

12-15-2017

Is there a right to life for the Colorado River?

Reed D. Benson

University of New Mexico School of Law

Follow this and additional works at: http://digitalrepository.unm.edu/law_facultyscholarship

 Part of the [Law Commons](#)

Recommended Citation

Reed D. Benson, *Is there a right to life for the Colorado River?*, Denver Post (2017).

Available at: http://digitalrepository.unm.edu/law_facultyscholarship/548

This Article is brought to you for free and open access by the School of Law at UNM Digital Repository. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of UNM Digital Repository. For more information, please contact disc@unm.edu.



SCHOOL
OF LAW

**SMALL SCHOOL.
BIG VALUE.**

<https://www.denverpost.com/2017/12/15/is-there-a-right-to-life-for-the-colorado-river/>

Is there a right to life for the Colorado River?

By Reed D. Benson

Denver Post
December 15, 2017

When environmental activists filed a lawsuit asking a federal court in Denver to declare that the Colorado River has a legal right to exist, the media took notice of a case that was seemingly doomed to go nowhere. And, in fact, the plaintiffs, under pressure from Colorado's attorney general, recently withdrew their case. But the notion of a river suing the government for failing to protect the river's rights was a "man bites dog" story that got attention, appearing in outlets from [The New York Times](#) to High Country News.



Francisco Kjolseth, The Salt Lake Tribune via AP
The Colorado River flows through southeastern Utah.

This was no ordinary lawsuit. A typical environmental case involves a challenge to some action by a government agency. This case, by contrast, asked the court to recognize a new status for the Colorado River, and declare that a river has legal rights of its own. A lawsuit this unconventional was sure to be mocked by some, and this one drew its share of ridicule. I didn't see it as laughable, but it had almost no chance of success in court.

Although the law was against them, the plaintiffs had a serious point about the overworked Colorado, the great river of the Southwest. It provides drinking water for 40 million people (including me) as well as irrigation water for farms in two countries. This iconic river flowed wild and free less than a century ago, but several

large dams have changed all that, and for the past 45 years it has rarely reached the ocean. In short, the plight of the mighty but depleted Colorado is no laughing matter.

The lawsuit that sought to protect it, however, had much to overcome. For starters, the person bringing a case in federal court must have “standing” to sue. This requires, primarily, that the person suing have a personal stake in the case, and that a court be able to remedy that person’s harm if she wins. Without the right kind of person to bring the case, the court can’t accept it.

In an early environmental case, Supreme Court Justice William O. Douglas issued an eloquent dissent, arguing that people should be able to sue in the name of wild places they seek to protect. If a corporation can be a legal person for this purpose, he wrote, so should a river, which he called “the living symbol of all the life it sustains or nourishes,” including human life. But that view never caught on in U.S. law, and the Supreme Court has only moved further away from that kind of thinking.

Even if the Colorado River had gotten into court, it was virtually certain to lose. Water law in the U.S. has never recognized a river’s fundamental right to exist. To the contrary, the law gives people and institutions the right to take water from the river, and these rights often mean there is little or nothing left for the river itself. States have rights to water under interstate compacts; water providers and users have rights to water under state law and/or federal contracts; and tribes have rights to water under court decrees or settlements. Several Western states offer limited legal recognition for environmental flows, but no federal or state law gives a river a right to exist; at best, laws protect a river from harm caused by new development.

There may be no river with less of a right to exist than the Colorado. This great interstate and international waterway has been over-promised since the 1922 Colorado River Compact divided up its water supply based on an inflated assumption of annual flows. Today, the Colorado’s management relies on decisions made by multiple sovereign entities, including the U.S. government and seven Western states. Giant federal dams, operated mostly for water supply and hydropower, have drastically altered the natural system. This legal, institutional and physical system protects human uses of the Colorado rather than the river itself. As historian Donald Worster once put it, the Colorado was “a part of nature that had died and been reborn as money.”

This short-lived lawsuit was never going to bring the river back to life, but it drew needed attention to its problems. Other nations, including New Zealand, have taken steps to recognize the legal rights of their rivers, and U.S. law has evolved regarding the rights of people. Someday, a river in this nation may have a right to life.

Reed D. Benson is a contributor to Writers on the Range, the opinion service of High Country News. He is a law professor at the University of New Mexico.