
**UNITED STATES-MEXICO AGREEMENT
REPRESENTS COOPERATIVE APPROACH TO
ADDRESS WATER ALLOCATION ISSUES ON
THE COLORADO RIVER**

Meredith E. Nikke l

The United States and Mexico reached an agreement in November 2012 for the management of Colorado River water deliveries to Mexico over the next five years. The cooperative effort was designed to address impacts of shortage conditions in the Colorado River basin, provide Mexico an opportunity to use U.S. infrastructure to store water, and generate additional volumes of water by creating new water sources and implementing water conservation efforts. Within a complex history of the allocation of Colorado River water and following Mexico's rebuffed efforts to share in the river's surplus waters, the agreement symbolizes a collaborative and cooperative approach between the United States and Mexico.

Historic Allocation of Colorado River Water

The Colorado River basin spans seven states in the United States and traverses parts of northern Mexico before draining into the Gulf of California. Along its way, the river provides water to about 40 million people for municipal use and irrigates nearly four million acres of land in the United States. The river supports agriculture industry in the Mexicali Valley and provides municipal water supplies for Mexican communities, including Tijuana. The average long-term historical natural flow of the river over the approximately 100-year period from 1906 through 2011 is about 16.4 million acre-feet per year (AFY). Consumptive uses of that water basin-wide have grown over the past three decades, however, from approximately 13 million AFY in 1971 to 16 million AFY in 1999. Colorado River Basin Water Supply and Demand Study, U.S. Department of the Interior, Bureau of Reclamation (2012) SR-3, 36. According to a recent study released by the U.S. Bureau of Reclamation (Reclamation), demand in the Colorado River basin could exceed supply by as much as 3.2 million AFY by 2060. *Id.* at SR-36. According to Reclamation, the recent agreement with Mexico will be an integral aspect of the overall strategy to address

such imbalances. <http://www.usbr.gov/newsroom/speech/detail.cfm?RecordID=741>

Allocation of Colorado River water in the United States was set forth in the 1922 Colorado River Compact, an agreement between Colorado, New Mexico, Utah, and Wyoming (the upper division) and Nevada, Arizona, and California (the lower division). The 1922 compact provides for a roughly equal apportionment of water between the upper and lower divisions, allocating 7.5 million acre-feet of water per year to each division. The states in each division were then left to allocate the 7.5 million acre-feet share among themselves. The allocation among the states has since spawned various disputes, interim policies, and guidelines, including the 2007 Interim Guidelines for Lower Basin Shortages that established how much California, Arizona, and Nevada would sacrifice when insufficient mainstream water is available to satisfy the 7.5 million acre-feet allocation to the lower division. Record of Decision: Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (Dec. 2007) 5.

In 1944, the United States and Mexico entered into a treaty regarding the allocation of Colorado River water between the two countries. Treaty Series 994, Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Treaty Between the United States of America and Mexico. The countries agreed to a guaranteed quantity of 1.5 million acre-feet to be delivered to Mexico annually. The 1944 treaty further provided for a proportionate reduction of the delivery to Mexico in the event of extraordinary drought or serious accident affecting the U.S. irrigation system, but did not set forth specific reduction amounts. In addition, Mexico agreed to pay a proportional share of the actual costs of construction of the All-American Canal used to deliver Colorado River water to Mexico.

Allocation of Surplus River Water and Seepage Water in Mexico

As consumptive uses of Colorado River water increased in the United States, Mexico sought to protect its own interests in surplus river water and

waters seeping from the All-American Canal into Mexican groundwater basins. Initially, Mexico's efforts were rebuffed and relations between the two countries were strained.

In 2001, the United States established rules to determine the conditions under which surplus Colorado River water would be available for use within Arizona, California, and Nevada. Mexico expressed concerns that the new rules would impact Mexico's use of those surpluses for groundwater recharge, salinity control, and to address environmental issues in the upper Gulf of California. The United States expressed its commitment to work cooperatively with Mexico, but stated that it does not mitigate for impacts in a foreign country. 66 Fed. Reg. 7772 at 7779 (2001). The new agreement between the United States and Mexico now expressly provides for the allocation of surplus Colorado River water to Mexico and requires cooperation between the countries to address environmental and water quality issues.

Another source of tension in Mexico-U.S. relations concerning Colorado River water was generated by the United States's effort to place a concrete liner on the All-American Canal, which had historically seeped water into a Mexican groundwater basin. In 1994, Reclamation issued the relining plan in order to prevent the loss of water as demands for Colorado River water increased in the United States. 59 Fed. Reg. 18,573 (Apr. 19, 1994). Although in a 1973 agreement the parties agreed to consult with each other before taking on any new development of surface or groundwater resources in the border area that might adversely affect the other country, Mexico complained that the United States only engaged in a cursory and insufficient consultation regarding the project. *Consejo de Desarrollo Economico de Mexicali, A.C. v. U.S.*, 482 F.3d 1157, 1164–65 (9th Cir. 2007).

A Mexican citizens group, joined by two American environmental nonprofits, brought suit in U.S. district court, but were denied relief on jurisdictional and other technical grounds. 482 F.3d at 1167. While the litigation was pending, Congress directed the Department of the Interior to carry out the project “[n]otwithstanding any other provision of law.” Pub. L.

No. 109-432, § 395. The Ninth Circuit held that this language exempted the project from various claims under environmental and other federal laws and ultimately held that the court was without jurisdiction. *See Consejo de Desarrollo Economico de Mexicali, A.C.*, 482 F.3d at 1169, 1174. The new legislation also provided that the 1944 treaty is the “exclusive authority” for identifying and addressing impacts of the lining project on Mexico. Pub. L. No. 109-432, § 396. Without recourse in the courts, resolution of the impacts in Mexico of American activities on the Colorado River were left to be negotiated under the 1944 treaty.

United States and Mexico Reach Colorado River Water Allocation Agreement

By 2010, the United States and Mexico had committed to working cooperatively to address issues related to the Colorado River. The historic agreement reached in November 2012 represents the fruits of that collaboration and cooperation. *See* Minute Nos. 317, 319 of the International Boundary and Water Commission. The 2012 agreement addresses allocation, salinity, and environmental and supply issues. The agreement was informed by a binational consultative council composed of representatives of the International Boundary and Water Commission, the federal governments of the United States and Mexico, and the seven American states in the Colorado River basin.

Building on the general proportionate reductions established in the 1944 treaty, the agreement sets forth specific reductions and increases in water deliveries to Mexico under certain conditions of drought and surplus in the basin. The agreement establishes a mechanism for Mexico to create water credits by deferring delivery of amounts allocated to it during times of surplus water supplies or amounts deferred in order to allow Mexico to repair infrastructure damaged in a 2010 earthquake. Mexico will store the deferred water supplies in Lake Mead, situated outside of Las Vegas at the border between Arizona and Nevada. The new system will allow Mexico to defer 250,000 AFY through December 31, 2017 and to take additional delivery of 200,000 AFY until its deferred water

credits are depleted. However, Mexico may not take delivery of its deferred water if the Lake Mead elevation is below a certain level under prolonged drought conditions. In addition, regular water deliveries to Mexico will be reduced under prolonged drought conditions in the Colorado River basin.

The parties acknowledge that the creation of Mexico's water credit and deferral system may impact salinity of the Colorado River and affect measures implemented in a 1973 agreement addressing the international problem of the salinity of the Colorado River. In the 1973 agreement, Minute No. 242, the United States agreed to adopt measures to reduce salinity levels of the water delivered to Mexico, and Mexico agreed to allow the United States to drain brine from desalting operations carried out to implement the desalination measures. The recent agreement adopts additional measures to minimize impacts on salinity levels, including use of the Wellton-Mohawk bypass drain to convey Mexican water deliveries from the river and the inclusion of surplus and deferred water amounts in the salinity requirements of the 1973 agreement.

The 2012 agreement also recognizes and promotes cooperative efforts to address environmental issues in the usually dry Colorado River delta at the Gulf of California. Environmental concerns relating to the delta have been studied and reported for decades and an agreement between the United States and Mexico in 2000 commenced a binational effort to restore water to the delta. The current agreement furthers these efforts by establishing a pilot program to deliver both base flow and pulse flow to serve ecological needs in the delta. A binational coalition of nongovernmental organizations has indicated its willingness to provide water for base flow and the pulse flow will be generated in part by Mexico's water credits and deferred water and by Mexican water supply projects funded by the United States. In particular, the United States will contribute \$21 million dollars to Mexico for infrastructure and environmental projects in Mexico in exchange for 124,000 acre-feet of water from Mexico's water credits or other sources.

Finally, the countries have agreed to implement certain international construction projects to promote water

conservation or the generation of new water sources to address water demands and potential shortage conditions in the basin. These include an environmental restoration project, various water conservation and new water source development projects, and the conveyance of Mexican water through the All-American Canal. Although the parties agreed to continue discussion of these projects, no financial obligations were committed in the agreement. The agreement represents a significant collaborative effort by the United States and Mexico to address Colorado River water allocation issues ranging from drought and surplus supplies to environmental and water quality concerns. It will provide critical guidance for such allocation over the next five years and serve as the launching point for future negotiations to address the increasing demand for the water of the Colorado River.

Meredith E. Nikkel is a member of the Water Practice Group of Downey Brand LLP and can be reached at mnikkel@downeybrand.com or 916/444-1000.

