

COLLABORATION AND THE COLORADO RIVER COMPACT

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On December 13, 2007, at the Colorado River Water Users Association's annual conference in Las Vegas, Nevada, the Secretary of the Interior signed a historic Record of Decision approving adoption of interim guidelines for the management of shortages in the Lower Colorado River Basin and the coordinated operation of Lake Powell and Lake Mead.¹ The decision is historic because it outlines—for the first time in the history of the Colorado River Compact—specific guidelines for addressing shortage conditions among the three states in the Lower Basin (Arizona, California, and Nevada), as well as for coordinating the operation of Lakes Powell and Mead under low water conditions for the benefit of states in both the Upper and Lower Basins. The guidelines, in turn, substantially reflect the collaborative thinking and input of the seven basin states, as provided to the Secretary of the Interior on February 3, 2006,² and April 30, 2007,³ as part of the Department of Interior's two-year public involvement plan for the development of shortage criteria on the lower Colorado River.

As noted by the Record of Decision, the guidelines include:

- ◆ [establishment of] discrete levels of shortage volumes associated with Lake Mead elevations to conserve reservoir storage and provide water users and managers in the Lower Basin with greater certainty to know when, and by how much, water deliveries will be reduced in drought and other low reservoir conditions;
- ◆ a coordinated operation of Lake Powell and Lake Mead determined by specified reservoir conditions that would minimize shortages in the Lower Basin and avoid the risk of curtailments in the Upper Basin;
- ◆ a mechanism to encourage and account for augmentation and conservation of water supplies, referred to as Intentionally Created Surplus (ICS), that would minimize the likelihood and severity of potential future shortages; and

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¹ U.S. DEP'T OF THE INTERIOR, RECORD OF DECISION—COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND THE COORDINATED OPERATIONS OF LAKE POWELL AND LAKE MEAD (Dec. 2007), *available at* <http://www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf> [hereinafter RECORD OF DECISION].

² Seven Basin States' Preliminary Proposal Regarding Colorado River Interim Operations (Feb. 2006), *available at* <http://www.usbr.gov/lc/region/programs/strategies/consultation/Feb06SevenBasinStatesPreliminaryProposal.pdf>.

³ Letter from the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming Governors' Representatives on Colorado River Operations to Dirk Kempthorne, Sec'y of the Interior (Apr. 30, 2007), *available at* <http://www.usbr.gov/lc/region/programs/strategies/DEISComments/State/BasinStates.pdf> (regarding comments on the Draft Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages, and Coordinated Operations for Lake Powell and Lake Mead).

◆ the modification and extension of the Interim Surplus Guidelines through 2026.⁴

The new guidelines implement interim reservoir operations that are designed to minimize shortages in the Lower Basin and avoid the risk of curtailments in the Upper Basin through an operating strategy for Lakes Powell and Mead that strives to balance the water supply between these reservoirs, while maximizing their use. The guidelines replace the existing Interim Surplus Guidelines by extending the Interim Surplus Guidelines through 2025 with amendments that (a) remove the partial domestic surplus category; (b) limit domestic surpluses for the Metropolitan Water District to 250,000 acre-feet, for Arizona to 100,000 acre-feet, and for the Southern Nevada Water Authority (“SNWA”) to 100,000 acre-feet during the years 2016 through 2025; and (c) implement shortage conditions when Lake Mead’s elevation is at 1075 feet or lower. The guidelines also provide an opportunity for Lower Basin states to develop, store, and access intentionally created surplus (“ICS”) water through extraordinary conservation efforts, tributary conservation, system efficiency projects, or importation of non-Colorado River water into the mainstream of the Colorado River. In any one year, the creation of extraordinary conservation ICS for California, Nevada, and Arizona will be limited to 400,000 acre-feet, 125,000 acre-feet, and 100,000 acre-feet, respectively, while the maximum amount that California, Nevada, and Arizona can accumulate at any one time is limited to 1.5 million acre-feet, 300,000 acre-feet, and 300,000 acre-feet, respectively. These limits do not apply to other categories of ICS water available to Nevada.

The Record of Decision also activates an existing agreement between the seven basin states⁵ to pursue interim water supplies, system augmentation, system efficiency, and water enhancement projects within the Colorado River system, including but not limited to importation of new sources of supply from outside the Colorado River Basin and desalination of ocean water or brackish water.

The decision and interim guidelines are a major advancement in the management of Colorado River water resources, one with significant benefits to Southern Nevada. Beyond the advantages cited above, the guidelines provide for the development of procedures that will allow Nevada’s pre-compact tributary and imported groundwater water resources to be introduced, conveyed through, and diverted from the Colorado River system. Ninety-five percent of this water would be recoverable and available during any shortage and would contribute to return flow credits. As the SNWA pursues development of additional, available groundwater supplies within Nevada, this procedure will provide an opportunity for the SNWA to extend the use of these new supplies significantly. Second, the guidelines allow Nevada to participate in the implementation of system efficiency projects such as the Drop 2 Reservoir along the All American Canal in California and the Yuma Desalting Plant in Arizona, as

⁴ RECORD OF DECISION, *supra* note 1, at 4 (citation omitted).

⁵ Letter from the States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming Governors’ Representatives on Colorado River Operations, *supra* note 3, at Attachment A (Agreement Concerning Colorado River Management and Operations), *available at* <http://www.usbr.gov/lc/region/programs/strategies/DEIScomments/State/BasinStates.pdf>.

well as future augmentation projects. Participation in the Drop 2 project alone will give Nevada access to a one-time supply of water (at least 400,000 acre-feet) that can be accessed in future years on an as-needed basis.

The Record of Decision was specifically the result of a public process that began in 2005 when the Secretary requested input from the seven states of the Colorado River Compact and other stakeholders regarding development of additional operational guidelines and tools to meet the challenges of the ongoing drought in the Colorado River Basin. In actuality, however, the decision is the product of a decades-long interaction among the seven basin states—an interaction that has helped to clarify issues and concerns, develop effective working relationships among all the parties, and establish trust and commitment on matters of regional and national importance. As a result of their collective history and experience, the seven basin states have learned how to move forward and address water management challenges incrementally, while working steadfastly to meet the water supply needs of individual states and communities.

Unfortunately, there is no magic formula for success in this type of endeavor. While there are advantages to interstate water compacts in meeting regional and local water needs, and although one cannot overstate the importance of collaboration in managing activities and defusing potential conflicts when or where water is scarce, neither is a substitute for the hard work and compromise that ultimately produces results in the face of competing interests and needs.

Over the past eight years, the sustained drought in the American West and the reality of climate change gradually altered historical understandings of the Colorado River and challenged many underlying assumptions about the river's long-term management. In response to these new conditions, the seven states of the Colorado River Basin and numerous communities that depend on the river for water began to adjust infrastructure plans, further improve water efficiency, and take steps to develop additional unused water supplies to maintain the reliability of their delivery systems. In only a few years, the river's many stakeholders had to accept and respond to this "strategic inflection point" in their collective history as stewards of the river and its life-giving water.⁶ Their ability to do so is a testament not only to the flexibility inherent in the original Colorado River Compact, but also to the pragmatic and collaborative working relationship that has developed between the seven basin states, particularly in the past twenty years.

The recent success in the Colorado River Basin stands in stark contrast to the ongoing water challenges facing communities in the southeastern United States, where drought and climate change have impacted water supplies with equal severity, and collaboration and formal compacts among states have yet to resolve ongoing water challenges facing major communities such as Atlanta.

⁶ The phrase "strategic inflection point" was coined by Andrew Grove of Intel Corporation to describe a business situation where the fundamentals of the business change, requiring new approaches in order for the business to adapt successfully and remain viable. The concept applies to any situation where standards, conditions, or expectations are supplanted, either slowly or suddenly, by new ones that challenge the established order of things, resulting in a crisis point. See ANDREW S. GROVE, *ONLY THE PARANOID SURVIVE* (1996).

To put this into perspective, it is worth briefly comparing the success of the seven states in the Colorado River Basin with the challenges faced by Georgia, Alabama, and Florida in the Apalachicola-Chattahoochee-Flint River Basin.⁷ Each basin is the principal surface-water source for one of the fastest growing metropolitan regions in the United States,⁸ and each has been the subject of an interstate river compact. However, whereas the seven states in the Colorado River Basin have extensive experience wrestling with the equitable allocation of their river through an interstate compact, such is not the case with the states of the Chattahoochee.⁹ The Colorado River Compact was first envisioned in the early 1900s and subsequently approved by Congress in 1922,¹⁰ but the Chattahoochee Compact, formally known as the Apalachicola-Chattahoochee-Flint River Basin Compact, was not signed into law by Congress until 1997.¹¹ Even then, the Chattahoochee Compact did not last long, expiring on August 31, 2003, after Florida refused further extension of negotiations on allocation formulas.¹² Since that time, much of the Chattahoochee conflict has become litigious, focusing on lawsuits over water management of Lake Lanier and the prospect of having state apportionments allocated by judicial fiat.

This is far from ideal, but not unusual. In fact, people often forget that the Colorado River Compact of 1922 was only the first in a series of negotiations, agreements, and court cases that collectively comprise what is now called the “Law of the River.” Early negotiations on the river among the states of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming were unable to reach agreement on apportionment for each of the states. As a result, the states subsequently agreed to divide the Colorado River evenly between the Upper and Lower Basins (7.5 million acre-feet for each basin). It would be another six years before allocation among the Lower Basin states would occur,¹³ more than twenty-five years before allocations for each of the Upper Basin states would be established,¹⁴ and more than forty years before the allocations among the Lower Basin states would carry the kind of certainty they have today.¹⁵ Given the tortuous history of the Colorado River Compact, it should come as no surprise that Alabama, Florida, and Georgia have yet to resolve the allocation and management of the Chattahoochee in any definitive manner.

While it is premature to declare the Chattahoochee situation a failure, it has become a very real crisis for the greater Atlanta area, now home to over

⁷ For brevity’s sake, I will simply refer to the basin as “the Chattahoochee” for the balance of this article.

⁸ Las Vegas and Atlanta. Las Vegas depends on Colorado River water stored in Lake Mead, while Atlanta depends on Chattahoochee River water stored in Lake Lanier.

⁹ Benjamin L. Snowden, Student Article, *Bargaining in the Shadow of Uncertainty: Understanding the Failure of the ACF and ACT Compacts*, 13 N.Y.U. ENVTL. L.J. 134 (2005).

¹⁰ Colorado River Compact of 1922, 70 CONG. REC. 324 (1928).

¹¹ Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. Law No. 105-104, 111 Stat. 2219 (1997).

¹² Josh Clemons, *Water-Sharing Compact Dissolves*, WATER LOG, Nov. 2003, at 1, available at <http://www.olemiss.edu/orgs/SGLC/MS-AL/Water%20Log/23.3watershare.htm>.

¹³ See Boulder Canyon Project Act of 1928, ch. 42, 45 Stat. 1057.

¹⁴ See Upper Colorado River Basin Compact of 1948, ch. 48, 63 Stat. 31 (1949).

¹⁵ See *Arizona v. California*, 373 U.S. 546 (1963).

half of Georgia residents and dependent on the Chattahoochee River and Lake Lanier for the majority of its water supply. Having allowed the original Chattahoochee Compact to expire, the three states are forced to address such crisis points without the benefit of institutional trust or an established framework for resolving conflicts. Instead, they find themselves negotiating critical needs such as a drought response plan while under the watchful eye of the federal government.¹⁶

This is a point often overlooked when assessing the real value of compacts. The Colorado River Compact was formed

to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods.¹⁷

Similarly, the Chattahoochee Compact was formed “for the purposes of promoting interstate comity, removing causes of present and future controversies, equitably apportioning the surface water of the [Apalachicola-Chattahoochee-Flint River Basin], engaging in water planning, and developing shared common data bases.”¹⁸ Both compacts were intended not only to apportion available water supplies from their respective river systems, but also to establish forums for resolving conflict and creating “interstate comity.” In other words, a compact does not mark the final stage of problem-solving, only the beginning.

This has certainly been true for the Colorado River Compact. As noted above, the 1922 Compact left a great deal undecided, but it also provided a strong, yet flexible framework in which each state was given a greater degree of certainty about its water situation. Only then could the states individually and as a group really begin the long and arduous journey of more detailed negotiations over issues and concerns.¹⁹ Almost a century later, the wisdom of this approach can be seen in work products such as the recent Seven Basin States Agreement and interim shortage guidelines.

The drought and growing reality of climate change are helping to demonstrate the value of the Colorado River Compact and the collaborative mettle of the seven basin states. As others have noted, compacts are powerful collaborative tools whose full utility is limited only by the will and creative instincts of the participants.²⁰ Having negotiated complex water relationships in the West for over twenty years, I am convinced the best arrangements are those in which parties demonstrate a willingness and commitment to (1) collaborate with one another, (2) share risks and benefits equitably, and (3) construct agreements that are binding but alterable through good-faith negotiation and the unanimous

¹⁶ At the time of writing, Alabama, Florida, Georgia, and the Department of the Interior were working to develop a Tri-State Drought Plan by February 15, 2008.

¹⁷ Colorado River Compact of 1922, art. I, 70 CONG. REC. 324 (1928).

¹⁸ Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. Law No. 105-104, art. I, 111 Stat. 2219, 2219 (1997).

¹⁹ See Frank J. Trelease, *Arizona v. California: Allocation of Water Resources to People, States, and Nation*, 1963 SUP. CT. REV. 158.

²⁰ Snowden, *supra* note 9.

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assent of all the participants. While the precise tools for achieving this may vary on the basis of factors unique to each situation, the underlying principles of participation, risk sharing, and empowerment generally cannot. By honoring these core principles, any arrangement's potential for conflict, gridlock, or failure is greatly reduced, if not eliminated. As the recent work of the seven basin states affirms, there are few challenging issues that a participatory process cannot handle as long as these principles are in evidence and respected.

The seven states of the Colorado River Basin have spent much of the past century working through some of the most complex, contentious water resource issues imaginable. They will undoubtedly continue to do so into the future, as new challenges arise. Yet their collective experience demonstrates the profound value of working together to resolve seemingly intractable problems, rather than resorting to litigation or the kind of protracted conflict or competition that results in winners, losers, or nothing at all. By embracing the need for cooperation and partnership implicit in the Compact, balancing our competing needs and demands, and reaching out to share our experiences and solutions with others who are facing similar challenges, the seven basin states are setting new standards for resource management that will see our communities—and the Colorado River—through events such as the drought and climate change well into the future.