PPRs have a high priority and are the last rights subject to curtailment.

PPRs in the Lower Basin are important because the United States Supreme Court has quantified and prioritized PPRs in the Lower Basin states. In Article VI of its 1964 Decree in *Arizona v. California*, the Supreme Court set forth the manner in which the Lower Basin PPRs would be determined, stating that within two years Arizona, Nevada, and California and the federal government should each present to the Court a list of the PPRs in their state.¹⁷ Each state and water user was required to prove that they possessed PPRs.¹⁸ Many of the parties asserting PPRs did not have proof of the extent of their diversions prior to 1929.¹⁹ Furthermore, there were many unresolved issues regarding how PPRs were calculated, such as whether the PPRs should be asserted as a single diversion amount in acre-feet or in terms of irrigable acreage, and whether districts, such as Imperial Irrigation District, had to prove use for individual parcels or the amount used district-wide.²⁰

Eventually, the parties each filed their lists of PPRs with the Supreme Court and motioned to the Supreme Court for a determination of the PPRs within the parties' respective states.²¹ On January 9, 1979, the Supreme Court granted the States' motion for a supplemental decree on the PPR issues left

15. *Arizona v. California*, 376 U.S. 340, 342-43 (1964); see also *Mohave Valley Irr. & Drainage Dist. v. Norton*, 244 F.3d 1164, 1166. Article II(B)(4) of the 1964 Supreme Court Decree states that any mainstream water consumptively used in a state, presumably including PPRs, is charged against that state's apportionment. *Arizona v. California*, 376 U.S. 340, 343 (1964).

16. Colorado River Basin Project Act, Pub. L. No. 90-357, 82 Stat. 885 (Sept. 30, 1968) (codified at 43 U.S.C. § 1521(b)). Specifically, Section 301(b) states:

Article II(B)(3) . . . shall be so administered that in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada, diversions from the main stream for the Central Arizona Project shall be so limited as to assure the availability of water in quantities sufficient to provide for the aggregate annual consumptive use by holders of present perfected rights, by other users in the State of California served under existing contracts with the United States by diversion works heretofore constructed, and by other existing Federal reservations in that State, of four million four hundred thousand acre-feet of mainstream water, and by users of the same character in Arizona and Nevada.

43 U.S.C. § 1521(b).

17. *Arizona v. California*, 376 U.S. 340, 351-52 (1964). This time period was later extended to three years by stipulation of the parties. See *Arizona v. California*, 383 U.S. 268, 268 (1966); *The Supreme Court Decree in Arizona v. California*, WYOMING STATE WATER PLAN (last visited Mar. 7, 2013) <http://waterplan.state.wy.us/BAG/green/briefbook/lor/lor-11.html>.

18. *Arizona v. California*, 376 U.S. 340, 351-52 (1964).

19. See *id.* at 341.

20. *Arizona v. California*, 439 U.S. 419, 420-22 (1979).

21. *Id.* at 419-20.

open by Article VI of the Court's 1964 Decree.²² In its 1979 decision, the Court determined the PPRs in California (3,019,573 acre-feet), Nevada (13,034 acre-feet), and Arizona (1,077,971 acre-feet).²³ The Court also determined the parties in each state entitled to PPRs and the priority dates of each party's PPRs.²⁴

Beyond *Arizona v. California*, there is very little case law addressing PPRs. One case that elaborates on PPRs in the Imperial Irrigation District is *Yellen v. Hickel*.²⁵ In *Yellen*, the plaintiffs filed suit to enforce section 5 of the Reclamation Act of 1902.²⁶ Section 5 bars the Bureau of Reclamation from selling water for use on land that exceeds 160 acres owned by one party, and if the land is fewer than 160 acres, Section 5 requires that the owner of the land reside on the property.²⁷ The defendants argued that the Boulder Canyon Project Act governed Colorado River water use and that it recognized and gave priority to PPRs.²⁸ Because the defendants possessed PPRs, they argued they could not be denied Colorado River water as a result of the acreage and residency requirements of the Reclamation Act.²⁹

In the end, the Court held that it did not have jurisdiction to determine whether the plaintiffs possessed PPRs, but if it did have jurisdiction, it would have determined the defendants did not possess PPRs.³⁰ The Court stated the defendants did not present evidence of PPRs as of 1929.³¹ The defendants had filed water rights claims to divert water from the Colorado River in 1900, but by 1903, their intakes were clogged with silt, and they ceased their diversions.³² Therefore, defendants could not establish PPRs as of 1929. Based on *Yellen*, any individual asserting a PPR should be prepared to demonstrate the use and establishment of their PPR prior to 1929.

PPRs are very important in the Upper Basin because they impact curtailment between the Upper Basin states under the Upper Basin Compact, and they affect how the Upper Basin meets its seventy-five maf over ten years non-

22. *Id.* at 420; see also *Arizona v. California*, 547 U.S. 150, 151-52 (2006).

23. *Arizona v. California*, 439 U.S. 419, 423-36 (1979); *Arizona v. California*, 547 U.S. 150, 169-182 (2006); CRGI DRAFT INTERIM REPORT, *supra* note 4, at 47.

24. *Arizona v. California*, 439 U.S. 419, 423-36 (1979).

25. *Yellen v. Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972).

26. *Id.* at 1303.

27. 43 U.S.C. § 431 (1902).

28. *Yellen v. Hickel*, 352 F. Supp. at 1307.

29. *Id.* at 1308-09.

30. *Id.* at 1319.

31. *Id.* at 1308.

32. *Id.* at 1308-09. The Court does state that if the landowners:

[H]ave perfected United States water rights, they are free to make use of *those* water rights, *i.e.* they are free to make use of their original diversions in lieu of using B.C.P.A. [Boulder Canyon Project Act] water. However, if the landowners opt to use B.C.P.A. water, they must satisfy the conditions of delivery. The B.C.P.A. recognition given to 'present perfected rights' is a limited recognition.

Id. at 1309. However, the Court quickly states that the United States possesses a superior navigation easement that "precludes private ownership of the water or its flow in a navigable stream." *Id.* at 1309-10. The Court also points out that the landowners were required, pursuant to *Arizona v. California*, 376 U.S. 340 (1964), to submit their claims of PPRs to the Secretary of the Interior before they could be acknowledged, which the defendants had not done. *Id.* at 1310.

depletion requirement.³³ Under the Upper Basin Compact, curtailment occurs based on the previous year's use.³⁴ Article IV of the Upper Basin Compact states that curtailment will occur at the same ratio as each state's consumption ratio of the year, before "overdraft" from the previous years is accounted for, and "provided that in determining such relation the uses of water under rights perfected prior to November 24, 1922, shall be excluded."³⁵ Because PPRs are protected from curtailment in the Upper Basin (at least the initial rounds of curtailment) the extent of PPRs within each state is important. The more of a state's uses qualify as PPRs, the less its uses will be curtailed as against other Upper Basin states.

PPRs could also affect the Upper Basin states' non-depletion requirement to the Lower Basin states if PPRs are not counted against the Upper Basin's seventy-five maf over ten years non-depletion requirement under Article III(d) of the 1922 Compact.³⁶ The Upper Basin's PPRs are not subject to a Lower Basin compact call.³⁷ Therefore, the more Upper Basin uses that are considered PPRs, the more water the Upper Basin states can use that is not subject to curtailment under a Lower Basin call to enforce the seventy-five maf over ten years non-depletion requirement.³⁸

33. CRGI DRAFT INTERIM REPORT, *supra* note 4, at 32.

34. Upper Colorado River Basin Compact art. IV(c), 1948.

35. *Id.* at art. IV. The full text of Art. IV, section (b) and (c) is:

(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 of 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 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.

36. KUHN, *supra* note 10, at 13.

37. See Upper Colorado River Basin Compact art. IV(c), 1948; KUHN, *supra* note 4, at 4, 23.

38. KUHN, *supra* note 4, at 80 (noting "[a]s a practical matter, the priorities for the available water in the Upper Basin are as follows: 1. Water rights perfected by use prior to November 24, 1922 [or Jun 25, 1929 depending on how this issue is resolved]. 2. Upper Basin's Mexican Treaty Obligation under Article III(c). 3. Upper Basin 75 maf every ten years obligation under Article III(d). 4. Upper Basin's post-1922 Compact depletions.").

IV. UNRESOLVED ISSUES

It is unclear whether *Arizona v. California* is binding on New Mexico and Utah, or on any of the Upper Basin states. Colorado and Wyoming were not parties to the case.³⁹ Utah and New Mexico were only joined because of their Lower Basin tributaries.⁴⁰ Furthermore, *Arizona v. California* only addressed the Boulder Canyon Project Act, not the Upper Colorado River Basin Compact.⁴¹ It is unclear whether the date for perfection of PPRs is, as stated in the Upper Colorado River Basin Compact, prior to the Colorado River Compact (November 24, 1922) or those perfected before the Boulder Canyon Project Act (June 25, 1929).

The greatest uncertainty related to PPRs is whether the date for perfection of PPRs in the Upper Basin is 1922 or 1929 and, regardless of which date is used, what constitutes “perfection.” The difference in wet water for a state’s PPRs between 1922 and 1929 may not be significant. But, even if the date of perfection had been agreed upon, it would not resolve the issue of what constitutes perfection of a water right. The Supreme Court has not defined the PPRs in the Upper Basin. Though these states are in the process of determining their PPRs internally, the Upper Basin states have not reached consensus on what constitutes a PPR.⁴² Must a user file for a water right and put it to beneficial use by that date; must the state water rights agency only approve it; or must the agency also certify it by that date? If the water right at issue was part of a state adjudication, must the owner start the adjudication or complete it by the specified date? This issue becomes harder to resolve with time as historic use becomes harder to prove. The Upper Basin states should begin addressing what constitutes a PPR and then quantify the PPRs in each of their states.

A starting point for determining Upper Basin PPRs is the calculations prepared during the Colorado River Compact negotiations around 1920. These calculations provide the best estimate for determining PPRs in the Upper Basin. The Bureau of Reclamation and the Committee on Water Requirements, a subcommittee of the Colorado River Negotiations, each calculated a separate estimate of PPRs⁴³:

State	Water Consumption (acre-feet) (for irrigation), circa 1920	
	Table A, Bureau of Reclamation	Table C, Committee on Water Requirements
Colorado	1,100,000	1,105,000
New Mexico	68,000	99,750
Utah	538,500	376,000
Wyoming	550,500	600,000
Upper Basin Total	2,267,000	2,180,750

39. See CRGI DRAFT INTERIM REPORT, *supra* note 4, at 46.

40. *Id.* at 47.

41. *Arizona v. California*, 547 U.S. 150, 154 (2006).

42. CRGI DRAFT INTERIM REPORT, *supra* note 4, at 47.

43. *Id.* at 48.

Each calculation is an estimate of irrigation uses and does not include domestic or industrial uses.⁴⁴ How tribal reserved water rights are treated under the Upper Basin Compact in times of curtailment is uncertain.⁴⁵ There is also debate regarding whether a party possessing a PPR may divert water without a contract with the US Bureau of Reclamation.⁴⁶

V. CONCLUSION

PPRs are defined under the Law of the River and are high-priority water rights to Colorado River water. In times of curtailment, PPRs could play a very important role in allocating resources within the Upper Basin and between the Upper Basin and Lower Basin. There are many unresolved issues with PPRs that would be better resolved outside of a curtailment scenario. Additional agreements within each basin and between the basins may be necessary to resolve the current uncertainties. The Upper Basin states should begin addressing what constitutes a PPR and then quantify the PPRs in each of their states. The sooner these issues are resolved, the better.

44. See KUHN, *supra* note 10, at 10 n.21.

45. *Id.* at 10.

46. See Robert Glennon & Michael J. Pearce, *Transferring Mainstem Colorado River Water Rights: The Arizona Experience*, 49 ARIZ. L. REV. 235, 247 (2007); see also Boulder Canyon Project Act § 5, 43 U.S.C. § 617d.