

# [***ARTICLE:AN UPPER BASIN PERSPECTIVE ON CALIFORNIA'S CLAIMS TO WATER FROM THE COLORADO RIVER PART II: THE DEVELOPMENT, IMPLEMENTATION AND COLLAPSE OF CALIFORNIA'S PLAN TO LIVE WITHIN ITS BASIC APPORTIONMENT***](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:499F-8J80-00SW-50NP-00000-00&context=1516831)

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**Text**

**[\*319]**

[*I*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831). INTRODUCTION

This article chronicles the negotiations among the states of the ***Colorado*** ***River*** Basin ("Basin"), the federal government, and various water agencies within Southern California concerning California's overuse of water allocated to it by law from the ***Colorado*** ***River***. The negotiations began in 1991, at a time when California was dealing with the effects of a multiple year drought, and sought the continued availability of surplus ***Colorado*** ***River*** water. Many thought the negotiations had culminated in 2001 when the Department of the Interior ("DOI") adopted Interim Surplus Guidelines ("Guidelines"). The Guidelines established operating rules for Lower ***Colorado*** ***River*** reservoirs for a fifteen-year period, and gave California some assurance of continued surplus water, but only if it timely put into effect the California Plan to reduce its dependence on surplus ***Colorado*** ***River*** **[\*320]** water. [[1]](#footnote-2)1 However, adoption of the Guidelines did not end the debate, it only set the stage for California agencies and the DOI to attempt to solve the tough environmental, socioeconomic, and political issues inherent in implementing the California Plan.

Unfortunately, after more than ten years of negotiations, the California agencies were unable to finalize the agreements necessary to effectuate the California Plan. The negotiations continue, and their success or failure will likely set the tone of the relationship of the Basin's states and water agencies for years to come. Should the California Plan fail, the relationship could be characterized by adversarial politics and divisive litigation. Should the California Plan succeed, the relationship of the federal government, the states and water users in the Basin could be characterized, as has been the hope of the Basin States, by good faith working relationships, innovation, and problem solving in the best interests of the overall management of the ***Colorado*** ***River***. The importance of a productive working relationship among the Basin States is critical, not just in resolving California's water use problems. Such a relationship also is critical to addressing the pressing issues on the ***Colorado*** ***River*** in the next several decades, including Nevada's increasing need for water in excess of its apportionment, and Mexico's demands for additional water over and above its Treaty entitlement.

This article consists of two parts. Part I reviewed the development of the Law of the ***Colorado*** ***River*** [[2]](#footnote-3)2 ("Law of the ***River***") from an Upper Basin perspective. [[3]](#footnote-4)3 It focused on the motivations of the Upper Division States, and ***Colorado*** in particular, in pressing for the ***Colorado*** ***River*** Compact [[4]](#footnote-5)4 ("Compact") and later federal laws. These motivations were premised on key themes or principles that remain relevant today - and which have guided the positions of ***Colorado*** and the other Upper Basin States in their negotiations with California. Through those negotiations, the Upper Basin States have attempted to maintain a foundation of security for their right to develop and use water under the terms of the Compact as economic need dictates. As its most important principle in protecting that right, the Upper Basin has insisted that the California issue be resolved within the Lower **[\*321]** Basin, in a manner consistent with the Law of the ***River***.

An understanding of the historical development of the Law of the ***River***, as summarized in Part I of this article, is also important background to the chronology of the California negotiations that have occurred since 1991. The Law of the ***River*** establishes: (1) the legal and institutional foundation for the interstate and international management and allocation of the waters of the Basin; (2) the underpinnings of relationships between the states, Indian tribes and the federal government; and (3) the framework within which the complex state/federal/tribal/water agency negotiations have taken place.

Part II relates the major events and negotiations leading to the adoption of the California Plan and the Guidelines, and the subsequent collapse of the California Plan and suspension of the Guidelines. As one might imagine, these events did not transpire in a linear fashion. Politics, economic issues, technical input, changes in personnel, and other factors influenced them. This article will attempt to describe those events, and their effect on the changing courses, ebbs, and flows of the states', the federal government's, and California agencies' efforts to reach agreement on the outstanding issues before them.

It should be noted at the outset, this article is not written by a disinterested observer. The author has been continuously and directly involved since the beginning of the negotiations, and has developed strategy and policy on the matters discussed herein on behalf of the state of ***Colorado***, and subsequently on behalf of the major municipalities and water districts in ***Colorado***. [[5]](#footnote-6)5 The reader should recognize this perspective and the inherent bias that may be so reflected.

The progress and success of the efforts described in this article is the product of incredible hard work, dedication, and good faith on the part of the politicians, managers, board members and lawyers of the federal agencies, states, and water agencies involved in these negotiations. At the risk of failing to mention many of the fine people with whom the author has worked, some of the major contributions were made by Governor Roy Romer, Ken Salazar and Scott Balcomb of ***Colorado***; Betsy Rieke (later Assistant Secretary for Water and Science for the Department of the Interior), Rita Pearson Maguire, Herb Dishlip, and Mike Pearce of Arizona; Jerry Zimmerman, David Kennedy, Tom Hannigan, Dennis Underwood, Tom Levy, Maureen Stapleton, and John Carter of California and its water agencies; Pat Mulroy and Richard Bunker of Nevada; Phil Mutz of New Mexico; Larry Anderson of Utah; Jeff Fassett, John Shields, and Tom Davidson of Wyoming; and Wayne Cook, Executive Director of the Upper ***Colorado*** ***River*** Basin Commission. Numerous individuals from the **[\*322]** DOI worked long and hard, and played key roles, in the bit of ***Colorado*** ***River*** history outlined in this article. Secretary Bruce Babbitt, Deputy Secretary David Hayes, and Assistant Secretary Patty Beneke had intense hands-on involvement in shaping these events. Bob Snow of the Department's Solicitor's office, and Bob Johnson, Regional Director of the Lower ***Colorado*** Region, played critical roles. Secretary Gale Norton and Assistant Secretary Bennett Raley continued the initiatives of the prior administration and have provided strong leadership on behalf of the DOI in the new "era of limits" on the ***Colorado*** ***River***.

[*II*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831). THE SITUATION IN 1990 AND THE START OF THE INTERSTATE DISCUSSIONS ON CALIFORNIA AND NEVADA WATER SUPPLY ISSUES

The historical interests of the Upper Basin States in security of supply and interstate allocations began to be tested in 1990, as the Basin States and the Bureau of Reclamation ("Bureau") prepared the Annual Operating Plan ("AOP") for operation of federal ***Colorado*** ***River*** system reservoirs. [[6]](#footnote-7)6 At that time, a number of factors converged to challenge the legal and policy underpinnings of the Law of the ***River***. The states and federal government faced the following issues:

1. The construction of the Central Arizona Project ("CAP") was nearing completion, water deliveries had commenced, and demand for CAP water was projected to increase Arizona total consumptive water use from the ***Colorado*** ***River*** mainstem to a level close to Arizona's basic apportionment of 2.8 million acre-feet per year. [[7]](#footnote-8)7

2. Growth and development in southern Nevada caused the cessation of "commitments to serve" water to new municipal growth in the Las Vegas area. Nevada at that time expected to exceed its basic apportionment of 300,000 acre-feet per year as early as 2002. [[8]](#footnote-9)8

3. For several years, California's consumption of ***Colorado*** ***River*** water exceeded the state's basic apportionment of 4.4 million acre-feet per year. [[9]](#footnote-10)9 However, to this point, California's excess use had not been a problem; total beneficial consumptive uses of water from the ***Colorado*** ***River*** mainstem in the Lower Division States [[10]](#footnote-11)10 had not **[\*323]** exceeded the total amount of consumptive use allowable in "normal" years of 7.5 million acre-feet. [[11]](#footnote-12)11 Thus, California users had, to this point, been able to use the apportioned but unused water of Arizona and Nevada. However, projected uses in the Lower Basin for 1991 were about 7.8 million acre-feet, necessitating a decision by the Secretary of the Interior under the Decree in Arizona v. California [[12]](#footnote-13)12 and the Criteria for Coordinated Long-Range Operation of ***Colorado*** ***River*** Reservoirs [[13]](#footnote-14)13 ("Operating Criteria") as to whether to declare a surplus condition and allow for all uses, or to declare a normal condition and limit water use in California. [[14]](#footnote-15)14

4. The ***Colorado*** ***River*** Aqueduct operated by the Metropolitan Water District of Southern California ("MWD") for the municipal water delivery to the California Coastal Plain, has a capacity of about 1.3 million acre-feet per year. [[15]](#footnote-16)15 Of California's basic apportionment of 4.4 million acre-feet per year, the first 3.85 million acre-feet is allocated, under the 1931 Seven Party Agreement, for use by irrigation districts in the Imperial, Coachella, and Palo Verde Valleys. The next 550,000 acre-feet are allocated for use by MWD. MWD then has the next priority for the water use in California over 4.4 million acre-feet, which totals 0.662 million acre-feet. [[16]](#footnote-17)16 Therefore, roughly one-half of MWD's ***Colorado*** ***River*** supply exceeds California's basic apportionment. Because of California's ability to use the unused apportionments of Arizona and Nevada, MWD, until 1991, diverted nearly the full capacity of its aqueduct. Any reduction in California's ability to use water, however, would directly reduce the supply of water to MWD - the entity most in need of a full and secure supply.

5. Recognizing the need to firm up its supply, in 1988 MWD and the Imperial Irrigation District ("IID") negotiated an agreement to transfer conserved water from IID to MWD. One of the primary factors precipitating the shift from agricultural to urban uses in California involved legal action commenced in 1980 by the California Department of Water Resources and the State Water Resources Control Board ("SWRCB") to enjoin wasteful irrigation practices by IID. [[17]](#footnote-18)17 The SWRCB had ordered IID to undertake various measures to **[\*324]** stop the loss of water from sources such as canal spill, resulting in losses of 53,000 to 135,000 acre-feet per year, and excessive tailwater, resulting in losses of 312,000 to 559,000 acre-feet per year. [[18]](#footnote-19)18 Under the IID/MWD transfer agreement, MWD agreed to fund the necessary water conservation improvements in the IID system. These improvements included lining existing canals, constructing local reservoirs and spill interceptor canals, installing non-leak gates and automation equipment, and instituting distribution system and on-farm management activities. Upon the completion of these measures, IID agreed to reduce its diversions from the ***Colorado*** ***River*** by an amount equal to the water saved. In theory, MWD could increase its firm water supply from the ***Colorado*** ***River*** by one acre foot for every acre foot saved, MWD would fund IID's improvements ordered by the Water Resources Control Board, and no irrigated acreage would be lost in the Imperial Valley. [[19]](#footnote-20)19 Although the agreement was expected to yield a total of 106,110 acre-feet per year upon full implementation, [[20]](#footnote-21)20 it did not cover all of the possible areas of conserved water. Therefore, MWD and IID began negotiations on a Phase II agreement, which would save an additional 150,000 acre-feet per year. [[21]](#footnote-22)21 The parties contemplated other measures to allow MWD greater firm yield within California's basic apportionment. For example, MWD estimated that All-American Canal and Coachella Branch lining would yield 100,000 acre-feet per year, and land-fallowing programs would result in additional yield. [[22]](#footnote-23)22

6. California had experienced a five-year period of severe drought. [[23]](#footnote-24)23 Moreover, the years 1988-90 were the driest three-year period of record in the Upper ***Colorado*** ***River*** Basin. Thus, ***Colorado*** ***River*** system reservoirs were in a declining storage condition, increasing the sensitivity of the other Basin States to more water being withdrawn from storage. [[24]](#footnote-25)24

7. The population of the service area of MWD in 1990 was about **[\*325]** fifteen million people, and was projected to increase to 18.2 million people by the year 2010, translating to an increased water demand of about one million acre-feet by the year 2010. [[25]](#footnote-26)25 MWD projected shortfalls in its water supply by the year 2010 of between 0.74 and 1.71 million acre-feet. [[26]](#footnote-27)26 As a result, MWD perceived an urgent need to "firm up" the yield of MWD's ***Colorado*** ***River*** water supply so as to assure its ability to divert the full capacity of its ***Colorado*** ***River*** Aqueduct.

8. In contrast to the Lower Basin situation, the Upper Division States of ***Colorado***, New Mexico, Utah, and Wyoming [[27]](#footnote-28)27 had yet to reach development of their entitlements to consumptive use of the ***Colorado*** ***River*** System under the Compact, and were not expected to reach full development for many years. [[28]](#footnote-29)28

With the above circumstances in play, the draft AOP for 1991, for the first time since the adoption of the Operating Criteria in 1970, [[29]](#footnote-30)29 proposed that the Secretary issue a normal declaration, thus limiting deliveries to California water users to 4.4 million acre-feet per year. [[30]](#footnote-31)30 Wanting to maintain deliveries of 5.1 million acre-feet per year, the state of California took the position that the 1991 AOP should be premised on a surplus declaration, allowing for a full water supply to all water users in California, particularly MWD. [[31]](#footnote-32)31 California argued that the amount of water remaining in storage in the ***Colorado*** ***River*** system, together with the fact that the Upper Basin did not plan on developing its entitlement for many years, was sufficient to meet California's needs without significant adverse risk to the water supplies of other Basin States. California also complained that the Secretary, in proposing to issue a normal declaration involving application of the **[\*326]** Operating Criteria, based his proposed decision on politics, rather than technical criteria.

The Central Arizona Water Conservancy District ("CAWCD"), CAP operator, along with the states of Arizona and Nevada, adamantly opposed California's request. The CAWCD asserted that continuing to meet all of California's demands with unused Arizona supply increased the risk of long term shortage to Arizona (and in particular to the CAP). [[32]](#footnote-33)32 However, Bureau projections showed little, if any, risk of future shortages to the other states if California's water needs were met. [[33]](#footnote-34)33 Arizona responded that it was entitled to rely not only on not increasing its risk of shortage, but also on the availability future surpluses as part of the water supply for the CAP. [[34]](#footnote-35)34 Additionally, the Upper ***Colorado*** ***River*** Commission opposed a surplus declaration, asserting that a surplus declaration in 1991 would increase future risks of shortages in the Upper Basin. [[35]](#footnote-36)35

With the Basin States deadlocked, the Bureau tentatively recommended to the Secretary that he declare a normal condition and limit California's water use, since there was "no clear basis in the existing legal and institutional framework of the ***Colorado*** ***River*** to allow consumptive uses in the Lower Basin greater than 7,500,000 acre-feet without the consensus of all seven Basin States." [[36]](#footnote-37)36 However, the Bureau also proposed that its recommendation to the Secretary contain the separate views of the states, and given the severe drought in California it was clear that California would lobby the Secretary heavily to declare a surplus condition. The Basin States other than California [[37]](#footnote-38)37 thus faced the risk the Secretary would disagree with the Bureau's recommendation. In the event of such a disagreement, the states would have to decide whether to acquiesce in the decision, or litigate the issue, asserting the Secretary was obligated under the Operating Criteria to declare a normal condition on the ***Colorado*** ***River***. The prospects for success in such a lawsuit were doubtful. The states, especially in the Upper Basin, would have difficulty proving injury, because system reservoirs were relatively full. Moreover, the Upper Basin States did not project full development of their compact **[\*327]** entitlement for many decades.

In view of this risk, and the severe drought conditions in California, representatives of the Basin States met in San Diego in August of 1990 to discuss a potential accommodation that would provide California some relief, while creating a precedent that California would not be entitled to endless surpluses. They discussed several options, including a review of the Annual Operating Plan based on snowpack conditions, and methods for California to assume risks of shortages in the event of continued drought conditions. [[38]](#footnote-39)38 The state representatives adopted a tentative plan to allow California to receive an additional 400,000 acre-feet of water in 1991. If runoff conditions in subsequent years were not "above normal," California would be required to pay this water back to the system by foregoing deliveries in those years. If runoff conditions in subsequent years were "above normal," California would be relieved of the payback obligation. [[39]](#footnote-40)39 The state representatives did not know it at the time, but this San Diego meeting on a proposed system of credits and payback would launch over ten years of meetings and negotiations between the states, the DOI, and California water agencies, eventually cumulating in the adoption of the Guidelines and the California Plan.

The states continued negotiations among themselves and also with the Bureau as to the language of a memorandum from the Commissioner of Reclamation to the Secretary of the Interior outlining the Bureau's recommendation for an AOP. After several drafts, California retreated from its initial insistence on a normal declaration, and the states reached agreement on a recommendation for a normal declaration. To accommodate California, the memorandum also referenced the ongoing discussions between the Basin States toward a mechanism for allowing California to divert an additional 400,000 acre-feet of water in 1991, and the possibility the AOP would be re-opened in 1991 to allow for this additional use. [[40]](#footnote-41)40

The 1991 AOP issued by the Secretary made a normal declaration, providing that releases of water from Hoover Dam would be made to satisfy up to 7.5 million acre-feet of consumptive use in the Lower Basin in 1991. [[41]](#footnote-42)41 However, the AOP also provided that California would be able to utilize the apportioned but unused water from Arizona and Nevada. [[42]](#footnote-43)42

**[\*328]** Encouraged by the Basin States, other than California, and in anticipation of the new "era of limits," the Bureau also began a public discussion of stricter administration and accounting of uses in the Lower Basin. These proposed measures included adoption of regulations for administration of ***Colorado*** ***River*** entitlements in the Lower Basin. [[43]](#footnote-44)43 Unfortunately, for a number of reasons, the Bureau would not follow through on its desire to implement tighter administration. The issue of administration and overrun accounting remains of critical importance and significant debate in the Lower ***Colorado*** ***River*** basin.

In early 1991, the Basin States continued to discuss a mechanism by which California could access additional water from Lake Mead. These discussions began to form the outlines of agreements that would, ten years later, result in the adoption and anticipated implementation of the California Plan. The Upper Basin States suggested they would not oppose the release of up to 400,000 acre-feet of water from Lake Mead, but stipulated the water be accounted as if it were still in Lake Mead so as to avoid the potential for equalization releases from Lake Powell. [[44]](#footnote-45)44 The proposal asked for California's commitment to a program to reduce its use of ***Colorado*** ***River*** water to 4.4 million acre-feet per year within a reasonable time, to commit to operations within the Law of the ***River***, and not to engage in inter-basin water marketing or transfers. [[45]](#footnote-46)45 There was mixed reaction by the Lower Basin States. In particular, Arizona opposed the idea of credits, because in its view, by keeping water in the Upper Basin, the Upper Basin proposal only shifted the risk of shortage to Arizona. [[46]](#footnote-47)46

However, the Upper Basin was not so interested in the idea of credits per se, as it was in assuring that Lower Basin water supply issues be resolved within the Lower Basin, and that the Lower Basin States would assume any risk of shortage resulting from deliveries of surplus water. [[47]](#footnote-48)47 The genesis of the Upper Basin proposal was its historical concern that California's growing dependence on surplus water would one day ripen into a legal entitlement. ***Colorado***, in particular, was also adamantly opposed to inter-basin water marketing or leasing as antithetical to the perpetual right to develop under the Compact, as putting ***Colorado***'s future economic development up for bid, and as perpetuating California's dependence on water in excess of its basic apportionment. [[48]](#footnote-49)48 ***Colorado***'s strategy was to use California's desire for **[\*329]** short-term surpluses during the drought to obtain California's commitment to live permanently within its means, and to implement that commitment through programs and water transfers within California. By doing so, ***Colorado*** could reduce the threat of inter-basin water marketing, and achieve the security of solidifying the framework of interstate apportionments that are the foundation of the Law of the ***River***. [[49]](#footnote-50)49

As discussed in Part I of this article, the biggest threat to the Upper Basin's entitlement was Southern California municipal users' dependence on surplus ***Colorado*** ***River*** water. [[50]](#footnote-51)50 If California agricultural and municipal agencies could be convinced to expand on the MWD/IID water conservation agreement, and thereby satisfy MWD's Fifth Priority within an overall California water delivery of 4.4 million acre-feet, that dependence could be eliminated. MWD also saw the opportunity presented by the Upper Basin proposal, and put forward its own proposal to engage in a program of increased water conservation-based transfers from the California agricultural agencies to MWD, based on the MWD/IID water conservation agreement. [[51]](#footnote-52)51

[*III*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831). THE ***COLORADO*** INITIATIVE AND THE 1991 MEETING IN TORRANCE, CALIFORNIA

As the Basin States continued their discussions with little result, the drought in California worsened, prompting national attention. In 1991, the Senate Subcommittee on Water, Power, and Offshore Resources held a hearing on the California drought. In California, the state developed a water bank to facilitate agriculture to urban water transfers within the State Water Project. [[52]](#footnote-53)52 MWD imposed watering restrictions within its service area. [[53]](#footnote-54)53 IID was under increasing pressure to either cut back on its water use or enter into additional water conservation and transfer agreements with MWD. [[54]](#footnote-55)54 In ***Colorado***, the political pressure to market or lease water increased when Secretary of the Interior, Manuel Lujan, suggested that ***Colorado*** and the other Upper Basin States "donate" surplus water to California. [[55]](#footnote-56)55 ***Colorado*** Congressman Ben Nighthorse Campbell responded with a letter to Secretary Lujan offering to work together to transfer water rights decrees for Congressionally authorized, but unbuilt, projects in the Upper Basin to instream flows and then lease the water under such **[\*330]** decrees to California. [[56]](#footnote-57)56 Congressman Campbell proposed that payments from the lease would be used to build water projects in ***Colorado***. [[57]](#footnote-58)57

The pressure on the Upper Basin was more than political. Secretary Lujan's comment carried with it the subtle implication that if the Upper Basin States did not reach some accommodation with California, there was a possibility the Secretary could - in the future - accept California's arguments that additional surpluses would not create increased risk of shortages to the other states, and declare surplus conditions in the Lower Basin over the other states' objections. This would force the states either to accept the delivery to California of additional water, or sue to overturn the Secretary's determination.

With increasing pressure to do something before Congress or the federal government acted, and out of frustration at the lack of definitive progress in the interstate discussions on the mechanism for providing additional ***Colorado*** ***River*** water to California, Governor Roy Romer of ***Colorado*** sent a letter to Governor Pete Wilson of California that sent shockwaves through the ***Colorado*** ***River*** water community. [[58]](#footnote-59)58 Governor Romer offered to "move quickly to work with the ***River*** Basin states and the United States to reach accommodations to assure that the Metropolitan Water District of Southern California receives a full supply of ***Colorado*** ***River*** water this year." [[59]](#footnote-60)59 He placed four conditions on his offer: (1) that the discussions occur on a state-to-state basis, thus repudiating private water marketing schemes; (2) that any agreement be made and implemented within the current framework of the Law of the ***River***; (3) that the discussions identify how California would reduce its dependence on surplus water; and (4) that other issues of interest to the Upper Basin also be discussed, such as environmental issues, ***river*** operations and continued development. [[60]](#footnote-61)60 The Governor's proposal was intended to: (1) move the interstate discussions off "dead center;" (2) firmly establish ***Colorado***'s opposition to inter-basin water marketing; (3) maintain state control over discussions relative to ***Colorado*** ***River*** operations (as opposed to federal intervention or private water marketing schemes); (4) promote ***Colorado***'s desire to affirm interstate allocations, and; (5) achieve a reduction in California water use to its basic apportionment through internal California programs. [[61]](#footnote-62)61

**[\*331]** In the meantime, the Basin States and the Bureau continued to discuss 1991 ***Colorado*** ***River*** operations, and whether all of California's needs could be accommodated within a total Lower Basin use of 7.5 million acre-feet through the allocation of unused apportionment water from Arizona and Nevada. [[62]](#footnote-63)62 Given the difficulty in predicting precipitation and water demands in the other states, the amount of unused water that would be available to California was uncertain. Therefore, with the support of the other Basin States, the Bureau began a campaign to bring IID "to the table" to agree to water conservation and transfers that would, in both the short and long-term, bring California's water use within its apportionment. [[63]](#footnote-64)63 Dennis Underwood, [[64]](#footnote-65)64 United States Bureau of Reclamation Commissioner, met with the IID Board to urge the Imperial Valley to undertake voluntary water conservation or "have somebody do it for you." [[65]](#footnote-66)65 Commissioner Underwood then wrote to the governors of the Basin States, informing them MWD's full delivery requirement would be honored. [[66]](#footnote-67)66 But, the Bureau would also undertake efforts to keep total Lower Basin uses below 7.5 million acre-feet, and would require MWD to pay back to the ***Colorado*** ***River*** any overuse by the Lower Basin in excess of 7.5 million acre-feet. [[67]](#footnote-68)67

Within ***Colorado***, as part of the strategy behind Governor Romer's initiative, officials privately discussed a negotiating concept that would later be instituted as part of the Law of the ***River*** in the Interim Surplus Guidelines adopted by Secretary Babbitt in 2001. The concept was that in exchange for California's commitment to reduce its use of water in normal years from 5.2 million acre-feet to 4.4 million acre-feet over fifteen years on a fixed schedule, the other Basin States would agree not to oppose surplus deliveries of ***Colorado*** ***River*** water to California in accordance with that schedule. [[68]](#footnote-69)68 Part of this strategy was **[\*332]** to achieve an actual reduction of water use in California. The other part of the strategy was for California to explicitly recognize the limitation on its water use imposed by the Law of the ***River***, and at least attempt to achieve such a reduction. If the states and the DOI agreed to the concept, California would be bound not just by its 1929 commitment to limit its use to 4.4 million acre-feet per year, [[69]](#footnote-70)69 but also by a defined and enforceable program to reduce its uses to its basic apportionment over a specific period of time. Therefore, if California were unsuccessful in its effort to reduce its water use, the limitation could more easily be imposed upon California by operation of law and, as importantly, as a matter of politics. The proposal had a further underlying purpose: providing the Secretary of the Interior with the non-discretionary obligation to enforce a scheduled reduction in California's water use, thus eliminating any threat that political or legal pressure by California would cause the Secretary to declare surpluses and perpetuate California's overuse of water to the detriment of the other states. If California failed to adhere to its obligation to reduce its use, the Secretary would have to enforce that obligation.

On March 11, 1991, Governor Wilson responded to Governor Romer's letter. [[70]](#footnote-71)70 Governor Wilson recognized that discussions should occur at the state level, and offered California's willingness to "fully discuss the issues raised in your letter, as well as any other of interest to the Basin States." [[71]](#footnote-72)71 In response to the letters from Commissioner Underwood and Governor Wilson, Governor Romer contacted the governors of all the Basin States, asking each governor to designate a high-level negotiating team to begin state-to-state discussions. [[72]](#footnote-73)72 A delegation of ***Colorado*** representatives then met with each state individually. Although the reaction from some of the other states was guarded (if not suspicious), the other states did agree to a meeting in June. [[73]](#footnote-74)73 ***Colorado*** presented to the other states an outline of issues for **[\*333]** resolution at the June meeting. Consistent with other communications from ***Colorado***, the framework proposal was that:

1. California would agree to reduce its use of water from the ***Colorado*** ***River*** in normal years to 4.4 million acre-feet over a reasonable time.

2. During this time, the Secretary of the Interior would deliver ***Colorado*** ***River*** water to the full capacity of MWD's aqueduct.

3. The states would explore the concept of consideration and mitigation of impacts associated with MWD's continued use of water during the specified period.

4. Beneficial consumptive use in the Upper Basin would not be curtailed.

5. The Basin States would confirm the respective entitlements to use water under the Law of the ***River*** and agree not to deal with private interests in the interstate marketing of water. [[74]](#footnote-75)74

The meeting of the state representatives, together with a number of the California water agencies, took place in Torrance, California over three days in June 1991. [[75]](#footnote-76)75 At this meeting, the state representatives - other than California's - expressed their concern about California's reliance on water in excess of its basic apportionment. The states expressed their willingness to find ways to accommodate the continued needs of California. Arizona, in particular, insisted the risk of shortage be on California, and that California water agencies be willing to commit to a program to reduce normal year water use to 4.4 million acre-feet per year. At one point in the meeting, the state representatives put the question to California and the California water agencies of whether they would be willing to engage in discussions based on the ***Colorado*** framework. The California parties adjourned to an animated outdoor caucus, and returned to the meeting to announce they would agree to such discussions.

However, California continued to insist the definition of "surplus" under the Operating Criteria be more specifically defined. This definition proposed by California would increase fluctuation in the federal reservoirs on the ***Colorado*** ***River***, make more water available for use in California, and maximize the use of water within the United States by reducing the risk of surplus deliveries of water to Mexico **[\*334]** under the Mexican Treaty. [[76]](#footnote-77)76 California also presented a conceptual proposal to create a seven state interstate water bank, patterned after the water bank instituted in California during the 1991 drought in the Central Valley - through which water could be purchased from willing sellers by willing buyers on an interstate basis. Although the other states applauded burgeoning negotiations within California to transfer water from agricultural to municipal uses, they were wary of California's water bank proposal. [[77]](#footnote-78)77

The meeting ended with a general consensus that if California would agree to an enforceable program over a defined period of time to reduce its use of ***Colorado*** ***River*** water in normal years to 4.4 million acre-feet, the other states would agree to discuss a potential mechanism that would assure California of additional water during that period of time. California agreed to take this concept under advisement and develop a proposed approach in response to the position of the other states.

[*IV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831). THE CALIFORNIA WATER BANK PROPOSAL

At a meeting of the state representatives in Denver in August 1991, California, in response to the agreements reached at the Torrance meeting, formally presented its "Conceptual Approach" for a ***Colorado*** ***River*** Basin water bank. [[78]](#footnote-79)78 The approach contained a number of proposals that are relevant to current discussions and issues among the states. California presented three principle elements to its proposal.

The first element was an "escrow account" concept. [[79]](#footnote-80)79 MWD would undertake a program of agricultural water conservation measures and water transfers within a twenty-year timeframe, resulting in it being able to divert water to the full capacity of its ***Colorado*** ***River*** Aqueduct within California's overall 4.4 million acre-feet limitation. In its proposal, California offered general descriptions of programs that eventually would result in anticipated reductions in agricultural water use in California by 721,000 acre-feet per year. [[80]](#footnote-81)80 In exchange for the California commitment to embark on this program, California proposed the other states agree not to oppose MWD receiving a full supply during the twenty-year period. [[81]](#footnote-82)81

The escrow account part of the proposal allowed California to buy its way out of non-compliance with its commitment to reduce its use of **[\*335]** water within the twenty-year period. California proposed that if MWD caused California's total water use to exceed the sum of 4.4 million acre-feet, plus unused apportionments from Arizona and Nevada, plus any surplus water, then MWD would place a specified sum of money into an escrow account for each acre-foot of water over such amount to compensate the other states for any impact or risk of future shortage occasioned by MWD's excess water use. [[82]](#footnote-83)82 California proposed the states support the adoption by the Secretary of the Interior of Interim Operating Criteria for ***Colorado*** ***River*** system reservoirs that would recognize MWD's right to receive an assured supply of water under the above terms. The escrow account concept followed the lines of the ***Colorado*** framework proposal made at the Torrance meeting, and, except for the actual establishment of an escrow account, was consistent in concept with the approach eventually taken by California, the other states, and the DOI in the adoption of the California Plan and the Guidelines.

The second element of the California approach was a seven-state interstate water bank. Under this concept, any state could deposit water with the bank for sale or lease to other states. This would be water presently being consumed in the depositing state, what is referred to as "wet water." The bank would then broker the water to other states wishing to purchase this water. [[83]](#footnote-84)83 A version of this water banking concept would eventually be implemented in the Lower Basin, through the Arizona groundwater bank, in which other Lower Division States could participate.

The third element of California's approach was for the states and the DOI to agree on clearer (in California's view) definitions of the circumstances under which the Secretary would declare surplus conditions under the Operating Criteria. [[84]](#footnote-85)84 California continued to express that it wanted more surplus water to become available to California than under the current determinations made by the Secretary. [[85]](#footnote-86)85 This element would later be implemented through the Guidelines adopted by the Secretary in 2001.

Although the Basin States' representatives discussed the California Conceptual Approach for some time, the reaction to the proposal by the other states over the next several months was mixed. There was, not surprisingly, unanimous support for a California commitment to reduce its uses to its basic apportionment. Most of the states were interested in the escrow account concept (although not necessarily in the exchange of money). However, the states were concerned the water banking concept would erode the security of their entitlements and violate the Law of the ***River***.

In ***Colorado***'s view, the California Conceptual Approach provided a "responsible and comprehensive response to the issues raised in **[\*336]** Torrance." [[86]](#footnote-87)86 ***Colorado*** found favor with the escrow account concept, as generally consistent with and responsive to the framework ***Colorado*** had proposed at the Torrance meeting. [[87]](#footnote-88)87 Although ***Colorado*** remained open to discussions of a water bank, it expressed a number of reservations and questions as to how such a bank could operate consistently with the Law of the ***River*** and the protection of the entitlements of future development of the other states. [[88]](#footnote-89)88 ***Colorado*** Governor Roy Romer stated the water bank concept would not "offer the necessary incentive to California to solve its own water supply problems." [[89]](#footnote-90)89

Because of its own need for additional water over its entitlement, Nevada expressed interest in the concepts of banking, wheeling, conservation investments, exchanges and transfers of water, on both an inter-and intra-basin basis. However, Nevada's major concern was its view that the combination of redefined surplus and water banking as proposed by California would increase the risk of shortages - shortages Nevada could not tolerate. Nevada was only interested in water, not money in an escrow account arrangement. [[90]](#footnote-91)90

Arizona seemed less receptive. Arizona's basic concern was that the California proposal would result in California continuing to request and receive water in excess of its basic apportionment. Arizona urged California to resolve its problems within its own state, and not at the expense of future risk of shortages to the other states. In Arizona's view, California's priority established under the 1968 Act increased Arizona's risk of shortages and heightened Arizona's concern about surplus water use in California. [[91]](#footnote-92)91 Arizona expressed no interest in either the monetary aspect of the escrow account or the water bank, and insisted that any program allowing California to use any ***Colorado*** ***River*** water over its basic normal entitlement give "absolute assurance" to Arizona that its future water supplies not be impaired. [[92]](#footnote-93)92

Utah posited that unused ***Colorado*** ***River*** system water should be available for use by states with a need, so long as such use did not **[\*337]** increase risk or injury to other states. Utah expressed interest in continued discussions of the escrow account and water banking concepts, although it expressed that legal, institutional, political, and practical obstacles to implementation of a water bank would be "virtually insurmountable." [[93]](#footnote-94)93 However, Utah expressed continued interest in a credit system similar to that which had been discussed by the states in relation to the development of the 1991 AOP.

New Mexico expressed appreciation for California's offer to commit to reduce its uses over a period of time to its basic apportionment, and interest in continued discussions over the escrow account concept. However it was "nervous" about the monetary aspect of the escrow account proposal, and opposed the water bank proposal. [[94]](#footnote-95)94

Wyoming supported an enforceable schedule of reductions in California's use of water to its basic apportionment, and found the escrow concept worthy of further discussion. However, Wyoming offered "no encouragement or support" on the water banking concept "until the in-state and regional (lower basin) opportunities of this concept have been fully exhausted." [[95]](#footnote-96)95

[*V*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3X2-8T6X-731X-00000-00&context=1516831). A HIATUS IN THE SEVEN STATE PROCESS: LOWER BASIN DISCUSSIONS

Despite the fact that the states apparently agreed to the substantive elements of the framework proposal made by ***Colorado*** and the escrow account concept proposed by California, progress of the seven state negotiations stalled. The states could not reach consensus on a basis for moving forward with discussions. California and Arizona expressed a desire to address issues between themselves, and, due to internal political issues, Nevada asked for additional time to develop its position. [[96]](#footnote-97)96 Arizona Director of Water Resources, Betsy Rieke, then criticized the original ***Colorado*** proposal as "playing fast and loose with Arizona's water," and asserted that, with increasing Arizona uses, California should be required to reduce its use of water as a matter of law, not agreement. [[97]](#footnote-98)97

**[\*338]** As a result, the states agreed the Lower Division States should meet among themselves to discuss ***river*** operations. The Lower Division States discussed issues beyond the use of water in California including: (1) Nevada's anticipated growth and demands for water; (2) the worsening agricultural economic conditions in Arizona; [[98]](#footnote-99)98 and (3) the resulting decreased demand for CAP water that was threatening the viability of local irrigation districts. [[99]](#footnote-100)99 The states also discussed issues such as redefining "surplus," wheeling of tributary water, and interstate transfers and exchanges. [[100]](#footnote-101)100

Of particular note, the states discussed a concept of groundwater storage in Arizona as an element of ***Colorado*** ***River*** management. The discussion included proposals to store underground ***Colorado*** ***River*** water as a supplement to storage in Lake Mead, and to store Arizona's unused entitlement in exchange for allowing California and Nevada to exceed their apportionments. [[101]](#footnote-102)101 Through these discussions, California and Arizona developed a pilot groundwater recharge program, by which MWD would be allowed to store water in Arizona groundwater aquifers for recovery in later years.

MWD also pursued a pilot land fallowing program with the Palo Verde Irrigation District ("PVID"). Under this program, MWD paid farmers in PVID to fallow portions of their fields for no more than two years. MWD proposed the Bureau store the water saved by the program in Lake Mead. There the water would be banked under defined terms for subsequent release for use by MWD. [[102]](#footnote-103)102 Although both Arizona and Nevada opposed the proposed Lake Mead banking arrangement as illegal under the decree in Arizona v. California, [[103]](#footnote-104)103 the Bureau executed an agreement with MWD and PVID that allowed "top banking" in Lake Mead of water saved from fallowed land in the PVID. Under this arrangement, the banked water would be the first to spill in the event of flood releases from Lake Mead. [[104]](#footnote-105)104 MWD also entered into **[\*339]** a similar test land fallowing and water banking agreement with IID. [[105]](#footnote-106)105

The Basin States' discussions, and particularly the California proposal for a ***Colorado*** ***River*** water bank, piqued the interest of in-Basin Indian tribes and private interests attracted to the idea of inter-basin water marketing. With its need for additional water, the State of Nevada was more than happy to accommodate them.

[*VI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4F2-D6RV-H37N-00000-00&context=1516831). THE TEN ***COLORADO*** ***RIVER*** INDIAN TRIBES

In reaction to the state discussions concerning the California and Nevada issues, and in particular to the California water bank proposal, ten ***Colorado*** ***River*** Indian Tribes [[106]](#footnote-107)106 formed a "Tribal Partnership" to participate in the discussions. In the Tribes' view, the California escrow proposal would compensate the Basin States for California's use of unused water that the Tribes were entitled to under their unused (and, in many cases, unquantified) reserved rights. The Tribal Partnership presented to the states a position paper expressing the Tribes' desire to engage in off-reservation marketing of both unused tribal entitlements as well as water currently being put to use on-reservation. [[107]](#footnote-108)107 Following a meeting between the states and tribes in September 1992, the Tribal Partnership presented to the states a proposed memorandum of understanding between the states and the tribes that outlined a framework for endorsing off-reservation leasing of Tribal reserved water rights. [[108]](#footnote-109)108

Nevada was interested in the proposal, but the Upper Basin States and Arizona expressed concern, for much the same reasons as they were concerned about the California water bank - the proposal would violate the Law of the ***River***, erode the entitlements to use water within the states, and lead to wholesale inter-basin water marketing. These states preferred to seek ways to resolve the California and Nevada issues through operational mechanisms sanctioned within the Law of the ***River***, and thus drifted back to the type of operational arrangement first proposed by ***Colorado*** and fleshed out in the **[\*340]** California escrow account proposal. [[109]](#footnote-110)109

At a meeting of the states and tribes in Newport Beach, California, in November 1992, the parties agreed to a process for continuing discussions based on needs in California and Nevada, economic needs of the tribes, preservation of the entitlements of the states and tribes, and preservation of state/tribal control of the water resources within their borders. [[110]](#footnote-111)110 Thus began a series of communications and meetings between representatives of states and tribes called the "7/10 Process." Although the tribes continued to present various proposals to the states, the process failed to produce specific agreements. The broad scope of the proposals by some of the participants, such as the tribes and Nevada, would have resulted in such major changes to the institutional and operational framework governing the ***Colorado*** ***River*** that neither the states nor the tribes could have effectively dealt with those changes.

In contrast, Upper Basin States based their proposals on the principle that Lower Basin water supply problems should be solved within the Lower Basin. As a result, the Upper Basin proposals were much more modest (and, in the opinion of the Upper Basin, more doable) than some of the other, more aggressive, proposals. [[111]](#footnote-112)111 Two additional factors contributed to the disruption and failure of the 7/10 Process: Chevron Shale Oil Company's proposal to develop a reservoir in ***Colorado*** and lease ***Colorado*** water to Nevada; [[112]](#footnote-113)112 and the financial crises in Arizona associated with the repayment obligations of the CAP.

[*VII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T4S2-D6RV-H37V-00000-00&context=1516831). NEVADA<CSQ>S AGGRESSIVE APPROACH TO ACQUIRING WATER

With pressing demands in excess of Nevada's basic entitlement of 300,000 acre-feet per year, southern Nevada embarked on an ambitious campaign to obtain water from any source. The following factors pressured the Southern Nevada Water Authority ("SNWA"), which encompassed a consortium of water districts in the Las Vegas area, to take some action: (1) its policy of not extending taps without a long-term supply of water to support new growth; (2) the speculative purchasing and holding of taps by developers; and (3) increasing political pressure from the casino industry to develop additional water supplies. Nevada made the intentions of its new campaign known **[\*341]** shortly after the Newport Beach meeting. Nevada then proposed state/tribal discussions over several controversial alternatives including: interstate banking; fallowing and conservation transactions in the Lower Basin; Upper-to-Lower Basin water marketing; tribal leasing and marketing; creation of a basin-wide ***river*** commission; and Lake Mead and Lake Powell water banks. [[113]](#footnote-114)113

Southern Nevada expanded its campaign in late 1993, when the ***Colorado*** ***River*** Commission of Nevada held a hearing - the "Southern Nevada Water Summit" - inviting anyone with water to sell to make a proposal. Over two days, the Commission heard proposals by water speculators for schemes such as shipping glacial water from Alaska, exchanging water with Mexico, leasing water from the Upper Basin, transferring water from northern Nevada, and establishing "water ranches" in Arizona. [[114]](#footnote-115)114 Nevada also invited the other Basin States to make presentations. However, the other states were not willing to encourage Nevada to work outside the context of state-to-state institutional discussions and arrangements. For example, the State of ***Colorado*** warned Nevada that "embracing, or even considering, private interbasin water marketing proposals may be destructive of the process to resolve long term issues on the ***River***." [[115]](#footnote-116)115 Even California, which also needed additional water, commented that Nevada's need for additional water "can only be accomplished through joint, cooperative efforts among the states." [[116]](#footnote-117)116

These cautions did not deter the Nevada interests. Nevada and Utah officials met to discuss exchanges of water on the Virgin and ***Colorado*** ***Rivers***, and a proposed pipeline from Lake Powell to St. George, Utah, which could serve the needs of both southern Utah and southern Nevada. [[117]](#footnote-118)117 At a follow-up summit on February 8, 1994, the boards of the ***Colorado*** ***River*** Commission of Nevada and the SNWA asked their staffs to prepare a white paper on "wheeling" Virgin ***River*** and ***Colorado*** ***River*** water to Nevada. [[118]](#footnote-119)118 Board members expressed **[\*342]** frustration that the Law of the ***River*** was an apparent impediment to their access to additional water. One board member stated, "we must change the "Law of the ***River***.' Congressional people listening take note. The "Law of the ***River***' is blocking most of the best proposals because they cannot be delivered." [[119]](#footnote-120)119 Nevada officials followed the summit with public calls for changing the allocations among the states. [[120]](#footnote-121)120 Nevada then piqued the interest of Congress, and convinced Senator Bill Bradley of New Jersey, Chair of the Subcommittee on Water and Power of the Senate Energy Committee, to schedule oversight hearings on ***Colorado*** ***River*** management. However, because of progress in the Lower Basin interstate discussions on water banking, Nevada did not follow-up on its threats to try to redefine the Law of the ***River***, and quickly moderated its approach.

[*VIII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T502-8T6X-7323-00000-00&context=1516831). FINANCIAL CRISES IN ARIZONA

In the early stages of the negotiations between the states on the issue of California's reliance on surplus water from the ***Colorado*** ***River***, Arizona was a reluctant participant. Arizona took the position that California's obligation to reduce its use of water was a legal requirement that was not subject to negotiation, and openly criticized ***Colorado***'s approach. However, in 1991, Arizona began facing a critical financial problem in the operation of the CAP that was a factor in causing it to look at financial alternatives, including striking a "deal with the devil" - California.

Due primarily to low agricultural demand for CAP water, deliveries of CAP water dropped significantly in 1991. [[121]](#footnote-122)121 Contracts obligated agricultural districts to continue to pay for CAP water even though they were not receiving it, causing some of these districts to file for bankruptcy. At the same time, the Secretary of the Interior prepared to declare the construction of the CAP substantially complete, which would trigger additional payments and financial hardship. Contributing to the crises, the DOI and the CAWCD disputed the amount that CAWCD would owe the United States once the Secretary declared substantial completion declaration.

These problems forced Arizona to look for potential alternative solutions. A task force, appointed by the governor, looked at opportunities to increase agricultural water use, and also considered **[\*343]** the possibility of interstate marketing of CAP water. Early in 1993, a report by the Arizona Department of Water Resources rejected the idea of interstate water marketing, stating:

Arizona faces considerable risks by pursuing a marketing agreement. If Arizona attempts to market a share of its low priority CAP water, other parties will likely demand the right to market their water, including currently unused water. Arizona may find that once this currently unused water is marketed, its low priority supply is diminished and it no longer has any water to market. If Arizona seeks to negotiate a change in the Law of the ***River*** that allows a direct marketing of water, it may find, after the negotiations, that the state has lost more than it is willing and can afford to give up. [[122]](#footnote-123)122

However, by the end of 1993, Arizona was more willing to discuss the subject. A Governor's Task Force report stated that "[the Arizona Department of Water Resources] should study the feasibility of arrangements in which California and Nevada take advantage of unused entitlement and canal capacity to store water in Arizona in exchange for the right to increased ***Colorado*** ***River*** diversions in the future." [[123]](#footnote-124)123 Arizona, Nevada, and MWD entered into a demonstration project allowing for Nevada or MWD to pay the CAWCD to deliver ***Colorado*** ***River*** water to farmers who normally used groundwater. In exchange, Nevada or MWD would then receive rights to the groundwater the farmers did not pump. When necessary, Nevada or MWD could later gain access to this "in-lieu" storage through a forbearance agreement whereby Arizona agreed to forbear, in the future, the use of an equal portion of its ***Colorado*** ***River*** entitlement to Nevada or MWD. [[124]](#footnote-125)124 This arrangement increased the use and financial feasibility of the CAP, gave to Arizona farmers water at a cheaper price than their pumped groundwater, and created a storage water bank for Nevada and MWD.

Negotiations between Arizona and the DOI over the repayment obligation of the CAWCD for the CAP eventually broke down in 1995; the matter then went to litigation. [[125]](#footnote-126)125 However, the concepts of developing a market for Arizona's unused entitlement and canal capacity became important components in developing an incentive for California to develop the California Plan, and for Arizona to develop **[\*344]** its groundwater bank. Additionally, the concept of Arizona forbearing a portion of its unused apportionment would find utility in the Guidelines that were later developed by the DOI, and in the implementation of the California Plan.

[*IX*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T532-D6RV-H381-00000-00&context=1516831). DISCUSSIONS ON A LOWER BASIN WATER BANK AND LOWER BASIN OPERATIONS

In 1994, in the context of renewed discussions among the seven Basin States, Nevada proposed to form a publicly controlled water bank in the Lower Basin. The bank would collect and allocate unused and voluntarily contributed water "to assure a full aqueduct for [MWD], an effective end to the [CAP] subordination, and a long-term augmentation of the water supply of the [SNWA] (starting with the transportation of appropriated Virgin ***River*** water in Lake Mead)." [[126]](#footnote-127)126 Nevada proposed that a commission, composed of representatives of each of the three Lower Division States, operate the bank. [[127]](#footnote-128)127

The proposal was generally well received by the other states. In particular, the Upper Division States felt the proposal was consistent with two of their fundamental principles - that the Lower Basin resolve its water allocation issues within the Lower Basin, and that no private water marketing occur between the Upper and Lower Basins. [[128]](#footnote-129)128

Arizona responded that a Lower Basin Commission might be appropriate, but suggested that, instead of a central water bank, the states allow for the creation of individual state water banks. [[129]](#footnote-130)129 In Arizona, the legislature would create the bank with the authority to secure long-term supplies through sources such as underground water storage credits, ***Colorado*** ***River*** water available through land fallowing, and interim contracts with CAWCD for excess CAP water for groundwater storage. [[130]](#footnote-131)130 The bank could then contract with other **[\*345]** states for their acquisition of such supplies, and arrange to store those supplies (including underground storage). The transfer of water from the bank to California or Nevada would be made through a "forbearance agreement" entered into under the provisions of Article II(B)(6) of the Decree in Arizona v. California, under which the Secretary can deliver the unused entitlement of one Lower Division state in any one year for use in another Lower Division state. [[131]](#footnote-132)131 Arizona recognized the Secretary would have to promulgate regulations to implement transfers between the states under Article II(B)(6). [[132]](#footnote-133)132

The DOI also put forth a proposal for improving the management of Lower Basin supplies. In early 1994, the DOI circulated draft regulations for managing ***Colorado*** ***River*** water entitlements in the Lower Basin. The regulations addressed many of the issues being discussed by the states, including marketing ***Colorado*** ***River*** in the Lower Basin, banking conserved water in Lake Mead, administering reasonable beneficial use, imposing fees, and wheeling non-project water. [[133]](#footnote-134)133 The Lower Division States expressed numerous reservations and concerns as to these draft regulations, resulting in the DOI agreeing to suspend publication pending further discussion. [[134]](#footnote-135)134

In response to the seeming progress on state water banking discussions and the suspension of draft regulations, the Lower Division States appointed a technical committee charged to develop alternatives to more efficient management of the ***Colorado*** ***River*** system in the Lower Basin. The committee discussed the operation of an interstate water bank, surplus and shortage operating criteria, overrun criteria, transfers of Tribal water, modeling, establishment of a "Lower Basin Forum," facilitators, public involvement, and other issues. [[135]](#footnote-136)135

Throughout these discussions, Nevada continued to push the idea that the states not oppose the wheeling of 60,000 acre-feet of water per year from the Virgin ***River*** through Lake Mead for use in Nevada. Nevada felt that this wheeling could be in lieu of a water development project on the Virgin ***River***. Arizona and California opposed the idea, however, on the basis that once water entered Lake Mead, it became subject to the allocation scheme under the Boulder Canyon Project **[\*346]** Act and the Decree in Arizona v. California. Also, MWD pushed the idea of a water bank in Lake Mead. Arizona opposed this idea as well. [[136]](#footnote-137)136 These disagreements effectively stalled the discussions for about a year.

Further complicating the negotiations, similar to earlier proposals for interstate transactions, other interests on the ***Colorado*** ***River*** desired to "get in on the action." The ***Colorado*** ***River*** Basin Tribes Partnership presented its own water banking proposal to the states. [[137]](#footnote-138)137 Much to the consternation of the other Upper Division States, the State of Utah broke ranks by proposing an Upper Basin water bank that could market Upper Basin water to the Lower Basin. [[138]](#footnote-139)138 The other Upper Basin States expressed no interest in the proposal. After meeting with the governor's representatives of each of the other Upper Division States, the Utah Director of Natural Resources characterized the reaction of the other states as ""Not interested. No. Hell no.' Depending on the state." [[139]](#footnote-140)139 One might view this as a knee-jerk response to a progressive proposal, but the reasons for the Upper Basin's historical opposition to Upper-to-Lower Basin water marketing have their roots in the very foundation of the Law of the ***River*** for the Upper Basin - the protection in perpetuity under the Compact to develop the Upper Basin's share of the ***Colorado*** ***River***. [[140]](#footnote-141)140

After more than a year of negotiations, the Lower Basin technical committee failed to reach any substantive agreement. In apparent frustration over the lack of progress, the Bureau wrote a paper to the committee outlining Bureau proposals for managing surpluses, shortages, and unused apportionment "until a lower basin consensus on these issues is achieved." [[141]](#footnote-142)141 The paper proposed to declare more surpluses, resulting in more and deeper drawdowns in Lake Mead than had historically occurred. [[142]](#footnote-143)142 Although MWD supported the proposal, **[\*347]** IID and other agencies opposed it.

In late 1995, Arizona set forth its position with respect to the technical committee discussions. It explained that it would view any proposals against two basic criteria. Would the proposal: (1) "increase the risk of shortage to the CAP?"; or (2) "in any way threaten Arizona's entitlement to consumptively use 2.8 million acre-feet per year from the mainstream?" [[143]](#footnote-144)143 Against these criteria, Arizona announced its willingness to discuss a number of proposals, but its unwillingness to discuss water banking in Lake Mead (a proposal of much interest to MWD) or party-to-party transfers of water not authorized by the states involved. [[144]](#footnote-145)144 Faced with proposals by the other two states that it did not support, and the Bureau proposal to increase surplus releases of water to California, Arizona also presented a proposal that would put additional pressure on California and Nevada by hastening the day when Arizona would fully utilize its apportionment.

The Arizona Department of Water Resources proposed that the Arizona legislature enact legislation to: (1) provide state funding and mechanisms to divert Arizona's unused apportionment through the CAP and store the water in groundwater basins for future use during times of CAP water shortages; and (2) replace some existing uses of groundwater by central Arizona agricultural entities with CAP water that would otherwise be unused and unstored. [[145]](#footnote-146)145 Arizona also proposed creation of an "Arizona State Water Bank" through which California and Nevada could store additional amounts of Arizona's unused apportionment. In the future, California and Nevada would be able to exchange the unused apportionment stored in Arizona for limited amounts of ***Colorado*** ***River*** water - amounts additional to their decreed apportionments. [[146]](#footnote-147)146 This proposal sought to put Arizona out in front of the other states by adopting a banking plan acceptable to Arizona, increasing Arizona's use of its apportionment, and developing a mechanism to create a market, and thus a repayment source for the financially troubled CAP. The proposal would achieve all of these goals.

[*X*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T552-8T6X-7328-00000-00&context=1516831). THE DREAM TEAM

But Nevada and MWD had other ideas. As the discussions in the technical committee broke down, MWD and the SNWA entered into secret negotiations and formed an alliance they called the "Dream Team." [[147]](#footnote-148)147 MWD and the SNWA proposed a "long-term partnership" under which they agreed to explore and develop programs to enhance their water supplies and support the Bureau's recommendations **[\*348]** concerning surplus and shortage criteria. [[148]](#footnote-149)148 MWD also agreed to pay for lining of the All-American Canal, which diverts water to IID. Part of this water would be sold at a discounted rate to the San Luis Rey Indian Tribe in settlement of its reserved rights claims. [[149]](#footnote-150)149 Nevada would fund a portion of the canal lining, and MWD would forbear use of up to 30,000 acre-feet per year to the benefit of Nevada. [[150]](#footnote-151)150 Both states would seek to bank water not needed in any one year in Lake Mead for later release. [[151]](#footnote-152)151

However, the forbearance would have to be approved and implemented by the Secretary of the Interior, and the secret nature of the negotiations had a poisonous influence on MWD's and SNWA's relationship with the Lower Basin States and agencies within Southern California. Governor Symington of Arizona blasted the proposed deal, in particular the Lake Mead "top-banking" proposal that Arizona had opposed in the technical committee discussions, in letters to the governors of California and Nevada and to Secretary of the Interior Babbitt. [[152]](#footnote-153)152 Governor Symington illustrated the bitterness of the political atmosphere, stating that the secret negotiations "[have] severely undermined our confidence in the ability of Nevada to negotiate in good faith … Arizona will not sit idly by while such a disingenuous plan is put into operation." [[153]](#footnote-154)153 Governor Miller of Nevada responded "Arizona's been kicking sand in our face for a long time. And now with the political might of Southern California, it's like we've got a big brother to stand behind us." [[154]](#footnote-155)154

MWD moved quickly to assuage the concerns of Arizona. In a meeting between the General Manager of MWD and the Arizona Director of Water Resources, MWD offered to discuss giving up California's priority to the first 4.4 million acre-feet of water in the Lower ***River***. [[155]](#footnote-156)155 California's priority had been a burr under Arizona's saddle since 1968, and MWD's overture caused Arizona to inch back toward the negotiating table. [[156]](#footnote-157)156

However, the MWD/SNWA deal had created greater problems within California. In addition to leaving Arizona out of the mix, MWD and the SNWA had not involved the agricultural districts in Southern California from whom the water would be generated. The Coachella **[\*349]** Valley Water District ("CVWD"), IID, and Palo Verde Irrigation District jointly complained to MWD that MWD's actions would jeopardize the Districts' water rights. [[157]](#footnote-158)157 The San Diego County Water Authority ("SDCWA"), which is a member agency of MWD and was engaged in water transfer negotiations with IID and also negotiations with MWD for "wheeling" conserved IID water through MWD's ***Colorado*** ***River*** Aqueduct to San Diego, expressed its concern to MWD that it should have a "right of first refusal" to participate in conservation transactions. [[158]](#footnote-159)158 California Governor Pete Wilson quickly backed away from any implication that the State had any part in the negotiations. [[159]](#footnote-160)159 He then went further, writing a letter to the Chairman of MWD chastising the agency for "usurping the authority of the State of California in dealing independently with Arizona and Nevada. In particular, Metropolitan is acting as though it has the authority to sell ***Colorado*** ***River*** water to Nevada and to potentially give up California's statutory priority over the Central Arizona Project." [[160]](#footnote-161)160

The DOI also took a step back from the proposal, stating that it would not approve any forbearance until it received a formal proposal and analyzed the impacts on the rest of the states. [[161]](#footnote-162)161 Secretary Babbitt, in what would become an annual ritual, then appeared before the December 1995 meeting of the ***Colorado*** ***River*** Water Users' Association meeting in Las Vegas. He noted the efforts the DOI had undertaken to work with the states in formulating new management strategies, and his preference for consensus solutions to be developed by mutual agreement. [[162]](#footnote-163)162 Noting further that the Seven-Party Agreement of 1931 [[163]](#footnote-164)163 authorizes MWD, Los Angeles, and SDCWA to bank in Lake Mead an aggregate of up to five million acre-feet of water by reason of diversions reduced below their entitlements, he called such banking "vintage Law-of-the-***River***." [[164]](#footnote-165)164 He went on to state his support for voluntary market transactions within the legal framework of the Law of the ***River***, and announced that it was his responsibility, as ***River*** Master, to consider applications for willing buyer-seller transfers **[\*350]** of conserved water between the Lower Basin States. [[165]](#footnote-166)165 Stating he would "move cautiously," he nonetheless signaled he would not wait for the three states to arrive at final agreements before he approved individual Lower Basin interstate transfers. [[166]](#footnote-167)166

The controversy within California precipitated a new facilitated consensus-building process. The six major Southern California water agencies - MWD, the Los Angeles Department of Water and Power, the SDCWA, IID, Coachella, and PVID - convened the Six Agency Committee closed-door discussions to try and close the gap on their positions relative to issues such as interstate transactions, the IID/SDCWA conservation transfer, and wheeling of IID water through MWD's ***Colorado*** ***River*** Aqueduct to San Diego. [[167]](#footnote-168)167 Finally, the political pressure was enough to break up the "Dream Team." In March 1996, the General Manager of MWD announced to a California General Assembly hearing the MWD/SNWA proposal was "off the table." [[168]](#footnote-169)168

In 1996, the SNWA created some relief for itself by reversing its previous policy requiring a permanent water supply to be in place to support the issuance of new water taps, and that had allowed developers to hoard taps for speculative purposes. The new policy allowed SNMA to issue taps that contemplated a need for water in excess of Nevada's basic apportionment. Thus, Nevada "defined" its way out of the current political crises, but still had not come up with real water beyond the limitation of its entitlement.

[*XI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T582-D6RV-H386-00000-00&context=1516831). THE ARIZONA WATER BANK AND INCREASING TENSIONS (AND WATER USE) IN CALIFORNIA

In response to the ongoing discussions and positions of California and Nevada, Arizona went on the offensive by implementing the plan for water banking that it had proposed earlier. The Arizona legislature enacted a groundwater banking law creating a state-run water banking authority. [[169]](#footnote-170)169 The Arizona Water Banking Authority ("Banking Authority") is a state government organization authorized to purchase unused ***Colorado*** ***River*** water. The Banking Authority diverts water through the CAP for storage directly or indirectly in groundwater aquifers in Arizona in order to protect against future shortages and provide water supply augmentation opportunities to meet state water management objectives. The Banking Authority can then sell and recover the water. Additionally, the Banking Authority is able to store water on behalf of California or Nevada, and guarantee a mechanism to allow the states to recover the stored water. The storage and banking arrangements are operated under Arizona's Underground **[\*351]** Water Storage statutes [[170]](#footnote-171)170 and Article II(B)(6) of the Decree in Arizona v. California. [[171]](#footnote-172)171 The Banking Authority immediately began diverting ***Colorado*** ***River*** water through the CAP, causing diversions to increase dramatically towards Arizona's full 2.8 million acre-feet per year entitlement. [[172]](#footnote-173)172

Meanwhile, in California, interagency disagreements broke out as water use in the Imperial Valley also increased. The Six Agency Committee negotiations broke down. IID did not renew its water conservation agreement with the MWD, but did enter into a letter of intent with the SDCWA (which, as the largest but most junior member of MWD, was trying to establish a degree of water independence), under which water conserved in IID and paid for by SDCWA would be transferred either through MWD's ***Colorado*** ***River*** Aqueduct or through a new aqueduct to be constructed from the ***Colorado*** ***River***. [[173]](#footnote-174)173 MWD objected to the agreement, arguing that SDCWA had no right independent of MWD to "wheel" water through the Aqueduct, and raised several other obstacles and legal arguments. [[174]](#footnote-175)174

Coachella, which holds an unquantified right to ***Colorado*** ***River*** water junior to IID but senior to MWD, also joined the fray. CVWD faced its own problems in the form of groundwater overdraft. Coachella argued that any water saved by conservation in the IID should go to it, not to MWD. CVWD asserted that only after its needs were satisfied should water then be allowed to go to a junior user. [[175]](#footnote-176)175

The combination of increasing water use in IID and diversions by Arizona to bank water pushed total Lower Basin mainstream water use to about eight million acre-feet in 1996. [[176]](#footnote-177)176 The clear prospect was that this use would continue. However, ***Colorado*** ***River*** system reservoirs were full enough, and runoff was large enough, that the Secretary was justified in declaring surplus conditions in 1996, 1997, and 1998. If a normal year were justified, the Secretary would have been forced to reduce MWD's diversions, to return total California water use to 4.4 million acre-feet and total Lower Basin use to 7.5 million acre-feet. [[177]](#footnote-178)177

**[\*352]**

[*XII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T5B2-8T6X-732F-00000-00&context=1516831). THE SIX-STATE ALLIANCE

Sitting on the sidelines, the representatives of the six Basin States other than California became increasingly concerned that, despite nearly continuous discussions among the states and water agencies since 1991, there was no measurable progress in achieving a reduction in California water use. Despite the MWD/IID water transfer agreement, not only were agricultural uses in California increasing, but also California agencies apparently were also under the assumption that California's demands would continue to be met into the foreseeable future by surplus releases. [[178]](#footnote-179)178 The states requested a meeting with California water agency representatives, which took place in San Diego on November 22, 1996. The six states made a comprehensive presentation of their concerns to the California agencies. The states reviewed the lack of progress in the discussions that had taken place since 1991, and the concurrent increase in uses in the Lower Basin in that same period. [[179]](#footnote-180)179 The states presented to California a choice: either commit to a defined and enforceable program to reduce its water use to its 4.4 million acre-feet apportionment, or face the risk the states would ask the Secretary of the Interior to reduce California's use to its basic apportionment on a year-to-year basis. Going back to the positions developed by ***Colorado*** in 1991, the states told California:

We are available to engage in serious discussions toward the development of multiple year surplus and shortage criteria, that will meet, for an interim period only, at least part of the demand for surplus water in the Lower Basin, and will allow for more secure water planning and more efficient use in the United States.

These discussions must be preceded by, and based upon, California's commitment to enter into a defined, enforceable program to reduce its dependence on ***Colorado*** ***River*** water over its basic entitlement, in a way that avoids undue risk of shortage to the other Basin States. We are also interested in moving forward with the steps necessary to implement the interstate storage component of the Arizona Water Bank. However, the states are extremely concerned with proposals in California to bank surplus system water within Lake Mead in a "top water bank" or a "transitional water bank."

**[\*353]**

If we cannot proceed on this basis, our states will continue to review ***Colorado*** ***River*** operations on a year-to-year basis. Under this approach, conditions change rapidly. However, it is possible that a surplus condition will not be justified in 1998. Therefore, we will expect use of ***Colorado*** ***River*** water in California will be reduced to or toward 4.4 [million acre-feet] in 1998, if the Secretary makes a normal or limited surplus declaration. [[180]](#footnote-181)180

The six states had coordinated their position statement with the Secretary of the Interior. Immediately following the six-state letter, Secretary Babbitt addressed the situation in his annual speech to the ***Colorado*** ***River*** Water Users' Association in Las Vegas. [[181]](#footnote-182)181 The Secretary underscored the concerns expressed in the six-state letter and announced several actions he would take.

He instructed the Bureau to work with IID to quantify beneficial use within IID. [[182]](#footnote-183)182 This action would serve to limit deliveries to IID, and establish a baseline for the quantification of conservation savings that could be transferred to MWD. He also instructed the Bureau to develop targeted management regulations in the Lower Basin. These regulations would focus on intrastate water marketing and implementation of the Arizona Water Bank. [[183]](#footnote-184)183 The Secretary then announced his desire to clarify the relative rights of California agricultural agencies, in order to resolve the CVWD/IID dispute. [[184]](#footnote-185)184 He announced his intent to proceed with the development of surplus criteria, but stated he would defer finalizing any such guidelines pending the development of a California strategy to reduce its dependence on surplus water. [[185]](#footnote-186)185 Finally, he recognized the concerns of the six states over surplus top-water banking proposals, and stated he would defer consideration of top-water banking proposals. [[186]](#footnote-187)186 Echoing the six-state letter, he warned California water agencies that California could expect cutbacks in water deliveries at any time, if he declared a normal condition on the ***Colorado*** ***River***. [[187]](#footnote-188)187 It was a warning that Secretaries Babbitt and Norton would frequently repeat.

Shortly after the Secretary's speech, the Bureau denied IID's request for a water order of 3.3 million acre-feet of water in 1997. "This action was taken despite the anticipation of surplus conditions in the [***Colorado***] ***River***, and therefore represented a first step in placing beneficial use limitations on [California agriculture]." [[188]](#footnote-189)188

**[\*354]**

[*XIII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T5D2-8T6X-732M-00000-00&context=1516831). THE CALIFORNIA 4.4 PLAN

Following the six-state letter and the Secretary's speech, the IID and CVWD began discussions over an issue they had not been able to resolve since 1931 - the quantification of California agricultural priorities within the first 3.85 million acre-feet of water to which California is entitled. [[189]](#footnote-190)189 IID made a proposal to CVWD that included a limit on IID's uses of 3.1 million acre-feet per year, and a limit on CVWD's uses of 330,000 acre-feet per year. This started discussions over one of the most basic issues that had hampered any proposal to transfer conserved water from IID to the ***Colorado*** ***River*** Aqueduct, quantification of IID's and CVWD's priorities. [[190]](#footnote-191)190 Additionally, the California agencies began discussions over the development of a "California Plan."

At a meeting of the Basin States in Las Vegas on March 31-April 1, 1997, California agency representatives outlined to the six states the status of their internal negotiations toward the development of a California Plan. Overall, under State of California facilitation, the California agencies were negotiating five issues: (1) quantification of the IID and CVWD priorities; (2) the meaning of "conservation" as against reasonable beneficial use requirements; (3) the amount and administration of any transfers of conservation savings from agricultural to municipal agencies; (4) issues of wheeling SDCWA water through MWD's ***Colorado*** ***River*** Aqueduct; and (5) administration and accounting of overruns in use by California agencies. [[191]](#footnote-192)191

California designed the California Plan to respond directly to the concerns of the states and the Secretary by articulating a water budget, timetable, and program to reduce total California water use to 4.4 million acre-feet. The Plan contained components on conservation measures that would support additional water for MWD, dry year land-fallowing **[\*355]** options, accounting, administration, overrun accounting, credit for unmeasured return flows, reasonable and beneficial use, seepage recovery, settlement of the San Luis Rey claims, conjunctive use of groundwater, desalinization of drainage water, Salton Sea impacts, ***Colorado*** ***River*** impacts, surplus water criteria, Lake Mead water banking, and use of the Arizona groundwater bank, all of which were designed to keep MWD's ***Colorado*** ***River*** Aqueduct essentially full within California's basic apportionment of 4.4 million acre-feet of water per year. [[192]](#footnote-193)192

However, there were many unresolved issues. First, the plan did not deal with present perfected rights within California's 4.4 million acre-feet per year basic apportionment. These rights included Indian and non-Indian claims totaling about 85,000 acre-feet per year. Second, the transfers from agricultural agencies to MWD identified in the Plan (referred to as "core transfers") totaled only about 600,000 acre-feet per year, about 200,000 acre-feet per year short of that needed for California to get down to 4.4 million acre-feet per year. Third, perhaps as a result of this shortfall, the Plan relied heavily on surplus operations and Lake Mead water banking - the very issues that had precipitated the six-state letter of concern in 1996. Fourth, the plan did not have a schedule for implementation. [[193]](#footnote-194)193 The Director of the California Department of Water Resources characterized the Plan as a "work in progress." [[194]](#footnote-195)194

The California agencies had not reached agreement on many fundamental issues necessary to implement the core transfers. The agencies began working on three "lynchpin" issues: (1) SDCWA and MWD had to finalize an agreement to wheel water, conserved under the SDCWA/IID agreement, through the ***Colorado*** ***River*** Aqueduct; (2) IID and CVWD had to agree on the relative quantification of their entitlements within California's third priority; and (3) the California agencies, the DOI, and the Basin States had to agree on the implementation of surplus and shortage criteria on the ***Colorado*** ***River*** - identified as a critical component of establishing a "soft landing" for California to reduce its water uses to 4.4 million acre-feet per year. [[195]](#footnote-196)195

Additionally, the issue of environmental compliance associated with the implementation of the California Plan came to the forefront. The implementation of conservation measures in the Imperial Valley would reduce agricultural return flows to the Salton Sea, thus increasing salinity levels and hastening the decline of the fishery resource in the Sea, impacting several listed or candidate species of **[\*356]** wildlife under the federal Endangered Species Act ("ESA"). The United States Fish and Wildlife Service ("USFWS") requested that no action be taken for three years, so the impacts to the Sea could be studied. Moreover, the California agencies recognized that implementation of the California Plan required environmental compliance under both California and federal law. [[196]](#footnote-197)196 These clearly were complex issues. Therefore, although the outline of the California Plan was a start, California was still a significant distance from having a plan it was ready to implement.

With continued work, the California Plan did get a bit more specific. For example, a revised plan released in November 1997 established a goal of reaching 4.7 million acre-feet per year by the year 2010 or 2015, with an unspecified second phase. [[197]](#footnote-198)197 However, the six states were not satisfied, and continued to ask questions and seek specificity to the plan.

In his 1997 speech to the ***Colorado*** ***River*** Water Users' Association, Secretary Babbitt highlighted a number of the concerns the six states had expressed with regard to the lack of specificity and definition in the California Plan. He stated he would not approve water transfers from agriculture to urban uses within California unless the agricultural uses had been quantified. He reiterated his warning to the California agricultural agencies that they faced reductions based on beneficial use limitations. He also assured the six states he would support and implement their proposal for ***river*** operating criteria that would provide California with a soft landing to 4.4 million acre-feet per year, but only if and when the California Plan was ready to be implemented, and only if the Plan provided enforceable mechanisms to assure California stayed on track in its water use reduction program. The Secretary stated:

When further steps are taken so that firm commitments are in place for implementation of [Phase I of the California Plan], including the execution of binding contracts, agreed-on arrangements for transportation, and resolution of quantification and beneficial use issues, I will adopt surplus criteria that will permit California to continue to meet its beneficial use needs from the ***Colorado*** ***River***. I anticipate that these criteria will be effective for a specified number of years, at which time they will expire of their own terms, and will be reviewed before they are renewed, in order to ensure that California continues to make reasonable forward progress in implementation of its strategic plan. [[198]](#footnote-199)198

**[\*357]** Following up on his previous year's commitment, the Secretary also announced the Bureau would publish regulations allowing for offstream storage of ***Colorado*** ***River*** water and interstate redemption or transfer of storage credits in the Lower Basin. Essentially, the proposed rule would provide a framework and authority for the implementation of the interstate aspects of the Arizona Groundwater Banking regulations, primarily between Arizona and Nevada. [[199]](#footnote-200)199 Under the regulations, Arizona could store to Nevada's account surplus or unused Nevada entitlement. In later years, Arizona would then forego the use of ***Colorado*** ***River*** water to Nevada's credit, and would take the stored groundwater in exchange, under the authority of Article II(B)(6) of the Decree in Arizona v. California.

Although the states supported the regulations as a small but important step in achieving greater flexibility under the Law of the ***River***, the Bureau did not adopt the regulations. The Bureau withheld the regulations over the dispute between the DOI and the State of Arizona over whether the regulations required a separate federal contract for contractors to receive and deliver water, or whether the regulations necessitated only a state contract. The Bureau finally adopted regulations in 1999. [[200]](#footnote-201)200

The California agencies continued to work on negotiating the lynchpin issues, but with little to show for their efforts. The California agencies also presented, and the states discussed, concepts for applying surplus criteria for ***Colorado*** ***River*** operations during the implementation phases of the California Plan. Surplus criteria were not the focus of any real negotiation, as the basic components of the California Plan still were not in place.

In April 1998, SDCWA and IID finalized the water conservation and transfer agreement they had been working on for several years. The agreement provided for incremental increases in transfers to up to 200,000 acre-feet, with a possible additional 100,000 acre-feet available, over a term of up to seventy-five years. IID's statement in the agreement that land "fallowing will not be a permitted Water Conservation effort" [[201]](#footnote-202)201 posed one of the most significant issues later frustrating negotiations to finalize the California Plan. Previous versions of the IID/SDCWA agreement had included land fallowing as a source of water to be transferred. However, the agreement had a number of contingencies such as the need for the SDCWA to reach agreement with MWD over a wheeling arrangement through the ***Colorado*** ***River*** Aqueduct and the requirement for the parties to mitigate environmental impacts and obtain necessary federal and state **[\*358]** approvals. [[202]](#footnote-203)202

The six states were becoming increasingly frustrated that the California agencies were not making any progress in resolving the lynchpin issues and developing a specific California Plan. In May 1998, the six states sent a letter to Secretary Babbitt expressing their position that, despite the ongoing negotiations in California, the Secretary should implement the Law of the ***River*** by reducing California water use to 4.4 million acre-feet in the first year in which he did not declare a surplus. [[203]](#footnote-204)203 Reservoirs on the ***River*** had been relatively full, allowing the Secretary to declare surplus conditions, and enabling MWD to continue to receive a full supply. Concerned these conditions would not last, the states wanted to put California on notice that time was wasting. If reservoir conditions turned less favorable, the states again would not hesitate to ask the Secretary to make a normal declaration and enforce reductions in MWD's supply. The states told the Secretary:

The state of California has taken aggressive steps to facilitate discussions, but the California 4.4 Plan has not progressed beyond the concept stage. Southern California agencies have been unable to bridge internal disagreements over details in the implementation of the proposed Plan. In the meantime, as each year goes by, we all face the risk of inevitable drought conditions, which will necessitate the drawdown of system reservoirs. In short, we are concerned that the California agencies are squandering the opportunity and the flexibility the system is currently providing to reduce their excessive reliance on the ***Colorado*** ***River***.

Our states will continue to cooperate in and support the development of the California 4.4 Plan. However, we also have the obligation to minimize the risk of shortage and protect for our citizens the right to use water, now and in the future, under the Law of the ***River***. Our states continue to rely, among other things, on the limitations imposed on California under the Self-Limitation Act of 1929.

Absent a California Plan, our states will insist on the enforcement of normal or shortage conditions on the ***River*** when conditions warrant. Our states also may insist on appropriate limitations on surplus declarations that support the operational integrity of system reservoirs and the appropriate beneficial use of water. [[204]](#footnote-205)204

In August 1998, SDCWA and MWD reached agreement over the wheeling issue. The agreement established a mechanism for MWD to take conserved IID water through the ***Colorado*** ***River*** Aqueduct for which SDCWA paid. MWD would then deliver a like amount to San **[\*359]** Diego. A legislative appropriation of $ 235 million to line IID's canals assisted the deal. [[205]](#footnote-206)205 However, the California agencies remained stuck on the quantification issue, and discussions on the development of surplus ***Colorado*** ***River*** criteria remained on hold. The SDCWA/MWD wheeling agreement was specifically contingent on:

A. The promulgation and application by the Secretary of the Interior (the "Secretary") of surplus criteria, including ***river*** re-operations, that are sufficient, together with those other water supplies that are under the control of MWD, to assure that the ***Colorado*** ***River*** Aqueduct is full at least through 2015; and

B. The establishment and completion of a process, acceptable to the Secretary and the State of California, in which the ***Colorado*** ***River*** Board and the California public agencies that hold contracts with the Secretary for delivery of ***Colorado*** ***River*** water would participate, which quantifies or otherwise resolves ***Colorado*** ***River*** agricultural water entitlements in a manner that will assure that water conserved from reasonable and beneficial uses can be transferred from an agricultural to an urban agency. [[206]](#footnote-207)206

The six states did not find the first contingency acceptable, that new surplus criteria "assure" the ***Colorado*** ***River*** Aqueduct would remain full through 2015. At a Basin States meeting in San Diego in September 1998, the six states expressed their opposition to such a concept, stating that any guarantee of a firm supply for MWD would create an unreasonable risk of shortage to the other states, and objecting that, in any event, the Secretary did not have the authority to make such a guarantee. [[207]](#footnote-208)207 The states also laid out some principles to develop surplus criteria, which they would later put in writing. Equally discouraging, David Hayes, Deputy Secretary of the Interior, who had been attempting to facilitate discussions between IID and CVWD on the quantification issue, reported the negotiations were at an impasse. [[208]](#footnote-209)208

[*XIV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T5M2-D6RV-H38C-00000-00&context=1516831). THE SIX STATES TAKE THE INITIATIVE ON INTERIM SURPLUS GUIDELINES

The six states found the contingency in the IID/SDCWA transfer agreement concerning surplus criteria substantively unacceptable. In addition, the states realized they did not want to be pressured by contingencies in California agency agreements into accepting surplus criteria put forward by California. The states felt it was important that **[\*360]** they, rather than California, control the agenda as to the terms of any criteria the Secretary might adopt. Therefore, in October 1998 the six states prepared and forwarded to California and to the DOI their Background and Principles for Negotiation - Special Interim Criteria for Releases of Water From Lake Mead During Implementation of the California 4.4 Plan. [[209]](#footnote-210)209 The states designed the document to "lay down a marker" by them as to the bottom-line positions they were willing to negotiate. Stated below, the document articulated principles under which the states would negotiate interim surplus criteria.

There is no need or justification for the Secretary to modify the existing Operating Criteria to accommodate the California 4.4 Plan. The existing Operating Criteria should remain in effect during implementation of the 4.4 Plan, and upon termination or expiration of the special interim criteria. Instead of modifying the Operating Criteria, the Secretary should adopt special interim criteria for releases of water from Lake Mead. The six states will prepare a more detailed proposal that describes acceptable interim Lake Mead operating criteria. The following elements should be addressed in the adoption of the special interim criteria:

1. No water user, including MWD and SDCWA, can be guaranteed or assured of a firm supply for any specified period. Any assurance or guarantee of supply to MWD and SDCWA will create unreasonable risk to other states. Moreover, the Secretary of the Interior does not have the authority to adopt any criteria that would assure any water user of a full supply. Any risk created by the implementation of the interim criteria shall be borne by the Lower Division State(s) which benefited from the additional water made available.

2. The interim criteria will not take effect until firm commitments are in place in California to implement Phase I of the 4.4 Plan, including the execution of binding contracts, agreed-on arrangements for transportation, and resolution of the quantification and beneficial use issues.

3. Any interim criteria will be effective only for a specified period of years, after which the interim criteria will expire on their own terms. The states and Interior will need to discuss the time-frame for the interim criteria suggested in the MWD/SDCWA agreement. After expiration of the interim criteria, the existing Operating Criteria will continue to control operations, unless the Secretary modifies the Operating Criteria pursuant to his authority and under the process set out in the Criteria.

4. Any interim criteria should include triggers that will implement different surplus or shortage deliveries at specified target elevations of storage. Such triggers may need to include an assessment of the **[\*361]** water available to MWD and SDCWA from all sources of supply. The criteria should also include benchmarks, reporting mechanisms, and reviews, by which California will demonstrate measurable and defined progress in meeting the goals of the 4.4 Plan. If sufficient progress is not being made, the interim criteria should automatically and by their own terms terminate or suspend, and operations will revert back to the existing Operating Criteria under a 70R strategy with no look-ahead.

5. Interim criteria should expire by 2015. Phase I of the Plan does not achieve a reduction in use in California to 4.4 [million acre-feet per year]. California should identify how Phase II will be developed and implemented concurrently with Phase I, such that use in California in normal years will be reduced to 4.4 [million acre-feet] by 2015.

6. Any amount declared by the Secretary as surplus above the 7.5 [million acre-feet per year] basic apportionment available to the Lower Division States must be apportioned 50% to California, unless Arizona and Nevada choose not to divert and use the 46% and 4% of the surplus amount that is available to those states, respectively. Any interim criteria should address the conditions under which Arizona and Nevada would agree not to divert and use their respective 46% and 4% interests in such surplus.

7. The interim criteria should address use of water during shortage and surplus conditions by the states of Arizona and Nevada, in order to optimize operations agreed to by those states under the Arizona Water Bank.

8. The interim criteria may need to address the issue of off-stream storage, whether during surplus or flood control release conditions, and whether such storage should be accounted under the equalization and 602(a) storage requirements of the Operating Criteria.

9. The Secretary of the Interior should implement measures to curtail all illegal uses of mainstream ***Colorado*** ***River*** water in the Lower Basin by \_\_\_\_. [[210]](#footnote-211)210

In December 1998, the six states issued a detailed proposal for interim surplus criteria that would meet the articulated principles. The states based the proposal on making surplus water available not only to MWD, but also to Southern Nevada. The states predicated the proposal on the agreement of Arizona to temporarily waive, under defined circumstances, all or a portion of its legal entitlement to forty-six percent of any surplus. [[211]](#footnote-212)211

The states proposed that the Secretary declare surplus conditions in tiers, depending on the water level in Lake Mead. In a normal year, the proposal limited each state to its basic apportionment. In a year of **[\*362]** partial municipal and industrial ("M&I") surplus, the proposal allowed MWD and the SNWA to meet a portion of their needs, but no other surplus water would be available from the system to any other water user. In a full M&I surplus year, the proposal allowed MWD and Southern Nevada to meet all their needs, but again no other water user would receive surplus water. The Secretary would make additional surplus water available in years when warranted based on a 70R strategy. [[212]](#footnote-213)212

The six states preferred the 70R strategy because it results in fuller reservoirs, and thus creates less risk of shortage when drought conditions exist. California preferred strategies that resulted in more frequent and deeper surpluses, providing more water to MWD, drawing system reservoirs down further. The six states viewed these strategies as increasing risks of shortage conditions, elevating delivery costs, potentially degrading water quality, and losing recreational benefits. Moreover, the Upper Basin States opposed other operating strategies supported by California because they would receive no direct benefit from surplus declarations, but must bear the negative impacts of having Lake Powell lowered as a result of equalization requirement in the 1968 ***Colorado*** ***River*** Basin Project Act and the Operating Criteria. [[213]](#footnote-214)213

[*XV*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T602-D6RV-H38J-00000-00&context=1516831). THE IID/COACHELLA PEACE ACCORD AND THE MWD/IID MELTDOWN

As the six states worked on their interim surplus guideline proposal, the DOI and the California agricultural agencies re-engaged in intense negotiations. However, neglecting to include MWD in these negotiations turned out to be one of the major flaws in this new round of negotiations. In December 1998, Secretary Babbitt made his annual speech to the ***Colorado*** ***River*** Water Users Association. He spoke on four basic subject areas: (1) a newly negotiated quantification memorandum of understanding between IID and CVWD; [[214]](#footnote-215)214 (2) the development of interim surplus criteria; (3) the Lower Basin water banking regulation; and (4) the Salton Sea. [[215]](#footnote-216)215

[*First*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831), Secretary Babbitt outlined the terms of the Interior/IID/CVWD agreement. This memorandum of understanding established the basis for more detailed negotiations **[\*363]** over the next six months, but was subject to a number of contingencies. Nonetheless, the agreement appeared to represent significant progress by the California agencies in the resolution of three "lynchpin issues" on which they had been working. Some of the key provisions of the agreement were as follows:

. The agreement would cap IID's entitlement under Priority 3 of the 1931 Seven Party Agreement [[216]](#footnote-217)216 at 3.1 million acre-feet per year (which was about its current level of use), from which would be deducted conserved water transferred under the 1988 MWD agreement and the IID/SDCWA agreement. This cap would provide the necessary baseline from which to measure the conservation transfers to MWD and SDCWA.

. CVWD would have a base entitlement of 330,000 acre-feet per year under Priority 3, plus another 50,000 acre-feet per year under a 1989 agreement that otherwise would have been available to MWD, plus the right to another 138,000 acre-feet per year of conserved water when the 1989 agreement terminated.

. Under the Seven Party Agreement, the PVID and Yuma Project rights under Priorities 1 and 2 are quantified by acreage, not by amount of water. To the extent that diversions under those priorities exceeded an average of 420,000 acre-feet per year and caused total diversions under the first three priorities to exceed 3.85 million acre-feet, IID and CVWD would absorb that excess on a 90/10 basis.

. IID and CVWD entered into a "peace agreement," by which they would agree not to challenge each other's water practices, i.e. assert they are wasting or not beneficially using water.

. The agreement recognized that MWD was not a party and was not involved in the negotiations. The agreement obligated the parties to a six-month period not only to finalize an agreement with MWD's participation, but also to allow for a period for the DOI to develop surplus operating criteria for the ***Colorado*** ***River*** reservoirs. IID and CVWD also wanted a "peace agreement" with MWD, by which MWD would agree to allow conserved water to be transferred from IID to CVWD and not challenge IID's or CVWD's use of water. CVWD also wanted MWD to invest in groundwater recharge facilities within the Coachella Valley, to store its wet-year water. [[217]](#footnote-218)217

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), Secretary Babbitt turned to interim surplus criteria. The Secretary stated his desire to move forward with the development of interim criteria through an "open public process." [[218]](#footnote-219)218 Although he **[\*364]** noted the six-state proposal and urged the states to reach agreement, he stated that if the states did not reach agreement, he would move unilaterally after the six month period referenced in the IID/CVWD agreement, giving "due regard" to the views of the states. [[219]](#footnote-220)219 Significantly, he also seemed to accept California's proposal that the California Plan be developed in two phases, reducing its use of water only half way to 4.4 million acre-feet by the year 2015 - as opposed to all the way as proposed by the six states. [[220]](#footnote-221)220 The Secretary's position on this issue troubled the other states. If it were implemented, in light of the "peace agreement" proposed in the Interior/IID/CVWD agreement, the other states would be the only parties left to make beneficial use challenges to California agencies, with California still 400,000 acre-feet short of its goal.

[*Third*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831), the Secretary referred to the deadlock between the DOI and Arizona over the proposed Lower Basin banking regulations that had been published a year earlier. The DOI had not finalized the regulations because of disagreement between the DOI and Arizona over whether the Arizona water bank would need to enter into a new, separate contact with the Secretary, or whether the existing agreement with the CAWCD, which runs the CAP, would suffice. The Secretary stated that if these regulations were not finalized, he would look at "other possibilities" to meet the needs of Nevada. [[221]](#footnote-222)221

Finally, the Secretary reported on the status of the Salton Sea. [[222]](#footnote-223)222 He noted the passage of the Salton Sea Reclamation Act, [[223]](#footnote-224)223 and reminded the audience of the difficulty of implementing water conservation in the Imperial Valley in a way that resolved the Salton Sea environmental problems. [[224]](#footnote-225)224 This statement was prophetic, as the environmental issues surrounding the Salton Sea would be one of the major reasons why the negotiations over the finalization of the California Plan would ultimately fail.

The "peace accord" began to unravel almost immediately. Shortly after the Secretary's speech, the MWD Board of Directors considered a proposed policy that questioned some of the basic premises of the IID/CVWD agreement. It questioned whether MWD should give up its right to judicially challenge waste and beneficial use in the Imperial Valley, whether urban rate payers should be required to pay for agricultural water that federal taxpayers had already subsidized, and whether the Secretary of the Interior should simply unilaterally re-allocate water among the parties to the 1931 Seven Party Agreement. [[225]](#footnote-226)225 The IID became aware of the policy questions and fired off a letter to **[\*365]** MWD asserting that relinquishing beneficial use claims was indeed necessary to reach an accord on the quantification of agricultural priorities within Southern California, and denied receiving subsidized water, having paid the debt on its diversion facilities. [[226]](#footnote-227)226

Secretary Babbitt met with MWD in an attempt to diffuse the impending breakdown in negotiations. He denied that he had the authority to reallocate water under the 1931 Seven Party Agreement. [[227]](#footnote-228)227 Refusing to back down, in a letter to the Secretary immediately after the meeting, MWD stated, "the Department owes a duty to urban Southern California water users to determine whether the public interest warrants continuing the 1931 allocations of ***Colorado*** ***River*** water made available through federal reclamation programs among agricultural and urban users within California." [[228]](#footnote-229)228 The letter went on to express a concern that was shared by the six states, the proposed quantification agreement would not achieve a full reduction in California water use, and would therefore "leave urban Southern California with assurances of only half the water it needs to fill its ***Colorado*** Aqueduct in the long run." [[229]](#footnote-230)229

MWD then circulated a draft resolution to its member agencies urging the Secretary to "review and adjust California's ***Colorado*** ***River*** allocations for the highest and best use of this precious public resource." [[230]](#footnote-231)230 The Secretary responded that "MET's newly-articulated interest in reappropriating ***Colorado*** ***River*** water undercuts the basic policy commitment and approach adopted by California in its 4.4 Plan, and undermines the actions that many California entities and the [DOI] have been making to implement the California Plan." [[231]](#footnote-232)231 IID went on a spirited defense of its water rights and the permanency of its allocation under the 1931 Seven Party Agreement, writing letters, generating articles, and articulating its legal position. Following another exchange of letters between MWD, IID, and the Secretary's office, Secretary Babbitt decided he had had enough. Expressing his hope the disagreements would not "signal the onset of yet another western water war," the Secretary backed out of any further meetings with the California agencies. [[232]](#footnote-233)232

**[\*366]**

[*XVI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T632-8T6X-732T-00000-00&context=1516831). RENEWED NEGOTIATIONS: THE "KEY TERMS" AGREEMENT

In March of 1998, the California legislature held a hearing on Southern California water issues. [[233]](#footnote-234)233 Several legislators were openly critical of MWD's approach to water negotiations, even threatening to pass legislation that would dismantle MWD or strip it of a significant amount of its powers. Legislators also urged IID and the SDCWA to press forward in the negotiation of their water transfer agreement. [[234]](#footnote-235)234 Secretary Babbitt testified at the hearing, and announced that he would initiate a "process" to seek input to the development of surplus criteria on the ***Colorado*** ***River***. [[235]](#footnote-236)235 The Secretary attempted to instill a sense of urgency in California, stating, ""it is past time for California to get suited up, out of the locker room and into the game… . Unless we can get together on the terms of this contract, the whole thing will collapse.' He continued, "you'll be sitting on the bench … I can't wait any longer.'" [[236]](#footnote-237)236 Babbitt warned that "within [thirty] days he would begin the process of promulgating new criteria for the operation of ***Colorado*** ***River*** facilities, the declaration of "surpluses,' and the apportionment of its waters. He added that the rules would be "less favorable to California unless a [IID/SDCWA] transfer plan is approved.'" [[237]](#footnote-238)237

Shortly thereafter, at a meeting with state representatives, he explained his proposal. He stated that he had no preconceived notion as to the form or substance of what he might do, or whether he would even do anything at all. He announced that the DOI would publish a federal register notice soliciting comment as to whether, and if so what, it should do with respect to surplus criteria. The Secretary intended the proposal as a way to put additional pressure on California to resolve and finalize the California 4.4 Plan. [[238]](#footnote-239)238 The DOI worked with the Basin States to develop the notice, which was worded so as to warn California it could either be included in the process or left out. [[239]](#footnote-240)239

**[\*367]** Secretary Babbitt, through his Deputy Secretary David Hayes, also entered back into the California agency negotiations on the 4.4 Plan as a mediator. [[240]](#footnote-241)240 The internal negotiations immediately focused on the most important and contentious issue: quantification of the California agricultural priorities, specifically IID's. The core issue remained the same - what was the appropriate cap on IID's right, as compared to the amount of water that was reasonably required to meet the beneficial use needs of Imperial Valley farmers? [[241]](#footnote-242)241 Also at issue were: (1) a proposal to eventually transfer 500,000 acre-feet from IID to SDCWA and MWD; and (2) the impacts to the Imperial Valley economy. [[242]](#footnote-243)242

However, this time, the reluctant party was the Coachella Valley Water District. Under the Seven Party Agreement, CVWD shared priority 3(a) with IID. [[243]](#footnote-244)243 It faced a continuing groundwater overdraft problem, and its leverage was its threat to assert its legal right under the Seven Party Agreement to take and use ahead of MWD and SDCWA any conserved water that MWD or SDCWA might pay for within IID. Using its leverage, CVWD bargained for its share of a shrinking California pie.

After months of intense negotiation, Secretary Babbitt and the California agencies announced they had reached agreement on the critical issue of quantifying the California agricultural priorities. In October 1999, the DOI, IID, CVWD, MWD and the State of California signed what became known as the "Key Terms Agreement." [[244]](#footnote-245)244 The Agreement was conceptual and not legally binding, and was also subject to several contingencies, but nevertheless represented a significant step forward in finalizing the California Plan. It filled in the missing pieces of the IID/CVWD "peace accord" of nearly a year earlier. Notably, the Agreement established a "quantification period" of seventy-five years from the date of the first water transfer under the **[\*368]** 1998 IID/SDCWA water transfer agreement. [[245]](#footnote-246)245 Also, it established a "water budget" for the agencies during the quantification period consisting of a 3.1 million acre-foot cap on IID's water use and a 330,000 acre-foot cap on CVWD's water use. [[246]](#footnote-247)246

The Agreement provided a basis for quantifying transfers of water between the three agencies. It not only allowed MWD and SDCWA access to conserved IID water, but also allowed CVWD access to IID water in order to resolve its groundwater overdraft problem. [[247]](#footnote-248)247 If the parties implemented all the transfers, at times when California would be limited to its 4.4 million acre-foot basic apportionment, IID would be limited to 2.61 to 2.69 million acre-feet, CVWD would receive 456,000 acre-feet, and MWD would have the ability to run a full ***Colorado*** ***River*** Aqueduct, with 771-851,000 acre-feet of Priority 4 water combined with obligations to the San Luis Rey Indian water rights settlement, and water made available from water put into groundwater storage in MWD's Hayfield, Cadiz, or other projects when surplus water was available. [[248]](#footnote-249)248

The parties also honored what was now becoming a California tradition of making agreements subject to a wide array of conditions precedent or subsequent. The effectiveness of the Agreement was subject to a dozen conditions precedent drafted to the advantage of the California agencies that allowed them discretion to terminate the agreement if matters did not work out to their satisfaction. Four such conditions precedent included: (1) completion of environmental reviews with an ESA Section 10(a) "no surprises" assurance; (2) DOI adoption of revised surplus criteria for ***Colorado*** ***River*** operations that would "assure" MWD a full ***Colorado*** ***River*** Aqueduct for fifteen years; (3) Bureau adoption of standards and procedures for decree accounting and "inadvertent overruns" of the caps to which the parties had agreed; and (4) California State Water Resources Control Board approval of the contemplated water transfers. [[249]](#footnote-250)249

Following a briefing by California and the DOI in Ontario, California in December 1999, the six states submitted their written reaction to the Key Terms Agreement. In particular, they stated they would not back down from the principles for negotiation and the proposed interim operating criteria they had submitted to California and the DOI a year earlier. The states also made clear they felt the California agencies still had a long way to go in the development of a California Plan. The states wanted to make their views known before Secretary Babbitt gave his annual speech to the ***Colorado*** ***River*** Water Users Association in Las Vegas. The states said:

**[\*369]**

The Ontario briefing made it clear that while the Quantification Agreement was an integral part of the 4.4 Plan, it is not the 4.4 Plan. That document is still being developed. It is apparent from the text of the Quantification Agreement and the responses to our questions, that the proposed conservation transfers will not, by themselves, allow MWD to maintain a full aqueduct within California's 4.4 [million acre-feet] basic apportionment.

We cannot over-emphasize the need for California to commit to reduce its ***Colorado*** ***River*** uses to 4.4 [million acre-feet] in order to gain support within our states for the more flexible operating criteria California desires… .

As the representatives of our states' governors, we must be able to explain the benefits, and justify the risks, of adopting more liberal operating criteria to our legislators, congressional members, water users and the general citizenry. The sole benefit to our states is California's guarantee that it will reduce its basic demands for ***Colorado*** ***River*** water to 4.4 [million acre-feet]. This issue has concerned the Basin States for over seventy years. The temporary use of some surplus water to provide a "soft landing' to California may well be worth the risks created but without the promise of a "light at the end of the tunnel' through the implementation of a 4.4 Plan, there is very little hope that we can muster support within our states to liberalize the operating criteria.

… .

All six states have repeatedly stated that we are willing to engage in serious discussions about the development of multi-year surplus and shortage criteria that will meet, for an interim period only, at least part of the demand for surplus water in California. In order for those discussions to be fruitful, however, certain steps must be taken by your water agencies. First and foremost, a 4.4 Plan must be adopted that commits California to an enforceable program to reduce its dependence on ***Colorado*** ***River*** water. Second, we expect that any operating criteria will be focused on meeting California's objective of protecting its M&I economy within the 4.4 [million acre-feet] base apportionment. Third, any criteria must be of an interim nature only, sufficient to provide a cushion to California while it steps down its use through meaningful conservation measures and water transfers. Fourth, we expect that in the development of interim operating criteria, full consideration will be given to the impacts and risks that extraordinary releases from Lake Mead may create. And finally, we expect that the direct beneficiaries of the "soft landing" interim surplus criteria should be responsible for bearing the risks, and mitigating the impacts on others caused by those criteria. [[250]](#footnote-251)250

**[\*370]**

[*XVII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T652-D6RV-H38R-00000-00&context=1516831). DEVELOPMENT OF THE INTERIM SURPLUS GUIDELINES

The pieces were finally in place. California was working on the development of a specific California Plan, and the DOI had begun the scoping process necessary to comply with NEPA in preparation of surplus criteria and was preparing alternative sets of criteria for analysis in an environmental impact statement ("EIS"). The DOI broadcasted to the states that they should develop a "consensus" set of surplus guidelines to include in the NEPA analysis, or the DOI would make its own assumptions and determination.

With that impetus, the states - this time including California - began to negotiate. California prepared a set of interim surplus criteria as a counter proposal to the six-state proposal prepared in October 1998. The California agencies tied their criteria to the implementation schedule of the 4.4 Plan. The California criteria agreed with the six-state criteria in allowing a fifteen-year period for California to implement its Plan and prepare to live within its basic apportionment. But the Plan did not provide for enough water transfers for MWD's priority to be fully met within California's basic apportionment for the fifteen-year period.

California based its criteria, like the six-state criteria, on a tiered approach under which the Secretary would make different types of surplus declarations based on the water elevation in Lake Mead, with more restrictive surpluses, and finally a normal declaration, as Lake Mead levels dropped. However, the California criteria contemplated more anticipated surpluses, which would allow MWD to put some two million acre-feet of surplus water into groundwater storage during the fifteen-year period. That groundwater storage would then allow MWD time to implement the Phase II portion of the California Plan to effectuate enough transfers to actually get its priority within California's basic apportionment. Both sets of criteria also allowed Nevada access to surplus water during the fifteen-year period, in order to put some surplus water away into groundwater storage. [[251]](#footnote-252)251

Concurrently with the state negotiations to develop consensus criteria, California produced a new ***Colorado*** ***River*** Water Use Plan in May 2000. Unfortunately, there was not much new in the Plan. It outlined a menu of water conservation based transfers within Southern California that would reduce demand for ***Colorado*** ***River*** water of about 480,000 acre-feet over a fifteen-year period, thus resulting not in a "4.4 Plan" but a "4.8 Plan." The Plan also reiterated the "Lynchpin Components" - key elements needed to be in place for the Plan to be effective. In particular, the Plan recognized, as essential, the Key Terms for Quantification Settlement. The Plan stated:

**[\*371]**

The lack of further quantification of the third priority would make it difficult to develop and implement cooperative water supply programs and can cast uncertainty as to water supply reliability. Further quantification of the third priority also can provide the needed quantum baseline by which conservation and transfer programs can be measured. [[252]](#footnote-253)252

To their credit, the California agencies were working hard on the enormously complex array of agreements and environmental compliance processes necessary to implement the California Plan. The California agencies identified some thirty-two such elements. [[253]](#footnote-254)253

A. Issue Resolution to Finalize the Interim Surplus Guideline Proposal

Through their negotiations, the state representatives neared agreement on a seven-state interim surplus guidelines proposal. In essence, California agreed to the six-state proposal, and, of particular importance to the six states, to the adoption of the 70R strategy as guiding baseline operations and operations after the termination of the Guidelines after fifteen years. The states, working with the DOI, also identified several issues they needed to resolve to finalize the Guidelines.

1. Mitigation

The basic principle of the mitigation approach was that those who would benefit from the interim surplus criteria must also mitigate for the incremental harm to others attributable to their use of surplus water under interim criteria as compared to a base case (70R) operating strategy for making surplus water available. This concept was consistent with the 1998 six-state letter setting forth their principles of negotiation. [[254]](#footnote-255)254 California proposed two potential approaches to mitigation: a "volume-based approach" by which the incremental difference in reservoir volume as compared to the base case would be mitigated; and a "risk based approach" by which mitigation would be provided up front for the risk of shortages.

The other states preferred volume-based approach, and also suggested an approach by which mitigation would be measured in three forms: a shortage being triggered sooner than would otherwise **[\*372]** be the case under 70R; a "deeper" shortage than would otherwise be the case under 70R; and a longer shortage than would otherwise be the case under 70R. California would mitigate this impact by actually foregoing the delivery of water in the year of the shortage in the amount of the incremental difference by which California had benefited. The obligation to mitigate would extend beyond the interim surplus period, since the risk also would extend beyond this period. The mitigation obligation would terminate either when reservoir levels converged with a 70R operation, or in the event of a spill, whichever occurred first. The states also discussed mitigation for impacts to Las Vegas Wash, including erosion and water quality impacts as well as recreation impacts at Lake Mead resulting from lower lake levels. [[255]](#footnote-256)255

2. Enforcement

Both the six states and the DOI insisted the Guidelines should be enforceable. In other words, they wanted California's water use reduction to be placed on a schedule, and measures in place to assure California would not benefit from the interim criteria unless it met the schedule. This was also consistent with the 1998 six-state principles. [[256]](#footnote-257)256 The states and the DOI discussed and rejected alternative enforcement mechanisms, such as federal legislation or a stipulation in Arizona v. California that would embody the schedule for California to step down to 4.4 million acre-feet over the fifteen-year period. State discussions centered on enforcement mechanisms within the Guidelines themselves, such as automatic termination and reversion to 70R operating criteria at the end of the fifteen-year period and automatic reversion to 70R criteria if California did not meet identified water use reduction benchmarks. [[257]](#footnote-258)257

3. Overrun Accounting and Averaging

The California agencies had, throughout the negotiation process, linked their desire for a mechanism to pay back "inadvertent overruns" in their use of water to the implementation of the California Plan. The agencies proposed the DOI approve "inadvertent overrun accounts" for each of the California agencies equal to ten percent of the quantities specified in the Key Terms agreement, with a five-year period to pay back such overruns. [[258]](#footnote-259)258 The states and the DOI discussed **[\*373]** a draft federal register notice that would solicit comments on the development of an administrative policy to deal with these issues. [[259]](#footnote-260)259

Additionally, MWD presented the states a paper outlining a proposal concerning decree averaging. The paper described the difficulty of MWD's position as being junior to the unquantified senior rights of the Palo Verde Irrigation District and the Yuma Project. [[260]](#footnote-261)260 For example, deliveries to PVID varied between 314,000 and 504,000 acre-feet per year, resulting in uncertainty in scheduling for MWD. The paper proposed allowing these senior rights to be accounted, for purposes of scheduling water deliveries, based on a defined historic average as opposed to actual use in any one year, thus allowing MWD to schedule a firm delivery for any particular year. This operation would, however, also result in California exceeding 4.4 million acre-feet even in normal years, with MWD being required to "pay back" any overruns through the "inadvertent overrun" procedures. [[261]](#footnote-262)261 The six states opposed this proposal as inconsistent with the Decree in Arizona v. California, since the Decree and the Operating Criteria contemplate only annual determinations and operations.

4. Environmental Mitigation

The California agencies and the DOI had underway, on parallel tracks, a multitude of environmental compliance processes, in addition to the EIS process underway to develop Guidelines. These included a programmatic environmental impact review ("EIR") under California law to implement the Key Terms agreement, a joint EIR/EIS for the implementation of the IID/SDWCA water transfer, an EIR for Coachella groundwater management, ESA section 10(a) no surprises assurance and section 7 consultation, and an environmental assessment to settle the San Luis Rey Tribal reserved rights Settlement. [[262]](#footnote-263)262 Consultation with the USFWS began regarding potential impacts of reduced water use in the Imperial Valley on the Salton Sea. Reduced return flows would increase salinity levels, accelerating the decline of the Salton Sea ecosystem. IID insisted on a $ 15 million limitation on the amount of money it would spend on mitigation measures, and looked to other agencies to pick up all costs above this amount. [[263]](#footnote-264)263

**[\*374]**

B. Issues Arising During the EIS Process

In July 2000, the DOI published a draft EIS ("DEIS") on the proposed adoption of interim surplus criteria. [[264]](#footnote-265)264 The DEIS analyzed four alternatives: a baseline (no action) alternative premised on a 75R strategy; [[265]](#footnote-266)265 a "flood control" alternative that limited surpluses to times when the Bureau made flood control releases from Lake Mead; a "six-states alternative" that was a modified version of the Guidelines proposed by the six states; and a "California Alternative" based on the criteria proposed as part of the Key Terms Agreement.

At about the time the DOI published the DEIS, the seven states completed negotiations on their draft of proposed interim surplus criteria, and forwarded the draft to the DOI. After discussing the draft with the states, the DOI published the states' alternative in the federal register as "supplementary information" received in the EIS process, paving the way for the alternative to be incorporated within the final EIS ("FEIS"). [[266]](#footnote-267)266

The Bureau issued the FEIS in December 2000, which described six alternatives: no action; the preferred Basin States Alternative; the Flood Control Alternative; the Six States Alternative; the California Alternative; and the Shortage Protection Alternative. [[267]](#footnote-268)267 The preferred alternative was based on the criteria the seven states had jointly proposed to the DOI in July. The FEIS included a summary description of the preferred alternative, and attached a "Draft Interim **[\*375]** Surplus Guidelines." Significantly, neither the description of the preferred alternative nor the draft guidelines in the FEIS included several elements that were in the seven states proposal, and which were important to the six states in particular. With these differences noted, and with the end of the Clinton administration approaching in January, the states and the DOI immediately began discussions as to what to include within the record of decision. Following these negotiations, at a ceremony in San Diego under a banner proclaiming "Peace on the ***River***," Secretary Babbitt signed the Record of Decision adopting the Guidelines as his last official act as Secretary of the Interior.

The issues of importance to the states in the Guidelines are summarized below, together with a description of how the issues were handled by the DOI in the final Record of Decision. [[268]](#footnote-269)268

1. Effective Date

The states' alternative provided that the guidelines would not become effective until the California settlement agreements become effective. [[269]](#footnote-270)269 This was important to the states because the guidelines were not necessary or desirable unless California was implementing the California Plan. In contrast, the draft guidelines in the FEIS would become effective thirty days after the Secretary of the Interior issued publication of the Record of Decision. The Record of Decision was still effective thirty days after publication, as previously provided. However, the interrelationship of the effective date of the Guidelines and the California implementation agreements was handled by language in the enforcement, benchmark and termination provisions, discussed below.

2. Relationship of the Interim Surplus Guidelines to the Existing Law of the ***River***

The draft guidelines in the FEIS did not include statements, particularly important to the six states, which were in the authority and purpose section of the seven-state proposal. However, these statements and disclaimers were restored in total into the Record of Decision. [[270]](#footnote-271)270

These Guidelines are not intended to do, and do not:

a. Guarantee or assure any water user a firm supply for any specified period.

b. Change or expand existing authorities under [the Law of the ***River***] … .

**[\*376]**

c. Address intrastate storage or intrastate distribution of water … .

d. 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 Compact.

e. Affect any obligation of any Upper Division State under the [Compact].

f. Affect any right of any State or of the United States under Sec. 14 of the ***Colorado*** ***River*** Storage Project Act of 1956; Sec. 601(c) of the ***Colorado*** ***River*** Basin Project Act of 1968; the California Limitation Act; or any other provision of [the Law of the ***River***].

g. Affect the rights of any holder of present perfected rights or reserved rights, which shall be satisfied within the apportionment of the State within which the use is made in accordance with the Decree. [[271]](#footnote-272)271

3. Allocation of Unused Apportionment Water

Before surplus water is available, the Secretary allocates water apportioned to one of the Lower Division States, but unused by that state, pursuant to Article II(B)(6) of the Decree in Arizona v. California. [[272]](#footnote-273)272 The seven-states proposal provided that the Secretary would allocate this water in a specified order of priority, before allocating any surplus water. The draft guidelines in the FEIS did not address this issue, instead leaving this matter up to the Secretary's discretion each year. The Record of Decision restored the states' priority allocation. The Guidelines provided the Secretary would allocate unused water from basic apportionments first to meet the requirements of MWD and the SNWA, second to meet off-stream water banking needs of MWD and SNWA, and third to meet other needs in California in accordance with the Seven Party Agreement as modified by the Quantification Settlement Agreement ("QSA"). [[273]](#footnote-274)273 This priority provision is of critical importance to the SNWA. Nevada is at its basic apportionment, and has no buffer of a "bank" of irrigated agriculture within Nevada to which to turn to meet municipal demands. Therefore, this provision allows Southern Nevada first access to unused apportionment water together with MWD.

4. Allocation of Surplus Water

The draft guidelines in the FEIS used the same trigger elevations in Lake Mead as in the seven-state proposal, but did not provide for the allocation of such surplus water to the specific uses contemplated in the seven-state plan. This was because the Decree in Arizona v. **[\*377]** California simply provided the Secretary will allocate surplus water 50% to California, 46% to Arizona and 4% to Nevada, leaving the Secretary with no discretion to allocate water in any other manner absent agreement with and among the states. [[274]](#footnote-275)274 The Record of Decision contains much more detailed language than the draft guidelines in the FEIS concerning the allocation of the surplus water under the various triggers in the guidelines, based on the states' proposal.

In summary, the Guidelines make surplus water available when the water elevation in Lake Mead is above 1125 feet. Then, depending on the Lake Mead elevation, surplus water is made available to an increasing number of different uses, starting with limited domestic uses in the three states, then full domestic uses, then water banking, and then finally, all other uses. [[275]](#footnote-276)275 The Record of Decision recognized the allocation of surplus water and unused apportionment water, as set forth in the Guidelines, can be implemented by the Secretary only through forbearance agreements and water orders submitted by Lower ***Colorado*** ***River*** water users. It stated the Secretary will honor such arrangements, but will allocate surplus water according to the percentages in the Arizona v. California Decree if such agreements are not executed. [[276]](#footnote-277)276

5. Mexican Treaty Deliveries

The states' proposal provided that in a flood control release, the Secretary would make surplus water available for release in excess of the 1.5 million acre-foot Mexican Treaty delivery only after all uses in the United States had been satisfied. [[277]](#footnote-278)277 This provision was not included in the draft guidelines or in the Record of Decision. The DOI determined this proposal was beyond the purpose and need of the proposed action, since it dealt with a different question of "surplus" (i.e., Mexican Treaty surplus) than that being considered in the interim surplus criteria. However, the Record of Decision did contain a statement that the modeling upon which the Record of Decision was based assumed that water is released to Mexico in excess of 1.5 million acre-feet only in a flood control release situation. [[278]](#footnote-279)278

**[\*378]**

6. 602(a) Storage Levels for Lake Powell

The states' proposal included a provision that during the interim period, 602(a) storage requirements for Lake Powell would use a value of not less than 14.85 million acre-feet. [[279]](#footnote-280)279 For the same scoping reason the Record of Decision did not include reference to Mexican Treaty deliveries, the DOI did not include this provision in the Record of Decision. Instead, the states and the DOI agreed to include reference to the 602(a) trigger of 14.85 million acre-feet in all operating plans during the fifteen-year interim period. [[280]](#footnote-281)280

7. Termination

The states' proposal provided the surplus guidelines would terminate in 2016, and that upon termination, Lake Mead operations, for the purpose of determining surplus, would immediately revert to a 70R strategy. [[281]](#footnote-282)281 In contrast, the draft guidelines were not as specific on termination, and were not automatic in their operation. They did not provide that surplus determinations would be based on a 70R operation upon termination. In the Record of Decision, the DOI specifically strengthened the termination provisions. The Record of Decision provided the interim guidelines terminate on December 31, 2015 (with the 2016 AOP). The guidelines did not specify that 70R would be the guiding criteria upon termination of the guidelines. However, the Record of Decision contained a statement that all the modeling assumptions of the Record of Decision were based on a 70R strategy upon termination, and that the entire purpose of the guidelines and the "California Plan is that California shall have implemented sufficient measures to be able to limit total uses" within California to 4.4 million acre-feet unless a surplus is determined under the 70R strategy. [[282]](#footnote-283)282

8. Benchmarks and Reparations

The states' proposal included enforcement and mitigation measures that provided the guidelines would terminate in the event California did not implement conservation measures as set forth in the **[\*379]** California Plan, which actually would reduce its need for surplus ***Colorado*** ***River*** water by specific amounts on given dates, called "benchmarks." The states' proposal went on to provide an accounting of water that MWD proposed to groundwater bank during this period. This provision, referred to by the states as "reparations," required MWD to pay this water back to the ***river***. MWD would thus lose the benefit of the Guidelines if California did not meet its conservation benchmarks. The draft guidelines did not include the MWD payback provision, although they did provide that if California did not meet the benchmarks, operations would revert to 70R for the interim period only.

The Record of Decision strengthened the benchmark and reparations provisions. Of critical importance to the states was a requirement the Secretary would suspend the Guidelines if the California agencies have not executed the agreements necessary to implement the California Plan (including specifically the QSA) by December 31, 2002, and would be reinstated when and if the California agencies do so. [[283]](#footnote-284)283 This issue was important because the QSA was the basis upon which conservation measures and water transfer agreements could be measured and implemented. The Guidelines clearly set forth the ultimate goal: "At the conclusion of the effective period of these Guidelines, California shall have implemented sufficient measures to be able to limit total uses of ***Colorado*** ***River*** water within California to 4.4 [million acre-feet], unless a surplus is determined under a 70R strategy." [[284]](#footnote-285)284 The guidelines contained three-year benchmarks to reduce California agricultural agencies' use by and transfer such use to MWD. If any benchmark is not met, the guidelines suspend until California meets the benchmark. Upon suspension of the guidelines, the system operates under the 70R strategy, and California water use must be limited to 4.4 million acre-feet in any normal year under such a strategy. If the guidelines remain suspended, 70R will be the strategy for the entire fifteen-year period. [[285]](#footnote-286)285

[*XVIII*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T212-8T6X-730N-00000-00&context=1516831). THE IMPLEMENTATION AGREEMENTS

In order to implement the California Plan and the Interim Surplus Guidelines, state and local water agencies in the Lower Basin had to prepare several implementation agreements. Important components of the negotiation between the states and with the DOI on the Guidelines were arrangements in the Lower Basin: (1) the types of use and specific agencies to whom surplus water would be delivered; (2) shortage criteria; (3) the allocation of apportioned but unused water under Article II(B)(6) of the Decree in Arizona v. California; and (4) **[\*380]** reparations by MWD in the event that they did not implement the California Plan on schedule. In December 2000, the California agencies released drafts of the key agreements that had to be in place for the Guidelines and the California Plan to be effective. After the Record of Decision on the Guidelines, the California agencies intensified their negotiations on these agreements and efforts to undertake environmental permitting and financing of the elements of the California Plan. The major intra-California agreements are discussed below.

A. Quantification Settlement Agreement

This agreement, between IID, MWD and CVWD, also known as the QSA, established the "water budget" for each agency necessary to implement the water transfers contemplated in the California Plan. The agencies patterned this agreement after the Key Terms agreement. For example, IID would limit its use to 3.1 million acre-feet per year, and CVWD would limit its use to 330,000 acre-feet per year. Saved water transferred to MWD would reduce deliveries to that agency by an equal amount. The parties agreed on the amount of water to be saved by All American and Coachella Canal lining projects, and made a portion of that water available to the Secretary in settlement of the San Luis Rey Indian Rights Settlement Act.

This agreement would not be effective until several contingencies were satisfied, before December 31, 2002. The contingencies included finalization of all federal and California administrative, environmental and ESA compliance approvals; adoption by the Bureau of an inadvertent overrun program, decree averaging, and the Guidelines. Once effective, the term of the agreement was for seventy-five years. [[286]](#footnote-287)286

B. Agreement for Acquisition of Conserved Water Between Imperial Irrigation District and Coachella Valley Water District

This agreement provided for Coachella to acquire up to 100,000 acre-feet of IID saved water per year, in 5,000 acre-foot annual increments. [[287]](#footnote-288)287

C. Agreement for Acquisition of Conserved Water Between Imperial Irrigation District and the Metropolitan Water District of Southern California

This agreement amended the 1988 IID/MWD agreement, by which MWD paid for conservation measures in the IID to acquire 110,000 acre-feet of water per year, to provide an additional right of first refusal to MWD for any water referenced above in the IID/CVWD **[\*381]** agreement and not acquired by CVWD, together with an option to acquire up to 85,000 acre-feet of conserved water from IID. The time frames and contingencies were the same as the other agreements. [[288]](#footnote-289)288

D. Agreement for Acquisition of Water Between Coachella Valley Water District and the Metropolitan Water District of Southern California

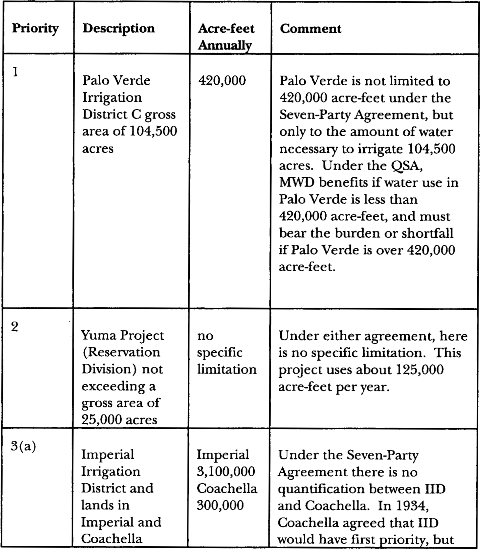
In this agreement, MWD agreed to reimburse CVWD for a portion of its costs in acquiring the second 50,000 acre-feet of water from IID under the IID/CVWD agreement, and to keep CVWD whole in its ability to acquire that water, by providing replacement water if the IID agreement expires. [[289]](#footnote-290)289

E. Implementation Agreement

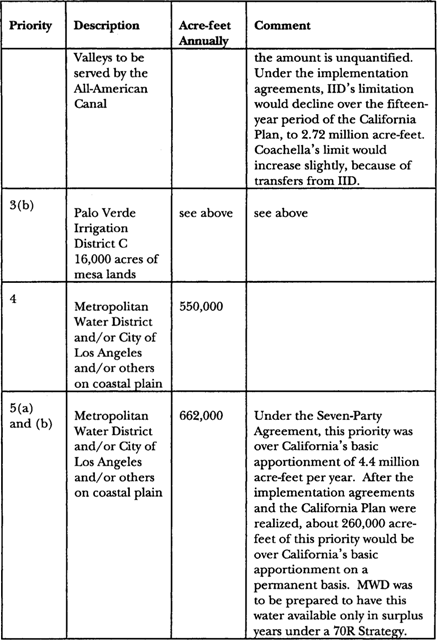
This agreement was to be executed between the Secretary of the Interior, IID, CVWD, MWD, and the SDCWA. In this agreement, the Secretary would agree to exercise his authority to: implement the terms and limit water deliveries to IID to not more than 3.1 million acre-feet per year under Priority 3(a), less conserved water transferred to others; implement the IID/MWD agreement, the SDCWA/IID agreement, and the IID/CVWD agreement; make conserved water from the All-American Canal and Coachella Canal lining projects available to the San Luis Rey Tribe under its settlement; deliver not more than 330,000 acre-feet per year to CVWD under Priority 3(a), less conserved water transferred to others; deliver to or withhold water from MWD so that MWD bears the burden if total use under Priorities 1 and 2 (the PVID and the Yuma Project) exceed 420,000 acre-feet, and the benefit if such use is less than 420,000 acre-feet (the effect of this provision is that Priorities 1 and 2 are effectively quantified, and IID and CVWD waive their rights to take any excess water over 420,000 acre-feet); deliver to CVWD any water by MWD as set forth in the MWD/CVWD agreement; deliver Priority 6(a) water as agreed by the agencies; take no action against IID concerning whether IID has made reasonable and beneficial use of water, and to take IID's water conservation activities into account in future assessments on that issue. The Secretary would agree in this agreement to implement a Decree Accounting Program and Inadvertent Overrun Program, and not modify them for thirty years. The Secretary would also "acknowledge" the importance of the Guidelines. [[290]](#footnote-291)290

In sum, the implementation agreements would provide the baseline by which conservation and water transfer agreements under **[\*382]** the California Plan would be implemented and accounted. The agreements would also alter the structure of priorities established by the 1931 Seven Party Agreement. [[291]](#footnote-292)291 This structural alteration would be the key to California limiting its use to its 4.4 million acre-foot basic apportionment in normal years. Table I below shows the difference between the priorities established under the 1931 Seven Party Agreement and the quantified priorities that would be established under the various California implementation agreements.

Table I: California Seven-Party Agreement Priorities Before and After the California Implementation Agreements



**[\*383]**



In addition to the intra-California agreements necessary to implement the California Plan, the California agencies and Lower Division States began negotiations on the interstate arrangements necessary to implement the Guidelines. MWD and the State of **[\*384]** Arizona signed a reparation/forbearance agreement. [[292]](#footnote-293)292 This agreement was necessary to implement two aspects of the guidelines. First, Arizona agreed to forebear its entitlement to forty-six percent of any surplus declared in the Lower Basin under the Decree in Arizona v. California, so that MWD could take that surplus under the various tiers of surplus that will be declared by the Secretary. [[293]](#footnote-294)293

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), MWD agreed to implement the California Plan, to limit its orders for water to comply with the California Plan, and to provide reparations to Arizona, in the form of paybacks to the ***River***, in the event the Secretary terminates or suspends the Guidelines for California's failure to meet the benchmarks in the 4.4 Plan. Significantly, as a condition precedent to the effectiveness of the Forbearance Agreement, California agencies had to execute the QSA before December 31, 2003. If this condition was not met or waived, the Forbearance Agreement would be void. [[294]](#footnote-295)294

[*XIX*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T232-D6RV-H36D-00000-00&context=1516831). THE MEXICAN CONNECTION

Further complicating matters, due to the implications of the development of surplus criteria on relations with Mexico, the United States, through the International Boundary and Water Commission ("IBWC"), consulted with Mexico on the development of the Guidelines. The information developed through this consultation could then be incorporated into any NEPA process the Bureau might undertake. In the early 1990s, the IBWC held a consultation on the effect of the lining of the All-American Canal, one of the conservation measures identified in the California 4.4 Plan as providing water for transfer to MWD. The lining would affect Mexican irrigation interests dependent on seepage from the canal to supply groundwater and seeps for the irrigation of about 60,000 acres of land, much of which was under lease to United States interests. [[295]](#footnote-296)295

The new consultation jumpstarted a Mexican interest letter writing campaign to protest the canal lining. [[296]](#footnote-297)296 However, the United States side of the IBWC took the position that the consultation on the lining had already taken place, the issue was closed and could not be reopened, and in any event there was nothing Mexico could do or that the United States was obligated to do under international law to **[\*385]** prevent the efficient use of water in the United States. Moreover, both the United States side and the Bureau asserted that the canal lining issues and the surplus criteria issues were separate, and should not be joined. [[297]](#footnote-298)297

The United States' position in the consultation on the idea of a new surplus criteria was that: (1) United States has the right to make maximum use of the waters within its boundaries; (2) under the United States-Mexican water treaty, Mexico has the right to 1.5 million acre-feet per year, plus 200,000 acre-feet in surplus years, and no more; [[298]](#footnote-299)298 (3) a flood control release constitutes a surplus for Mexican Treaty purposes, but the United States can develop surplus criteria for another purpose, operating federal facilities under United States law; [[299]](#footnote-300)299 (4) there is a need for surplus criteria to resolve issues in the United States, and the United States can implement spill avoidance measures so long as it meets its Treaty obligations; (5) the United States is under no obligation to mitigate the impacts of such operations in Mexico; but (6) under principles of international comity, there may be circumstances in which the United States would agree to provide mitigation. [[300]](#footnote-301)300

During the EIS process for the Guidelines, the Bureau consulted with the USFWS on the "discretionary action" of the Bureau in adopting interim surplus criteria and the California water transfers. [[301]](#footnote-302)301 The USFWS identified the action area for the biological assessment as the 100-year flood plain below Lake Mead and the full pool elevations of the Lower Basin reservoirs, within the United States. [[302]](#footnote-303)302 It also consulted on the following species: southwestern willow flycatcher, brown pelican, Yuma clapper rail, razorback sucker, bonytail chub, Desert tortoise, Bald eagle, and Desert Pupfish. [[303]](#footnote-304)303

Ongoing consultation between the Bureau and USFWS and the National Marine Fisheries Service (now NOAA Fisheries) affected the consultation on the Guidelines with respect to ongoing operations of Lower ***Colorado*** ***River*** Reservoirs. In this consultation, the Bureau initially defined the action area for its biological assessment as **[\*386]** extending from Lake Mead to the Southern International Boundary. In response to comment from the USFWS, the Bureau expanded its biological assessment to include analysis of impacts on species in Mexico. However, despite a "may affect" determination as to the Totoaba Bass (a species located only in Mexico), the Bureau did not seek formal consultation, asserting that it lacked any discretion over water deliveries to or within Mexico.

On June 28, 2000, Defenders of Wildlife and a number of other United States and Mexican organizations sued the Secretary, challenging his failure during the consultation to consider the adverse effects of his actions in operating Lower ***Colorado*** ***River*** reservoirs on endangered species in the United States and Mexico that depend on the ***Colorado*** ***River*** delta in Mexico for their survival and recovery. [[304]](#footnote-305)304 Species alleged to have been adversely affected included species found only in Mexico, such as the Totoaba Bass and the Vaquita Harbor Porpoise. The Lower Basin States and several water user organizations in the Lower Basin filed a motion to intervene, which the court denied. No Upper Basin state sought intervention. The lawsuit raised the significant and heretofore unanswered legal question as to the scope of the ESA, whether the Act requires federal agencies to consult on the extraterritorial effects on listed species of actions undertaken within the United States.

In response to the lawsuit, DOI Solicitor John Leshy sent a memorandum to the Commissioner of Reclamation, asking the Bureau to continue consultations with the USFWS and the National Marine Fisheries Service on effects in Mexico. [[305]](#footnote-306)305 The carefully worded memorandum stated:

The continuation of consultation does not reflect any conclusion on our part that the consultation is required, as a matter of law or regulation, on any possible impact the adoption of interim surplus guidelines may have on United States-listed species in Mexico. Rather, Reclamation's consultation on these effects should proceed with the express understanding that it may exceed what is required under applicable federal law and regulations and does not establish a legal or policy precedent… .

…

The ongoing discussions with the consulting agencies should also take into consideration the fact that the United States cannot unilaterally control hydrologic conditions in the ***Colorado*** ***River*** south of the international boundary… . Finally, the discussions should take into account mandates and limitations on Reclamation's actions pursuant to the Supreme Court's 1964 Decree. [[306]](#footnote-307)306

**[\*387]** The FEIS on the Guidelines undertook an analysis of effects on listed species and species of concern in Mexico, including the desert pupfish, Vaquita Harbor Porpoise, Yuma clapper rail, California black rail, Clark's grebe, Totoaba Bass, southwestern willow flycatcher, yellow-billed cuckoo, elf owl, and Bell's vireo. [[307]](#footnote-308)307 In general summary, the FEIS concluded that under both baseline conditions and all alternatives, the United States Treaty deliveries to Mexico will be the same: 1.5 million acre-feet per year. It noted that Mexico has complete discretion and sovereignty over this water, and the Bureau has no discretion or authority over how that water is used in Mexico. According to the FEIS, each of the alternatives would slightly decrease the frequency of surplus flow events into Mexico, including flows in excess of 250,000 acre-feet, which had been identified by environmental organizations as beneficial for environmental restoration. However, it found "there are only minor differences in the potential magnitudes and potential frequencies of excess flows between baseline conditions and the Basin States Alternative." [[308]](#footnote-309)308

It is important to note that ***Colorado*** ***River*** deliveries to Mexico are diverted at Morelos Dam, just below the border, and from there are distributed to farming operations. Irrigation return flow patterns may serve to maintain groundwater table levels and maintain riparian vegetation more than channel deliveries from the United States. Flows to the Cienega de Santa Clara, an important wetland, are delivered directly from irrigation return flows from the United States not currently counted as part of the Treaty delivery obligation, and are therefore unaffected by Lower Basin ***Colorado*** ***River*** reservoir operations. Also, irrigation return flows, not ***Colorado*** ***River*** deliveries, maintain flows in the Rio Hardy. Therefore, the Bureau concluded that other factors affect all of the species by a much greater degree, such as over fishing, habitat alteration, and irrigation operations in Mexico, than by whether the interim surplus criteria were implemented. The Bureau thus concluded there would either be a "no effect" or "not likely to be any adverse effect" on all the species considered. [[309]](#footnote-310)309

In the FEIS, the Bureau did not analyze an alternative Pacific Institute proposed that was based on the Six State Alternative, but which in addition proposed the Bureau provide 32,000 acre-feet of water each year to Mexico in addition to its Treaty obligation, and 260,000 acre-feet periodic flow, for environmental restoration purposes in the delta, in addition to United States Mexican Treaty deliveries. As it did with the states' request that Mexican Treaty deliveries be specifically referenced in the Record of Decision as limited to 1.5 million acre-feet per year, the Bureau determined the Pacific Institute proposal was beyond the purpose and need of the proposed action, since it dealt with a different question of "surplus" **[\*388]** (i.e., Mexican Treaty surplus) than that being considered in the interim surplus criteria. The Bureau also determined that the Pacific Institute proposal would cause the Bureau to violate the mandatory operating injunctions in Arizona v. California.

The Guidelines articulated the official position of the United States. The Guidelines state:

Though it is the position of the United States through the United States International Boundary and Water Commission that the United States does not mitigate for impacts in a foreign country, the United States is committed to participate with Mexico through the IBWC Technical Work Groups to develop cooperative projects beneficial to both countries concerning the issues expressed by Mexico. [[310]](#footnote-311)310

The DOI argued that consideration of additional flows to Mexico was further inappropriate because Mexico has sovereign control and authority over water once it crosses the international boundary, and the United States was not in a position to dictate to Mexico whether it directed the additional water for use for environmental restoration purposes in the delta, or developed the water for irrigation or municipal use. Moreover, the DOI asserted, that without additional Treaty authorization, it lacked the authority to exceed the required deliveries set forth in the Treaty. [[311]](#footnote-312)311

In January 2001, the Government of Mexico sent to the United States a diplomatic note, expressing concern with respect to anticipated reductions in deliveries of surplus water to Mexico. [[312]](#footnote-313)312 The United States responded with a continued reaffirmation that it is under not obligation to deliver any water to Mexico beyond that expressly required by the Treaty. [[313]](#footnote-314)313

**[\*389]** In 2003, the Federal District Court made its determination in Defenders of Wildlife v. Norton. [[314]](#footnote-315)314 Finding that "Mexico is an independent sovereign not answerable to this Court," [[315]](#footnote-316)315 the court held that the Bureau did not have a duty to consult with the USFWS under the Endangered Species Act, since its actions with regard to the delivery of water to Mexico and over the use of water within Mexico were nondiscretionary. [[316]](#footnote-317)316 The court found that "the formulas established by the Law of the ***River*** strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation's authority." [[317]](#footnote-318)317 The Court went on to hold that even discretionary actions by the Secretary with regard to water deliveries within the United States, such as adoption or implementation of the Guidelines or orders with respect to deliveries of water in the United States, do not implicate any duty under the Endangered Species Act to address the impacts of such actions to species or habitat in Mexico. The Court held that, "Reclamation does not have the discretion to manipulate water delivery in the United States in order to create excess releases for the delta." [[318]](#footnote-319)318 Nor can the Secretary:

interpret the Law of the ***River*** in a way that will divert or somehow "indirectly result' in excess flows to Mexico… . It seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower ***Colorado*** ***River*** water. [[319]](#footnote-320)319

[*XX*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T262-8T6X-730V-00000-00&context=1516831). THE BEGINNING OF THE END (OR THE END OF THE BEGINNING): THE UNWINDING OF THE CALIFORNIA PLAN

Nearly a year after Secretary Babbitt's Record of Decision adopting the Guidelines, the states were beginning to grow restless with a continuing perception the California agencies were not finalizing the agreements and processes necessary to put the California Plan into action. The DOI shared this concern. At the December 2001 **[\*390]** ***Colorado*** ***River*** Water User's meeting in Las Vegas, Assistant Secretary for Water and Science, Bennett Raley, delivered the DOI's annual message. He affirmed that the DOI, under the new Bush administration, intended to "stay the course" with respect directions established on the ***Colorado*** ***River*** over the last several years. He also took up the annual task, started by Secretary Babbitt, of scolding California for being dilatory in getting its water use within its apportionment. Raley affirmed that Secretary Gale Norton would enforce the terms of the Decree in Arizona v. California, which would hold California to 4.4 million acre-feet in normal years, thus cutting off MWD and potentially setting off a string of political and legal battles on the ***Colorado*** ***River*** and in California.

Raley also expressed concern about the environmental compliance issues in the implementation of the 4.4 Plan. The California agencies, particularly the IID, wanted an ESA Section 10 habitat conservation plan approach to ESA compliance, believing that more regulatory certainty for the agencies could be achieved. [[320]](#footnote-321)320 However, with this process stalled in issues related to the Salton Sea, he stated the DOI's intent to proceed with an alternative approach under Section 7, asserting that restoration of the Salton Sea "is separate from what is necessary to implement the California 4.4 Plan… . The California 4.4 Plan cannot and should not be held hostage to the larger issues presented by the Salton Sea." [[321]](#footnote-322)321

The QSA was hung up on issues surrounding the Salton Sea, and environmental compliance with the federal and state endangered species acts ("ESA and CESA"), which was required in order for the California agencies to implement the water conservation measures necessary to meet the water reduction benchmarks established in the Record of Decision. The water conservation measures would reduce agricultural return flows to the Sea, thus accelerating the inevitable decline of the Sea. California agencies were working on an amendment to the California ESA, and were involved in hearings before the state Water Resources Control Board, to obtain environmental compliance for the California Plan. MWD also developed a plan for "transitional land fallowing" designed to allow the California Plan to avoid Salton Sea restoration issues. However, IID resisted the plan because of political opposition to land fallowing.

IID presented to the other California agencies and the DOI what can only be euphemistically described as a "Santa's wish list" of demands and assurances that it needed in order to even consider land fallowing. It claimed that it must be protected by agreement and legislation from any challenges to the reasonability of its beneficial use of water. It insisted on protection by agreement and legislation from future demands for additional land fallowing. IID demanded: (1) ESA **[\*391]** and CESA "coverage" for all identified (not just listed) species of concern, which number over twenty-five species, under incidental take permits; (2) "no surprises" assurances under the ESA and CESA, by agreement and legislation, for the effects of implementation of the fallowing and conservation measures; and (3) a new federal law limiting statutes of limitation for citizen suits under both NEPA and the ESA. IID wanted full mitigation of the social and economic impacts of land fallowing. Finally, IID demanded federal liability protection from any lawsuits that might be filed related to air quality or other impacts from fallowing or conservation programs. [[322]](#footnote-323)322

With IID's demands on the table and no apparent progress in the California negotiations, in mid-2002 the DOI began its annual process of developing the AOP for 2003. The issue immediately arose as to how the AOP should deal with the possibility that the California agencies might not reach agreement on the QSA before the December 31, 2002, benchmark. The Guidelines provided that they would be suspended if California did not meet the specified benchmarks for reductions in water use, and would be replaced by a 70R operating regime until such time as the benchmark is met. The first benchmark was that the agricultural agencies in California reduce their total water use to 3.74 million acre-feet in 2003. [[323]](#footnote-324)323 California would be able to meet this first water reduction benchmark, because this involved the already-implemented MWD/IID agreement to conserve 110,000 acre-feet reached in 1988.

However, without quantification of the California agricultural priorities, there was no way to measure or administer the water transfer upon which the 1988 MWD/IID agreement was based. Therefore, the Guidelines also provided that in the event the California water agencies did not execute the QSA before December 31, 2002, the Secretary would suspend the Guidelines, "until such time as California completes all required actions and complies with the reductions in water use … ." [[324]](#footnote-325)324 The issue faced by the states and the DOI was whether signing the QSA before December 31, 2002 was in and of itself a benchmark, regardless of whether California would be able to meet the reduction in water use in 2003. Several states took the position that the QSA was indeed a stand-alone benchmark that must be met in order for California to continue to receive the benefit of the Guidelines. The MWD/Arizona forbearance agreement affirmed this position because it was expressly contingent on execution of the QSA by the end of this year. [[325]](#footnote-326)325 In response to an inquiry from IID on the issue, Assistant Secretary Raley made the DOI's position clear that the Secretary would in fact suspend the Guidelines if the QSA were not **[\*392]** signed, stating, "the Department is fully committed and prepared to take whatever steps are necessary to ensure that California's use of ***Colorado*** ***River*** water fully complies with the requirements of the Decree of the United States Supreme Court in Arizona v. California." [[326]](#footnote-327)326 In subsequent Congressional testimony, he put it even more bluntly. "The draft QSA is a cornerstone of the California 4.4 Plan… . Absent completion of the [QSA], the contemplated water transfers cannot proceed. Absent these water transfers, the California 4.4 Plan will fail." [[327]](#footnote-328)327

As negotiations between the California agencies proceeded on a full-time, daily basis, with shifts in the negotiations occurring hourly, the DOI proceeded to make plans for a potential suspension of the Guidelines on January 1, 2003. The then-current draft of the 2003 AOP, being circulated by the DOI, included two options for the operation of Lower Basin reservoirs depending upon whether or not California agencies executed the QSA. "Option A" assumed California agencies would execute the QSA, and provided for a Full Domestic Surplus under the Guidelines. "Option B" assumed California agencies would not execute QSA as required by the Guidelines; thus, the DOI would suspend the Guidelines and under a 70R strategy a normal condition would apply, reducing deliveries to California to 4.4 million acre-feet in 2003.

In addition to the penalty to California, the Option B operation would reduce deliveries to Nevada by about 18,000 acre-feet from its 2001 deliveries. This meant Nevada would not be able to undertake underground storage operations for use in future years, as it had contemplated it would be able to do under the surplus declarations established by the Guidelines. [[328]](#footnote-329)328 As a result, the DOI issued a Federal Register notice outlining the DOI's position that the Guidelines required California agencies to execute the QSA, and raising the question as to the effect of suspension of the Guidelines on entities outside of California. The notice raised the question of whether special treatment should be afforded to affected agencies such as the Southern Nevada Water Authority, and requested comments. [[329]](#footnote-330)329

Nevada asserted the drought and the failure of California to finalize the QSA were elements outside its control, and that the Secretary should not penalize Nevada for California's failure. It asked the states to support a position to the Secretary that the Secretary should penalize only California, and not limit Nevada's access to the **[\*393]** surplus waters it would have had if the Guidelines were in effect. Despite sympathy with the equities of Nevada's position, the states declined to support Nevada's requested position, because there was no support for special treatment of Nevada under the Law of the ***River***.

The states took the position the Operating Criteria, to which the Guidelines are subservient and implement, and the Decree in Arizona v. California, do not contemplate differential treatment of Lower Basin States with regard to normal, shortage and surplus declarations, except as expressly set forth in the Decree or by Congress. For example, surpluses are to be shared fifty percent to California, forty-six percent to Arizona, and four percent to Nevada. [[330]](#footnote-331)330 In a shortage situation, CAP deliveries are subordinated to 4.4 million acre-feet of deliveries to California. [[331]](#footnote-332)331 In all other cases, normal, shortage and surplus declarations are made based on water supply and demand conditions of the Lower Basin as a whole.

The other states also pointed out to Nevada that there was a precedent Nevada could use, in the form of the MWD/Arizona forbearance agreement in place, for the states to agree on and the Secretary to allocate, unused apportionment or surplus water. For example, if Arizona did not use its full 2.8 million acre-foot apportionment, MWD could forbear its entitlement to the use of such water so as to maximize the amount of water available to Nevada. However, due to the drought and continuing demands in Arizona, Arizona could not guarantee that it would not use its full apportionment in 2003, and refused to enter into a forbearance agreement. Moreover, California representatives made repeated assurances of their "cautious optimism" that the QSA would be executed by the end of the year. As a result of this discussion, Nevada and the other states agreed to defer any discussion of the issue of differential treatment until such time as the QSA was not signed. [[332]](#footnote-333)332

Meanwhile, back in California, new developments continued apace. By the fall of 2002, House Speaker Emeritus Bob Hertzberg facilitated negotiations, and the California agencies had imposed a deadline of October 15 to reach agreement on a term sheet that could then form the basis for the QSA. Both California and federal environmental permitting agencies were proceeding under the premise the interim land fallowing programs proposed by MWD would eliminate any adverse effect on the Salton Sea or listed species with respect to implementation of the QSA.

Moreover, there was an apparent crack in the wall of IID's opposition to land fallowing. IID had announced in August that it was willing to consider a five-year land-fallowing program, but later agreed **[\*394]** to a possible ten-year, 500,000 acre-foot per year program - for a price. The SDCWA responded in late August with an offer of a schedule of payments for a larger fallowing program. The SDCWA offer illustrated the lengths that metropolitan Southern California was prepared to go to satisfy IID's demands. San Diego proposed limiting fallowing to ten percent of the irrigated lands in the Imperial Valley, and for a period not to exceed fifteen years. San Diego would pay to farmers a one-time enrollment fee of $ 700 per acre, plus $ 550 per acre (escalated at 2.5% per year) for each acre of land fallowed. It would also create an escrow fund for on-farm/system improvements of $ 800 per acre of land enrolled in the program, totaling $ 354 million over the life of the fifteen-year program. San Diego would fund a community benefit fund at $ 100 per acre per year of enrolled land, totaling $ 40 million over the fifteen-year program. San Diego would create a $ 50 million environmental fund. Finally, San Diego would pay IID $ 25 per acre-foot for transferred water to cover IID's administrative costs, together with $ 175 per acre-foot for water transferred through system improvements, totaling $ 73 million over the fifteen-year program. [[333]](#footnote-334)333 Not swayed, IID's response held firm reiterating its initial 500,000 acre foot/ten-year proposal, demanding additional up front payments, and requiring that IID be held harmless from environmental risk. [[334]](#footnote-335)334

Thus, as of late August, the parties still seemed far apart. However, other activities were also ongoing, and pressure from all sides mounted for resolution of the stalemate over the QSA, and in particular, for IID to agree to land fallowing. On August 30, 2002, the California Legislature passed Assembly Concurrent Resolution 251 ("ACR 251"), which declared that signing the QSA by December 31 was of "utmost importance to the people of California." If the parties did not sign the QSA, the Legislature declared it would "consider appropriate legislative actions" to ensure implementation of the QSA. [[335]](#footnote-336)335 The legislature transmitted the resolution to the parties by a letter from legislative leadership underscoring the importance of reaching agreement. [[336]](#footnote-337)336 Governor Davis added his voice in support of ACR 251, in a letter to legislative leadership. [[337]](#footnote-338)337

**[\*395]** Shortly thereafter, Governor Davis signed Senate Bill 482, which provided for allocation of $ 50 million from a statewide referendum, Proposition 50, the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002. Proposition 50 provided $ 3.4 billion in bond funds for various environmental programs in California. [[338]](#footnote-339)338 The funding in Senate Bill 482 depended on voter passage of Proposition 50 at the November election, execution of the QSA by December 31, and determination by California agencies that the QSA would not adversely affect the Salton Sea. The money was to be used for environmental mitigation purposes at the Salton Sea. Also, the legislation authorized the take of specified species in the Salton Sea, as a result of the QSA implementation, if the QSA implementation did not result in a material increase in the salinity of the Salton Sea during the first fifteen years of the QSA. The act also confirmed that fallowing was an authorized water conservation measure under California law. [[339]](#footnote-340)339

Additionally, Governor Davis signed into law Senate Bill 1473, a bill that made available an additional $ 150 million in funding allocated from Proposition 50 funds for projects contributing to achieving the benchmarks in the Guidelines (including desalination projects). [[340]](#footnote-341)340 Thus, the San Diego and legislative proposals alone put over $ 700 million on the table to IID.

With great fanfare, on October 15, the day of their deadline and following several straight days of negotiation well into the night, the California agencies announced agreement on a term sheet providing a framework for a QSA by December 31, 2002. House Speaker Emeritus Bob Hertzberg, who led the negotiations, hailed the agreement as a "lasting peace on the ***river***." [[341]](#footnote-342)341

However, as was the history over the last several years of negotiations of California announcements about reaching agreement, the term sheet and the draft QSA that was released by the California agencies about a month later did not resolve all issues. Instead of the usual conditions precedent, the draft QSA contained a condition subsequent that the Habitat Conservation Plan be completed before December 31, 2003, "acceptable in form, substance and coverage to **[\*396]** IID" [[342]](#footnote-343)342 "in its sole, complete and absolute discretion." [[343]](#footnote-344)343 The QSA also capped IID's costs of environmental mitigation at $ 30 million. The MWD and SWCDA would bear the costs above that amount, but the draft QSA also contained a condition subsequent that if the costs became unacceptably high, MWD or SDCWA could back out of the QSA. [[344]](#footnote-345)344

As a practical matter, these conditions subsequent illustrated that the California agencies had in fact not reached agreement on the important issues necessary for a QSA, and the conditions subsequent simply would have amounted to an extension of the Guideline benchmark that required the QSA be finally executed by December 31, 2002. The other Basin States and the DOI found these conditions unacceptable, and asserted that California could meet the benchmark only by executing a final and binding QSA. On December 9, 2002, on the day the IID Board was scheduled to vote to approve the QSA, Assistant Secretary Bennett Raley wrote to the California agencies expressing the DOI's opposition to the conditions subsequent. He wrote:

Recent proposed revisions that add new conditions subsequent to the QSA will not meet the requirements of the Interim Surplus Guidelines. In this regard, I have become aware that some have suggested that the Quantification Settlement Agreement should be subject to termination unless a Habitat Conservation Plan is approved by the Department relating to potential impacts on the Salton Sea. This proposal is unacceptable because it would destroy the long-term certainty that is required if California is to have access to surplus water under the Interim Surplus Guidelines.

The Department has no interest in a QSA that does not represent a long term Quantification of the parties' portion of California's apportionment of ***Colorado*** ***River*** water, lest in fifteen years we find ourselves as Gatsby did - "So we beat on, boats against the current, borne back ceaselessly into the past.' [[345]](#footnote-346)345

On December 9, 2002, amid defiant statements against the DOI and the other California agencies, the Imperial Irrigation District Board voted 3-2 to reject the proposed QSA, the terms of which had been agreed to in October. One of the District's board members served on the IID negotiating team that agreed to the term sheet in **[\*397]** October, yet voted against the full agreement when it came before the Board in December. [[346]](#footnote-347)346

In truth, it would appear that IID was never interested in actually entering into an agreement. A "proposal" made by IID on December 13, four days after it voted to reject the draft QSA illustrates the wide gulf between the positions of IID and the other California agencies. In the proposal, IID backed away from many of the commitments that it had previously made, both in the QSA document it had agreed to in 2000 and in the term sheet that its negotiators had endorsed in October. Among other demands, IID proposed a shorter-term fallowing program, a shorter overall term, and renegotiated environmental and socio-economic mitigation measures. [[347]](#footnote-348)347

In the wake of the IID vote, the Governor's or their representatives of Arizona, ***Colorado***, New Mexico, Utah and Wyoming wrote letters to Secretary Norton, urging the Secretary to suspend the Guidelines, according to their terms on January 1, 2003, if the agencies did not sign the QSA by the end of the year. [[348]](#footnote-349)348

The ***Colorado*** ***River*** Water Users Association meeting in Las Vegas provided a fitting occasion for the Secretary to reflect on the year's events and set direction for the upcoming year. Clear and forceful in her comments, Secretary Norton told the California agencies that, in fact, she would order reductions in California's use of water if the California agencies did not sign an acceptable QSA by the end of the year. She further warned the reduction might not come to California as a whole (which under the Seven Party Agreement would hit MWD only as the junior-most priority). Secretary Norton implied that individual California water users could face reductions in water use in the DOI's enforcement of the Arizona v. California Decree.

We are at a turning point in the history of the ***Colorado*** ***River***. For the first time, a Secretary of the Interior faces the need to enforce the limits confirmed by the U.S. Supreme Court in the historic Arizona v. California litigation. The issue is not whether but when California will live within its apportionment of 4.4 million acre-feet of water.

… .

As Secretary and ***River*** Master, I must enforce the Law of the ***River***. This means I will hold California to the express covenant it made in **[\*398]** 1929 to limit its use of the ***Colorado*** ***River*** to 4.4 million acre-feet. No alternative is permitted under the Decree of the United States Supreme Court in Arizona v. California. Absent enforcement of the limits established in the Law of the ***River***, the allocation of the right to consume water among the states would be meaningless.

… .

The Department will be carefully considering all of these issues in the course of acting on the pending water orders for 2003. In this context, the Department may take other steps to ensure that all requirements of the Decree of the United States Supreme Court are met. [[349]](#footnote-350)349

Secretary Norton also affirmed what the Guidelines said, that if the California agencies executed a QSA after the first of the year, the Guidelines could be reinstated. However, she did not back down on the DOI's position that a QSA must effect a permanent quantification of the agricultural priorities within the first 3.85 million acre-feet of California's apportionment, with no strings attached.

In the event that the QSA is not signed by the deadline, it is possible for California to have the Guidelines reinstated. Reinstatement can occur if the QSA is signed, or if California takes such actions as are required by the Department. For those who rest hope on the "all required actions" option in the Guidelines, you should be aware that the actions that will be required must be real and permanent. It makes no sense to respond to a failure to meet the first deadline in the Seven States agreement [the Guidelines] by lessening the requirements for enhanced access to surplus water. To the contrary, the bar will be raised. [[350]](#footnote-351)350

Finally, recognizing the hardship on Nevada for California's failure to meet the benchmark, Secretary Norton held out a small ray of hope.

As noted in our Federal Register notice last summer, [[351]](#footnote-352)351 we are aware of the impact of a suspension of the enhanced surplus on Nevada. We will continue our discussions with Nevada and the other basin states to address this issue. We understand the equity issues, and are wrestling with the legal issues associated with separating Nevada's future from the consequences of California's actions. [[352]](#footnote-353)352

If the QSA was not finalized, the California agencies would lose more than just the benefits of the Guidelines. In addition to a suspension of the Guidelines, a number of pieces to the California Plan would unravel if there was not a QSA by the end of the year. One **[\*399]** of the most significant pressures on the California agencies to enter into a QSA was the fact that the California legislation that provided an exemption from the "take" of species under the California fully protected species law would expire on December 31, 2002, if there was no QSA. [[353]](#footnote-354)353 The MWD/Arizona forbearance agreement, an important piece of the California Plan implementation, would also expire at the end of the year if the agencies did not execute the QSA. [[354]](#footnote-355)354

At meetings in Las Vegas between representatives of the Basin States and the California water agencies, during the Water Users Association conference, the three California agencies other than IID (MWD, SDWCA and CVWD) expressed their continued desire to make proposals to IID that might bring IID back to the table before the end of the year. Yet at the same time there was a realistic assessment of the prospects for success. Although the Basin States had both formally and informally expressed strong support for an immediate suspension of the Guidelines after the first of the year, they also expressed a continued desire to work with the California agencies to implement a "soft landing" for reductions in California's water use.

However, the states also expressed some principles that should be met by the California agencies in any renegotiation of the QSA. First, the states expressed there should be no conditions subsequent in the QSA. The Guidelines require, and the states insisted upon, a firm quantification. Second, the states expressed that it might be possible to consider conditions subsequent, if California would agree to allow the Guidelines to go into suspension, or if MWD would agree to forego any surplus water deliveries, until the parties met the conditions subsequent.

The California agencies continued negotiations on the terms of a QSA. On December 31, 2002, the IID Board voted three-to-two in favor of a revised QSA. The IID-approved version of the QSA continued to contain conditions subsequent that allowed IID to back out of the deal, and also contained an additional provision for a $ 150 million loan guarantee and an additional $ 50 million to be provided to IID for mitigation water. However CVWD and MWD had already rejected the version of the QSA that IID approved, rendering the act meaningless. [[355]](#footnote-356)355

On December 31, Assistant Secretary Bennett Raley held a press conference, and announced that the DOI would institute two basic actions. First, it would declare the Guidelines in suspension, limiting California to 4.4 million acre-feet in 2003 and running the ***Colorado*** ***River*** under a 70R strategy. Second, it would limit IID diversions to a duty of water set forth in the 1979 Decree in Arizona v. California. This latter action would limit IID to about 2.9 million acre-feet, as opposed to the 3.1 million acre-feet that would have been allowed under the Guidelines or the approximately 3.3 million acre-feet that IID **[\*400]** historically used. [[356]](#footnote-357)356

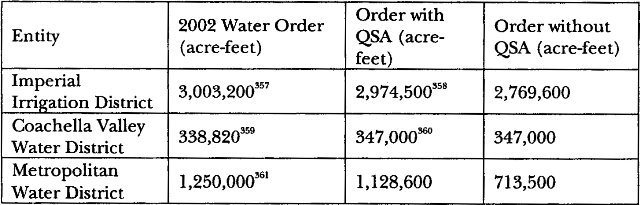
Shortly before the end of 2002, the DOI sent letters to seventeen ***Colorado*** ***River*** contractors in Nevada, California, and Arizona informing them how much ***Colorado*** ***River*** water would be available to them under their water delivery contracts in 2003. The DOI approved all water orders as submitted except for those of the State of Nevada, IID, and MWD. The amount of water use for 2003 approved for these entities depended on whether or not the California agencies would be able to agree on a QSA. This approval process represented a milestone in Lower ***Colorado*** ***River*** accounting and administration. It was the first time the Secretary had exercised administrative authority with respect to individual water orders pursuant to contracts under the Boulder Canyon Project Act.

Because the California agencies did not sign a QSA, the DOI restricted Nevada's consumptive use to its basic apportionment of 300,000 acre-feet, as opposed to the 337,000 acre-feet it requested. It restricted the cumulative requests for the State of California to its basic apportionment of 4.4 million acre-feet, as opposed to cumulative requests of 5.02 million acre-feet. The DOI approved the Arizona requests, up to the state's full allocation of 2.8 million acre-feet.

The adjustments to California water orders from the MWD, IID and CVWD water order requests are described in Table II, below.

Table II: Adjustments to California Water Orders

[[357]](#footnote-358)357 [[358]](#footnote-359)358 [[359]](#footnote-360)359 [[360]](#footnote-361)360 [[361]](#footnote-362)361



**[\*401]** The DOI's letter to IID carefully set forth the basis for its action in reducing IID's water order. First, the letter asserted the DOI had no discretion in ordering the reduction. This statement is important with respect to the issue of whether the DOI is required to comply with Section 7 of the ESA in the implementation of its action. [[362]](#footnote-363)362 The letter stated:

The Supreme Court has specifically enjoined the United States, its officers, attorneys, agents and employees in the 1964 Decree in Arizona v. California from releasing ***Colorado*** ***River*** water other than pursuant to valid contracts. The Department is therefore compelled by the Supreme Court and the terms of IID's 1932 contract to release water to IID only in such quantities as might be "reasonably required for potable and irrigation purposes within the boundaries of the District,' to ensure that the junior right holders are not deprived of water lawfully theirs. [[363]](#footnote-364)363

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), the letter based the DOI's approval on the 1979 Decree in Arizona v. California. [[364]](#footnote-365)364 That decree approved a joint motion by various litigating parties, including IID, which quantified their present perfected rights [[365]](#footnote-366)365 for the use of mainstem water within each of the Lower Division States. The Decree quantified IID rights at 2.6 million acre-feet, or the amount necessary to irrigate 424,145 acres, whichever amount is less. The DOI found that this admission by IID formed the basis for a duty of water within IID. [[366]](#footnote-367)366 Its letter noted that the actual duty of water within IID might be less, but that for the purpose of approving 2003 water orders, it could not be more than this amount.

[*Third*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831), the letter required the IID delivery in 2003 might be further reduced to repay the ***Colorado*** ***River*** for overuse by IID that occurred in 2002. This repayment requirement was pursuant to an amendment to the AOP, as amended by letter of the Secretary. [[367]](#footnote-368)367

Finally, the DOI's letter signaled a change in the historic administration of water in the Lower ***Colorado*** ***River***. Historically, the DOI simply delivered whatever water the contractors ordered, and then made an accounting at the end of the year. Because of system inefficiencies and contractor tendency to order more than actually needed, there have often been overruns in water deliveries. In contrast to this historic practice, the DOI's letter announced:

**[\*402]**

Reclamation will be monitoring and projecting consumptive use of ***Colorado*** ***River*** water during calendar year 2003 to ensure the annual entitlement of each water service contractor is not exceeded. These projections will be made available to IID on a monthly basis. It is expected that IID will use this information to adjust diversions to remain within approved annual quantities. [[368]](#footnote-369)368

In the dawning of the new-year, Governor Davis of California called the agencies back to the negotiating table "with the goal of having the Surplus Guidelines reinstated early this year," and initiating new rounds of negotiation. [[369]](#footnote-370)369 However, MWD denied that the suspension of the Guidelines had precipitated a southern California water crisis. MWD asserted that it had been planning for the contingency of the suspension of the Guidelines by developing programs to rely more heavily on groundwater storage, shifting delivery schedules, accelerating conservation and seawater desalination programs, and entering into a series of dry-year option contracts with water districts and farmers in the Central Valley. [[370]](#footnote-371)370 There were other factors that made MWD less motivated to agree to a QSA. Without the Guidelines, and with operation of the ***Colorado*** ***River*** system under a 70R strategy, MWD is not denied all access to surplus water. That water will simply not be available in every year, and will not be available on a reliable basis. Additionally, the onset of dry years in 2000-2002 meant that MWD might not receive as much surplus water under the Guidelines as originally projected. Finally, the Secretary's enforcement of reductions in water orders to IID, if upheld, would mitigate the adverse effect on MWD of termination of the Guidelines by some 200,000 acre-feet per year.

On January 10, 2003, IID filed suit in federal district court against the DOI, challenging the DOI's water orders. The complaint outlined the priority system established under the 1931 Seven Party Agreement, and asserted IID's right to the delivery of any amount up to 3.85 million acre-feet, less deliveries to priorities 1 and 2 under the California Seven Party Agreement. [[371]](#footnote-372)371 The complaint then summarized the history of the QSA negotiations, and accused the DOI of attempting to "strong-arm" IID into executing a QSA, in order to avoid DOI-imposed water reductions. [[372]](#footnote-373)372

The suit sought to enjoin the DOI's asserted reductions based on a violation of IID's water rights under the 1931 Seven Party Agreement and a taking of IID property. Asserting the DOI's action was **[\*403]** discretionary; the complaint further sought an injunction based on the failure of the DOI to undertake compliance with NEPA, ESA, and the environmental justice provisions of federal law. Although the DOI's letter did not base its authority under 43 C.F.R. Part 417, [[373]](#footnote-374)373 the complaint sought to invalidate the 417 regulations and to enjoin based on improper application of the 417 regulations. IID also based its request on a separation of powers argument (asserting the DOI had asserted judicial functions), violation of state's rights under the Tenth Amendment, and violation of an alleged oral contract by IID to pay back overruns. [[374]](#footnote-375)374

IID also began a campaign to try to put political pressure on the DOI to back down from its position and diffuse attempts by the California legislature to exact retribution on IID for the failure of the QSA negotiations. [[375]](#footnote-376)375 IID convinced some members of the California congressional delegation to send a letter to Secretary Norton blaming the DOI for the collapse of the QSA negotiations. IID started a campaign to assert the DOI's action was one of an oppressive federal government that has impacts on and should be resisted by water users all over the West. In a letter to Secretary Norton, the IID stated:

Your Department has falsely blamed IID for the failure to execute the QSA by December 31st, and has wrongfully sought to punish IID by attempting to cut IID's water supply for the 2003 water year. Simply stated, the action of your Department is misguided, unjustified, unsupported by the law or the facts, and is an example of heavy-handed and unwarranted federal interference with intrastate water allocation matters.

… .

Finally, your action also sends a message to all water rights holders throughout the West: comply with the desires of the Department of the Interior and the urban populations, or your water rights will be confiscated. [[376]](#footnote-377)376

**[\*404]** At a hearing on March 18, 2003, the court granted IID's motion for preliminary injunction, finding that IID had "established a likelihood of success on the merits" of its claims of a violation of DOI's 43 C.F.R. Part 417 regulations and breach of contract. [[377]](#footnote-378)377 The court ordered DOI to restore IID's full water allotment of 3.1 million acre-feet. [[378]](#footnote-379)378 The court asked for briefing on whether Interior should conduct a complete Part 417 review, or whether the parties (including Coachella and MWD) should commence a reasonable beneficial use challenge to IID in an alternative forum. [[379]](#footnote-380)379 Following the briefing, the court approved a process proposed by DOI to conduct a Part 417 review of IID's water use practices. [[380]](#footnote-381)380

The DOI immediately reversed its December 27, 2003 water order approvals, [[381]](#footnote-382)381 the effect of which was that California was still restricted to 4.4 million acre-feet, but IID's allowed use increased by about 330,000 acre-feet, Coachella's approved use decreased by about 108,000 acre-feet, and MWD's approved use decreased by about 121,000 acre-feet. [[382]](#footnote-383)382 The DOI initiated the Part 417 process, with the intent to complete the administrative part of the process by the fall of 2003. [[383]](#footnote-384)383

Despite the litigation, and at the urging of the California Governor's office, the California parties hammered out a new version of the QSA ("2003 QSA"). At a March 13, 2003 meeting of the Basin States, the State of California and the California water agencies presented a new packet of materials they touted as the "new and final" QSA. Re-using a phrase that has become almost tiresome, Governor Davis hailed the agreement as a "peace treaty" among the water agencies. [[384]](#footnote-385)384 The negotiators for the State of California and the southern California water agencies signed a statement that they would seek approval of the 2003 QSA from their respective boards when:

the conditions precedent to the [2003] QSA … are all satisfied; … the Interim Surplus Guidelines are reinstated; the overrun payback issue is resolved; the legal action of IID v. U.S… . is settled and/or dismissed; the California legislature … enacts the implementing **[\*405]** legislation; and the [2003] QSA and related agreements are satisfactory to the Department of the Interior and the other Basin States. [[385]](#footnote-386)385

All of these measures must be completed by October 30, 2003. This is a formidable list, raising serious doubts that these matters can be satisfied before that time. Moreover, the 2003 QSA differs in significant respects from the QSA negotiated in 2000, that was the basis for the agreement between the Basin States and DOI to the Guidelines ("2000 QSA"). [[386]](#footnote-387)386

[*First*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831), the fundamental structure of the program to reduce California's water use changed from the time the 1999 California Plan documents and the 2000 QSA were prepared. These changes were a result of the need to address environmental mitigation issues, and were the subject of intense negotiation among the California agencies. Rather than permanent conservation-based water transfers, the 2003 QSA was now predicated on temporary land fallowing in the early years of the fifteen-year program, with a sudden increase in conservation-based transfers late in the fifteen-year period. Land fallowing is a measure that can be quickly implemented, but also quickly reversed. Moreover, IID has throughout the opposed land fallowing as a permanent measure to reduce water demands. As a result, the permanence of the program to reduce California's reliance on surplus ***Colorado*** ***River*** is again brought into question.

[*Second*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T352-D6RV-H379-00000-00&context=1516831), the 2003 QSA was subject to four off-ramps, including if the costs of environmental mitigation exceed $ 243 million, and if IID is afforded sufficient environmental regulatory assurance. One of the objectionable off-ramps to the 2002 QSA was IID's ability to terminate the QSA if a Habitat Conservation Plan was not completed before December 31, 2003, "acceptable in form, substance and coverage to IID," "in its sole, complete and absolute discretion." [[387]](#footnote-388)387 Assistant Secretary Raley specifically rejected such an off-ramp in his December 9, 2002, correspondence to IID. [[388]](#footnote-389)388 However, the off-ramp remained in substance, albeit in different form, in the 2003 QSA.

[*Third*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831), the 2003 QSA listed over fifteen conditions precedent that must be satisfied before October 30, 2003. [[389]](#footnote-390)389 The difficulty of completing all these matters casts doubt on the viability of the 2003 QSA. For example, the 2003 QSA provided that all permits and other resource approvals necessary to implement the 1998 IID/SDCWA Transfer Agreement, the conservation by IID of up to 303,000 AFY, **[\*406]** and IID's priority 3a cap, including ESA and CESA compliance, be finalized, that all appeals there from be exhausted, and that the governing board of each entity approve the measures. Additionally, the pending litigation in IID v. U.S. must be settled or dismissed. This may be particularly difficult given the beneficial use claims in the litigation, the initiation of the Part 417 process by DOI which was scheduled to be complete by October 2003, and in light of the beneficial use provisions in the proposed Secretarial Implementation Agreement, discussed below.

[*Fourth*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T3H2-D6RV-H37G-00000-00&context=1516831), part of the "related agreements" associated with the 2003 QSA include a proposed Secretarial Implementation Agreement ("SIA"), by which the Secretary would agree to implement the water transfers contemplated by the QSA. [[390]](#footnote-391)390 The SIA is similar to a draft implementation agreement that was part of the 2000 QSA. However, that portion of the SIA concerning reasonable and beneficial use is substantially different. This paragraph, as amended, potentially limits the authority of the Secretary under the Boulder Canyon Project Act and section 5 water delivery contracts thereunder, and the Secretary's ability to meet her obligations under the Decree in Arizona v. California. In the SIA, the Secretary is asked to foreclose consideration of the reasonableness of both past and current beneficial use within IID. The Secretary is asked to acknowledge that the creation and use of conserved water by IID is within the scope of the IID's Section 5 Contract. [[391]](#footnote-392)391 Thus, the Secretary is asked to deliver water to IID under its contract that is not needed for irrigation use, and allow IID to use that water for other purposes, including for environmental mitigation.

The Secretary is asked to take the implementation schedule in the 2003 QSA into account in connection with any future assessment of reasonable and beneficial use of ***Colorado*** ***River*** water within IID. Although called "conservation" in the 2003 QSA, land fallowing is more accurately described as forbearance of use. As discussed above, the QSA implementation schedule is based on land fallowing in the early years of the program, with true water conservation measures not being implemented until the later years of the fifteen-year program. The Secretary is further requested not to assess IID's reasonable and beneficial use until year 24. [[392]](#footnote-393)392 Thus, IID would appear to avoid scrutiny of its reasonable and beneficial use, which was first initiated by the State Water Resources Control Board in the 1980s, for another quarter of a century.

The adoption by the Bureau of Reclamation of an Inadvertent Overrun and Payback Program acceptable to the California agencies is **[\*407]** a condition precedent to the 2003 QSA. The SIA solidifies the program by requiring that the Secretary shall not materially modify the program for a period of thirty years. This provision is not only of questionable legality, but also hamstrings the potential efficient management of the ***Colorado*** ***River***. If effective, it forecloses the ability of the Basin States and the Bureau of Reclamation to modify the program based on operating experience, drought, or other issues.

So, the California agencies continue to circle endlessly around the same set of issues. In the meantime, the window of opportunity presented by the relatively full reservoir conditions in the ***Colorado*** ***River*** Basin, that in part prompted the Basin States to offer additional surplus water, [[393]](#footnote-394)393 may have closed. As California continues to negotiate, system reservoir levels continue down in the course of a new drought cycle. Even if the Guidelines are restored, the availability of surplus water may be less than originally anticipated when the Guidelines were adopted in 2000. In the words of Assistant Secretary Bennett Raley, quoting from The Great Gatsby, "so we beat on, boats against the current, borne back ceaselessly into the past." [[394]](#footnote-395)394

[*XXI*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T282-D6RV-H36K-00000-00&context=1516831). EPILOGUE

After twelve years of negotiation, tens of thousands of hours of meetings, millions of dollars-mostly public-in resources spent on environmental studies, legal and engineering fees, facilitated processes, lawsuits and lobbying, the success or failure of the California Plan came down to the vote of five people, the board members of the Imperial Irrigation District. Those five votes, representing about 100,000 people, determined, for the time being, the destiny of a portion of the water supply for twenty million people in the Southern California coastal plain, and the management of a ***river*** system serving seven states. Those five votes, along with everything that led up to the vote of the IID Board, illustrated so much about the dynamics of the complex yet fragile nature of our democratic public process, of the tension between urban and rural cultures in the western United States, of the paralysis sometimes caused by our environmental laws, and of the difficulty in dealing with the ultimate public resource - water.

It would be easy to lay the blame for the failure of the California Plan at the doorstep of the Imperial Irrigation District. Certainly, the IID Board asked for far more than any agency could ever deliver, not only in money, but also in regulatory certainty and freedom from legal and political liability. The certainty demanded by IID simply does not exist in the water supply business. But the IID Board was not just protecting a water supply; it was protecting a culture, an economy, and a lifestyle. And for that, as members of their community and as elected representatives, they could hardly be blamed. Certainly, every **[\*408]** agency involved in the processes that began in 1991 made mistakes or overplayed their hand at one time or another. The IID Board was just the last.

Perhaps one could place the blame on "the system," and in particular on the Law of the ***River***. One could argue that it was an arcane, complex, rigid, and shortsighted set of allocations and operational regimes that ultimately could not be made to accommodate the need for additional water in southern California and southern Nevada. Yet the negotiators for the Basin States and the DOI demonstrated the Law of the ***River*** can, in fact, be modified to meet changing needs, while still protecting the fundamental public interests of security of supply and economic stability the Law of the ***River*** was developed to serve. The states and the DOI put in place the framework necessary to meet California's needs, and are fully capable of doing so in the future to meet new challenges. It was not the inflexibility of the Law of the ***River***, but the failure of negotiations within California, that led to the demise of the California Plan. Without the foundation of the Law of the ***River***, that framework negotiated by the states and the DOI could not have been put in place. As was stated in Part I of this article, [[395]](#footnote-396)395 and as echoed by Secretary Norton in her 2002 speech to the ***Colorado*** ***River*** Water Users Association, [[396]](#footnote-397)396 if California were not required, either by agreement or legal fiat, to honor its commitment to live within its apportionment, then the allocation upon which the entire Law of the ***River*** is based would have no meaning whatsoever.

Perhaps the process illustrates the ultimate reality, as the West faces the challenge of balancing the needs of a booming population, the need to maintain agricultural water supplies, the need to quantify and honor commitments to Tribal interests, the need to address increasing interest in in-stream recreational values, and the urgent need to protect a water-dependent environment under siege. The reality is in the era of limits, which will define the future of water supply planning and negotiation, in which increased supply for one segment must be balanced by the loss of supply for another. For better or worse, the prior appropriation doctrine has established individual property rights, contract rights, reserved rights, and public expectations far in excess of the water supply available. And also for better or worse, even though the Upper Basin has not developed its full entitlement under the Law of the ***River***, the water of the ***River*** is over-allocated and over-appropriated. This over-allocation is exacerbated by the uncertainties associated with unresolved issues such as reserved rights and whether the Upper Basin must bear the burden of sharing the Mexican Treaty delivery obligation.

The dawning of the era of limits is precisely the reason that the Upper Basin, and ***Colorado*** in particular, pushed the issue of California's reliance on water in excess of its apportionment. The **[\*409]** Upper Basin's future, based as it is on hydrologic and legal leftovers, could not tolerate the additional uncertainty of a California addiction to surplus water.

From the perspective of the Upper Basin, the process achieved precisely what ***Colorado*** intended when Governor Romer of ***Colorado*** initiated the process with his letter to Governor Wilson in 1991. [[397]](#footnote-398)397 ***Colorado*** did not care whether the limits to California's allocation were realized by the mutual negotiation of the California Plan, or by the operation of law through the enforcement of entitlements by the DOI. ***Colorado*** sought to have California live within its means, so that ***Colorado***'s interests could be protected. However, ***Colorado*** also never intended that California, Nevada, or any other water user would be forced to suffer shortages or hardship through the imposition of limits to water use.

The negotiated solution of the California Plan and the Interim Surplus Guidelines represented a remarkable achievement in good faith public interest negotiation - a management regime developed by public entities interested in sharing and managing a public resource for the benefit of the greatest number of people. Such a solution is obviously preferable to litigation, divisiveness, and competition between states and agencies, and illustrates why water should continue to be a public resource rather than a private commodity. It will be in ***Colorado***'s and other Basin States' interest to continue those negotiations, and seek ways to accommodate the interests of California and Nevada in achieving a more secure water supply consistent with the interests and allocations established under the Law of the ***River***.

The economics, land use, recreation, environment, law, technology, and political landscape of the ***Colorado*** ***River*** Basin will continue to evolve and change. The fundamental error of the original negotiators of the ***Colorado*** ***River*** Compact in overestimating water supply will be magnified as global climate change alters the hydrology of the Basin. The public trust held by the agencies responsible for managing the ***river*** system demands that these dynamics be recognized. Perhaps at some point in the future, and with an appropriate change in the law, interbasin water marketing will be a reality. Perhaps at some point in the future the allocations of the states may have to be renegotiated. However, there is a significant distance that must be covered before those fundamental cornerstones are revisited. As demonstrated in these negotiations, there is plenty of flexibility in the system to accommodate the needs of the ***Colorado*** ***River*** over the next several decades, and those issues should be left to another generation. Despite the inability of the California agencies to reach agreement on implementation of the California Plan, there are sufficient resources within California and within the Lower Basin to take care of the relatively modest needs of MWD and southern Nevada. The agricultural transfers and interstate water banking arrangements **[\*410]** already being negotiated or in place provide ample demonstration of that fact.

In continuing their negotiations, and in light of the reality of the era of limits, the states and the DOI should continue to be mindful of the basic principles that underlie the allocation framework established by the Law of the ***River***, and the principles reflected in the six-state positions taken in the negotiations of the interim surplus criteria. In particular, no water user has been or can be guaranteed a firm supply of water. Water use, efficiency, and transfers must be maximized at a local level before proceeding to a regional, interstate or interbasin level, and these levels must be addressed sequentially and on the basis of good-faith negotiation. For the time being, the fundamentals of the 1922 ***Colorado*** ***River*** Compact [[398]](#footnote-399)398 and the interests articulated by Delph Carpenter [[399]](#footnote-400)399 on behalf of ***Colorado***, which have formed the basis for the ***Colorado*** negotiating position, remain.

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**End of Document**

1. 1 The California Plan, described in this article, refers to the complex series of agreements and approvals necessary for California agencies to implement water conservation measures and transfers from agricultural to municipal agencies so as to reduce California's overall use of ***Colorado*** ***River*** water to its basic apportionment of 4.4 million acre-feet of water per year. [↑](#footnote-ref-2)
2. 2 The "Law of the ***River***" refers to a body of law affecting the interstate and international use, management, and allocation of water in the ***Colorado*** ***River*** System, including the 1922 ***Colorado*** ***River*** Compact, the Mexican Water Treaty of 1944, the Upper ***Colorado*** ***River*** Basin Compact, several United States Supreme Court decisions and the Decree in [*Arizona v. California, 376 U.S. 340 (1964),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H350-003B-S2D6-00000-00&context=1516831) and a host of federal laws and administrative regulations. [↑](#footnote-ref-3)
3. 3 See generally James S. Lochhead, An Upper Basin Perspective on California's Claims to Water From the ***Colorado*** ***River*** - Part I: The Law of the ***River***, [*4 U. Denv. Water L. Rev. 290 (2001)*](https://advance.lexis.com/api/document?collection=analytical-materials&id=urn:contentItem:43XH-WN80-00SW-5022-00000-00&context=1516831) [hereinafter Part I]. [↑](#footnote-ref-4)
4. 4 ***Colorado*** ***River*** Compact, [***Colo.*** *Rev. Stat. 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831) to -104 (2002). [↑](#footnote-ref-5)
5. 5 The source materials for this article consist primarily of correspondence, meeting notes and materials, recollections, newspaper articles, government publications, and other materials that are all on file with the author. [↑](#footnote-ref-6)
6. 6 See Part I, supra note 3, at 314. [↑](#footnote-ref-7)
7. 7 Id. at 291-92 n.4. [↑](#footnote-ref-8)
8. 8 Gerald A. Lopez, Deputy Attorney Gen. for Nev., Speech at the American Society for Public Administration 3 (Sept. 10, 1991). [↑](#footnote-ref-9)
9. 9 In 1981, California used 4.839 million acre-feet of ***Colorado*** ***River*** water. Bureau of Reclamation, U.S. Dep't of the Interior, ***Colorado*** ***River*** System Consumptive Uses and Loses Report 1981-1985, at iv (1991). By 1991, California's use of ***Colorado*** ***River*** water had increased to 5.163 million acre-feet. Bureau of Reclamation, U.S. Dep't of the Interior, ***Colorado*** ***River*** System Consumptive Uses and Losses Report 1986-1990, at iv (1998). [↑](#footnote-ref-10)
10. 10 The "Lower Division States" are defined as "the States of Arizona, California, and Nevada." ***Colorado*** ***River*** Compact, [***Colo.*** *Rev. Stat. 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831), art. II(d) (2002). [↑](#footnote-ref-11)
11. 11 Under the Criteria for Coordinated Long-Range Operation of ***Colorado*** ***River*** Reservoirs ("Operating Criteria"), the Secretary determines each year in the AOP whether "surplus," "normal" or "shortage" conditions exist with respect to the release of water from Lake Mead for use in the Lower Division States. See Part I, supra note 3, at 291-92 n.4. [↑](#footnote-ref-12)
12. 12 [*376 U.S. 340, 342 (1964).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H350-003B-S2D6-00000-00&context=1516831) [↑](#footnote-ref-13)
13. 13 Criteria for Coordinated Long-Range Operation of ***Colorado*** ***River*** Reservoirs, ***35 Fed. Reg. 8951, 8951-52*** (June 10, 1970). [↑](#footnote-ref-14)
14. 14 Projected water uses as of July 1990 were 2.435 million acre-feet in Arizona, 5.194 million acre-feet in California, and 175,000 acre-feet in Nevada, totaling 7.804 million acre-feet. 1990 Projected Lower Basin States Water use. [↑](#footnote-ref-15)
15. 15 Planning & Mgmt. Consultants, Ltd., The Regional Urban Water Management Plan for the Metropolitan Water District of Southern California 58 (1990) [hereinafter MWD Plan]. [↑](#footnote-ref-16)
16. 16 Part I, supra note 3, at 307-09. [↑](#footnote-ref-17)
17. 17 [*Imperial Irrigation Dist. v. State Water Res. Control Bd., 275 Cal. Rptr. 250, 254 (Cal. Ct. App. 1991)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HHM0-003D-J1NM-00000-00&context=1516831) [hereinafter IID II]; [*Imperial Irrigation Dist. v. State Water Res. Control Bd., 231 Cal. Rptr. 283, 284 (Cal. Ct. App. 1986).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-JYJ0-003D-J2KW-00000-00&context=1516831) [↑](#footnote-ref-18)
18. 18 [*IID II, 275 Cal. Rptr. at 255.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HHM0-003D-J1NM-00000-00&context=1516831) [↑](#footnote-ref-19)
19. 19 However, for MWD to realize these benefits, both parties needed agreement from the Coachella Valley Water District, as entitled to water under the third priority. See Part I, supra note 3, at 307-09. [↑](#footnote-ref-20)
20. 20 MWD Plan, supra note 15, at 58. [↑](#footnote-ref-21)
21. 21 Id. at 62. [↑](#footnote-ref-22)
22. 22 Id. at 62-63. In 1992, MWD entered into a pilot land fallowing program with the Palo Verde Irrigation District. This agreement demonstrated the feasibility of land fallowing programs in California. [↑](#footnote-ref-23)
23. 23 In early 1991, before the 1991 "March Miracle" rains which put the drought on temporary hold, there had been no significant precipitation since November of 1990. California officials estimated that deliveries to the MWD through the State Water Project would be only fifty percent of a requested order of 1.645 million acre-feet. Agricultural water users received sixty-five percent cutbacks from State Water Project deliveries. Memorandum from Clint Stevens, Chief Eng'r, Upper ***Colo.*** Water Comm'n, to Wayne Cook, Exec. Dir., Upper ***Colo.*** Water Comm'n (Jan. 3, 1991). [↑](#footnote-ref-24)
24. 24 In July 1990, storage levels in Upper Basin reservoirs were between forty-five and sixty-four percent of normal. Reservoir Status as of July 23, 1990. [↑](#footnote-ref-25)
25. 25 MWD Plan, supra note 15, at 11, 36. [↑](#footnote-ref-26)
26. 26 Id. at 60 tbl. III-6. [↑](#footnote-ref-27)
27. 27 ***Colorado*** ***River*** Compact, [***Colo.*** *Rev. Stat. 37-62-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33Y-00000-00&context=1516831), art. II(c) (2002). [↑](#footnote-ref-28)
28. 28 At the time, provisional water consumption estimates for the Upper Division States totaled about 3.7 million acre-feet. Upper ***Colo.*** ***River*** Comm'n, Upper ***Colorado*** ***River*** States' Depletion Schedule (1994). When combined with the estimated reservoir evaporation losses in the Upper Basin, total consumption in the Upper Basin were at that time about 4.2 million acre-feet per year. Id. This compares with the Bureau's estimate (with which the Upper Division States do not agree), of a firm developable yield in the Upper Basin of 6.0 million acre-feet per year. Bureau of Reclamation, U.S. Dep't of Interior, Hydrologic Determination, Water Availability From Navajo Reservoir and the Upper ***Colorado*** ***River*** Basin for use in New Mexico (1987). [↑](#footnote-ref-29)
29. 29 Criteria for Coordinated Long-Range Operation of ***Colorado*** ***River*** Reservoirs, ***35 Fed. Reg. 8951, 8951-52*** (June 10, 1970). [↑](#footnote-ref-30)
30. 30 See Part I, supra note 3, at 313-316. [↑](#footnote-ref-31)
31. 31 California's position was that the "draft plan's limitation against meeting all contracts with the United States and other California rights … does not have a technical or legal basis." Position paper of the ***Colorado*** ***River*** Bd. of California; Letter from Carl Boronkay, Gen. Manager of Metro. Water Dist. of S. Cal., to Edward M. Hallenbeck, Reg'l Dir., Bureau of Reclamation Lower ***Colo.*** Region (July 13, 1990); Resolution of the ***Colorado*** ***River*** Board of California Regarding Adoption of the 1991 Annual Operating Plan for the ***Colorado*** ***River*** System Reservoirs (Aug. 8, 1990). [↑](#footnote-ref-32)
32. 32 Letter from Thomas C. Clark, Gen. Manager of Cent. Ariz. Water Conservancy Dist., to Edward M. Hallenbeck, Reg'l Dir., Bureau of Reclamation Lower ***Colo.*** Region (June 18, 1990). [↑](#footnote-ref-33)
33. 33 James S. Lochhead, Personal Notes, 1991 Annual Operating Plan Meeting, Las Vegas, Nev., at 2 (Aug. 9, 1990). [↑](#footnote-ref-34)
34. 34 Id. at 4. When the Central Arizona Project was authorized, the assumptions of its water supply and financial feasibility were based on projections the Upper Basin would not develop its Compact entitlement for several decades, thus allowing surplus system water to be available to the CAP for continued agricultural diversions until increasing urbanization and a shift of water from agricultural to urban use would allow for a decreased water supply. [↑](#footnote-ref-35)
35. 35 Letter from Jack Ross, Chairman of the Upper ***Colo.*** ***River*** Comm'n, to Roland G. Robison & Edward M. Hallenbeck, Bureau of Reclamation 1-3 (Aug. 14, 1990). [↑](#footnote-ref-36)
36. 36 Draft Memorandum from Comm'r, Bureau of Reclamation, to the Secretary, U.S. Dep't of Interior 2 (Aug. 21, 1990). [↑](#footnote-ref-37)
37. 37 Arizona, ***Colorado***, New Mexico, Nevada, Utah, and Wyoming. [↑](#footnote-ref-38)
38. 38 Memorandum from James S. Lochhead, to ***Colo.*** Water Conservation Bd. Members 4 (Sept. 4, 1990). [↑](#footnote-ref-39)
39. 39 Memorandum from Clint Stevens, Chief Eng'r, Upper ***Colo.*** ***River*** Comm'n, to Upper ***Colo.*** ***River*** Comm'rs & Eugene I. Jencsok, ***Colo.*** Water Conservation Bd. 2 (Aug. 28, 1990); James S. Lochhead, Personal Notes, supra note 33. [↑](#footnote-ref-40)
40. 40 Memorandum from Comm'r, Bureau of Reclamation, to the Secretary, U.S. Dep't of Interior 1-3 (Sept. 28, 1990). [↑](#footnote-ref-41)
41. 41 Bureau of Reclamation, U.S. Dep't of Interior, Operation of the ***Colorado*** ***River*** Basin 1990, Projected Operations 1991, 20th Annual Report 4 (Jan. 1991). [↑](#footnote-ref-42)
42. 42 Under the Decree in [*Arizona v. California, 376 U.S. 340 (1964),*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H350-003B-S2D6-00000-00&context=1516831) the Secretary may make unused water in one Lower Division state available for use in another Lower Division state, on a temporary basis. Part I, supra note 3, at 312. [↑](#footnote-ref-43)
43. 43 Bob Johnson & Walt Fite, Bureau of Reclamation, Presentation to the Upper Basin States, Managing the ***Colorado*** ***River*** in the Lower Basin in an Era of Limits (Jan. 7, 1991). [↑](#footnote-ref-44)
44. 44 Part I, supra note 3, at 314. [↑](#footnote-ref-45)
45. 45 James S. Lochhead, Personal Notes, Meeting of Basin States, Las Vegas, Nev., at 4 (Jan. 16, 1991). [↑](#footnote-ref-46)
46. 46 Memorandum from James S. Lochhead, to Roy Romer, Governor of ***Colorado*** and Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res. 11 (Jan. 22, 1991). [↑](#footnote-ref-47)
47. 47 See Letter from Wayne E. Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n, to Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of Cal. (Jan. 31, 1991). [↑](#footnote-ref-48)
48. 48 See Part I, supra note 3, at 322-29. [↑](#footnote-ref-49)
49. 49 Id. at 291-92. [↑](#footnote-ref-50)
50. 50 See id. at 309. [↑](#footnote-ref-51)
51. 51 Metropolitan's Plan for More Effective use of California's ***Colorado*** ***River*** Apportionment (Jan. 15, 1991). [↑](#footnote-ref-52)
52. 52 Wilson Unveils Water Transfer Battle Plan, Imperial Valley Press, Feb. 19, 1991, at A1. [↑](#footnote-ref-53)
53. 53 Kathryn Dettman, Water Rationing: MWD OKs 50 Percent Cut for Farmers, Imperial Valley Press, Feb. 19, 1991, at A8. [↑](#footnote-ref-54)
54. 54 P.A. Rice, Concrete Lining of All-American Canal Emotional Issue, Imperial Valley Press, Feb. 19, 1991, at A5; P.A. Rice, MWD May Get Full Request, Imperial Valley Press, Feb. 19, 1991, at A1. [↑](#footnote-ref-55)
55. 55 Mark Obmascik, Send California Our Water?, Denver Post, Feb. 13, 1991, at [*1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831)A. [↑](#footnote-ref-56)
56. 56 Press Release, Ben Nighthorse Campbell, United States Representative, ***Colo.*** (Feb. 15, 1991) (quoting Letter from Ben Nighthorse Campbell, United States Representative, ***Colo.***, to Manuel Lujan, Sec'y of the Interior). [↑](#footnote-ref-57)
57. 57 Id. [↑](#footnote-ref-58)
58. 58 Letter from Roy Romer, Governor of ***Colorado***, to Pete Wilson, Governor of California (Feb. 21, 1991); Statement, Roy Romer, Governor of ***Colorado***, California's Request for ***Colorado*** ***River*** Water (Feb. 21, 1991); Letter from Roy Romer, Governor of ***Colorado***, to Members of the ***Colorado*** General Assembly (Feb. 25, 1991). [↑](#footnote-ref-59)
59. 59 Letter from Roy Romer to Pete Wilson, supra note 58, at 1. [↑](#footnote-ref-60)
60. 60 Id. at 1-2. [↑](#footnote-ref-61)
61. 61 Memorandum from James S. Lochhead, to Members of the ***Colo.*** Water Conservation Bd. (Feb. 24, 1991). [↑](#footnote-ref-62)
62. 62 Memorandum from James S. Lochhead, to David Walker, Deputy Dir., ***Colo.*** Water Conservation Bd. 1-2 (Feb. 28, 1991). [↑](#footnote-ref-63)
63. 63 Id. at 1. [↑](#footnote-ref-64)
64. 64 Before his appointment as commissioner of the United States Bureau of Reclamation, Dennis Underwood was the director of the ***Colorado*** ***River*** Board of California. He later became a vice president of MWD, and spearheaded MWD's efforts to negotiate and implement the California Plan. [↑](#footnote-ref-65)
65. 65 P.A. Rice, Underwood Requests Huge Water Cuts, Imperial Valley Press, Mar. 3, 1991, at A1. [↑](#footnote-ref-66)
66. 66 Letter from Dennis B. Underwood, Comm'r, Bureau of Reclamation, to Pete Wilson, California Governor 1-2 (Mar. 11, 1991). [↑](#footnote-ref-67)
67. 67 Id. at 2. The letter would find an echo in 2002. Faced with the prospect that overuse of water by California agricultural agencies would exceed the quantities approved in the 2002 AOP, Secretary of the Interior Gale Norton wrote to the Governors a letter amending the AOP, but requiring repayment of any excess water use. Letter from Gale A. Norton, Secretary of the Interior, to Gray Davis, Governor of California (Nov. 22, 2002), at http://www/usbr.gov/lc/region/g4000/2002suppaop.pdf. [↑](#footnote-ref-68)
68. 68 Memorandum from Eric Kuhn, ***Colo.*** ***River*** Water Conservation Dist., to Roland C. Fischer, Sec'y, ***Colo.*** ***River*** Water Conservation Dist., David Merritt, Eng'r, ***Colo.*** ***River*** Water Conservation Dist, Mike Gross, Eng'r, ***Colo.*** ***River*** Water Conservation Dist, Ray Tenney, Eng'r, ***Colo.*** ***River*** Water Conservation Dist, & Donald Hamburg, Gen. Counsel, ***Colo.*** ***River*** Water Conservation Dist 1-3 (Apr. 1, 1991); Memorandum from Eric Kuhn, ***Colo.*** ***River*** Water Conservation Dist., to Jim Lochhead, David Walker, Dir., ***Colo.*** Water Conservation Bd. & Eugene I. Jencsok, ***Colo.*** Water Conservation Bd. (Apr. 19, 1991); Memorandum from Wayne Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n, to Upper ***Colo.*** ***River*** Comm'rs (May 24, 1991). [↑](#footnote-ref-69)
69. 69 In 1929, in order to secure the construction of Hoover Dam, the State of California through its legislature, irrevocably and unconditionally, and as a covenant for the benefit of the other Basin States, limited its use of ***Colorado*** ***River*** water to 4.4 million acre-feet per year. Act of Mar. 4, 1929, ch. 16, 48 Cal. Stat. 38, 38-39 (1929). [↑](#footnote-ref-70)
70. 70 Letter from Pete Wilson, Governor of California, to Roy Romer, Governor of ***Colorado*** (Mar. 11, 1991). [↑](#footnote-ref-71)
71. 71 Id. at 1. [↑](#footnote-ref-72)
72. 72 Roy Romer, Governor of ***Colorado***, Statement Regarding the ***Colorado*** ***River*** 1 (Mar. 19, 1991); Memorandum from Roy Romer, Governor of ***Colorado***, to Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res., David Walker, Dir., ***Colo.*** Water Conservation Bd., Jeris Danielson, State Eng'r & Jim Lochhead, Upper ***Colo.*** ***River*** Comm'r 1 (Mar. 20, 1991). [↑](#footnote-ref-73)
73. 73 See Memorandum from James S. Lochhead, to Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res., David Walker, Dir., ***Colo.*** Water Conservation Bd. & Jeris Danielson, State Eng'r (May 20, 1991) (discussing meetings with New Mexico and Utah representatives); See also Memorandum from James S. Lochhead, to Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res., David Walker, Dir., ***Colo.*** Water Conservation Bd., & Jeris Danielson, State Eng'r (May 30, 1991) (discussing meetings with Arizona, Nevada, and California representatives). [↑](#footnote-ref-74)
74. 74 Memorandum from Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res., to ***Colorado*** State Senator Tilman Bishop, Chairman, Senate Agric., Nat. Res. Energy Comm. & ***Colorado*** State Representative Danny Williams, Chairman, House Agric., Livestock & Nat. Res. Comm. (June 4, 1991). [↑](#footnote-ref-75)
75. 75 Included at the meeting were representatives of MWD, IID, the Coachella Valley Water District ("CVWD"), and the Palo Verde Irrigation District ("Palo Verde"). Attendance List, Meeting of the Seven ***Colorado*** ***River*** Basin States on Long-term Issues on the ***Colorado*** ***River*** (June 24, 1991). [↑](#footnote-ref-76)
76. 76 Letter from James S. Lochhead, to Eric Kuhn, ***Colo.*** ***River*** Water Conservation Dist. (July 11, 1991). [↑](#footnote-ref-77)
77. 77 P.A. Rice, States Wary About Proposal for Water Bank, Imperial Valley Press, June 26, 1991, at A1. [↑](#footnote-ref-78)
78. 78 See generally State of Cal., Conceptual Approach for Reaching Basin States Agreement on Interim Operation of ***Colorado*** ***River*** System Reservoirs, California's use of ***Colorado*** ***River*** Water Above its Basic Apportionment, and Implementation of an Interstate Water Bank (Aug. 28, 1991) [hereinafter California Conceptual Approach]. [↑](#footnote-ref-79)
79. 79 Id. at 15. [↑](#footnote-ref-80)
80. 80 Id. at 9. [↑](#footnote-ref-81)
81. 81 See id. at 13. [↑](#footnote-ref-82)
82. 82 Id. at 15. [↑](#footnote-ref-83)
83. 83 California Conceptual Approach, supra note 78, at 15-19. [↑](#footnote-ref-84)
84. 84 Id. at 19. [↑](#footnote-ref-85)
85. 85 See id. at 1-3. [↑](#footnote-ref-86)
86. 86 State of ***Colo.***, Comments of the State of ***Colorado*** on the Conceptual Approach for Reaching Basin States Agreement on Interim Operation of ***Colorado*** ***River*** System Reservoirs, California's use of ***Colorado*** ***River*** Water Above its Basic Apportionment, and Implementation of an Interstate Water Bank 6 (Oct. 23, 1991). [↑](#footnote-ref-87)
87. 87 Id. at 7. [↑](#footnote-ref-88)
88. 88 Id. [↑](#footnote-ref-89)
89. 89 Mark Obmascik, Romer Douses California's Water Request, Denver Post, Oct. 24, 1991, at [*3*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T372-8T6X-731R-00000-00&context=1516831)B (quoting ***Colorado*** Governor Roy Romer). [↑](#footnote-ref-90)
90. 90 Letter from Jack L. Stonehocker, Dir., ***Colo.*** ***River*** Comm'n of Nevada, to Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of California 1-3, 8 (Oct. 22, 1991); James S. Lochhead, Personal Notes, Meeting of Basin States, Phoenix, Ariz. 2 (Nov. 6, 1991). [↑](#footnote-ref-91)
91. 91 See Part I, supra note 3, at 313. [↑](#footnote-ref-92)
92. 92 Letter, Elizabeth Ann Rieke, Dir., Arizona Dep't of Water Res., to Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of California, 1-2 (Oct. 23, 1991); James S. Lochhead, Personal Notes, supra note 90, at 1. [↑](#footnote-ref-93)
93. 93 Letter, D. Larry Anderson, Dir., Utah Div. of Water Res., to Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of California (Oct. 24, 1991); James S. Lochhead, Personal Notes, supra note 90, at 4. Utah's position is curious, given its later advocacy of interbasin water marketing. See Memorandum from D. Larry Anderson, Dir., Utah Div. of Water Res., to Upper Basin State Comm'rs 1-3 (Dec. 13, 1994). [↑](#footnote-ref-94)
94. 94 Letter from Eluid L. Martinez, New Mexico State Eng'r, to Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of California (Oct. 25, 1991); James S. Lochhead, Personal Notes, supra note 90, at 3. [↑](#footnote-ref-95)
95. 95 Letter from Gordon W. Fassett, Wyoming State Eng'r, to Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of California 2 (Oct. 28, 1991); James S. Lochhead, Personal Notes, supra note 90, at 5. [↑](#footnote-ref-96)
96. 96 Heather McGregor, Water Talks Delay 7-State Negotiations, Grand Junction Daily Sentinel, Dec. 23, 1991; Letter from Jack L. Stonehocker, Dir., ***Colo.*** ***River*** Comm'n of Nevada, to James S. Lochhead (Dec. 10, 1991). [↑](#footnote-ref-97)
97. 97 Heather McGregor, Arizona Rips Romer's Water Offer, Grand Junction Daily Sentinel, Jan. 25, 1992, at [*1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831)B (quoting Elizabeth Ann Rieke, Dir., Arizona Dep't of Water Res.). [↑](#footnote-ref-98)
98. 98 Status Report: Arizona-Nevada-California Discussions, Lower Basin use of ***Colorado*** ***River*** Water (Apr. 8, 1992) [hereinafter Status Report]. [↑](#footnote-ref-99)
99. 99 Joel Nilsson, Perspective, Use it or Lose it, The Arizona Republic, May 10, 1992, at C1-C2. [↑](#footnote-ref-100)
100. 100 Status Report, supra note 98, at 1, 3. [↑](#footnote-ref-101)
101. 101 Ariz. Dep't of Water Res., Scoping Report: Potential for Groundwater Storage as an Element of ***Colorado*** ***River*** Management 2-3 (Mar. 10, 1992); Cent. Ariz. Water Conservancy Dist., Overview of CAWCD/MWD Demonstration Project on Interstate Underground Storage of Unused ***Colorado*** ***River*** Water 1 (June 18, 1992). [↑](#footnote-ref-102)
102. 102 Agreement between MWD and PVID Regarding Test Land Fallowing Program 5 (undated); Revised Agreement between MWD and PVID Regarding Test Land Fallowing Program 5 (undated). [↑](#footnote-ref-103)
103. 103 Letter from Elizabeth Ann Rieke, Dir., Arizona Dep't of Water Res., to Robert Towles, Reg'l Dir., Bureau of Reclamation 1 (Apr. 8, 1992); Thomas E. Cahill, Dir., ***Colo.*** ***River*** Comm'n of Nevada, to Robert J. Towles, Reg' Dir., Bureau of Reclamation 1-2 (May 22, 1992). [↑](#footnote-ref-104)
104. 104 Memorandum from James S. Lochhead, to Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res., Hal D. Simpson, State Eng'r, Eugene I. Jencsok, ***Colo.*** Water Conservation Bd. & Wendy Weiss, 1st Assistant Attorney Gen., ***Colo.*** (July 13, 1992). [↑](#footnote-ref-105)
105. 105 Letter from Robert J. Towles, Reg'l Dir., Bureau of Reclamation, to Wayne Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n (Dec. 23, 1992) (with attached Agreement for the Implementation of a Test Water Savings Program and use of Saved Water). [↑](#footnote-ref-106)
106. 106 The ten tribes included the Chemehuevi Indian Tribe, the Cocopah Indian Tribe, the ***Colorado*** ***River*** Indian Tribes, the Fort Mojave Indian Tribe, the Jicarilla Apache Tribe, the Navajo Nation, the Northern Ute Indian Tribe, the Quechan Indian Tribe, the Southern Ute Indian Tribe, and the Ute Mountain Ute Indian Tribe. Position Paper of the Ten Indian Tribes with Water Rights in the ***Colorado*** ***River*** Basin 5-7 (undated). [↑](#footnote-ref-107)
107. 107 Letter from Scott B. McElroy, Partner, Greene, Meyer & McElroy, to James S. Lochhead (May 11, 1992) (with attached Position Paper of the Ten Indian Tribes with Water Rights in the ***Colorado*** ***River*** Basin (undated)). [↑](#footnote-ref-108)
108. 108 Draft Memorandum of Understanding between the Ten Tribes of the ***Colorado*** ***River*** Basin Tribes Partnership and the Seven Basin States of the ***Colorado*** ***River*** Regarding Tribal Water Leasing Proposals (Sept. 23, 1992). [↑](#footnote-ref-109)
109. 109 Memorandum from James S. Lochhead, to Ken Salazar, Exec. Dir., ***Colo.*** Dep't of Nat. Res., Hal D. Simpson, State Eng'r, Chuck Lile, Dir., ***Colo.*** Water Conservation Bd., & Trish Bangert, Deputy Attorney Gen., ***Colo.*** (Oct. 13, 1992) (with attached Draft Memorandum from Gen. Counsel, to Upper ***Colorado*** ***River*** Comm'rs discussing Indian Water Rights and the Law of the ***River***) (Oct. 7, 1992). [↑](#footnote-ref-110)
110. 110 James S. Lochhead, Personal Notes, Meeting of Basin States and Tribes, Newport Beach, Cal., at 3 (Nov. 17, 1992). [↑](#footnote-ref-111)
111. 111 See Memorandum from Wayne E. Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n, to Lower ***Colo.*** ***River*** Basin States Representatives & ***Colo.*** ***River*** Tribal P'ship Representatives (Mar. 3, 1993). [↑](#footnote-ref-112)
112. 112 For a discussion of the Roan Creek proposal, and some of the reasons why ***Colorado*** was adamantly opposed to the proposal, see Part I, supra note 3, at 322-29. [↑](#footnote-ref-113)
113. 113 Memorandum from Thomas E. Cahill, Dir., ***Colo.*** ***River*** Comm'n of Nev., to 7/10 Committee Representatives 7-8 (Jan. 22, 1993). [↑](#footnote-ref-114)
114. 114 Memorandum from James S. Lochhead, to Ken Salazar, Exec. Dir., Dep't of Nat. Res. & Chuck Lile, Dir., ***Colo.*** Water Conservation Bd. 1-2 (Nov. 12, 1993); See generally ***Colo.*** ***River*** Comm'n & S. Nev. Water Auth., Southern Nevada Water Summit, Water Category Analysis 3-37 (Feb. 8, 1994). [↑](#footnote-ref-115)
115. 115 James S. Lochhead, ***Colo.*** Comm'r, Upper ***Colo.*** ***River*** Comm'n, Presentation of the State of ***Colorado*** Before the ***Colorado*** ***River*** Commission of Nevada and the Southern Nevada Water Authority 5 (Nov. 5, 1993). [↑](#footnote-ref-116)
116. 116 Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of Cal., Presentation at the Nevada Water Summit 1 (Nov. 5, 1993). [↑](#footnote-ref-117)
117. 117 Letter from James S. Lochhead, to Ken Salazar, Dir., ***Colo.*** Dep't of Nat. Res. & Chuck Lile, Dir., ***Colo.*** Water Conservation Bd. 1-2 (Feb. 8, 1994). [↑](#footnote-ref-118)
118. 118 Memorandum from Wayne E. Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n, to Upper ***Colo.*** ***River*** Comm'rs 1 (Feb. 11, 1994). The term "wheeling" as applied to the Virgin ***River*** referred to obtaining the legal right to use, or a physical supply of water from, the Virgin ***River***. However, instead of developing an intake or wells from the Virgin ***River*** watershed and pipeline to Las Vegas, Las Vegas would let the Virgin ***River*** water flow into Lake Mead, and would take the water through its existing intake. California and Arizona opposed the wheeling concept, on the basis that under the Decree in Arizona v. California, once water from the Virgin ***River*** entered Lake Mead, it became subject to federal control and allocation pursuant to the Decree. See Part I, supra note 3, at 328-29. [↑](#footnote-ref-119)
119. 119 Memorandum from Wayne E. Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n, to Upper ***Colo.*** ***River*** Comm'rs 1 (Feb. 11, 1994) (quoting Tom Coward, ***Colo.*** ***River*** Comm'n of Nev.). [↑](#footnote-ref-120)
120. 120 Timothy Egan, Las Vegas Stakes Claim in 90's Water War, N.Y. Times, Apr. 10, 1994, at A1. [↑](#footnote-ref-121)
121. 121 Central Arizona Project deliveries dropped from 745,000 acre-feet in 1990 to 420,000 acre-feet in 1991. Governor's Task Force on Cent. Ariz. Project, Governor's Task Force on Central Arizona Project Issues: Report to Governor Fife Symington 1 (1992). [↑](#footnote-ref-122)
122. 122 Ariz. Dep't of Water Res., Governor's Central Arizona Project Advisory Committee: Preliminary Draft, Marketing ***Colorado*** ***River*** Water to California or Nevada Users 27 (1993). [↑](#footnote-ref-123)
123. 123 Ariz. Dep't of Water Res., Governor's Central Arizona Project Advisory Committee: Final Report and Recommendations 29 (1993). [↑](#footnote-ref-124)
124. 124 Jon Christensen, Las Vegas Wheels and Deals for ***Colorado*** ***River*** Water, High Country News, Feb. 21, 1994, at 12-13. The vehicle for implementing the forbearance arrangement is Article II (B)(6) of the Decree in Arizona, which authorizes the Secretary of the Interior to make unused water in one state available for use in another state, on a temporary basis. See Part I, supra note 3, at 312. [↑](#footnote-ref-125)
125. 125 Editorial, CAP Agreement Collapses: Playing Politics With Water, The Arizona Republic, June 21, 1995, at B8. See also Memorandum from James S. Lochhead, Exec. Dir., ***Colo.*** Dep't of Nat. Res., to Roy Romer, Governor of ***Colorado*** (June 23, 1995). [↑](#footnote-ref-126)
126. 126 Nevada's Approach to a Lower Division Regional Solution 1 (Apr. 29, 1994). [↑](#footnote-ref-127)
127. 127 Id. at 1, 4; Janet F. Rogers, Chair, ***Colo.*** ***River*** Comm'n of Nev., Statement before the Subcommittee on Water and Power of the Senate Energy Committee for the Lower ***Colorado*** ***River*** Oversight Hearings 4-8 (June 8 & 9, 1994); ***Colo.*** ***River*** Comm'n of Nev., Amplification of Nevada's Approach to a Lower Division/Basin Regional Solution 1-2 (July 8, 1994). [↑](#footnote-ref-128)
128. 128 Heather McGregor, "Water Bank" Could Help State ***Rivers***, Grand Junction Daily Sentinel, May 6, 1994, at [*1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8T9R-T2X2-D6RV-H374-00000-00&context=1516831)B; Memorandum from D. Larry Anderson, Div. Dir., Utah Div. of Water Res., to Basin States Representatives 1 (May 25, 1994); Memorandum from Philip B. Mutz, Upper ***Colo.*** ***River*** Comm'r for New Mexico & Eluid L. Martinez, Sec'y, New Mexico Interstate Stream Comm'n, to ***Colo.*** ***River*** Basin States Representatives & Wayne Cook, Exec. Dir., Upper ***Colo.*** ***River*** Comm'n 1 (May 26, 1994); Memorandum from Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of Cal., to ***Colo.*** ***River*** Basin States Representatives 1 (May 26, 1994); Memorandum from Gordon W. Fassett, Wyoming State Eng'r, to Seven ***Colo.*** Basin States Representatives 1 (May 31, 1994). [↑](#footnote-ref-129)
129. 129 Memorandum from Rita P. Pearson, Dir., Arizona Dep't of Water Res., to Seven ***Colo.*** Basin States Representatives 1 (May 27, 1994); See generally Ariz. Dep't of Water Res., Arizona Water Bank Proposal (July 14, 1994). [↑](#footnote-ref-130)
130. 130 See Larry Linser, Deputy Dir., Ariz. Dep't of Water Res., Testimony Before the Water and Power Subcommittee of the United States Senate Energy and Nat. Res. Committee 6 (June 8-9, 1994). [↑](#footnote-ref-131)
131. 131 See id.; Memorandum from Daries C. Lile, Dir., ***Colo.*** Water Conservation Bd., to ***Colo.*** Water Conservation Bd. Members & ***Colo.*** ***River*** Policy Advisory Council 1-2 (June 14, 1994). [↑](#footnote-ref-132)
132. 132 See Larry Linser, supra note 130. [↑](#footnote-ref-133)
133. 133 Elizabeth Ann Rieke, Assistant Sec'y for Water & Science, Dep't of the Interior, Statement Before the Water and Power Subcommittee of the United States Senate Energy and Nat. Res. Committee 12-14 (June 8, 1994). [↑](#footnote-ref-134)
134. 134 ***Colo.*** ***River*** Lower Basin Technical Comm., Progress Report 1 (Oct. 11, 1994). [↑](#footnote-ref-135)
135. 135 Lower ***Colo.*** ***River*** Basin Technical Comm., Progress Report No. 4, at 2-6, 8-10 (June 1, 1995); Lower ***Colo.*** ***River*** Basin Technical Comm., Progress Report No. 3, at 1-5 (Mar. 22, 1995); Lower ***Colo.*** ***River*** Basin Technical Comm., Progress Report No. 2, at 2, 4-9, 11 (Jan. 19, 1995); ***Colo.*** ***River*** Lower Basin Technical Comm., Progress Report 3-4, 6 (Oct. 11, 1994). [↑](#footnote-ref-136)
136. 136 Letter from Rita P. Pearson, Dir., Ariz. Dep't of Water Res., to Bruce Babbitt, Sec'y of the Interior (June 2, 1995); Lower ***Colo.*** ***River*** Basin Technical Comm., Progress Report No. 4, at 4-6, 9 (June 1, 1995) . [↑](#footnote-ref-137)
137. 137 ***Colo.*** ***River*** Basin Tribes P'ship, Proposed Fundamental Components of ***Colorado*** ***River*** Marketing/Banking (Oct. 11, 1994). [↑](#footnote-ref-138)
138. 138 Memorandum from D. Larry Anderson, Dir., Div. of Water Res., to Upper Basin State Comm'rs (Dec. 13, 1994) (including Upper Basin Water Bank Working Paper). [↑](#footnote-ref-139)
139. 139 Utah Ponders Selling Las Vegas $ 20 Million in Water Annually, Salt Lake Trib., Feb. 12, 1995 (quoting Ted Stewart, Exec. Dir., Dep't of Nat. Res.). [↑](#footnote-ref-140)
140. 140 See Part I, supra note 3, at 322-29. [↑](#footnote-ref-141)
141. 141 Letter from V. LeGrand Neilson, Dir., Office of ***Colo.*** ***River*** Water & Power Mgmt., Bureau of Reclamation, to Abraham Sofaer, Facilitator, Lower ***Colo.*** ***River*** Basin Technical Comm. (Sept. 29, 1995). [↑](#footnote-ref-142)
142. 142 The Bureau recommended a shortage criterion of eighty percent assurance of protecting Lake Mead elevation of 1050 feet and a surplus criterion of eighty percent assurance of not triggering a shortage. This was opposed to the historic operational surplus strategy based on a seventy percent assurance of avoiding flood control releases (the so-called "70R strategy"). These criteria are of vital importance to the states. The six states other than California favored the 70R strategy because it keeps system reservoirs fuller than other strategies and minimizes risks of shortages. California had argued for greater reservoir fluctuations, which would give it greater access to surpluses. [↑](#footnote-ref-143)
143. 143 ***Colorado*** ***River*** Issues, The Arizona Perspective 2 (Nov. 7, 1995). [↑](#footnote-ref-144)
144. 144 Id. at 2, 13-14. [↑](#footnote-ref-145)
145. 145 Ariz. Dep't of Water Res., Discussion Paper: A Proposal to Increase the use of ***Colorado*** ***River*** Water in the State of Arizona 2 (Oct. 1995). [↑](#footnote-ref-146)
146. 146 Id. [↑](#footnote-ref-147)
147. 147 Susan Greene, Pact may Bring More Water, Las Vegas Rev.-J., Nov. 22, 1995. [↑](#footnote-ref-148)
148. 148 Draft Memorandum of Understanding Between the Southern Nevada Water Authority and the Metropolitan Water District of Southern California 1, 3 (Nov. 16, 1995). [↑](#footnote-ref-149)
149. 149 See id. at 2. [↑](#footnote-ref-150)
150. 150 Id. at 4. [↑](#footnote-ref-151)
151. 151 Id. at 5. [↑](#footnote-ref-152)
152. 152 Letter from Fife Symington, Governor of Arizona, to Pete Wilson, Governor of California 2 (Nov. 17, 1995); Letter from Fife Symington, Governor of Arizona, to Bruce Babbitt, Sec'y of the Interior 1 (Nov. 22, 1995). [↑](#footnote-ref-153)
153. 153 Susan Greene, Arizona Raps Water Alliance, Las Vegas Rev.-J., Nov. 23, 1995 (quoting Fife Symington, Governor of Arizona). [↑](#footnote-ref-154)
154. 154 Id. (quoting Bob Miller, Governor of Nevada). [↑](#footnote-ref-155)
155. 155 See Part I, supra note 3, at 313. [↑](#footnote-ref-156)
156. 156 Letter from Rita P. Pearson, Dir., Arizona Dep't of Water Res., to John R. Wodraska, Gen. Manager, Metro. Water Dist. of S. Cal. (Dec. 5, 1995). [↑](#footnote-ref-157)
157. 157 Letter from Tellis Codekas, President Coachella Valley Water Dist., William R. Condit, President, Imperial Irrigation Dist. & Virgil Jones, President, Palo Verde Irrigation Dist., to Jack Foley, Chairman, Metro. Water Dist. of S. Cal. (Nov. 28, 1995). [↑](#footnote-ref-158)
158. 158 Letter from Mark Watton, Chair, Bd. of Dirs., San Diego County Water Auth., to Jack Foley, Chairman, Metro. Water Dist. of S. Cal. (Dec. 12, 1995). [↑](#footnote-ref-159)
159. 159 Letter from Pete Wilson, Governor of California, to Fife Symington, Governor of Arizona (Dec. 4, 1995). [↑](#footnote-ref-160)
160. 160 Letter from Pete Wilson, Governor of California, to Jack Foley, Chairman, Bd. of Dirs., Metro. Water Dist. of S. Cal. (Jan. 24, 1996); see also Steve La Rue, Water Deal Assailed by Wilson, San Diego Union, Jan. 27, 1996, at A3. [↑](#footnote-ref-161)
161. 161 Press Release, U.S. Dep't of the Interior, Statement of the Department of the Interior (Nov. 24, 1995); Jeffrey Cohen, Water Decision on Hold, Las Vegas Rev.-J., Nov. 25, 1995. [↑](#footnote-ref-162)
162. 162 Bruce Babbitt, Sec'y of the Interior, Address to the ***Colorado*** ***River*** Water Users Association, 1995 Annual Conference 9-12 (Dec. 8, 1995). [↑](#footnote-ref-163)
163. 163 See Part I, supra note 3, at 307. [↑](#footnote-ref-164)
164. 164 Bruce Babbitt 1995 Address, supra note 162, at 8. [↑](#footnote-ref-165)
165. 165 Id. at 20-21. [↑](#footnote-ref-166)
166. 166 Id. at 18-21, 24. [↑](#footnote-ref-167)
167. 167 Sue McClurg, ***Colorado*** ***River*** Controversies, W. Water, Mar.-Apr. 1996, at 4-5. [↑](#footnote-ref-168)
168. 168 Id. at 13. [↑](#footnote-ref-169)
169. 169 [*Ariz. Rev. Stat. Ann. 45-105*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:68K0-T653-CGX8-0261-00000-00&context=1516831), -107, -421(7), -566(A)(13)(a)-(c), -567(A)(11)(a)-(c), -611(C)(3), -615(4), -802.01, -852.01, -896.01, -2401 to -2472 (West 2003); Id. 48-3710, -3713, -3715. [↑](#footnote-ref-170)
170. 170 Id. 45-801.01 to -836.01. [↑](#footnote-ref-171)
171. 171 [*376 U.S. 340, 342 (1964).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H350-003B-S2D6-00000-00&context=1516831) [↑](#footnote-ref-172)
172. 172 Arizona projected its diversions of ***Colorado*** ***River*** water would increase from 2.15 million acre-feet in 1994 to 2.59 million acre-feet in 1996 and 2.7 million acre-feet in 1997. Memorandum from Chuck Lile, Dir., ***Colo.*** Water Conservation Bd., to James S. Lochhead, Exec. Dir., ***Colo.*** Dep't of Nat. Res. 2 (May 16, 1996). [↑](#footnote-ref-173)
173. 173 Press Release, San Diego County Water Auth., Directors Release Summary of Draft Terms for Water Transfer 2-4 (July 23, 1996). [↑](#footnote-ref-174)
174. 174 See generally Metro. Water Dist. of S. Cal., Preliminary Comments Re: Cooperative Water Conservation and Transfer Proposal Summary of Draft Terms (Sept. 30, 1996). [↑](#footnote-ref-175)
175. 175 Letter from Tom Levy, Gen. Manager, Coachella Valley Water Dist., to Michael J. Clinton, Gen. Manager, Imperial Irrigation Dist. 2-3 (Oct. 16, 1996). See also Part I, supra note 3, at 307-09. [↑](#footnote-ref-176)
176. 176 Letter from Governor's Representatives on the ***Colorado*** ***River*** Operations, States of Arizona, ***Colorado***, Nevada, New Mexico, Utah, and Wyoming, to David Kennedy, Dir., California Dep't of Water Res. & Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of Cal. 2 (Dec. 9, 1996). [↑](#footnote-ref-177)
177. 177 ***Colo.*** ***River*** Bd. of Cal., First Quarterly Progress Report, Living Within California's Annual ***Colorado*** ***River*** Apportionment 3 (1997). [↑](#footnote-ref-178)
178. 178 Letter from Governor's Representatives on the ***Colorado*** ***River*** Operations, supra note 176, at 2. [↑](#footnote-ref-179)
179. 179 Id. at 1-2. Summarizing Lower Basin States' water use, the letter stated:

     Nevada's use of ***Colorado*** ***River*** water increased from about 175,000 [acre-feet] in 1992 to about 245,000 [acre-feet] in 1996. Arizona's use of ***Colorado*** ***River*** water increased from about 1.8 [million acre-feet] in 1992 to about 2.6 [million acre-feet] in 1996… . Use of ***Colorado*** ***River*** water by California agriculture increased from about 3.2 [million acre-feet] in 1992 to over 4 [million acre-feet] in 1996 - despite the purported conservation of up to 106,000 [acre-feet] of water under the IID/MWD [water conservation and transfer] agreement.

     Id at 2. [↑](#footnote-ref-180)
180. 180 Id. at 2-3. [↑](#footnote-ref-181)
181. 181 Bruce Babbitt, Sec'y of the Interior, Address to the ***Colorado*** ***River*** Water Users Association, 1996 Annual Conference (Dec. 19, 1996). [↑](#footnote-ref-182)
182. 182 Id. at 4. [↑](#footnote-ref-183)
183. 183 Id. at 5. [↑](#footnote-ref-184)
184. 184 Id. [↑](#footnote-ref-185)
185. 185 Id. at 6-7. [↑](#footnote-ref-186)
186. 186 Bruce Babbitt 1996 Address, supra note 181, at 7. [↑](#footnote-ref-187)
187. 187 Id. at 7-8. [↑](#footnote-ref-188)
188. 188 Letter from James S. Lochhead, Exec. Dir., ***Colo.*** Dep't of Nat. Res., to Don Ament, Chairman, ***Colo.*** State Senate Agric., Nat. Res. and Energy Comm. & Lewis H. Entz, Chairman, ***Colo.*** House Agric. Comm. 2 (Dec. 20, 1996). [↑](#footnote-ref-189)
189. 189 See Part I, supra note 3, at 307-09. [↑](#footnote-ref-190)
190. 190 In her 1994 testimony before Congress, Assistant Secretary for Water and Science, Betsy Rieke, had summarized the problem as follows:

     The administration problem stems from the fact that the separate rights of the California agricultural entitlement holders have not been quantified. Rather, the irrigation districts share a joint entitlement to 3.85 [million acre-feet] of California's 4.4 [million acre-feet] apportionment. The separate rights are prioritized so it is clear who has the prior right in normal and shortage years. However, each district has the right to utilize all the water it can put to reasonable beneficial use within its service area as long as the 3.85 [million acre-feet] is not exceeded. Such a system of elastic water rights will make it difficult to assign responsibility for overruns if the 3.85 [million acre-feet] entitlement is exceeded, and places extreme pressure on the junior entitlement holders. Such a system also hampers water marketing and transfers when a high priority user tries to transfer water to lower priority users; users with intervening priorities generally take action to block any transfers.

     Elizabeth Ann Rieke, Assistant Sec'y for Water & Science, U.S. Dep't of the Interior, Statement Before the Water and Power Subcommittee of the United States Senate Energy & Nat. Res. Comm. 15 (June 8, 1994). [↑](#footnote-ref-191)
191. 191 Minutes, Record of the ***Colorado*** ***River*** Basin States Meeting, Las Vegas, Nev. 1-2 (Mar. 31-Apr. 1, 1997). [↑](#footnote-ref-192)
192. 192 See generally ***Colo.*** ***River*** Bd. of Cal., Draft Policy and Principles of the ***Colorado*** ***River*** Board of California: California's ***Colorado*** ***River*** Plan (Apr. 17, 1997). [↑](#footnote-ref-193)
193. 193 Memorandum from James S. Lochhead, Exec. Dir., ***Colo.*** Dep't of Nat. Res., to Roy Romer, Governor of ***Colorado***, Don Ament, ***Colorado*** State Senator, Lewis Entz, ***Colorado*** State Representative, ***Colo.*** Water Conservation Bd. & ***Colo.*** ***River*** Advisory Council (Aug. 20, 1997). [↑](#footnote-ref-194)
194. 194 Alec Rosenberg, Water Plan Doesn't Float, yet, Imperial Valley Press, Aug. 12, 1997, at A1. [↑](#footnote-ref-195)
195. 195 First Quarterly Progress Report, supra note 177, at 3. [↑](#footnote-ref-196)
196. 196 Memorandum from James S. Lochhead, Exec. Dir., ***Colo.*** Dep't of Nat. Res., to Roy Romer, Governor of ***Colorado***, Don Ament, ***Colorado*** State Senator, Lewis Entz, ***Colorado*** State Representative, CWCB Members & ***Colo.*** ***River*** Advisory Council 1-2 (Nov. 3, 1997). [↑](#footnote-ref-197)
197. 197 ***Colo.*** ***River*** Bd. of Cal., Draft ***Colorado*** ***River*** Board 4.4 Plan, California's use of its ***Colorado*** ***River*** Allocation 5, 14-15 (Oct. 8, 1997). [↑](#footnote-ref-198)
198. 198 Bruce Babbitt, Sec'y of the Interior, Address to the ***Colorado*** ***River*** Water Users Association, 1997 Annual Conference 6 (Dec. 18, 1997). [↑](#footnote-ref-199)
199. 199 Id. at 3; Offstream Storage of ***Colorado*** ***River*** Water and Interstate Redemption of Storage Credits in the Lower Division States, [*62 Fed. Reg. 68492*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:3RNP-2XF0-006W-83B3-00000-00&context=1516831) (Dec. 31, 1997). [↑](#footnote-ref-200)
200. 200 Offstream Storage of ***Colorado*** ***River*** Water and Development and Lease of Intentionally Created Unused Apportionment in the Lower Division States, 43 C.F.R. pt.414 (2003). [↑](#footnote-ref-201)
201. 201 David E. Lindgren, ***Colorado*** ***River*** Update: The Cliff-Hanger Continues, But is it all Motion or is There Real Progress Beneath the Surface?, 3 W. Water L. & Pol'y Rep. 237, 239 (1999). [↑](#footnote-ref-202)
202. 202 Press Release, San Diego County Water Auth., Landmark Water Conservation and Transfer Agreement Ratified 3 (Apr. 29, 1998). [↑](#footnote-ref-203)
203. 203 Letter from the Governor's Representatives on ***Colorado*** ***River*** Operations, States of Arizona, ***Colorado***, Nevada, New Mexico, Utah, and Wyoming, to Bruce Babbitt, Sec'y of the Interior 1-2 (May 27, 1998). [↑](#footnote-ref-204)
204. 204 Id. [↑](#footnote-ref-205)
205. 205 Memorandum of Understanding of Essential Terms of a Contract Between MWD and SDCWA 5 (Aug. 12, 1998). [↑](#footnote-ref-206)
206. 206 Id. at 2-3. [↑](#footnote-ref-207)
207. 207 Memorandum from James S. Lochhead, to the Governor's Representatives on ***Colorado*** ***River*** Operations, States of Arizona, ***Colorado***, Nevada, New Mexico, Utah, and Wyoming 2 (Sept. 11, 1998). [↑](#footnote-ref-208)
208. 208 James S. Lochhead, Personal Notes, Seven States Meeting, San Diego, Cal., at 1 (Sept. 21, 1998). [↑](#footnote-ref-209)
209. 209 States of Ariz., ***Colo.***, Nev., N.M., Utah and Wyo., Background and Principles for Negotiation - Special Interim Criteria for Releases of Water From Lake Mead During Implementation of the California 4.4 Plan (Oct. 20, 1998) [hereinafter Six States Principles]. [↑](#footnote-ref-210)
210. 210 Id. at 2-4. [↑](#footnote-ref-211)
211. 211 See Part I, supra note 3, at 309, 312. [↑](#footnote-ref-212)
212. 212 This operational strategy is based on providing adequate reservoir storage capacity necessary to capture an assumed runoff without spilling, rather than an actual annual forecast. The 70R strategy is based on an assumed runoff value of the seventieth percentile of excedance based on the historic period of record. [↑](#footnote-ref-213)
213. 213 See Part I, supra note 3, at 314. [↑](#footnote-ref-214)
214. 214 Memorandum of Understanding between IID/CVWD/DOI Regarding Quantification of ***Colorado*** ***River*** Rights (Dec. 16, 1998) [hereinafter IID/CVWD/DOI MOU]. [↑](#footnote-ref-215)
215. 215 Bruce Babbitt, Sec'y of the Interior, Address to the ***Colorado*** ***River*** Water Users Association, 1998 Annual Conference (Dec. 17, 1998); Memorandum from James S. Lochhead, to ***Colo.*** Water Conservation Bd. & ***Colo.*** ***River*** Advisory Council 2 (Dec. 26, 1998). [↑](#footnote-ref-216)
216. 216 Part I, supra note 3, at 307-09. [↑](#footnote-ref-217)
217. 217 Memorandum from James S. Lochhead, supra note 215, at 2; IID/CVWD/DOI MOU, supra note 214, at 2-5. [↑](#footnote-ref-218)
218. 218 Bruce Babbitt 1998 Address, supra note 215, at 4. [↑](#footnote-ref-219)
219. 219 Id. [↑](#footnote-ref-220)
220. 220 See id. at 3. [↑](#footnote-ref-221)
221. 221 Id. at 4. [↑](#footnote-ref-222)
222. 222 Id. [↑](#footnote-ref-223)
223. 223 Salton Sea Reclamation Act of 1998, Pub. L. No. 105-372, ***112 Stat. 3377, 3377-3380.*** [↑](#footnote-ref-224)
224. 224 Bruce Babbitt 1998 Address, supra note 215, at 5. [↑](#footnote-ref-225)
225. 225 Memorandum from Metro. Water Dist. of S. Cal. Negotiating Team, to Bd. of Dirs. 3-4 (Jan. 6, 1999). [↑](#footnote-ref-226)
226. 226 Letter from Bruce Kuhn, President, Imperial Irrigation Dist., to Phil Pace, Chairman, Bd. of Dirs., Metro. Water Dist. of S. Cal. (Jan. 11, 1999). [↑](#footnote-ref-227)
227. 227 Tony Perry, Babbitt Deals Setback to MWD, L.A. Times, Jan. 22, 1999, at A3. [↑](#footnote-ref-228)
228. 228 Letter from Phillip J. Pace, Chairman, Bd. of Dirs., Metro. Water Dist. of S. Cal., to Bruce Babbitt, Sec'y of the Interior 1 (Jan. 25, 1999). [↑](#footnote-ref-229)
229. 229 Id. at 2. [↑](#footnote-ref-230)
230. 230 See Letter from Tellis Codekas, President, Coachella Valley Water Dist., Bruce Kuhn, Imperial Irrigation Dist. & Robert Micalizio, President, Palo Verde Irrigation Dist., to Phillip J. Pace, Chairman, Bd. of Dirs., Metropolitan Water Dist. of S. Cal. (Feb. 2, 1999) (quoting parts of the resolution). [↑](#footnote-ref-231)
231. 231 Letter from David J. Hayes, Counselor to the Sec'y, U.S. Dep't of the Interior, to Phillip J. Pace, Chairman-Elect, Bd. of Dirs., Metro. Water Dist. of S. Cal. 3 (Feb. 1, 1999). [↑](#footnote-ref-232)
232. 232 Letter from Bruce Babbitt, Sec'y of the Interior, to Phillip J. Pace, Chairman, Bd. of Dirs., Metropolitan Water Dist. of S. Cal. (Feb. 10, 1999). [↑](#footnote-ref-233)
233. 233 MWD's Policy Toward the California 4.4 Plan: Hearing Before the Senate Select Comm. on S. Cal. Water Districts' Expenditures & Governance, 1999 Leg. (Cal. Mar. 17, 1999). [↑](#footnote-ref-234)
234. 234 Rudy Yniguez, Water Districts Told to Move Ahead With Transfer, Imperial Valley Press, Apr. 28, 1999, at A1. [↑](#footnote-ref-235)
235. 235 Memorandum from James S. Lochhead, to Greg Walcher, Exec. Dir., ***Colo.*** Dep't of Nat. Res., Peter Evans, Dir., ***Colo.*** Water Conservation Bd., Randy Seaholm, ***Colo.*** Water Conservation Bd., Jennifer Gimbel, Deputy Attorney Gen., ***Colo.***, & Carol Angel, Deputy Attorney Gen., ***Colo.***, at 1 (Apr. 5, 1999) [hereinafter ***Colo.*** ***River*** Update]. [↑](#footnote-ref-236)
236. 236 W. States Water Council, Water Resources, California/***Colorado*** ***River***, W. States Water, Apr. 2, 1999, at 2. [↑](#footnote-ref-237)
237. 237 Id. [↑](#footnote-ref-238)
238. 238 ***Colo.*** ***River*** Update, supra note 235, at 1-2. [↑](#footnote-ref-239)
239. 239 The notice stated, in part:

     Reclamation intends to scope and, if appropriate, to develop and implement specific criteria under which "surplus" determinations will be made for the Lower Basin States.

     … .

     Reclamation may implement the surplus criteria by revising the Long-Range Operating Criteria set forth in Article III(3) or by developing interim implementing criteria pursuant to Article III(3) of the Long-Range Operating Criteria… .

     … .

     … Reclamation recognizes that efforts are currently underway to reduce California's reliance on surplus deliveries.

     Reclamation will take account of progress in that effort, or lack thereof, in the decision-making process regarding specific surplus criteria. Reclamation also intends to make full use of technical information and approaches that have been developed through on-going discussions with the Basin States.

     Intent to Solicit Comments on the Development of Surplus Criteria for Management of the ***Colorado*** ***River*** and to Initiate National Environmental Policy Act (NEPA) Process, [*64 Fed. Reg. 27,008, 27,009*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:3WGX-YXP0-006W-82S3-00000-00&context=1516831) (May 18, 1999). [↑](#footnote-ref-240)
240. 240 Tony Perry, Mediator Will try to Keep Water war From Boiling Over, L.A. Times, Apr. 6, 1999, at A3; ***Colo.*** ***River*** Update, supra note 235, at 2. [↑](#footnote-ref-241)
241. 241 See generally Michael Gardner, Agreement on ***Colorado*** ***River*** Water use Nears, San Diego Union Trib., May 29, 1999, at A3-4 (summarizing discussions between water users about quantification of their water rights, and 3.1 million acre-feet cap for IID). [↑](#footnote-ref-242)
242. 242 See Rudy Yniguez, IID Puts 500,000 acre-feet on Table, Imperial Valley Press, June 4, 1999, at A1. [↑](#footnote-ref-243)
243. 243 See Part I, supra note 3, at 308. [↑](#footnote-ref-244)
244. 244 Cal. Dep't of Water Res. et al., Key Terms for Quantification Settlement Among the State of California, IID, CVWD and MWD (Oct. 15, 1999). [↑](#footnote-ref-245)
245. 245 Id. at 23. [↑](#footnote-ref-246)
246. 246 Id. at 3-4, 12. [↑](#footnote-ref-247)
247. 247 Id. at 5-10. [↑](#footnote-ref-248)
248. 248 Id. at 16A. [↑](#footnote-ref-249)
249. 249 Cal. Dep't of Water Res. et al., supra note 244, at 17-19. [↑](#footnote-ref-250)
250. 250 Letter from Governors' Representatives on ***Colorado*** ***River*** Operations, States of Arizona, ***Colorado***, Nevada, New Mexico, Utah and Wyoming, to Tom Hannigan, Dir., Cal. Dep't of Water Res., Jerry Zimmerman, Dir., ***Colo.*** ***River*** Bd. of Cal. 1-3 (Dec. 6, 1999). [↑](#footnote-ref-251)
251. 251 See Memorandum from Dennis B. Underwood, Vice-Pres. Metro. Water Dist. of S. Cal., to Greg Walcher, Exec. Dir., ***Colo.*** Dep't of Nat. Res. (Mar. 15, 2000); Notes from Seven States Meeting - Phoenix (Mar. 22, 2000). See generally S. Nev. Water Auth., Comparison of Interim Criteria Proposals (Mar. 22, 2000) (showing tiered plan based on Lake Mead elevations, graphically comparing proposals). [↑](#footnote-ref-252)
252. 252 ***Colo.*** ***River*** Bd. of Cal., Draft: California's ***Colorado*** ***River*** Water use Plan 25-26 (May 11, 2000). [↑](#footnote-ref-253)
253. 253 Cal. Dep't of Water Res., California's ***Colorado*** ***River*** Water use Quantification Settlement Agreement Milestones (June 13, 2000) (provided to Senate Agriculture & Water Committee and Assembly Water, Parks & Wildlife Committee). Among the required elements were the QSA Agreement; four water transfer agreements among IID, CVWD, MWD and San Diego; a federal approval agreement for each of the transfer agreements; construction and funding agreements for implementation of canal lining and other construction activities; Indian reserved rights settlement agreements; and California and federal environmental and endangered species compliance. [↑](#footnote-ref-254)
254. 254 See Six States Principles, supra note 209, at 3. [↑](#footnote-ref-255)
255. 255 Memorandum from James S. Lochhead, to Greg Walcher, Exec. Dir., ***Colo.*** Dep't of Nat. Res., Peter Evans, Dir., ***Colo.*** Water Conservation Bd., Randy Seaholm, ***Colo.*** Water Conservation Bd., Jennifer Gimbel, Deputy Attorney Gen., ***Colo.***, & Carol Angel, Deputy Attorney Gen., ***Colo.***, at 1-2 (June 8, 2000). [↑](#footnote-ref-256)
256. 256 See Six States Principles, supra note 209, at 3. [↑](#footnote-ref-257)
257. 257 ***Colo.*** ***River*** Bd. of Cal., Draft: Enforceability of Interim Lake Mead Operating Criteria 1-4 (June 15, 2000); See Six States Principles, supra note 209, at 3. [↑](#footnote-ref-258)
258. 258 ***Colo.*** ***River*** Bd. of Cal., Draft: Justification for Cumulative Inadvertent Overrun Accounts for the Imperial Irrigation District, Coachella Valley Water District, and the Metropolitan Water District of Southern California 6-7 (June 7, 2000). [↑](#footnote-ref-259)
259. 259 Bureau of Reclamation, U.S. Dep't of the Interior, Draft Definition and Payback of Inadvertent Overruns, and use of Long Term Averaging Method for Delivery of ***Colorado*** ***River*** Water (Aug. 17, 2000). [↑](#footnote-ref-260)
260. 260 Part I, supra note 3, at 307-09. [↑](#footnote-ref-261)
261. 261 ***Colo.*** ***River*** Bd. of Cal., Draft: Accounting of Consumptive Uses as the Average Annual Consumptive use Over Preceding Years 3-4, 7 (Aug. 16, 2000). [↑](#footnote-ref-262)
262. 262 Cal. Dep't of Water Res., supra note 253, at 3-4. [↑](#footnote-ref-263)
263. 263 Sue McClurg, A ***Colorado*** ***River*** Compromise, W. Water, Nov./Dec. 2000, at 4, 13. [↑](#footnote-ref-264)
264. 264 The proposed federal action was described as:

     The adoption of specific interim surplus criteria pursuant to Article III(3)(b) of the [Operating Criteria]. The interim surplus criteria would be used annually to determine whether the conditions exist under which the Secretary may declare the availability of "surplus" water, as defined, for use within the states of Arizona, California and Nevada. The criteria must be consistent with both the Decree entered by the U.S. Supreme Court in 1964 in the case of Arizona v. California (Decree) and the [Operating Criteria]. The interim surplus criteria would remain in effect through calendar year 2015, subject to five-year reviews, concurrent with the [Operating Criteria] reviews, and applied each year as part of the Annual Operating Plan.

     Bureau of Reclamation, U.S. Dep't of the Interior, Draft Environmental Impact Statement ***Colorado*** ***River*** Interim Surplus Criteria, at S-1 (filed July 7, 2000), at [*http://www.lc.usbr.gov/g4000/surplus1/SURPLUS*](http://www.lc.usbr.gov/g4000/surplus1/SURPLUS) DEIS.HTML. [↑](#footnote-ref-265)
265. 265 A 75R strategy:

     Refers to a value for which 75 percent of the historic natural flow at Lee Ferry is less than this value (18.1 [million acre-feet]). Spill avoidance strategies assume a particular percentile historical runoff, along with normal depletion projections for the next year… . If the calculated space available at the end of the next year is less than the space required by flood control criteria, then [the Secretary determines a surplus condition].

     Id. at S-4. This is contrasted to the 70R strategy that the six states advocated as the proper baseline, which was based on a seventy percent of the historic natural flow. [↑](#footnote-ref-266)
266. 266 ***Colorado*** ***River*** Interim Surplus Criteria, [*65 Fed. Reg. 48,531, 48,531*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:40XF-BNY0-006W-84R5-00000-00&context=1516831) (Aug. 8, 2000); ***Colorado*** ***River*** Interim Surplus Criteria; Correction, ***65 Fed. Reg. 57,371*** (Sept. 22, 2000). [↑](#footnote-ref-267)
267. 267 Bureau of Reclamation, U.S. Dep't of the Interior, Final Environmental Impact Statement, ***Colorado*** ***River*** Interim Surplus Criteria 2.2 (Dec. 2000), at [*http://www.lc.usbr.gov/g4000/surplus/SURPLUS*](http://www.lc.usbr.gov/g4000/surplus/SURPLUS) FEIS.HTML [hereinafter FEIS]. [↑](#footnote-ref-268)
268. 268 ***Colorado*** ***River*** Interim Surplus Guidelines ***66 Fed. Reg. 7772*** (Jan. 25, 2001). [↑](#footnote-ref-269)
269. 269 ***Colorado*** ***River*** Interim Surplus Criteria, [*65 Fed. Reg. at 48,535.*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:40XF-BNY0-006W-84R5-00000-00&context=1516831) [↑](#footnote-ref-270)
270. 270 See ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. 7772, 7780*** (Jan. 25, 2001). [↑](#footnote-ref-271)
271. 271 ***Id. at 7780*** (emphasis added and citations omitted). [↑](#footnote-ref-272)
272. 272 [*376 U.S. 340, 343 (1964);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H350-003B-S2D6-00000-00&context=1516831) see also Part I, supra note 3, at 311-12. [↑](#footnote-ref-273)
273. 273 ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. at 7780.*** [↑](#footnote-ref-274)
274. 274 ***Id. at 7781.*** [↑](#footnote-ref-275)
275. 275 ***Id. at 7780-81.*** [↑](#footnote-ref-276)
276. 276 ***Id. at 7780.*** [↑](#footnote-ref-277)
277. 277 See ***Colorado*** ***River*** Interim Surplus Criteria, [*65 Fed. Reg. 48,351, 48,357*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:40XF-BN50-006W-84M2-00000-00&context=1516831) (Aug. 8, 2000). [↑](#footnote-ref-278)
278. 278 The Record of Decision states:

     Under current practice, surplus declarations under the Treaty for Mexico are declared when flood control releases are made. Modeling assumptions used in the FEIS are based on this practice. The proposed action is not intended to identify, or change in any manner, conditions when Mexico may schedule up to an additional 0.2 [million acre-feet]. Any issues relating to the implementation of the Treaty, including any potential changes in approach relating to surplus declarations under the Treaty, must be addressed in a bilateral fashion with the Republic of Mexico.

     ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. at 7781.*** [↑](#footnote-ref-279)
279. 279 ***Colorado*** ***River*** Interim Surplus Criteria, [*65 Fed. Reg. at 48,357;*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:40XF-BN50-006W-84M2-00000-00&context=1516831) see Part I, supra note 3, at 314. [↑](#footnote-ref-280)
280. 280 The 2003 Annual Operating Plan states:

     The Secretary is considering information submitted to the Department of the Interior by the ***Colorado*** ***River*** Basin States whereby 602(a) storage requirements determined in accordance with Article II(1) of the Operating Criteria would utilize a value of not less than 14.85 [million acre-feet] (elevation 3630 feet) for Lake Powell through the year 2016. The Secretary, through Reclamation, may initiate a NEPA process in 2003 to determine the impacts of the Basin States proposed 602(a) storage.

     Bureau of Reclamation, U.S. Dep't of the Interior, 2003 Annual Operating Plan For ***Colorado*** ***River*** System Reservoirs 15 (Dec. 2002), at [*http://www.uc.usbr.gov/wrg/aop/aop03*](http://www.uc.usbr.gov/wrg/aop/aop03) final.pdf (citation omitted). [↑](#footnote-ref-281)
281. 281 ***Colorado*** ***River*** Interim Surplus Criteria, [*65 Fed. Reg. at 48,357-48,358.*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:40XF-BN50-006W-84M2-00000-00&context=1516831) [↑](#footnote-ref-282)
282. 282 See ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. at 7782.*** [↑](#footnote-ref-283)
283. 283 The Guidelines provide: "In the event that the California contractors and the Secretary have not executed [the QSA (and its related documents)] by Dec. 31, 2002, the interim surplus determinations under sections 2(B)(1) and 2(B)(2) of these Guidelines will be suspended and will instead be based on the 70R Strategy … ." Id. [↑](#footnote-ref-284)
284. 284 Id. [↑](#footnote-ref-285)
285. 285 Id. [↑](#footnote-ref-286)
286. 286 Imperial Irrigation Dist. et al., Draft Quantification Settlement Agreement 2 (Dec. 12, 2000). [↑](#footnote-ref-287)
287. 287 Draft Agreement for Acquisition of Conserved Water Between Imperial Irrigation District and Coachella Valley Water District 5 (Oct. 17, 2000). [↑](#footnote-ref-288)
288. 288 Draft Agreement for Acquisition of Conserved Water Between Imperial Irrigation District and the Metropolitan Water District Southern California 5, 6 (Dec. 12, 2000). [↑](#footnote-ref-289)
289. 289 Draft Agreement for Acquisition of Water Between Coachella Valley Water District and the Metropolitan Water District Southern California 5, 6 (Dec. 12, 2000). [↑](#footnote-ref-290)
290. 290 U.S. Dep't of the Interior et al., Draft Implementation Agreement (Dec. 12, 2000). [↑](#footnote-ref-291)
291. 291 See Palo Verde Irrigation Dist. et al., Boulder Canyon Project Agreement (Aug. 18, 1931), at [*http://www.lc.usbr.gov/g1000/pdfiles/ca7pty.pdf*](http://www.lc.usbr.gov/g1000/pdfiles/ca7pty.pdf) (apportioning California's share of the waters of the ***Colorado*** ***River*** among the applicants in the State). [↑](#footnote-ref-292)
292. 292 Interim Surplus Guidelines Agreement Between the State of Arizona and the Metropolitan Water District of Southern California (May 23, 2001). [↑](#footnote-ref-293)
293. 293 Id. 5, 6. This forbearance was accomplished through a Joint Resolution of the Arizona Legislature. S.J. Res. 1001, 45th Leg., 1st Reg. Sess. (Ariz. 2001). [↑](#footnote-ref-294)
294. 294 Id. 2.1.2, 5.6, 7. [↑](#footnote-ref-295)
295. 295 Memorandum from James S. Lochhead, to Greg Walcher, Exec. Dir., ***Colo.*** Dep't of Nat. Res., Peter Evans, Dir., ***Colo.*** Water Conservation Bd., Randy Seaholm, ***Colo.*** Water Conservation Bd., Jennifer Gimbel, Deputy Attorney Gen., ***Colo.***, Carol Angel, Deputy Attorney Gen., ***Colo.***, at 1 (Apr. 12, 2000) [hereinafter Status Meeting]. [↑](#footnote-ref-296)
296. 296 Letter from Lic. Federico Diaz Gallego, President, Econ. Devel. Council of Mex., to Patricia Mulroy, S. Nev. Water Auth. (Apr. 5, 2000). Letter from Arq. Victor Hermosillo Celada, Mayor, Mexicali City, to Patricia Mulroy, S. Nev. Water Auth. (Apr. 5, 2000). [↑](#footnote-ref-297)
297. 297 Status Meeting, supra note 295, at 1. [↑](#footnote-ref-298)
298. 298 See Part I, supra note 3, at 309-10. [↑](#footnote-ref-299)
299. 299 Id. [↑](#footnote-ref-300)
300. 300 Status Meeting, supra note 295, at 2. [↑](#footnote-ref-301)
301. 301 The consultation requirements of section 7(a)(2) of the ESA only apply if an agency action may affect the continued existence of a listed species. [*16 U.S.C. 1536*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S8T-0KG2-8T6X-7084-00000-00&context=1516831)(a)(2) (2000). The ESA regulations define agency action to mean "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies … ." ***50 C.F.R. 402.02 (2002)***. The regulation further states that section 7 applies to "all actions in which there is discretionary Federal involvement or control." Id. 402.03. The regulation gives several examples of an ESA agency action, including the granting of licenses, contracts, easements, leases, right-of-ways and permits. Id. 402.02. [↑](#footnote-ref-302)
302. 302 "Action area [is] all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." Id. [↑](#footnote-ref-303)
303. 303 ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. 7772, 7777*** (Jan. 25, 2001). [↑](#footnote-ref-304)
304. 304 Plaintiff's Complaint at 17, Defenders of Wildlife v. Babbitt, No. 1:00CV01544 (D.D.C. filed June 28, 2000). [↑](#footnote-ref-305)
305. 305 Memorandum from John Leshy, Solicitor, U.S. Dep't of the Interior, to Eluid L. Martinez, Comm'r, Bureau of Reclamation (Aug. 14, 2000). [↑](#footnote-ref-306)
306. 306 Id. at 2. [↑](#footnote-ref-307)
307. 307 FEIS, supra note 267, at 3.8-1. [↑](#footnote-ref-308)
308. 308 Id. at 3.16-18. [↑](#footnote-ref-309)
309. 309 Id. at 3.8-24 to 3.8-27. [↑](#footnote-ref-310)
310. 310 ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. 7772*** (Jan. 25, 2001). [↑](#footnote-ref-311)
311. 311 FEIS, supra note 267, at 2-3 to 2-4, 3.16 to 3.23. [↑](#footnote-ref-312)
312. 312 Alberto Szekely, Advisor to the Sec'y of Foreign Relations, Address at the ***Colorado*** ***River*** Delta Bi-National Symposium 16 (Sep. 11-12, 2001); [*http://www.ibwc.state.gov/FAO/CRDS0901/EnglishSymposium.pdf*](http://www.ibwc.state.gov/FAO/CRDS0901/EnglishSymposium.pdf). [↑](#footnote-ref-313)
313. 313 In Sept. 2001, Paula Dobrioski, Undersecretary for Global Affairs, State Dep't, prepared a statement to be read by Dennis Linsky, which said:

     The Department of State is aware of Mexico's concerns that certain U.S. actions with respect to the management of the ***Colorado*** ***River*** system within the United States have failed to take into account the potential impacts on our neighbor Mexico. However, the Department of State believes, nonetheless, that the United States carefully considered such transboundary impacts during a series of consultations held with Mexico under the auspices of International Boundary and Water Commission over the past year, as well as during the development of the Environmental Impact Statement called for by the United States National Environmental Policy Act.

     The Department of State also believes that in taking these actions the Unites states is acting in a manner that is consistent with the 1983 La Paz agreement. The United States concluded that adjustments to the management of the ***Colorado*** ***River*** system within the United States [sic]. Those adjustments which have occurred will not result in appreciable adverse impacts on Mexico.

     In closing, it's important to add that the United States intends to fulfill its treaty obligations to deliver to Mexico 1.5 million acre-feet of ***Colorado*** ***River*** water per year as provided for in the 1944 Water Treaty. And the United States will continue to comply with its legal obligations concerning the salinity of those waters as provided under International Boundary Water Commission Minute 242.

     Dennis Linsky, U.S. State Dep't, Address at the ***Colorado*** ***River*** Delta Bi-National Symposium 17-18 (Sep. 11-12, 2001). [↑](#footnote-ref-314)
314. 314 Defenders of Wildlife v. Norton, No. 00-1544, slip op. (D.D.C. Mar. 31, 2003). [↑](#footnote-ref-315)
315. 315 Id. at 20. [↑](#footnote-ref-316)
316. 316 Id. at 29. [↑](#footnote-ref-317)
317. 317 Id. at 27. [↑](#footnote-ref-318)
318. 318 Id. at 29. [↑](#footnote-ref-319)
319. 319 Defenders of Wildlife, No. 00-1544, slip op. at 30-31. [↑](#footnote-ref-320)
320. 320 Bennett Raley, Assistant Sec'y for Water & Science, U.S. Dep't of Interior, Address to ***Colorado*** ***River*** Water Users Association, 2001 Annual Conference (Dec. 13, 2001). [↑](#footnote-ref-321)
321. 321 Id. at 7. [↑](#footnote-ref-322)
322. 322 Letter from John P. Carter, Partner, Horton, Knox, Carter & Foote, to Warren Weinstein, Legislative Assistant, Office of U.S. Senator Dianne Feinstein (Mar. 1, 2002). [↑](#footnote-ref-323)
323. 323 ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. 7772, 7782*** (Jan. 25, 2001). [↑](#footnote-ref-324)
324. 324 Id. [↑](#footnote-ref-325)
325. 325 ***Id. at 7779-80.*** [↑](#footnote-ref-326)
326. 326 Letter from Bennett W. Raley, Assistant Sec'y for Water & Science, U.S. Dep't of the Interior, to Stella Mendoza, President of Bd. of Dirs., Imperial Irrigation Dist. (May 31, 2002). [↑](#footnote-ref-327)
327. 327 Implementation of the California Plan for the ***Colorado*** ***River***: Opportunities and Challenges Before the House Comm. on Res., Subcomm. on Water and Power, 107th Cong., 6, 9 (June 14, 2002) (statement of Bennett W. Raley, Assistant Sec'y for Water & Science, U.S. Dep't of the Interior). [↑](#footnote-ref-328)
328. 328 See ***Colorado*** ***River*** Interim Surplus Guidelines, ***66 Fed. Reg. at 7782.*** [↑](#footnote-ref-329)
329. 329 ***Colorado*** ***River*** Interim Surplus Guidelines, Notice Regarding Implementation of Guidelines, [*67 Fed. Reg. 41,733, 41,734*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:463F-HBB0-006W-8359-00000-00&context=1516831) (June 19, 2002). [↑](#footnote-ref-330)
330. 330 See Part I, supra note 3, at 311-12. [↑](#footnote-ref-331)
331. 331 Id. at 316 n.122. [↑](#footnote-ref-332)
332. 332 Memorandum from James S. Lochhead, to City of Grand Junction, ***Colo.*** ***River*** Water Conservation Dist., Denver Water Dep't, N. ***Colo.*** Water Conservancy Dist., Southeast ***Colo.*** Water Conservancy Dist., Southwestern Water Conservation Dist. 2-3 (Sept. 24, 2002). [↑](#footnote-ref-333)
333. 333 Letter from Maureen A. Stapleton, Gen. Manager, San Diego County Water Auth., to John P. Carter, Partner, Horton, Knox, Carter & Foote 2-3 (Aug. 23, 2002). [↑](#footnote-ref-334)
334. 334 Letter from John P. Carter, Partner, Horton, Knox, Carter & Foote, to Maureen A. Stapleton, Gen. Manager, San Diego County Water Auth. 3 (Aug. 30, 2002); Letter from John P. Carter, Partner, Horton, Knox, Carter & Foote, to Maureen A. Stapleton, Gen. Manager, San Diego County Water Auth. 2 (Sept. 11, 2002). [↑](#footnote-ref-335)
335. 335 A.C.R. 251, 153rd Leg., Spec. Sess. 2-4 (Cal. 2002), at [*http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab*](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab) 0251-0300/acr 251 bill 20020918 chaptered.pdf. [↑](#footnote-ref-336)
336. 336 Letter from John L. Burton, President Pro Tempore of the State Senate, and Herb J. Wesson, Jr., Speaker of the California State Assembly, to Maureen A. Stapleton, Gen. Manager, San Diego County Water Auth., Tom Levy, Gen. Manager/Chief Eng'r, Coachella Valley Water Dist., Ronald R. Gastelum, Chief Exec. Officer, Metro. Water Dist. of S. Cal., Jesse Silva, Gen. Manager, Imperial Irrigation Dist. 1-2 (Aug. 31, 2002). [↑](#footnote-ref-337)
337. 337 Letter from Gray Davis, Governor of California, to Herb Wesson, Speaker of the State Assembly, & John Burton, President Pro Tempore of the California State Senate (Sept. 10, 2002). [↑](#footnote-ref-338)
338. 338 S.B. 1473, 153rd Leg., Spec. Sess. (Cal. 2002), at [*http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb*](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb) 1451-1500/sb 1473 bill 20020917 chaptered.pdf. [↑](#footnote-ref-339)
339. 339 S.B. 482, 153rd Leg., Spec. Sess., ch. 617, 1(b), 1(f), 2(a), 3, 7(b) (Cal. 2002),at [*http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb*](http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb) 0451-0500/sb 482 bill 20020917 chaptered.pdf. [↑](#footnote-ref-340)
340. 340 Letter from Gerald R. Zimmerman, Exec. Dir., ***Colo.*** ***River*** Bd. of Cal., to ***Colo.*** ***River*** Basin State Representatives (Sept. 13, 2002); S.B. 1473, 153rd Leg., Spec. Sess., ch. 617. [↑](#footnote-ref-341)
341. 341 Press Release, Imperial Irrigation Dist., Agreement Reached on Landmark ***Colorado*** ***River*** Water Accords (Oct. 16, 2002) (quoting Bob Hertzberg, House Speaker Emeritus). [↑](#footnote-ref-342)
342. 342 Draft Quantification Settlement Agreement Between Imperial Irrigation Dist., Metro. Water Dist. of S. Cal., and Coahcella Valley Water Dist., art. 6, 6.2(2)(ii)(c) (Nov. 27, 2002). [↑](#footnote-ref-343)
343. 343 Summary Term Sheet-Principal QSA Revisions 4 (Oct. 15, 2002). [↑](#footnote-ref-344)
344. 344 Id.; Draft Quantification Settlement Agreement Between Imperial Irrigation Dist., Metro. Water Dist. of S. Cal., and Coahcella Valley Water Dist. (Nov. 27, 2002). [↑](#footnote-ref-345)
345. 345 Letter from Bennett W. Raley, Assistant Sec'y for Water & Science, U.S. Dep't of the Interior, to Tom Levy, Gen. Manager/Chief Eng'r, Coachella Valley Water Dist., Ronald R. Gastelum, Chief Exec. Officer, Metro. Water Dist. of S. Cal., Stella Mendoza, President, Imperial Irrigation Dist. & Maureen A. Stapleton, Gen. Manager, San Diego County Water Auth. 2 (Dec. 9, 2002) [hereinafter Letter to Cal. water agencies]. [↑](#footnote-ref-346)
346. 346 Tony Perry, Inland Water Sale Rejected; Coastal Cutback Threatened, L.A. Times, Dec. 10, 2002, at A1. [↑](#footnote-ref-347)
347. 347 Imperial Irrigation District Proposal for Short-Term Fallowing Transfer Pending Resolution of Outstanding Issues and Conditions for Long-Term Transfer 1, 3 (Dec. 13, 2002). [↑](#footnote-ref-348)
348. 348 Letters from Jane Dee Hull, Governor, State of Arizona (Dec. 17, 2002), Greg E. Walcher, Exec. Dir., ***Colo.*** Dep't of Nat. Res. (Dec. 12, 2002), Philip B. Mutz, Upper ***Colo.*** ***River*** Comm'r, New Mexico, & Thomas C. Turney, State Eng'r & Sec'y Interstate Stream Comm'n, New Mexico (Dec. 16, 2002), D. Larry Anderson, Dir./Interstate Streams Comm'r (Dec. 13, 2002), Patrick T. Tyrrell, Wyoming State Eng'r (Dec. 13, 2002), to Gale Norton, Sec'y of the Interior. [↑](#footnote-ref-349)
349. 349 Gale Norton, Sec'y of the Interior, Address to the ***Colorado*** ***River*** Water Users Association, 2002 Annual Conference 1, 3-4 (Dec. 16, 2002). [↑](#footnote-ref-350)
350. 350 Id. at 3, 4. [↑](#footnote-ref-351)
351. 351 See supra text accompanying note 328-29. [↑](#footnote-ref-352)
352. 352 Gale Norton 2002 Conference, supra note 349, at 4. [↑](#footnote-ref-353)
353. 353 See supra text accompanying note 338-39. [↑](#footnote-ref-354)
354. 354 See supra text accompanying notes 292-93. [↑](#footnote-ref-355)
355. 355 Rudy Yniguez, Transfer: A Done Deal?, Imperial Valley Press, Jan. 1, 2003. [↑](#footnote-ref-356)
356. 356 See generally Tony Perry, Southland Share of Water to be cut as Deal Collapses; Farmers, MWD Fail to Reach Accord That Would Allow ***Colorado*** ***River*** Allotments to Continue, L.A. Times, Jan. 1, 2003; Press Release, U.S. Dep't of the Interior, Interior Department Transmits 2003 Water Order Approvals to ***Colorado*** ***River*** Users (Dec. 27, 2002). [↑](#footnote-ref-357)
357. 357 Bureau of Reclamation, U.S. Dep't of the Interior, 2003 Water Order Approvals 2 (Dec. 27, 2002),at [*http://www.lc.usbr.gov/pao/2003orders/2003approvals.pdf*](http://www.lc.usbr.gov/pao/2003orders/2003approvals.pdf). [↑](#footnote-ref-358)
358. 358 "From this amount, 104,000 acre-feet [is] be delivered to MWD under the 1988 [IID/MWD water transfer] agreement, 11,500 acre-feet will be provided for present perfected rights and miscellaneous users, and 10,000 acre-feet will be provided to San Diego County Water Authority under a separate agreement." Id. at 2 n.2. [↑](#footnote-ref-359)
359. 359 Id. at 2. [↑](#footnote-ref-360)
360. 360 This amount is based upon a "330,000 [acre-foot] consumptive use cap, plus 20,000 acre-feet from conserved water use under [the 1988 IID MWD water transfer] agreement, minus 3,000 acre-feet for present perfected rights and miscellaneous users." Id. at 2 n.3. [↑](#footnote-ref-361)
361. 361 Id. at 2. [↑](#footnote-ref-362)
362. 362 The ESA applies to actions "authorized, funded, or carried out by [a federal] agency," but only where there is "discretionary federal involvement or control." [*16 U.S.C. 1536*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8S8T-0KG2-8T6X-7084-00000-00&context=1516831)(a)(2) (2000); ***50 C.F.R. 402.02 (2002)***; see also supra text accompanying note 301. [↑](#footnote-ref-363)
363. 363 Letter from Bennett W. Raley, Assistant Sec'y for Water & Science, U.S. Dep't of Interior, to Jesse P. Silva, Gen. Manager, Imperial Irrigation Dist. 4-5 (Dec. 27, 2002) [hereinafter Letter to IID]. [↑](#footnote-ref-364)
364. 364 [*439 U.S. 419 (1979).*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HN0-003B-S3S8-00000-00&context=1516831) [↑](#footnote-ref-365)
365. 365 Present perfected rights are rights in existence prior to June 25, 1929, the effective date of the [*Boulder Canyon Project Act. Arizona v. California, 376 U.S. 340 (1963);*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H350-003B-S2D6-00000-00&context=1516831) [*Arizona v. California, 439 U.S. at 429.*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8HN0-003B-S3S8-00000-00&context=1516831) [↑](#footnote-ref-366)
366. 366 [*Letter to IID, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HHM0-003D-J1NM-00000-00&context=1516831) note 363, at 5. [↑](#footnote-ref-367)
367. 367 Id. at 7. Letter from Gale Norton, supra note 67. [↑](#footnote-ref-368)
368. 368 [*Letter to IID, supra*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3RX6-HHM0-003D-J1NM-00000-00&context=1516831) note 363, at 5. [↑](#footnote-ref-369)
369. 369 Letter from Gray Davis, Governor of California, to Dede Alpert & Dennis Hollingsworth, California State Senators (Jan. 14, 2003). [↑](#footnote-ref-370)
370. 370 See generally Written Statement of Jeffery Kightlinger, Gen. Counsel, and Debra Man, Vice Pres. of Water Transfers & Exchanges, Metro. Water Dist. of S. Cal. Informational Hearing of the Assembly Water, Parks and Wildlife Committee, 2003 Leg., XX Sess. (Cal. 2003). [↑](#footnote-ref-371)
371. 371 Plaintiff's Complaint at 17-18, Imperial Irrigation Dist. v. United States, No. 03 CV 006 (S.D. Cal., filed Jan. 10, 2003). [↑](#footnote-ref-372)
372. 372 Id. at 23-27. [↑](#footnote-ref-373)
373. 373 These regulations, known as "beneficial use regulations," provide for the Regional Director of the Lower ***Colorado*** Region of the Bureau of Reclamation to make a determination each year of a Contractor's estimated water requirements for the ensuing calendar year, "to the end that deliveries of ***Colorado*** ***River*** water to each Contractor will not exceed those reasonably required for beneficial use … ." [*43 C.F.R. 417.2 (2002)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:6094-SSJ1-DYB7-W305-00000-00&context=1516831). [↑](#footnote-ref-374)
374. 374 Plaintiff's Complaint at 36-38, 46-50, Imperial Irrigation Dist. v. United States, No. 03 CV 006 (S.D. Cal., filed Jan. 10, 2003). [↑](#footnote-ref-375)
375. 375 For example, two California legislators introduced a bill to limit IID's water supply to 2.6 million acre-feet per year. See Jim Sanders & Dale Kasler, Senators Target Imperial Water Agency, The Sacramento Bee, Jan. 8, 2003; S.B. 117, 154th Leg., Spec. Sess. (Cal. 2003) (Introduced Feb. 3, 2003), at [*http://www.leginfo.ca.gov/pub/bill/sen/sb*](http://www.leginfo.ca.gov/pub/bill/sen/sb) 0101-0150/sb 117 bill 20030203 introduced.pdf. [↑](#footnote-ref-376)
376. 376 Letter from Lloyd Allen, President, Imperial Irrigation Dist., to Gale Norton, Sec'y of the Interior (Jan. 10, 2003). [↑](#footnote-ref-377)
377. 377 Transcript of Motions for Preliminary Injunction, Imperial Irrigation Dist. v. United States, No 03CV0069-TJW, at 126 (S.D. Cal. argued Mar. 18, 2003). [↑](#footnote-ref-378)
378. 378 Id. at 134. [↑](#footnote-ref-379)
379. 379 Id. at 134-35. [↑](#footnote-ref-380)
380. 380 Order Remanding Action, Imperial Irrigation Dist. v. United States, No 03CV0069 W (JFS) (S.D. Cal. Apr. 17, 2003). [↑](#footnote-ref-381)
381. 381 Bureau of Reclamation, supra note 357. [↑](#footnote-ref-382)
382. 382 Letter from Bennett W. Raley, Assistant Sec'y for Water & Science, U.S. Dep't of the Interior, to Jesse P. Silva, Gen. Manager, Imperial Irrigation Dist., Steve Robbins, Gen. Manager, Coachella Valley Water Dist., and Ronald R. Gastelum, Chief Exec. Officer, Metro. Water Dist. of S. Cal., at 3 (Apr. 28, 2003). [↑](#footnote-ref-383)
383. 383 ***Colorado*** ***River***, Notice of Opportunity for Input Regarding Recommendations and Determinations Authorized by 43 C.F.R. Part 417, [*68 Fed. Reg. 22738*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:48GD-94R0-006W-8239-00000-00&context=1516831) (Apr. 29, 2003). [↑](#footnote-ref-384)
384. 384 Associated Press, "Peace Treaty" Drafted for ***Colorado*** ***River*** use California Presents Water Supply Agreement Bid for Federal Review, at [*http://www.familyfarmalliance.org/news/****Colorado****%20River%20%27Peace%Treaty%27.shtml*](http://www.familyfarmalliance.org/news/Colorado%20River%20%27Peace%Treaty%27.shtml). [↑](#footnote-ref-385)
385. 385 Press Release, Office of the Governor, Governor Davis, Water Agencies Present ***Colorado*** ***River*** Water Transfer Proposal 2 (Mar. 12, 2003). [↑](#footnote-ref-386)
386. 386 Compare Imperial Irrigation Dist. et al., Draft Quantification Settlement Agreement (Mar. 10, 2003) [hereinafter 2003 QSA], with Imperial Irrigation Dist. et al., Draft Quantification Settlement Agreement (Dec. 12, 2000) discussed in Part XVIII. [↑](#footnote-ref-387)
387. 387 See supra notes 342-43. [↑](#footnote-ref-388)
388. 388 See Letter to Cal. water agencies, supra note 345, at 2. [↑](#footnote-ref-389)
389. 389 2003 QSA, supra note 386, 6.1. [↑](#footnote-ref-390)
390. 390 Secretarial Implementation Draft Agreement (2003). [↑](#footnote-ref-391)
391. 391 The concept in the 2003 QSA of IID retaining dominion and control over conserved water, changing the point of diversion of such water, and retaining the right to subsequently use such water, is an unusual concept in western water law. Normally, conserved water is available to the stream system and subject to use by other water users. Such a concept is certainly true under the 1931 Seven Party Agreement absent agreement among the California Parties and DOI. [↑](#footnote-ref-392)
392. 392 2003 QSA, supra note 387, 7(g). [↑](#footnote-ref-393)
393. 393 Letter from the Governor's Representatives on ***Colorado*** ***River*** Operations, supra note 203. [↑](#footnote-ref-394)
394. 394 See Letter to Cal. water agencies, supra note 345, at 2. [↑](#footnote-ref-395)
395. 395 See Part I, supra note 3, at 292. [↑](#footnote-ref-396)
396. 396 See supra text accompanying note 349. [↑](#footnote-ref-397)
397. 397 Letter from Roy Romer, Governor of ***Colorado***, to Members of the ***Colorado*** General Assembly, supra note 58. [↑](#footnote-ref-398)
398. 398 ***Colorado*** ***River*** Compact, [***Colo.*** *Rev. Stat. 37-61-101*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:61P5-WY01-DYDC-J33S-00000-00&context=1516831) to 104 (2000). [↑](#footnote-ref-399)
399. 399 See generally Part I, supra note 3, at 293-306; Daniel Tyler, Delphus Emory Carpenter and the ***Colorado*** ***River*** Compact of 1922, 1 U. Denv. Water L. Rev. 228 (1998). [↑](#footnote-ref-400)