

Negotiation and Settlement of Indian Water Rights Claims

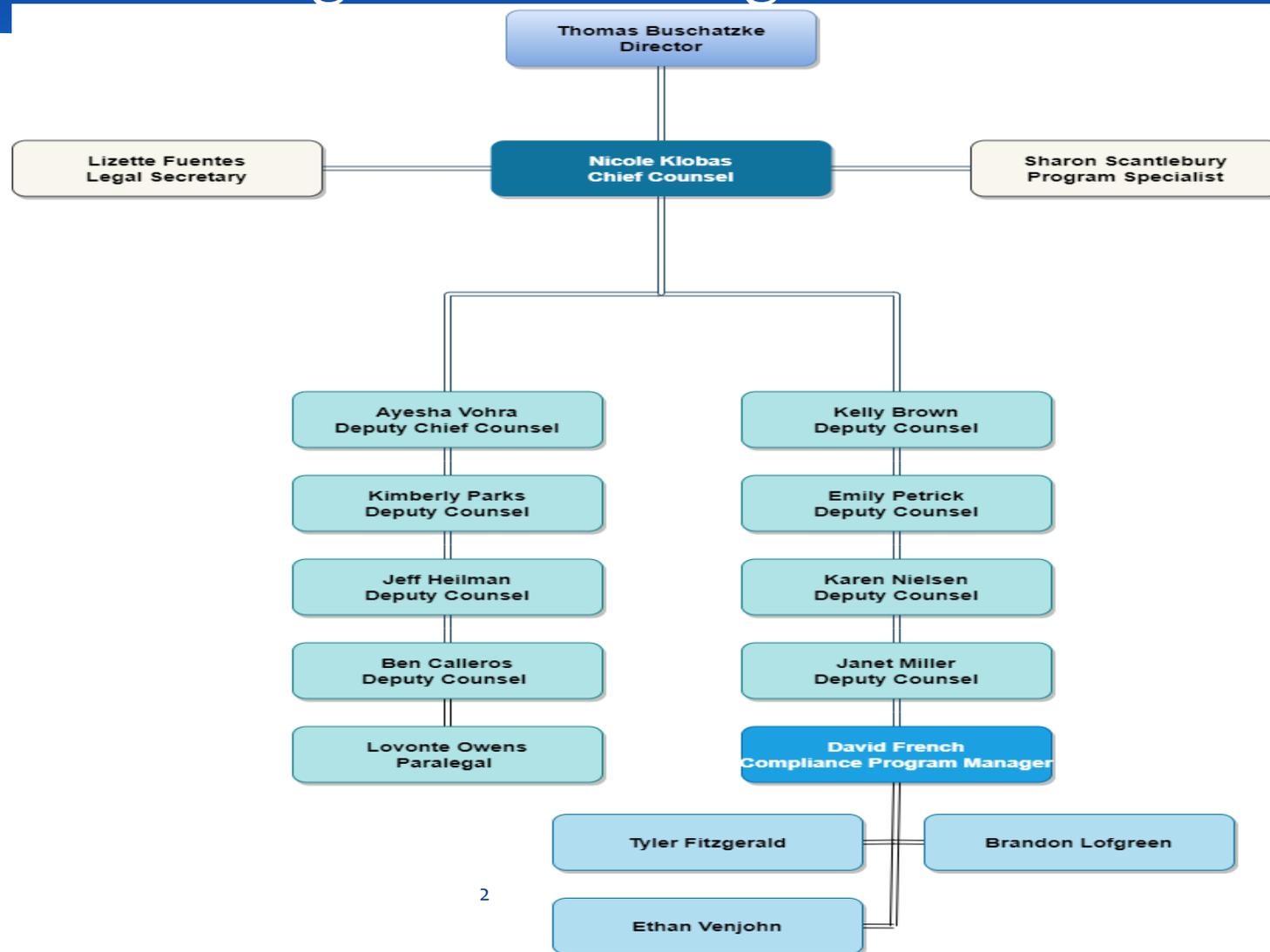
Hualapai Tribe Water Rights Settlement



Jeff Heilman, Deputy Counsel
Arizona Department of Water Resources
Western States Water Council – Native American Rights Fund
18th Biennial Indian Water Rights Symposium
August 9, 2023

Arizona Department of Water Resources

Legal Division Organization



Governor's Policy



Governor-Elect Katie Hobbs Announces Environmental & Natural Resources Cabinet Members

 <p>KAREN PETERS Director of the Department of Environmental Quality (DEQ)</p>	 <p>TOM BUSCHATZKI Director of the Department of Water Resources</p>	 <p>CYNTHIA ZWICK Director of the Residential Utility Consumer Office (RUCCO)</p>
 <p>TOM TORRES Director of the Department of Forestry and Fire Management (DFFM)</p>	 <p>BOB BROSCHIED Director of the State Parks and Trails</p>	 <p>TTY GRAY Director of the Arizona Game and Fish Department</p>



Director's Authority

- * A.R.S. § 45-104(F) “[T]he director may employ legal counsel to advise and represent the department in connection with legal matters . . . and **represent this state in litigation** concerning affairs of the department.”
- * A.R.S. § 45-105(A)(10) “The director may . . . [i]nitiate and participate in conferences, conventions or hearings, including **congressional hearings**, court hearings or hearings of other competent judicial or quasi-judicial departments, agencies or organizations, and **negotiate and cooperate with agencies of the United States or of any state or government** and **represent this state concerning matters within the department’s jurisdiction.**”

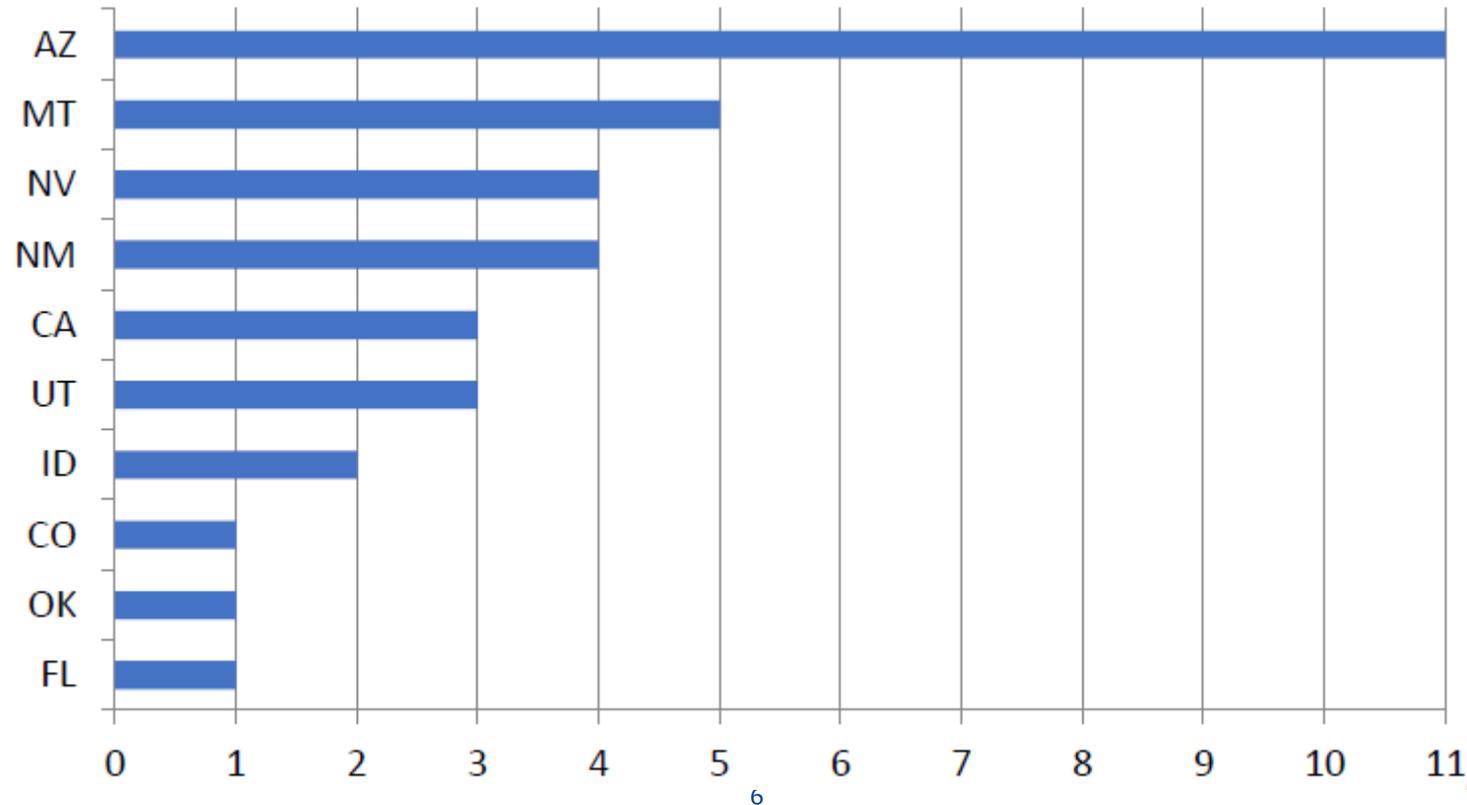


Federal Indian Water Rights Settlements

- * The Department of Interior has completed 39 Indian water rights settlements since 1978
 - * 35 Congressionally approved settlements
 - * 4 Administratively approved by DOI & DOJ

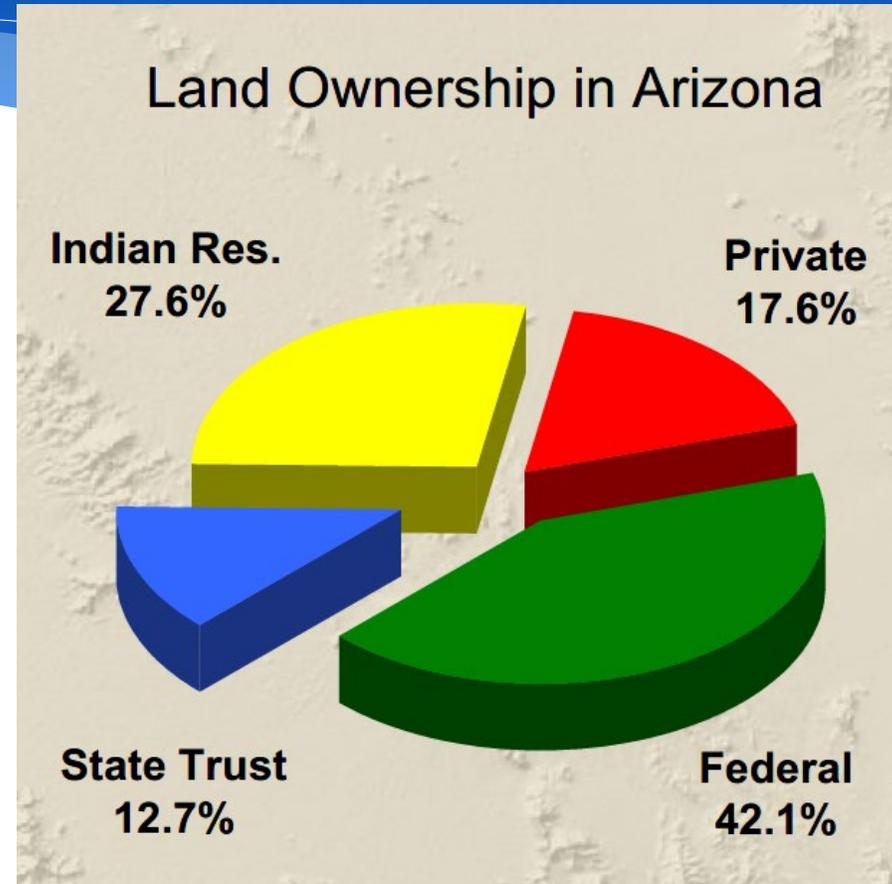


Indian Water Rights Settlements with Federal Legislation, by State



Arizona Tribes

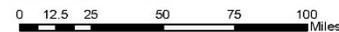
- * There are 22 federally recognized Indian tribes in Arizona.
- * Arizona ranks first among all states in the percentage of tribal land in the state – 27.7% (Alaska is the second highest at 10.7%).



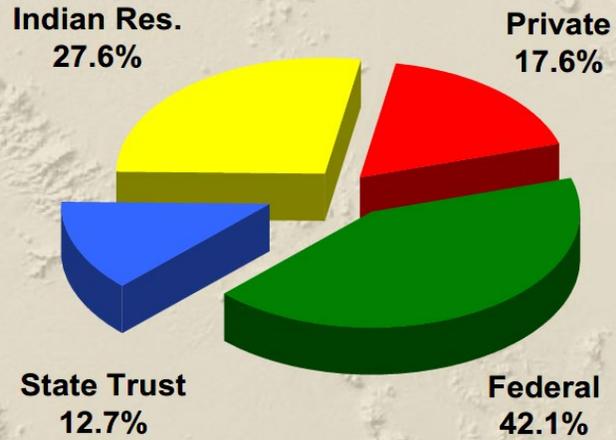
Arizona Tribes



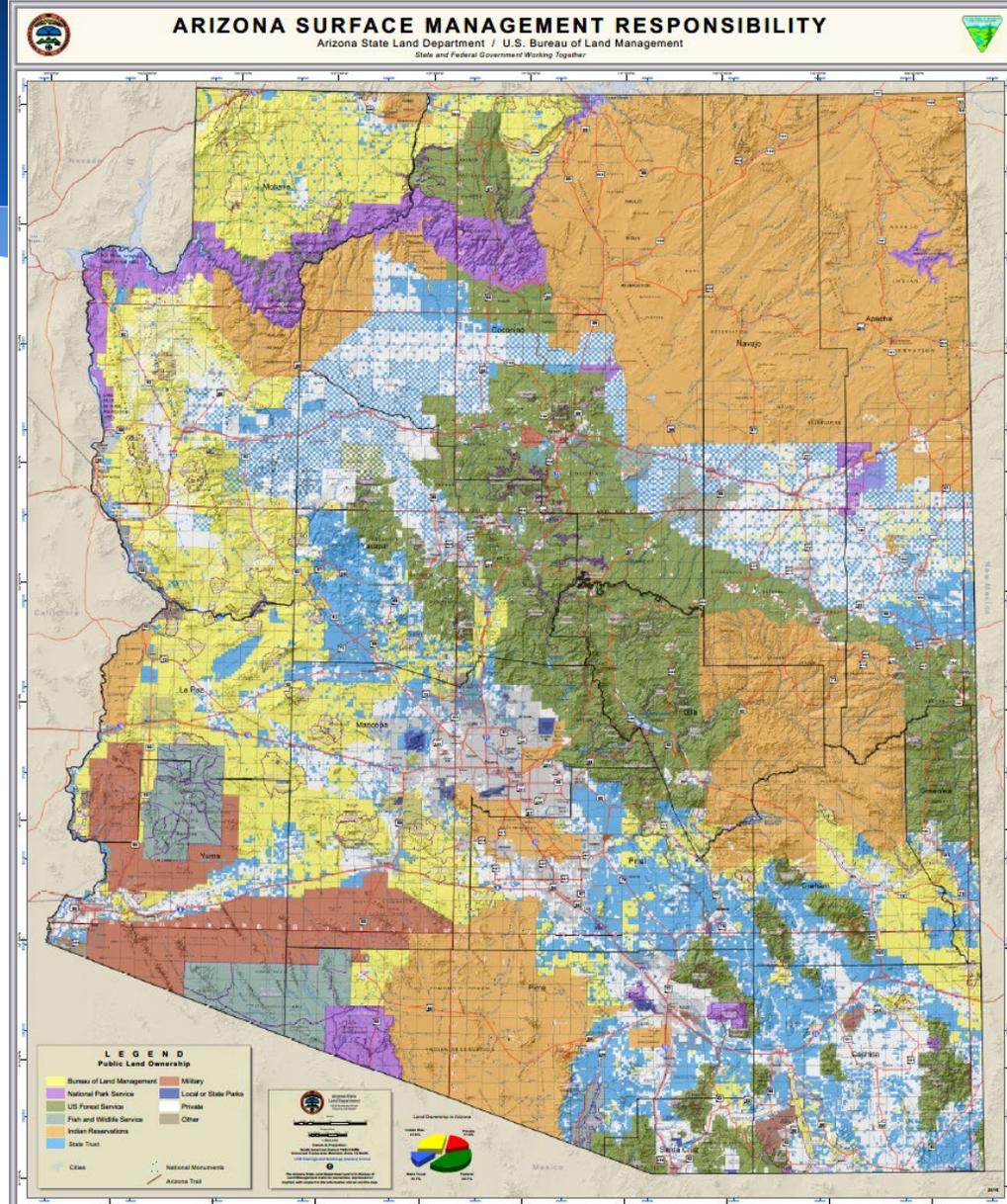
PROTECTING ARIZONA'S WATER SUPPLIES FOR ITS NEXT CENTURY



Land Ownership in Arizona



LEGEND Public Land Ownership



A total of 69% of the land in Arizona is a combination of federal and tribal land.

August 9, 2023



Arizona Tribes With Water Rights Through Litigation

- In *Arizona v. California* (1963), the U.S. Supreme Court adjudicated the federal reserved water rights of five Indian tribes near the Colorado River in the Lower Basin:
 - Cocopah Tribe – 7,681 AF (1917 priority date)
 - Colorado River Indian Tribes – 662,402 AF (1865-1874)
 - Fort Mojave Indian Tribe – 103,535 AF (1890-1911)
 - Fort Yuma (Quechan) Indian Tribe – 6,350 AF (1884)
- **Total amount of Colorado River water awarded** – 779,968 AF (27% of Arizona's 2.8 million AF share of the Lower Colorado River).



Arizona Tribes With Water Rights Through Settlement

- * 10 Arizona tribes have water rights through a congressionally approved settlement:
 - * Ak Chin Indian Community (1984)
 - * Tohono O’odham Nation (partial settlement) (1982/2004)
 - * Salt River-Pima Maricopa Indian Community (1988)
 - * Fort McDowell Yavapai Nation (1990)
 - * San Carlos Apache Tribe (partial settlement- Gila River Claims TBD) (1992)
 - * Yavapai-Prescott Indian Tribe (1994)
 - * Zuni Indian Tribe (2003)
 - * Gila River Indian Community (2004)
 - * White Mountain Apache Tribe (2010)
 - * Hualapai Tribe (2014/2023)



Arizona Tribes With Outstanding Water Rights Claims

- * 10 Arizona Tribes have outstanding water rights claims:
 - * Havasupai Tribe (Protection of Springs)
 - * Hopi Tribe
 - * Kaibab Paiute Tribe
 - * Navajo Nation
 - * Pascua Yaqui Tribe
 - * San Carlos Tribe (claims to Gila River)
 - * San Juan Southern Paiute Tribe
 - * Tohono O’odham Nation (claims in central and southern Arizona)
 - * Tonto Apache Tribe
 - * Yavapai Apache Nation



Why Settle?

- * Turning paper water rights into wet water
 - * Tribal economies and development
 - * Poverty alleviation
 - * Infrastructure
- * Removes Uncertainty
 - * Costly Litigation with Uncertain Prospects
 - * Litigation may result in paper water rights without funding
- * Congressional Funding
 - * Project Based vs. Fund Based
 - * Cost with project based
 - * Flexibility with fund based
 - * Interest with fund based
- * Buy-in from non-tribal partners and governments
- * Firming and CAP Water
- * Creates Partnerships



Arizona's Permanent Tribal Homeland Standard

- * The nonexclusive list of factors considered under *Gila River V* when quantifying Tribal federal water rights include:
 - * Future Population
 - * Residential Use
 - * Commercial Development
 - * Industrial Use
 - * Agricultural Production - Practicably Irrigable Acreage (PIA)
 - * Tribal Use for Traditional Practices/Ceremony
 - * Recreational Use
 - * Wilderness Use
 - * Economy of the Tribe
 - * Tribal History of Water Use
- * Settlements generally assess these elements.



August 9, 2023



Settlement Process

Settlement

- * Initial Discussions
- * Identify Interested Parties
 - * ADWR Role
- * Negotiations Round I
 - * Settlement Agreement
 - * Legislation
- * Congressional Approval
 - * Congressional delegation and lobbying – A champion
 - * House Hearing (House Resolution)
 - * House Legislative Changes
 - * Senate Hearing (Senate Bill)
 - * Senate Legislative Changes
 - * Signed into Law (Enactment)
- * State Legislative Approval (if funding appropriation or state legislation is necessary)
- * Negotiations Round II
 - * Conform Settlement Agreement to Legislation
 - * Work out any remaining questions
- * Adjudication Court Integration



Settlement Process - Parties

- * Necessary Parties
 - * Tribe
 - * Tribal Representatives
 - * Tribal Counsel – More active role now than previously
 - * Lobbyists
 - * United States (Trustee)
 - * Appointment of a Federal Team
 - * Solicitor's Office (DOI)
 - * Coordinates with other Federal Interests (Administration, BLM, Parks, USDA (e.g., Forest Service), Bureau of Reclamation)
 - * DOJ – (Litigators – legislative review)
 - * Major Water Users – Central Arizona Project, Salt River Project, Freeport Minerals Corporation etc.
 - * State (Coordinates with local public entities - e.g., cities, towns, counties, which may be brought into negotiation)
 - * In Hualapai, Mohave County were included in settlement meetings because of the Tribe's desire to have certain fee lands in the county brought into trust status for the Tribe through the legislation.
 - * State confers with Arizona congressional delegation



Water Supplies for Future Tribal Settlements (Cont'd)

CAP water

- * 2004 Arizona Water Settlements Act (Public Law 108-451) set aside 67,300 AF of non-Indian agricultural (NIA) priority CAP water for future tribal settlements in Arizona.
 - The Act reserves 6,411 AF reserved for a future Navajo Nation settlement.
 - 23,782 AF used for White Mountain Apache Tribe settlement.
 - 4,000 AF included in the pending Hualapai Tribe settlement
 - **33,107 AF remain for future settlements**



An Arizona Perspective

- * Resolving tribal claims through settlement is a priority for Arizona.
- * Equitable outcomes for tribes (including tribes with existing settlements)
- * Helping Tribes avoid costly and uncertain litigation
- * Creativity in the face of increasing challenges in water supplies
- * Flexibility



Benefits from Hualapai Settlement for Arizona

- * Providing a renewable water supply for the Hualapai Tribe's current and future needs.
- * Ending the Tribe's dependence on limited groundwater supplies beneath the Tribe's reservation.
- * Expand tourism opportunities at the Tribe's Grand Canyon West development (economic benefits to the Tribe and increased tax revenues for Arizona, Mojave County, and the Federal Government).
- * Resolving all of the Tribe's water rights claims, including its claims to the Colorado River and provide greater certainty to Tribal and Non-Tribal water users throughout the State.



Peach Springs

- * Early in settlement negotiations, the Tribe and State parties agreed that as a part of a comprehensive settlement of the Tribe's claims, the Tribe should receive an allocation of CAP water from the volume of Non-Indian Agricultural priority CAP water set aside by the Arizona Water Settlements Act of 2004.
- * The Tribe and the State Parties also agreed that the settlement should include an authorization by Congress of an appropriation of monies to construct a pipeline to carry the CAP water from the Colorado River to Peach Springs and Grand Canyon West



Comprehensive Settlements

- * State policy to only enter “comprehensive settlements” (i.e. settlement of all water rights claims in Arizona for that tribe and the United States as trustee), including claims to the Colorado River.
- * In 2012, the parties agreed to bifurcate the settlement into two phases:
 - * Phase 1 - Resolving only the Tribe’s water rights claims in the Bill Williams River watershed; and
 - * Effective December 31, 2015 (Public Law 113-223)
 - * Phase 2 – Settling all the Tribe’s remaining water rights claims in Arizona, including its claims to water for its main reservation.



Phase 1

- * Agreement by Freeport Minerals Corporation to transfer \$1m to the Tribe for study of alternative infrastructure project.
- * Study (December 2014) – most feasible pipeline carrying CAP water from Diamond Creek located in the southeastern portion of the Hualapai Reservation to Peach Springs and then on to Grand Canyon West (70 miles total).
- * Agreement by Freeport to contribute money to the Hualapai Tribe Economic Development Fund to enable Tribe to acquire additional Colorado River water rights.



Phase 2

- * After study, State Parties and the United States began meeting to discuss finalizing a Phase 2 settlement, which would be a comprehensive settlement of all the Tribe's remaining water rights claims and would include as parties the Tribe, the State Parties and the United States.
- * 2016 Settlement Agreement – In June 2016, the Tribe and the State Parties, but not the United States, agreed to the terms of a Hualapai Phase 2 settlement.



2016 Settlement Agreement

- * Allocation of 4,000 AFA of NIA priority CAP water (United States and Arizona each firming 557.50 AFA) to the equivalent of the higher priority CAP municipal and industrial priority water during water shortages.
- * Authorization of an appropriation of \$134.5m for construction of project to convey 3,414 AFA of Tribe's Colorado River water from Diamond Creek to Peach Springs and Grand Canyon West.
- * Authorization of an appropriation of \$39 million for OM&R for project, including technical assistance.
- * Tribe has right to all groundwater under, and all surface water on, its Reservation and trust lands.



2016 Settlement Agreement (Cont'd)

- * Tribe and the United States, as trustee for the Tribe would waive the right to assert claims for injury to water rights against persons pumping groundwater off the Reservation.
- * Certain lands near the Tribe's main Reservation would be brought into Reservation status and certain lands owned in fee by the Tribe would be brought into trust status.
- * Limited waiver of the Tribe's and United States' sovereign immunity to allow actions to be brought against the Tribe and the United States for the interpretation or enforcement of the settlement agreement and authorizing legislation by any party to the settlement agreement, any landowner or water user in the Verde River Watershed or the Colorado River Basin within Arizona, and the States of California and Nevada.



2016 Settlement Agreement (Cont'd)

- * Legislation authorizing and approving the settlement was introduced in the Senate in 2016 (S. 3300), in both the Senate and the House of Representatives in 2017 (S. 1770 and H.R. 4723), and in both the Senate and the House of Representatives in 2019 (S. 1277 and H.R. 2459).
- * Due in part to concerns raised by the Department of the Interior regarding certain provisions in the settlement, none of the bills introduced in Congress in 2016, 2017, and 2019 were passed by Congress.
- * In written testimony to the House subcommittee in June 2019, Alan Mikkelsen, Senior Advisor to the Secretary on water and Western Resources, stated that Interior could not support the legislation because:
 - * The waiver of the right of the Tribe and the US to object to any groundwater pumping outside the boundaries of the Reservation, even if the pumping interfered with the Tribe's Federal reserved groundwater rights;
 - * The size and cost of the project; and
 - * The accuracy of the cost estimate.
- * He also expressed that the United States had concerns regarding the waiver of federal sovereign immunity in the legislation.
- * The parties ultimately agreed to make changes in the settlement to resolve the Interior's objections.



Fund-Based vs. Project-Based Settlement

- * The parties agreed to change the settlement from a project-based settlement to a fund-based settlement in which Congress would authorize an appropriation of \$180m to be deposited into the Hualapai Water Trust Fund Account.
- * Tribe will be authorized to use monies in the fund to pay for water projects, including the planning, design, and construction of the Hualapai Water Project – a project to divert, treat, and convey up to 3,414 AFA of water from the Colorado River in the Lower Basin in Arizona, including locations on or directly adjacent to the Hualapai Reservation.
- * The parties also agreed to a \$5m Hualapai Water Settlement Implementation Fund Account for the use of the Secretary in carrying out the Act.



Off-Reservation Groundwater Pumping

- * Parties agreed that the Tribe and US, as trustee for the Tribe, will retain the right to assert claims for injury to the Tribe's water rights resulting from off-Reservation withdrawal from new wells constructed in areas near the Reservation under the following circumstances:
 - * Areas outside of the Truxton Basin – Tribe and US will have the right to assert claims against wells constructed after the date of enactment and located within two miles of the Tribe's reservation (except for replacement wells).



Off-Reservation Groundwater Pumping (Cont'd)

- * Within Truxton Basin – USGS will issue an estimate of groundwater withdrawals within portion of the Truxton Basin outside the Reservation within one year after the enactment date and will publish an estimate of groundwater withdrawals for the basin each year after.
- * Secretary will provide Arizona with notice if the total groundwater withdrawals within that portion of the basin exceed the initial estimate of 3,000 AFA or more, excluding any withdrawals from wells located on lands owned by the Tribe.
- * Once notice is provided, the Tribe and the US will have right to assert claims from the following wells:
 - * Wells constructed for domestic purposes or stock watering after the date of the notice, except for wells that qualify as replacement wells.
 - * Wells constructed for purposes other than domestic purposes or stockwatering after the date of enactment of the legislation, except for wells that qualify as replacement wells.



Limited Waiver of Sovereign Immunity

- * The parties agreed to narrow the scope of the limited waiver of sovereign immunity so that it will apply only to actions brought by the parties to the settlement agreement and landowners and water users in the Verde River Watershed.



Firming

- * State of Arizona has agreed to firm 557.5 AFA of the Tribe's 4,000 AFA allocation of NIA priority CAP water to the equivalent of CAP municipal and industrial priority water during water shortages until 2108.
- * The cost of firming this water as of today would range from \$4.9m to over \$8m based on 2022 CAP water delivery and storage rates and the current market rate to purchase long-term storage credits.



November 2022 Amendments

- * House Committee on Natural Resources, Subcommittee on Water Oceans, and Wildlife Hearing (H.R. 7633) on May 12, 2022
- * Senate Committee on Indian Affairs Hearing (S. 4104) on July 20, 2022
- * Envoy to DC, including the Director of ADWR on behalf of the State, representatives from Mojave County, CAP, SRP, Freeport, and the Tribe met with Arizona delegation to address an amendment



November 2022 Amendments

- * Existing Agreement:
 - * 4,000 AFA of NIA CAP water to Tribe
 - * \$180m trust fund for the Tribe to construct infrastructure to deliver water from the Colorado River to the Adjudication
- * Amendment seeking an additional \$132m (\$312m total) for three main reasons



Reason 2: Electrical Transmission

- * The Tribe sought an additional \$64m to construct electric transmission lines to provide power to deliver water from the Colorado River throughout the Reservation.
- * Tribe had originally been encouraged by representatives from the Department of the Interior to remove funding for electric transmission infrastructure from the settlement.
- * Biden administration was supportive of funding this critical infrastructure component, and the State parties were also supportive for this addition.



Reason 3: OM&R

- * The Tribe sought an additional \$48m for the operation, maintenance, and replacement costs of the infrastructure project.
- * Again, Tribe had been encouraged to remove a request for OM&R funding from the settlement under the previous administration.
- * Biden Administration was supportive of this request as well, and likewise, the State Parties also supported the Tribe in this request.
- * Will help the project remain solvent and protect the Tribe's investment after construction.



Future Tribal Engagement

- * Governor's Water Policy Council
 - * Maria Dadgar, Executive Director of the Inter Tribal Council of Arizona
 - * Bidtah Becker, Legal Counsel for Navajo Nation President Buu Nygren
 - * Chairman Robert Miguel, Ak-Chin Indian Community
 - * Chairwoman Amelia Flores, Colorado Indian Tribes
 - * Governor Stephen Roe Lewis, Gila River Indian Community
- * Bureau of Reclamation is Establishing a Federal-Tribes-States Group, led and facilitated by Reclamation to make Tribes more central to Colorado River discussions.
 - * Group will include 30 Colorado River Basin Tribes and representatives from each of the seven Colorado River Basin States
 - * Inaugural meeting is scheduled for August 10 in Phoenix.



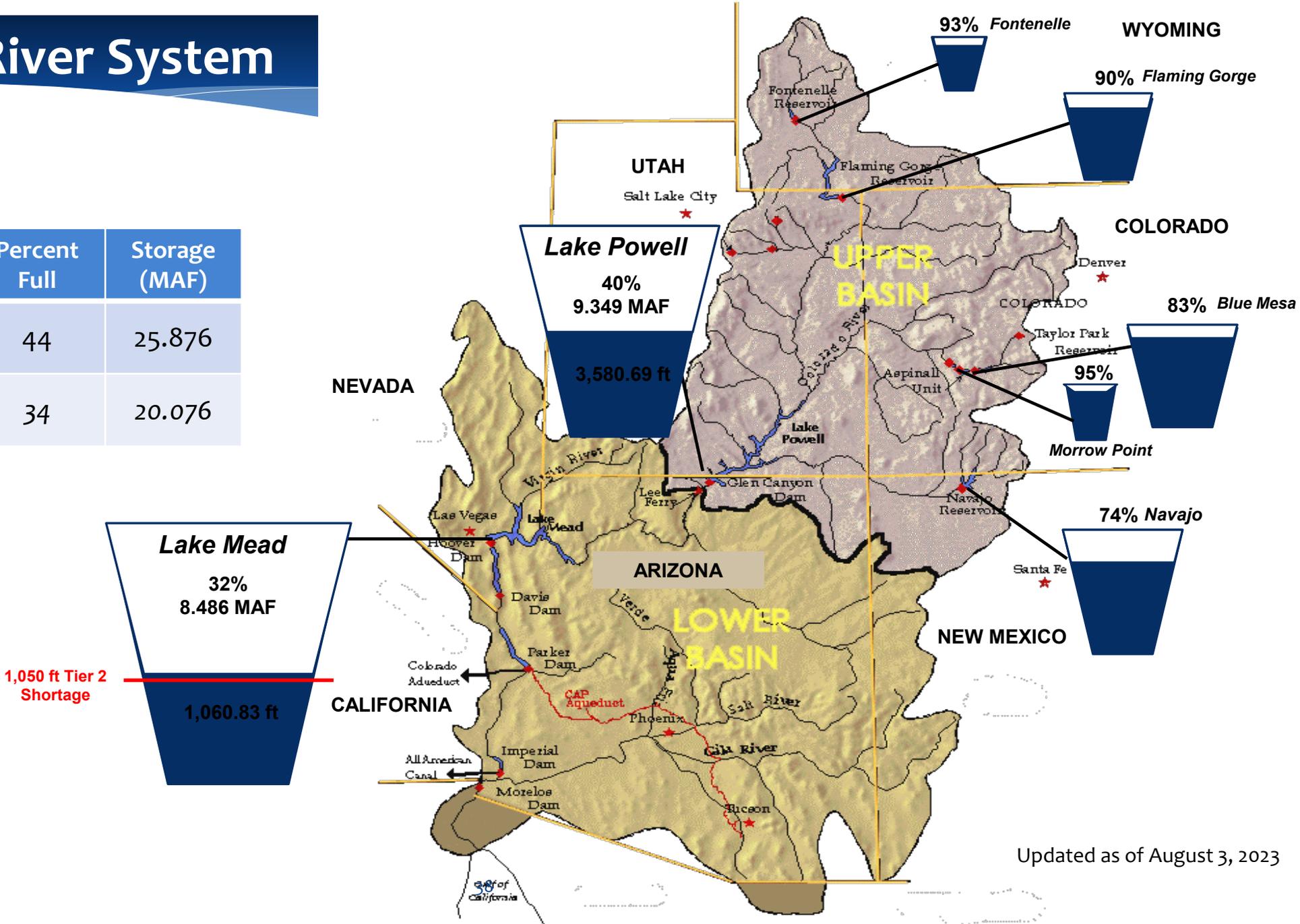
Hualapai Water Rights Settlement: State Perspective

Questions

jheilman@azwater.gov

Colorado River System

	Percent Full	Storage (MAF)
Total System Storage	44	25.876
Total System Storage (this time last year)	34	20.076

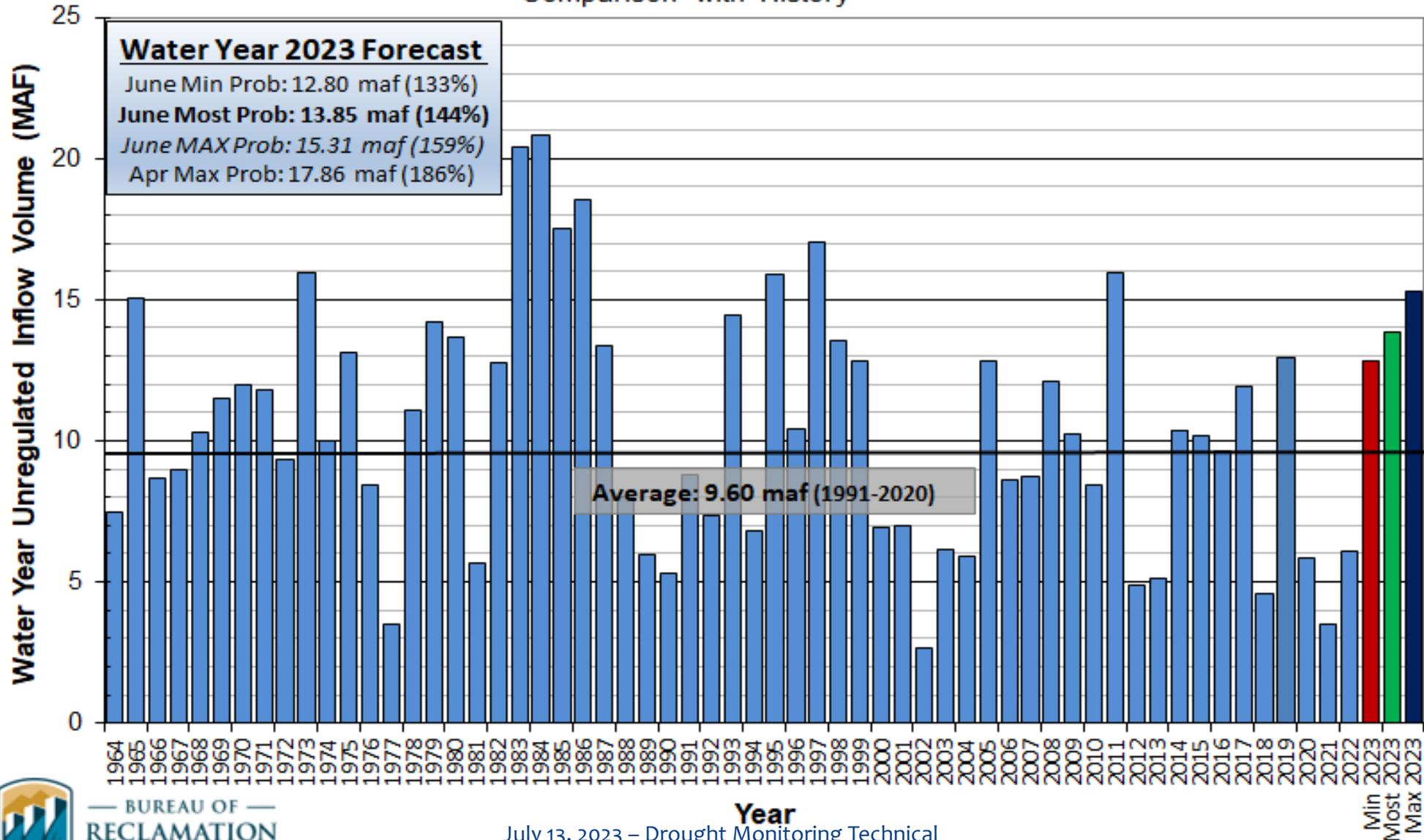


Updated as of August 3, 2023

Lake Powell Unregulated Inflow

Water Year 2023 Forecast (issued June 6)

Comparison with History



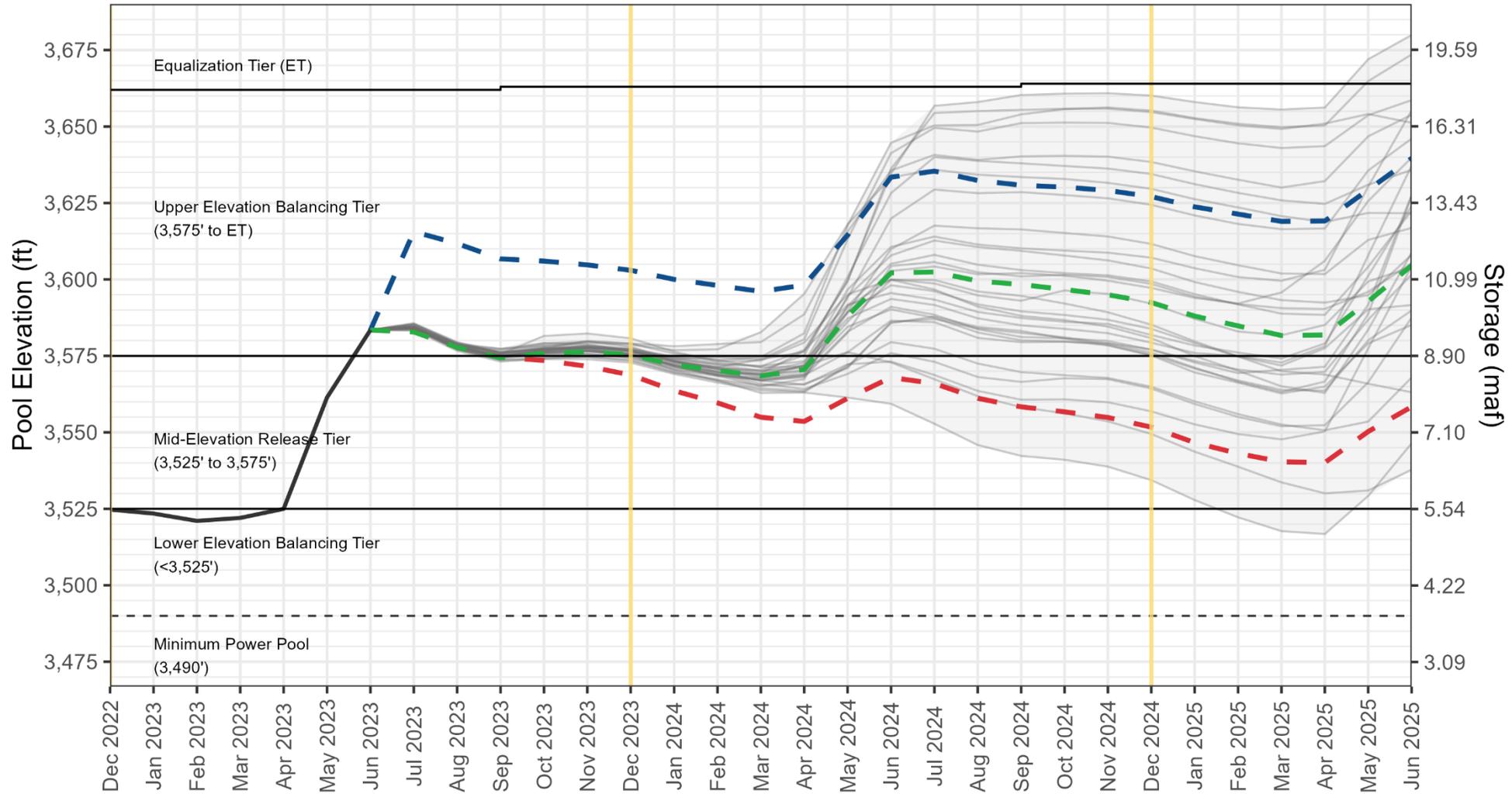
WY Forecast (July 3)
 14.0 MAF

A-J Forecast (July 3)
 10.8 MAF



Lake Powell End-of-Month Elevations

CRMMS Projections from April and July 2023



End of CY 2023 Projections

Most Probable:
3,575.32 feet

Probable Min:
3,568.76 feet

End of CY 2024 Projections

Most Probable:
3,592.46 feet

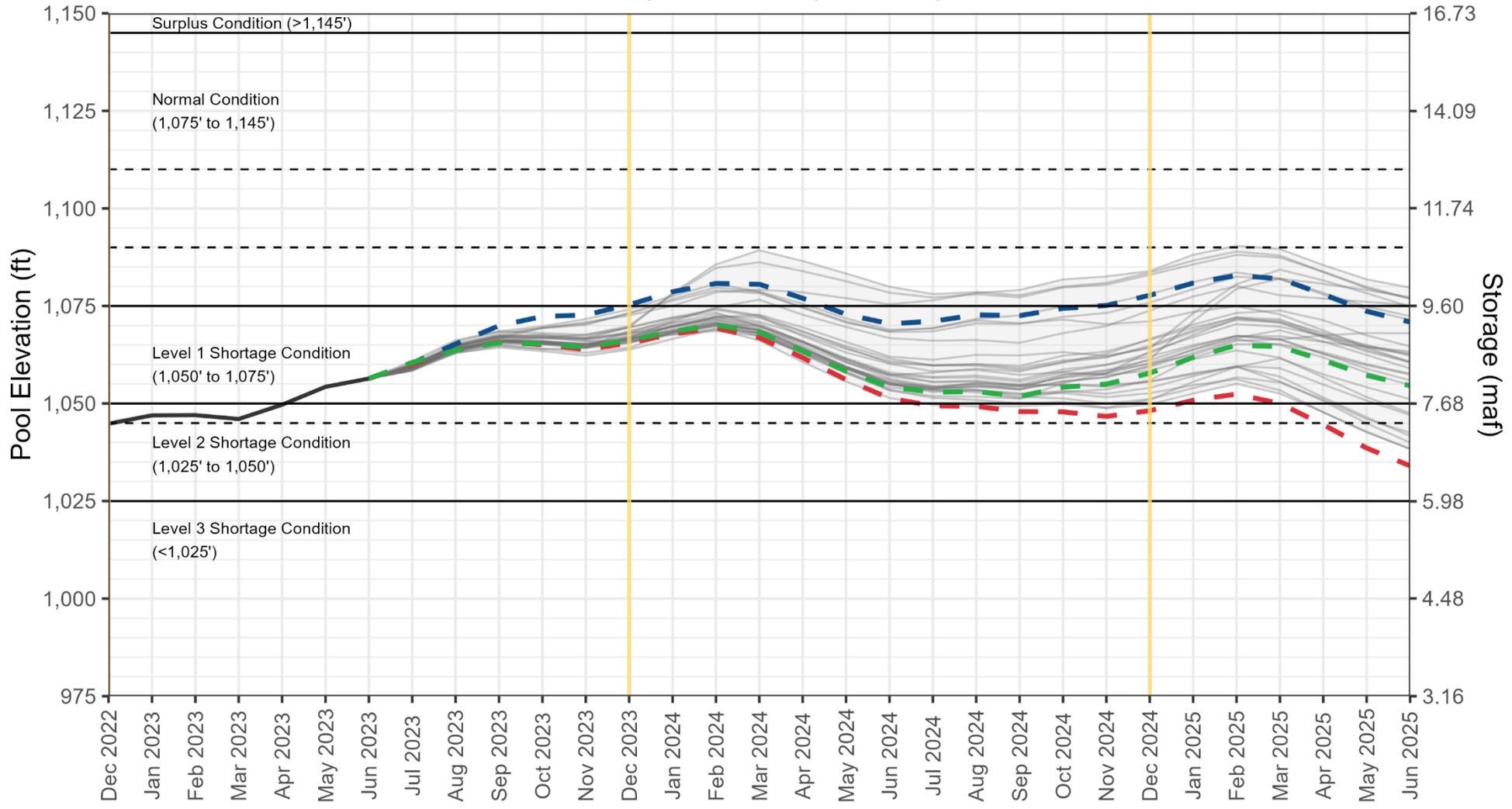
Probable Min:
3,551.70 feet

- April 2023 Probable Maximum 24-Month Study
- July 2023 Most Probable 24-Month Study
- July 2023 DROA Probable Minimum 24-Month Study
- Historical
- CRMMS-ESP Projection (30 traces)
- CRMMS-ESP Projections Range



Lake Mead End-of-Month Elevations

CRMMS Projections from April and July 2023



End of CY 2023 Projections

Most Probable:
1,066.20 feet

Probable Min:
1,065.49 feet

End of CY 2024 Projections

Most Probable:
1,057.76 feet

Probable Min:
1,048.16 feet

- April 2023 Probable Maximum 24-Month Study
- July 2023 Most Probable 24-Month Study
- July 2023 DROA Probable Minimum 24-Month Study
- Historical
- CRMMS-ESP Projection (30 traces)
- CRMMS-ESP Projections Range



May 2023 Lower Basin Proposal

- Through the interim period, the Lower Basin States have proposed at least 3.0 million acre-feet in additional conservation – not attributable by state.
- Current conservation proposals by state:
 - Arizona ~ 1.1 maf
 - California ~ 1.6 maf
 - Nevada ~ 285 kaf
 - These conservation volumes are in addition to contributions and reductions under the 2007 Interim Guidelines and DCP.
- None of the 3.0 maf will be created by mandatory reductions.
- At least 1.5 maf of the 3.0 maf reductions will be achieved by the end of Calendar Year 2024.

Post-2026 Guidelines

- The current Interim Guidelines sunset at the end of Calendar Year 2026.
- New operating criteria, and any supporting legislation and agreements, need to be effective before January 1, 2027.
- The Notice of Intent to prepare an Environmental Impact Statement was published in the Federal Register on June 16, 2023.
 - 60-day Scoping Period, with Scoping Comments due by August 15, 2023.
 - Anticipated 6-month “alternative development” phase.
 - DRAFT EIS planned for December 2024.