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NEW COURSES FOR THE COLORADO RIVER

Gary Weatherford & Lee Brown eds.
Albuquerque: University of New Mexico Press. 1986.
Pp. xviii, 253, \$17.50.

Many persons will find this to be the single most useful book available on the Colorado River, whether their interests are historical, legal, political, or environmental. In a publishing era that favors narrowly conceived books, the accomplishment of this collection is its comprehensive, basin-wide perspective. It contains nine essays by thirteen authors, plus introductory and concluding chapters by the two editors, and a thoughtful forward by Governor Bruce Babbitt of Arizona. It contains the history of the Colorado River, the origins and evolution of the Law of the River, analysis of its problems, and suggestions for future improvements. The authors are historically well grounded but future looking, and do not succumb to the trendy trend-sketching that often passes for issue analysis. They offer individual points of view and lay out some serious problems, but their tone is constructive and tolerant. Conciliation of diverse interests is the sub-vocal theme of the book. The sobering cumulative impact of the book is that the Colorado River Compact, and the substantive and procedural arrangements it has spawned, are insufficient for moving into the next century of the river's use.

The way the book came about helps to explain its character. The future editors conceived of a symposium of Colorado River specialists to be held at Bishop's Lodge near Santa Fe, New Mexico where the original Colorado River Compact was negotiated in 1922. With Donner Foundation backing, augmented by the General Service Foundation, sixty-six participants and speakers were selected and gathered at the historic lodge for four days in May, 1983. Unlike the 1922 meeting where official state delegations came to negotiate, the governors, state engineers, attorneys, water commissioners, and scholars attended unofficially for the purpose of discussing and thinking. Unlike 1922, women and Indians participated. Unlike 1922, the long-range flow of the river was accurately known. Unlike 1922, water quality and wilderness values had a place in the proceedings. Unlike 1922, the Colorado River has been dammed and diverted to within an acre-foot of its life. The talks at this symposium, after rewriting and editing, became this book.

What does it tell us? Governor Babbitt, David Getches, Charles Meyers, and Gilbert White give overviews of the major issues that the basin states (and the federal government) need to solve. Norris Hundley provides an institutional history of Colorado River management. Allen Kneese, Gilbert Bonem, and Edward Clyde describe foreseeable "shocks" or

disruptive demands on the river's resources. Paul Bloom summarizes the strengths and weaknesses of the legal regime that has evolved for allocating and managing the river waters. Delworth Gardner outlines how a market approach might improve water use practices. Helen Ingram, Lawrence Scaff, and Leslie Silko show how public rather than just private ownership values might be better served in river management. Roderick Nash reminds us that, unlike all other major rivers in the world, the Colorado does not have a single large city on its banks, and that for over 1000 miles between Flaming Gorge and Needles there are only six places to cross the river by car. There is still wilderness there, which is treasured by many non-basin residents from all over the United States.

It would have been easy, given a slightly different tone at the 1983 symposium, for the accumulated criticism of the 1922 Compact to provoke the modern day analysts into hanging black crepe over the portals of Bishop's Lodge as testimony to the blunders committed at that critical beginning of the evolution of the Law of the River. If only the 1922 negotiators had not used a bad estimate of the river's capacity as the basis for their division of the river's flow between the upper and the lower basin states! They knew that river flows fluctuated from year to year, so they wrote into the Compact the use of ten year averages. But they didn't conceive that the mean itself could drop significantly and made no provisions for adjusting things. The blunder was in the rigidity of the Compact, not only in the statistical calculations. We therefore have inherited chronic over-allocation problems among the states and between the United States and Mexico.

Another major negative about the 1922 meeting was the neglect of Indian water interests. One intent of the Compact was to compromise the prior appropriation system by protecting the later developing states in the upper basin from losing rights to Colorado River water to earlier developing lower basin states. Prior appropriation doctrine would allow lower basin states which use the river water first to use that temporal priority to stop upper basin states from drawing water out of the river later on. The Compact reserves a certain amount of water for use by the upper basin states when they are ready. The blunder was not applying the same logic to the Indian tribes, whose reserved rights to water had been affirmed by the Supreme Court in the *Winters* decision fourteen years before the Bishop's Lodge negotiations. The tribes were not included among the negotiators or signatories to the Compact. The Supreme Court in the 1963 *California v. Arizona* decision reaffirmed Indian reserved rights and excused them from the beneficial use test for maintaining their validity. The snarl we now have to deal with consists of the beneficial use claims established under the 1922 Compact in conflict with Indian water rights that were reserved before the Compact existed. Not all, but a great deal

of the dislocations we now face regarding Indian claims could have been forestalled in Santa Fe in 1922.

Lest we be too hard on our forebears, we should acknowledge that this is more than a conflict between claimants in a common legal framework; it is a conflict between two different legal philosophies of water allocation. We should acknowledge that it is also hard for us to get a clear fix on Indian water claims solutions. This is illustrated in Governor Babbitt's forward to the book. He affirms the centrality of the Indian claims issue and states, "The principal difficulty is that piecemeal adjudication of Indian claims, in so many different state and federal courts, is not working well." (p. xii) He then suggests that Congress should preempt this case by case adjudication method by means of a comprehensive settlement in the broader context of basin hydrology and water uses. This sounds rational and constructive, and it is. But on the next page the governor also states, "The social, economic and equitable arguments on both sides are complex, and in fact the desirable result may differ from state to state and from tribe to tribe." (p. xiii) This apparent self-contradiction is compounded by the insensitivity of the suggested congressional action to the minority status of the tribes. They know, if the governor doesn't, that they are relatively weaker in the Congress and stronger in the courts; it is understandable if they don't rally behind the governor's suggestion.

Salinity control is the third major Colorado River issue. We cannot fault the 1922 group for not addressing this problem, because water use was not extensive enough then to generate salinity problems. The potential for the problem lies in the area's geology. The rocky formations through which the river cuts are naturally salty, having been formed largely from sediment left behind by evaporating ancient inland seas. Natural background salinity in the Colorado, however, is well within acceptable human consumption standards, and nowhere near high enough to endanger natural and cultivated plants. As upstream irrigation and transbasin diversions increased, salinity levels downstream doubled and tripled, until using the water for irrigation in California and Mexico began to kill crops. Constructive activity by the federal government since the 1960s has temporarily kept the salinity problem in check, at very high costs to the federal budget. Enough evidence had appeared to the 1983 group to make it anxious about the continuing largesse of the national treasury for western water projects, including salinity controls. Although this issue was recognized at the symposium, unfortunately there was no salinity expert included among the speakers, so the resulting book is thin in its treatment of this problem.

The book has greater strength on a fourth issue, institutional mechanisms for managing water problems. The 1983 group is clearly more supportive of the idea of a basinwide management authority than the 1922

group evidently was. Our contemporaries sharply criticize the lack of a Colorado River Commission. What can the states do about salinity, for example, through the purely voluntary Salinity Control Forum that lacks financing and enforcement powers? How many costly and time consuming court cases could have been forestalled by a commission's negotiating leadership? Several of the symposium's eleven specific recommendations for further consideration build upon the establishment of a commission which could facilitate market transfers of water; create incentives for salinity control by salinity management fees; help harmonize water use objectives at the local level by consultation, before adversarial positions harden; and conduct information programs about river problems and opportunities. A water atlas for the basin is needed, for example, but there is no group to sustain this formidable task. A complete list of the important issues considered in the book includes instream uses, definitions of federal reserve rights, and response capacity to severe drought. It is a rich and informative collection. Some readers might find the repetitive descriptions of the Law of the River a bit trying; others will wish for more maps; not a few philosophers and economists will wince at the discussion of equity; all readers will appreciate the attractive cover and first-rate printing job.

There is one issue that readers sixty years hence might say we should have taken more seriously. The clues are the *Sporhase* and *El Paso* decisions and the Callaway/San Diego County water leasing effort. The issue needing more analysis is how much the Colorado River Compact might be a restraint on interstate commerce. Anyone for another Santa Fe symposium?

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