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**M E M O R A N D U M**

November 18, 1997

**TO:** Frank (Sam) Maynes, James Lochhead, Larry Anderson and Gordon Fassett

**FROM:** Philip B. Mutz

**SUBJECT:** Diversion and Use of Colorado River Water

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In the past several months the diversion and use of Colorado River water in the Upper and Lower Basin portions of Northeastern Arizona and Northwestern New Mexico has been discussed. At the last meeting of Upper Colorado River Commission, I mentioned that we had done some research on questions posed and that I would forward our thoughts for your information. Accordingly, enclosed is a seven page compilation of our work.

Please let me know if you have comments or if additional information would be useful.

PBM:rs

cc: Wayne Cook

A handwritten signature in black ink, appearing to read "Philip B. Mutz".

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bcc: Norman Gaume  
 Jay Groseclose  
 Brian James  
 John Whipple

## **DIVERSION AND USE OF COLORADO RIVER WATER**

### **Colorado River Compact Definitions**

Article II(c) The term "States of the Upper Division" means the states of Colorado, New Mexico, Utah and Wyoming.

Article II(f) The term "Upper Basin" means those parts of the states of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said states located without the drainage area of the Colorado River System which are now or hereafter be beneficially served by waters diverted from the system above Lee Ferry.

Article II(g) The term "Lower Basin" means those parts of the states of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said states located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the system below Lee Ferry.

Article III(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, ...

Article III(d) The states of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of 10 consecutive years reckoned continuing progressive series...

Article III(e) The states of the Upper Division shall not withhold water, and the states of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

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## **Upper Colorado River Basin Compact Definitions**

**Article IX(a)** No state shall deny the right of the United States of America and, subject to the conditions hereinafter contained, no state shall deny the right of another signatory state, any person or entity of any signatory state to acquire rights to the use of water, or to construct or participate in the construction and use of diversion works and storage reservoirs with appurtenant works, canals and conduits in one state for the purpose of diverting, conveying, storing, regulating and releasing water to satisfy the provisions of the Colorado River Compact relating to the obligation of the states of the upper division to make deliveries of water at Lee Ferry, or for the purpose of diverting, conveying, storing or regulating water in an upper signatory state for consumptive use in a lower signatory state, when such use is within the apportionment to such lower state made by this compact. Such rights shall be subject to the rights of water users, in a state in which such reservoir or works are located, to receive and use water, the use of which is within the apportionment to such state by this compact.

**Article XIV** Subject to the provisions of this compact, the consumptive use of the waters of the San Juan river and its tributaries is here by apportioned between the states of Colorado and New Mexico as follows:

The state of Colorado agrees to deliver to the state of New Mexico from the San Juan river and its tributaries which rise in the state of Colorado a quantity of water which shall be sufficient, together with water originating in the San Juan basin in the state of New Mexico, to enable the state of New Mexico to make full use of the water apportioned to the state of New Mexico by Article III of this compact, subject, however, to the following:

- (a) A first and prior right shall be recognized as to:
- (1) All uses of water made in either state at the time of the signing of this compact; and
  - (2) All uses of water contemplated by projects authorized, at the time of the signing of this compact, under the laws of the United States of America whether or not such projects are eventually constructed by the United States of America or by some other entity.
- (b) The state of Colorado assents to diversions and storage of water in the state of Colorado for use in the state of New Mexico, subject to compliance with Article IX of this Compact.
- (c) The uses of the waters of the San Juan river and any of its tributaries within either state which are dependent upon a common source of water and which are not covered by (a) hereof, shall in times of water shortages be reduced in such quantity that the resulting consumptive use in each state will bear the same proportionate relation to the consumptive use made in each state during times of average water supply as determined by the commission; provided, that any preferential uses of water to which Indians are entitled under Article XIX shall be excluded in determining the amount of curtailment to be made under this paragraph.
- (d) The curtailment of water use by either state in order to make deliveries at Lee Ferry as required by Article IV of this compact shall be independent of any and all conditions imposed by this article and shall be made by each state, as any when required, without regard to any provision of this article.

- (e) All consumptive use of the waters of the San Juan river and its tributaries shall be charged under the apportionment of Article III hereof to the state in which the use is made; provided that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

Article XV(a) Subject to the provisions of the Colorado River Compact and of this compact, water of the upper Colorado river system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

- (b) The provisions of this Compact shall not apply to or interfere with the right or power of any signatory state to regulate within its boundaries the appropriation, use and control of water, the consumptive use of which is apportioned and available to such states by this Compact.

Article XIX Nothing in this compact shall be construed as:

- (a) Affecting the obligation of the United States of America to Indian tribes;
- (b) Affecting the obligations of the United States of America under the treaty with the United Mexican States (Treaty Series 994);
- (c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado river system, or its capacity to acquire rights in and to the use of said waters;

- (d) Subjecting any property of the United States of America, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States of America, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;
- (e) Subjecting any property of the United States of America, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this compact.

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**DISCUSSION**

The apportionment of Article III(a) of the Colorado River Compact is to the Upper Basin and to the Lower Basin. The Compact is explicit that the consumptive use of water apportioned to the Upper Basin is for uses exclusively in the Upper Basin as defined in Article II(f), and similarly the consumptive use of water apportioned to the Lower Basin is for use exclusively in the Lower Basin as defined in Article II(g). Parts of the states of Arizona, New Mexico and Utah are in the Upper Basin and parts of these states are in the Lower Basin.

**QUESTION** Can the states of Arizona, New Mexico and Utah use water apportioned to the Upper Basin in the Lower Basin portions of these states?

Yes. Articles II(f) and III(a) of the Colorado River Compact are explicit that the beneficial consumptive use of water apportioned to the Upper Basin is for use exclusively within the boundaries of the Upper Basin states. It would be illogical to

suggest that the Lower Basin portions of the states of Arizona, New Mexico and Utah be excluded from using water apportioned to the Upper Basin portion of those states. Further, Article XV(b) of the Upper Colorado River Basin Compact gives the signatory states discretion as to the appropriation, use and control of the consumptive use of water apportioned and available to such state by the Compact. Thus, Arizona, New Mexico and Utah may use water apportioned to each by the Upper Basin Compact in the Lower Basin portions of such states.

**QUESTION** Can Arizona divert water from the Colorado River above Lee Ferry for beneficial consumptive use in the Lower Basin of Arizona so long as the consumptive use is charged against Arizona's Lower Basin apportionment?

Yes, subject to the concurrence of all seven Colorado River Basin states and the Secretary of the Interior that the volume of water so diverted into the Lower Basin is accounted as part of the delivery obligation of Article III(d) of the Colorado River Compact.

**QUESTION** Can Arizona divert water from the San Juan River Basin in New Mexico for delivery and use in either the Upper Basin or Lower Basin portions of Arizona?

Yes, subject to the provisions of Article XIV of the Upper Colorado River Basin Compact which apportions the flow of the San Juan River and its tributaries between Colorado and New Mexico and requires Colorado to deliver to New Mexico sufficient water to enable New Mexico to make full use of the water apportioned to New Mexico by Article III of the Upper Basin Compact. Further, that the provisions of Article XIV (2)(c) regarding exclusion during curtailment of preferential use of water to which Indians are entitled under Article XIX of the Upper Basin Compact

shall not apply to any water diverted from the San Juan River for use in Arizona. Further, that the diversion and use in Arizona is subject to Article IX of the Upper Basin Compact which prioritizes the rights of the use of water in the state in which the water is diverted over the rights for use in another state.

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