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The Legal Framework for Water Transfers in the Colorado River Basin Will Be Important

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**A DETAILED ANALYSIS OF THE WATER
TRANSFERS FRAMEWORK IN THREE
COLORADO RIVER BASIN STATES**

**INTRODUCTION: THE LEGAL FRAMEWORK FOR WATER
TRANSFERS IN THE COLORADO RIVER BASIN WILL BE
IMPORTANT**

JENNIFER PITT

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One need only look at the dry Colorado River delta, where flows in the last decade have been intermittent at best, to know that the Colorado River is fully tapped. While legal rights to additional uses of Colorado River water may yet be granted, water users seeking new or increased supply will increasingly look to water transfers, the mechanism by which, in the context of water markets, voluntary and compensated transactions allow for the temporary lease or permanent sale of water. Water users will pursue these transfers either to increase water use or firm the use of existing supplies that are vulnerable to shortage. To stakeholders and decision-makers, understanding how transfers will work is critical to understanding the future of Colorado River management.

The three papers that follow, reviewing the framework for water transfers in Arizona, Colorado, and Utah, address two questions: who can transfer Colorado River water and who can block a transfer? The answers should be of interest to anyone wishing to learn more about the future of water use in the Colorado River basin, and in particular to:

- existing water users who need to know if they will be able to transfer their rights or whether their rights will be protected if another water rights holder wants to transfer;
- entities seeking water who need to know if they will be able to lease or buy water, the potential obstacles, and the transaction costs;
- state and federal decision-makers who have an interest in whether the existing legal and policy framework is adequate to protect existing users and third party beneficiaries, and the extent to which the existing

legal and policy framework allows transfers that could meet new demands; and

- state parties, including those whose revenues depend on existing water uses, and those, such as environmental, recreational and community stakeholders, who have an interest in how water transfers will shape where and how water is used in the basin.

I. THE AGE OF LIMITS

The Colorado River, for eons, has been a lifeline for an arid land, the major watershed in the driest region of the United States. Over the past century, aided by federal subsidies, we have built a thriving society in the American West that depends on the Colorado's water. Our predecessors faced monumental challenges in taming the Colorado's floods, harnessing its power, and delivering its waters to the farms and cities they built. The region's thriving communities and economies are testament to their success. Today we face a different monumental challenge: how do we grow now that we have so completely developed this river that our use of water exceeds the supply? Figure 1, developed by the Bureau of Reclamation,

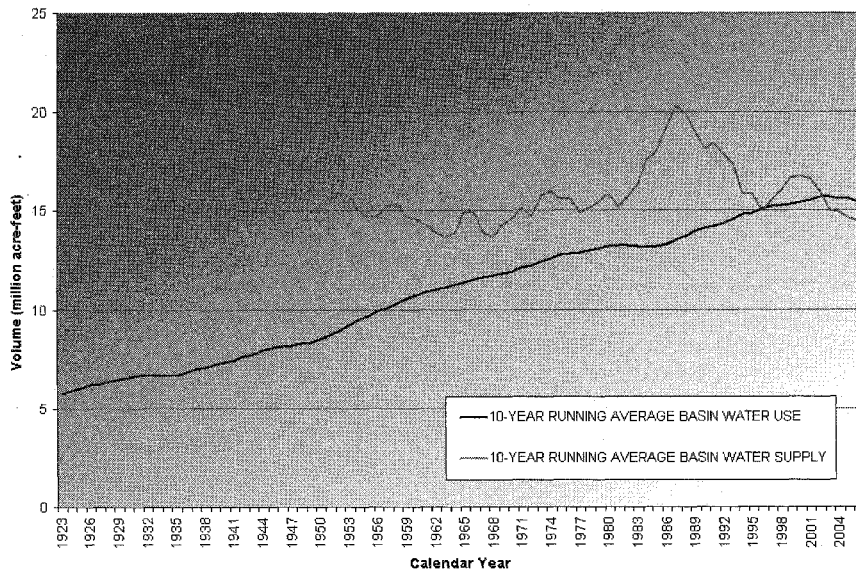


Figure 1. Colorado River Basin Historical Supply and Use (Source: U.S. Bureau of Reclamation, Colorado River Basin Water Supply and Demand Study: A Proposal Submitted for Consideration under the Basin Study Program, June 2009. Page 9. Online at <http://www.usbr.gov/lc/region/programs/crbstudy/CRBasinStudy.pdf>)

plainly illustrates the predicament, as the line depicting our increasing use of water over the twentieth century has indisputably crossed the line which depicts the river's supply of water. This is nowhere more evident

than the Colorado River Delta, where the United States and Mexico meet across the Colorado's dry channel, and is increasingly evident in the declining volume of water remaining in storage at Lakes Powell and Mead.¹

The age of limits hit the Lower Basin about ten years ago as Arizona began using its full apportionment and California was cut back to its apportionment with the "4.4 plan." In the Upper Basin parties are beginning to grapple with the idea of limits, as new Colorado River pipelines to serve growing urban populations are proposed, and regulators assess the remaining water supply available.² Moreover, the projected impacts of climate change on the Colorado River are the subject of much study and understood with increasing specificity. The federal government's first basin-specific projection foresees a decline of 8.5% in water supply by mid-century.³

II. MEETING NEW DEMANDS IN THE AGE OF LIMITS

Many water governance organizations in the Basin have weighed in on the response to the age of limits. The seven states that share the Basin in the U.S. collaborated to study "augmentation" options including everything from desalination to river basin imports and water imports using ocean routes, but did not assess water transfers.⁴ A broader study of responses that includes water transfers is expected in the results of the Colorado River Basin Water Supply and Demand Study now in progress by the federal and seven Basin State governments. This Basin Study will identify and assess a broad range of structural and non-structural options and strategies.⁵

The Western Governors have recognized that "water continues to move from farms to cities."⁶ A review of water transfers in the Colorado River Basin found more than 3000 water transactions of more than 23

1. For a view of water in storage at Lake Mead see http://www.usbr.gov/uc/water/rsrvs/ops/monthly_summaries/index.html and http://www.usbr.gov/lc/region/g4000/lakemead_line.pdf.

2. See Study Plans for Lake Powell Pipeline in consideration by FERC - docket P-12966-001, also see Colorado Water Conservation Board, 2010. Colorado River Water Availability Study, Phase 1 Draft Report, available at <http://cwcb.state.co.us/technical-resources/colorado-river-water-availabilitystudy/Documents/CRWAS1Task10Phase1ReportDraft.pdf>.

3. Reclamation, 2011. SECURE Water Act Section 9503(c) - Reclamation Climate Change and Water. <http://www.usbr.gov/climate/SECURE/docs/SECUREWaterReport.pdf>.

4. The Seven Colorado River Basin States, 2007. Study of Long-Term Augmentation Options for the Water Supply of the Colorado River System. Available at http://waterplan.state.wy.us/BAG/green/briefbook/Final_Augmentation_Study.pdf.

5. Reclamation, 2011. Colorado River Basin Water Supply and Demand Study, Interim Report No. 1, Status Report at Appendix 1-2. Available at <http://www.usbr.gov/lc/region/programs/crbstudy/Report1/StatusRpt.pdf>.

6. Western Governors' Association, 2006. Water Needs and Strategies for a Sustainable Future, p. 4. Available at <http://www.westgov.org/wga/publicat/Water06.pdf>.

million acre-feet in the past 20 years.⁷ Eleven percent of the volume transacted was in permanent sales and 85% of the volume was in leases that for the most part are for fewer than 10 years.⁸

It is this reality, that water transfers do occur and likely will occur with increased frequency in the age of limits, that points to the importance of understanding the applicable legal and policy framework, and underscores the importance of the three papers published in this volume of the *Water Law Review*. From the perspective of any Colorado River stakeholder, not least those working to protect and restore healthy river flows, it is critical to think through where transfers may occur, how such transfers might affect both instream and off-stream environmental values, and how those impacts compare to the impacts of alternative water supply projects such as new dams and diversions, desalination plants, and basin imports.

Complex, diverse, and multi-layered laws, as well as regulations and contract terms all play a role in governing how water transfers may or may not be transacted. Short of the basic premise that a transfer may not injure another water right, a principal that appears in various forms in state water law, there do not appear to be uniform criteria against which transfers are assessed. Each state in the Colorado River Basin has law that governs transfers, and some transfers are controlled by federal contracts as well. In most cases irrigation and water conservancy districts must approve water transfers in their jurisdictions or even in related jurisdictions, and their charters and bylaws control who sits on these boards and thus who is represented in the decisions they make.

By asking “who can transfer water” and “who can block a water transfer and on what premises” it is possible to define the contours of the regulatory framework in which transfers take place.

7. Pritchett, James, 2011. “Quantification Task: A Description of Agriculture Production and Water Transfers in the Colorado River Basin” Special Report No. 21. of the Water Resources Institute at Colorado State University. Available at <http://www.cwi.colostate.edu/publications/sr/21.pdf> at 17.

8. *Id.* at 18.