

A POSSIBLE WEST SLOPE DEFENSE AGAINST DEMAND MANAGEMENT AND PREEMPTIVE CURTAILMENT

*Protection of Upper Basin Consumptive Use in the 1968
Colorado River Basin Projects Act and 2007 Interim
Guidelines*

Ed Millard
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Montezuma County residents became aware in October of serious threats from the Front Range, they were targeting the West Slope at the Colorado Water Conservation Board (CWCB) September board meeting. The threat was to preemptively curtail junior water rights in the Colorado Basin in Colorado. If these threats come to fruition they could seriously, perhaps catastrophically, affect the Dolores Project and McPhee reservoir which are vital to Montezuma County's economy, an economy which is not diverse and is very dependent on agriculture and water from the Dolores River and the Dolores Project.

We've since embarked on an aggressive and focused search to:

- Understand the problem and threat
- Find solutions better than the ones being proposed which may cause massive collateral damage to counties like ours
- Find defenses to mitigate the threat to McPhee and our community from the proposed Colorado River Drought Contingency Plan(DCP) and Demand Management

In our deep dives into the documents which govern the Colorado Compact we found one issue which at least has the potential to fulfill some or all of the above goals. It looks too good to be true, but it is our sincere hope it is true.

Sources of the Current Crisis

There are a number of known causes for the looming crisis with elevation levels in Lake Powell:

- Droughts in 2002, 2013 and 2018
- Large releases from Lake Powell driven by the 2007 Interim Guidelines
- Hydrology of the Colorado River which is no longer as bountiful as it was in 1922 when the Colorado Compact was written and the river was first divided
- Construction of a number of large reservoirs which are losing around 1.5-1.8 Million AF of water to evaporation every year
- The need to provide 1.5 Million AF, give or take, to Mexico each year under a 1944 treaty
- Lower Basin States which are using every drop of water they can find in the Colorado River and under their entitlements under the compact
- Rising demand for and consumptive use of water in all parts of the Basin

Protection of Upper Basin Consumptive Use

The issue we found centers on sentences in a Federal Law, the '68 Colorado River Basin Projects Act, the 2007 Seven States Agreement and 2007 Interim Guidelines which currently govern Lake Powell, Lake Mead and implement the terms of the Compact.

They seem to provide various forms of protection for "**Upper Basin Consumptive Use**" which we think is a key to our county's defense if they hold up.

There are a number of definitions of this term; we think this USBR definition is most appropriate in this context:

from Reclamation Glossary (2012)

by U.S. Department of the Interior, Bureau of Reclamation

A use which lessens the amount of water available for another use. Water uses normally associated with man's activities, primarily municipal, industrial, and irrigation uses that deplete water supplies. Water removed from available supplies without direct return to a water resource system, for uses such as manufacturing, agriculture, and food preparation. A nonconsumptive use would be one such as boating or swimming.

1968 Colorado River Basin Projects Act

The first protection is in Section 602 (a):

SEC. 602 (a) ... shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant to the Colorado River Compact...

Section 602(a), however, was superseded in the 2007 Seven States agreement because it's in the middle of old rules for releases from Lake Powell.

The second protection is in Section 603 which still seems to be in force:

SEC. 603. (a) Rights of the upper basin to the consumptive use of water available to that basin from the Colorado River system under the Colorado River Compact shall not be reduced or prejudiced by any use of such water in the lower basin.

Section 603 seems to suggest that Lower Basin activities like overuse or gaming of equalization rules that result in increased pressures on Lake Powell are not allowed if they reach a level where they reduce Upper Basin consumptive use which may soon be the case under Demand Management or if various forms of Upper Basin curtailment occur.

2007 Interim Guidelines

The 602 (a) protections appear to be restored in the 2007 Interim Guidelines Record of Decision (ROD), Section E and were apparently strengthened with water rights protections.

These Guidelines are not intended to, and do not:

...

4. change the apportionments made for use within individual States, or in any way impair or impede the right of the Upper Basin to consumptively use water available to that Basin under the Colorado River Compact;

...

7. affect the rights of any holder of present perfected rights or reserved rights, which rights shall be satisfied within the apportionment of the State within which the use is made, and in the Lower Basin, in accordance with the Consolidated Decree; or...

These protections have yet to be triggered to our knowledge, but it appears they would be if Demand Management or preemptive curtailment were implemented.

If a new agreement is not signed in 2026 when the 2007 guidelines expire I'm told the '68 terms will return to govern the river, '68 CRBPA is Federal law.

The Two Faces of the 2007 Interim Guidelines

The 2007 Interim Guidelines are two completely different agreements if these protections are in force or are not:

Without these protections the Upper Basin could be devastated by extended drought between now and 2026 if we are forced to reduce our consumptive use to push water in to Lake Powell to maintain equalization releases and the target elevation in DCP. This is the problem the current DCP is trying to solve, pretty badly in our opinion and with a lot of collateral damage.

With these protections the Lower Basin is welcome to all of the water in Lake Mead, Lake Powell and the Colorado River as long as our Upper Basin Consumptive use is protected. The pie chart in the following page and 2016 depletion tables from the Upper Basin Commission show what I think is the Upper Basin State's 2016 consumptive use, though this may be subject to legal interpretation. If these protections are in place the Upper Basin DCP doesn't really make sense and at minimum needs to be reviewed and debated, or in the worst, or perhaps best, case replaced altogether.

Demand Management .vs. Upper Basin Consumptive Use Protections

Demand Management is by definition going to reduce "Upper Basin Consumptive Use". If it does so through curtailment or voluntary fallowing under pressure in my view these protections will come into play for the first time. Unfortunately we haven't had time to secure a proper legal opinion to delve in to the possible consequences of triggering these protections.

I have tried to bring this issue to persons of authority and I have been routinely met with evasion, obstruction or silence which is a pretty strong tell.

Demand Management and Supersedence

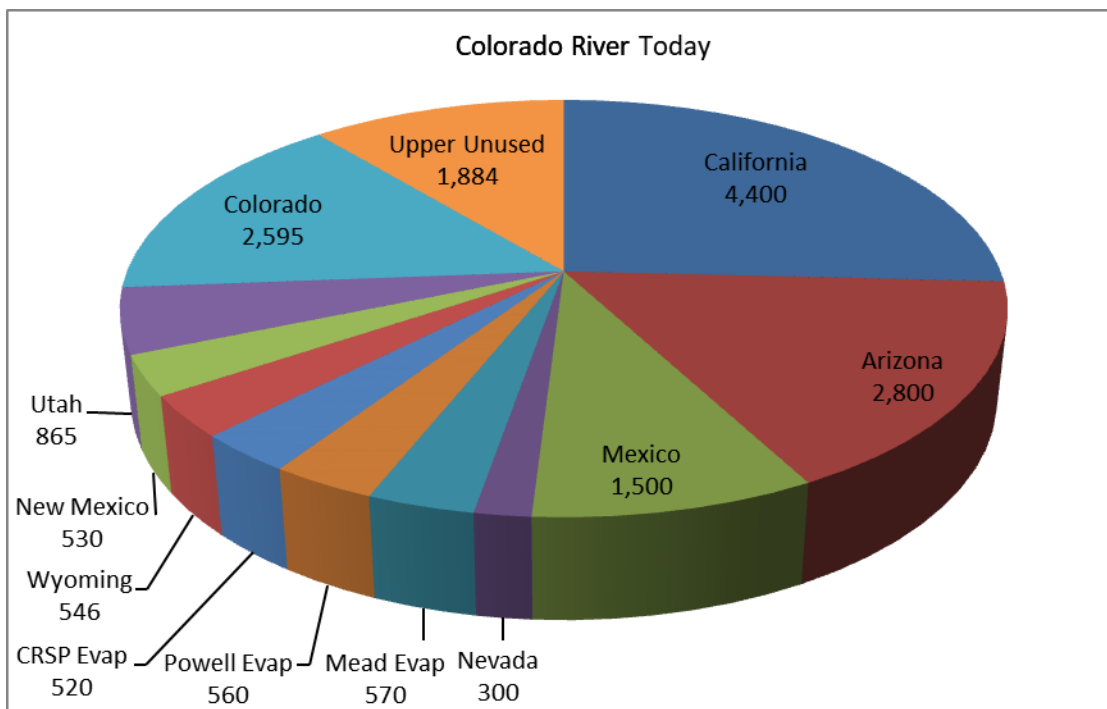
There is an open question if the DCP and Demand Management are going to supersede in some way these Upper Basin protections. If there is any risk of or intent to do this it is unfathomable why the Upper Basin commissioners would concede these priceless protections in return for nothing of value to upper basin water rights holders.

Upper Basin Consumptive Use

In all the CWCB/AG presentations I've seen they **never** tell Coloradans what our actual consumptive use is. Colorado's is 2.4 million AF out of a 3.8 million AF compact entitlement. They don't want us to see these numbers though they are readily available on the web. I've asked them multiple times why and am answered with shrugs and silence. They know they are concealing this information probably because it is a counter argument to Demand Management.

Here is how I currently think the Colorado River is divided today. The Upper Basin numbers are total depletion which is consumptive use plus evaporation losses. There are about 200,000 AF of evaporation loss in Colorado so total depletion is around 2.6 million AF. These are from the Upper Basin Commission Depletion schedule for 2016.

Lower basin accounting is very complex, depletions are difficult to compute, so I am currently showing their compact entitlement. They strive to use or bank their entire entitlement. Why does the Lower Basin get to bank their unused entitlement while the Upper Basin is forced to send theirs down river?



Horse Trading in the 2007 Interim Guidelines

In the 2007 Interim Guidelines the Upper Basin States made enormous concessions to the Lower Basin. The Lower Basin is getting:

- 9.2 Million AF a year on average over the last ten years, far in excess of any compact requirement. This average may come down some in the future
- The Lower Basin states get their full compact entitlements while the upper basin is running at 50-66% of its entitlement.
- Intentionally Created Surplus and aquifer storage to bank their unused entitlement. The Upper Basin isn't getting to bank its unused entitlement other than in our very limited reservoir storage. The new DCP water bank in Lake Powell will also be out of our reach, that water can only go to the lower basin or to evaporation losses.

The one thing the upper basin seems to have gotten in return was **our existing consumptive use is supposed to be protected**. This isn't much to ask versus everything given to the Lower Basin.

A key point, under the compact the Lower Basin **is entitled to surplus** water in the Colorado River and those large releases are fine **until they start cutting in to Upper Basin Consumptive Use** which is where we may soon be heading, especially with more drought and implementation of the DCP and Demand Management. Assuming they are not superseded by implementation of the DCP then these protections kick in with unknown consequence. To my knowledge they've never been triggered before so it's unclear what will happen when they are. They may prove to be a valuable shield to the Upper Basin and especially West Slope Ag.

Unfortunately the Colorado Water Conservation Board in their November 15, 2018 Support and Policy Statement declare their intent to abandon these protections:

Demand management activities that could be promoted in Colorado as a result of the DCP would likely involve intentionally reducing consumptive uses from the Colorado River System, and storing the conserved water at the Initial Units to help assure the Upper Basin's continued compact compliance. Any such actions require careful consideration of the impacts to individuals, communities, and local economies.

One such impact is it's contrary to protections we are afforded by existing law and agreements.

Today, living on the West Slope and depending on an agricultural economy we face a situation where:

- The Lower Basin wants to continue draining Lake Powell and the Upper Basin, the DCP facilitates that.
- The Reclamation commissioner wants to keep Glen Canyon running, keep water in Lake Mead and keep sending water to the Lower Basin. Without Upper Basin consumptive use protections it will be at the expense of the Upper Basin especially in event of more droughts.
- The Front Range wants to shift Lower Basin and USBR pressures on to West Slope Ag. They also want to shift pressure from ever increasing demands for municipal water there as well; a water bank in Lake Powell facilitates that, especially from the Southwest corner of Colorado where we live. This would be a goal regardless of the situation in Lake Powell.
- The West Slope wants to shift the pressures from the Front Range on to its weaker elements, one of which is the Dolores Project, McPhee and Montezuma and Dolores counties. There is currently no way for Dolores Project water to be physically moved to the Front Range via trans-mountain diversion. A Lake Powell water bank, however, creates a means by which Front Range interests might meet their obligations by buying and drying farmland in the Montezuma Valley. This would relieve pressure on rivers like the Colorado which can be reached from the Front Range.

This is classic water war and fulfillment of the economic concept of “beggar thy neighbor”.

My position is the Lower Basin States and the Reclamation commissioner can do whatever they want with Lake Mead, Lake Powell and surplus water in the Colorado river as long as they leave my family's and my community's existing consumptive use alone, which may soon no longer be the case.

If the Reclamation commissioner is going to continue to drain Lake Powell with large equalization releases, (s)he may want to come to terms with the consequences of these protections sooner rather than later. Every effort should be made to avoid allowing equalization releases to push Lake Powell down to levels where the target elevation may be breached and those Upper Basin Consumptive Use protections come in to play.

Colorado Compact – 1922

Note: The following seem to be partially superseded by the 2007 Seven States Agreement and Interim Guidelines:

ARTICLE III

(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 beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in Paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

(c) 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).

(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 reckoned in continuing progressive series, beginning with the first day of October next succeeding the ratification of this compact.

(e) The states of the upper division shall not withhold water, and the states of the lower division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

Colorado River Basin Projects Act – 1968

<https://www.usbr.gov/lc/region/g1000/pdfiles/crbproj.pdf>

Note: This is the statute which created new guidelines for operation of Lake Powell and led to the 2007 Interim Guidelines

SEC. 602 (a) In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoir constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act. To effect in part the purposes expressed in this paragraph, the criteria shall make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell in the following listed order of priority:

- (1) releases to supply one-half the deficiency described in article III (c) of the Colorado River Compact, if any such deficiency exists and is chargeable to the States of the Upper Division, but in any event such releases, if any, shall not be required in any year, that the Secretary makes the determination and issues the proclamation specified in section 202 of this Act;
- (2) releases to comply with article III(9d) of the Colorado River Compact, less such quantities of water delivered into the Colorado River below Lee Ferry to the credit of the States of the Upper Division from other sources; and
- (3) storage of water not required for the releases specified in clauses (1) and (2) of this subsection to the extent that the Secretary, after consultation with the Upper Colorado River Commission and representatives of the three Lower Division States and taking into consideration all relevant factors (including, but not limited to, historic stream-flows, the most critical period of record, and probabilities of water supply), shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant to the Colorado River Compact: Provided, That water not so required to be stored shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in Article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in

Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.

(b) Not later than January 1, 1970, the criteria proposed in accordance with the foregoing subsection (a) of this section shall be submitted to the Governors of the seven Colorado River Basin States and to such other parties and agencies as the Secretary may deem appropriate for their review and comment. After receipt of comments on the proposed criteria, but not later than July 1, 1970, the Secretary shall adopt appropriate criteria in accordance with this section and publish the same in the Federal Register. Beginning January 1, 1972, and yearly thereafter, the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report describing the actual operation under the adopted criteria for the preceding compact water year and the projected operation for the current year. As a result of actual operating experience or unforeseen circumstances, the Secretary may thereafter modify the criteria to better achieve the purposes specified in subsection (a) of this section, but only after correspondence with the Governors of the seven Colorado River Basin States and appropriate consultation with such State representatives as each Governor may designate. (c) Section 7 of the Colorado River Storage Project Act shall be administered in accordance with the foregoing criteria.

SEC. 603. (a) Rights of the upper basin to the consumptive use of water available to that basin from the Colorado River system under the Colorado River Compact shall not be reduced or prejudiced by any use of such water in the lower basin.

(b) Nothing in this Act shall be construed so as to impair, conflict with, or otherwise change the duties and powers of the Upper Colorado River Commission.

SEC. 604. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the projects herein and hereafter authorized, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902; 32 Stat. 388, and Acts amendatory thereof or supplementary thereto) to which laws this Act shall be deemed a supplement.

SEC. 605. Part I of the federal Power Act (41 Stat. 1063; 16 U.S.C. 791a-823) shall not be applicable to the reaches of the main stream of the Colorado River

between Hoover Dam and Glen Canyon Dam until and unless otherwise provided by Congress.

SEC. 606. As used in this Act, (a) all terms which are defined in the Colorado River Compact shall have the meanings therein defined; (b) "Main stream" means the main stream of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon; (c) "User" or "water user" in relation to mainstream water in the lower basin means the United States or any person or legal entity entitled under the decree of the Supreme Court of the United States in Arizona against California, and others (376 U.S. 340), to use main stream water when available thereunder; (d) "Active storage" means that amount of water in reservoir storage, exclusive of bank storage, which can be released through the existing reservoir outlet works; (e) "Colorado River Basin States" means the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming; (f) "Western United States" means those States lying wholly or in part west of the Continental Divide; and (g) "Augment" or "augmentation", when used herein with reference to water, means to increase the supply of the Colorado River or its tributaries by the introduction of water into the Colorado River system, which is in addition to the natural supply of the system. Approved September 30, 1968.

Does the Upper Basin Have a Delivery Obligation or an Obligation Not to Deplete the Flow of the Colorado River at Lee Ferry?

https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1006&context=books_reports_studies

The CRBPA also required the Secretary of the Interior to develop operating guidelines for the Colorado River reservoirs, establishing the Glen Canyon objective release value at 8.23 million acre-feet—the quantity, assuming a 20,000 acre-foot contribution from the Paria River, presumably sufficient to satisfy the Upper Basin’s obligations to the Lower Basin (7.5 million acre-feet) and Mexico (0.75 million acre-feet).⁷³ In this way, “a minimum release of 8.23 million acre-feet [was] required regardless of the water conditions in the Upper Basin.”⁷⁴

Although the Upper Basin argued that this quantity was an “objective release” and not an obligation, this operation essentially created an inflexible annual delivery obligation of 8.23 million acre-feet instead of the 75,000,000 every ten years as Article III(d) Colorado River Compact requires.⁷⁵ While the Secretary of the Interior does have the authority to adjust the amount required for Lake Powell releases, in 2005, Secretary of the Interior Gale Norton decided for that year, even in the face of a drought, the Upper Basin could not reduce its annual delivery to the Lower Basin.⁷⁶ Some of this flexibility was restored in 2007 in the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (“Interim Guidelines”) which provides for releases less than 8.23 million acre-feet when storage in Lake Powell is unusually low.

7 States Operations Agreement Draft February 2006 Attachment A - Agreement Concerning Colorado River Management and Operations

Note: This came from the draft though it is probably the same in the final agreement which is an imaged document. I

9. Consistency with Existing Law. The Parties' Recommendation is consistent with existing law. The Parties expressly agree 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.

December 2007 – Interim Guidelines ROD - Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead

Note: These seem to be the sideboards in the 2007 guidelines to prevent it from injuring the upper basin

E. Relationship with Existing Law

These Guidelines are not intended to, and do not:

1. guarantee or assure any water user a firm supply for any specified period;
2. change or expand existing authorities under applicable federal law, except as specifically provided herein with respect to determinations under the Long-Range Operating Criteria and administration of water supplies during the effective period of these Guidelines;
3. address intrastate storage or intrastate distribution of water, except as may be specifically provided by Lower Division states and individual Contractors for Colorado River water who may adopt arrangements that will affect utilization of Colorado River water during the effective period of these Guidelines;
4. change the apportionments made for use within individual States, or in any way impair or impede the right of the Upper Basin to consumptively use water available to that Basin under the Colorado River Compact;
5. affect any obligation of any Upper Division state under the Colorado River Compact;
6. affect any right of any State or of the United States under Sec. 14 of the Colorado River Storage Project Act of 1956 (70 Stat. 105); Sec. 601(c) of the Colorado River Basin Project Act of 1968 (82 Stat. 885); the California Limitation Act (Act of March 4, 1929; Ch. 16, 48th Sess.); or any other provision of applicable federal law;
7. affect the rights of any holder of present perfected rights or reserved rights, which rights shall be satisfied within the apportionment of the State within which the use is made, and in the Lower Basin, in accordance with the Consolidated Decree; or

8. constitute an interpretation or application of the 1944 Treaty between the United States and Mexico Relating to the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande (1944 Treaty) or to represent current United States policy or a determination of 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 International Boundary and Water Commission (IBWC) in consultation with the Department of State.