

## CLIMATE CHANGE, COVID-19, CONTRACTS, AND THE COLORADO RIVER COMPACT:

### DISCHARGING THE UPPER DIVISION’S DELIVERY OR NON-DEPLETION OBLIGATIONS UNDER ARTICLE III (D)

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The Colorado River system is deeply mired in an existential crisis. A potent combination of growing demands, changing social and economic needs, and climate change bring the existing system to a breaking point. Something must bend in the existing legal and institutional approaches, or the entire system will collapse.

The Colorado River Compact (“Compact”) is the backbone of the Colorado River’s legal and institutional system.<sup>1</sup> Seven states—Utah, Colorado, Wyoming, New Mexico, Arizona, Nevada, and California—entered the Colorado River Compact on November 24, 1922, in Santa Fe, New Mexico.<sup>2</sup> Congress then ratified the Compact by passing the Boulder Canyon Project Act of 1928 (“Project Act”).<sup>3</sup> The Compact serves as the foundation for the “Law of the River,” which incorporates all relevant treaties, congressional statutes, and judicial decisions from more than a century as applied to either the Compact

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1. Colorado River Compact, COLO. REV. STAT. ANN. § 37-61-101 (1922).

2. *Id.*

3. Boulder Canyon Project Act of 1928, 43 U.S.C.A. § 617g.

itself or the states' abilities to meet the Compact's obligations and duties for managing the waters of the Colorado River and its tributaries.<sup>4</sup>

Climate change and a twenty-year drought severely stressed the Law of the River as well as the complex federal system operating Lakes Mead and Powell.<sup>5</sup> All parties to the Compact and those with interests in the Colorado River (including a wide range of Native American tribes and private parties) anxiously are negotiating how to handle severe shortfalls in water deliveries.<sup>6</sup> In July 2022, the federal government asked the Compact states to cut their use of Colorado River water by an additional 2 to 4 million acre-feet (MAF) from a total of 12 to 15 MAF historically used annually.<sup>7</sup> Large winter snowpacks in 2022-23 and 2023-24 allowed the parties to avoid such dramatic reductions.<sup>8</sup> The guidelines regarding accommodations for shortages only last through the 2025-26 season.<sup>9</sup> By the end of 2025, a longer-term and more durable set of operating agreements must be completed to recognize climate change's impacts on the mean level, variability, and reliability of Colorado River flows. The hydrological assumptions underlying the Compact are no longer valid.

The Compact apportions water equally between the Upper Division Basin (Utah, Colorado, Wyoming, and New Mexico), and the Lower Division Basin (Arizona, Nevada, and California).<sup>10</sup> Article III(a) apportions 7.5 MAF per year to each basin based on the parties' mutual understanding in 1922 that

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4. *Id.*; Thomas Buschatzke & Nicole D. Klobas, *Ensuring Arizona's Future Today: The Lower Basin Drought Contingency Plan and its Implementation in Arizona*, 8 ARIZ. J. ENV'T L. & POL'Y 29, 31 (2018).

5. Jeff Lukas et al., *Colorado River Basin Climate and Hydrology: State of the Science*, 1 W. WATER ASSESS'MT, 2-4 (2020), <https://www.colorado.edu/resources/colorado-river-resources/CRBreport>.

6. Brad Udall, Colo. State Univ., Panel Speaker at the University of Utah Wallace Stegner Center Symposium: Climate Change and the Next Management Framework (March 18, 2022) [hereinafter *2022 Stegner Symposium Day 2*]; Michelle Garrison, Senior Water Res. Specialist, Colo. Water Conservat'n Bd., Panel Speaker at the University of Denver Water Law Review Symposium (April 14-15, 2022) [hereinafter *2022 Denver Symposium*].

7. CHARLES V. STERN, CONG. RSCH. SERV., IN11982, RESPONDING TO DROUGHT IN THE COLORADO RIVER BASIN 5 (2025).

8. *See also* U.S. BUREAU OF RECLAMATION, 5-YEAR PROBABILISTIC PROJECTIONS (2024) <https://www.usbr.gov/lc/region/g4000/riverops/crss-5year-projections.html> (finding that the 24-month probabilistic projections of reaching Minimum Power Pool ("MPP") elevations at Lake Powell in August 2022 showed a 30% probability of levels dropping below MPP in water year 2024. A water year (WY) runs from October 1 through September 30 the following year and captures the annual seasonal cycle. The risk of Lake Powell elevations being only 35 feet above MPP was reduced by August 2023 to 0% for WY 2024 but remained at 13% for WY 2025 and WY 2026. The January 2024 estimates were consistent with August 2023 estimates, but the risk of elevations below that level had dropped to 0% for WY 2025 by May 2024 after another good winter).

9. *See* DEP'T. OF INTERIOR, RECORD OF DECISION: COLORADO RIVER INTERIM GUIDELINES FOR LOWER BASIN SHORTAGES AND THE COORDINATED OPERATIONS FOR LAKE POWELL AND LAKE MEAD: FINAL ENVIRONMENTAL IMPACT STATEMENT 4 (2007), <https://www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf>.

10. Colorado River Compact, COLO. REV. STAT. ANN. § 37-61-101, art. II(c)-(d), art. III(a) (1922).

there would be sufficient water flow to meet at least 15 MAF in demand.<sup>11</sup> The parties also agreed that the two basins would share necessary reductions equally to meet future treaty obligations with Mexico (which, since a 1944 treaty, now requires 1.5 MAF to be delivered to Mexico).<sup>12</sup> The total water deliveries apportioned by the Compact and 1944 Treaty are at least 16.5 MAF per year. These deliveries account for neither evaporation during transport nor tribal water rights.<sup>13</sup> Recent estimates of reliable Colorado River flows range from only 11 to 13 MAF per year.<sup>14</sup>

Article III(a) apportiones the Colorado River's flow equally between the Upper Division and the Lower Division, but Article III(d) imposes an obligation only on the Upper Division, stating that:

The states of the Upper Division will not cause the flow of the river at Lee Ferry<sup>15</sup> to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.<sup>16</sup>

Article III(d) historically was interpreted and constructed as a “delivery” obligation by the Upper Division.<sup>17</sup> However, the phrase “will not cause . . . to be depleted” has been interpreted by some as a “non-depletion” obligation rather than an affirmative “delivery” obligation.<sup>18</sup> This interpretation places a different duty on the Upper Division states. Rather than having an affirmative obligation to *deliver* 75 MAF every ten consecutive years,<sup>19</sup> the

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11. § 37-61-101 art. III(a).

12. See Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, 59 Stat. 1219.

13. See generally *id.*

14. 2022 Stegner Symposium Day 2 (showing that Paleo Flows were only 11.8 MAF; the 2000-2020 estimated natural flow was 12.3 MAF; and recent climate and hydrology models project a range of 9-16 MAF with an estimate of 10.6 MAF in annual average flow); John Fleck, Univ. of N.M., Panel Speaker at the University of Utah Wallace Stegner Center Symposium: Science & Governance: From Overallocation to Climate Change and Megadrought (March 17, 2022) [hereinafter *2022 Stegner Symposium Day 1*] (showing that Stockton and Jacoby estimated in 1976 that the long-term historic average flow was only 13.5 MAF).

15. “Lee’s Ferry” is a historic crossing of the Colorado River just *upstream* of the Colorado River’s confluence with the Paria River, but “Lee Ferry” (without the possessive apostrophe) is defined in the Compact as slightly *downstream* of that confluence. Therefore, the Paria River’s flows are counted within the Upper Basin’s apportionment. § 37-61-101 art. II(e).

16. § 37-61-101 art. III(d).

17. NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST*, 199 (2nd ed. 2009).

18. Sara Leopold, *Exploiting an Ambiguity*, 13 ARIZ. J. OF ENV’T L. & POL’Y 87, 89 (2023).

19. It is striking that the word “deliver” does not appear in the text of the Compact. Various drafts of the Compact did include a more explicit, affirmative obligation for the Upper Division to deliver a fixed amount of water. *An Act to Authorize the Secretary of the Interior to Construct, Operate, and Maintain the Colorado River Storage Project and Participating Projects, and for Other Purposes: Hearing Before the Subcomm. on Interior and Insular Aff.*, 84th Cong. 435

Upper Division would be obligated only *not to cause* a depletion of the flow resulting in less than 75 MAF being delivered to the Lower Division every ten years. The primary argument in favor of the latter construction is textual: Article III(d) includes the word “cause,” which implies that this section limits the Upper Basin states from *withdrawing water* for use from the Colorado River and its tributaries if such withdrawals exceed 7.5 MAF per year.

Enter climate change. What if climate change is the *cause* of depletion of the flow?<sup>20</sup> In this context, could the Upper Division successfully argue that it does not have a *delivery* obligation? Could Upper Division states argue that, due to climate change, they are not the *cause* of any depletion of the flow to less than 75 MAF over any ten-year period? If the Upper Basin states were to prevail with this construction, what is the likely impact of such a change to the legal status of the parties in ongoing negotiations? Moreover, would it make any difference in the actual operation of the Colorado system?

Three critical legal questions arise under the Compact in the face of climate change:

- (1) What obligations do the U.S. Bureau of Reclamation (“USBR”) and U.S. Department of Interior (“DOI”) have to ensure that flows at Lee Ferry do not go below 75 MAF each rolling decade?
- (2) Can the Lower Division states make a “call” under the Compact for the Upper Division states to deliver more water to the Lower Division states if the average flow at Lee Ferry goes below 75 MAF each rolling decade?
- (3) If such a Compact call were made, what are the Upper Division states’ obligations to reduce their own water diversions and consumption?

This article explores how the development of contract law doctrine in the wake of the COVID-19 pandemic may affect the answers to these three critical legal questions. Section One discusses Article III(d)’s delivery or non-depletion obligation for the Upper Basin states and outlines four affirmative defenses to a delivery obligation if the Upper Basin states fail to establish that Article III(d) only guarantees a non-depletion obligation. Section Two discusses the Compact as a contract and reviews other authors’ analyses of the theoretical basis for either rescission, reformation, or unilateral withdrawal from the Compact. Section Three explores common law contract principles for invoking *force majeure* clauses and the three related doctrines of mutual mistake, impossibility of performance, and frustration of purpose. Section Four discusses how these contract law doctrines vary among the seven Compact states. Section Five examines whether those doctrines were modified in the

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(1955) (statement of F.C. Merreill, Chief Eng’r for Colo. River Conservation Dist.).

20. This article does not evaluate the merits of this claim, but there is ample evidence that declines in Colorado River flows have occurred primarily due to the aridification of the basin. 2022 Stegner Symposium Day 2.

wake of COVID-19. Section Six explores how these principles were applied to a set of arbitration decisions involving housing lease disputes at Brigham Young University (“BYU”) during the Covid-19 pandemic. Section Seven takes the analyses of contract principles and applies them to the Compact. Section Eight takes the analyses of contract principles and applies them to the Colorado River Delivery Contracts with USBR/DOI. Section Nine discusses how the doctrine of waste could be deployed by Lower Division states to affect any potential Upper Division delivery obligation under Article III(d). Finally, Section Ten discusses the future of the Law of the River in light of this article’s analysis.

### I. DELIVERY OR NON-DEPLETION OBLIGATION?

The Upper Division historically interpreted and constructed Article III(d) as a “delivery” obligation.<sup>21</sup> Despite this, Upper Division states potentially could win litigation with Lower Division states by convincing the Supreme Court to construct Article III(d) as a *non-depletion* obligation rather than a *delivery* obligation. The Colorado River Governance Initiative (“CRGI”) published a white paper on this question of construction in 2012.<sup>22</sup> Climate change (and increasing evidence over the past dozen years of the impact climate change and drought have on the reliability of the Compact’s 15-16.5 MAF assumed flows) does not fundamentally change the 2012 analysis, but it may place another thumb on the scale in favor of the Upper Division’s argument that Article III(d) establishes a non-depletion rather than delivery obligation for the Upper Division states. Therefore, Upper Division states have a viable legal position regarding the construction of the Article III(d) obligation. This would be the initial focus of an argument in court.

Winning this construction argument would end the matter. Lower Division states could not make a “call” under the Compact, and the USBR and DOI would have no obligation (under the Compact) to modify Colorado River operations to ensure that there was a *delivery* of 75 MAF each decade from the Upper Division to the Lower Division.<sup>23</sup>

If the Supreme Court found that Upper Division states had an affirmative delivery obligation under Article III(d), the battle before the Court would not be over. Upper Division states may also have affirmative defenses against fulfilling their obligation that could relieve them of their obligations to Lower Division states. There are four relevant affirmative defenses: *Force*

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21. Hundley, *supra* note 17, at 199.

22. Colo. River Governance Initiative, DOES THE UPPER BASIN HAVE A DELIVERY OBLIGATION OR AN OBLIGATION NOT TO DEplete THE FLOW OF THE COLORADO RIVER AT LEE FERRY? (2012), [https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1006&context=books\\_reports\\_studies](https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1006&context=books_reports_studies).

23. Other post-Compact aspects of the Law of the River may impose such obligations on USBR/DOI—or give flexibility to modify operations to require such delivery. This paper does not attempt to analyze the legal duties, obligations, or defenses of the USBR/DOI under these post-Compact statutes, regulations, and court decisions.

*Majeure*; Mutual Mistake of Fact; Impossibility of Performance; and Frustration of Purpose.

This article evaluates these affirmative defenses in the context of the COVID-19 pandemic. COVID-19 triggered state contract law litigation that could be relevant to the resolution of the Article III(d)'s interpretation and construction question under the Compact. Governments adopted severe restrictions on a wide range of commercial and personal activities as COVID-19 quickly became an international health crisis.<sup>24</sup> Such restrictions imposed significant costs on parties who could not fulfill their previous contractual commitments to pay for leases, supplies, employees, etc.<sup>25</sup> The subsequent litigation regarding COVID-related contract breaches generated new case law on the contract law doctrines of *force majeure*, mutual mistake, impossibility of performance, and frustration of purpose.<sup>26</sup> Because contract law is generally state law (even when states have adopted the Uniform Commercial Code ("UCC"),<sup>27</sup> COVID-19 prompted a wide range of diverging judicial opinions among the seven states. Differences in the law among the Compact states were the basis for conflicting legal positions, raising important conflict-of-law issues. On the other hand, consistencies across the Compact states could be the basis for a common understanding of the relative strength of possible Upper Basin state defenses.

This article evaluates developments for the seven Compact states to determine whether COVID-19-related legal developments have altered how climate change impacts the strength of the parties' legal positions regarding Article III(d) *delivery* defenses. This article then discusses the applicability of those developments to any future Compact litigation.

## II. COMPACTS AS CONTRACTS

Compacts have been treated by the Supreme Court as both *statutes* (because Congress must ratify them through statute) and *contracts* (because they represent an agreement between states).<sup>28</sup> As Justice Frankfurter wrote for the Court in 1951, "a compact is after all a legal document."<sup>29</sup> "Interstate compacts are not only statutes; they are also contracts . . . this means that the substantive

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24. AJMC Staff, A Timeline of COVID-19 Developments in 2020 (2021), <https://www.ajmc.com/view/a-timeline-of-covid19-developments-in-2020>.

25. Mark Peter Henriques, *Push the Pause Button? Contracts and COVID-19*, AM. BAR. ASS'N (Mar. 25, 2020), [https://www.americanbar.org/groups/business\\_law/resources/business-law-today/2020-april/push-the-pause-button/](https://www.americanbar.org/groups/business_law/resources/business-law-today/2020-april/push-the-pause-button/).

26. AJMC Staff, *supra* note 24.

27. This paper does not analyze either potential Federal common law on these issues or address choice-of-law issues. Instead, it explores the commonalities among the seven Compact states' *state* common law on the issues.

28. *Texas v. New Mexico*, 144 S.Ct. 1756, 1762 (2024); *see also* *Green v. Biddle*, 21 U.S. 1 (1823); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951).

29. *West Virginia ex rel. Dyer*, 341 U.S. at 28.

law of contracts is applicable to them.”<sup>30</sup> Therefore, common law principles of contract apply to both the competing constructions of Article III(d) and the affirmative defenses against obligations arising from the Compact. Additionally, under common law principles of contract law, *rescission* and *reformation* of a Compact are possible.

The Supreme Court has original jurisdiction to hear any dispute between states.<sup>31</sup> “Equitable apportionment” is the primary principle guiding the Supreme Court’s resolution of water rights conflicts between states.<sup>32</sup> In water disputes, the Court sometimes appoints a Special Master to act as a trier-of-fact before the Court applies the doctrine of equitable apportionment to resolve the dispute if it is not decided on other grounds (i.e., the explicit text of a Compact or statute).<sup>33</sup> Although the Court applied a strict principle of prior appropriation in *Wyoming v. Colorado*,<sup>34</sup> it incorporated a more flexible approach in *Nebraska v. Wyoming*.<sup>35</sup> As the Court stated in *Colorado v. New Mexico*, its “aim is always to secure a just and equitable apportionment ‘without quibbling over formulas.’”<sup>36</sup>

The approach to equitable apportionment generated enormous uncertainty regarding the Court’s process in resolving water conflicts.<sup>37</sup> Today, none of the Compact states’ negotiators want any conflicts regarding the Compact to go before the Supreme Court.<sup>38</sup> The negotiators publicly advocate for negotiating modifications to the operating rules rather than either a complete renegotiation of the Compact itself or litigation over its meaning.<sup>39</sup>

This reluctance to renegotiate the Compact or litigate the Compact’s meaning does not mean that legal arguments relevant to Compact litigation have not been considered. Other authors have analyzed when *rescission* or *reformation* of a Compact may be appropriate, in addition to other grounds for unilateral state *withdrawal* from a Compact. In particular, at least two scholarly

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30. David H. Getches, *Competing Demands for the Colorado River*, 56 U. COLO. L. REV. 413, 425 n.32 (1985) (quoting F. Zimmerman & M. Wendell, *THE LAW AND USE OF INTERSTATE COMPACTS* 2 (1961)).

31. U.S. CONST. art III, § 2, cl. 1.

32. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907); *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931).

33. Christal Keegan, *The Future of Water Law*, NAT’L JUD. COLL. (Sept. 22, 2015), <https://www.judges.org/news-and-info/the-future-of-water-law/>.

34. *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922).

35. *Nebraska v. Wyoming*, 325 U.S. 589, 643 (1945).

36. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (quoting *New Jersey v. New York*, 283 U.S. 336, 343 (1931)).

37. Statements by many state representatives at the 2022 Stegner Symposium, 2022 Denver Symposium, and 2022 Colorado River Water Users Association (CRWUA) Conference, Las Vegas, NV, December 14-16, 2022.

38. *Id.*

39. *Id.*

treatises explored how those approaches could apply to interstate water compacts in general and the Colorado Compact in particular.<sup>40</sup>

Carlson and Boles specifically discuss the Article III(d) delivery versus non-depletion obligation construction debate and suggest that the Upper Division will argue that the Court should “[c]onstrue the Compact [a]ccording to [i]ts [p]lain [l]anguage and [i]ntent.”<sup>41</sup> These states could argue for rescission of the Compact based on a mistake of fact by the parties to the Compact in 1922 regarding the amount of Colorado River flow subject to the Compact’s apportionment<sup>42</sup> and the fact that the Upper Basin did not agree to bear the risk of such a mistake in fact.<sup>43</sup> However, as Carlson and Boles note when discussing the value of the remedy, “[i]f the Compact were voided and the River equitably apportioned, the northern [i.e., Upper Division] states would be up the proverbial creek without a paddle.”<sup>44</sup> Theories that lead to Compact *rescission* generally do not support Upper Division interests. The reason is simple: in the absence of the Compact, the Court would favor a system of seniority in determining who would get priority in accessing available water in times of shortages.<sup>45</sup> Lower Division states generally have higher-priority water rights over most diversions in Upper Division states.<sup>46</sup>

Therefore, Carlson and Boles turn to *reformation* of the Compact rather than *rescission* as a remedy.<sup>47</sup> After an extensive discussion of the historical record, they conclude that:

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40. John U. Carlson & Alan E. Boles, Jr., *Contrary Views of the Law of the Colorado River: An Examination of Rivalries Between the Upper and Lower Basins*, 32 ROCKY MOUNTAIN MINERAL L. INST. 1 (1986); Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105 (2002).

41. *Id.*

42. *Id.* at 21.

43. *Id.* at 23.

44. *Id.* at 28.

45. *See Wyoming*, 259 U.S. 419 (demonstrating that while the prior appropriation system takes slightly different form in different states, the Court established a general rule of applying some form of it when both states use some form of the prior appropriation system.) That decision was one of the key motivations for Upper Division states to agree to the Compact—the Lower Division states (especially California) had already established more “senior” rights than the Upper Division states through prior appropriation, so there was concern that later-developing economies could lose rights to the as-yet-unappropriated Colorado River and be forced to let the water flow downstream to the more senior appropriators. The Boulder Canyon Project Act (1928), the Colorado River Storage Project Act (1956), and the Colorado River Basin Project Improvement Act (1968) would influence how the Court would resolve any litigation, though, as *Arizona v. California*, 373 U.S. 546 (1963) has already demonstrated.

46. Joe Gelt, *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*, 10 ARROYO 1, 2-3 (1997) (noting because Lower Division states (especially California) had already established more “senior” rights than the Upper Division states through prior appropriation, the *Wyoming v. Colorado* decision was one of the key motivations for Upper Division states to agree to the Compact as there was concern that later-developing economies could lose any rights to the as-yet-unappropriated Colorado River and be forced to let the water flow downstream to the more senior appropriators).

47. Carlson & Boles, Jr., *supra* note 40, at 28.

What Paragraph (d) was not intended to do was deny the Upper Basin the same amount of water as the Lower Basin receives from the mainstream. It would be just to reform the Compact so that Article III(a) and (d) provides that each Basin is apportioned an equal amount of water and that the Upper Basin is prohibited from depleting the flow of the mainstream at Lee's [sic] Ferry below the amount of its apportionment.<sup>48</sup>

Finally, Carlson and Boles consider whether there had been Congressional Apportionment between the Upper and Lower Divisions through the adoption of the Boulder Canyon Project Act in 1928 and through subsequent construction of the Act by the Supreme Court in *Arizona vs. California*.<sup>49</sup> They conclude that "it is inconceivable that Congress intended to allocate less water from the mainstream to the Upper Basin than to the Lower [Basin]. The Boulder Canyon Project Act should be construed to apportion equal shares of the mainstream to each Basin."<sup>50</sup> This conclusion could be relevant to USBR/DOI's operational decisions even if the Supreme Court did not construe paragraph III(d) of the Compact as a delivery obligation or did not consider the affirmative defenses by the Upper Division states to such an adverse construction of III(d). We will return to this USBR/DOI operational issue below when we discuss the practical consequences of the affirmative defense analysis.

Grant takes a different approach to the problem.<sup>51</sup> He explores the tension between permanence and inflexibility when Compacts are treated as perpetual contracts.<sup>52</sup> He recognizes the value of permanence when Compacts resolve boundary disputes but suggests that the value of permanence is outweighed by the high cost of inflexibility for water apportionment Compacts.<sup>53</sup> Grant summarizes the problem of inflexibility for the Pecos River Compact, the Rio Grande Compact, and the Colorado River Compact before offering a theoretical basis for states that are disadvantaged by changing conditions to withdraw unilaterally from the Compact.<sup>54</sup> Although his doctrinal rationale is complex and compelling, it would not be useful to the Upper Division states if the cost of withdrawal substantially exceeds the benefits of avoiding an Article III(d) delivery obligation (as Carlson and Boles found for the option of Compact rescission by Upper Division states). Therefore, although Grant's analysis is potentially relevant to conflicts between Upper Division and Lower Division states due to climate change, his analysis is not discussed further here. Instead, this article focuses on common law affirmative defenses within

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48. *Id.* at 32.

49. Carlson & Boles, Jr., *supra* note 40, at 32.

50. *Id.* at 35.

51. *See* Grant, *supra* note 40, at 109.

52. *Id.*

53. *Id.* at 146.

54. *Id.* at 109-10. (These changing conditions include restrictions due to environmental regulations or infrastructure conditions).

contracts rather than theories of state sovereignty and limitations on constraining future legislatures.

Grant's specific discussion of the Colorado River Compact offers an interesting historical perspective into the Paragraph III(d) tensions first raised by Carlson and Boles: "Despite these various sources of tension, the Colorado River system is not presently [in 2002] in crisis. Existing water storage can buffer the effects of drought if the shortfall does not last too long."<sup>55</sup>

Because a twenty-year drought has since occurred, along with the growing widespread scientific recognition that climate change has fundamentally altered the region's hydrological regime through aridification, Grant's observations and theoretical framework still could be useful to some of the Compact states someday. Specifically, Grant writes, "Although none of the seven Colorado River Compact states presently [in 2002] wants to modify the compact, attitudes could change . . . global warming could significantly reduce the river flows."<sup>56</sup>

Indeed, that day has come. Global warming significantly reduced river flows and many states may want to modify the Compact. These states also recognize the enormous uncertainty about the Court's approach to reformation of the Compact or use of equitable apportionment among the states if the Compact were to be rescinded. An understanding of the key legal principles of contracts that the Court would deploy in a case involving potential Compact reformation is essential to addressing the first uncertainty.

### III. CONTRACT LAW PRINCIPLES

Sometimes parties enter into contracts (or compacts), and conditions make it difficult, costly, or impossible for one or both parties to perform as anticipated when they entered the contract. In some cases, one party may simply breach the contract because it is less costly to pay damages for the breach than to perform. This is known in contract theory as an "efficient breach", and courts generally make the other party whole through monetary damages.<sup>57</sup> This intentional breach does not apply well in the case of the Colorado River Compact because Lower Division states want specific performance by Upper Division states rather than damages.

The Restatement (Second) of Contracts discusses general principles for the *force majeure* doctrine in which performance under a contract can be excused due to certain events or situations that are beyond the control of the

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55. *Id.* at 118.

56. *Id.* at 119-20. Grant also mentions other reasons that conditions may change in the future [post-2002] that could lead some states to want to modify the Compact. Global warming is the most pressing of those changes.

57. *Id.* at 144, n.239 (quoting *Thyssen, Inc. v. S.S. Fortune Star*, 777 F.2d 57, 63 (2d Cir. 1985)).

parties, such as natural disasters, war, or pandemics.<sup>58</sup> The Restatement notes that a party's performance may be excused due to the occurrence of an unforeseen event if:

The event or circumstance is beyond the control of the parties;

The event or circumstance makes performance under the contract impossible or impracticable;

The event or circumstance concerns a "basic assumption" on which both parties made the contract was formed.<sup>59</sup>; and

The event or circumstance was not foreseeable at the time the contract was formed.<sup>60</sup>

The Restatement also provides examples of when courts could apply the *force majeure* doctrine, such as in situations involving war, crop failure, and embargoes.<sup>61</sup> Williston on Contracts defines *force majeure* as "an event beyond the parties' reasonable control that intervenes to create a contractual impossibility and thereby excuse contract performance."<sup>62</sup> Williston notes that force majeure provisions typically have four elements:

A list of specific events or circumstances that will trigger the provision, such as "acts of God" or "war;"

A requirement that the event or circumstance must be beyond the control of the parties;

A requirement that the event or circumstance must make performance under the contract impossible or impracticable; and

A requirement that the event or circumstance must not have been foreseeable at the time the contract was formed.<sup>63</sup>

The Colorado River Compact does not have an explicit *force majeure* provision. Therefore, courts would apply these default principles regarding the *force majeure* doctrine when resolving a contract dispute. The Upper Division states can argue that these elements apply:

Climate change is beyond the control of the parties;

Climate change makes performance under the contract impossible or impracticable; and

Climate change was not foreseeable at the time the contract was formed.

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58. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981) ("[w]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged.").

59. *See id.* The Restatement doesn't use the term *force majeure* in its discussion of this principle. Rather, it refers to "supervening impracticability."

60. *See id.*

61. *Id.* cmt. d.

62. Richard A. Lord, WILLISTON ON CONTRACTS (4th ed. 2024) § 77:31.

63. *See id.*

Courts have developed common law principles when these types of circumstances exist, yet an explicit *force majeure* provision was not included in the contract itself. There are three distinct but related common law affirmative defenses that address these types of cases: Mutual Mistake of Fact; Impossibility of Performance; and Frustration of Purpose.

We therefore reviewed the recent case law in all seven Compact states to answer two questions: (1) Do these doctrines differ in any significant ways across the states; and (2) Did the state doctrines evolve substantially through application of new Covid-19 fact patterns?

#### IV. STATE-BY-STATE DOCTRINES<sup>64</sup>

We reviewed the relevant case law for all seven Compact states through December 2022. With few exceptions, state law varied little among the states: they all followed the general principles of the Restatement (Second) of Contracts for all four possible affirmative defenses to contract breach. Each of the state's doctrines and cases are summarized by state in this section, and then we discuss any differences that might apply to an Article III(d) dispute.

##### A. ARIZONA

###### 1. Force Majeure

A *force majeure* defense is invoked only when it is included in a previous clause or provision within an agreement.<sup>65</sup> Arizona has no case law in which a party to a contract successfully invoked *force majeure* without such a clause. As such, it is reasonable to assume that a *force majeure* enables the contracting parties to be excused from fulfilling their commitments when specific events take place that are out of their control, but only when previously stipulated, and it is governed by the language of the contract itself.<sup>66</sup> A commonly used form for contracts and commercial transactions includes:

Performance may be suspended by either party in case of *Act of God*, war, riots, fire, explosion, flood, strike, lockout, injunction, inability to obtain fuel, power, raw materials, labor, containers, or transportation facilities, accident, breakage of machinery, national defense requirements, *or any cause beyond the control of such party*, preventing the manufacture, shipment, acceptance, or consumption of a shipment of the goods or of a material upon which the manufacture of the goods is dependent. If, because of any such circumstance, seller is unable to supply the total demand for the goods, seller

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64. This section was initially prepared primarily by my research assistant, Andrew Christensen. I then edited his state-by-state summaries to highlight key areas of agreement among the seven Compact states or deviation from agreement with the others by any individual state.

65. VEREIT Real Estate, LP v. Fitness Int'l, LLC, 529 P.3d 83, 87-88 (Ariz. Ct. App. 2023).

66. Fen Invs., LLC v. Fonzi Food, 551 P.3d 625, 630 (Ariz. Ct. App. 2024) (citing VEREIT Real Estate, 529 P.3d at 91).

may allocate its available supply among itself and all of its customers, including those not under contract, in an equitable manner. Such deliveries so suspended shall be canceled without liability, but the contract shall otherwise remain unaffected.<sup>67</sup>

Note that this standard clause includes “Act of God” and the phrase “or any cause beyond the control of such party.” These two catch-all terms could apply to an extended drought caused by climate change (even though climate change is caused primarily by human emissions and land use change). Despite this, no such clause is present in the Colorado River Compact, and courts generally will not read such a *force majeure* clause into a contract without it being invoked within the agreement.

## 2. Mutual Mistake of Fact

A false or deceptive statement of fact made by one party to induce another to engage in a contract is referred to as a misrepresentation.<sup>68</sup> A contract may be voidable if a material fact was misrepresented and the party who received the false statement relied on it and would not have entered into the agreement if the statement had not been made.<sup>69</sup> A “mutual” misrepresentation or mistake of fact would be similar, but both parties to the contract would be under the same misrepresentation (or mistake) about a non-issue-of-law fact within the contract.<sup>70</sup>

In Arizona, *Renner v. Kehl* establishes a four-prong approach to using a mutual mistake defense: (1) at the time the contract was created, both parties must have made the error; (2) the error must concern a fundamental presumption upon which the contract was based; (3) the exchange must be materially harmed by the error; and (4) only the party that was negatively impacted by the error may void the contract.<sup>71</sup> This would seem to apply to the seven Compact states’ mutual mistakes of fact regarding the consistency and reliability of future flows (as they have proved not to be due to climate change). However, the parties cannot break the agreement unless all parties are prejudiced by the necessary knowledge. This doctrine therefore does not help Upper Division states as a defense against III(d) delivery obligation; Lower Division states are not prejudiced by the mutual mistake of fact.

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67. 4a VRN-OKFORM § 2-301 Form 10 (emphasis added). (This form originated in Oklahoma, but it represents a standard *force majeure* clause in any state.).

68. Brooke Marissa Lee Harris, BUSINESS LAW DESKBOOK, FORMATION AND OPERATION OF BUSINESSES § 7:17 (Dec. 2024 ed.).

69. *Id.*

70. *See Renner v. Kehl*, 722 P.2d 262, 265 (Ariz. 1986).

71. *See id.* at 265 (citing RESTATEMENT (SECOND) OF CONTRACTS § 152; *Mortensen v. Berzell Investment Co.*, 429 P.2d 945, 947 (Ariz. 1967)).

### 3. Impossibility of Performance

According to the controlling state case on this matter, *Garner v. Ellingson*, the nonperformance defense of impossibility of performance applies when the performance becomes impossible due to circumstances beyond the parties' control.<sup>72</sup> Further required of the defense is proof that the supervening event that was "frustrating"<sup>73</sup> was "not reasonably foreseeable."<sup>74</sup> Unless a contrary intention has been manifested, when the performance of a promise is rendered impossible due to facts that the promisor had no reason to foresee and for which the promisor is not responsible, his duty is discharged.<sup>75</sup>

This is a promising doctrine for Upper Division states: if it is "impossible" to "deliver" an average of 75 MAF, their duty to "deliver" that water under Article III(d) is discharged. In other states, the high threshold of "impossible" is lowered to "impractical."

### 4. Frustration of Purpose

The frustration of purpose defense is limited in Arizona. In *Next Gen Capital, LLC v. Consumer Lending Assocs., LLC*, the court held that frustration of purpose "has been severely limited to cases of extreme hardship so as not to diminish the power of parties to contract, and . . . require[s] proof from the party seeking to excuse himself that the supervening frustrating event was not reasonably foreseeable."<sup>76</sup> The court in *B.F. Goodrich Co. v. Vinyltech Corp.*, which was also a *force majeure* case, states that Arizona follows the Restatement (Second) of Contracts when determining which elements need to be present for a frustration of purpose claim.<sup>77</sup> The Restatement has four elements:

- (1) the frustrated purpose must have been a principal purpose of that party and must have been so within the understanding of both parties;
- (2) the frustration must be so severe that it is not to be regarded as within the risks assumed under the contract;
- (3) the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made; and
- (4) relief will not be granted if it may be inferred from either the language of the contract or the circumstances that the risk of the

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72. *Garner v. Ellingson*, 501 P.2d 22, 23 (Ariz. Ct. App. 1972) (quoting *Whelan v. Griffith Consumers Co.*, 170 A.2d 229, 230 (D.C. 1961)).

73. This is not to be confused with the Frustration of Purpose doctrine, covered separately below.

74. *Garner*, 501 P.2d at 24.

75. *Minderman v. Perry*, 437 P.2d 407, 410 (Ariz. 1968).

76. *Next Gen Capital, LLC v. Consumer Lending Assocs., LLC*, 316 P.3d 598, 600 (Ariz. Ct. App. 2013) (quoting *Garner v. Ellingson*, 501 P.2d 22, 24 (Ariz. Ct. App. 1972)).

77. *B.F. Goodrich Co. v. Vinyltech Corp.*, 711 F. Supp. 1513, 1519 (D. Ariz. 1989).

frustrating occurrence, or the loss caused thereby, should properly be placed on the party seeking relief.<sup>78</sup>

Climate change appears to meet the first three of these four elements. The issue for invoking such a defense is, who should bear the risks of climate change?

## B. CALIFORNIA

California courts follow the Restatement (Second) § 261, “Discharge by Supervening Impracticability,” where “a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”<sup>79</sup> Moreover, statutory law excuses performance “[w]hen it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States.”<sup>80</sup>

“Under California law, unless a contract explicitly identifies an event as a *force majeure*, the event must be unforeseeable at the time of contracting to qualify.”<sup>81</sup> Absent an agreement to the contrary, responsibility for reasonably foreseeable *force majeure* delays generally falls on the party responsible for performing the work.<sup>82</sup> Furthermore, the “event” must be the “proximate cause of non-performance.”<sup>83</sup>

California courts consider whether an event characterized as “an Act of God” “would render performance unreasonably costly regardless of whether a specific disaster could have been anticipated.”<sup>84</sup> The moving party must show

78. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981); *see also* Carlson & Boles, Jr., *supra* note 40, at 23 (Explaining that the Upper Division should not bear this risk of lower flows).

79. 1 WITKIN, SUMMARY OF CALIFORNIA LAW: CONTRACTS § 854 (11th ed. 2024).

80. *Id.* § 853.

81. Free Range Content, Inc. v. Google Inc., No. 14-cv-02329-BLF, 2016 WL 2902332, at \*6 (N.D. Cal. 2016).

82. *See* McCulloch v. Liguori, 199 P.2d 25, 29 (Cal. Dist. Ct. App. 1948) (Explaining that courts have required a promisor seeking to excuse himself from performance of his obligations to prove that the risk of the frustrating event was not reasonably foreseeable and that the value of counter performance is totally or nearly totally destroyed, because frustration is no defense if it was foreseeable or controllable by the promisor, or if counter performance remains valuable.).

83. Hong Kong Islands Line Am. S.A. v. Distrib. Servs. Ltd., 795 F. Supp. 983, 989 (C.D. Cal. 1991) (citing *Wheeling Valley Coal Corp. v. Mead*, 186 F.2d 219, 223 (4th Cir. 1950)).

84. 1 WITKIN, SUMMARY OF CALIFORNIA LAW: CONTRACTS § 853(2) (11th ed. 2024). (“In the early law, ‘act of God’ (‘vis major,’ ‘force majeure’) was regarded as the principal impossibility defense.”); *see* Pope v. Farmers’ Union & Milling Co., 130 Cal. 139, 141, 62 P. 384 (1900); *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 477, 263 P.2d 472 (1953); 14 *Corbin on Contracts* § 74.1 (rev. ed.); 7 *Calif. L. Rev.* 115; 64 *Harv. L. Rev.* 462; 20 *Hastings L.J.* 1393; *Cal. Civil Practice: Business Litigation* § 24:62 et seq.; 2 *California Affirmative Defenses* § 30:1 et seq.; 3 *California Affirmative Defenses* § 60:1 et seq.; 6 *Proof of Facts 3d* 319 [act of God]; 1 *Am. Jur. 2d Act of God* § 1 et seq. (2016); 14 *Am. Jur. 2d Carriers* § 510 et seq. (2009); 5A *Am. Jur. Pleading & Practice Forms Carriers* § 161 (2008).”).

“that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive.”<sup>85</sup> It is the burdened party’s responsibility to establish that there is “extreme and unreasonable difficulty, expense, injury, or loss involved.”<sup>86</sup>

This means that the California courts open the possibility of some events being characterized as an “Act of God” that could excuse non-performance of a contract *even if there is not an explicit force majeure clause in the contract—as long as the event was unforeseeable*. Foreseeability in California and its dominant test are laid out in *Myers v. Trendwest Resorts, Inc.*<sup>87</sup> The court in *Myers* states that foreseeability in the context of a vicarious liability claim under the doctrine of *respondeat superior* must be “distinguished from foreseeability as a test for negligence.”<sup>88</sup> “In the latter sense ‘foreseeable’ means a level of probability which would lead a prudent person to take effective precautions, whereas ‘foreseeability’ as a test for respondeat superior merely means that in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair.”<sup>89</sup> Neither foreseeability test fits well with climate change, but an objective measure of foreseeability is what the “reasonable person” would have known under similar circumstances when signing the contract. This approach favors the Upper Division states: climate change and its impacts were unforeseeable in 1922.

## C. COLORADO

### 1. Force Majeure

In the state of Colorado, parties are likely confined to the common law defenses of impracticability or frustration of purpose in the absence of any specific *force majeure* wording. In Colorado, these provisions have seldom been used; hence there is a lack of case law in Colorado that interprets these clauses. The Colorado courts have acknowledged regulatory action (or inaction) in *Gillespie v. Simpson* as a potential *force majeure* event, which could include USBR/DOI operational changes made to accommodate drought or climate change.<sup>90</sup>

Although *force majeure* provisions do not generally protect against common economic risks, they may be used when unanticipated changes in

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85. *Jim Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App’x 511, 511 (9th Cir. 2015) (quoting *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 291 P.2d 17, 21 (Cal. 1955)).

86. *Oosten*, 291 P.2d at 20.

87. *Myers v. Trendwest Resorts, Inc.*, 56 Cal. Rptr. 3d 501, 519 (Cal. Ct. App. 2007).

88. *Id.* at 519.

89. *Id.*

90. *Gillespie v. Simpson*, 588 P.2d 890, 892 (Colo. App. 1978) (noting, as discussed below in Section 8, that USBR contracts for delivered water are generally broad and insulate the USBR from liability for failure to deliver water under the various statutes authorizing Compact implementation).

circumstances render it impossible to carry out the contract's intended business objective profitably.<sup>91</sup> The language in *Smith* shows a very lenient attitude to *force majeure* provisions based on the financial circumstances of the parties.<sup>92</sup> The absence of explicit *force majeure* provisions in the Compact make this irrelevant under Colorado law.

## 2. Mutual Mistake of Fact

Colorado has broken down the principle of mutual mistake of fact into three elements:

- (1) there is a "mutual mistake," in which both parties to a contract are both mistaken about the exact same material fact within an agreement;
- (2) this fact is material; and
- (3) the mistaken fact must be a past or present existing one as opposed to a fact that becomes true in the future.<sup>93</sup>

*Hailpern v. Dryden* establishes that the mistake must be to an *existing* fact.<sup>94</sup> There cannot be any mutual misunderstanding over a *future* fact.<sup>95</sup> A mutual mistake about *future* flows at Lee Ferry therefore would not be sufficient under Colorado law.

## 3. Impossibility of Performance

Colorado case law on this principle is somewhat limited, but situations in which it applies must be those where the party obligated to perform can demonstrate that:

- (1) an event occurred that could not reasonably have been anticipated when the parties entered into the contract;
- (2) the party obligated to perform did not cause the event; and
- (3) the event made performance physically impossible or impracticable because of a change in circumstances that the parties have not excluded the application of the doctrine of impossibility and have not otherwise allocated the risk in their contract.<sup>96</sup>

Additionally, the court in *Town of Fraser v. Davis* clarified that "the essence of the defense is not impossibility, but rather impracticability which is determined by whether 'an unanticipated circumstance has made performance

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91. *Smith v. Long*, 578 P.2d 232, 234 (Colo. App. 1978).

92. *Id.*

93. *England v. Amerigas Propane*, 395 P.3d 766, 771 (Colo. 2017) (citing *Cary v. Chevron*, 867 P.2d 117, 118 (Colo. App. 1993); *Carpenter v. Hill*, 283 P.2d 963, 965 (Colo. 1955); *Reliance Fin. Corp. v. Miller*, 557 F.2d 674, 679 (9<sup>th</sup> Cir. 1977); *Hailpern v. Dryden*, 389 P.2d 590, 593 (Colo. 1964)).

94. *Hailpern*, 389 P.2d, at 593.

95. *Id.*

96. Colo. Jury Instr., Civil 30:23; *See also* *Town of Fraser v. Davis*, 644 P.2d 100 (Colo. App. 1982); *Ruff v. Yuma Cnty. Transp. Co.*, 690 P.2d 1296 (Colo. App. 1984); *City of Littleton v. Emps. Fire Ins. Co.*, 453 P.2d 810 (Colo. 1969).

of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.”<sup>97</sup> *Impracticability* is an easier bar to meet than *impossibility* and is sufficient under Colorado law.

#### 4. Frustration of Purpose

To utilize this doctrine, the party seeking to terminate the agreement for frustration of purpose must demonstrate complete or close to complete destruction of the transaction’s *primary goal*.<sup>98</sup>

Under Colorado law, a party seeking to invoke the frustration of purpose doctrine must meet three elements:

- (1) ‘the frustrated purpose must have been so completely the basis of the contract that, as both parties acknowledge, without it the transaction would make little sense’;
- (2) ‘the intervening event cannot fairly be regarded as within the risks the frustrated party assumed under the contract’; and
- (3) ‘the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made.’<sup>99</sup>

Upper Division states may argue that climate change fundamentally frustrates the purpose of the Contract, but Lower Division states may then argue that they considered the possibility of lower flows in the negotiations among the states and ultimately chose not to address the possibility in the Compact.<sup>100</sup>

### D. NEVADA

#### 1. Force Majeure

Nevada courts have only briefly touched upon invalidating a contract under *force majeure* “acts of God” provisions. In *Alamo Airways v. Benum*, the Court held that the condition “must be such a providential occurrence or extraordinary manifestation of the forces of nature that it could not reasonably have been foreseen, and the effect thereof avoided by the exercise of reasonable prudence, diligence and care, or by the use of those means which the situation renders reasonable to employ.”<sup>101</sup>

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97. *Town of Fraser*, 644 P.2d at 101 (quoting 6 S. WILLISTON, CONTRACTS § 1931 (rev. ed.)).

98. *Beals v. Tri-B Assocs.*, 644 P.2d 78, 80–81 (Colo. App. 1982) (citing RESTATEMENT (SECOND) OF CONTRACTS § 265); see also *Asphalt Specialties, Co. v. City of Com. City*, 218 P.3d 741, 746 (Colo. App. 2009) (applying frustration of purpose doctrine to interpretation of state statutes).

99. *United States v. Chaidez-Guerrero*, 665 F. App’x 723, 726 (10th Cir. 2016) (quoting *United States v. Bunner*, 134 F.3d 1000, 1004 (10th Cir. 1998)).

100. *Cf. Hundley*, *supra* note 17, at 313–14; *Carlson & Boles, Jr.*, *supra* note 40, at 32.

101. *Alamo Airways, Inc. v. Benum*, 374 P.2d 684, 686 (Nev. 1962).

## 2. Mutual Mistake of Fact

Nevada also recognizes mutual mistake of fact as an acceptable reason for voiding an agreement.<sup>102</sup> The contract may terminate without the need for a party at fault to fully restore any advantages they previously granted to a non-breaching party; however, this is not a requirement.<sup>103</sup> Nevada courts defined “mistake” in *Tarrant v. Monson* and stated that a mistake is a mentality that differs from reality.<sup>104</sup> Mutual mistake happens when both parties, at the time of contracting, misunderstand a crucial fact that they used as the foundation for their agreement.<sup>105</sup>

## 3. Impossibility of Performance

Nevada courts permit invalidating a contract if its terms are demonstrably unattainable. The party seeking impracticability must demonstrate that (1) the occurrence or contingency made the agreed-upon performance impracticable; and (2) either the contingency not occurring was of a fundamental presumption on which the contract was made or it’s due to “compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”<sup>106</sup>

The impossibility (or impracticability) defense is used when conditions develop that were not anticipated in the contract (and were outside the control of the party raising this defense) and prevent enforcement of the contract against the non-performing party.<sup>107</sup>

This argument is not applicable if the unforeseen event is one that the party making the defense should have anticipated and provided for in the contract.<sup>108</sup> Performance will be excused if the promisor’s “performance is made impossible or highly impractical by the occurrence of unforeseen contingencies.”<sup>109</sup> If the unforeseen contingency is one that the promisor should have foreseen, and for which he should have provided, this defense is unavailable.<sup>110</sup>

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102. *See Anderson v. Sanchez*, 373 P.3d 860, 863 (Nev. 2016).

103. *See Aja v. Appleton*, 472 P.2d 524, 526 (Nev. 1970).

104. *Tarrant v. Monson*, 619 P.2d 1210, 1211 (Nev. 1980).

105. *Gen. Motors v. Jackson*, 900 P.2d 345, 349 (Nev. 1995).

106. *See Nev. Rev. Stat. § 104.2615 (2023)*. This provision explicitly applies to sales of goods under the Universal Commercial Code.

107. *Cashman Equip. Co. v. W. Edna Assocs., Ltd.*, 380 P.3d 844, 852 (Nev. 2016).

108. *Helms Constr. and Dev. Co. v. Nevada*, 634 P.2d 1224, 1225 (Nev. 1981) (quoting *Nebaco, Inc. v. Riverview Realty Co.*, 482 P.2d 305, 307 (Nev. 1971)).

109. *Nebaco, Inc.*, 482 P.2d at 307 (quoting RESTATEMENT (FIRST) OF CONTRACTS. § 454 (1932)).

110. *Id.*

#### 4. Frustration of Purpose

Nevada interprets frustration of purpose as a doctrine that applies when performance of the contract is technically still possible, but an unexpected event has destroyed the “expected value of performance” for the party seeking to be excused from performance.<sup>111</sup> This leads to an actual but not a strictly “literal failure of consideration”, so the counter-party cannot enforce the contract against that party.<sup>112</sup>

However, the frustration of purpose defense is not applicable (and the party claiming it is not released from their contractual duties) if the incident is one that they should have anticipated and included in the agreement.<sup>113</sup> In *Nebaco*, the court held that the defense of frustration of purpose “does not apply ‘if the unforeseen contingency is one which the promisor should have foreseen, and for which he should have provided.’”<sup>114</sup>

### E. NEW MEXICO

#### 1. Force Majeure

New Mexico strictly interprets *force majeure* clauses.<sup>115</sup> Only if the incident is mentioned by name in the *force majeure* clause will it be interpreted as reflective of the parties’ intentions, and the non-performing party will be able to assert a *force majeure* defense.<sup>116</sup> The events constituting *force majeure* therefore “depend[] on the specific language included in the clause.”<sup>117</sup> The injured party also has an affirmative duty to attempt to mitigate damages in the event of a breach of contract.<sup>118</sup> In *Acme Cigarette Services v. Gallegos*, the movant could not recover from the non-performing party those damages that it otherwise averts with reasonable effort.<sup>119</sup>

To successfully use the *force majeure* defense, the non-performing party must show that its failure to comply with the requirements of the contract truly precluded performance rather than just made it more difficult to fulfill its responsibilities under the contract.<sup>120</sup> “Where a particular risk exists or is readily foreseeable at the time of contracting, and the parties merely recite a general or boilerplate force-majeure provision, courts will presume the risk has been

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111. *Graham v. Kim*, 899 P.2d 1122, 1124 (Nev. 1995).

112. *Id.*

113. *Id.*

114. *Id.* (quoting *Nebaco, Inc.*, 482 P.2d at 307).

115. *See Maralex Res., Inc. v. Gilbreath*, 76 P.3d 626 (N.M. 2003).

116. *See id.*

117. *Id.* at 636.

118. *Acme Cigarette Serv., Inc. v. Gallegos*, 577 P.2d 885, 891 (N.M. Ct. App. 1978) (Hernandez, J., concurring).

119. *Id.* at 888.

120. *See Maralex Res., Inc.*, 76 P.3d at 637.

assumed by the party whose performance will be affected by the realization of that risk.”<sup>121</sup>

In all these cases, New Mexico law requires a *force majeure* provision in the contract between the parties—so a *force majeure* defense is unavailable for Upper Division states.

## 2. Mutual Mistake of Fact

New Mexico provides a surprisingly liberal approach to the doctrine of mutual mistake of fact. Unlike many of the other Compact states, New Mexico does not use mutual mistake only when parties to an agreement have contracted under a misconception or ignorance of a *material* fact.<sup>122</sup> Instead, New Mexico’s mutual mistake of fact doctrine operates independent of false factual assumptions.<sup>123</sup> The doctrine applies more generally if the contract’s “written form[] does not express what was really intended by the parties thereto.”<sup>124</sup>

Thus, a court may “reform” the written agreement if the parties did not express their genuine intentions.<sup>125</sup> New Mexico implies elements of good faith in every mutual mistake case, meaning there is a weaker burden placed upon the party claiming it to show that it was, indeed, mutual.<sup>126</sup>

Upper Division states face a steep climb despite this more liberal doctrine under New Mexico law because the Lower Division states will argue that the historical record does not show clear mutual intent by all the Compact states to modify the “delivery” obligation if the decadal river flows drop below 75 MAF.<sup>127</sup> The historical record is indeed ambiguous on this issue.<sup>128</sup>

## 3. Impossibility of Performance

New Mexico law supports an affirmative defense of *impossibility* of performance when a circumstance outside the control of the parties makes carrying out the terms of the contract *physically impossible*.<sup>129</sup> Relatedly, the *impracticability* of performance happens when a circumstance beyond the control of the parties makes the fulfillment of a contract technically conceivable,

121. *Medite Corp. v. Pub. Serv. Co.*, No. CIV 96-0929BB/RLP, 1998 U.S. Dist. LEXIS 24560, at \*19 (D.N.M. Sep. 28, 1998).

122. *See Ballard v. Chavez*, 868 P.2d 646, 647-48 (N.M. 1994) (noting that Mutual Mistake Doctrine extends beyond misconception and ignorance).

123. *See Hendren v. Allstate Ins. Co.*, 672 P.2d 1137, 1139-40 (N.M. App. 1983) (emphasizing that “A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties”).

124. *C.R. Anthony Co. v. Loretto Mall Partners*, 817 P.2d 238, 245 (N.M. 1991) (quoting *Cleveland v. Bateman*, 158 P. 648, 650 (N.M. 1916)).

125. *Id.*

126. *See Spencer v. J.P. White Bldg.*, 585 P.2d 1092, 1095 (N.M. 1978).

127. Colorado River Compact, art. III(c-d) (1922).

128. *See generally id.* and the discussion of the negotiations in *Hundley*, *supra* note 17.

129. *Wood v. Bartolino*, 146 P.2d 883, 886 (N.M. 1944).

but extremely difficult.<sup>130</sup> High impracticability occurs when one of the parties may suffer harm or loss as a result of the performance, or when “the performance itself becomes unreasonably difficult or expensive.”<sup>131</sup> A party can show impracticability only because of “extreme or unreasonable difficulty, expense, injury or loss involved.”<sup>132</sup>

#### 4. Frustration of Purpose

Frustration of purpose in New Mexico requires that an “unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.”<sup>133</sup> Courts excuse performance when the occurrence or cessation of a specific circumstance or state of affairs has made performance impossible and the contract’s purpose thwarted.<sup>134</sup> This approach applies where it is clear from the contract and the surrounding circumstances that the parties assumed a specific condition or set of conditions would persist.<sup>135</sup> A New Mexico court could decide that the entire purpose of the contract has been defeated if that condition or situation no longer exists.<sup>136</sup>

However, New Mexico courts will not hold a contract ineffective just because one of the parties’ costs has increased because, “[t]he parties clearly contemplated the likelihood of changing economic conditions, including alterations in fuel price levels ‘and such fluctuation was not the kind of completely unforeseeable event required to invoke the doctrine of frustration of purpose.’”<sup>137</sup>

The 10<sup>th</sup> Circuit relied on the Restatement (Second) of Contracts (and applied New Mexico law) when resolving an issue involving the frustration of purpose doctrine.<sup>138</sup> The Restatement provides that the following conditions must be met: (1) a party’s primary purpose is substantially frustrated; (2) such party is not at fault; and (3) the contract was made on the fundamental premise that the cause of the frustration would not occur.<sup>139</sup> Upper Division states may argue that all three of these conditions are met for purposes of not enforcing an Article III(d) delivery obligation.

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130. *Id.*

131. Matthew Hippler & Joshua Halen, *Events Excusing Performance of a Contract*, HOLLAND & HART, Apr. 30, 2020, <https://www.hollandhart.com/events-excusing-performance-of-a-contract>, (last visited Dec. 13, 2024).

132. *See* Int’l Minerals & Chem. Corp. v. Llano, Inc., 770 F.2d 879, 886 (10th Cir. 1985) (applying New Mexico law).

133. *Wood*, 146 P.2d at 886.

134. *Id.* at 885, 886.

135. *Id.* at 885.

136. *Id.*

137. *Hartman v. El Paso Nat. Gas Co.*, 763 P.2d 1144, 1151 (N.M. 1988).

138. *See* Int’l Minerals & Chem. Corp., 770 F.2d at 886.

139. Restatement (Second) of Contracts § 265 (Am. L. Inst. 1981).

## F. UTAH

### 1. Force Majeure

Only one Utah case discusses the enforceability of a *force majeure* clause. In that instance, the court declined to excuse the performance of that party under a *force majeure* provision because the party “contributed to the delays.”<sup>140</sup> In *Desert Power*, the Court states, “an event of force majeure must be a cause beyond the reasonable control of both Desert Power and PacifiCorp.,” and “the Commission’s factual finding that Desert Power was partially responsible for the delays it claims were events of force majeure precludes Desert Power from qualifying for relief even under its proposed interpretation of the contract.”<sup>141</sup>

Of course, a question of fact exists whether an incident rises to the level of excusing performance of contractual obligations in each claimed case of *force majeure*.<sup>142</sup> Depending on the difficulties and constraints that the parties encounter in various circumstances, it can be the case for one contract but not another.<sup>143</sup> However, there must be an explicit *force majeure* provision in the contract under Utah law; again, the Compact does not include any such provision.<sup>144</sup>

### 2. Mutual Mistake of Fact

In Utah, the following elements must be met when proving mutual mistake of fact: (1) both parties are mistaken about a material fact of the issue at hand; and (2) the material fact is the same fact between the two parties.<sup>145</sup> The controlling case on this doctrine is *Campbell v Stagg*.<sup>146</sup>

Both the fact pattern and procedural posture of *Campbell* make it difficult to determine the applicability of this relatively simple two-element test to the Compact and Article III(d).<sup>147</sup> It seems unlikely that simply meeting these two elements would be sufficient for either contract rescission or reformation as a remedy. As in Colorado, the doctrine may not apply to a *future* fact.<sup>148</sup>

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140. *Desert Power, LP v. Pub. Serv. Comm’n*, 173 P.3d 218, 222 (Utah Ct. App. 2007).

141. *Id.* at 219, 222.

142. *See generally* 1 Corbin: Force Majeure and Impossibility COVID-19 § 1.02 (2024).

143. Lisa M. Richman et al., *Force Majeure and COVID-19: Frequently Asked Questions*, MCDERMOTT WILL & EMERY (Mar. 20, 2020), <https://www.mwe.com/insights/force-majeure-and-covid-19-frequently-asked-questions/#>, (last visited Dec. 13, 2024).

144. *Of Contracts, COVID, and Force Majeure Clauses*, IRVINE LEGAL (Jul. 30, 2020), <https://www.irvine-legal.com/irvine-articles/2020/7/30/of-contracts-covid-and-force-majeure-clauses>, (last visited Dec. 13, 2024); *See generally* Colorado River Compact.

145. *See Bergmann v. Bergmann*, 428 P.3d 89, 94 (Utah Ct. App. 2018) (quoting *Cantamar, LLC v. Champagne*, 142 P.3d 140 (Utah Ct. App. 2006)).

146. *Campbell v. Stagg*, 596 P.2d 1037 (Utah 1979).

147. *See generally id.* at 1038, 1041 (Utah 1979); *see also Seamon v. Wiser*, 462 P.3d 387, 388, 391 (Utah Ct. App. 2020).

148. *See Hailpern*, 389 P.2d, at 593.

### 3. Impossibility of Performance

“[A]n obligation is deemed discharged [under Utah law] if an unforeseen event occurs after formation of the contract and without fault of the obligated party, which event makes performance of the obligation impossible or highly impracticable.”<sup>149</sup> A party is excused from performing if it is determined that it is impossible or impractical “unless the party has assumed the risk of the event.”<sup>150</sup> The obligation is deemed discharged under Utah’s contractual defense of impossibility.<sup>151</sup> This principle is explored somewhat extensively in *Robinson*.<sup>152</sup>

The Utah doctrine favors the Upper Division states in the Compact: any “delivery” obligation under Article III(d) would be deemed discharged if it is impossible or impractical to deliver 75 MAF every rolling consecutive ten-year period.<sup>153</sup> Lower Division states would argue that the Upper Division states assumed the risk of such an event (*Kilgore*), but Carlson and Boles effectively argue against such a conclusion.<sup>154</sup>

### 4. Frustration of Purpose

A party has an affirmative defense of frustration of purpose to fulfill its obligations if a subsequent, unanticipated incident interferes with its goal in making the agreement and the other parties to the contract were aware of this goal at the time the contract was made.<sup>155</sup> *Castagno v. Church* summarizes the doctrine and the required elements:

The applicability of [the doctrine of frustration of purpose] depends on the total or *nearly total destruction of the purpose* for which, in the contemplation of both parties, the transaction was made. Although performance remains possible, the expected value of performance to the party seeking to be excused has been *destroyed by a fortuitous event*, which supervenes to cause an actual, but not literal, failure of consideration.<sup>156</sup>

Upper Division states would argue that the original purpose of Article III(d) has been frustrated by climate change; climate change was unforeseeable in 1922 when the Compact was signed; climate change occurred through no fault of the Upper Division states; and climate change has made the Article III(d) provisions useless. Lower Division states would primarily argue that Article III(d) is not useless because storage in Lake Powell allows USBR/DOI

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149. *Tech Center 2000, LLC v. Zrii, LLC*, 363 P.3d 566, 575 (Utah Ct. App. 2015) (quoting *Kilgore Pavement Maint., LLC v. West Jordan City*, 257 P.3d 460 (Utah Ct. App. 2011)).

150. *See Kilgore Pavement Maint., LLC*, 257 P.3d at 462.

151. *Robinson v. Robinson*, 232 P.3d 1081, 1084 (Utah Ct. App. 2010).

152. *See generally id.*

153. *See generally* Colorado River Compact, art. III(d) (1922).

154. Carlson & Boles, Jr., *supra* note 40, at 21.

155. 1 Corbin: Force Majeure and Impossibility COVID-19 § 1.02 (2) (B).

156. *Diston v. EnviroPak Med. Prods., Inc.*, 893 P.2d 1071, 1077 (Utah Ct. App. 1995) (citing *Castagno v. Church*, 552 P.2d 1282 (Utah 1976)).

to operate the Glen Canyon Dam (and other upstream dams) in such a way to ensure that the Article III(d) delivery obligations can continue to be met.

## G. WYOMING

### 1. Force Majeure

In the state of Wyoming, any kind of catch-all clause will be helpful in establishing that an event qualifies as a *force majeure*.<sup>157</sup> There is a dearth of published cases on *force majeure* in the state. But, as noted above, the absence of any such clause in the Compact makes this irrelevant.<sup>158</sup>

### 2. Mutual Mistake of Fact

Wyoming law recognizes the concept of mutual mistake of fact as it pertains to contracts. According to the Wyoming UCC § 2-302, a contract is “voidable on grounds of mutual mistake when both parties independently make a mistake at the time the contract is made as to a basic assumption of the contract, unless the party seeking avoidance bears the risk of the mistake. . . The mistake, however, must have been a mutual one. There must have been a meeting of the minds.”<sup>159</sup> This statute indicates that if a substantial fact crucial to the contract is misunderstood by both parties and thus impacts the party’s rights and obligations under the contract, the contract may be void.<sup>160</sup> An error will be deemed substantial only if it would have changed the parties’ choice to enter into the contract if they had known the true fact.<sup>161</sup>

In order to be successful, the party seeking rescission or reformation must prove that: “(1) there was a prior agreement that the written instrument undertook to evidence; (2) a mistake occurred in drafting the instrument; and (3) there was no fraud or inequitable conduct on the part of a party.”<sup>162</sup> If these conditions are satisfied, the court may decide to annul the agreement and put the parties back in their pre-agreement positions or to alter the agreement to represent the parties’ genuine intentions.<sup>163</sup>

The Upper Division states can argue that the doctrine applies to climate change because it meets all five of the elements for mutual mistake of fact under Wyoming law.

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157. See *Denbury Onshore, LLC v. APMTG Helium LLC*, 476 P.3d 1098 (Wyo. 2020).

158. See *Colorado River Compact* (1922).

159. See *generally* *Pellet v. Pellet*, 510 P.3d 388, 397 (Wyo. 2022).

160. *Shrum v. Zeltwanger*, 559 P.2d 1384, 1386-87 (Wyo. 1977) (noting that if the agreement does not expressly form the intent of the party then there is a mutual mistake of fact).

161. See *id.*

162. See *Larson v. Burton Constr., Inc.*, 421 P.3d 538, 543 (Wyo. 2018).

163. See *generally* 66 Am. Jur. 2d *Reformation of Instruments* § 21.

### 3. Impossibility of Performance

Under Wyoming law, a contract may be dismissed if an event that the non-performing party reasonably could not have predicted at the time of contracting renders performance impossible.<sup>164</sup> This can be utilized as an affirmative defense against a breach of contract action.<sup>165</sup>

It is unclear if only the clause in question affected by the impossibility (Article III(d) in the case of the Compact) would be rescinded or if rescission would affect the entire Compact. Carlson and Boles noted that complete rescission of the Compact would negatively affect the Upper Division states: “[i]f the Compact were voided and the River equitably apportioned, the northern [i.e., Upper Division] states would be up the proverbial creek without a paddle.”<sup>166</sup> The Upper Division states would therefore seek reformation of the Compact as a remedy.

### 4. Frustration of Purpose

Frustration of Purpose is an affirmative defense under Wyoming law when an unanticipated event occurs after a contract is formed and renders it impossible or impractical for one of the parties to obtain the benefit they reasonably had anticipated from the contract.<sup>167</sup>

[A] party seeking to be excused from performance under a contract based on this doctrine [of commercial frustration] must prove the following elements:

- (1) The contract is at least partially executory.
- (2) A supervening event occurred after the contract was made.
- (3) The non-occurrence of such event was a basic assumption on which the contract was made.
- (4) Such occurrence frustrated the party’s principal purpose for the contract.
- (5) The frustration was substantial, and
- (6) The party has not agreed, expressly or impliedly, to perform in spite of the occurrence of the event.”<sup>168</sup>

Note that the Wyoming doctrine addresses “*the party’s principal purpose* for the contract” rather than a broader purpose of the contract.<sup>169</sup> This means that the *Upper* Division states would have difficulty asserting that the purpose of Article III(d) for the *Upper* Division states has been frustrated by climate change: only the *Lower* Division states are disadvantaged by the *Upper*

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164. See *Mortenson v. Scheer*, 957 P.2d 1302, 1305-06 (Wyo. 1998).

165. See *id.*

166. Carlson & Boles, Jr., *supra* note 40, at 28.

167. *Wallace v. Pinnacle Bank-Wyoming*, 275 P.3d 1250, 1255 (Wyo. 2012).

168. *Id.*

169. *Id.* (emphasis added).

Division's failure to deliver under Article III(d).<sup>170</sup> Therefore, Wyoming's frustration of purpose doctrine makes it less useful to the Upper Division states than some of the other states' related doctrines.<sup>171</sup>

## V. THE IMPACT OF COVID-19 CASES

The Covid-19 pandemic was an historical event with massive ramifications for many aspects of societies throughout the world. It led to nearly 7.1 million deaths globally (more than 1.2 million in the United States alone),<sup>172</sup> dramatic governmental restrictions on commercial and personal activities, and fundamental changes in people's daily lives and social activities. The economic and social consequences of Covid-19 continue to ripple through American society.<sup>173</sup>

Not surprisingly, such a dramatic event also affected the legal system. The most visible litigation addressed issues of individual liberty in the face of governmental restrictions and the scope of regulatory action governmental agencies may exert.<sup>174</sup> But litigation also addressed the issues at the heart of this article: whether or not parties need to fulfill their previous contract commitments when unanticipated and unforeseeable events interfere with at least one party's ability to fulfill those commitments. Like climate change,<sup>175</sup> Covid-19 was unforeseeable for many parties who formed contracts before 2020.<sup>176</sup>

We reviewed all published case law for all seven Compact states from 2020 to 2022 to determine if Covid-related litigation altered the broader common law reviewed in Section 4 of this article. There are surprisingly few

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170. See generally Hundley, *supra* note 17, at 79 (arguing that Upper Division states must allow a certain flow of water to reach Lower Basin states).

171. See generally Wallace, 275 P.3d (Wyoming's own doctrine would work against the Upper Division states if they asserted climate change as a frustration of purpose. The fourth element of the doctrine is so narrow that Wyoming may struggle to convince a court that such a broad impact caused by climate change frustrates their ability to deliver water to lower basins. A court may find it difficult to quantify and represent the impact as solely based on climate change).

172. *Number of COVID-19 deaths reported to WHO (cumulative total)*, WORLD HEALTH ORG., <https://data.who.int/dashboards/covid19/deaths?n=c> (last visited Feb. 6, 2025).

173. Hanna Ziady, *Working from home could wipe \$800 billion from office values globally*, CNN (Jul. 13, 2023), <https://www.cnn.com/2023/07/13/investing/remote-work-impact-real-estate/index.html> (noting there have been continuing changes in remote work, for example, which have affected commercial office real estate occupancy and valuations).

174. *Tandon v. Newsom*, 593 U.S. 61, 63-64 (2021).

175. Selina Lee-Andersen & Andrew West, *Impacts of climate change - foreseeable or unforeseeable? Drafting force majeure clauses in the era of climate uncertainty*, MCCARTHY TETRAULT LLP, (Aug. 8, 2018), <https://www.mccarthy.ca/en/insights/blogs/canadian-era-perspectives/impacts-climate-change-foreseeable-or-unforeseeable-drafting-force-majeure-clauses-era-climate-uncertainty#:~:text=Climate%20change%2Drelated%20events%20may,unforeseen%20and%20impossible%20to%20prevent.>, (noting that there is a debate to the question as to how long ago climate change was foreseeable, but it certainly wasn't in 1922).

176. Paula M Bagger, *The Importance of Force Majeure Clauses in the COVID-19 Era*, AM. BAR ASS'N (Mar. 25, 2021), <https://www.americanbar.org/groups/litigation/resources/newsletters/commercial-business/importance-force-majeure-clauses-covid-19-era/>.

cases—with one exception in Utah,<sup>177</sup> only California published cases involving application of these affirmative defenses to a Covid-related fact pattern.<sup>178</sup> The California Covid cases involved all of the doctrines except Mutual Mistake of Fact.<sup>179a</sup> We suspect that the lack of cases reflects two unusual aspects of Covid-related litigation: (1) the courts were generally closed during the pandemic, leading many disputes to alternative methods of resolution (some of which were established expressly to relieve the judicial backlog);<sup>179</sup> and (2) extensive government funding resulted in fewer litigated conflicts over failure to pay.<sup>180</sup> We therefore also analyze in Section 6 some Covid-related cases that were decided in arbitration.

The California cases are nevertheless illuminating, showing that the courts did not fundamentally alter the existing relevant common law principles when applying them to the unprecedented fact patterns of the Covid pandemic.<sup>181</sup> Instead, courts simply applied those principles to the novel Covid fact patterns and maintained the status quo at common law.<sup>182</sup>

As a reminder, California courts have specifically held that *force majeure* is the equivalent of the common law contract defense of impossibility and/or frustration of purpose.<sup>183</sup>

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177. *Hiatt v. Brigham Young Univ.*, 512 F. Supp. 3d 1180, 1184, 1187-88 (D. Utah 2021). (denying BYU's Motion to Dismiss Hiatt's claim that BYU had breached its contract to provide in-person instruction when BYU moved its courses to remote instruction due to Covid-19. The court did not evaluate the merits of the claim or apply relevant Utah state contract law to the Covid-19 facts due to the required procedure for a motion to dismiss).

178. See Jonathan P. Wolfert, Eddy Salcedo, Owen R. Wolfe, Sierra Chinn-Liu, *California Courts Weigh in on Contractual Obligations in the Era of COVID-19*, SEYFARTH (Oct. 28, 2020), <https://www.seyfarth.com/news-insights/california-courts-weigh-in-on-contractual-obligations-in-the-era-of-covid-19.html>. (This article highlights the trend identified where California courts reviewed non-performance related to COVID-19 early on).

179a. See e.g. *Mudpie, Inc. v. Travelers Cas. Ins.*, 15 F.4th 885, 893 (9th Cir. 2021); *Apple Annie, LLC v. Oregon Mutual Ins.*, 82 Cal. App. 5th 919, 934 (2022); *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins.* 77 Cal. App. 5th 753, 761 (2022) (noting these cases are part of a collection of COVID-19 breach of contract cases. Mutual Mistake of fact was not a doctrine discussed by the court in their opinions).

179. See *Pro Bono Program Created to Help Resolve Civil Court Matters Amid Pandemic*, NBC, (Jun. 23, 2020), <https://www.nbcsandiego.com/news/local/pro-bono-program-created-to-help-resolve-civil-court-matters-amid-pandemic/2352066/> (noting the RESOLVE program in San Diego, which was established by the San Diego County Bar Association).

180. See generally *Covid-19 Relief: Funding and Spending as of Jan. 31, 2023*, U.S. GOV'T ACCT. OFF. (Feb. 28, 2023), <https://www.gao.gov/products/gao-23-106647> (This report snapshot covers the high level of federal government funding that was provided related to COVID-19 relief).

181. See generally *W. Pueblo Partners, LLC v. Stone Brewing Co., LLC*, 307 Cal. Rptr. 3d 626, 632 (Cal. App. 2023).

182. *Id.*

183. See *COVID-19 Update: Force Majeure Under California Law in Business and Commercial Disputes*, SEYFARTH SHAW LLP, (Mar. 26, 2020), <https://www.seyfarth.com/news-insights/covid-19-update-force-majeure-under-california-law-in-business-and-commercial-disputes.html> (citing 1 WITKIN, SUMMARY 11TH CONTRACTS).

[T]he party asserting the defense of impossibility has to prove (1) an unforeseeable supervening event made performance impossible; (2) the event's nonoccurrence was a basic assumption upon which the agreement was based; (3) the occurrence did not arise out of any fault of the party seeking to be excused; (4) the affected party did not otherwise assume the risk of the event's occurrence; and (5) the affected party did not agree, either expressly or impliedly, to perform despite of impossibility of the event.<sup>184</sup>

Furthermore, the "event must be the proximate cause of nonperformance of the contract."<sup>185</sup> California courts will consider whether an event characterized as an "Act of God" would render performance unreasonably costly regardless of whether a specific disaster could have been anticipated.<sup>186</sup> The moving party must "show that, in spite of skill, diligence and good faith on his part, performance became impossible or unreasonably expensive."<sup>187</sup> It is the burdened party's responsibility to establish that there is "extreme and unreasonable difficulty, expense, injury, or loss involved."<sup>188</sup>

This makes California unique among the seven Compact states in at least two ways: (1) *force majeure* principles may be applied *even in the absence of an explicit force majeure clause in the contract*, and (2) *force majeure* doctrine blends into impossibility of performance doctrine and/or frustration of purpose doctrine. But the courts applied California law in fairly straightforward ways without altering the pre-Covid common law doctrine in any major way.<sup>189</sup>

In *Daversa-Evdyriadis v. Norwegian Air*, the court cited the Restatement (Second) § 264, which states that "[i]f the performance of a duty is made impracticable by having to comply with a domestic . . . governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made."<sup>190</sup> Thus, due to the travel ban, Defendant Norwegian Air Shuttle was released from its contractual obligation to provide transportation for Plaintiff and other

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184. FORCE MAJEURE LAW (CA), <https://advance.lexis.com/practical-guidance-home?crid=8e2e8fa3-9331-42dd-8994-9271bc4b2b15&pdmfid=1000522> (last visited December 1, 2024).

185. *Hong Kong Islands Line Am. S.A. v. Distrib. Servs. Ltd.*, 795 F. Supp. 983, 989 (C.D. Cal. 1991).

186. *See* *Butler v. Nepple*, 354 P.2d 239, 245 (Cal. 1960).

187. *Jin Rui Grp., Inc. v. Societe Kamel Bekdache & Fils S.A.L.*, 621 F. App'x 511, 511 (9th Cir. 2015).

188. *Oosten v. Hay Haulers Dairy Emps. & Helpers Union*, 291 P.2d 17, 20 (Cal. 1955).

189. *See generally* *VFLA Eventco, LLC v. William Morris Endeavor Ent., LLC* 318 Cal. Rptr. 3d 844, 854-56 (Cal. Ct. App. 2024) (applying the common law doctrine of *force majeure* and not altering due to COVID-19 conditions).

190. *Daversa-Evdyriadis v. Norwegian Air*, No. EDCV 20-767-JGB(SP), 2020 U.S. Dist. LEXIS 173854, at \*14 (C.D. Cal. Sep. 17, 2020) (quoting RESTATEMENT (SECOND) OF CONTRACTS §264 (AM. L. INST. 1981)).

passengers.<sup>191</sup> In *STORE SPE LA FITNESS, et al. v. Fitness Int'l, LLC*, the court declined to adopt a new “temporary frustration of intent” doctrine—developed in Kentucky and Tennessee common law—and instead held that a temporary inability to make lease payments, due to government restrictions measured in *months*, did not frustrate the entire purpose of a twenty-year lease.<sup>192</sup> In *In re CEC Ent., Inc.*, the court relied on a contract’s explicit *force majeure* provision—which explicitly *excluded* rent payment obligations—to supersede a broader frustration of purpose defense.<sup>193</sup>

These examples illustrate straightforward applications of existing doctrine, which, in most relevant respects, closely resembles the doctrines in all seven Compact states. We therefore conclude that the COVID-19 pandemic did not fundamentally alter the common law doctrine relevant to a climate-change-based affirmative defense against Article III(d) obligations.

## VI. THE BYU HOUSING ARBITRATIONS

As Section 5 notes, the seven Compact states published relatively few COVID-19-related cases between 2020 and 2022. Although most arbitration cases remain unpublished, in 2022 the Brigham Young University (BYU) Law Center for Peace & Conflict Resolution briefly posted a series of eleven redacted decisions from COVID-19-related arbitration cases on its public website.<sup>194</sup> In these cases, the parties disputed breaches of a standard lease for off-campus housing that BYU had approved.<sup>195</sup> These eleven decisions, each with slightly different fact patterns but all triggered by the COVID-19 pandemic, apply the same contract. They offer an unusual opportunity to assess how fact-dependent the affirmative defenses must be, as well as how the different defenses overlap under Utah law.

The relevant clause of the BYU off-campus lease agreement is section 23B:<sup>196</sup>

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191. *Id.*

192. *STORE SPE LA FITNESS, et al. v. Fitness Int'l, LLC*, No. SACV 20-953 JVS(ADSx) 2021 WL 3285036, at \*9-10 (C.D. Cal. Jun. 30, 2021) (emphasis added).

193. *In re CEC Ent., Inc.*, 625 B.R. 344 (Bankr. S.D. Tex. 2020). (“CEC Ent., Inc.” is a Chuck E. Cheese franchise).

194. *Dispute Resolution Processes*, BYU CTR. FOR PEACE & CONFLICT RESOL., [https://cpcr.byu.edu/covidhousing?fbclid=IwAR1RVGUbjn4Wrlgs-HBktJJP65RnGpQ1fUNIH2TW1EbGk\\_T6thTC-dV31Fcg](https://cpcr.byu.edu/covidhousing?fbclid=IwAR1RVGUbjn4Wrlgs-HBktJJP65RnGpQ1fUNIH2TW1EbGk_T6thTC-dV31Fcg) (last visited Nov. 21, 2022) (on file with the DU Water Law Review) [hereinafter Exhibit A] (There were twelve cases but only eleven decisions because one case involved two siblings; the Arbitrator reached different holdings for the two siblings due to different factual circumstances regarding their particular, individual health conditions and therefore the risks that they each directly faced during the COVID-19 pandemic).

195. *See id.*; *see also Student Housing Policy*, BYU, <https://policy.byu.edu/view/student-housing-policy> (last visited Dec. 19, 2024) (noting that single BYU students are required to live in such BYU-approved housing or at home with their parents).

196. *2019-2020 BYU Student-Landlord Rental Agreement* (on file with the DU Water Law Review) [hereinafter Exhibit B].

23.TERMINATION BY STUDENT OR AUTOMATIC TERMINATION: The Agreement may be automatically terminated, or terminated by the student, prior to its expiration, with all rental charges prorated through the last day of tenancy under the following circumstances and conditions:

B.If the student leaves school due to a verified unforeseeable and unexpected catastrophic loss or serious illness. In such instances, termination of the Agreement is in effect after acceptable verification has taken place. Student shall forfeit security deposit and legal deductions.<sup>197</sup>

In the BYU arbitration cases, student tenants either moved out of or did not move into their leased apartments under the standard contract because COVID-19 restrictions prompted BYU to move all spring 2020 classes to a remote format.<sup>198</sup> BYU did not require these students to continue paying for on-campus housing, but several landlords of off-campus apartments, subject to the standard BYU lease agreement terms, refused to forgive any payments due.<sup>199</sup> Student tenants sought relief from their remaining lease payments, or landlords sought to enforce payment from the students for the full lease term.<sup>200</sup>

The variation in the case outcomes reveals how each case depended on the construction of the specific language in section 23B and the fact-specific application of that text, especially under one key overarching construction: Judge Scofield construed the phrase “*due to a serious illness*” in section 23B as requiring that “[a] tenant seeking termination must demonstrate a direct, personal effect on that tenant from the serious illness.”<sup>201</sup> Nine of the twelve cases<sup>202</sup> were decided based on this construction of section 23B, while one case was decided under section 23F. Student tenants won eight of the twelve cases, while landlords won four of the cases.<sup>203</sup>

Notably, only two of the twelve decisions were based upon the frustration of purpose doctrine—and both were decided in favor of the student tenant.<sup>204</sup> Judge Scofield told us that he applied Utah common law principles to the cases and that neither *force majeure* nor mutual mistake of fact doctrines

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197. *Id.*

198. Exhibit A; *BYU to continue remote learning through summer term*, BYU (Mar. 24, 2020), <https://news.byu.edu/announcements/byu-to-continue-remote-learning-through-spring-term>.

199. Exhibit A; *see* Exhibit B.

200. *See* Exhibit A.

201. Zoom Interview with Hon. Judge Anthony W. Scofield, retired Judge in Provo’s 4th Dist. Ct. (Jan. 26, 2023) [hereinafter *Zoom*] (discussing the applicability of the four doctrines under Utah law to the BYU Arbitration cases).

202. *See* Exhibit A.

203. *Id.*

204. *See generally id.*

are applied except under very rare circumstances.<sup>205</sup> Instead, he relied upon construction of the contract's explicit text and the frustration of purpose doctrine.<sup>206</sup>

With that in mind, it is worth noting that §§ 23C and 23D<sup>207</sup> provide for specific conditions where a student tenant would be relieved of at least some lease payments:

C. If the student leaves school due to a verified call into active military duty, the student may terminate further contractual obligation after 5 days written notice to landlord as outlined in the Service Members Civil Relief Act of 2003.

D. If at any time during the term of the contract the student graduates from BYU, receives a mission call, gets married, or is required to do an internship for graduation which necessitates leaving the area, the student may terminate with 120 days written notice and shall forfeit security deposit and legal deductions. After receiving the 120 day written notice the Landlord may at the end of any semester, relet the rental space and thus relieve the student of any further obligation under this Agreement or continue to collect rents for the full duration of the 120 days. The student's rent obligation continues 120 days from the date written notice is given to the landlord.<sup>208</sup>

The presence of the "3M" exceptions (Military service, Mission service, and Marriage) as alternative bases for discharging at least some of the remaining lease payment obligations highlights a crucial conclusion from the BYU Housing Arbitrations: the *specific terms* of each contract are paramount.<sup>209</sup>

## VII. APPLICATION TO THE COLORADO COMPACT

What do common law defenses to breach of contract, the impact of COVID-19 on the evolution of relevant doctrines, and the BYU Housing Arbitration cases mean for defenses to Article III(d) of the Colorado River Compact? Can climate change be a strong legal basis for discharging any Upper Division delivery obligations under Article III(d) if the Supreme Court were to construe III(d) as a delivery obligation?<sup>210</sup>

The short answer is: yes, climate change potentially serves the basis for a successful affirmative defense against a delivery obligation under Article III(d).

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205. Zoom, *supra* note 201.

206. *Id.*; see also Exhibit A.

207. See Exhibit B for the rest of Sec. 23.

208. Exhibit B.

209. Exhibit B.

210. Colorado River Compact (1922).

This is true under the common law doctrines of all seven of the Compact states. But not all of the specific doctrines apply:

#### A. FORCE MAJEURE

This is the weakest of the defenses, because an explicit clause is required in all states except for California. The Colorado Compact contains no such explicit *force majeure* clause.<sup>211</sup>

#### B. MUTUAL MISTAKE OF FACT

All seven states shared a mutual mistake of fact in 1922 about material *future* conditions regarding flows, but neither Colorado nor Utah recognizes the doctrine for a *future* fact.

#### C. IMPOSSIBILITY OF PERFORMANCE

This is the strongest of the defenses because climate change has altered *physical* conditions through aridification so that it is now at least *highly impracticable* (the weaker standard) and perhaps even *physically impossible* (at least with the current infrastructure of the Colorado River system) to discharge the delivery obligation under Article III(d).<sup>212</sup> An affirmative defense in almost any contract case brought in any of the seven Compact states under state common law is likely to be successful. There is no reason, therefore, that the Upper Division would not be successful in an original jurisdiction case under the Compact.

#### D. FRUSTRATION OF PURPOSE

This defense depends upon a narrow definition of the purpose of Article III(d). In the context of the entire Compact (and the history of negotiations over its final terms), however, the Lower Division can argue that the purpose of Article III(d) should not be determined in isolation from the broader purposes of the Compact.<sup>213</sup> The Lower Division is likely to prevail with this position, so this defense is unlikely to succeed before the Court.

### VIII. COLORADO RIVER DELIVERY CONTRACTS

Our focus so far has been on the terms of the Compact, but Congress ratified the Compact with the Boulder Canyon Project Act in 1928 and the Supreme Court construed the latter in *Arizona v. California* in 1963.<sup>214</sup> Boulder

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211. See generally *id.*

212. See Minderman, 437 P.2d at 409-10; See generally Colorado River Compact, art. III(d) (1922).

213. See generally Colorado River Compact, art. III(d) (1922).

214. *Arizona v. California*, 373 U.S. 546 (1963); Jason A. Robison & Lawrence J. MacDonnell, *Arizona v. California & the Colorado River Compact: Fifty Years Ago, Fifty Years Ahead*, 4 *Ariz. J. of Env. L. & Pol'y* 130 (2014); Lawrence J. MacDonnell, *Arizona v. California Revisited*, 52

(Hoover) Dam was built under the Project Act, which authorized the U.S. Secretary of Interior (through USBR) to sign contracts for delivery of water from Lake Mead to the Lower Division states.<sup>215</sup> *Arizona v. California* is best known for its apportionment of the Lower Division share of 7.5 MAF among the three Lower Division states (4.4 MAF for California, 2.8 MAF for Arizona, and 0.3 MAF for Nevada) and apportioning the Gila River equitably between New Mexico and Arizona.<sup>216</sup> But it also effectively made USBR/DOI the water master for all Lower Division deliveries under the Project Act and the Compact itself.<sup>217</sup>

This raises two critical questions: (1) would USBR/DOI face its own delivery obligation under the Project Act's delivery contracts even if the Upper Division can discharge any delivery obligation under Article III(d), and (2) do the USBR/DOI delivery contracts include any explicit provisions regarding *force majeure* or any other relevant affirmative defenses? The Project Act explicitly states that the United States and all appropriators of water from the Colorado River "shall observe and be subject and controlled by [the] Colorado River compact . . . anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide."<sup>218</sup>

A more specific and explicit provision in USBR/DOI delivery contracts may still create a delivery obligation (potentially subject to a Takings Clause claim if breached by USBR/DOI) despite any decision discharging the Upper Division states from any delivery obligation under Article III(d) of the Compact itself. We therefore reviewed USBR/DOI delivery contracts, which proved to be surprisingly difficult, to determine what clauses (if any) address doctrines of *force majeure* and its close cousins. The original contract (April 24, 1930) between USBR/DOI and the Metropolitan Water District ("District") is illustrative.<sup>219</sup> Section 6 states, "[t]he United States shall deliver to the District . . . up to but not to exceed one million fifty thousand (1,050,000) acre feet of water, which shall be delivered continuously *as far as reasonable diligence will permit*."<sup>220</sup> It also explicitly notes Project Act's need to comply with the Compact:

The United States shall not be obligated to deliver water to the District *when for any reason such delivery would interfere with the use of Boulder Canyon dam, and reservoir for river regulation,*

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Natural Resources Journal 363 (2012).

215. See Boulder Canyon Project Act, 43 U.S.C.S. § 617(d) (1928).

216. *Arizona*, 373 U.S. at 593, 595. The primary claim by California was that the roughly 1.0 MAF that flows through Arizona from the Gila into the Colorado River should be counted against Arizona's 2.8 MAF under the Compact; Arizona claimed that the Gila River flows were not subject to either the Compact or the Boulder Canyon Project Act. The Court found for Arizona.

217. *Id.* at 580.

218. Boulder Canyon Project Act § 617g(a).

219. *Contract for Delivery of Water* (Apr. 24, 1930) (on file with the DU Water Law Review [hereinafter Exhibit C]).

220. *Id.* at 2-3 (emphasis added).

*improvement of navigation, flood control, and/or satisfaction of present perfected rights, in or to the waters of the Colorado River, or its tributaries, in pursuance of Article VIII of the Colorado River Compact, and this contract is made upon the express condition and with the express covenant that the right of the District to waters of the Colorado River, or its tributaries, is subject to and controlled by the Colorado River Compact.*<sup>221</sup>

Even more importantly, the contract uses expansive language to relieve the USBR/DOI from any liability if it fails to deliver water under the contract: “The United States, its officers, agents and employees shall not be liable for damages *when, for any reason whatsoever, suspensions or reductions in delivery of water occur.*”<sup>222</sup> This expansive language was repeated in a Supplementary Contract with Met on September 28, 1931.<sup>223</sup> This a broad and explicit release from liability for non-delivery.

The USBR/DOI operating criteria for Lakes Mead and Powell are established in the Secretary’s *Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs* (“Criteria”);<sup>224</sup> they include conditions for the Secretary to declare “shortage” conditions that then trigger changes to both reservoir operations and deliveries.<sup>225</sup> Most of the scrambling by USBR/DOI over the past two decades to deal with the impact of climate change and the 22-year drought from 2000 to 2022 has been over how to operate within the criteria.<sup>226</sup> Previous policies focused on how to allocate *surpluses* rather than *shortages*.<sup>227</sup> The first Drought Contingency Plan (“DCP”) was adopted in 2007 and the Drought Contingency Plan Authorization Act cemented updated DCP agreements in 2019.<sup>228</sup> These DCPs last only through 2026, however, and are currently being renegotiated in anticipation of their termination.<sup>229</sup> Rather than address the long-term structural deficit in the system and potential *permanent* non-delivery under the overly optimistic hydrological assumptions underlying

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221. *Id.* at 3 (emphasis added).

222. *Id.* at 3 (emphasis added).

223. *See generally*, Supplementary Contract for Delivery of Water (Sep. 28, 1931).

224. *Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (P.L. 90-357)*, BUREAU OF RECLAMATION (Jun. 8, 1970), <https://usbr.gov/lc/region/pao/pdffiles/opcritcr.pdf>.

225. DRAFT 2024 ANNUAL OPERATING PLAN FOR COLORADO RIVER RESERVOIRS, BUREAU OF RECLAMATION 37 (2024), [https://www.usbr.gov/lc/region/g4000/AOP2024/AOP24\\_draft.pdf](https://www.usbr.gov/lc/region/g4000/AOP2024/AOP24_draft.pdf) [hereinafter *DRAFT*].

226. *Id.* at 6.

227. *See generally id.* at 32.

228. Drought Contingency Plan Authorization Act (Pub. L. 116-114).

229. *See generally Reclamation announces 2025 operating conditions for Lake Powell and Lake Mead*, BUREAU OF RECLAMATION (Aug. 15, 2024), <https://www.usbr.gov/newsroom/news-release/4934>.

the Compact, the DCPs focus on “shortage” conditions as if they will only be a *temporary* condition during extreme drought.<sup>230</sup>

In contrast, the 2003 Quantitative Settlement Agreement (“QSA”), which established how California would reduce its excessive use of 5.3 MAF per year (which was available before Arizona was able to use its full authorized use of 2.8 MAF) to its authorized use of 4.4 MAF per year under the Compact (as the Project Act was construed by the Court in *Arizona v. California*), addressed a *permanent* reduction—although the amount of that reduction may also prove to be temporary due to climate change, requiring additional permanent reductions.<sup>231</sup> The QSA uses the term “Uncontrollable Force” to relieve the USBR/DOI from any liability for non-delivery:<sup>232</sup>

Section 3.58

“Uncontrollable Force” shall mean any cause beyond the control of the Party affected, *excluding a shortage determined by the Secretary in accordance with the Secretary’s Criteria for Coordinated Long-range Operation of Colorado River Reservoirs*, and shall include, *but is not limited to*, facilities failure, flood, earthquake, storm, lightning, fire, epidemic, war, riot, civil disturbance, labor disturbance, sabotage, restraint by court or public authority *or other events which by exercise of due diligence and foresight such Party could not have been reasonably expected to avoid*.

Section 5.5

Uncontrollable Forces. The amount of water available to be allocated from each of the Projects may be *reduced temporarily or permanently* as a result of Uncontrollable Forces. In the event of an Uncontrollable Force occurring after the Secretary has issued notice(s) of reach completion or notice(s) of completion or of construction of either or both Projects, the Secretary shall determine, in consultation with the Parties, whether and to what extent the amount of water made available for allocation as a result of the Projects is thereby reduced. If the reduction is temporary, the Secretary shall also provide notice of the amount of water made available for allocation as a result of the Projects as conditions change. The Secretary shall provide notice of such determinations to all Parties.

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230. *See generally id.*

231. *See generally California’s Plan: How Does It Compare to the Six States’ Proposal?*, BLUERIBBON COALITION, (Feb. 10, 2023), <https://blueribboncoalition.org/californias-plan-how-does-it-compare-to-the-six-states-proposal/> [hereinafter Allocation Proposal].

232. *Id.* at §3.58.

## ARTICLE 22

Uncontrollable Forces

*None of the Parties shall be considered to be in default in respect to any obligation hereunder, if prevented from fulfilling such obligation by reason of an Uncontrollable Force. Any Party rendered unable to fulfill any obligation by reason of an Uncontrollable Force shall give prompt written notice of such fact to the Party to whom the obligation is owed and shall exercise due diligence to remove such inability with all reasonable dispatch.*<sup>233</sup>

The following three elements of the Law of the River suggest that USBR/DOI would face no liability even if it permanently failed to deliver water to Lower Division states under the Compact, the Project Act, and delivery contracts:

- (1) the expansive language in the original USBR/DOI contracts with Met in the case of non-delivery;<sup>234</sup>
- (2) the flexibility afforded the USBR/DOI to determine “shortage” conditions under the Project Act;<sup>235</sup> and
- (3) the expansive language in the QSA regarding the need for USBR/DOI only to give notice if an “uncontrollable force” causes non-performance.<sup>236</sup>

Therefore, the failure of the Upper Division states to deliver the water described in Article III(d) would not create any liability risk of damages for either the Upper Division states or the United States. Article III(d) is effectively unenforceable under state common law, federal statutory law, and USBR/DOI contracts in the face of Climate Change.

**IX. WATER RIGHTS AND THE DOCTRINE OF WASTE**

The analysis in this article shows that any purported Article III(d) delivery obligation is really just a paper tiger: the Upper Division states could assert an affirmative defense to any breach of delivery obligation on the grounds of *impossibility of performance*, and, under the common law of all seven Compact states, their duty under III(d) would be discharged.<sup>237</sup> The USBR/DOI could also operate the Colorado River projects to accommodate the physical limitations of the projected climate change hydrology so that the *temporary shortages* contemplated by the Project Act and the Criteria become *permanent*

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233. *Id.* at §§3.58, 5.5, art. 22 (emphasis added).

234. Exhibit C.

235. DRAFT, *supra* note 225.

236. *See id.* (applying the uncontrollable forces doctrine to show that the Bureau of Reclamation would face no liability due to climate change).

237. *See, e.g., Kilgore Pavement Maint., LLC*, 257 P.3d at 463; *see generally* Colorado River Compact, art. III(d) (1922).

*reductions* in the contracted amounts that Lower Division water users may expect to be delivered compared to the amounts delivered under the historic hydrological regime and operating decisions by the USBR/DOI.<sup>238</sup> Under their contracts with USBR/DOI—at least under the Metropolitan Water District contracts<sup>239</sup>—the users have little legal basis for higher delivery amounts.

But that would not be the end of the matter: some Lower Division users, who generally have much more senior water rights than most of the Upper Division users, could still seek to upend Upper Division water rights and diversions by invoking the doctrine of waste. Doing so could then be a basis for showing that the Upper Division states are in fact *causing* depletion through Upper Division diversions that are wasteful.<sup>240</sup> Lower Division states could potentially compel greater deliveries by the Upper Division even if (1) they achieved a construction by the Court that Article III(d) is a delivery rather than a non-depletion obligation, and (2) the Upper Division successfully discharged any delivery obligation with an affirmative defense that it is physically impossible to perform.<sup>241</sup> The doctrine of waste, if squeezed hard enough by the Lower Division states, could still yield more Colorado River water for delivery to the Lower Division.

The doctrine of waste, like all water rights law, is a creature of state law and therefore varies across the seven Compact states.<sup>242</sup> We have not analyzed the doctrine systematically here (as we have for the common law doctrines discussed in this article) across all seven Compact states. But it played a prominent role in altering the perceived seniority and security of the Imperial Irrigation District (“IID”) water rights when California was facing the need to cut its Colorado River use from 5.3 MAF to 4.4 MAF.<sup>243</sup> IID holds senior water rights for roughly three-fourths of California rights to Colorado River (subject to the transfers embodied in the QSA)<sup>244</sup> so California could not bring its overall use down without either reducing IID’s rights or taking all of the reduction from more junior appropriators—including almost all of the municipal and domestic water rights holders. Nonetheless, the California State Water Resources

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238. Allocation Agreement, *supra* note 231, at §5.5; see generally Colorado River Compact, art. III(d) (1922).

239. See generally Contract for Delivery of Water, *supra* note 219.

240. See generally *id.*

241. See Heather Sackett, *The Runoff / Big water year begins to fade away*, ASPEN JOURNALISM, Aug. 11, 2023, <https://aspensjournalism.org/newsletter/the-runoff-big-water-year-begins-to-fade-away/>, (last visited Feb. 8, 2025).

242. See generally Tara K. Righetti & Joseph A. Schremmer, *Waste and the Governance of Private and Public Property*, 93 U. Colo. L. Rev. 609, 644-49 (2022) (explaining the doctrine of waste as it is expressed in the common law of both riparian and prior-appropriation water rights systems).

243. Gokce Sencan and Brian Gray, *The Colorado River*, Public Policy Institute of California, (March 2025), <https://www.ppic.org/publication/the-colorado-river/>.

244. Dan Walters, *Two decrees affect California water wars*, CALMATTERS (Jul. 6, 2021), <https://calmatters.org/commentary/2021/07/california-supreme-court-westlands-water-wars-drought/>.

Control Board (“SWRCB”) determined in Water Rights Decision 1600 in 1984 that IID’s failure to implement additional water conservation measures was unreasonable and constituted a misuse of water under Article X, Section 2 of the California Constitution and Section 100 of the California Water Code.<sup>245</sup>

As a result, the doctrine of waste, through the reasonable use doctrine, continues to cast a long and dark shadow over internal California water policy and law decisions (including for the Sacramento-San Joaquin River systems).<sup>246</sup> The doctrine of waste could play a similar role in motivating the most senior water rights holders (generally agricultural users) across the seven Compact states to question the presumed security of their long-established senior positions.<sup>247</sup> “First in time, first in right” is only valid in most states if the water continues to be put to *reasonable* use—being a *beneficial* use, alone, is insufficient.<sup>248</sup>

The reality is that there are many senior water rights throughout the Compact states that irrigate in relatively inefficient ways while producing relatively low-value crops. The social and cultural role that water plays in rural settings throughout the seven Compact states is important,<sup>249</sup> but the security of its continuing beneficial use effectively could be challenged under the doctrine

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245. Water Rights Decision 1600, Decision Regarding Misuse of Water by Imperial Irrigation Dist., 66, CAL. STATE WATER RES. CONTROL BD. (1984); *see also* Water Rights Order 84-12, Affirming Decision 1600 and Denying Petitions for Reconsideration, 19, CAL. STATE WATER RES. CONTROL BD. (1984). (Decisions 1600 and 88-20 laid the groundwork for the QSA, with IID facing the prospect of further findings by the SWRCB under the doctrine of waste that would chip away at 1 MAF of IID’s historically senior rights. Senior water rights holders in California have now operated under the shadow of Decision 1600 for four decades: the SWRCB could determine that some of their senior water rights are “waste”).

246. See Brian E. Gray, *The Reasonable Use Doctrine in California Water Law and Policy*, in SUSTAINABLE WATER: CHALLENGES AND SOLUTIONS FROM CALIFORNIA 83, 84, 90 103 (2015) (inferring that many senior water rights holders have offered “voluntary” cutbacks during recent droughts following SWRCB’s issuance of mandatory cutbacks for some junior water rights holders and “requests” for senior cutbacks in use. Effectively, the SWRCB and the senior water rights holders were in a game of “chicken” on the doctrine of waste).

247. See generally Righetti & Schrenmer, *supra* note 242, at 647 n.215 (inferring that senior rights holders have presumed security in their positions, but that presumption would be challenged if the Doctrine of Waste is applied).

248. The evolution of the reasonable use doctrine in California is instructive. *Herminghaus v. S. Cal. Edison Co.*, 252 P. 607, 627 (1926) (noting that California did not require that water use be “reasonable” as long as it was “beneficial”). California voters then adopted a constitutional amendment in 1928 to add Article X, section 2) (requiring that water use be “reasonable” as well as beneficial). The Doctrine of Waste depends upon whether a use remains “reasonable.”

249. See generally INT’L LAB. OFF., *Water for Improved Rural Livelihoods* (2019), [https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed\\_dialogue/@sector/documents/publication/wcms\\_729058.pdf](https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@ed_dialogue/@sector/documents/publication/wcms_729058.pdf).

of waste.<sup>250</sup> We therefore expect that disadvantaged Lower Division water users will pursue such claims against more senior rights holders in the future.<sup>251</sup>

## X. THE FUTURE OF THE LAW OF THE RIVER

The entire Law of the River was built upon the rigid spine of the Colorado Compact. It served us well for eight decades. But the flesh and muscle and tendons and ligaments that have been added to the Compact's skeleton over the past century have created a creature whose cartilage is now worn out and whose internal organs are quietly wasting away. Adopting a new Drought Contingency Plan or revising the Criteria for declaring a shortage will not address the fundamental deterioration of the Law of the River's ability to function.<sup>252</sup> The state and federal negotiators<sup>253</sup> seeking to develop a viable, sustainable post-2025 system that will endure another century therefore need to address the structural issues driving the system.

The first is the physical reality of climate change: aridification now makes reliable projections of future flows likely to be in the range of only 11 to 13 MAF per year.<sup>254</sup> This makes any Article III(d) delivery obligation of 75 MAF *physically impossible* if Article III(a)'s commitment to an equal share of flows between the Upper Division and Lower Division is to be respected.<sup>255</sup> Article III(a)'s call for 7.5 MAF per year (as operationalized by the Project Act) to be released from Lake Mead is unrealistic if the upstream bank account at Lake Powell has been depleted and is unlikely ever again to be filled.<sup>256</sup> Both Glen Canyon Dam and Hoover Dam releases to the Lower Division states need to be less than 7.5 MAF per year to maintain Lake Powell elevations above the Glen Canyon Dam penstocks—or else releases will drop to well below 7.5 MAF

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250. See Righetti & Schremmer, *supra* note 242, at 643-44 (“The waste principle inherently limits rights in water through its requirements that water must be used beneficially or reasonably, efficiently, and in a manner that does not monopolize the resource or diminish the fair rights of access and use by others.”).

251. See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV., 347 (1967) (arguing that property rights arise to address externalities and improve economic efficiency, and changes in economic value and technology drive shifts in property rights structures).

252. See Righetti & Schremmer, *supra* note 242, at 651 (implying that a long-standing beneficial use may be challenged under the Doctrine of Waste as no longer meeting a state's standard for continuing use if that state's water law requires reasonable use).

253. See generally, *The Cooperative Conservation Alternative*, WATER FOR COLO., Mar. 29, 2024, <https://waterforcolorado.org/the-cooperative-conservation-alternative/> (noting that tribal and environmental interests should also be part of the negotiations, but they continue to play only advisory roles—the only sovereign parties to the Compact itself are the states and the federal government).

254. Austin Corona, *Study: Front Range cities most vulnerable to possible Colorado River cuts*, ASPEN DAILY NEWS, (Dec. 10, 2023), [https://www.aspendailynews.com/news/study-front-range-cities-most-vulnerable-to-possible-colorado-river-cuts/article\\_72c23f5c-9702-11ee-9fb8-7b90341611c8.html](https://www.aspendailynews.com/news/study-front-range-cities-most-vulnerable-to-possible-colorado-river-cuts/article_72c23f5c-9702-11ee-9fb8-7b90341611c8.html).

255. See generally Colorado River Compact, art. III(d) (1922).

256. *Id.* at art. III(a).

per year (absent dramatic engineering changes to the design of the Glen Canyon bypass tubes).<sup>257</sup>

The second is the social and economic reality of a changing Colorado River basin: the world has changed dramatically since 1922, and the seniority system of prior appropriation will be severely tested as more junior users deploy their resources to challenge more senior users under the doctrine of waste.<sup>258</sup> This article shows how the Upper Division states can repel a “call” on the River under Article III(d) of the Compact by asserting affirmative defenses.<sup>259</sup> But winning that battle will not win the war. The doctrine of waste will probably be pursued before state water boards, state engineers, and in state courts throughout the seven Compact states. This is a war that cannot be won by invoking either textualist construction or affirmative defenses available at common law. The doctrine of waste, which evolves with changing social and economic realities,<sup>260</sup> will continue to erode the cliffs of prior appropriation as the seas of change continue to rise due to both climate change and continuing urbanization of the basin.

Letting go of antiquated ideas about Article III(d)’s purported legal force as a delivery obligation is a necessary first step toward a more realistic view of the Compact in the age of climate change. Article III(d) is simply unenforceable. However, the doctrine of waste lies waiting, ready to challenge the presumed seniority of many water rights throughout the Colorado River Basin. The negotiators constructing the post-2025 Law of the River must keep both legal realities in mind. The Law of the River will not stay stagnant in the face of climate change.

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257. UTAH RIVERS COUNCIL, GLEN CANYON INSTITUTE, & GREAT BASIN WATER NETWORK, *Antique Plumbing & Leadership Postponed* (Aug. 2022), <https://www.glencanyon.org/wp-content/uploads/2022/08/Final-Antique-Plumbing-at-Glen-Canyon-Dam.pdf> (noting that Glen Canyon Dam was designed with an assumption that relatively high reservoir elevations would be maintained, thus keeping a minimum power pool Lake Powell elevation of 3,490 feet has become the focus of policy-makers and negotiators).

258. See Kait Schilling, *Addressing the Prior Appropriation Doctrine in the Shadow of Climate Change and the Paris Climate Agreement*, 8 Seattle J. of ENV’T L., 98, 104-05 (2018).

259. See generally Colorado River Compact, art. III (d).

260. Tulare Irrigation Dist., et al. v. Lindsay-Strathmore Irrigation Dist., 45 P.2d 972, 1007 (Cal. 1935) (stating “[w]hat is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.”).