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Softening the Divides: The Seven Colorado River Basin States' Recommendation to the Secretary of the Interior regarding Lower Basin Shortage Guidelines and the Operation of Lakes Mead and Powell in Low Reservoir Conditions

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**SOFTENING THE DIVIDES: THE SEVEN
COLORADO RIVER BASIN STATES’
RECOMMENDATION TO THE SECRETARY OF THE
INTERIOR REGARDING LOWER BASIN
SHORTAGE GUIDELINES AND THE OPERATION
OF LAKES MEAD AND POWELL IN LOW
RESERVOIR CONDITIONS**

JAMES H. DAVENPORT[†]

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I. INTRODUCTION

The Colorado River has a reputation as a “much litigated” river about which the states have had little success in agreeing on river management. But on February 3, 2006,¹ and again on April 30, 2007, representatives of the Colorado River Basin states beat the rap, arriving at a significant milestone in the development of a more modern resource management regime. The states’ representatives recommended to the Secretary of the Interior an approach for Colorado River reservoir operations including storage in Lake Mead, coordinated strategies for

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1. Coincidentally, this was the 62nd anniversary of the United States’ adoption of the U.S./Mexican Water Treaty. *See infra* note 13.

Lake Powell and Lake Mead under low reservoir conditions and Lower Basin shortage guidelines. The states' representatives' agreement and proposal are ensclosed in several documents. The states' representatives' February 3 correspondence with the Secretary conveyed two documents: the Seven Basin States' Preliminary Proposal Regarding Colorado River Interim Operations and a draft Agreement between the Colorado River states' water management agencies and water users. Their April 30, 2007, correspondence with the Secretary, offered in the context of comments on the Bureau of Reclamation's *Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*,² conveyed a fully executed Agreement Concerning Colorado River Management and Operations ("States' Agreement"); Proposed Interim Guidelines for Colorado River Operations ("Proposed Guidelines"); a Forbearance Agreement between Lower Basin parties ("Forbearance Agreement"); a Shortage Sharing Agreement Between Arizona and Nevada ("Shortage Sharing Agreement") and described a "Delivery Agreement" that would be necessary between the parties and the Secretary of the Interior to provide assurance for those parties developing projects to augment water supplies that Colorado River deliveries will be available. The fundamentals of the February 3, 2006, Preliminary Proposal and Draft Agreement, and the subsequent developments reflected in the April 30, 2007 documents, are set forth below in section II. The effect of the proposal is to begin to resolve and soften the divides in the hydrologic risk³ distribution put in place by existing Colorado River law. The proposal does so without amending the law, but by adopting some new approaches to the way in which it is applied.

II. THE CONTEXT OF NEGOTIATIONS

The Colorado River is a legally bifurcated and segmented river. Above Lee Ferry, which the Colorado River Compact established as the division between the Upper and Lower Basins of the Colorado River Basin, the prior appropriation doctrine prevails and state water managers administer water rights, meeting only the needs of senior priority right holders when hydrologic conditions dictate. Thus the highest level hydrologic risk is assigned to the latest party to obtain a right. As between the Upper Basin states, the hydrologic risk is apportioned in terms of overuse of the respective states' Upper Basin Compact apportionments, which come into play when a "curtailment" is required so as

2. 72 Fed. Reg. 9026 (February 28, 2007), available at <http://www.usbr.gov/lc/region/programs/strategies/draftEIS/index.html> (hereinafter DEIS).

3. The risk is that the available water supply will not be large enough to meet the current demand.

not to interfere with deliveries to the Lower Basin.⁴ Below Lee Ferry, the Secretary of the Interior is the “water master” pursuant to the mandates of the Boulder Canyon Project Act of 1928,⁵ meeting the needs of all parties holding contracts with the Secretary for the delivery of Colorado River water.⁶ There, the hydrologic risk is contractually and statutorily apportioned in favor of those California contractors, whose facilities had been put in place before the 1968 Colorado River Project Act,⁷ over Arizona’s Central Arizona Project. As between the upper and lower basins of the Colorado River, the Colorado River Compact assigns the hydrologic risk to the Upper Basin by guaranteeing a minimum delivery to the Lower Basin.⁸ The hydrologic risk distributions necessarily following from the current law, which developed over time to meet then-legitimate concerns and hard political realities, make agreements between the Colorado River states difficult.

Federal law and practice, including Section 602(b) of the 1968 Colorado River Basin Project Act and the Secretary’s Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act, call upon the Secretary of the Interior to consult with the states through “Governors’ Representatives,” who represent the governors and their respective states, regarding the operation of Lakes Powell and Mead.⁹ Through this law and practice, the Governors’ Representatives have, in the past, reached agreements among themselves and with the Secretary on various aspects of Colorado River reservoir operation. The states developed the documents forwarded to the Secretary on February 3, 2006, and April 30, 2007, in furtherance of this law and practice.

In 2001, the Secretary of the Interior adopted interim surplus guidelines (“ISG”) for utilization in the Lower Basin of the Colorado, based in large part on a proposal from the states’ representatives.¹⁰ In

4. Upper Colorado River Compact, art. IV, 63 Stat. 31 (1949).

5. Boulder Canyon Project Act of 1928, 43 U.S.C. § 617 (2000).

6. § 617d.

7. *See id.* § 1521(b). Within California, hydrologic risk is apportioned by the “Seven Party Agreement,” in which contractors are organized in groups with the municipal water users deriving their rights through the Metropolitan Water District of Southern California assuming the greatest risk.

8. Colorado River Compact of 1922, art. III, 42 Stat. 171 (1921).

9. 43 U.S.C. § 1552(b) (2000); Review of Existing Coordinated Long-Range Operating Criteria for Colorado River Reservoirs (Operating Criteria), 70 Fed. Reg. 15,873 (Mar. 29, 2005); *see also* MILTON N. NATHANSON, UPDATING THE HOOVER DAM DOCUMENTS VIII-5 to -7 (1978).

10. Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772 (Jan. 25, 2001) (stating the ISG were adopted for the purpose of determining annually the conditions under which the Secretary would declare the availability of surplus water for use within the states of Arizona, California and Nevada in accordance with and under the authority of the Boulder Canyon Project Act of 1928, 43 U.S.C. §§ 617–617v, and the Decree of the United States Supreme Court in *Arizona v. California*, 376 U.S. 340 (1964). The

the years following the adoption of the ISG, drought conditions in the Colorado River Basin caused a significant reduction in water stored in Lakes Powell and Mead, and precipitated discussions by and among the states' representatives, and with the United States through the Department of the Interior and the Bureau of Reclamation.

Upper Basin states—Colorado, Wyoming, Utah, and New Mexico—began to express concern about actual shortages and insufficient water availability in headwaters and tributaries to meet all permitted rights, conditions which had been occurring in those states. Dendrochronological (tree ring) studies raised questions in the academic and environmental communities about the factual reliability of Colorado River hydrological data as a basis for water allocation.¹¹ The Honorable J. Steven Griles, Deputy Secretary of the Interior, on behalf of Secretary of the Interior Gale Norton, announced at the Colorado River Water Users' Conference in Las Vegas in December 2004, that the Colorado River drought of 2001-2004 compelled the Secretary to consider the adoption of rules through which to govern the distribution of Colorado River water in the Lower Basin during shortage conditions.¹² He requested, on behalf of Norton and the Department, that the Lower Basin states, Arizona, California, and Nevada, negotiate to propose rules for operation in a shortage regime. The states' representatives began to discuss whether the United States has a right to deliver less than 1.5 million acre feet to Mexico under the U.S. – Mexico 1944 Water Treaty's "extraordinary drought" provision when only Upper Basin water users had suffered actual shortages.¹³

In early 2005, Upper Basin states sought a "mid-year review" by the Secretary of the Interior of the operating determinations previously made in the 2005 Annual Operating Plan. The Secretary had deter-

ISG are currently effective through calendar year 2015 (through preparation of the 2016 Annual Operating Plan).

11. In this writer's view, whether dendrochronological data is included in the hydrologic record is academic. To the extent that the historic hydrologic record is not sufficiently "dry" to provide accurate predictions of future water supply assumptions, the matter can just as easily be resolved by applying a conservative risk assumption, discounting the historic hydrologic record by some agreed value, e.g. 5-10%. Reliance upon any historic data as a basis to predict the future is speculative at best, and a conservative supply assumption is the better course. See NATIONAL RESEARCH COUNCIL, WATER AND SCIENCE TECHNOLOGY BOARD, COLORADO RIVER BASIN WATER MANAGEMENT: EVALUATING AND ADJUSTING TO HYDROCLIMATIC VARIABILITY (2007). Reliance upon the historic record only is even less justified when taking the potential effects of climate change into account. In that light, some greater agree discounting value, e.g. 15%, may be in order.

12. Honorable J. Steven Griles, Deputy Sec'y of the Interior, Building on Success – Facing the Challenges Ahead, Address to the Colorado River Water Users Association (Dec. 17, 2004).

13. Treaty between the United States of America and Mexico respecting utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., art. 9(f), Feb. 3, 1944, 59 Stat. 1219 [hereinafter 1944 U.S. – Mexico Water Treaty].

mined in the annual plan that the release of Colorado River water from Lake Powell to Lake Mead would be 8.23 million acre feet.¹⁴ Upper and Lower Basin state representatives have long disagreed in their interpretation of the Compact's provisions relating to the "deficiency" referred to in Article III(c) of the Compact, and the role of Lower Basin tributaries in meeting the U.S./Mexican Treaty obligation.¹⁵ This long-standing disagreement motivated the states' Congressional representatives to incorporate several defensive mechanisms into the 1968 Colorado River Basin Project Act, incorporating a strategy not unlike that imposed by the prior appropriation doctrine, to protect parties already enjoying Colorado River water rights at the expense of those newly acquiring them, thus establishing the latest aspect of current hydrologic risk distributions. For the Lower Basin, Congress adopted Section 301(b) of the 1968 Colorado River Basin Project Act to protect California's more senior river diversion rights.¹⁶ For the Upper Basin, Section 602(a) of the same Act guaranteed sufficient water maintenance in Lake Powell to permit the Upper Basin states to meet their obligations under Section III(c) of the Colorado River Compact.¹⁷

On May 2, 2005, the Secretary wrote to the governors of the seven Colorado River Basin states, declining to review her earlier determinations in the 2005 Annual Operating Plan, reserving her authority and discretion to release less than 8,230,000 acre feet of water from Lake Powell into Lake Mead in any year, and announcing her intention to undertake a process to develop Lower Basin shortage guidelines and to explore management options for the operation of Lakes Powell and

14. Review of Existing Coordinated Long-Range Operating Criteria for Colorado River Reservoirs (Operating Criteria), 70 Fed. Reg. at 15,875 (determining the amount of water as mentioned in section II(2)(b) by the phrase "the objective shall be to maintain a minimum release of water from Lake Powell of 8.23 million acre-feet."). That number is arguably composed of 7.5 million acre feet (the amount stated in Article III(a) of the Colorado River Compact), plus 750,000 acre feet (1/2 of the U.S. and Mexico Treaty Obligation), minus 20,000 acre feet (presumed to flow into the Colorado River from the Paria River below Glen Canyon Dam and above Lee Ferry). The Upper and Lower Basin states have long disagreed over both the origin of this number and their respective obligations regarding it.

15. If as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d). Colorado River Compact of 1922, art. III, 42 Stat. 171 (1921); see also James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water From the Colorado River*, 4 U. DENV. WATER L. REV. 290, 320 (2001).

16. 43 U.S.C. § 1521(b) (2000).

17. *Id.* § 1552(b).

Mead in low reservoir conditions.¹⁸ On June 19, 2005, the Secretary initiated a decision-making process pursuant to the National Environmental Policy Act ("NEPA"),¹⁹ beginning with the Bureau of Reclamation's "Notice to Solicit Comments and Hold Public Meetings on the development of management strategies for Lakes Powell and Mead, including Lower Basin shortage guidelines, under low reservoir conditions."²⁰ The Bureau of Reclamation proceeded to undertake scoping and develop alternatives pursuant to NEPA in anticipation of development of an environmental impact statement supporting a record of decision ("ROD") on *Colorado River Reservoir Operations: Development of Lower Basin Shortage Guidelines and Coordinated Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions*.²¹

For more than a year, the states' representatives, including the author of this article, the Bureau of Reclamation, and others, engaged in discussions on a variety of potential management options to address the system-wide drought in the Colorado River Basin. Initially, by August 15, 2005, they agreed that shortage guidelines should be designed to delay the onset and minimize the extent and duration of shortages in the Lower Basin, that management strategies should maximize the protection afforded to the Upper Basin by Lake Powell against possible calls upon the Upper Basin to curtail uses, and that shortage guidelines should be premised upon proportionate sharing of shortages by Mexico pursuant to the U.S./Mexico Water Treaty.

On August 25, 2005, the states' representatives' corresponded with the Secretary expressing conceptual agreement in the development and implementation of three broad concepts for improved management and operation of the Colorado River: coordinated reservoir management and Lower Basin shortage strategies, system efficiency and management, and augmentation of supply.²² The states agreed to refine these concepts into an interrelated suite of management strategies that should be analyzed during the Secretary's environmental compliance process. They emphasized, in their correspondence to the Secretary, that the coordinated reservoir management and Lower Ba-

18. Letter from Gale Norton, Sec'y of the Interior, to Honorable Jon Huntsman, Jr., Governor of Utah et al. (May 2, 2005), available at <http://www.usbr.gov/lc/region/g4000/AOP2005/DOIDecision.pdf>.

19. National Environmental Policy Act, 42 U.S.C. §§ 4321-4370f (2000).

20. Colorado River Reservoir Operations: Development of Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions, 70 Fed. Reg. 34794 (June 15, 2005).

21. Colorado River Reservoir Operations: Development of Lower Basin Shortage Guidelines and Coordinated Management Strategies for Lake Powell and Lake Mead Under Low Reservoir Conditions, 70 Fed. Reg. 57322 (Sept. 30, 2005).

22. Letter from The States of Ariz., Cal., Colo., Nev., N.M., Utah and Wyo. Governor's Representatives on Colo. River Operations to Gale A. Norton, Sec'y of the Interior (Aug. 25, 2005), available at http://www.colorado.edu/resources/colorado_river/interior/letter_to_Norton_08-05.pdf.

sin shortage strategies under development by the seven states were essential and integral parts of a larger, more comprehensive management arrangement developing between them. The objectives of their developing agreement were to avoid political and legal confrontation over the meaning of fundamental aspects of the law pertaining to the Colorado River; to augment the supply of Colorado River water; and to realize a common goal to implement management strategies that allow more efficient, flexible, responsive and reliable operation of the system reservoirs for the benefit of all interests in the Colorado River Basin. The states emphasized that their coordinated reservoir management and shortage strategy recommendation, outlined in their correspondence to the Secretary, was tentative and conditional on final agreement of all the other aspects of that more comprehensive management arrangement by the states.

The states proposed that any reservoir operating strategy that the Secretary developed be explicitly limited to an interim period for the purpose of gaining operational experience. They recommended tying interim operations to the implementation of additional measures that would accomplish the dual objectives of augmenting the supply of the River and operating the existing infrastructure in the system more efficiently. They reserved the issue of their differing interpretations of Article III(c) of the Compact and mainstream and tributary development, hoping to find practical resolution of their differences in ensuing discussions. The states generally recommended system augmentation through weather modification and desalination, individual supply augmentation through additions of non-system water or retired use of tributary rights in exchange for mainstem diversions, and generally greater use of the concepts of forbearance, replacement, or exchange.

The states also recommended coordinated reservoir management and a Lower Basin shortage strategy using the water surface elevations or volumetric contents of both Lake Mead and Lake Powell to determine the beginning and end of a Lower Basin shortage condition, and incorporating various water management strategies including tiered deliveries, content balancing, alternative release schedules, Section 602(a) and other equalization, and storage of water in Lake Mead. The states pointed out that the ISG, which had been adopted by the Secretary in January 2001, might need modification and extension. The states reiterated that shortages to the Lower Basin states should be shared proportionately with Mexico under the 1944 Treaty. The probability that shortage guidelines will impose shortages should be reduced by the implementation of the coordinated reservoir operation strategy, benefiting Lower Basin as well as Mexican users.

At the request of Upper Basin states, the states' representatives began to discuss whether to agree that during the interim period they would not raise issues of the meaning, interpretation, or enforcement of the Colorado River Compact, the 1968 Colorado River Basin Project

Act, or other aspects of Colorado River law concerning any obligation of the Upper Basin to meet any requirement at Lee Ferry, as the coordinated operations of Lakes Powell and Mead might change the volume of water retained in Lake Powell under existing operations so as to meet current hydrologic risk distributions.

The states also offered to work with the Department of the Interior to analyze and implement a program of tamarisk eradication throughout the basin, yielding multiple benefits to the environment and water supply of the basin, to develop a prioritized list of specific measures that could result in the more efficient management of the River in the Lower Basin,²³ and to implement measures, together with the Secretary, to better coordinate daily system operations and water orders of contractors in the Lower Basin. The states requested that the Department take all necessary actions to replace water that has been released to Mexico through the bypass drain since 2004, and continue to minimize over-deliveries to Mexico.

A technical committee—comprised of representatives from each of the seven states and the Upper Colorado River Commission—formed in the summer of 2004 to identify an operating regime for the coordinated operation of Lakes Powell and Mead under low reservoir conditions. The Bureau of Reclamation provided technical assistance in the form of hydrologic modeling. The technical committee examined a number of potential operational strategies for times of extended drought or periods of below-average runoff in order to minimize shortages in the Lower Basin and avoid the risk of curtailment in the Upper Basin. In the ensuing months after the creation of the technical committee, the technical committee and the Bureau of Reclamation performed numerous hydrologic modeling runs and analyzed the results. When evaluating a particular operational strategy, the Committee examined the effects of the strategy on key lake elevations (for both Lakes Powell and Mead), energy generation, and probability and magnitude of shortage. On January 25, 2006, the Committee reached consensus and recommended the strategy now incorporated into the states' recommendations to the Secretary.

Negotiations between the states continued through the fall of 2005, progressing and regressing at times. Given the disparity of the expectations under which the discussion had begun, the disproportionate hydrologic risk distributions, the Colorado River's litigious reputation, and the non-institutionalized framework of multi-state discussion, it came as a surprise to some that, on February 3, 2006, the seven Colorado River Basin states were able to correspond with the Secretary of the Interior recommending a common approach to management of

23. Initial priorities for implementation include full utilization of Senator Wash Reservoir, development of Drop 2 and Wellton-Mohawk regulatory storage, and evacuating accumulated sediments behind Laguna Dam.

Lakes Powell and Mead and for management of shortages in the Lower Basin of the Colorado River.²⁴

Taking the states' representatives' Proposal and Draft Agreement into account, along with the proposals of others, Bureau of Reclamation staff immediately began work developing and defining alternative proposals for action that the Bureau could consider and compare in an environmental impact statement, which would be published in support of a Secretarial record of decision that would be published—if on schedule—in December 2007. Subjecting each of those alternatives to hydrologic analysis, as well as the broad perspective of analysis otherwise required by the National Environmental Policy Act, the Bureau of Reclamation published a Draft Environmental Impact Statement ("DEIS") on February 28, 2007. The DEIS analyzed five alternatives: No Action, the "Basin States Alternative,"²⁵ the "Conservation Before Storage Alternative,"²⁶ the "Water Supply Alternative,"²⁷ and the "Reservoir Storage Alternative."²⁸

Throughout 2006, the states' representatives met to draft further agreements between themselves, particularly in the Lower Basin, that would be necessary to make the states' earlier proposal work, under the presumption that the Secretary of the Interior would adopt the proposal. Negotiations between the states' representatives responding to the Bureau of Reclamation's request for comments on its DEIS ensued immediately upon that document's publication, resulting in the April 23, 2007, execution of the States Agreement and the April 30, 2007, correspondence forwarding it and other documents to the Secretary. Again, the Colorado River Basin states demonstrated a new-found commitment toward working together to enhance the collaborative spirit of Colorado River management and the natural resource value of their common resource.

24. Letter from The States of Ariz., Cal., Colo., Nev., N.M., Utah and Wyo. Governor's Representatives on Colo. River Operations to Gale A. Norton, Sec'y of the Interior (Feb. 3, 2006), available at <http://www.usbr.gov/lc/region/programs/strategies/consultation/Feb06BasinStatesTransmittalLetter.pdf>. It is unfair to suggest that the states' representatives' recommendation was the only viable proposal made to the Secretary, both before and after February 3. Representatives of the Colorado River hydropower community made several valuable suggestions. Representatives of environmental groups also offered valuable suggestions under the moniker "Conservation Before Shortage." Recreation concerns have also been expressed through the National Park Service directly to the Bureau of Reclamation.

25. DEIS, *supra* note 2, at 2-8.

26. *Id.* at 2-11.

27. *Id.* at 2-13.

28. *Id.* at 2-14.

III. THE SEVEN BASIN STATES' RECOMMENDATION

A. SEVEN BASIN STATES' PROPOSAL REGARDING COLORADO RIVER INTERIM OPERATIONS

The seven Colorado River Basin states recommended interim operations that would minimize shortages in the Lower Basin and avoid the risk of curtailment in the Upper Basin through conservation, more efficient reservoir operations, and long-term alternatives to bring additional water into the Colorado River community. The states' recommendation has three key elements: management of Lake Powell and Lake Mead to minimize shortages and avoid curtailments; actions that fully utilize and conserve water in the Lower Basin; and apportionment of shortages in the Lower Basin.²⁹

1. Coordinated Operation of Lakes Powell and Mead

The states' representatives recommended improvements in coordination for the operation of Lake Mead and Lake Powell. Under the proposal, the Secretary would determine the amount of water to release from Lake Powell to Lake Mead each year using the elevation of the two lakes to occur on the following January 1 as predicted by the Bureau of Reclamation's 24 month study performed in August.

In years when Lake Powell's projected content is at or above an elevation between 3636 and 3666, as stated in a "Lake Powell Equalization Elevation" table reflecting anticipated growth in Upper Basin water use, the Secretary would release water from Lake Powell to Lake Mead at a rate greater than 8,230,000 acre-feet per year to the extent necessary to equalize storage in the two reservoirs, or would otherwise release 8,230,000 acre-feet from Lake Powell.³⁰ In years when Lake Powell's projected content is below the elevation stated in the same table but at or above 3575 ft., the secretary would release 8,230,000 acre-feet from Lake Powell if the projected elevation of Lake Mead were at or above 1075 ft.³¹ If the projected elevation of Lake Mead were below 1075 ft., the Secretary would balance the contents of Lake Mead and Lake Powell, but release no more than 9,000,000 acre-feet and no less than 7,000,000 acre-feet from Lake Powell.³²

29. Seven Basin States' Proposed Interim Guidelines for Colorado River Operation (April 30, 2007) [hereinafter Proposed Guidelines] available at <http://www.usbr.gov/lc/region/programs/strategies/DEIScomments/State/BasinStates.pdf> (Attachment B to the Basin States Comments on *Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*).

30. *Id.* § 3.

31. *Id.*

32. *Id.*

In years when Lake Powell's projected content is below 3575 ft. but at or above 3525 ft., 7,480,000 acre-feet would be released from Lake Powell if the projected elevation of Lake Mead were at or above 1025 ft.³³ If the projected elevation of Lake Mead is below 1025 ft., the Secretary would release 8,230,000 acre-feet from Lake Powell.³⁴ In years when Lake Powell's projected content is below 3525 ft., the Secretary would balance the contents of Lake Mead and Lake Powell, but would release no more than 9,500,000 acre-feet and no less than 7,000,000 acre-feet from Lake Powell.³⁵

Coordinated reservoir operation, as proposed by the states, raises only one legal conundrum—one which the representatives of the seven states had earlier agreed to set aside. The issue arises from Section 602 of the 1968 Colorado River Projects Act. That section sets forth the elements which the Secretary must consider in making an annual determination about when "equalization" of the two reservoirs should occur (but provides no specific numeric requirements),³⁶ and is the putative premise for disagreement regarding the annual release of 8,230,000 acre feet from Lake Powell. By agreeing that predictive lake elevations would guide the Secretary's determinations, the states' representatives set aside the controversy regarding the application of the Section 602(a) storage requirement.³⁷

2. Actions That Fully Utilize and Conserve Water in the Lower Basin

Modification and Extension of the Interim Surplus Guidelines

The Proposed Interim Guidelines forwarded to the Secretary by the states' representatives on April 30, 2007, are drafted into the In-

33. *Id.*

34. *Id.*

35. *Id.*

36. Colorado River Basin Project Act, sec. 602, Pub. L. No. 90-537, 82 Stat. 885 (1968).

37. Article 9 of the States Agreement provides that "The Parties' Recommendation has been developed with the intent to be consistent with existing law. The Parties expressly agree, for purposes of this Agreement, that the storage of water in and release of water from Lakes Powell and Mead pursuant to a ROD issued by the Secretary in substantial conformance with the Parties' Recommendation and this Agreement, and any agreements, rules and regulations adopted by the Secretary or the parties to implement such ROD, shall not constitute a violation of Article III(a)-(e) inclusive of the Colorado River Compact, or Sections 601 and 602(a) of the Colorado River Basin Project Act of 1968 (43 U.S.C. §§ 1551 and 1552(a)), and all applicable rules and regulations promulgated thereunder." Agreement Concerning Colorado River Management and Operations (April 23, 2007) [hereinafter Agreement], *available at* <http://www.usbr.gov/lc/region/programs/strategies/DEIScomments/State/BasinStates.pdf> (attachment A to the Basin States' Comments on *Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*).

terim Surplus Guidelines adopted by the Secretary in 2001,³⁸ and are intended as a replacement for those Guidelines. The Proposed Interim Guidelines extend the interim period to 2025 (through operating year 2026),³⁹ and removes those provisions of the current Interim Surplus Guidelines that have become redundant due to passage of time. The Proposed Interim Guidelines delete one surplus operating condition under the existing Interim Surplus Guidelines, "Partial Domestic Surplus." Until 2017, "Domestic Surplus" water distribution would occur as currently specified by the ISG.⁴⁰

(a) For Direct Delivery Domestic Use⁴¹ by MWD, 1.250 million acre-feet (maf) reduced by the amount of basic apportionment available to MWD.

(b) For use by SNWA, the Direct Delivery Domestic Use within the SNWA Service Area in excess of the State of Nevada's basic apportionment.

(c) For use in Arizona, the Direct Delivery Domestic Use in excess of Arizona's basic apportionment.⁴²

During the years 2017 through 2025, the Secretary should distribute "Domestic Surplus" water as follows:

(a) For use by MWD, 250,000 acre-feet per Year in addition to the amount of California's basic apportionment available to MWD;

(b) For use by SNWA, 100,000 acre-feet per Year in addition to the amount of Nevada's basic apportionment available to SNWA;

38. Interim Shortage Guidelines, *supra* note 10.

39. Proposed Guidelines, *supra* note 29, § 9(A)-(B).

40. *Id.* § 4(B)(1) ("In years when Lake Mead elevation is projected on January 1 to be above 1145 ft and below [the] 70R Strategy elevation determination, the Secretary would determine a Domestic Surplus....").

41. "Direct Delivery Domestic Use" means "direct delivery of water to domestic end users or other municipal and industrial water providers within the contractor's area of normal service, including incidental regulation of Colorado River water supplies within the Year of operation but not including Off-stream Banking. For the Metropolitan Water District of Southern California (MWD), Direct Delivery Domestic Use shall include delivery of water to end users within its area of normal service, incidental regulation of Colorado River water supplies within the Year of operation and Off-stream Banking only with water delivered through the Colorado River Aqueduct." "Domestic Use" has the same meaning as defined in the 1922 Colorado River Compact. *Id.* § 1(A)(8)-(9).

42. *Id.* § (4)(B)(1).

(c) For use by Arizona, 100,000 acre-feet per Year in addition to the amount of Arizona's basic apportionment available to Arizona contractors.⁴³

In years in which the Secretary makes space building or flood control releases, having determined a "Flood Control Surplus" for the remainder of that year or the subsequent year, releases would "be made to satisfy all beneficial uses within the United States, including unlimited off-stream banking."⁴⁴ In years when the Secretary determines that water release is necessary to reduce the risk of potential reservoir spills based on the 70R Strategy,⁴⁵ and that a "Quantified Surplus" is therefore available, the Secretary would first establish the volume of the Quantified Surplus (discounting the volume of Intentionally Created Surplus credits) then allocate and distribute the Quantified Surplus 50% to California, 46% to Arizona, and 4% to Nevada.⁴⁶

Storage of Water in Lake Mead

The states' representatives proposed that the Secretary develop a policy and accounting procedure that would create opportunities for Lower Basin Colorado River contractors to store water in Lake Mead on a multi-year basis. As recommended by the states, the storage program is intended to help avoid shortages to the Lower Basin, benefit both Lake Mead and Lake Powell, and increase the surface elevations of Lakes Powell and Mead to higher levels than would have otherwise occurred. Storage under the shortage program would permit augmentation of water supplies through "projects that create water system effi-

43. *Id.* § (4)(B)(2).

44. *Id.* § (4)(B)(4). Surplus declarations for Mexico under the U.S./Mexico Water Treaty "are declared when flood control releases are made.... These Guidelines are not intended to identify, or change in any manner, conditions when Mexico may schedule up to an additional 0.2 [million acre-feet]." *Id.*

45. The "70R Strategy" is a determination that there is at least a 70% probability that a flood control release will be required to create reservoir space to receive anticipated flood water flows. The probability is modeled using the historic hydrologic record for the Colorado River.

46. Proposed Guidelines, *supra* note 29, § 4(B)(3)(b). California's share would be distributed first to meet basic apportionment demands and MWD's demands and then to California Priorities 6 and 7 and other surplus contracts. *Id.* § 4(B)(3)(c). Nevada's share would be distributed first to meet basic apportionment demands and the Southern Nevada Water Authority's demands. *Id.* Arizona's share would be distributed to surplus demands in Arizona including off stream banking and interstate banking demands. *Id.* Arizona, California and Nevada have agreed that Nevada would get first priority for interstate banking in Arizona. *Id.* Any unused share of the Quantified Surplus would be distributed in accordance Article II (B)(6) of the Decree in *Arizona v. California*. *Id.* § 4(B)(3)(d).

ciency, extraordinary conservation, and the importation of non-Colorado River System water into the Colorado River Mainstream."⁴⁷

The seven states' Proposed Interim Guidelines recommend an accounting approach referred to as "intentionally created surplus" or "ICS." That approach develops the notion that water intentionally not used in a given year creates a "surplus" available for use in another year. The approach rests upon the Secretary's use of the term "surplus" in the Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs,⁴⁸ to declare an annual operating condition and the U.S. Supreme Court's use of the term "surplus" in Article II(B)(2) of the 2006 Consolidated Decree in *Arizona v. California* ("Consolidated Decree").⁴⁹ The States' Proposed Interim Guidelines define ICS as "surplus available for use under the terms and conditions of the Forbearance Agreement and a Delivery Agreement."⁵⁰ The Proposed Guidelines subdivide ICS into four groups: Extraordinary Conservation ICS, Tributary Conservation ICS, System Efficiency ICS, and Imported ICS. Contractors that create surplus within each of these categories⁵¹ would recover them by requesting delivery of a volume of Colorado River water equivalent to previously stored water at the time the contractor submits its annual water order for a year following the creation of the credit. The Secretary would declare an "ICS Surplus" in years when Lake Mead's elevation was at or above 1075 feet,⁵² the same elevation which would cause the Secretary to determine that a "normal" operation condition exist.⁵³ The additional water would be added to the Contractor's approved water order for that following year.⁵⁴

47. Proposed Guidelines, *supra* note 29, § 5(A).

48. Criteria for Coordinated Long Range Operation of Colorado River Reservoirs, 35 Fed. Reg. 8951 (June 10, 1970).

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

50. Proposed Guidelines, *supra* note 29, § 1(A)(11).

51. *See id.* § 5(D)(5) (describing of process by which ICS is created).

52. *Id.* § 4(B)(5)(a).

53. *Id.* § 4(A).

54. *Id.* § 5(D)(6). The Secretary has not yet offered a detailed plan for implementation of this approach to Lake Mead storage. Because the "intentionally created surplus" notion utilizes the concept of surplus *operations*, as envisioned by the Criteria for Coordinated Long Range Operation of the Colorado River Reservoirs, designation of stored water as surplus water suggests that stored water may only be recovered in years when the Secretary has determined to operate system reservoirs under conditions where significant supplies of new inflow are available—conditions under which contractors that had stored water would not need it. The ICS concept's reliance on the language of Article II(B)(2) of the Decree would seem to constrain the recovery opportunities for contractors storing water in Lake Mead, as the antecedent of that Article's "such surplus" reference is "mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid states in excess of 7,500,000 acre feet." *Arizona v. California*, 376 U.S. at 342. Because most contractors would more likely desire to store water as a hedge against drier

Utilizing the concept of surplus, as contemplated by Article II(B)(2) of the Decree, raises the question whether existing parties having prior, potentially conflicting claims, to that "surplus" must waive them. The approach adopted by the states' representatives is to execute a "Forbearance Agreement"⁵⁵ in which those existing parties declare that they will not assert those rights.⁵⁶ The Proposed Interim Guidelines that the states' representatives transmitted to the Secretary on April 30, 2007, provided:

Under these Guidelines, Colorado River water will continue to be allocated for use among the Lower Division States in a manner consistent with the provisions of the Consolidated Decree. It is expected that Lower Division States and individual Contractors for Colorado River water have or will adopt arrangements that will affect utilization of Colorado River water during the Interim Period. It is expected that water orders from Colorado River Contractors will be submitted to reflect forbearance arrangements by Lower Division States and individual Contractors. The Secretary will deliver Colorado River water to Contractors in a manner consistent with these arrangements. Surplus water will be delivered only to entities with contracts that are eligible to receive surplus water.⁵⁷

Extraordinary Conservation ICS

Lake Mead storage opportunities depend, in a number of instances upon "extraordinary conservation" by Colorado River contractors. "Extraordinary conservation" activities include: fallowing of land that

times, and because storage of water as a hedge against future growth in demand is advisable, the states also developed the concept of "Developed Shortage Supply."

55. The Proposed Interim Guidelines define "Forbearance Agreement" by reference to a particular document, which the parties in the Lower Basin States agreed to, and which was tendered to the Secretary of the Interior on April 30, 2007. Proposed Guidelines, *supra* note 29, § (1)(A)(10).

56. "Forbearance" is inaction—its closest synonym is "abstention." Declaration of intent to abstain from exercise of a future right is forbearance. The definition poses the question whether the future right involved is a right of states identified in Article II(B)(2) of the Decree to protect the surplus "apportioned" to the respective states pursuant to that provision, or alternatively the right of individual Section 5 contractors to order water pursuant to their contracts. The Forbearance Agreement accompanying the states' representatives' April 30, 2007, correspondence forbears "[a]ny right [a party] may have to delivery of any ICS released in accordance with the terms and conditions set forth in this Forbearance Agreement and the Delivery Agreement for use within the [alternate party states]." Lower Colo. River Basin Intentionally Created Surplus Forbearance Agreement 13-14 (April 30, 2007) available at <http://www.usbr.gov/lc/region/programs/strategies/DEIScomments/State/BasinStates.pdf> (Attachment C to the Basin States Comments on *Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*).

57. Proposed Guidelines, *supra* note 29, § 4(C).

is, was, or would in the next year be irrigated; canal lining; desalination; “extraordinary conservation” programs existing as of January 1, 2006; extraordinary conservation ICS credit programs predating the effective date of the Proposed Interim Guidelines; Tributary Conservation ICS not released in the year created; Imported ICS not released in the year of creation; and other “extraordinary conservation” measures as agreed upon by the states.⁵⁸ The Metropolitan Water District of Southern California (“MWD”) and the Imperial Irrigation District (“IID”) were the first contractors to arrange for Lake Mead storage, even in advance of the Secretary’s adoption of guidelines establishing any process for recovery of the stored water. In 2006, utilizing a “pilot program” approach, established through correspondence with the Bureau of Reclamation, MWD and IID left water in Lake Mead of which they were entitled to take delivery.⁵⁹ Extraordinary Conservation ICS may only be created if the stored water would otherwise have been beneficially used in the storage year.⁶⁰ The maximum amount of water that states could store during any year on the basis of extraordinary conservation would be subject to the following limitations: California: 400,000 acre-feet per year; Arizona: 100,000 acre-feet per year; Nevada: 125,000 acre-feet per year.⁶¹ Additionally, the maximum cumulative amount of water that states could store on the basis of extraordinary conservation would be subject to the following limitations: California: 1,500,000 acre-feet; Arizona: 300,000 acre-feet; Nevada: 300,000 acre-feet.⁶² The states must dedicate five percent of the stored water to the system on a one-time basis to provide a water supply benefit to the system.⁶³ If the Bureau of Reclamation released water for flood control purposes, such action would reduce the right to recover stored water on a pro-rata basis among all parties having stored water.⁶⁴

System Efficiency ICS

Another means by which contractors can create ICS under the states’ representatives’ proposal is through the creation of system efficiencies. The states’ representatives recommended that a contractor⁶⁵

58. Proposed Guidelines, *supra* note 29, § 5(D)(1). What conservation is “extraordinary” tends to be in the eye of the beholder, and will necessarily be the subject of some additional discussion.

59. MWD and IID intend to do the same in 2007.

60. Proposed Guidelines, *supra* note 29, § 5(D)(5)(e)(1).

61. *Id.* § 5(D)(5)(e)(2).

62. *Id.* § 5(D)(5)(e)(3).

63. *Id.* § 5(D)(5)(c). Additionally, stored water would be subject to annual evaporation loss of 3% annually. *Id.* § 5(D)(5)(e)(5).

64. *Id.* § 5(D)(6)(e)(3).

65. The term “contractor” here means any party holding a Colorado River water delivery contract with the Secretary of the Interior pursuant to Section 5 of the Boulder Canyon Project Act. *Id.* § 1(A)(5).

be able to make contributions of capital to the Secretary for use in Secretarial projects designed to realize efficiencies that save water that would otherwise be lost from the Colorado River system in the United States.⁶⁶ The Secretary, in consultation with the states, would identify system efficiency projects, terms for capital participation in such projects, and types and amounts of benefits the Secretary would provide in consideration of non-federal capital contributions to system efficiency projects, including a portion of the water saved by the project.⁶⁷ Water that the Secretary made available to contractors as a result of system efficiencies would be released to the contributing contractor on a pre-determined schedule of annual deliveries for a period of years as agreed in advance.⁶⁸ System efficiency projects would only provide temporary water supplies and would not create permanent use rights.

Tributary Conservation ICS

Under the states' representatives' proposal, a contractor could create "Tributary Conservation ICS" by purchasing documented water rights on Colorado River System tributaries upstream of Hoover Dam within the contractor's state.⁶⁹ The water rights must have been used for a significant period of years and have been created prior to the effective date of the Boulder Canyon Project Act (June 25, 1929).⁷⁰ The Secretary would verify the amount of water resulting from the augmentation that actually flows into Lake Mead, and the Tributary Augmentation would be limited to that amount to the extent that the amount is less than allowed under the Forbearance Agreement.⁷¹ The recovered water would be available for domestic use only.⁷² This water would be in addition to the state's basic apportionment and would be available during declared shortages as "Developed Shortage Supply."⁷³ The contractor could take this water on a real-time basis and could not recover more than 95% of the water.⁷⁴ If storage were required, the Secretary would administer the stored water under the rules for establishment and recovery of extraordinary conservation ICS.⁷⁵

66. *Id.* § 5(D)(3).

67. *Id.*

68. *Id.*

69. *Id.* § 5(D)(2).

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* §§ 1(A)(7), 6(A)(1).

74. *Id.* § 5(D)(5)(c).

75. *Id.* § 5(D)(2).

Imported ICS

The states' representatives' proposal would allow creation of an ICS by introduction of non-Colorado River system water in a contractor's state into the Colorado River Mainstream.⁷⁶ This water is in addition to a state's basic apportionment and may be used whenever the Secretary declared the existence of an "ICS Surplus"⁷⁷ or a shortage condition.⁷⁸

Contractors would recover no more than 95% of the water introduced.⁷⁹ The intent is to take the non-Colorado River system water on a real-time basis, and hence not spill from system reservoirs. However, if storage were required, such stored water would be subject to all provisions applicable to extraordinary conservation ICS.⁸⁰ Any agreements made with the Secretary to introduce and recover this water would survive the termination of the states' proposed program for coordinated operations of Lakes Powell and Mead.

Normal Operations

In years when Lake Mead elevation as of January 1 is projected to be above elevation 1075 ft. and below 1145 ft., the Secretary would determine a normal operating condition.⁸¹ ICS water would be available during the normal operating condition, provided the Secretary had also determined that an "ICS Surplus" exists.⁸²

Shortage Operations

On February 3, 2006, the states representatives proposed to the Secretary that, in years when the projected content of Lake Mead on January 1 is at or below an elevation of 1075 ft. but at or above 1050 ft., a quantity of 400,000 acre-feet would not be delivered to the Lower Basin states and Mexico.⁸³ In years when Lake Mead projected content is below elevation 1050 ft. but at or above 1025 ft., a quantity of 500,000 acre-feet would not be delivered to the Lower Basin states and Mexico.⁸⁴ In years when Lake Mead projected content is below 1025 ft., a quantity of 600,000 acre-feet would not be delivered to the Lower Basin

76. *Id.* § 5(D) (4).

77. *Id.* § 4(B) (5).

78. *Id.* § 6(B).

79. *Id.* § 5(D) (5).

80. *Id.* § 5(D) (4).

81. *Id.* § 4(A).

82. *Id.* § 4(C).

83. Seven Basin States' Preliminary Proposal Regarding Colo. River Interim Operations to Gale A. Norton, Sec'y of the Interior, § 3(F)(1) (Feb. 3, 2006) [hereinafter Preliminary Proposal] available at <http://www.usbr.gov/lc/region/programs/strategies/consultation/Feb06SevenBasinStatesPreliminaryProposal.pdf>.

84. *Id.* § 3(F) (2).

states and Mexico.⁸⁵ Under the states' representatives' February 3, 2006, proposal, whenever Lake Mead reaches elevation 1025 ft., the Secretary would consult with the states to determine whether Colorado River hydrologic conditions, together with the delivery of 8.4 million acre-feet of Colorado River water to Lower Basin users and Mexico, would cause the elevation of Lake Mead to fall below 1000 ft.⁸⁶ Discussion would then ensue regarding further measures that may then need to be undertaken to avoid or reduce further increases in shortage determinations.

The states' representatives also proposed that United States should reduce deliveries to Mexico pursuant to Article 10 of the 1944 Treaty in any year in which the Secretary had declared that a shortage condition existed pursuant to Article II(B)(3) of the Decree in *Arizona v. California*. The Secretary would base the total quantity of water that would not be delivered to Mexico on Lower Basin water deliveries during normal water supply conditions. The states' recommendation proposed that Mexico bear 17% of any declared shortage.⁸⁷

Although the hydrologic modeling incorporated in the Bureau of Reclamation's Draft Environmental Impact Statement published on February 28, 2007, incorporated the states' representatives' recommendation that Mexico share 17% of any reduced deliveries of Colorado River water in a declared shortage, the text of the DEIS itself was somewhat more equivocal on the willingness or commitment of the United States to do so:

In order to assess the potential effects of the alternatives, it was assumed that Mexico would share proportionately in Lower Basin shortages. Allocation of Colorado River water to Mexico is governed by the 1944 Treaty. The proposed federal action is for the purpose of adopting additional operational strategies to improve the Department's annual management and operation of key Colorado River reservoirs for an interim period through 2026. However, in order to assess the potential effects of the proposed federal action in this Draft EIS, certain modeling assumptions are used that display projected wa-

85. *Id.* § 3(F)(3).

86. *Id.* § 3(F)(7).

87. *Id.* This component of the state representatives' recommendation raises issues of interpretation of the 1944 U.S.-Mexico Water Treaty. Notwithstanding these issues, at least one proposal recommended by other parties suggests a palliative measure by which the effect of under-deliveries to Mexico can be ameliorated—creation of opportunities to permit Mexico to store water in reservoirs in the United States. Article 10 of the Treaty creates a U.S. obligation to deliver a minimum of 1.5 MAF of Colorado River water to Mexico each year. 1944 U.S.-Mexico Water Treaty, *supra* note 13, art. 10(a). The corollary of that obligation is, of course, a Treaty right of the state of Mexico to receive that much water each year. Mexico could offer to waive some portion of its annual Treaty right in exchange for deliveries of larger amounts of water in later years, perhaps on a schedule or upon demand given the existence of pre-defined circumstances.

ter deliveries to Mexico. Reclamation's modeling assumptions are not intended to constitute an interpretation or application of the 1944 Treaty or to represent current or future United States policy regarding deliveries to Mexico. The United States will conduct all necessary and appropriate discussions regarding the proposed federal action and implementation of the 1944 Treaty with Mexico through the IBWC in consultation with the Department of State.⁸⁸

Understanding the uncertainty of the shortage allotment relationship of the United States and Mexico, Arizona, and Nevada negotiated a Shortage Sharing Agreement between themselves in February 2007, which divided 83% of the reduced deliveries that had been recommended to the Secretary on February 3, 2006 between those two states.⁸⁹ Arizona agreed to assume 320,000 acre-feet of the first tier of those reduced deliveries.⁹⁰ Nevada agreed to assume 13,000 acre-feet thereof.⁹¹ Arizona agreed to assume 400,000 acre feet of the second tier of reduced deliveries.⁹² Nevada agreed to assume 17,000 acre feet thereof.⁹³ Arizona agreed to assume 480,000 acre feet of the third tier of reduced deliveries.⁹⁴ Nevada agreed to assume 20,000 acre feet thereof.⁹⁵ Subsequently, upon reviewing the Bureau of Reclamation's February 28, 2007, Draft Environmental Impact Statement, the states' representatives amended their proposal regarding stepped shortages to reflect only those reduced water deliveries which would occur within the United States. The Proposed Interim Guidelines transmitted to the Secretary on April 30, 2007, thus proposed a three-step reduction program in which the reductions of deliveries that would be made in the Lower Division states were stated as 333,000, 417,000, and 500,000 acre-feet per year, respectively.⁹⁶

B. INTERSTATE AGREEMENT

The states' representatives' February 3, 2006, proposal contemplated that state water agencies, major water users, and parties holding Colorado River water delivery contracts would become parties to an

88. DEIS, *supra* note 2, at 4-9.

89. Arizona-Nevada Shortage-Sharing Agreement (Feb. 9, 2007) available at <http://www.usbr.gov/lc/region/programs/strategies/DEISComments/State/BasinStates.pdf> (Attachment D to the Basin States Comments on *Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead*).

90. *Id.* § 3(A).

91. *Id.*

92. *Id.* § 3(B).

93. *Id.*

94. *Id.* § 3(C).

95. *Id.*

96. Proposed Guidelines, *supra* note 29, § 4(D).

interstate agreement⁹⁷ Those parties would enter into the agreement in furtherance of the same federal law and practice through which they have consulted with the Secretary in the preparation of the preliminary proposal described above.⁹⁸ The states' representatives executed that Agreement Concerning Colorado River Management and Operations on April 23, 2007, and forwarded it to the Secretary together with their April 30, 2007, correspondence.⁹⁹ The States' Agreement espouses that, through its terms, cooperation and communication among the parties will improve; additional security and certainty in the water sup-

97. Some early hesitancy to enter a multiparty, multi-state agreement was premised on an apprehension of the implication of the Compact Clause of the U.S. Constitution, Art I, § 10, cl. 3. However, the question whether an association of governments in different states, be they the sovereign states themselves, or another entity like an agency or a political subdivision, constitutes a "compact" is not a question of who the parties are, but what the effect of the association is on the political power of Congress. See generally *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (upholding the creation of an interstate agency (Multistate Tax Commission) by seven states, later joined by 14 other states); *New Hampshire v. Maine*, 426 U.S. 363 (1976) (stating that the boundary was first established by King George II); *North Carolina v. Tennessee*, 235 U.S. 1 (1914) (stating that the boundary was established by cession act of North Carolina Legislature and later marked out by Commissioners appointed by North and Carolina and Tennessee); *Virginia v. Tennessee*, 148 U.S. 503 (1893) (stating that the boundary was established by charters of English sovereigns (James I, Charles II) by whom colonies of Virginia and North Carolina were formed). In all of these cases, the U.S. Supreme Court pointed out that not all "compacts" or "agreements" invoke the Compact Clause. The test for implication of the Compact Clause is most succinctly stated in *New Hampshire v. Maine*: "The application of the Compact Clause is limited to agreements that are 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States.'" *New Hampshire v. Maine*, 426 U.S. at 369 (quoting *Virginia v. Tennessee*, 148 U.S. at 519). Applying the *New Hampshire v. Maine* "encroachment" test to the states agreement, there is clearly no "encroachment" on federal authority, as the agreement permits a federal officer, the Secretary of the Interior, to perform his/her statutory, and U.S. Supreme Court sanctioned, responsibilities more easily. Nor does the agreement interfere with any Congressional scheme.

In all these cases, the U.S. Supreme Court recognized that the interstate agreements were ratified by formal action of the state legislatures—so there is no question of the exercise of state sovereignty in all cases. The exercise of state sovereignty through legislative action is not the test. Nor is the identity of states as parties. As evident from the *United States Steel* case, the modern attitude about multi-state (some say "regional") government is to permit its enhancement, not judicially preclude it. Therefore, only in those cases where states are trying to politically aggrandize themselves, at the expense of Congress, is judicial intervention against multi-state agreements likely to occur. See *United States Steel*, 434 U.S. at 472-73. If then, the only consequence is invalidation as in the boundary cases.

98. See generally 43 U.S.C. § 1552(b) (2000); Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act, 35 Fed. Reg. 8951 (June 10, 1970). The Secretary of the Interior consults with the States through Governors' Representatives who represent the Governors and their respective States regarding the operation of Lakes Powell and Mead.

99. Agreement, *supra* note 37.

ply of the Colorado River system would accrue to the benefit of the people that the Colorado River serves; and, the parties would avoid circumstances which might otherwise form the basis for claims or controversies over interpretation or implementation of the Colorado River Compact and other applicable provisions of the law of the river.¹⁰⁰

The agreement provides the parties' mutual and aggregate support for the recommendation to the Secretary as contained in the April 30, 2007, comments to the Secretary regarding the DEIS, stating that the Secretary's adoption of the Parties' Recommendation in a Record of Decision ("ROD") is in the best interests of the respective parties and promoting the health and welfare of the public in the Colorado River Basin states.¹⁰¹ If circumstances change or the Secretary issues a ROD not in substantial conformance with the seven states' recommendation, notice and consultation ensues, both between the parties, and with the Secretary of the Interior. If differences are irreconcilable, all of the parties' rights are reserved. In the event that one party withdraws, the others may continue or disaggregate.

The agreement provides that the parties would take all necessary actions to implement the terms of the Secretary's ROD, including approval and execution of agreements necessary for that implementation. The agreement also provides that the parties would confer among themselves, at least annually, to assess the operations of Lakes Powell and Mead. Any party may request consultation with the other parties on any proposed adjustment or modification of those operations, based on changed circumstances, unanticipated conditions, or other factors. Upon such a request, the parties would confer "in good faith" to resolve any conflicted issues, and thereafter to request consultation by the other states and with the Secretary on adjustments to or modifications of operations under the ROD. The agreement would require, in any event, that the parties confer, before December 31, 2020, to determine whether to extend their agreement and recommend that the Secretary continue operations under the ROD for an additional period, modify the agreement and recommend that the Secretary modify operations under the ROD, or terminate the agree-

100. *Id.* at 4.

101. *Id.* at 6. The Agreement requests that the Secretary recognize its specific provisions as part of the Secretary's NEPA compliance, and that specific provisions be included in the ROD that references the Agreement as a basis for the ROD, including the provision that the Secretary will first consult with all the States, through their designated Governor's Representatives, before making any substantive modification to the ROD. The Agreement also requests that the Secretary include in the ROD specific provision that, upon any state's request for modification of the ROD, request to resolve claims or controversies arising under the Agreement or regarding the operation of Lakes Powell and Mead pursuant to the ROD, the ISG, or any other applicable provision of federal law, the Secretary shall invite all of the governors, or their designated representatives, to consult with the Secretary in an attempt to resolve that claim or controversy by mutual agreement.

ment and recommend that the Secretary not continue operations under the ROD after the agreement's expiration.¹⁰²

The agreement provides for diligent pursuit of augmentation within the Colorado River system including thorough determination of the feasibility of projects which increase precipitation in the basin or augment available supplies through desalination. The agreement also provides for cooperative pursuit of an interim water supply of at least 280,000 acre-feet for use in Nevada "while long-term augmentation projects are being pursued."¹⁰³ The agreement anticipates that "this interim water supply will be made available in return for Nevada's funding of the [United States'] Drop 2 Reservoir" on the All American Canal.¹⁰⁴ Significant additional saved water would inure to the benefit of the entire Colorado River system.

The parties agreed that all aspects of the proposal made to the Secretary were intended to be "consistent with existing law" and specifically that:

102. *Id.* at 8.

103. *Id.* "In consideration of the Parties' diligent pursuit of long-term augmentation and the availability of the interim water supply, the Southern Nevada Water Authority (SNWA) agree[d] that it [would] withdraw [its] right-of-way application . . . filed with the Bureau of Land Management . . . for the purpose of developing" its Nevada permit. *Id.* at 9. This permit's purpose is to develop its 1993 Virgin River water rights. SNWA would not refile its application prior to 2014 "so long as Nevada is allowed to utilize its pre-Boulder Canyon Project Act Virgin and Muddy River rights" in accordance with the Parties' April 30, 2007 comments to the Secretary, "the interim water supply made available to Nevada is reasonably certain to remain available," and "diligent pursuit of system augmentation is proceeding to provide Nevada an annual supply of 75,000 acre-feet by the year 2020." *Id.* at 9. In its April 27, 2007, correspondence to the Secretary of the Interior tendering Nevada's comments on the DEIS, Nevada stated: "Nevada is currently pursuing three separate projects to develop System Efficiency, Tributary Conservation and Imported ICS, as those terms are defined in the Basin States Proposal, with delivery taken by SNWA from Lake Mead. Each of these projects has been agreed to among the parties to the Forbearance Agreement and final details regarding these projects will be set forth in exhibits to the Forbearance Agreement. During shortages, water from projects that would otherwise qualify as Tributary Conservation ICS and Imported ICS would be available for creation, release and delivery as Developed Shortage Supply." Basin States Comments on *Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* (April 30, 2007) available at <http://www.usbr.gov/lc/region/programs/strategies/DEIScomments/State/BasinStates.pdf>. These three projects are the Drop 2 Reservoir Storage Project in Imperial County, California, the Coyote Spring Well and Moapa Transmission System Project in Clark County, Nevada, and tributary conservation along the Virgin and Muddy Rivers in Nevada. The hydrologic modeling incorporated within the DEIS assumed the development of these projects. DEIS, *supra* note 2, at 5-12.

104. Agreement, *supra* note 37, at 9. Nevada's annual water supply from this arrangement would not exceed 40,000 acre-feet. All water available to Nevada in consideration for funding the Drop 2 Reservoir would remain available during all shortage conditions declared by the Secretary. *Id.*

the storage of water in and release of water from Lakes Powell and Mead pursuant to a ROD issued by the Secretary in substantial conformance with Parties' Recommendation and this Agreement, and any agreements, rules and regulations adopted by the Secretary or the parties to implement such ROD, shall not constitute a violation of Article III(a)-(e) inclusive of the Colorado River Compact, or Sections 601 and 602(a) of the Colorado River Basin Project Act of 1968... and all applicable rules and regulations promulgated thereunder.¹⁰⁵

Regarding extended controversies about violation of the Colorado River Compact, the parties agreed, at least for the time being, to bury the hatchet,¹⁰⁶ but reserved their rights.¹⁰⁷

III. CONCLUSIONS

Sweeping statements regarding the significance of the seven states' February 3, 2006, recommendation to the Secretary burgeoned quickly

105. *Id.* at 10. See also 43 U.S.C. § 1551, 1552(a) (2000).

106. Agreement, *supra* note 37, at 10. "The Parties recognize that judicial or administrative proceedings are not preferred alternatives to the resolution of claims or controversies concerning the law of the river. In furtherance of this Agreement, the Parties desire to avoid judicial or administrative proceedings, and agree to pursue a consultative approach to the resolution of any claim or controversy. In the event that any Party becomes concerned that there may be a claim or controversy under this Agreement, the ROD, Article III(a)-(e) inclusive of the Colorado River Compact, or Sections 601 and 602(a) of the Colorado River Basin Project Act of 1968 (43 U.S.C. §§ 1551 and 1552(a)), and all applicable rules and regulations promulgated thereunder, such Party shall notify all other Parties in writing, and the Parties shall in good faith meet in order to resolve such claim or controversy by mutual agreement prior to initiating any judicial or administrative proceeding. No Party shall initiate any judicial or administrative proceeding against any other Party or against the Secretary under Article III(a)-(e) inclusive of the Colorado River Compact, or Sections 601 and 602(a) of the Colorado River Basin Project Act of 1968 (43 U.S.C. §§ 1551 and 1552(a)), or any other applicable provision of federal law, regulation, criteria, policy, rule or guideline, and no claim thereunder shall be ripe, until such conference has been completed. All States shall comply with any request by the Secretary for consultation in order to resolve any claim or controversy. In addition, any State may invoke the provisions of Article VI of the Colorado River Compact. Notwithstanding anything in this Agreement to the contrary, the terms of this Paragraph shall survive for a period of five years following the termination or expiration of this Agreement, and shall apply to any withdrawing Party after withdrawal for such period." *Id.*

107. *Id.* at 11-12. "Notwithstanding the terms of this Agreement and the Parties' Recommendation, in the event that for any reason this Agreement is terminated, or that the term of this Agreement is not extended, or upon the withdrawal of any Party from this Agreement, the Parties reserve, and shall not be deemed to have waived, any and all rights, including any claims or defenses, they may have as of the date hereof or as may accrue during the term hereof, under any existing federal or state law or administrative rule, regulation or guideline, including without limitation the Colorado River Compact, the Upper Colorado River Basin Compact, the Decree in *Arizona v. California*, the Colorado River Basin Project Act of 1968, and any other applicable provision of federal law, rule, regulation, or guideline." *Id.*

in the early months of 2006. Reducing principles of agreement to operational agreement language presented new issues of detail upon which the states' representatives worked resolvedly throughout 2006 and early 2007. In December 15, 2006, now-Commissioner of the Bureau of Reclamation Robert W. Johnson, prior Regional Director of the Lower Colorado region of the Bureau, and longtime participant in the affairs of the seven states of the Colorado River, hailed the seven states' proposal as one of the more significant events having occurred since the signing of the 1922 Colorado River Compact.¹⁰⁸ Although the states' representatives have together corresponded with the Secretary on various matters in recent years, the April 23, 2007 States' Agreement is the first document establishing mutual promises between the seven states of the Colorado River since execution of the Colorado River Compact in 1922. Hopefully it portends a new era in relations between them.

The onus now is on the Secretary of the Interior to act. There is a great deal of compromise between the states incorporated into the seven states' recommendation and States' Agreement. This alone should recommend its adoption to the Secretary. Perhaps a more compelling suasion upon the Secretary, however, is the trend that the states' recommendation makes toward softening the divides of the disproportionate hydrologic risk distribution consequent of the current law. The recommendation puts more water into and through the Colorado River. It better distributes interim supply without threatening rights to future development. It reduces risk to those to whom the law apportions the greatest risk. As the Colorado's risk distribution becomes more even, it becomes more possible to think of the River as a unified whole where common approaches and common solutions become more palatable. That is the future that the seven states' recommendation and Agreement portends. In June of 2007, the Secretary indicated that the preferred alternative that the Final Environmental Impact Statement and Record of Decision will analyze "incorporates the key elements of the plan submitted to the Secretary by the seven Colorado River Basin states."¹⁰⁹

108. Robert W. Johnson, Commissioner of the Bureau of Reclamation, Address at the Colorado River Water Users Association 61st Annual Conference (December 15, 2006), available at <http://www.usbr.gov/newsroom/speech/detail.cfm?RecordID=361>.

109. U.S. DEPARTMENT OF THE INTERIOR – BUREAU OF RECLAMATION, RECLAMATION ANNOUNCES PREFERRED ALTERNATIVE FOR COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND COORDINATED OPERATIONS OF LAKE POWELL AND LAKE MEAD (June 18, 2007) available at <http://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=17341>.

