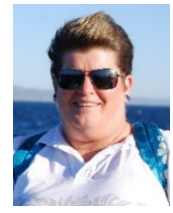
Robin Kundis Craig[*]



CALIFORNIA EXCEPTIONALISM IN THE COLORADO RIVER: A BRIEF HISTORY AND IMPLICATIONS FOR THE FUTURE

Introduction

In August 2021, amid record drought, the federal government declared a Tier 1 water shortage in the Colorado River system for the first time, affecting water users in the Lower Basin states—Arizona, California, and Nevada—who are dependent on Lake Mead. A year later, Lake Mead operations worsened to a Tier 2a shortage, which governs operations through 2023.[1] Implementation of this shortage standard according to the Colorado Basin states' 2019 Drought Contingency Plan means that Arizona reduced its normal 2.8 million acre-feet allocation from the Colorado River by 592,000 acre-feet in 2023, losing "approximately 21% of the state's annual apportionment"; Nevada reduced its normal allocation of 300,000 acre-feet by 25,000 acre-feet, "which is 8% of the state's annual apportionment"; and Mexico received reduced its allocation of 1.5 million acre-feet by 104,000 acre-feet, "which is approximately 7% of the country's annual allotment."[2]

California, in contrast, continues—at least for the moment—to receive its full non-drought share of the Colorado River, or 4.4 million acre-feet.[3] This relative insulation from Colorado River drought is the latest manifestation of California exceptionalism under the Law of the River.

---

[*] Robin Kundis Craig is the Robert C. Packard Trustee Chair in Law at the University of Southern California Gould School of Law. She specializes in all things water, including water law, and is the co-author of a leading water law textbook. My thanks to Rhett Larson for asking me to be part of this special issue. I may be reached at rcraig@law.usc.edu.

1. *Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead*, U.S. DEPT. OF THE INTERIOR (Aug. 16, 2022), https://www.doi.gov/pressreleases/interior-department-announces-actions-protect-colorado-river-system-sets-2023.

2. *Id.* An acre-foot is the amount of water it takes to cover one acre of land with one foot of water, or almost 326,000 gallons.

3. *Id.* ("There is no required water savings contribution for California in 2023 under this operating condition.").

Those who learn the history of the Law of the River can easily become fascinated by Arizona's role in Lower Basin negotiations. After all, it was Arizona alone of the seven Colorado River Basin states that refused to ratify the 1922 Colorado River Compact, the interstate compact that started the "Law of the River."[4] This initial compact allocated 7.5 million acre-feet per year on average to each of the Upper Basin (Wyoming, Utah, Colorado, New Mexico, and a fraction of Arizona) and the Lower Basin (Arizona, Nevada, and California), with the division at Lee Ferry, Arizona.[5] Indeed, Arizona did not ratify the compact until 1944.[6]

The hydrologic boundaries of the Upper and Lower Colorado River Basin and the adjacent areas of the Basin States that receive Colorado River water. Courtesy of the Bureau of Reclamation.

In the interim, moreover, Arizona filed an original jurisdiction lawsuit in the U.S. Supreme Court to protest an early dam in the Colorado River system (1930);[7] sent troops (1934) to California's border to stop the construction of a different dam, the Parker Dam, which diverts water from the Colorado River into southern California[8]; and began the long process of

4. *Colorado River Compact*, WATER EDUCATION FOUNDATION (viewed April 1, 2023), https://www.watereducation.org/aquapedia-background/colorado-river-compact.

5. Colorado River Compact, art. III (1922).

6. *Colorado River Compact*, WATER EDUCATION FOUNDATION (viewed April 1, 2023), https://www.watereducation.org/aquapedia-background/colorado-river-compact.

7. Arizona v. California, 282 U.S. 795 (1930) (allowing Arizona to file the original jurisdiction lawsuit); Arizona v. California, 283 U.S. 423, 464 (1931) (dismissing Arizona's 1930 challenge to the construction of the Black Canyon dam).

8. Julia Rosen, November 10, 1934: *Arizona declares war against California at Parker Dam*, EARTH: THE SCIENCE BEHIND THE HEADLINES (Dec. 3, 2014),

getting an original jurisdiction case before the U.S. Supreme Court to challenge both the Boulder Canyon Project Act of 1928[9] and California's claims to the river (1934-1952),[10] which Arizona considered to be outsized and unfair.

Nevertheless, it was largely California that occasioned the creation of the Law of the River in the first place. This Article traces how a combination of early California settlement and the U.S. Supreme Court's recognition of prior appropriation induced the other Colorado River basin states to seek to legally protect their far more nascent claims to that river's water. The negotiations that led to the 1922 Colorado River Compact, moreover, merely began an ongoing centuries-long conversation that seeks to balance California's rights as the first developer of the Colorado River against a basin-wide equitable allocation of the river. Understanding the roots of and underlying tensions within this conversation sheds light on the current negotiations seeking to cope with a changing climate and shrinking water supply in the Lower Basin.

The Beginnings of California Exceptionalism: Prior Appropriation from the Gold Rush to the Parker Dam

Understanding California's influence on the Law of the River requires two pieces of background information. First, an understanding of how California fits into the overall development of the West is critical. Second, that first understanding is critical in part because the West adopted prior appropriation as its dominant water law doctrine, privileging first users of water.

https://www.earthmagazine.org/article/november-10-1934-arizona-declares-war-against-california-parker-dam/.

9. Act of Dec. 21, 1928, 45 Stat. 1057, *codified as* 43 U.S.C. §§ 617-617t.

10. Arizona v. California, 292 U.S. 341, 341 (1934) (dismissing Arizona's bill to preserve testimony for a future lawsuit against California challenging the Boulder Canyon Project Act); Arizona v. California, 296 U.S. 552, 552 (1935) (ordering the defendants to show cause why Arizona's bill should not be granted); Arizona v. California, 298 U.S. 558, 558 (1936), *petition for rehearing denied*, 299 U.S. 618 (1936) (denying Arizona's petition to file the complaint); Arizona v. California, 344 U.S. 806, 806 (1952) (ordering the defendants to show cause why Arizona should not be allowed to file its complaint); Arizona v. California, 344 U.S. 919, 920 (1952) (granting Arizona leave to file the complaint).

A. California and the Settlement of the West

California leapfrogged the steady movement west of European settlement in the United States.[11] Nine days before the United States signed the 1848 treaty with Mexico that would make California—and much of the rest of the Southwest—part of the United States, James Marshall, a carpenter employee of John Sutter, discovered gold.[12] This discovery triggered "the greatest mass migration in the history of the young Republic up to that time, some 80,000 in 1849 alone and probably 300,000 by 1854 . . . ."[13] As historian J.S. Holliday has summarized:

> Everything about California would change. In one astonishing year the place would be transformed from obscurity to world prominence, from an agricultural frontier that attracted 400 settlers in 1848 to a mining frontier that lured 90,000 impatient men in 1849; from a society of neighbors and families to one of strangers and transients; from an ox-cart economy based on hides and tallow to a complex economy based on gold mining; from Catholic to Protestant, from Latin to Anglo-Saxon. The impact of that new California would be profound on the nation it had so recently joined.[14]

The Gold Rush accelerated the Industrial Revolution and economic development in the United States; "[t]he influx of gold resulted in the expansion of manufacturing and the service industries, as many entrepreneurial newcomers took advantage of the demand for mining materials, lumber, clothing and transportation."[15] By the end of the Gold

11. J.S. HOLLIDAY, THE WORLD RUSHED IN: THE CALIFORNIA GOLD RUSH EXPERIENCE 25-45 (University of Oklahoma Press: 2002 paperback edition).

12. *Id*. at 25.

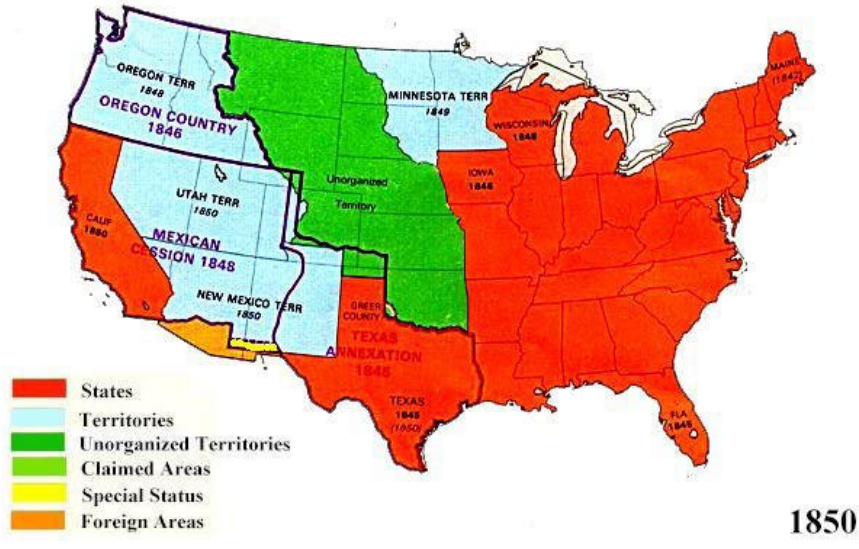
13. Malcolm Rohrbough, *No Boy's Play: Migration and Settlement in Early Gold Rush California*, 79:2 CALIFORNIA HISTORY 25, 25 (2000). *See also Historical Impact of the California Gold Rush*, NORWICH UNIVERSITY ONLINE (Oct. 2, 2017), https://online.norwich.edu/academic-programs/resources/historical-impact-of-the-California-gold-rush (noting that the California Gold Rush "prompted one of the largest migrations in U.S. history, with hundreds of thousands of migrants across the United States and the globe coming to California to find gold in the foothills of the Sierra Nevada mountains.").

14. HOLLIDAY, *supra* note 12, at 25-26.

15. *Historical Impact of the California Gold Rush*, NORWICH UNIVERSITY ONLINE (Oct. 2, 2017), https://online.norwich.edu/academic-programs/resources/historical-impact-of-the-California-gold-rush.

Rush, moreover, California had become "an economic powerhouse."[16]

One result of California's quick growth was very early statehood compared to the rest of the U.S. West.[17] California became a state in 1850, leading the rest of the Colorado River Basin states by at least a decade: Nevada became a state in 1864; Colorado in 1876; Wyoming in 1890; Utah in 1896; and New Mexico and Arizona in 1912.[18] Thus, the Gold Rush accelerated California's political and economic development, leaving it in a better position to actually use the Colorado River than the rest of the states in the Basin. At the same time, however, a new approach to water rights was developing in California that deemed "first" to be "best": prior appropriation.



U.S. Territorial Map, 1850.

B. California and Prior Appropriation

Gold mining in California was dependent on water.[19] As one result, "[w]hen the rainy season was late, each dry day cost the state's economy

16. *Id.*

17. *Id.*

18. *List of* U.S. *States' Dates of Admission to the* Union, Encyclopaedia Britannica (viewed April 11, 2023), https://www.britannica.com/topic/list-of-U-S-states-by-date-of-admission-to-the-Union-2130026.

19. Douglas R. Littlefield, *Water Rights During the California Gold Rush: Conflicts over Economic Points of View*, 14 WESTERN HISTORICAL QUARTERLY 415, 415 (1983).

$100,000."[20] Driven by gold fever, however, "westerners began to settle away from naturally existing water supplies. Major conflicts resulted that ultimately forced California to develop entirely new systems of water use and regulation."[21]

At the start of the California Gold Rush, California was still a territory of the United States, which provided one of the motivations for evolving water law to prior appropriation. "The miners were all trespassers"[22] and hence could not rely on riparian land ownership to support their claims to water, as became the law in the eastern United States.[23] Riparian law allocates the right to use water from a stream or river to the people who own real property bordering that stream or river.[24] Conversely, those who did not own riparian property had no rights to use the water.

The California miners were, essentially, water thieves. Nevertheless, the primary victims of this water theft—as well as the land squatting—were the federal government and states governments who owned this largely public land, and they mostly left the miners to themselves. The miners, therefore, were left to develop their own customs regarding rights to water, and two views began to emerge.[25] One position advocated free access to

20. Littlefield, *supra* note 20, at 418.

21. I*d*. at 418.

22. HOLLIDAY, *supra* note 15, at 37.

23. Although most legal scholars assume that the United States inherited riparianism from England, Douglas Littlefield traces a different lineage:

> Although riparian rights are part of the common law, at the time of the California gold rush they were a new legal concept and were still in the process of being defined in the courts. Riparian rights stemmed not from English common law, as is generally assumed, but were borrowed by American jurists and treatise writers from the Code Napolean. This was in part due to the post-Revolutionary desire to create an "American" legal system (some states even passed laws prohibiting English authorities to be cited) and in part a result of specific American needs. Riparian rights were first introduced to American law in the 1820s by Justices Joseph Story and James Kent, both of whom were well known for their disposition to incorporate civil law into the common law. It was not until 1833, however, that English law abandoned its version of prior appropriation as defined by Blackstone. By 1849 English jurists had accepted riparian rights, and, significantly, they cited Story and Kent as their authorities. It was this concept of riparian rights that eastern states adopted and that confronted the western practice of prior appropriation.

Littlefield, *supra* note 20, at 416 n.1.

24. I*d*. at 415.

25. I*d*. at 417.

water for all miners, while the other advocated for the ability to secure rights to provide water to distant locations and, potentially, to cash-paying customers.[26]

Prior appropriation furthered the latter vision of water's economic potential. Under this doctrine, "[t]hose who use water from a stream are entitled to divert it and diminish its flow to the detriment of those who subsequently locate upstream or downstream."[27] Prior appropriation is often summarized in the mantra "first in time, first in right." Priority matters most in times of water shortage, because junior users—those whose water rights were created later in time—must cease all water use in reverse order of priority so that senior water rights holders can take their full share. Prior appropriation rights are also perpetual, so long as the use continues, meaning that businesses and individuals in California in the 21st century continued to rely on very senior water rights established during the Gold Rush and the decades following it.

C. Prior Appropriation Becomes the Law of the West

While the debates among the miners participating in California's Gold Rush debate were critical to establishing early customs regarding water rights, they did not by themselves result in water l*aw*. Instead, courts and legislatures had to clarify how water rights would in fact work in California and the rest of the American West.

And, in fact, both courts and legislatures have been instrumental in establishing prior appropriation as the West's prevailing water law doctrine, including among the Colorado River Basin states. Moreover, these official pronouncements often served to reify mining customs into law, both state and federal. In California, for example, "the overwhelming majority of water rights cases to reach the California Supreme Court during the first decade of statehood derived from issues relating only to mining and water use, and it was the outcome of these cases that shaped the doctrine of prior appropriation."[28] The most famous of these cases was I*rwin v*. P*hillips*,[29] in which the California Supreme Court noted that it was "bound to take notice of the political and social condition" within the states and hence that it had to acknowledge the operation of prior appropriation among miners diverting water from the same source.[30] Only the riparian landowners themselves—

26. I*d*. at 417.
27. I*d*. at 416.
28. Littlefield, *supra* note 20, at 418-19 n.5.
29. 5 Cal. 140 (1855).
30. I*d*. at 146-47.

the state and federal governments—could complain about the abuse of riparian rights.[31]

Other Colorado River Basin states soon followed suit. Nevada clearly was enforcing the doctrine of prior appropriation by 1875.[32] In 1882, the Colorado Supreme Court announced that Colorado had *never* used riparian rights, only prior appropriation,[33] a view that the Wyoming Supreme Court later (1896) came to share.[34] Utah (1877),[35] Arizona (1888),[36] and New Mexico (1900)[37] recognized prior appropriation before statehood. Thus, by the turn of the 20th century, all seven Colorado River Basin states used prior appropriation to allocate their surface waters.[38]

Importantly for the numerous unpatented federal lands in the West, the federal government concurred in recognizing established customary rights; indeed, both the U.S. Supreme Court and Congress acknowledging the rule of prior appropriation among miners and others. In 1866, for example, Congress enacted the General Mining Law to govern mining claims on federal land, and the new law acknowledged and preserved established appropriation rights:

---

31. I*d*. at 146.

32. Barnes v. Sabron, 10 Nev. 217, 230-31 (1875).

33. Coffin v. Left Han Ditch Co., 6 Colo. 443, 448-49 (1882).

34. Moyer v. Preston, 44 P. 845, 847 (Wyo. 1896) ("The common-law doctrine relating to the rights of a riparian proprietor in the water of a natural stream, and the use thereof, is unsuited to our requirements and necessities, and never obtained in Wyoming.").

35. Crane v. Winsor, 2 Utah 248, 253 (1877) (holding that once settlers had previously appropriated water through a ditch for their settlement, miners created a private nuisance by poisoning the water through their ore crushing operations).

36. Hill v. Lenormand, 2 Ariz. 354, 356-57 (1888).

37. Albuquerque Land & Irr. Co. v. Gutierrez, 61 P. 357, 360 (N.M. 1900) ("The doctrine of the common law no longer obtains in what is known as the 'Arid and Mountainous Region of the West,' and the doctrine of prior appropriation has been substituted for the common law, as a matter of necessity, on account of the peculiar conditions existing in most, if not all, the mountain states and territories.").

38. Two caveats are important here. First, California uses multiple water law doctrines to allocate surface waters, including prior appropriation, riparian rights, and pueblo rights, giving it the most complicated water law for surface water in the West. Nevertheless, a variety of developments over time have left prior appropriation the most common and important of these doctrines. Second, while most western states also use prior appropriation for their *groundwater*, California and Arizona do not.

[W]henever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same.[39]

Similarly, the Desert Land Act of 1877 authorized the sale of federal desert lands but stipulated that all unappropriated waters "shall remain and be held free for the appropriation and use of the public . . . subject to existing rights."[40] Perhaps the most expansive example of Congress's deference to western states' water law (prior appropriation) came in the Reclamation Act of 1902:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."[41]

Through these statutes, Congress left the sale and development of western public lands subject to state water law, increasingly defined to be prior appropriation.[42]

The U.S. Supreme Court also acknowledged prior appropriation in dealing with the use of water for mining in the West. For example, in *Atchison v. Peterson* (1874), the Court dealt with competing miners and appropriators from the Ten-Mile Creek in the Montana Territory; specifically, the defendants were alleging blocking the plaintiffs' earlier-in-time ditches with mining tailings.[43] Delivering the Court's opinion, Justice Field first acknowledged the law of riparian rights.[44] This law, however, does not apply to the mining operations on western public lands.[45] Quoting the California

39. Act of July 26, 1866, §9, 14 Stat. 251, 253.

40. Act of March 3, 1877, §1, 19 Stat. 377, 377.

41. Act of June 17, 1902, §8, 32 Stat. 390, *codified as* 43 U.S.C. § 383.

42. Dale D. Goble, *Prior Appropriation and the Property Clause: a Dialogue of Accommodation*, 71 OR. L. REV. 381, 388-90 (1992).

43. Atchison v. Peterson, 87 U.S. 507, 508-09 (1874).

44. *Id*. at 510-12.

45. *Id*. at 512-13.

Supreme Court's opinion in I*rwin v. P*hillips and noting the Mining Act of 1866, the U.S. Supreme Court emphasized a labor theory approach to water rights in the West:

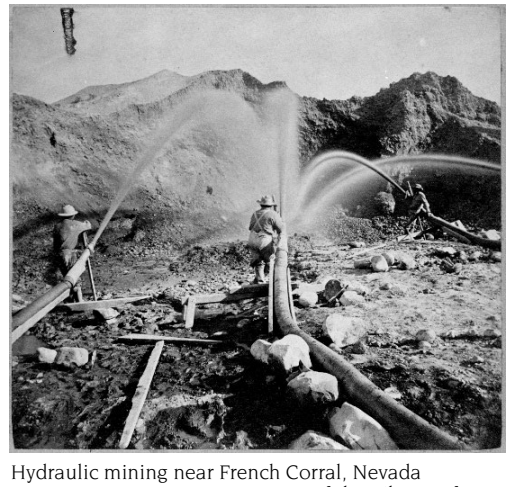
> "The government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and, to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories."[46]

Like Congress, therefore, the Court both recognized and applied the doctrine of prior appropriation, ultimately affirming the lower courts' refusal to enjoin the defendants' mining operations.[47]

D. The Threat of California as the Colorado River's Senior Appropriator

As noted, California developed earliest and fastest of the Colorado River Basin states. This growth helped to spur the original 1922 Colorado River Compact, through three developments.

First, California was the first state to divert water from the Colorado River. Indeed, southern Californians started viewing the Colorado as a source of water supply very early in California's statehood. "As early as 1869 Dr. Oliver Wozencraft was calling for the construction of a



Hydraulic mining near French Corral, Nevada County, CA, 1860-1870. Courtesy of the Library of Congress.

46. I*d*.

47. I*d*. at 515-16.

gravity canal from the Colorado to southeastern California," and "[i]rrigation engineer George Chaffey of Los Angeles completed such a project in May 1901."[48] "[T]he California Development Company began pulling water from the river in 1901, transporting it to the Imperial Valley through the Alamo Canal and helping transform the California desert into a farmland oasis."[49] This diversion made California the first state to appropriate the Colorado River and the senior water rights holder in the system. While the original Imperial Canal "filled with silt and its levee collapsed in a catastrophic flood in 1905," "Chaffey's canal proved that the waters of the Colorado River could be successfully brought into southern California."[50] Moreover, an improved All-American Canal (Chaffey's canal largely ran through Mexico)[51] allowed the diversion to both continue and expand:

> "The Imperial Irrigation District later purchased the company, along with its right to take 2.6 million acre-feet annually from the Colorado River. The irrigation district now takes 3 million acre-feet a year, using 98% percent of it to grow crops, including water-intensive ones like alfalfa and winter vegetables, on land that would otherwise be inhospitable to most farming."[52]

The second development relevant to the 1922 Colorado River Compact was that the U.S. Supreme Court made prior appropriation relevant to interstate rivers like the Colorado through its developing doctrine of equitable apportionment. When states fight with each other, they can petition the Court to have their disputes heard there first, skipping the lower courts, through what is known as the Court's *original jurisdiction*.[53] In 1901, Kansas filed the first such case against Colorado over the Arkansas River, and the Court published its decision in 1907.[54] Kansas argued that diversions in Colorado were depriving Kansas of the full flow of the river (a riparianism argument), and it asked the Court to enjoin those diversions.[55] Noting that no state can be forced to choose either riparianism or prior

48. Kevin Starr, W*atering the Land*: T*he Colorado River Project*, 75 SOUTHERN CALIFORNIA QUARTERLY 303, 303 (1993).

49. Amy Graff, U*nderstanding California's Relationship with the Colorado River*, SF GATE (Feb. 11 , 2023), https://www.sfgate.com/bayarea/article/california-relationship-with-colorado-river-17762725.php.

50. Starr, *supra* note 53, at 304.

51. I*d*.

52. Graff, *supra* note 54.

53. U.S. CONST., art. III, §2.

54. Kansas v. Colorado, 206 U.S. 46, 47 (1907).

55. I*d*. at 47-48.

appropriation,[56] the Court instead announced that its "cardinal rule, underlying all the relations of the states to each other, is that of equality of right. Each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none."[57] At the same time, however, because "Kansas thus recognizes the right of appropriating the waters of a stream for the purposes of irrigation, subject to the condition of an equitable division between the riparian proprietors, she cannot complain if the same rule is administered between herself and a sister state."[58] Although the Court ultimately dismissed Kansas's claim without prejudice, concluding that Kansas had not (yet) been deprived of its equitable share of the river's benefits,[59] it made the fact that both states allow water appropriations relevant to how a river will be divided.

This legal consequence became even clearer in the Supreme Court's 1922 decision in *Wyoming v. Colorado*, in which Wyoming sought—and received—equitable apportionment of the Laramie River.[60] The Court emphasized that both states had adopted prior appropriation as their water law[61] and that both Congress and itself had permitted and recognized their right to do so.[62] That fact distinguished *Wyoming v. Colorado* from *Kansas v. Colorado*, in which Colorado was a prior appropriation state but Kansas still largely adhered to riparianism.[63] Instead, here the controversy is between states in both of which the doctrine of appropriation has prevailed from the time of the first settlements, always has been applied in the same way, and had been recognized and sanctioned by the United States, the owner of the public lands. Here the complaining state is not seeking to impose a policy of her choosing on the other state, but to have the common policy which each enforces within her limits applied in determining their relative rights in the interstate stream.[64]

As a result, prior appropriation would furnish the primary basis for the Court's apportionment, because

> "[I]t furnishes the only basis which is consonant with the principles of right and equity applicable to such a controversy as

56. *Id.* at 94.
57. *Id.* at 97.
58. *Id.* at 104-05.
59. *Id.* at 117-18.
60. Wyoming v. Colorado, 259 U.S. 419, 496 (1922).
61. *Id.* at 458-59.
62. *Id.* at 459-63.
63. *Id.* at 464-65.
64. *Id.* at 465.

> this is. The cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory, and it is the one to which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to others."[65]

Moreover, because the average flow of the Laramie River was not sufficient to reliably satisfy the appropriations in both states, the Court determined appropriative priorities across state lines in dividing the river.[66] As a result, given that "available supply is 288,000 acre feet, and the amount covered by senior appropriations in Wyoming is 272,500 acre-feet, there remain 15,500 acre-feet which are subject to this junior appropriation in Colorado," and the Court enjoined Colorado from taking more than that of the Laramie River.[67] The legal lesson for the Colorado River Basin states was clear: California's early diversion of the Colorado River in large quantities would leave the upstream states unable to use the river, absent some other legal division of the river's flow.

Finally, the third development was that the federal government seemed to be favoring California through its authorization of the Boulder Canyon Project, which would ultimately create Hoover Dam and Lake Mead. Beginning in 1921, the U.S. Bureau of Reclamation began looking for a site to dam the Colorado River to improve its availability to what would become the Lower Basin states.[68] "By April 1923, Reclamation geologists and engineers were recommending Black Canyon, a site some thirty miles southeast of Las Vegas, as the best place to impound the waters of the Colorado."[69] Two Californians introduced the Boulder Canyon Project Act into Congress in 1923, and William Mulholland, chief engineer of the Los Angeles Municipal Water Bureau, began searching for a aqueduct route to bring water from the project to Los Angeles.[70] Small wonder, then, than the other Colorado Basin states were worried:

> "The moment planning seriously began in the 1920s to impound the waters of the Colorado at Boulder Canyon on the Arizona-Nevada border, it was recognized—by Arizona especially, which

65. I*d*. at 470.
66. I*d*. at 489-95.
67. I*d*. at 496.
68. Starr, *supra* note 53, at 304.
69. I*d*. at 304-05.
70. I*d*. at 305.

> fought the project to the Supreme Court—that southern California would be its prime and most immediate beneficiary. Wyoming, Utah, Colorado, New Mexico, Nevada, and Arizona, after all, were but in the infancy of their population and land-resource development. Southern California, by contrast, Los Angeles, especially, the largest city in the state since 1920, was entering into its second great boom of subdivision and population growth."[71]

Thus, just as the Supreme Court was clarifying the *legal* consequences of having a large downstream appropriator on a shared river, California, through Los Angeles, was taking the necessary practical steps to divert large quantities of the Colorado River for itself. By the time Congress enacted the Boulder Canyon Project Act in 1928, "California had already put over 5 million acre-feet to use."[72]

Given these three developments, "Anxieties about California's population growth from those in the river's upper reaches also contributed to the political climate needed for a Colorado River agreement to coalesce. If left unchecked, their thinking went, California could end up controlling the entire river, leaving every other state to scramble for what was left."[73] From this collective anxiety over California's exceptionalism—its ability and apparent willingness to appropriate most of the Colorado River before any other Basin state could really get in the game—the 1922 Colorado River Compact arose.[74]

Drought in the Colorado River: How Far Can California Push California Exceptionalism?

A. The 2019 Drought Contingency Plan

The uneven allocation of the impacts of drought in the Colorado River that has been the reality for Lower Basin states since 2021 is a consequence of the history of California exceptionalism with regard to the Colorado River, further enshrined in the 2019 Colorado River Drought Contingency Plan. "To

71. Starr, *supra* note 53, at 303.

72. A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NATURAL RESOURCES J. 769, 783 (2001).

73. Luke Runyon, *The Colorado River Compact Turns 100 Years Old. Is It Still Working?*, INSIDE CLIMATE NEWS (Nov. 24, 2022), https://insideclimatenews.org/news/24112022/colorado-river-compact-turns-100/?gclid=CjwKCAjwue6hBhBVEiwA9YTx8G5H9uS7GL13lRXz5Uh7kauYJYn6tBpff2Fn7LJbR0lPtjZicXM_yRoCSxwQAvD_BwE.

74. *Id*; Starr, *supra* note 53, at 304-05.

reduce the risk of Lake Powell and Lake Mead declining to critically low levels, in December 2017, the U.S. Department of the Interior called on the seven Colorado River Basin States of Wyoming, Colorado, Utah, New Mexico, Arizona, California, and Nevada to put drought contingency plans in place before the end of 2018."[75] The states submitted their plan to Congress on March 19, 2019,[76] and Congress endorsed it in federal legislation on April 16, 2019.[77]

For the Lower Basin (California, Arizona, and Nevada) and Mexico, cutbacks are tied to water elevations in Lake Mead, the storage reservoir just east of Las Vegas created by Hoover Dam. When Lake Mead drops to 1090 feet above sea level (Tier Zero), Arizona, Nevada, and Mexico start making cuts in their water use.[78] While Lake Mead barely stayed above this level through 2019, invocations of the drought reductions depend on the Bureau of Reclamation's projections in August; as a result, Tier Zero restrictions kicked in for 2020.[79] Tier 1 restrictions, triggered when the lake elevation is less than 1075 feet above sea level,[80] kicked in for 2022;[81] the Tier 2a cutbacks for 2023 took effects because Lake Mead's elevation fell below 1050 feet.[82] At the end of March 2023, despite a relatively rainy winter and spring,

75. *Colorado River Drought Contingency Plan*, DROUGHT.GOV (viewed April 1, 2023), https://www.drought.gov/colorado-river-drought-contingency-plan#.

76. *Id*.

77. Colorado River Drought Contingency Plan Authorization Act, Pub. L. No. 116-4, 133 Stat. 850 (April 16, 2019).

78. Central Arizona Project, *Fact Sheet: Drought Contingency Plan: Arizona Implementation* 2 (Feb. 2022), *available at* https://library.cap-az.com/documents/departments/planning/colorado-river-programs/CAP-FactSheet-DCP.pdf.

79. Chuck Cullom, *Lake Mead ends 2019 above 1090' – but 2020 still brings Tier Zero declaration*, CENTRAL ARIZONA PROJECT (Jan. 8, 2020), https://knowyourwaternews.com/lake-mead-ends-2019-above-1090-but-2020-still-brings-tier-zero-declaration/.

80. Central Arizona Project, *Fact Sheet: Drought Contingency Plan: Arizona Implementation* 2 (Feb. 2022), *available at* https://library.cap-az.com/documents/departments/planning/colorado-river-programs/CAP-FactSheet-DCP.pdf.

81. Central Arizona Project, *Colorado River Shortage*: 2022 *Fact Sheet* 1 (2022), *available at* https://new.azwater.gov/sites/default/files/media/ADWR-CAP-FactSheet-CoRiverShortage-081321.pdf.

82. Central Arizona Project, *Fact Sheet: Drought Contingency Plan: Arizona Implementation* 2 (Feb. 2022), *available at*
https://library.cap-az.com/documents/departments/planning/colorado-river-programs/CAP-FactSheet-DCP.pdf.

Lake Mead's elevation was 1046 feet above sea level, almost 183 feet below its full capacity.[83] "Dead pool," the level at which releases from Hoover Dam are no longer possible, occurs at 895 feet above sea level, but the dam stops producing electricity at 950 feet.[84]

B. 2023: California Exceptionalism and the Department of the Interior

California has dragged its feet in negotiating the next Drought Contingency Plan with the six other Colorado Basin states. For example, in January 2023, and "despite a deadline from federal officials,"

> "Six states presented the federal government with a proposal to slash the lower basin's use by 2.9 million acre-feet from their historic allotments—including more than 1 million acre-feet from California, or 25% of its entitlements. But California, the largest user of Colorado River water, refused to sign onto the proposal and, instead, hours later issued its own—which mirrors its offer last fall to cut imports by 9%, or 400,000 acre feet."[85]

With the Colorado River Basin states at an apparent impasse, on April 11, 2023, the Department of the Interior's Bureau of Reclamation issued a draft Supplemental Environmental Impact States (SEIS) to revise the December 2007 guidelines that guide the operations of Lake Powell and Lake Mead.[86] The draft SEIS contemplates three alternatives through 2026. The "No Action" alternative makes no changes to current management

83. *Lake Mead Water Level*, LAKESONLINE.COM (Mar. 31, 2023), https://mead.uslakes.info/level.asp.

84. *Storage Capacity of Lake Mead*, NATIONAL PARK SERVICE (updated Dec. 13, 2022), https://www.nps.gov/lake/learn/nature/storage-capacity-of-lake-mead.htm.

85. Alastair Bland, *California, Other States Reach Impasse over Colorado River*, CALMATTERS (Jan. 31, 2023), https://calmatters.org/environment/2023/01/california-colorado-river-water-2/.

86. Press Release: *Interior Department Announces Next Steps to Protect the Stability and Sustainability of Colorado River Basin*, U.S. DEPARTMENT OF THE INTERIOR (April 11, 2023), https://www.doi.gov/pressreleases/interior-department-announces-next-steps-protect-stability-and-sustainability-colorado. The requirement for a revised Environmental Impact Statement (EIS) comes from the National Environmental Policy Act (NEPA). 42 U.S.C. § 4332(2)(C).

plans,[87] but that strategy risks Lake Powell and Lake Mead reaching "dead pool" by 2026.[88] Action Alternative 1, in contrast, would cut water usage in accordance with water rights priority,[89] while Alternative 2 contemplates across-the-board even-percentage reductions in water allocations for all Lower Basin states,[90] "reducing water deliveries by as much as 13 percent beyond what each state has already agreed to."[91] Alternative 1 favors California:

> "If changes were based on seniority of water rights, California, which among the seven states is the largest and oldest user of Colorado River water, would mostly be spared. But that would greatly harm Nevada and force disastrous reductions on Arizona: the aqueduct that carries drinking water to Phoenix and Tucson would be reduced almost to zero."[92]

Alternative 1 would also hurt Tribes in Arizona.[93] Alternative 2—sharing the pain—seems fairer, but it abandons legal precedent.

Above all, however, the choices that the Department of the Interior pose surface many ambiguities left in the Law of the River—ambiguities that only matter because there is not even water to fulfill all allocated shares. Three are worth discussion in the context of California exceptionalism.

87. Press Release: I*nterior Department Announces Next Steps to Protect the Stability and Sustainability of Colorado River Basin*, U.S. DEPARTMENT OF THE INTERIOR (April 11, 2023), https://www.doi.gov/pressreleases/interior-department-announces-next-steps-protect-stability-and-sustainability-colorado.

88. Christopher Flavelle, B*iden Administration Proposes Evenly Cutting Water Allotments From Colorado River*, THE NEW YORK TIMES (April 11, 2023), https://www.nytimes.com/2023/04/11/climate/colorado-river-water-cuts-drought.html?auth=login-google1tap&login=google1tap.

89. Press Release: I*nterior Department Announces Next Steps to Protect the Stability and Sustainability of Colorado River Basin*, U.S. DEPARTMENT OF THE INTERIOR (April 11, 2023), https://www.doi.gov/pressreleases/interior-department-announces-next-steps-protect-stability-and-sustainability-colorado.

90. I*d*.

91. Flavelle, *supra* note 93.

92. I*d*.

93. I*d*.

1. Which Basin Bears the Burden of Shortage?

The 1922 Colorado River Compact contains within it an inherent ambiguity regarding which states bear the burden of shortages in the river. Article III governs the apportionment of the river. It first states that "[t]here is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."[94] At the same time, however, Article III also commands that "[t]he States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact."[95]

These two provisions present no problems when the Colorado River has at least 15 million acre-feet per year on average. In times when the river falls below that flow, however, they cannot both be fulfilled in the absence of sufficient storage in Lake Mead and Lake Powell[96]—the necessary storage that the system has lost to drought. The Compact simply does not contemplate the current reality, when neither sufficient flow nor sufficient storage exist to satisfy all parties.

Within this silence and Article III's contextual ambiguity during drought, one reading of the Compact is that the Upper Basin states must, in times of shortage, continue to deliver 7.5 million acre-feet per year (on a 10-year average) to the Lower Basin states—in other words, that the Upper Basin's obligation to deliver trumps its right to 7.5 million acre-feet per year. Given the Department of the Interior's proposals for the Lower Basin, California, Arizona, and Nevada may collectively invoke Article IX of the Compact to resolve this ambiguity.[97]

94. COLORADO RIVER COMPACT, art III(a) (Nov. 24, 1922).

95. *Id*. art. III(d).

96. *See also id*. art VIII ("Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.").

97. "Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or

2. What Exactly Is the Scope of the Secretary of the Interior's Authority to Reallocate Colorado River Water in the Lower Basin under the Boulder Canyon Project Act?

Congress and the U.S. Supreme Court seemed to have resolved Lower Basin issues through the intersection of the 1928 Boulder Canyon Project Act and the U.S. Supreme Court's 1963 decision in *Arizona v. California*.[98] The Boulder Canyon Project Act of 1928 authorized "the Secretary of the Interior, *subject to the terms of the Colorado River compact hereinafter mentioned*, . . . to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than 20 million acre-feet of water . . . ."[99] Construction could not occur until at least six states, one of which had to be California, had ratified the Colorado River Compact; moreover, California, through its legislature, had to "agree irrevocably and unconditionally"

> "that the aggregate annual consumptive use (diversion less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin states by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact . . . ."[100]

The Act also authorized the three Lower Basin states to enter into a compact that, in addition to giving California 4.4 million acre-feet plus half the surplus, allocated 2.8 million acre-feet plus half the surplus plus the Gila River and its tributaries to Arizona and 300,000 acre-feet to Nevada.[101]

The Act authorized the Secretary of the Interior to contract for the storage and delivery of the water[102] and specified three uses of the dam and reservoir: "First, for river regulation, improvement of navigation, and flood

---

equitable, for the protection of any right under this compact or the enforcement of any of its provisions." *Id*. art. IX.

98. 373 U.S. 546 (1963).

99. Pub. L. No. 70-642, §1, 45 Stat. 1057, 1057 (Dec. 21, 1928) (emphasis added).

100. *Id*. §4(a), 45 Stat. 1058.

101. *Id*., 45 Stat. 1059.

102. *Id*. §5, 45 Stat. 1060.

control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VII of said Colorado River compact; and third, for power."[103] However, it also made clear that the United States "shall observe and be subject to and controlled by" both the Colorado River compact and any Lower Basin Compact later created in constructing, managing, and operating the reservoir, canals, and other works.[104]

The Boulder Canyon Project Act authorized the construction of the Hoover Dam on the Colorado River. Courtesy of the National Archives.

These provisions left several questions regarding the Secretary of the Interior's authority to allocate water in the Lower Basin, which the Supreme Court addressed in *Arizona v California*. It first determined that the Boulder Canyon Project Act constituted a *congressional* apportionment of the Lower Basin.[105] As a result, neither equitable apportionment nor the 1922 Colorado River Compact are relevant to allocating water *within* the Lower Basin.[106] Moreover, the Court concluded that the Secretary of the Interior is in charge of Lower Basin allocations—"that Congress intended the Secretary of the Interior, through his §5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to

103. *Id*. §6, 45 Stat. 1061.

104. *Id*. §8(a), (b), 45 Stat. 1062.

105. *Arizona v. California*, 373 U.S. at 560, 565.

106. *Id*. at 565-66.

decide which users within each State would get water."[107] In particular, Congress had considered an allocation based on prior appropriation and rejected it.[108] Finally, rejecting the Special Master's recommendation of a *pro rata* reduction during shortages, the Supreme Court explicitly left the decision of what to do in shortages to the Secretary of the Interior:

> "While *pro rata* sharing of water shortages seems equitable on its face, more considered judgment may demonstrate quite the contrary. Certainly we should not bind the Secretary to this formula. We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. And neither the Project Act nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. And the Secretary may or may not conclude that a *pro rata* division is the best solution."[109]

The Supreme Court thus seemed to have settled the current shortage issue in 1963: the Department of the Interior can deal with shortages in the Lower Basin however it sees fit. *Arizona v. California* did not address the larger Upper Basin/Lower Basin issue, however. Moreover, Congress made another important change to Lower Basin allocations in 1968 that complicates any straightforward application of the 1963 shortage decision.

3. What About Arizona's Subordination of Its Priority to Get the Central Arizona Project?

While Arizona legally secured an allocation of 2.8 million acre-feet of the Colorado River in 1928 through the Boulder Canyon Project Act and *Arizona v. California*, it needed federally funded infrastructure—the Central Arizona Project—to actually use the water.[110] California used this fact and its political clout to alter the outcome of *Arizona v. California*. "California was able to force Arizona to subordinate her CAP priority to California's compact allocation as the price of congressional authorization of the project."[111] Through the 1968 Colorado River Project Act, Congress ensured that

107. *Id.* at 580-81.
108. *Id.* at 581.
109. *Id.* at 593.
110. Tarlock, *supra* note 77, at 784.
111. *Id.*

California would get its 4.4 million acre-feet per year in times of shortage before any Colorado River water is diverted into the Central Arizona Project.[112]

Unlike the Colorado River Compact, this provision of the 1968 Act *did* explicitly contemplate water shortage in the Lower Basin—and it explicitly altered the application of the *Arizona v. California* decree. The subordination provision applies "in any year in which, as determined by the Secretary, there is insufficient main stream Colorado River water available for release to satisfy annual consumptive use of seven million five hundred thousand acre-feet in Arizona, California, and Nevada."[113] As such, the 1968 Act both is more specific than and post-dates the Boulder Canyon Project Act (by forty years). Under well-recognized rules covering potentially conflicting statutes, the Colorado River Project Act should thus control.[114] More basically, the Supreme Court's reading of the Boulder Canyon Project Act in *Arizona v. California* turned most essentially on Congress's authority to apportion the Lower Colorado River, so it would be illogical for the Court to ignore Congress's later refinement of the 1928 scheme.

If the Supreme Court or the parties agree, the Secretary of the Interior's proposal to institute percentage reductions in all three states would violate federal law. Instead, Arizona would be obligated, under federal law, to stand in line behind California.

Conclusion

California exceptionalism has long driven the Law of the Colorado River. Gold Rush mining generated a fast-growing population with both the desire and the capacity to use more water than the state has, in places where large amounts of water do not occur. California was the first state to divert and use Colorado River water; that fact, in combination with Supreme Court case law

Lake Mead in 2014, pictured at its lowest water level since the 1930s. The top of the white ring indicates the highest historical water level. Courtesy of the National Oceanic and Atmospheric Administration.

112. Pub. L. No. 90-537, §301(b), 82 Stat. 887 (Sept. 30, 1968), *codified as amended*, 43 U.S.C. § 1521(b).

113. 43 U.S.C. § 1521(b).

114. *See* National Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 662-64 (2007) (choosing the more specific statute over the later in time when forced to choose, but recognizing both rules).

governing interstate rivers shared by prior appropriation states, resulted in an interstate compact that deviated from strict prior appropriation across state lines but failed to articulate a different legal methodology for dealing with water shortage. Even within the confines of the compact, however, by 1963, California had contracts with the Secretary of the Interior for 5.362 million acre-feet from Lake Mead[115] and in 1968 convinced Congress to give it priority access to its 4.4 million acre-foot allocation. The state has only recently been reducing its usage to back within that allocation. Notably, however, in 2019, California used only 3.858 million acre feet of Colorado River water.[116]

California thus epitomizes a longstanding tension underlying the Law of the River: seven states eagerly willing to adopt prior appropriation within their own borders decry its application to interstate waters—except, like California for the Colorado and Wyoming for the Laramie, when prior appropriation makes the downstream state the water winner. The compact's and statutes' failure to provide a clear and agreed-upon rule for shortages threatens the return of the Law of the River to litigation, potentially pitting California against Arizona and Nevada, the Lower Basin against the Upper Basin, and the Supreme Court against Congress.

115. *Arizona v. California*, 373 U.S. at 562.

116. John Fleck, *California's 2019 Use of Colorado River Water Lowest Since 1950*, JFLECK AT INKSTAIN (Dec. 31, 2019), https://www.inkstain.net/2019/12/californias-2019-use-of-colorado-river-water-lowest-since-1950/.