

**A NEW LAW OF THE RIVER TO ADDRESS
THE “ERA OF LIMITS” ON THE COLORADO**

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“Law of the River” is a magnificent phrase. Law students usually encounter it at the end of a water resources course, introduced as “*the* great epic of water law and politics in America.” J. SAX, ET AL., *LEGAL CONTROL OF WATER RESOURCES* 692 (3d ed. 2000). The historical collection of interstate compacts, congressional enactments, intrastate agreements, and U.S. Supreme Court decisions – emanating from the highest councils of our federal system – create the impression of a fixed body of law culminating in the 1963 and 1964 *Arizona v. California* decisions that achieved its goal of permitting the full development of the Colorado River. Four decades after the Supreme Court’s quantification of the lower basin states’ apportionments of water from the Colorado River, officials ranging from the Secretary of the Interior to local water district directors invoke the “Law of the River” as if carved as immutably as the commandments on Moses’ tablets.

In reality, two readings of the Law of the River contend today for control of the Southwest’s most important resource. The first of these, which I’ll term the “Old Law of the River” or “old law” confines itself to the provisions defining each state’s quantitative share and priority vis-à-vis the other Colorado River Basin states, and each water district’s share and priority vis-à-vis competing proprietary contractors. Historically, concepts such as public trust values, environmental assessment, endangered species, or

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air and water quality have not played much of a part in the Old Law of the River. In the hands of insensitive water districts and Department of the Interior (DOI) officials, the old law is invoked to ignore those needs, and to deny legal standing to those (outside the brotherhood of parties to a water contract or Supreme Court proceeding) who assert their protection. For some people, the old law is all that is relevant.

Old Law of the River

The old law includes the landmark 1922 Colorado River Compact (1922 Compact), 1928 Boulder Canyon Project Act (Project Act) and the 1931 Seven Party Agreement defining priorities among the Colorado River's California users. (Subsequent voluntary agreements include the 1944 treaty with Mexico, the 1948 Upper Colorado Compact, and the 1968 Colorado River Storage Project Act.) The Law of the River also includes a series of Supreme Court decisions adjudicating the competing claims of Arizona and California, the most notable of which are the 1963 interpretation of the Project Act in the most prominent *Arizona v. California* decision, 373 U.S. 546, and the *Arizona v. California* decree in 1964, 376 U.S. 340, that ordered the Secretary of the Interior to supply water stored by Hoover Dam in accordance with the mandates of the 1963 ruling.

The 1922 Compact permanently allocated 7.5 million acre feet (maf) annually to the upper basin (essentially the states of Wyoming, Colorado, Utah, and New Mexico) and 7.5 maf annually to the lower basin (essentially the states of Arizona, California, and Nevada). Apportionment to each individual state was left to the future. Before the states could agree to that apportionment, however, California sought construction of what became Hoover Dam, and of an All-American Canal to carry water from the river to the

Imperial Valley without crossing the Mexican border. To secure congressional authorization and funding for those works, California agreed to limit its legal entitlement from the Colorado to 4.4 maf annually, and to the requirement that all users of Colorado River water (including those who had perfected rights prior to 1929) take water only pursuant to a contract with the Secretary of the Interior. The resulting Project Act also granted advance congressional approval to a lower basin compact that annually guaranteed Arizona 2.8 maf and Nevada 0.3 maf.

Before signing any contracts with California water districts, the Secretary of the Interior asked California to subdivide the state's apportionment among those districts. In 1931 that sub-apportionment was partially accomplished through the Seven Party Agreement, which separated California agricultural and municipal users, but that agreement failed to quantify each agricultural district's share of 3.85 maf of annual allocation. Every secretarial contract in California, including the one signed in 1932 with the Imperial Irrigation District (IID), incorporated the terms of that Seven Party Agreement. Expecting that their share of Colorado River water would continue at levels projected at the signing of the 1922 Compact, and to include the river's tributaries, California agricultural and urban water districts ultimately contracted with the Secretary for 5.2 maf of Colorado River water annually.

Arizona's disagreement with California's expectations ultimately required Supreme Court adjudication. The landmark 1963 *Arizona* decision did more than confirm Arizona's claim to a Colorado River tributary, the Gila River. In the absence of a lower basin compact voluntarily apportioning the lower basin's share of Colorado River water, the Court held that Congress had effected that apportionment through the Project

Act, by requiring California to limit its annual claim to 4.4 maf, by authorizing the Secretary to contract for delivery of 2.8 maf annually in Arizona, and 0.3 maf annually in Nevada, and by requiring each user of water to be bound by a secretarial contract. The resulting 1964 *Arizona* decree enforced the 1963 interpretation by prohibiting the Secretary from supplying water out of federal facilities except in accordance with the limitations of the Project Act as so interpreted. (Armed with this quantification in its favor, Arizona secured through the 1968 Colorado River Storage Act authorization for its Central Arizona Project and the ability – perfected in the last few years – to take its annual 2.8 maf and leave less “surplus” for California.)

New Law of the River

The “New Law of the River” or “new law” adds to the proprietary determinations of the old law the jurisprudence that defines and enforces the non-proprietary rights of the commons and public domain with respect to the Colorado River. It is grounded in the statutory and common law developments emanating from the environmental era of the late 20th century, principally the National Environmental Policy Act (NEPA), the Clean Air Act, the Clean Water Act, and Endangered Species Act (ESA).

The new law does not displace the priorities of the old law, or impose chaos in their place, but instead embraces those private rights with an overlay of protection for common values shared by all Colorado River Basin inhabitants. While there is not yet any Supreme Court decision formally incorporating the new law into the old law, many pragmatic federal, state, and local officials have been creating it in plans and decisions that affect the Colorado River Basin. For instance, in both the upper and lower basins, federal and state officials have crafted plans to produce ESA compliance, even though

that new law and its requirements were not contemplated by the framers of the old law. Federal officials have engaged NEPA to guide contemporary decisions whose predecessors had been made without environmental assessment under the old law.

As we will now see, the new law is connected to the old by a vital link: our expanding comprehension of what “beneficial use” of water means. California’s present efforts to quantify and reduce its use of Colorado River water demonstrates how those charged with implementing the Law of the River either can embrace or implement the new law now, or risk having the new law thrust upon them, involuntarily and unpredictably, in a future Supreme Court decree.

DOI’s Restrictions on California

The 21st century’s first crisis on the Colorado River arises because, in this author’s view, the Law of the River has been misapplied by the one individual above all entrusted by Congress with its administration: the Secretary of the Interior. Rightfully concerned that California has been using more Colorado River water than the normal-year apportionment of 4.4 maf decreed in the 1964 *Arizona* decision, Secretary Gale Norton wrongfully punished California for that state’s failure to meet DOI’s artificial January 1, 2003 deadline for quantifying its districts’ uses under the Seven Party Agreement. Rightfully frustrated that the long-awaited transfer of Colorado River from the agricultural IID to San Diego (in which IID farmers would be compensated to “conserve” up to 300,000 afa through efficiency or land fallowing measures, and make that water available to diversion by urban users with lower priority) had not been implemented by that date, the Secretary wrongfully failed to address the cause of that failure: the inability of DOI as well as California officials to ensure that the transfer

would not destroy the Salton Sea. Rightfully declaring at the December 2002 meeting of the Colorado River Water Users Association that “the era of limits is upon us,” Secretary Norton wrongfully failed to recognize environmental needs as an important consideration in responding to those limits.

The critical need for DOI to recognize environmental needs in implementing the Law of the River becomes evident at the Salton Sea, a terminal saline lake that was historically flooded by the Colorado River before construction of Hoover Dam and has since been sustained by IID’s agricultural runoff. The frustration of the IID-San Diego transfer and the accompanying California quantification effort did not result from IID’s disregard of urban water demands or from California’s disrespect of her sister states’ interest in the river. California’s dilemma arose when its state water board in hearings that lasted through most of 2002 acted on compelling evidence to moderate the transfer’s impact on the Salton Sea. Cal. SWRCB Order WRO 2002-0016 (Dec. 20, 2002). The California Legislature also conditioned the transfer on “no harm to the sea” for at least 15 years. Cal. Stats. 2002, ch. 617 (S.B. 482).

Had the transfer proceeded without assured mitigation for its impacts, the Salton Sea would have degenerated into a fishless lake, incapable of supporting the endangered species and other wildlife that now enjoy this the nation’s second most productive avian habitat. The shrinking shoreline, exposed by the diversion of water to San Diego and resulting reduction of agricultural runoff, would create a region-wide air quality health hazard from airborne PM₁₀ dust emissions. Even if the state water board had allowed it, and despite DOI’s threats aimed at the Imperial Valley, neither California state leaders nor local officials were inclined to destroy this corner of the state in order to save it.

In singling out IID for punishment, Secretary Norton invoked the mandates of the Law of the River. But that law did not force her to restrict California's 2003 use to the normal-year apportionment of 4.4 maf; indeed, the Secretary offered to provide California up to 5.2 maf in 2003, if the transfer and quantification were finalized by New Year's Day. That 800,000 acre-foot incentive was to be accomplished by a secretarial declaration of surplus, a surplus grounded not in facts hydrologic, but political. But whatever political considerations the Secretary relied on, they did not include DOI's failure to meet the year 2000 congressional deadline for producing a Salton Sea Reclamation Plan, or DOI's responsibility for the endangered species at the Salton Sea. In the Secretary's selective choice of water delivery schedules, we hear the ghosts of the 1963 *Arizona* dissenters, warning of "a single appointed federal official ... vested with absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States" (373 U.S. at 603 (Harlan)), in a regime where "one can receive his priority because he is the most worthy Democrat or Republican, as the case may be" (373 U.S. at 629 (Douglas)). At the very least, then, the Secretary had and continues to have discretion under the Old Law of the River to extend the surplus determination for the additional year California has needed to work out the Salton Sea mitigation issues on its own.

Ironically, however, the greatest obstacle to Salton Sea restoration has arisen not from the Secretary's exercise of discretion, but *rejection* of discretion to consider public values in dictating how California should solve the problem. Four months after imposing the reduction in California's supply, Assistant Secretary Bennett Raley advised California's Director of Water Resources, "that the direct deliveries of Colorado River

water to the Salton Sea are not an authorized beneficial use under applicable law or contract.” Letter from B. Raley to T. Hannigan, Apr. 4, 2003. In other words, neither IID nor California can mitigate the transfer of water to San Diego by devoting some of its Colorado River resource to the environment, and no water excess to stringent irrigation measures can flow from IID’s lands into the sea; the Law of the River does not allow it. On this premise DOI would stress both the sea and fields of the Imperial Valley, and frustrate the mandates of the California state water board and state legislature that render the transfer environmentally and economically acceptable.

In fairness to DOI, Mr. Raley didn’t actually assert that Colorado River water devoted to the Salton Sea environment is “not an authorized beneficial use.” His actual statement reads “[t]he historical position of the Department” is that these deliveries would not constitute such use. When asked to back up this “historical position” with published departmental or solicitor opinions, DOI produced none. To justify this newest assertion of federal prerogative, DOI exclusively relied on the building blocks of the Old Law of the River – the Project Act, the Supreme Court’s 1964 decree, and the 1932 contract between the Secretary and IID.

Given DOI’s position, those seeking to protect the Salton Sea environment need to prove that deliveries of Colorado River water to the Salton Sea form an authorized beneficial use. This proof can be made through reliance on the 1922 Compact, the Project Act, the IID contract and the *Arizona* opinions. The operative terms that they contain limiting the authorized purposes of water use include “beneficial,” “consumptive,” and “domestic and agricultural.” The definition of “beneficial” use under California state law independently applies.

Federal Definition of Beneficial and Consumptive Use

The 1922 Compact is the relevant starting point because in the end, the Project Act, the IID contract, and 1964 Supreme Court decree require compliance with the 1922 Compact's terms, and those terms include the limitation that to each basin is apportioned the "beneficial consumptive use of 7,500,000 acre-feet of water per annum." COLORADO RIVER COMPACT, ART. III(a). Moreover, the 1922 Compact forbids the lower basin to demand release from the upper basin of water "which cannot be reasonably be applied to domestic and agricultural uses." COLORADO RIVER COMPACT, ART. III(e). These requirements are reiterated, as required by the Project Act, in IID's contract with the Secretary. Finally, the Supreme Court's decree prohibits the Secretary of the Interior from releasing water stored in Lake Mead to supply California users, except for these purposes.

As the Supreme Court's special master Simon Rifkind observed 40 years after their negotiations, the 1922 Compact's framers left us no express definition of "beneficial consumptive," but apparently intended without controversy to equate "beneficial" to "non-wasteful." SPECIAL MASTER'S REPORT, *Arizona v. California*, Oct. Term 1960, at 147-148 (1960). That undefined word "beneficial" will be addressed momentarily.

In contrast to "beneficial," however, the word "consumptive" was the subject of intense debate between the basins and among the states, both at the time the 1922 Compact was executed and subsequently, as a *measurement* device. Generally speaking, the states of origin argued that "consumption" of water should be measured to account for depletions in the headwaters, while the states of use contended that the term accounted only for actual diversions and with credit for return flow. NORRIS HUNDLEY, JR., WATER

AND THE WEST 312-314 (1975); C. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 15, 18-19 (1966). Congress resolved this issue in the Project Act by equating “consumptive use” with “diversions less returns to the river” (§ 4(a)), which the Supreme Court ratified in the 1964 *Arizona* decree. ¶I(A), 376 U.S. at 340.

Importantly, the governing definition of “consumptive use” in both the Project Act and 1964 decree did not exempt “instream” uses for wildlife protection. To the contrary, the 1964 decree, recognizing United States reserved rights for two federal wildlife preserves, specifically labeled these uses “consumptive.” 376 U.S. at 346. Thus, were IID to devote some of its diverted Colorado River resource to the preservation of wildlife in the Salton Sea, the Law of the River recognizes such a use as “consumptive.” But is the use “beneficial”? The short answer under federal law has to be “yes,” because the United States can hardly argue, after successfully advocating reserved rights for Colorado River water to protect wildlife on a federal preserve (373 U.S. at 595, 601), that this use can be deemed “wasteful.” Nor does the “beneficial” use of Colorado River water for wildlife depend on an assertion of reserved rights by the United States; IID can also make this use. A seemingly insignificant passage in Judge Rifkind’s 1960 report confirms that *the United States was not only authorizing, but actually purchasing, IID water for the exclusive purpose of protecting migratory birds at the Salton Sea National Wildlife Refuge.* SPECIAL MASTER’S REPORT at 95. Contrary to Assistant Secretary Raley’s position on April 4, 2003, DOI’s historical practice has endorsed the direct application of Colorado River water to the Salton Sea environment.

State Law Also Governs

Powerful as it is, this federal law of beneficial use does not provide the sole justification for lawfully providing Colorado River resources to the Salton Sea. The argument under federal law has been set forth first, not because it alone is determinative, but rather to show that, even if state law is not consulted, the use of Colorado River water for the Salton Sea is “beneficial.” Generally state law beneficial use definitions have been ignored because of this language the 1963 *Arizona* decision: “where the Secretary’s contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.” 373 U.S. at 588.

A careful reading of the 1963 *Arizona* opinion, combined with more recent Supreme Court and court of appeals authority, does not exclude the consideration of state law; to the contrary it requires such consultation. The Supreme Court’s “state law has no place” passage refers to the congressional design that apportioned the river among the three lower basin states, and authorized the Secretary to contract within each of these states without regard to the proprietary priorities of state law. The Court said nothing in that opinion, or in any other of the *Arizona* opinions, to suggest or require that state law cannot determine beneficial use under contracts entered into by the Secretary.

Evaluation of the “state law has no place” language must begin with the recognition that from the time of its publication the 1963 *Arizona* opinion faced near-universal criticism for its unnecessary denigration of state law considerations. Special Master Rifkind had recognized the role of state law in governing federal reclamation projects and particularly their intrastate allocations (SPECIAL MASTER’S REPORT at 216-218), invoking federal law not to promote sole federal regulation but to ensure federal

protection in the exceptional case in time of shortage of state-law-defined present perfected rights. SPECIAL MASTER’S REPORT at 234, citing Project Act §6. When the Supreme Court used sweeping language to establish federal supremacy in intrastate as well as intrastate allocation, the academic response was not kind; Dean Meyers described the Court’s treatment of Project Act section 18 (copied from section 8 of the 1902 Reclamation Act) as “fatuous,” and the majority’s interpretation of “the *Ivanhoe* case ... politely described as either disingenuous or muddleheaded.” Meyers, 19 STAN. L.REV. at 60. The Supreme Court itself ultimately came to a similar conclusion in the following decade, when (with Dean Meyers filing an *amicus* brief *pro se*) in *California v. United States*, 438 U.S. 645 (1978), the Court disavowed the unnecessarily broad texts in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958), and *Arizona* itself. 438 U.S. at 673-674.

In *California v. United States*, the Supreme Court held that section 8 of the Reclamation Act expressed congressional recognition of federal respect for the states, and of the variety of state water laws reflecting the geographic diversity of the nation. Describing section 8 as a “leading example” of the contemporary term “cooperative federalism,” the Court held that in reclamation projects state law should govern unless overridden by a “clear Congressional directive” to the contrary. Two subsequent Ninth Circuit decisions implemented the Supreme Court’s new-found respect for state law. One was the remand of *California v. United States* itself, in which the appeals court held that it “may not seek out conflicts between state and federal regulation where not clearly exists” and that state law governs federally-financed reclamation projects unless at “cross-purposes with an important federal interest served by the congressional scheme.”

694 F.2d 1171, 1176 (9th Cir. 1982). The other case was *United States v. Alpine Land & Reservoir Co.*, which held that “beneficial use,” the measure of rights to use reclamation project water, “was intended to be governed by state law.” 697 F.2d 851, 854 (9th Cir. 1983). Both opinions were authored by then-Circuit Judge Kennedy.

While Congress expressly designated the Boulder Canyon Project as a reclamation project (Project Act, § 14), state law will not be applied under the state-law savings clause section 8 of in the Reclamation Act if state law conflicts with clear federal objectives in the Project Act. The obvious federal objectives in the Project Act include the apportionment between the basins and among the states, and the secretarial power to decide with whom to contract for permanent water service. Another obvious federal objective is to avoid waste in the river system – but this latter objective is shared by each state in its formulation of beneficial use. True, residual federal power must repose in the Secretary to overrule rogue state beneficial use determinations that sanction universally-recognized waste. But as *California v. United States* and its progeny teach us, state law must be respected *ab initio* with a presumption that no federal conflict exists. Thus, state law defines beneficial use until an overriding federal mandate can be shown.

Beneficial Use under California Law

When examined to define beneficial use at the Salton Sea, California law unambiguously authorizes the supplying of water to protect the sea’s ecology, wildlife, and scenic value. This beneficial use of fresh water to sustain a terminal saline lake was declared a lifetime ago in the “first” Mono Lake case, *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460 (1935). It was ratified in the better-known public trust Mono Lake case of *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). The California

Water Code (sections 1243, 1257, 1707, 1736) also expresses this beneficial use, as does the 2002 California transfer legislation (ch. 617). In addition, the state water board enforced such use in its 2002 order (WRO 2002-0016) approving the IID-San Diego transfer subject to IID's sustenance of the Salton Sea for at least 15 years.

One searches in vain for an overriding and conflicting federal mandate. Adjudicated federal wildlife uses on the Colorado River hardly vitiate California's authorization for identical purposes. That California would authorize or require IID to devote a portion of its Colorado River allocation to the Salton Sea does not upset the interstate apportionment, because all uses within California – even *federal* ones – for wildlife are charged against the state's annual 4.4 maf. *Arizona*, 376 U.S. at 343. Nor does this use upset the 1922 Compact's division between the upper and lower basins, because in times of normal and surplus supply, California will always be able with its 5.2 maf of annual contractual entitlements to demand at least 4.4 maf of the 7.5 maf that the upper basin states are obligated to deliver to the lower basin. In times of shortage, IID can assert its priority of approximately 2.6 maf annually of present perfected right pursuant to *Arizona v. California*, 439 U.S. 419 (1979), with or without Salton Sea use.

Type of Use

Finally, and perhaps surprisingly, the use of Colorado River water to sustain the Salton Sea falls within the category of “domestic and agricultural” or “domestic and irrigation” uses, as the 1922 Compact, Project Act, IID contract, and 1964 *Arizona* decree require. That is because the language “domestic and agricultural use” first used in the 1922 Compact and carried forward in the subsequent mandates emerges as a term of art, essentially capturing all human uses other than navigation and (most importantly) other

than power production. “Domestic use” includes “household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.” COLORADO RIVER COMPACT, ART. II(h).

While the definitions of “domestic and agricultural” use in the 1922 Compact and subsequent mandates did not exclude wildlife and environmental protection from their reach, they did expressly exclude power production. The 1922 Compact authorizes impoundment for generation of electrical power, but that is “subservient to the use and consumption of such water for agricultural and domestic purposes.” Colorado River Compact, art. IV(b). That is because the upper basin states, knowing that power production in the Lower Colorado was intended to pay for the project (HUNDLEY 133), did not want the lower basin states calling on the upper states to give up their urban or rural economies so that the lower states could maximize the river’s run for power. Meyers, 19 STAN. L.REV. at 18-19.

The Project Act ratified the subservience of power production to consumptive uses (§ 6), and the Supreme Court’s decree (§ II(A)) catalogued the authorized uses and priorities: “(1) river regulation, improvement of navigation, and flood control; (2) irrigation and domestic uses, including the satisfaction of present perfected rights; and (3) for power.” 376 U.S. at 341. While Dean Meyers correctly observed two years later that “[i]t is regrettable that the Supreme Court failed to write even a word on the issues presented” by reserved rights for wildlife protection (19 STAN. L. REV. at 71), the Court consciously treated such uses as within the “irrigation and domestic use” priority.

To sum up, the Old Law of the River and its provisions do not prevent the use of Colorado River water for wildlife and environmental protection. Perhaps that explains

the absence of any authoritative contrary interpretation from the Secretary of the Interior. Given the demonstrable need in the “era of limits” to protect the common values in the Colorado River Basin on whose sustenance depend human health and biological diversity, and the need to empower individual states to protect those values within their Colorado River water apportionments, the Secretary’s most constructive course lies in engaging her immense influence as administrator of the 1964 *Arizona* decree to shape and not resist the new law.

The alternative – continued resistance by the Secretary to state efforts to protect environments that can be served by the Colorado River – invites the Supreme Court of necessity to incorporate the new law in a restatement of the old law decree. In that event, the Justices will inevitably produce as many surprises as they did when Arizona took most of the prize in 1963 and 1964. The Supreme Court most likely would qualify its overbroad “state law has no place” phrase, and empower the states and third parties to seek additional and potentially dramatic adjustments in river operations. Perhaps a new priority, somewhat lower than navigation and river regulation, but somewhat above conventional municipal and farming operations, will be established for the environment. To enforce this ecological reality a form of “federal public trust” might emerge. While the nation would be well served with that result, a Supreme Court decision likely would be preceded by years of uncertainty and inaction. Since the Secretary and her constituents agree that the Colorado’s limits have been reached now, not years hence, DOI should not wait any longer to recognize that the Law of the River – old combined with the new – protects the Salton Sea.