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Flowing Down the Basin: Federal Litigation on the Colorado River

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U.S. Department of Justice
Environment & Natural Resources Division
June 8, 2005
Colorado River Basin
Four Areas of Current and Potential Litigation

- Intra-Upper Basin Conflict
- Intra-Lower Basin Conflict
- Upper-Lower Basin Conflict
- International Conflict
Intra-Upper Basin Litigation

- Black Canyon National Park / Aspinall Unit
  - Colorado Water Division 4 Adjudication
  - High Country Citizens Alliance v. Norton

- Strawberry Valley Project / Central Utah Project
  - Strawberry Water Users Association v. United States
  - Strawberry Water Users Association v. Morgan
  - Uinta Basin and Utah Lake Adjudications
Black Canyon National Park Water Rights Litigation

- Black Canyon National Monument proclaimed by President in 1933 “for the preservation of the spectacular gorges and additional features of scenic, scientific, and educational interest…”

- Aspinall Unit authorized in 1956 under Colorado River Storage Project Act (CRSPA), including Curecanti (later Aspinall) Unit consisting of dams on Gunnison River upstream of Black Canyon

- Storage in Aspinall Unit facilitated Colorado’s use of entitlement under 1922 Colorado River Compact
Black Canyon Litigation

- In 1978, Colorado water court entered decree awarding United States a “conditional” federal reserved water right for Black Canyon National Monument

- Quantification of U.S. reserved right deferred until United States filed further application
Black Canyon Litigation

- U.S. filed quantification application in 2001, claiming:
  - Year round base flows (300+ cfs)
  - Shoulder flows (capped at 3,350 cfs)
  - Peak flows (in excess of 10,000 cfs)

- Opposed by hundreds of protestants, alleging:
  - Not minimum amount necessary for reservation purposes
  - Aspinall Unit authorization implicitly modified prior reserved right
  - Inconsistent with US obligations under CRSPA
  - Would flood parts of City of Delta
Black Canyon Litigation

- U.S. and Colorado negotiated agreement in 2003
  - U.S.-held reserved right for base flow of 300 cfs
  - State agency-held water right for peak flows up to 14,500 cfs, pending floodplain improvements
- United States amended 2001 application to reflect agreement
Environmental groups filed suit in federal court, \textit{High Country Citizens’ Alliance v. Norton} (D. Colo.), claiming that Interior’s agreements violated:

- APA
- National Park Service Organic Act
- Black Canyon of Gunnison National Park Act
- ESA
- NEPA
Black Canyon Litigation

- **State court status:**
  - Water court stayed quantification proceeding
  - Colorado Supreme Court recently affirmed stay

- **Federal court status**
  - U.S. motion to dismiss denied
  - Parties currently briefing merits
SVP / CUP Litigation

- SVP and CUP role in beneficial use of Utah’s allocation under 1922 Colorado River Compact
- Changing demographics and land uses in SVP service area and Salt Lake metro area
Central Utah Project (SVP)
SVP / CUP Litigation

- Contract negotiations for conversion from agricultural to M & I use and Spanish Fork-Nephi (SFN) Project

- SWUA departure and filings with State Engineer
  - Claims asserting ownership of SVP water rights
  - Change of use applications on SVP water
  - Exchange applications on SVP return flows
SVP / CUP Litigation

- SWUA filing of three cases in Utah state court
- Attempt to determine water rights in state court and contract rights in federal court
- Uinta Basin and Utah Lake State Adjudications
  - Petitions for Interlocutory Decree claiming:
    - SWUA holds “equitable title” and U.S holds “bare legal title” to SVP water rights
    - SWUA holds all title to SVP return flows
    - SWUA may use SVP water for irrigation of small lots
    - SWUA has right to file change and exchange applications on SVP water without U.S. approval
Uinta Basin & Utah Lake Adjudications.

- U.S. Motions to Dismiss granted by two state courts
  - U.S. not properly joined under McCarran Amendment in entire Uinta Basin Adjudication
  - SWUA’s claims against U.S. alone not properly part of general adjudication
  - SWUA seeks to adjudication ownership of water rights that are based on federal reclamation laws and contracts, properly before federal court

- Appeal pending before Utah Supreme Court
SWUA v. Morgan (State Engineer)

- Filing of competing change applications on SVP water rights by SWUA and United States
  - SWUA sought to change points of diversion, place of storage, places of use, periods of use and nature of use (to M & I)
  - U.S. sought “housekeeping” changes

- State Engineer ruling
  - Only “housekeeping” changes approved
  - Water right ownership outside his jurisdiction re change application
  - Upon resolution of ownership, non-owner’s change application will be cancelled
SWUA v. Morgan

- SWUA filed suit against State Engineer, joining United States as defendant
- SWUA’s Complaint claimed that SWUA had title to SVP water rights, U.S. title was “nominal” at best, and only SWUA could file change applications
- United States removed to federal court and consolidated with SWUA v. United States
SWUA v. United States (D. Utah)

- Started out as action against U.S. and CUWCD to enforce 1991 contract for operation of Enlarged Strawberry Reservoir
  - 600 cfs through new Syar Tunnel
  - NEPA violation from contract interpretation
  - Civil rights violations based on alleged retaliation
- U.S. counterclaims broadened case to include water rights ownership and approval for changes of use under both federal and state law
SWUA v. United States (D. Utah)

- Bench ruling February 17, 2005 found:
  - U.S. filed applications and received certificates of appropriation for SVP water rights with State Engineer when project constructed
  - U.S. ownership interest has not been diminished by 1991 contract or subsequent congressional action
  - As appropriator of SVP water rights, U.S. is proper party to file change applications with State Engineer
  - SWUA cannot file change applications without U.S. concurrence

- Limited issue remaining for trial is extent of any SWUA power development rights in CUP expansion
Intra-Lower Basin Litigation

- **Center for Biological Diversity v. Norton** ("Salton Sea") (C.D. Calif.)
- **Imperial Irrigation District v. United States** (S.D. Calif.)
- **Navajo Nation v. Dept. of Interior** (D. Arizona)
CBD v. Norton

- Salton Sea is largest inland body of water in California
- Created in 1905 when Colorado River flood flows breached irrigation structures and Colorado River flowed into basin for 18 months
- Exists today primarily due to continued agricultural drainage from Imperial, Coachella and Mexicali valleys
Colorado River Service Areas
And Major Facilities of Entities Using Colorado River Water
CBD v. Norton

- Salton Sea is rich and biodiverse natural resource, supporting productive fishery and provides important migratory and resident bird habitat within Pacific Flyway

- With continued agricultural drainage, evaporation, and no outlet, Salton Sea is becoming increasingly saline, and some scientists speculate its ecosystem could collapse beyond repair by 2030
CBD v. Norton

- Salton Sea Reclamation Act of 1998 ("SSRA") required Secretary of Interior to submit to Congress by January 2000 studies and a report on options, additional information and any recommendations to restore Sea

- In January 2000, Secretary submitted Draft EIS/EIR and other reports to Congress in fulfillment of SSRA mandate
CBD v. Norton

- Secretary Babbitt informed Congress in Overview and Summary Report:

“Under the expedited eighteen month process, it proved neither possible nor prudent to identify a clear and decisive final solution for the Salton Sea. The Sea is truly a massive body of water; with 365 square miles of surface and approximately 7.5 million acre feet or 2.445 trillion gallons of water it is roughly twice the size of Lake Tahoe. Given the complexity of the Salton Sea ecosystem, the physical environment, and the sheer volume of the Sea, addressing the serious water quality problems at the Sea is an engineering and scientific challenge of historic proportions with enormous cost and feasibility considerations. Considering these complex and interrelated challenges, a phased approach to restoration as contemplated in the DEIS/EIR, that allows further science to inform the process and guide restoration, will likely yield the highest possible degree of success.”
CBD v. Norton

- Environmental groups and Indian tribe filed suit, alleging that Secretary’s failure to finalize EIS and provide recommendations to Congress violated:
  - Salton Sea Reclamation Act
  - APA Sec. 706(1)
  - NEPA
CBD v. Norton

- In September 2004, court issued ruling granting summary judgment for Secretary, finding that plaintiffs lacked standing
  - No injury in fact based on claim of procedural injury
    - No complaint defendants acted without having first completed a final EIS, which is usual procedural injury
    - Instead plaintiffs complained that Secretary needed to prepare final EIS so that Congress could act
  - No injury in fact established based on informational or aesthetic/recreational injury
CBD v. Norton

- Causation and redressability criteria for standing not established
  - Redressability for any procedural injury to plaintiffs caused by Secretary’s inaction is with Congress and not with the court
  - Congress is in best position to determine adequacy of reports and recommendations submitted by Secretary, and to demand more information should they be inadequate
Under 2001 Interim Surplus Guidelines, Interior Department provided means to allow California to gradually reduce use of Colorado River water over 15 years to 4.4 maf apportionment.

“Soft landing” only if certain conditions met, including negotiation of Quantification Settlement Agreement (“QSA”) by end of 2002.

No QSA reached, so Interior made no surplus determination, reducing California’s allocation for 2003 to 4.4 maf (a “hard landing”) by approving a water order for IID of considerably less than requested.
Imperial Irrig. Dist. v. United States

- IID filed suit in January 2003, seeking injunctive relief and claiming the following violations:
  - IID’s appropriative and contractual water rights
  - Unlawful taking
  - NEPA and ESA
  - Separation of powers
  - Tenth Amendment
  - Invalidity and improper application of Part 417 regulations
Imperial Irrig. Dist. v. United States

- District court granted IID’s motion for preliminary injunction, finding that Interior had improperly reduced IID’s approved water order.
- But court remanded back to Interior for BOR to conduct review of IID’s 2003 water needs under “Part 417 regulations.”
- BOR undertook extremely detailed beneficial use inquiry, and DOJ prepared to defend final determination in court.
Imperial Irrig. Dist. v. United States

- Before Part 417 determination was final, negotiations resumed

- Intensive talks in August 2003 involved major CA players and representatives of other basin states

- Result was Colorado River Water Delivery Agreement of 2003 (“10 pager”)
Imperial Irrig. Dist. v. United States

- Colorado River Water Delivery Agreement
  - Long-term transfer of Colorado River water from agricultural users in Imperial Valley to municipal users on growing coastal plain in San Diego
  - Provides necessary agreement among Colorado River water users in California for reduction in state’s Colorado River use to 4.4 maf allocation
In March 2003, Navajo filed suit against US, asserting breach of trust and NEPA claims concerning Interior’s handling of Tribe’s water needs for reservation on Colorado River above Lake Mead in Lower Basin.
Navajo Nation v. Dept. of Interior

- Complaint alleges that Interior has breached trust obligation to Navajo by failing to consider Tribe’s water rights and unmet water needs in taking (or failing to take) various actions:
  - 2001 Colorado River Interim Surplus Guidelines
  - Regulations for interstate banking on Colorado River
  - Allocation of water from Central Arizona Project (CAP)
  - 2002 Final EIS for Implementation Agreement, Inadvertant Overrun and Payback Policy, and Related Federal Actions
Navajo Nation v. Dept. of Interior

- Numerous Lower Basin parties moved to intervene, including:
  - State of Arizona
  - Central Arizona Water Conservation District
  - Salt River Project
  - Arizona Power Authority
  - State of Nevada’s Colorado River Commission and Southern Nevada Water Authority (jointly)
  - Metropolitan Water District and Coachella Valley Water District (jointly)
  - Imperial Irrigation District
Navajo Nation v. Dept. of Interior

- On October 13, 2004, court approved stipulation by all parties and intervenor applicants staying case so settlement discussions could proceed
  - Case stayed for two years (until Oct. 2006) to allow negotiations among Navajo, U.S. and Arizona parties
  - Interior appointed Indian water rights settlement team
  - All motions to intervene granted
  - Nevada and California parties could have representative attend negotiations
- Negotiations ongoing with semi-annual status reports to court
Upper-Lower Basin Conflict

- During early 2005, wet winter in Lower Basin helped Lake Mead recover somewhat from prolonged drought.
- However, continued drought in Upper Basin left Lake Powell at low levels.
- Upper Basin states requested that they be allowed to release less from Lake Powell to Lower Basin this year than historic release of 8.23 maf.
- Lower Basin states opposed request, which would have resulted in greater drawdown of Lake Mead.
Interior conducted mid-year review under 2005 Annual Operating Plan for CO River Reservoirs to determine if runoff forecast warranted adjustment to release amount from Lake Powell for remainder of 2005 water year

On May 2, 2005, Secretary Norton sent letter to western governors and water officials with results of mid-year review
Key points in Secretary’s May 2, 2005 letter:

- Hydrologic conditions and reservoir storage improved beyond earlier projections
- Adjustment to Upper Basin releases from Lake Powell during last half of 2005 not warranted
- However, “the Department retains authority pursuant to applicable law and the Operating Criteria to adjust releases from Glen Canyon Dam to amounts less than 8.23 million acre-feet per year”
- States should start meeting in May 2005 on long-range plan to share river water during drought
- Further review in April 2006 to determine if adjustment to Lake Powell releases warranted for water year 2006
International Litigation


- **Potential litigation** - Recent 60 day notice letters concerning lining of All-American Canal and environmental impacts
Under 1944 treaty, U.S. guarantees Mexico 1.5 maf of water per year from the Colorado River.

In 1950, Mexico completed Morelos Dam diverting its Colorado River water for use in Mexcali and San Luis Valleys.

After U.S. meets obligations to Colorado River basin states and Mexico, little if any water actually reaches Gulf of California in a normal year.
Defenders of Wildlife v. Norton

- BOR undertook Section 7 consultation from 1995-1997, and reinitiated consultation in 2002 regarding various species in Lower Colorado River

- However, BOR concluded no formal consultation was required for Totoaba Bass because, lacking any discretion over water deliveries to or within Mexico, BOR had no ability to reverse conditions in Mexican delta

- American and Mexican environmental groups brought action against Interior alleging violations of ESA by BOR, FWS and NMFS
Defenders of Wildlife v. Norton

- Court held that BOR’s duty of consultation under Section 7(a)(2) of ESA does not extend to operations affecting listed species in parts of Mexican delta downstream from river flows over which BOR, under Law of the River and Mexican Treaty, has no discretionary control.
  - Section 7 consultation requirements have no application to non-discretionary action (see 50 C.F.R. 402.03).
  - Formulas established by Law of River strictly limit BOR’s authority to release additional waters to Mexico.
  - Section 7 does not loosen those limitations or expand BOR’s authority.
On May 17, 2005, two Mexican environmental groups sent Interior a letter giving notice of intent to sue for violations of ESA, Clean Water Act and Clean Air Act associated with proposal to line All-American Canal
- Consejo de Desarrollo Economico de Mexicali, A.C. (CDEM)
- Citizens United for Resources and the Environment (CURE)

On May 19, 2005, an identical letter was sent to Interior by an American environmental group, Desert Citizens Against Pollution (DCAP)
Colorado River Basin

246,000 Sq. Mile Watershed
Environmental groups allege various impacts from Canal lining:

- Wetlands
- Endangered species
- Migratory birds
- Human migration and security
- Growth inducement
- Air quality
Environmental groups also request analysis of cumulative impacts of allegedly related actions:

- Inadvertant overrun and payback policy
- Interim surplus guidelines
- QSA and Secretarial implementation agreement
- Rule for offstream storage of Colorado River water
- Coachella Canal Water Management Plan
- IID water conservation and transfer agreements
- Salton Sea restoration project
- Cadiz groundwater storage plan
- Lower CO River multi-species habitat conservation plan
Proposed lining of 23-mile stretch of All-American Canal with concrete between 2006-2008

Seepage from unlined Canal may nourish 8,000 acre Andrade Wetlands in Mexico

Water seeping out of Canal is part of California’s 4.4 maf Colorado River allocation

Lining would eliminate seepage of more than 67,000 acre-feet per year, pursuant to 2003 QSA

- 56,200 af would go to San Diego County
- 11,500 af would go to San Luis Rey Indian Reservation

Letters propose pre-litigation settlement discussions