Notes

THE ARIZONA WATER BANK AND THE LAW OF THE RIVER

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I. INTRODUCTION

In 1996, the Arizona State Legislature established the Arizona Water Bank ("Water Bank") to store Arizona's unused share of Colorado River water.[1] The Water Bank pays the delivery and storage costs to bring the Colorado River water into central and southern Arizona through the Central Arizona Project aqueduct ("CAP").[2] The water is stored underground in existing aquifers or is used directly by irrigation districts in exchange for future ground water recovery rights.[3] In addition, pending the promulgation of federal regulations,[4] the Water Bank legislation provides that California and Nevada can also bank Colorado River water in Arizona.[5]

At least two forces motivated the establishment of the Water Bank at this time. First, Arizona has long feared that if it allows its water to flow by and into California that Arizona will lose its right to that water.[6] Over the decades, Arizonans have viewed California water officials as "diabolical

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1. ARIZ. REV. STAT. ANN. § 45-2401(E)(1) (West Supp. 1997). Arizona's entitlement to the Colorado River was confirmed in *Arizona v. California*, 376 U.S. 340, 342 (1964) [hereinafter Arizona (1964)].

2. ARIZ. REV. STAT. ANN. § 45-2401(F)(1) (West Supp. 1997).

3. *Id.* § 45-2423(A) (West Supp. 1997).

4. The regulations regarding the interstate transfer of Colorado River water could be finalized in the fall of 1998 if the current schedule is unchanged. Telephone Interview with Dale E. Ensminger, Boulder Canyon Operations Office, Bureau of Reclamation (Mar. 9, 1998).

5. ARIZ. REV. STAT. ANN. § 45-2471(A) (West Supp. 1997).

6. Dale Pontius, Colorado River Basin Study 37 (Aug. 1997) (unpublished final report to the Western Water Policy Review Advisory Commission).

schemers...dedicated to the robbery of Arizona's birthright."[7] Not surprising, therefore, was the somewhat gleeful public response to the creation of the Arizona Water Bank—despite its expense.[8] If Californians want Arizona's water, Arizona Governor Fife Symington remarked upon signing the Water Bank legislation, they will have to move to Arizona.[9]

The second, related, force at work in the creation of the Water Bank was the pressure on the increasingly populated states of the Colorado River Basin to find a legal mechanism for the transfer of Colorado River water between states. Southern California and Las Vegas, Nevada, need more water than they are entitled to, while Arizona has yet to utilize its full entitlement.[10] However, there is disagreement over the terms by which the law allows transfers, if at all. Since 1990, there have been several proposals to facilitate transfers but Arizona has perceived these as contrary to Arizona's interests.[11] Whether the interstate banking aspect of the Arizona Water Bank succeeds will depend largely on federal regulations scheduled to be finalized this fall.[12]

Thus, the creation of the Water Bank was both inevitable and innovative: inevitable because Southern California's deep thirst for Colorado River water has shaped Arizona's water policy throughout the twentieth century, and the Water Bank is Arizona's latest effort to protect its water; and innovative because the Water Bank may be the first operation in the Colorado River Basin to effectively address the growing agitation for methods of interstate water transfer that complies with the Law of the River. This Note analyzes Arizona's Water Bank in these two contexts. It begins, in Section II, with a selective review of the Law of the River[13]

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7. DEAN E. MANN, THE POLITICS OF WATER IN ARIZONA 81 (1963). More recently, a newspaper article celebrated Interior Secretary Bruce Babbitt's message to California "to quit guzzling water. This was huge for Arizona and the other 'Lower Basin' states, for it amounted to the official 'River Master' of the Colorado defending the water shares of Arizona and other smaller states against the Golden State's voraciousness." *Water Music*, ARIZ. DAILY STAR, Dec. 26, 1997, at A12.

8. Paul Schatt, *Arizona Did Well Securing Its Water*, ARIZ. REPUB., Feb. 16, 1997, at H1 ("Now Arizona and Nevada are aligned with the other lower Colorado River basin states, all united against California, the 800-pound gorilla of western water. Appropriately."); Martin Van Der Werf, *Ariz. Signs Pacts to Bank Water; Colo. River Supply to be Held in Ground*, ARIZ. REPUB., Jan. 25, 1997, at A1 ("In the high stakes gambling over Colorado River Water, Arizona has just shown the trump card."); *Water-banking Legislation Charting Our Destiny*, ARIZ. REPUB., Feb. 8, 1996, at B4 ("The message it would send to California and Nevada would be unambiguous and forceful: Keep your hands off...."). The general fund appropriation for the Water Bank is "at least $4 million annually for the next 20 years." *State Water Bank: Saving for the Future*, PHX. GAZETTE, Feb. 6, 1996, at B4.

9. Van Der Werf, *supra* note 8, at A1.

10. *See infra* text accompanying notes 116–25.

11. *See infra* text accompanying notes 131–81.

12. *See supra* note 4.

13. For example, this discussion of the Law of the River does not touch on many major issues including Indian water rights, Mexico's entitlement, agricultural usage, and water quality. Nor does this discussion address issues unique to the Upper Basin.

to demonstrate the persistent pressure on Arizona to defend its water rights against California, and to provide the legal framework through which to evaluate the Water Bank's interstate transfer provision. In Section III, the Note surveys the growing interest in interstate water transfers, some proposals for its accommodation, and Arizona's opposition to those proposals. Section IV sets forth how the Arizona Water Bank operates and discusses the federal regulations necessary to activate the interstate aspect of the Water Bank.

II. THE LAW OF THE RIVER

A. The Colorado River Basin

A map of the American West conveys why Arizona so doggedly guards its allocation of the Colorado River. The Colorado River is the sole dependable source of water for the desert Southwest—nearly a quarter-million square miles of the nation's most arid lands.[14] The entire western slope of the Rocky Mountains drains into the Colorado River, yet the Colorado ranks only sixth in volume among the nation's rivers with an average annual volume of less than fifteen million acre-feet ("maf").[15] The demand in the twentieth century for this relatively small river has made it, arguably, "the most disputed body of water in the country and probably in the world."[16]

Out of the conflict for Colorado River water has grown the Law of the River.[17] The Law of the River is a myriad of deals and decisions[18] that determine the allocation of the Colorado River among the seven states in the Colorado River Basin. Considering the Law of the River from Arizona's perspective, its purpose—and, to a great degree, its effect—has been to protect Arizona from Southern California's ever-increasing need for water. While all of the basin states have feared California's water consumption,[19] the history of the Law of the River demonstrates that it is likely that none have done so as acutely as Arizona. Out of the "clangorous strife" between Arizona and California have come "five lawsuits in the United States Supreme Court, a filibuster in the Senate, a muster of troops by Arizona at the California border, and hundreds of thousands of words in

14. Norris Hundley, Jr., *The West Against Itself: The Colorado River—An Institutional History*, *in* NEW COURSES FOR THE COLORADO RIVER 9, 9 (Gary D. Weatherford & F. Lee Brown eds., 1986). The Colorado River cuts 1,400 miles through seven states (Wyoming, Colorado, Utah, New Mexico, Nevada, Arizona, and California) and into the Gulf of California. *Id.*

15. *Id.*

16. *Id.*

17. See Hundley, *supra* note 14, for a general survey of the development of the Law of the River.

18. By one count, there are 46 "major components of the Law of the River." Pontius, *supra* note 6, at B1.

19. Arizona v. California, 373 U.S. 546, 555 (1963) [hereinafter Arizona (1963)].

congressional hearings and judicial proceedings."[20] The problems of the Colorado River would be solved, observed Judge Simon H. Rifkind, the Special Master in the fourth *Arizona v. California*,[21] if only the scientists could turn words into water.[22]

B. The Colorado River Compact

The foundation of the Law of the River is the Colorado River Compact ("Compact").[23] The formation of the Compact in 1922 was, in large part, a reaction to the efforts of farmers in the Imperial Valley of California and urban dwellers in Los Angeles to win federal support for reclamation projects that would control the Colorado River for drought and flood protection and as a source of municipal water.[24] The popularity in Congress of California's proposal to develop the Colorado River alarmed the other basin states.[25]

Their concern was further fueled by the United States Supreme Court decision in *Wyoming v. Colorado*,[26] announced in June, 1922. *Wyoming* declared that the doctrine of prior appropriation was the applicable law regardless of state lines.[27] Under the prior appropriation doctrine, legal entitlement goes to the first party to put the water to beneficial use: "first in time, first in right."[28] The rule of priority becomes critical in times of shortages because the most senior rights or the earliest diversions claim the water while more junior users may receive no water. Before *Wyoming v. Colorado*, each of the basin states had recognized the doctrine within its borders, but it was not known whether the doctrine applied where there were users in two or more states on a common stream.[29] An interstate application of the prior appropriation doctrine meant that if California put the Colorado River water to beneficial use before the other basin states, it would be first in time and, therefore, first in right.

The basin states' concern that California would monopolize Colorado River water compelled the states to consent to negotiate a compact for the "equitable division and apportionment...of the water supply of the Colorado River."[30] Compact negotiations failed in that no agreement was reached as to each state's share of the water.[31] However, at the suggestion of then Secretary of

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20. Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 37–38 (1966) (citations omitted).

21. *Arizona (1963)*, 373 U.S. at 551.

22. Meyers, *supra* note 20, at 38.

23. Colorado River Compact, 70 CONG. REC. 324 (1928).

24. Hundley, *supra* note 14, at 11–14.

25. *Id.* The basin states are California, Arizona, Nevada, Utah, Colorado, Wyoming, and New Mexico.

26. 259 U.S. 419 (1922).

27. Arizona (1963), 373 U.S. 546, 555–56; *see Wyoming v. Colorado*, 259 U.S. at 470–71.

28. *Arizona (1963)*, 373 U.S. at 555.

29. Hundley, *supra* note 14, at 15.

30. *Arizona (1963)*, 373 U.S. at 556–557 (quoting 42 Stat. 171 (1921)).

31. *Id.* at 557.

Commerce Herbert Hoover, the representative for the United States, the states agreed to divide the basin into an Upper Basin and a Lower Basin, with the dividing point at Lee Ferry, Arizona.[32] Arizona, California, and Nevada are served by the Lower Basin, and Wyoming, Colorado, Utah, and New Mexico by the Upper Basin.[33]

Among other provisions, the Compact apportioned 7.5 maf of Colorado River water and its tributaries to each of the basins for "beneficial consumptive use" by the respective basin states.[34] In addition, the Lower Basin was granted the right to use another maf per year when the extra water is available.[35] Professor Meyers has praised many of the Compact's provisions:

> The agreement recognizes that upper riparians and lower riparians may develop at different rates and guarantees a supply to both riparians by limiting the lower riparians' ability to build up claims by the expansion of uses. It permits one state to make temporary use of water originating in a less fully developed state, but provides that uses in excess of the apportionment are subject to termination when the latter state needs the water.[36]

But in execution, the Compact has its drawbacks. Among other problems,[37] the Compact limits appropriations in terms measured by "beneficial consumptive uses," but such uses are not defined in the Compact.[38] In addition, it fails to provide how to handle shortages of available Colorado River water.

Despite the Compact's flaws, only Arizona refused to ratify it.[39] The Compact posed two problems for Arizona.[40] First, by suspending the law of prior appropriation between the Upper and Lower Basins, the Compact would protect the Upper Basin from California, but it did nothing to safeguard Arizona from California. Failure of the Compact to determine each state's share of the water left Arizona (and Nevada) vulnerable to California's ability to establish itself as senior appropriator of the Lower Basin allocation.[41]

Arizona also objected to the Compact's inclusion of the Colorado River tributaries in its allocation scheme.[42] Among the River's tributaries is the Gila

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32. *Id.* at 558; *see* Colorado River Compact, 70 CONG. REC. 324, 325 (1928) (Art. II(f)–(g)).

33. Hundley, *supra* note 14, at 17. Small portions of New Mexico and Utah are in the Lower Basin as waters from those states naturally drain into the Colorado River System below Lee Ferry; similarly, a small portion of Arizona is part of the Upper Basin. Colorado River Compact, 70 CONG. REC. 325 (Art. II(f)–(g)).

34. Colorado River Compact, 70 CONG. REC. 325 (Art. III(a)).

35. *Id.* (Art. III(b)).

36. Meyers, *supra* note 20, at 17.

37. For a discussion of the Compact's deficiencies, see *id.* at 18–26.

38. *Id.* at 18.

39. Arizona (1963), 373 U.S. 546, 558.

40. See MANN, *supra* note 7, at 82–84, for a discussion of other reasons Arizona objected to the Compact.

41. *Arizona (1963)*, 373 U.S. at 558.

42. *Id.*

River, the United States' portion of which is almost entirely in Arizona and heavily relied upon by the state.[43]

Pessimistic that Arizona would ever be satisfied with the Compact, and still concerned about securing their water rights against California, representatives from the Upper Basin states advocated to make the Compact ratifiable by six states, rather than by all seven basin states.[44] California agreed to the six-state approval but only on the condition that Congress approve funding for a high dam on the lower river along with the Compact.[45] The Upper Basin states, in turn, agreed to support California's proposal but only if California promised to limit its use of Colorado River water.[46] The Upper Basin states did not want Arizona, unbound by the Compact, to feel forced to develop projects of its own using water allocated under the Compact to the Upper Basin.[47]

C. The Boulder Canyon Project Act

Congress was sympathetic to Arizona's and the Upper Basin's desire to limit California's consumption of Colorado River water.[48] As a result, the Boulder Canyon Project Act[49] ("Project Act"), which approved the Compact[50] and authorized construction of the Hoover Dam,[51] included suggestions for how the Lower Basin's 7.5 maf of water should be allocated among the Lower Basin states. Congress apportioned 0.3 maf to Nevada, 4.4 maf and half the surplus to California, and 2.8 maf and half the surplus to Arizona.[52] In addition, Congress suggested that all of the water of the Gila River go to Arizona.[53]

Despite Arizona's continued opposition to the Compact,[54] the Project Act was adopted in December 1928; two months later the California Legislature agreed to adhere to the 4.4 maf limit proposed by Congress.[55] Subsequently, the Secretary of the Interior, under the authority of the Project Act, made contracts with water users in California for 5.36 maf, in Nevada for .3 maf, and in Arizona for 2.8 maf of Colorado River water.[56]

The construction of the Hoover Dam and the All-American Canal, a diversion into the Imperial Valley of California, encouraged rapid growth in

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43. *Id.*
44. Hundley, *supra* note 14, at 20.
45. *Id.* at 20–21. The high dam that was eventually constructed was the Hoover Dam.
46. *Id.* at 21.
47. *Id.* at 21–22; *see Arizona (1963)*, 373 U.S. at 560 n.29.
48. Hundley, *supra* note 14, at 21–22.
49. Boulder Canyon Project Act, 43 U.S.C. § 617 (1994).
50. *Id.* § 617(c).
51. *Id.* § 617.
52. *Id.* § 617(c).
53. *Id.*
54. Hundley, *supra* note 14, at 21–22.
55. 1929 Cal. Stat. ch. 16, § 1, at 38–39.
56. Arizona (1963), 373 U.S. 546, 562.

Southern California. Within the next three decades, the population of Los Angeles grew to three million inhabitants and the four coastal counties attracted a population in excess of ten million.[57]

D. Arizona v. California*: The Early Years*

Infuriated by California's booming economy in light of its own steady but unremarkable growth,[58] Arizona turned to the Supreme Court for help in securing the water rights it believed California had stolen. In the first of four *Arizona v. California* lawsuits, Arizona asked the Court to declare the Compact and the Project Act unconstitutional because they violated Arizona's "quasi-sovereign rights," first, by authorizing construction of a dam partially in Arizona without the state's permission and, second, by interfering with Arizona's right to determine the use of the Colorado River water that flowed within the state's borders.[59] The Court found Arizona lacked standing because its right to water had not actually been violated,[60] and, in any case, the federal government did not have to get state consent to carry out its constitutional power to improve navigation.[61]

Four years later Arizona returned to the Court asking for certification for later use of oral testimony on the meaning of the Compact.[62] The Court refused on the basis that the meaning of the Compact could not be material to Arizona because Arizona had not ratified the Compact.[63]

In the midst of its frustrated efforts to beat California through litigation, Arizona tried armed forces. In 1934, when construction was begun on Parker Dam, the structure to impound water for diversion to California, Arizona Governor Mouer sent the state militia to stop the work, claiming the project lacked statutory authorization.[64] On this point the Court agreed,[65] but legislation specifically authorizing the construction of Parker Dam was quickly passed through Congress. The troops were withdrawn and work continued.[66]

Arizona made its third appeal to the Court a year later, this time asking for an equitable apportionment of lower Colorado River waters.[67] The Court threw out the case on the technical ground that Arizona had failed to make the United States

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57. Hundley, *supra* note 14, at 23.
58. *Id.*
59. Arizona v. California, 283 U.S. 423, 449–51 (1931) [hereinafter Arizona (1931)].
60. *Id.* at 462–64.
61. *Id.* at 451.
62. Arizona v. California, 292 U.S. 341, 346 (1934) [hereinafter Arizona (1934)].
63. *Id.* at 356–57.
64. MANN, *supra* note 7, at 85–86; *see* United States v. Arizona, 295 U.S. 174, 179 (1935) [hereinafter Arizona (1935)].
65. *Arizona (1935)*, 295 U.S. at 192.
66. MANN, *supra* note 7, at 86.
67. Arizona v. California, 298 U.S. 558, 559–60 (1936) [hereinafter Arizona (1936)].

government a party to the suit.[68] The Court made it clear that even if the federal government had been included, Arizona still could not show it was actually being deprived of its water.[69]

E. Arizona v. California*: Round Four*

Arizona's failed attempts at litigation were interspersed with unsuccessful efforts to negotiate an agreement with California.[70] In the same years, Arizona suffered extreme drought.[71] The dire conditions, the stymied negotiations, the lost battles and a growing population in need of water softened Arizona's opposition to the Compact.[72] In addition, it became clear that to win congressional support for reclamation projects of its own, Arizona would have to ratify the Compact.[73] On February 24, 1944, after twenty-two years of opposition, the Arizona Legislature ratified the Compact and started lobbying to collect whatever benefits the Compact provided.[74]

For all its effort to protect its share of Colorado River water, the fact remained that Arizona had no way to turn its paper rights into wet water. The majority of growth in the state was happening in central Arizona, hundreds of miles away from the Colorado River, which runs along the border of the state.[75] Three years after Arizona ratified the Compact, the Bureau of Reclamation ("Bureau") presented plans for the Central Arizona Project.[76] The plans called for a 241-mile aqueduct to transport about 1.2 maf to central and southern Arizona.[77]

For several years, Arizona lobbied for federal funding for construction of the CAP.[78] But California fought hard against the project, claiming the CAP was Arizona's way to take Colorado River water that did not belong to the state.[79] Arizona was in a quagmire. Congress balked at authorizing funds for the CAP when it was unclear whether Arizona had title to the water necessary for the project.[80] But without congressional authorization and appropriation of money, it was debatable whether adjudication of the dispute between California and Arizona over the Colorado River water could be made a justiciable issue.[81]

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68. *Id.* at 571–72.
69. *Id.* at 566–67.
70. MANN, *supra* note 7, at 86; Hundley, *supra* note 14, at 24.
71. MANN, *supra* note 7, at 87.
72. *Id.* at 87–88; Hundley, *supra* note 14, at 24–25.
73. MANN, *supra* note 7, at 88; Hundley, *supra* note 14, at 25.
74. Hundley, *supra* note 14, at 25.
75. *Id.* at 24.
76. *Id.* at 30.
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. MANN, *supra* note 7, at 89.

Arizona watched with anxiety as California and the states of the Upper Basin developed enormous reclamation projects.[82] In 1952, with no other recourse, Arizona returned to the Supreme Court, again asking for judicial apportionment of the Lower Basin's water.[83] This time the Court agreed that Arizona would suffer serious harm if the dispute with California were not resolved,[84] and so it heard the case.[85]

The fourth *Arizona v. California* proved worth the wait. Arizona won virtually everything it had tried to secure in negotiations for the 1922 Compact.[86] Most surprisingly, the Court held "that Congress in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries."[87] What had appeared in the Project Act to be suggested apportionments to the Lower Basin states were deemed by the Court to be actual allocations. Accordingly, as their annual entitlements of Colorado River water, California receives 4.4 maf, Arizona 2.8 maf, and Nevada .3 maf, and Arizona and California each get one-half of any surplus in the mainstream.[88] Arizona is also entitled to the waters of the Gila River and other tributaries in the state.[89]

In addition, the Court read the Project Act to vest in the Secretary of the Interior ("Secretary") the control of the Colorado River water in the Lower Basin.[90] The Court stated that "it is the [Project] Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States."[91] Thus, the concern that California could become the senior appropriator of the Lower Basin appeared to be alleviated.

A decree issued pursuant to *Arizona v. California* ("Decree")[92] defines the Secretary's broad discretion. Among other provisions, the Decree enjoins the Secretary from releasing more water to the Lower Basin states than that apportioned in the Project Act, except when the Secretary determines there is a surplus.[93] Article II(B)(6) of the Decree allows the Secretary to release the apportioned but unused water of one state for consumptive use in other states; so doing does not create a right to the water in the latter.[94] Article II(B)(4) of the

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82. Hundley, *supra* note 14, at 30.
83. *Id.* at 31; *see* Arizona (1963), 373 U.S. 546.
84. Hundley, *supra* note 14, at 31.
85. See Meyers, *supra* note 20, at 40–42, for an interesting account of the hearing. The trial lasted eleven years and cost nearly five million dollars. Approximately 340 witnesses testified and nearly 50 lawyers participated. Hundley, *supra* note 14, at 31.
86. Hundley, *supra* note 14, at 31.
87. *Arizona (1963)*, 373 U.S. at 564–65.
88. *Id.* at 565.
89. *Id.* at 561.
90. *Id.* at 585–86.
91. *Id.* at 586.
92. Arizona (1964), 376 U.S. 340.
93. *Id.* at 341–42.
94. *Id.* at 343.

Decree requires that the Secretary, in accounting for states' use, charge to each state's apportionment any Colorado River water "consumptively used" within that state.[95]

Under the Decree, the Secretary also has absolute discretion to establish surplus and shortage criteria.[96] In the case of surplus, Article II(B)(2) dictates that Arizona and California each receive half.[97] But in a year when the Secretary declares a shortage, Article II(B)(3) of the Decree requires that in no event can California receive more than its 4.4 maf entitlement.[98]

F. Central Arizona Project

Flush from its victory over California, Arizona returned to Congress for authorization of the CAP.[99] But it faced a strong Californian congressional contingent determined to win a valuable consolation prize for its state's water interests.[100] California was threatened by the construction of the CAP; if Arizona was actually able to take its share of wet water, California would lose the approximately one maf of Colorado River water it had been taking surplus to its 4.4 maf allocation.[101] Intensifying California's concern was the fact that the basic entitlements confirmed in *Arizona v. California* were not assured. Studies conducted since the Compact was formed revealed that the annual flow of the Colorado River is closer to fourteen maf than the sixteen maf upon which the allocations made in the 1922 Compact had been based.[102] As a result, "[w]hen evaporation, Indian claims and Mexico's allotment were taken into account, the total amount available to the two major Lower Basin states could be much less than the theoretical 7.5 maf."[103]

After several years of congressional wrangling,[104] the CAP was authorized as part of the Colorado River Basin Project Act of 1968.[105] In exchange for California's support, Arizona agreed that the CAP water would have the lowest priority of the Lower Basin's allotment.[106] In effect, having the lowest priority

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95. *Id.*

96. *Arizona (1963)*, 373 U.S. at 593–94; *see Arizona (1964)*, 376 U.S. at 342.

97. *Arizona (1964)*, 376 U.S. at 342. The Secretary may also contract with Nevada, in which case Nevada gets 4% of the surplus and Arizona gets 46%. *Id.*

98. *Id.* at 342–43.

99. Hundley, *supra* note 14, at 35.

100. *Id.*

101. JOSEPH L. SAX ET AL., LEGAL CONTROL OF WATER RESOURCES 709 (2d ed. 1991).

102. *Id.*; *see* Ival V. Goslin, *Colorado River Development, in* VALUES AND CHOICES IN THE DEVELOPMENT OF THE COLORADO RIVER BASIN 18, 47 (Dean F. Peterson & A. Berry Crawford eds., 1978).

103. SAX, *supra* note 101, at 709.

104. Hundley, *supra* note 14, at 35.

105. 43 U.S.C. § 1521(a) (1994).

106. *Id.* § 1521(b) (1994). The Upper Basin also piggybacked onto CAP by packing the authorizing legislation with five additional Upper Basin projects. SAX, *supra* note 101, at 709.

means that when the Lower Basin's share of Colorado River water is fully allocated, as it is currently, a shortage may result in Arizona receiving less than its full entitlement. In the Colorado Basin Project Act, California gained by legislation what it lost under *Arizona v. California*. Arizona, on the other hand, has been haunted by its lost priority ever since.[107]

The CAP was substantially completed by 1996.[108] The CAP consists of a "335-mile long series of canals, siphons, pumping plants, and tunnels that move Colorado River water from Lake Havasu across the State of Arizona through the Phoenix valley and south to Tucson."[109] By the time the water reaches Tucson, it has been lifted almost 2,900 feet in elevation.[110] With a project cost of approximately $3.5 billion, the CAP is "one of the most massive and expensive public works projects in history."[111]

The CAP is capable of delivering to central and southern Arizona 1.2 maf of Arizona's 2.8 maf apportionment of Colorado River water.[112] However, the demand for CAP water has declined drastically in recent years due to a downturn in the agricultural economy and the decision by the City of Tucson, the CAP's largest municipal subscriber, to suspend indefinitely delivery of CAP water to customers.[113] The underutilization of CAP water has renewed the need for Arizona to protect its apportionment as California and Nevada view the underutilized CAP water as excess Colorado River water that should be available to serve their domestic needs.[114]

III. TRANSFERRING WATER INTERSTATE

A. A New Attitude Towards Interstate Transfers

For the most part, *Arizona v. California* settled the old disputes over the rights of the basin states to Colorado River water. Arizona, perhaps because of its persistent anxiety about California's water consumption, won recognition of its entitlement and, for a price, a way to deliver it as well.

But now there are new challenges to the Law of the River. In a 1995 speech to the Colorado River Water Users Association, Secretary Babbitt declared that the focus has shifted from the development of the water supply toward its

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107. The Arizona Legislature created the Arizona Water Bank, in part, because "due to the low priority on the Colorado river of the central Arizona project and other Arizona Colorado river water users, the susceptibility of this state to future shortages of water on the Colorado river is a threat to the general economy and welfare of this state and its citizens." ARIZ. REV. STAT. ANN. § 45-2401(A) (West Supp. 1997).

108. Pontius, *supra* note 6, at 33.

109. Robert Jerome Glennon, *Coattails of the Past: Using and Financing the Central Arizona Project*, 27 ARIZ. ST. L.J. 677, 682 (1995).

110. *Id.*

111. Pontius, *supra* note 6, at 33.

112. *Id.*

113. Glennon, *supra* note 109, at 683.

114. *Id.*

management for the greatest efficiency and productive use.[115] It appears inevitable that the new era will include the transfer of water between states with an abundant supply of Colorado River water and those in need of more.

The dynamics in the Lower Basin exemplify the need to be able to move water between states. In 1990 for the first time, and then in 1996, the Lower Basin states came close to using their full 7.5 maf apportionment; the same consumption was expected in 1997.[116] In 1998, the Lower Basin is estimated to use about 8.2 maf.[117] For years, California's annual 4.4 maf apportionment has been augmented by Colorado River water apportioned to, but unused by, Arizona and Nevada.[118] But in the future, if there is not enough mainstream water to meet the basin's normal annual 7.5 maf apportionment established in the Decree, the Secretary can declare a shortage under which California would receive no more than 4.4 maf.[119] Nonetheless, it is estimated that Southern California's need for water will increase by 940,000 acre-feet ("af") annually between 1990 and 2010, and an additional 600,000 af annually between 2010 and 2020.[120]

At the same time, Las Vegas, Nevada, is among the fastest growing cities in the country.[121] Las Vegas uses more than 300 gallons of water per person per day—about twice as much as that consumed by the average person in Tucson, Arizona.[122] It is projected that Nevada will utilize its full 300,000 af apportionment by 2010.[123] So Nevada, too, will need more water soon. Arizona is not projected to need its full Colorado River entitlement until 2035.[124] However, Arizona may be in a position to divert its entire apportionment by 1998, when the Water Bank is fully operational.[125]

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115. Secretary Bruce Babbitt, Address at the 50th Annual Convention of the Colorado River Water Users Association 3 (Dec. 8, 1995) (transcript on file with author).

116. Sue McClurg, *The Colorado Compact: 75 Years Later*, W. WATER, Sept.–Oct. 1997, at 9.

117. Secretary Bruce Babbitt, Address at the 1997 Annual Conference of the Colorado River Water Users Association 2 (Dec. 18, 1997) (transcript on file with author). The Secretary declared a surplus in 1998, which allows the Lower Basin to use more than 7.5 maf. *Id.*

118. From 1987 to 1993, California's use averaged nearly five maf. Eric L. Garner & Michelle Ouellette, *Future Shock? The Law of the Colorado River in the Twenty-first Century*, 27 ARIZ. ST. L.J. 469, 479–80 (1995).

119. Arizona (1964), 376 U.S. 340, 342. A declared shortage would also raise the question of how to allocate insufficient supplies between the Upper and Lower Basins.

120. Garner & Ouellette, *supra* note 118, at 480.

121. Ryan Dennett, *Las Vegas and the Virgin River: Cashing in on an Unclaimed Jackpot in the Southern Desert*, 10 BYU J. PUB. L. 367, 367 (1996).

122. *Id.*

123. Pontius, *supra* note 6, at 26.

124. Glennon, *supra* note 109, at 680. The prediction that Arizona would not use its full apportionment sooner brought threats of lawsuits from California and Nevada, who claimed Arizona was unfairly hoarding the water it was not using. Van Der Werf, *supra* note 8, at A1.

125. Pontius, *supra* note 6, at 26.

The question is whether the Law of the River allows water to be transferred interstate—from Arizona to California and Nevada—and if so, under what terms. *Arizona v. California* made the Secretary the water master of the Lower Basin with great power to apportion water between and within the Lower Basin states.[126] However, the Compact of 1922 makes no reference to interstate transfers. Neither does reclamation law contain any explicit Bureau water transfer policy.[127] And observers disagree over whether there is implicit allowance for water transfers.[128]

For many years, water interests in the seven basin states argued that water marketing of any sort was legally impossible.[129] But in the last decade the practical reality that some areas need more Colorado River water than they have entitlement to has resulted in a rapid shift in attitude.[130]

B. California's Seven State Water Bank Proposal

In the early 1990s, representatives of the basin states began to discuss how California could satisfy its water demand as the need for water in the Lower Basin exceeded its 7.5 maf apportionment.[131] California offered to take measures to cut back consumption to its 4.4 maf allocation within twenty years.[132] Until then, it proposed, it would continue to divert in excess of the state's annual share and make payments to an escrow account to compensate for any water it consumed that caused the Lower Basin's total consumption to exceed the Compact entitlement.[133] Included in the California proposal was an interstate water bank that would temporarily redistribute states' rights to Colorado River water.[134] The water would

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126. Arizona (1963), 373 U.S. 546, 580–81.

127. A. Dan Tarlock, *Western Water Law, Global Warming, and Growth Limitations*, 24 LOY. L.A. L. REV. 979, 989 (1991).

128. *See id.* at 989 ("Transfers of project water may take place under both federal and state law, but the prevailing assumption is that they will be the exception rather than the rule."); *see also* Warren J. Abbott, *California Colorado River Issues*, 19 PAC. L.J. 1391, 1412 (1988).

129. David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 609–11 (1997). For example, in 1984, the basin states opposed the purchase by the San Diego County Water Authority of an option to lease 300,000 af annually from a private entity, the Galloway Group, that proposed constructing a reservoir in Colorado. Allen D. Freemyer & Craig M. Bunnell, *Legal Impediments to Interstate Water Marketing: Application to Utah*, 9 J. ENERGY L. & POL'Y 237, 239 n.16 (1989). For a description of the Galloway Proposal, see David Elliott Prange, *Regional Water Scarcity and the Galloway Proposal*, 17 ENVTL. L. 81, 82–83 (1986)

130. Getches, *supra* note 129, at 609–11.

131. *Id.* at 611.

132. *Id.* at 612.

133. *Id.* at 611–12.

134. *Id.* at 612.

be available for purchase by any user in the basin states for a price fixed by a forum of the seven basin states.[135]

The other states rejected the California proposal primarily because it facilitated California's overconsumption.[136] According to water law scholar David Getches:

> The other states' focus on reducing California's demands reflects their apparent insecurity about the durability and enforceability of the law of the river if California were to remain dependent on water in excess of its apportioned share. They were willing to let California use their unused apportionments for free in the short-run but sought to avoid allowing it to use the water in the long-run, even for a price.[137]

While they nixed the California plan, some basin states soon recognized that assisting California through its water shortages could prove profitable.[138]

C. Nevada's Water Bank Proposal

In 1994, after the California plan was dismissed, Nevada presented a water bank proposal to the Lower Basin states.[139] The proposal attempted to address each of the states' concerns in that it (1) assured that the Southern California Metropolitan Water District had a full supply; (2) ended the CAP's low priority; and (3) provided a long-term increase in the Colorado River water allocation for Southern Nevada Water Authority.[140] The bank would be operated by a Lower Basin Commission comprised of delegates with equal voting power from each of the three states.[141] The Commission would market surplus, excess, and unused apportionments of Colorado River water.[142] Nevada proposed to fund the bank through equal contributions of each state and revenues from charges for storing and delivering water.[143]

As the one state of the three with water to market, Arizona objected to the Nevada water bank because Arizona could be outvoted by the two states that needed water.[144] Arizona was also put off by having to pay an equal portion to fund the bank when it would be the only state with water to sell.[145] In any case, the state

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135. *Id.*
136. *Id.* at 612–13.
137. *Id.*
138. *Id.*
139. Glennon, *supra* note 109, at 699. The proposal was titled "Nevada's Approach to a Lower Division Regional Solution." *Id.*
140. *Id.*
141. *Id.* at 700.
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*

legislation and federal rules necessary to activate the Nevada proposal were never forthcoming.[146]

D. The Bureau of Reclamation on Water Banking

Along with other water interests in the Colorado River Basin, the Bureau in the 1990s wrestled with how to implement interstate water transfers within the bounds of the Law of the River.[147] In a speech to the Colorado River Water Users Association, Secretary Babbitt claimed that water banking "as an authorized technique is vintage Law-of-the-River."[148] He pointed to "The Seven-Party Agreement" of 1931, an arrangement between Californian Colorado River water interests, which is incorporated into every water contract between the Secretary and California users.[149] Under the agreement, the parties can bank up to five maf of water saved by reduced diversions to be available for withdrawal according to terms set by the Secretary.[150] According to Secretary Babbitt, these contracts also give the United States the right to make similar arrangements with users in other states.[151] He noted that it is only now that the Lower Basin's 7.5 maf apportionment is fully utilized that the banking provisions may need to be exercised.[152]

The year before the Secretary's pronouncement, in 1994, the Bureau drafted rules for an interstate bank as part of a proposal for the administration of mainstream Colorado River water in the Lower Basin ("Draft Regulations").[153] Under the Draft Regulations, Lower Basin states could bank conserved Colorado River water.[154] To qualify as conserved water, the water must have been slated for consumptive use or lost from availability for consumptive use but for the conservation measures.[155]

Water thus conserved could be transferred directly to another use or banked in Lake Mead, behind the Hoover Dam, as "top water"—meaning it would have the lowest priority of stored water and be released first when flood control so

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146. Getches, *supra* note 129, at 614.
147. *Id.* at 616–19.
148. Babbitt, *supra* note 115, at 8.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. Bureau of Reclamation, Department of the Interior, Draft Regulations for Administering Entitlements to Colorado River Water in the Lower Colorado River Basin (proposed May 6, 1994) (issued by Robert W. Johnson, Acting Regional Director) [hereinafter Draft Regulations] (unpublished draft regulations on file with author). For further discussion of the Draft Regulations, see Glennon, *supra* note 109, at 701–03; LAWRENCE J. MACDONNELL ET AL., WATER BANKS IN THE WEST § 2.4.5, at 2–70 (1994).
154. Draft Regulations, *supra* note 153, at § 415.23(d)(2). In addition to conserved water, states could bank water made available through land fallowing within the Lower Basin states and water imported into the Lower Basin states from a non-Colorado River Basin source. *Id.*
155. *Id.*

required.[156] Following administrative approval, the saved water could then be marketed intrastate or interstate.[157] The Draft Regulations proposed that the bank be managed by the Regional Director, Lower Colorado Region.[158]

In order to comply with the Decree, the Draft Regulations declared that the act of conserving and banking would be considered a beneficial consumptive use.[159] That is, the water conserved would be charged against the apportionment of the conserving state in the year of the conservation.[160] Once the water had been "used" and charged against the apportionment of a Lower Basin state pursuant to Article II(B)(4) of the Decree,[161] in effect, it would no longer be Colorado River water and thus, no longer subject to the Law of the River.[162] Under the Draft Regulations, then, a state in need of extra water could buy banked (and thus, "used") water and receive that water in addition to its annual apportionment. According to some observers "this or some other comparable legal fiction probably is necessary to get around the inflexibility in the current interpretation of the Colorado River apportionments."[163]

Arizona threatened to sue over the Draft Regulations.[164] As the state with the largest unused apportionment in the Lower Basin, Arizona wanted more control over the marketing of its water.[165]

In addition, Arizona claimed that the Draft Regulations violated the Decree by redefining beneficial use.[166] The Draft Regulations redefined beneficial use because Article II(B)(4) of the Decree requires that "mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released."[167] If beneficial use is not redefined to include conservation, the state that actually used the water would be charged with it; as a result, states utilizing their full apportionments could never buy and receive Colorado River water because that would cause them to exceed their basic apportionments.[168] Arizona argued that the use should be charged against the apportionment of the state where the water is actually used, in the year that it is actually used—not charged to the state that implemented the conservation measures some year earlier.[169]

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156. *Id.* at § 415.23(e).
157. *Id.* at § 415.23(f).
158. *Id.* at § 415.23(c).
159. *Id.* at § 415.23(h).
160. *Id.*
161. Article II(B)(4) requires that water actually used in a state be charged against that state's annual apportionment. Arizona (1964), 376 U.S. 340, 343.
162. *Id.*
163. MACDONNELL, *supra* note 153, §5.1, at 5–3.
164. Pontius, *supra* note 6, at 23, 37.
165. Glennon, *supra* note 109, at 702–03.
166. *Id.* at 703.
167. *Arizona (1964)*, 376 U.S. at 343.
168. Glennon, *supra* note 109, at 703.
169. *Id.*

Arizona also claimed that the Draft Regulations violated language in the Decree that enjoins the Secretary from releasing more than 7.5 maf annually, except when a surplus has been declared.[170] To have the Secretary release the conserved water in addition to the combined states' annual apportionment means he would release more than 7.5 maf annually.

Arizona's opposition to top water banking is compelled by the low priority of CAP water. Storage of conserved water takes up capacity in Lake Mead that is otherwise available to the Lower Basin states to meet their needs in times of drought. Because of the low priority of CAP water, when drought occurs, the CAP supply is the first to be reduced.

Because of Arizona's strong objections to the Draft Regulations, the Bureau suspended their publication in November, 1994, pending further discussions among the Lower Basin states.[171]

E. Secret Negotiations Between California and Nevada

In 1995, Southern California Metropolitan Water District ("MWD") and the Southern Nevada Water Authority ("SNWA") made a deal[172] without consulting Arizona.[173] MWD would fund the lining of the All-American Canal, and thereby capture about 67,000 af of Colorado River water otherwise lost to seepage.[174] SNWA would pay for a proportionate share of the canal lining and, in return, MWD would forbear diversion of up to 30,000 af per year of the saved water for utilization by Nevada.[175] The conserved water would be stored as top water in Lake Mead.[176] The project required the Secretary's approval to line the canal and for the formation of a long term agreement allocating excess water in the Lower Basin.[177] While the proposal was never formally put before Secretary Babbitt, he has expressed his enthusiasm for the concept of banking conserved water for the later benefit of states that invested in the conservation measures.[178]

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170. Telephone Interview with Timothy J. Henley, Manager, Arizona Water Banking Authority (Mar. 26, 1998) [hereinafter Henley Interview]; *see Arizona (1964)*, 376 U.S. at 341–42.

171. *See* Offstream Storage of Colorado River Water and Interstate Redemption of Storage Credits in the Lower Division States, 62 Fed. Reg. 68492, 68495 (1997) (to be codified at 43 C.F.R. pt. 414) (proposed Dec. 31, 1997) [hereinafter Proposed Regulations].

172. Letter from Metropolitan Water District of Southern California and Southern Nevada Water Authority to Secretary Babbitt (Nov. 20, 1995) [hereinafter MWD Letter].

173. Letter from Arizona Governor Fife Symington to California Governor Pete Wilson (Nov. 17, 1995) (hereinafter "Symington Letter") ("Arizona was deeply disappointed to hear of these secret negotiations.").

174. MWD Letter, *supra* note 172.

175. *Id.*

176. Rita P. Pearson, *California's 'Top Water Bank' Could Shortchange Arizona*, ARIZ. REPUB., Jan. 28, 1996, at H5.

177. MWD Letter, *supra* note 172.

178. Babbitt, *supra* note 115, at 5–9.

Arizona was outraged. In a letter to California Governor Pete Wilson, Arizona Governor Fife Symington threatened to initiate another round of *Arizona v. California* if the deal proceeded.[179] Essentially, Arizona felt threatened by California's top water banking proposal for the same reason it fought the Draft Regulations. If California is allowed to store water in Lake Mead, to take as it needs, it draws down the reservoir making less water available for the CAP in times of shortage.[180]

Arizona further objected to the proposal because it would enable California to continue to consume more than its entitlement as California could receive what it conserved through the lining of the All-American Canal in addition to its 4.4 maf annual apportionment. A better approach, suggested Rita P. Pearson, Director of the Arizona Department of Water Resources, would be for the Secretary to reward conservation investments that reduce a state's demand below its annual entitlement.[181]

IV. ARIZONA'S WATER BANK

A. Arizona Legislation

In view of the threat of shortages and the menace of schemes to transfer away its water, Arizona created the Water Bank.[182] The Water Bank pays the delivery and storage costs to bring unused Colorado River water into central and southern Arizona through the CAP.[183] The water is stored underground in existing aquifers or is used directly by irrigation districts instead of ground water.[184]

With regard to interstate operations, the Water Bank can contract with "appropriately authorized agencies" in California and Nevada to store Colorado River water in Arizona.[185] The contracting agency pays the cost of transporting the unused apportionment to be recharged or used in lieu of ground water.[186] By paying the cost and other assessments, the contracting agency acquires the right to the same amount of Arizona's apportionment to be diverted to the contracting state from the Colorado River in a later year.[187] When it comes time for the contracting agency to "withdraw" its banked water, the agency receives a diversion from the Colorado River that would otherwise have gone to Arizona, and Arizona takes that

179. Symington Letter, *supra* note 173, at 2.
180. Pearson, *supra* note 176.
181. *Id.*
182. *See* Pontius, *supra* note 6, at 37.
183. ARIZ. REV. STAT. ANN. § 45–2423 (West Supp. 1997).
184. *Id.*; *see* ARIZONA WATER BANKING AUTHORITY, 1996 ANNUAL REPORT 12 (1996). In the near term, it is anticipated that most of the water will be banked through the use of CAP water in lieu of ground water. *Id.*
185. ARIZ. REV. STAT. ANN. § 45–2471(A) (West Supp. 1997).
186. *Id.* § 45–2471(C) (West Supp. 1997).
187. *Id.* § 45–2471(B) (West Supp. 1997).

amount of water from its storage facilities.[188] The contracts cannot require Arizona to divert more than a total of 100,000 af in any one year.[189]

B. Interstate Transfers and the Law of the River

Activation of the interstate provisions of the Water Bank depends upon the promulgation of Bureau regulations that "allow the contractual distribution of unused entitlement under article ii(b)(6) of the decree" and that are acceptable to the Director of the Department of Water Resources.[190] Under Article II(B)(6) of the Decree, the Secretary can release one state's apportioned but unused water for consumptive use by another state.[191]

As applied to the Water Bank, in the year when the contracting agency wants to recover its credits, first the Water Bank would arrange with the Secretary to decrease the diversion to Arizona by the amount requested, then the Secretary would release the agreed upon amount of Arizona's apportioned but unused water to the contracting state.[192] Because Article II(B)(6) gives the Secretary absolute discretion in reassigning apportioned but unused water, the Water Bank requires the Secretary's assurance that he will recognize the Water Bank's agreements and deliver Arizona's unused apportionment to the appropriate contracting party.

Arizona has stated that no other mechanism than this—the Secretary's power to redistribute unused apportionment under Article II(B)(6)—will satisfy the intent of the Arizona Water Bank legislation.[193] Arizona maintains that the Decree enjoins the Secretary from releasing any water to a state in excess of its Project Act entitlement except in two situations: when he has declared a surplus under Article II(B)(2) or when he has released apportioned but unused water pursuant to Article II(B)(6).[194] The thinking is that as long as the Secretary does not release more than the 7.5 maf (except in times of surplus), and delivers to each state its requested apportionment, then Article II(B)(6) gives the Secretary discretion to redistribute the unused portion of the 7.5 maf.[195] The Secretary has been doing essentially this in the many years when Arizona has not used its full 2.8 maf and the Secretary has released the water for use in California.

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188. *Id.* § 45-2471(B), (D) (West Supp. 1997).

189. *Id.* § 45-2471(A)(3).

190. *Id.* § 45-2427(C) (West Supp. 1997).

191. Arizona (1964), 376 U.S. 340, 343.

192. § 45-2471(D).

193. Arizona Water Banking Authority, Comments on Bureau of Reclamation, Department of the Interior, Proposed 43 CFR Part 414: Offstream Storage of Colorado River Water and Interstate Redemption of Storage Credits in the Lower Division States 2 (submitted Feb. 18, 1998) [hereinafter Arizona's Comments].

194. Henley Interview, *supra* note 170. The state's position is that Article II(B)(6) allows for interstate transfer of water without special federal regulations; the activation of the interstate provision is contingent upon the promulgation of the regulations because the Water Bank wants formalization of the Secretary's assurances to honor the interstate agreements. *Id.*

195. *Id.*

Professor Glennon has observed that Arizona's Water Bank gets snagged on the same provision of the Law of the River that Arizona claimed made the Draft Regulations unacceptable. In opposition to the Draft Regulations, Arizona argued that Article II(B)(4) of the Decree prevented a state from receiving conserved water in addition to its apportionment because Article II(B)(4) limited each state to its Project Act apportionment.[196] If Article II(B)(4) prevented a state from buying water that had been conserved by another state in an earlier year, would not it prevent a state from buying water that had been banked by another state in an earlier year? In other words, would not Article II(B)(4) prevent a state from receiving banked water that would cause it to receive more than its annual apportionment? Arizona's distinction "between Article II(B)(6), to justify its water bank, and Article II(B)(4), to prevent [the Bureau] from redefining 'beneficial consumptive use,'" according to Professor Glennon, "may prove too cute by half."[197]

Though perhaps contradictory, the necessity of Arizona's position is understandable. If the Secretary can release conserved water in addition to the total Project Act apportionment due to the Lower Basin—as allowed by the Draft Regulations—Arizona, with its low priority, might receive less than its full apportionment in years of shortage. Under the Arizona scheme, the Secretary never delivers more than authorized by the Project Act, because when a state collects its banked water, Arizona receives that amount less than its regular apportionment; thus, the reserviors are depleted less. Were the priorities different, Arizona would likely be less fervent. Indeed, Arizona has made clear that if the CAP supply had higher priority so that Arizona had less to lose from "a change in the management of the river," it might construe the Law of the River more liberally.[198] As it is, however, the clamor for some method of transferring Arizona's unused water to bolster the Project Act apportionments of more needy states has compelled Arizona to take control of how such transfers will happen. Arizona's insistence that the Law of the River permits such transfers only through Article II(B)(6) of the Decree best protects Arizona's interests.

C. Proposed Federal Regulations

On December 31, 1997, the Department of Interior released proposed regulations for offstream storage of Colorado River water and interstate redemption ("Proposed Regulations").[199] The Proposed Regulations attempt to accomplish Arizona's desired scheme. Essentially, the Proposed Regulations facilitate "interstate storage agreements" that allow an authorized entity in a "storing state" to store unused entitlement for the credit of an authorized entity in a "consuming state."[200] When it comes time for the consuming state to withdraw its deposit, the storing state informs the Secretary that the storing state's "intentionally

196. *See supra* text accompanying notes 153–71.
197. Glennon, *supra* note 109, at 705.
198. Pearson, *supra* note 176.
199. Proposed Regulations, *supra* note 171.
200. *Id.* at § 414.3(a).

created unused apportionment" should be diverted to the consuming state.[201] The Secretary then releases water "consistent with the [Project Act], Article II(B)(6) of the Decree, and all other applicable laws." Importantly, the Proposed Regulations provide that "[i]ntentionally created unused apportionment that is developed by the authorized entity of the Storing State will be made available to the authorized entity of the Consuming State and will not be made available to other contractors or Federal entitlement holders."[202] In other words, the Secretary, in redistributing unused apportionment pursuant to Article II(B)(6), will honor the banking agreements made between the states.

While Arizona has objected to some of the wording of the Proposed Regulations, the comments it submitted to the Bureau raise no substantial concerns.[203] Nevada, too, supports the Proposed Regulations for the most part,[204] and has responded positively to the Water Bank.[205] It may be that the will to create an interstate transfer mechanism is so strong and so widespread that even if the interstate provisions of the Water Bank did contradict the Law of the River, there would be no opposition to the Water Bank on those grounds. In any case, it appears Arizona has succeeded in organizing the interstate transfer of Lower Basin Colorado River water in a manner that protects Arizona's interests—at least for now.

V. CONCLUSION

The life of the Arizona Water Bank is inevitably short; within the next decades Arizona and Nevada will need their entire apportionments of Colorado River water as it becomes available, leaving no water to bank. Arizona has suggested changes to the Proposed Regulations that restrict their applicability.[206] But even if the Proposed Regulations can apply to none other than the Arizona Water Bank, perhaps the most lasting importance of the Water Bank will be that it

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201. *Id.* at § 414.4. Article II(B)(6) of the Decree authorizes the Secretary to release apportioned but unused water for consumptive use in other states. Arizona v. California, 376 U.S. 340, 343 (1964).

202. Proposed Regulations, *supra* note 171, at § 414.3(d).

203. *See* Arizona Comments, *supra* note 193; Henley Interview, *supra* note 170.

204. Letter from the Colorado River Commission of Nevada to Patricia J. Beneke, Assistant Secretary, Water and Science, Department of the Interior (Jan. 27, 1998). Nevada's primary response to the Proposed Regulations was that they should require that the Secretary make an "enforceable contractual commitment" to the storing state that he will deliver the agreed upon amount of intentionally created unused apportionment. *Id.*

205. Pontius, *supra* note 6, at 38.

206. Arizona Comments, *supra* note 193, at 3. Arizona suggests the regulations restrict participants in the interstate storage agreements to entities "specifically authorized to participate by State law because the transactions involve the apportionments of Colorado River water held by the individual States." *Id.* The reason for this is so that private parties that have entitlements to Colorado River water are not permitted to transfer water interstate under the Proposed Regulations. Henley Interview, *supra* note 170. Arizona's intent is that the Proposed Regulations be tailored to "this limited window of opportunity to make use of currently unused water." Arizona Comments, *supra* note 193, at 2.

facilitated the transfer of Colorado River water interstate, apparently within the bounds of the Law of the River. Ten years ago many believed that would be impossible.

In its first year of operation, the Arizona Water Bank pushed Arizona into full utilization of its entitlement for the first time ever.[207] Because the Secretary declared a surplus in 1997 and 1998, Arizona's increased diversion did not affect the other Lower Basin states.[208] But it will. The Water Bank will eventually force California to conserve more and use less Colorado River water. In addition, by recharging the aquifer and using the CAP water in lieu of ground water, Arizona preserves its most valuable natural resource. But it remains to be seen whether the Water Bank is more successful as a method of protecting Arizona's valuable water resource or as a way to force Southern California to cut back its water usage.

207. Arizona Water Banking Authority, 1998 Annual Plan of Operation (draft), 1 (unpublished draft plan on file with author).

208. *Id.* at 2–3. Total use in the Lower Basin in 1997 and 1998 is estimated to exceed 8.2 maf. *Id.*