

# THE CASE FOR THE GRAND BARGAIN



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# The Compact Allocations In Article III

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- ▶ (a) *“There is hereby apportioned from the Colorado River system in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum”*
- ▶ (d) *“The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years”*
- ▶ (c) Assuming no surplus water to satisfy the future Mexican apportionment, *“then the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin”*



# THE UPPER BASIN “SQUEEZE”

(WATER ALLOCATED V. WATER ACTUALLY AVAILABLE)

\*\* VERY ROUGH GENERALIZATIONS

	Average Total River Flow (in MAF)				
	<b>16.5 or more</b>  (minimum the Compact negotiators thought was available)	<b>15</b>  (~ 20 <sup>th</sup> century average)	<b>13.5</b>  (a 10% decline from the 20 <sup>th</sup> century average)	<b>12</b>  (a 20% decline from 20 <sup>th</sup> century, or about the actual 21 <sup>st</sup> century average thus far)	<b>11.2 or lower</b>  (a 25% decline from 20 <sup>th</sup> century average) = PPR
Mexico	1.5	1.5	1.5	1.5	1.5
Lower Basin	7.5	7.5	7.5	7.5	7.5
Upper Basin	7.5	6.0	4.5	3.0	~ 2.2

# The Overarching Goals of a Grand Bargain (at least as I see it)

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## ▶ Rescue the Compact

- ▶ To eliminate this tension between Articles III(a), III(d) and III(c)
- ▶ To honor the goals (as stated in Article I) of the agreement, particularly equity and interstate harmony

## ▶ Stay out of Court

## ▶ Create a stable foundation for further innovation



# THE “UPPER BASIN VOLUNTARY DEMAND CAP” AS A MEANS OF MITIGATING LEGAL UNCERTAINTY IN THE COLORADO RIVER BASIN: MODELING RESULTS (2013)

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- ▶ **The bargain:**
    - ▶ The Upper Basin agrees to voluntarily cap Upper Basin consumptive use at a level well below the apportionment value of 7.5 maf (but above a catastrophic decline)
    - ▶ The Lower Basin (and feds) agree to never call for or attempt to enforce a Compact Call
  - ▶ **So what’s the cap number? We used 5 maf (but of course that’s what the negotiation is for)**
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# What's in it for the Upper Basin?

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- ▶ The threat of a Compact Call is immediately eliminated. The need to devise rules for a Compact Call enforcement is immediately eliminated.
- ▶ The threat of continued climate change is significantly mitigated --- the risk is spread across both basins.
- ▶ If the deal is done soon, then the cap will (almost certainly) be above current levels of consumption. This immediately and dramatically increases the reliability for every existing UB water user.



# What's in it for the Lower Basin?

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- ▶ No need to rely upon a successful Compact Call enforcement, or a prompt victory in Court calling for a Compact Call enforcement.
  - ▶ No need to face legal challenges saying that III(d) is not a “delivery obligation” and that any reduced flows in a climate change era are not the responsibility of the UB.
  - ▶ No need to face legal challenges saying that the compact allocation scheme was based on a mutual error, and/or that the doctrine of equitable apportionment should be applied to better balance the actual water availability of the 2 basins.
  - ▶ No need to face legal challenges about whether the UB is legally liable for covering half of the Mexican Treaty obligation. No need to protect against legal challenges about the accounting the LB tributary uses.
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# Final Thoughts on the Grand Bargain

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- ▶ Ultimately, the “Do Nothing” Alternative will no Longer be Tenable
- ▶ The Politics of this Grand Bargain are Toxic (at least for now)
- ▶ Timing is Tricky
- ▶ The Administration of the Bargain Would be Challenging
- ▶ I’m Not Convinced This is the Right Model





# Thank You.

Supporting materials at: <http://www.waterpolicy.info/colorado-river-information-portal/>

- ▶ “Rethinking the Future of the Colorado River.” Report and Presentation to the Colorado River Water Users Association. 2010.
- ▶ “Does the Upper Basin have a Delivery Obligation or an Obligation Not to Deplete the Flow of the Colorado River at Lee Ferry.” April, 2012.
- ▶ “Respective Obligations of the Upper and Lower Basins Regarding the Delivery of Water to Mexico: A Review of Key Legal Issues.” March, 2012.
- ▶ “The Upper Basin Voluntary Demand Cap as a Means of Mitigating Legal Uncertainty in the Colorado River Basin: Modeling Results.” April 2013.
- ▶ “Equity and the Colorado River Compact.” (Jason Robison and Douglas Kenney). *Environmental Law*, 42(4):1157-1209 (2013).

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