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THE FUTURE OF THE COLORADO RIVER DELTA

MALISSA HATHAWAY MCKEITH*

I served as the Public Member of the Colorado River Board (CRBC)¹ from 1997 to 2002. I was appointed to the position by both Governors Pete Wilson and Joseph Graham Davis, Jr., surviving both a Republican and a Democratic Governor as the public member. I resigned this past month from the CRBC to begin working on the Rio Bravo.²

I am no longer ostensibly representing the state of California, which allows me to be really controversial. However, most people would say that I was never shy in the past. I at least hope I can be entertaining enough to elicit some dialogue from the audience. I think we have a very sophisticated audience.

Although we are using the Colorado River Delta as a model for discussing processes and approaches to constructively resolve water issues between Mexico and the United States, obviously the problems are much more extensive than this one issue. The Colorado Delta is very indicative of what is happening across the border. While its technical problems are certainly much easier to solve in some respects, the Colorado River has the same political traps as the Rio Grande/Rio Bravo. At least we agree on the name of the Colorado River. We are ahead in that regard.

All of the panelists, and many people in the room here, were in Mexicali, Mexico on September 11, 2001. I love everyone on my panel, as well as Alberto Szekely, who had to leave early. Frankly, I see Jaime Palafox, David Getches, and Alberto Szekely, along with many of the people in this room, as being part of the solution to the water problem, as opposed to part of the problem. When I see them, I see the things that we have constructively resolved in the past. I look toward my future, and Alberto and I like to joke about swimming in the Jordan River. Today I told him that if he would stay for the rest of the presentations I would swim with him naked, but that does not seem to do it any longer. So I am going to have to find a younger volunteer, I guess, to induce Alberto to stay.

On September 11, 2001, most of the federal, state, and local persons who were involved with the Colorado Delta were in Mexicali. A conference was convened for purposes of holding a multi-stakeholder discussion about water issues between the United States and Mexico. Representing the U.S. interests, for example, were Dennis Linsky from the State Department, Bennett Raley, the Under Secretary in charge of the Colorado River, and John Keyes, who runs the Bureau of Reclamation. Alberto Szekely was there to speak, along with many other Mexican representatives. It was a unique opportunity for people to discuss the Delta. Obviously there was quite a bit of distraction.

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1. The Colorado River Board's mission is to protect the rights of the state of California, its agencies and its citizens in the water and power resources of the Colorado River System. For more information see <http://www.crb.ca.gov/>.

2. For further discussion on the Rio Bravo issues see Alberto Szekely, *Mexico's Response to Problems Under the 1944 Treaty*, 11 U.S.-MEX. L.J. ____ (2003).

Having been a member of the CRBC, I have a tremendous amount of experience with the individuals who represent the basin states. After the World Trade Center disaster, I made a comment that upset many people. I stated that individual and collective indifference has consequences. It was not well received then; many people said that I must have made the comment only because I was upset. Frankly, that was not the case. We all know there are problems. In fact, we have addressed many of the solutions to those problems, and yet for a variety of political and economic reasons, we do not take the steps necessary to correct those problems before there is a crisis.

Clearly, September 11 is an extreme example of a crisis, but all of us know that there will be a serious water crisis along the Texas/Tamaulipas/Chihuahua border if there is not one already. Unless we collectively determine a way to implement in a timely fashion the several points that many of today's speakers made, this situation will escalate. Some days I view the glass as half empty instead of half full.

First, everyone knows both sides of the border need market rate structures. Do you think anyone in California is really talking about market rate structures? Not at all. Even as part of the California Water Plan,³ where California is going to be able to draw more water off the river, market rate structures are not being talked about.

Another important priority is reclaiming potable systems in all new housing. These systems are not very expensive. However, if a local politician were to suggest their use, it would fly in the face of the building industry association. Nobody has the guts to suggest their use; and so these issues are talked about in conferences.

I think what we have to really endeavor to do, those of us in this room who have access, understand the issues, and want to see solutions in a constructive fashion, is to figure out ways to provide each other cover. Those who work in the government need people outside the government who can help lobby for and move their agenda along. Similarly those who work outside the government who also have access and can make things happen because nobody can fire them need to facilitate those issues.

On that note, I will discuss how we try to implement some constructive bi-national, multi-stakeholder approaches to the Colorado Delta problem. In conjunction with Mr. Getches, Mr. Palafox, and many other people, a report was produced for the Ford and the Packard Foundation last year (Packard Report).⁴ Jesse Boyd, a University of New Mexico Law School student, asked why do we not come up with a new government structure to fix these problems? I almost choked. Frankly, I do not think we can depend on the government to fix all our problems. They are not good at it. Governmental institutions encourage a sort of passive consensus (I-want-to-cover-my-butt-type-attitudes). Also, there are people who need to be reelected in all of our agencies at this point, and that definitely is not a model for bold change anywhere. By just moving the chairs around, you only come up with another layer, and that is not necessarily going to work.

3. See the California Department of Water Resources at <http://www.dwr.water.ca.gov/>.

4. JO CLARK ET AL., Immediate Options for Augmenting Water Flows to the Colorado River Delta in Mexico, available at http://www.sonoran.org/pdf/Colorado_river.pdf (May, 2001) (unpublished report for the David and Lucile Packard Foundation) (hereinafter Packard Report).

There is a structure in place with the International Boundary and Water Commission (IBWC) that is not a bad structure.⁵ Our goal is to enable, fund, and make the IBWC more accountable. Similarly, with the North American Development Bank (NADB), the structure in place with the IBWC is one that can work. Why do we call it the Nada Bank? Because it has not been enabled and it does not have the political clout at this juncture to really fund the kinds of projects that we all know are needed. Front end planning and management projects are needed, not end-of-the-pipe projects where we fix problems only after things get out of hand.

My view, however, is to approach these complicated problems by creating teams who represent different stakeholders and who can candidly analyze issues. When I realized that there was no way that the CRBC, the basin states, or the United States were going to fix the problems on the Colorado Delta, the team of individuals who are listed at the beginning of the Packard Report was put together.⁶ The team consisted of four Americans and four Mexicans, and lawyers, engineers, and representatives from non-governmental organizations. We did not start with a consensus. Everyone had different perspectives and different access within their own interest groups. We focused on crafting short-term, politically achievable solutions on the Colorado Delta.

The Delta is currently threatened because of pending revisions in the U.S. law.⁷ We looked for what I call low-hanging fruit: how do we keep a baseline of water in the Delta to avoid litigation in the United States and to at least keep the habitat in the same condition while we spend the three to five years to come up with a long-term solution.

We were drafting a very result-oriented report. We had conference calls every Sunday night; people worked hard. In about four months we had a draft of proposals that had been, again, evaluated by different communities. We circulated the draft of the proposals, in English and Spanish, to thirty individuals for a peer review of the document. The report went to people in the Mexican federal government, to the Comisión Nacional de Aguas (CNA),⁸ and to the Mexican and U.S. non-governmental organization, Pro-Natura.⁹ Even after all we did, there were many people who complained they had no opportunity to review the document. We did our best. We had 180 pages of comments to a 30-page document. We tried very hard to consider these comments in producing our final recommendations.

The final recommendations were that 15,000 acre-feet of water should be leased and/or purchased from Mexican farmers from marginal farmland with concessions,

5. The IBWC's mission is to provide sensitive, timely, and fiscally responsible boundary, water and environmental services along the United States and Mexico border regions. For more information see <http://www.ibwc.state.gov/>.

6. Packard Report, *supra* note 2.

7. Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772 (2001).

8. CNA's mission is to administer and preserve national waters, with the participation of the community to achieve sustainable use of resources. For more information see <http://www.cna.gob.mx/portal/inicial.asp>.

9. Pro-Natura is a non-governmental organization that specialized in sustainable development. Their mission is to conserve biodiversity through integrated sustainable development projects adapted as models that are replicable at a regional level, in partnership with public entities, private initiatives, and organizes civil society. For more information see <http://www.pronatura.org.br/>.

and that 15,000 acre-feet of water should come from the United States.¹⁰ Thirty thousand acre-feet of water is a drop in the bucket. It would have been inexpensive and easy. The technical solutions on the Delta, at least on the short term, were far simpler than the technical solutions on the Rio Grande and the Salton Sea. We thought we could make it happen.

On September 10, 2001, a high-level meeting occurred in San Diego with the new Under Secretary, Bennett Raley, and the Secretary of Resources for California, along with David Getches and Tom Levy, Coachella Valley Water District general manager-chief engineer who administers the river for the basin states. Everybody wanted to mediate this problem and stay the litigation that the Defenders of Wildlife had pending and is still pending in the United States.¹¹ It was amazing that a deal of this kind could be created, but if no one in the government is willing to grab the opportunity, the deal can evaporate.

It evaporated maybe because of September 11. However, there were other political issues, not the least of which is the linkage between the politics on the Rio Grande and the Colorado Delta. Anybody who thinks these two things are not linked is out of touch. In Texas, Mexico has the water, while in the United States with regard to the Colorado River, California has the water. This simply underscores the fact that a solution is necessary, because he who has the water first is like he who has the money. It is always better to have the money, because it is harder to get the money away from people than it is to have them get it from you.

I sent an e-mail to all of the high-ranking people who failed to do anything after September 11, regarding where we were on September 10, since most people do not remember where they were. I remember the meeting very clearly. In my e-mail I said it is pretty terrible that we could not solve a little issue like the Colorado Delta, which was easy and inexpensive, and how can we ever expect people to solve the larger problems if we can not get our act together and solve the smaller ones?

I was disappointed this morning by the comments of Jill Warren, former Special Assistant Attorney General for Water Matters in Texas. It was the tone: we need to win, the water is ours, we are victimized. There is no question that there are injustices that have occurred on both sides and people have complaints. It is hard to manage water. We are only now beginning. Only during the last ten years have we had severe shortages on both rivers due to increased growth and over-subscription.

The treaties that were enacted prior to and including the 1944 treaty on the Colorado River did not contemplate the problems we face today. We did not have the technical wherewithal at that time. We did not think of in-stream environmental issues. We did not anticipate the amount of growth we have seen. We are going to have to find solutions quickly, or in ten years we, particularly in Texas, are going to have a serious crisis on our hands.

There are stop-gap measures in place now on the Rio Conchos and the Rio Bravo. California's fifteen-year plan to reduce their share of the Colorado River is also a stop-gap measure.¹² Until people's behaviors change and they stop wasting water,

10. Packard Report, *supra* note 2, at 21-28.

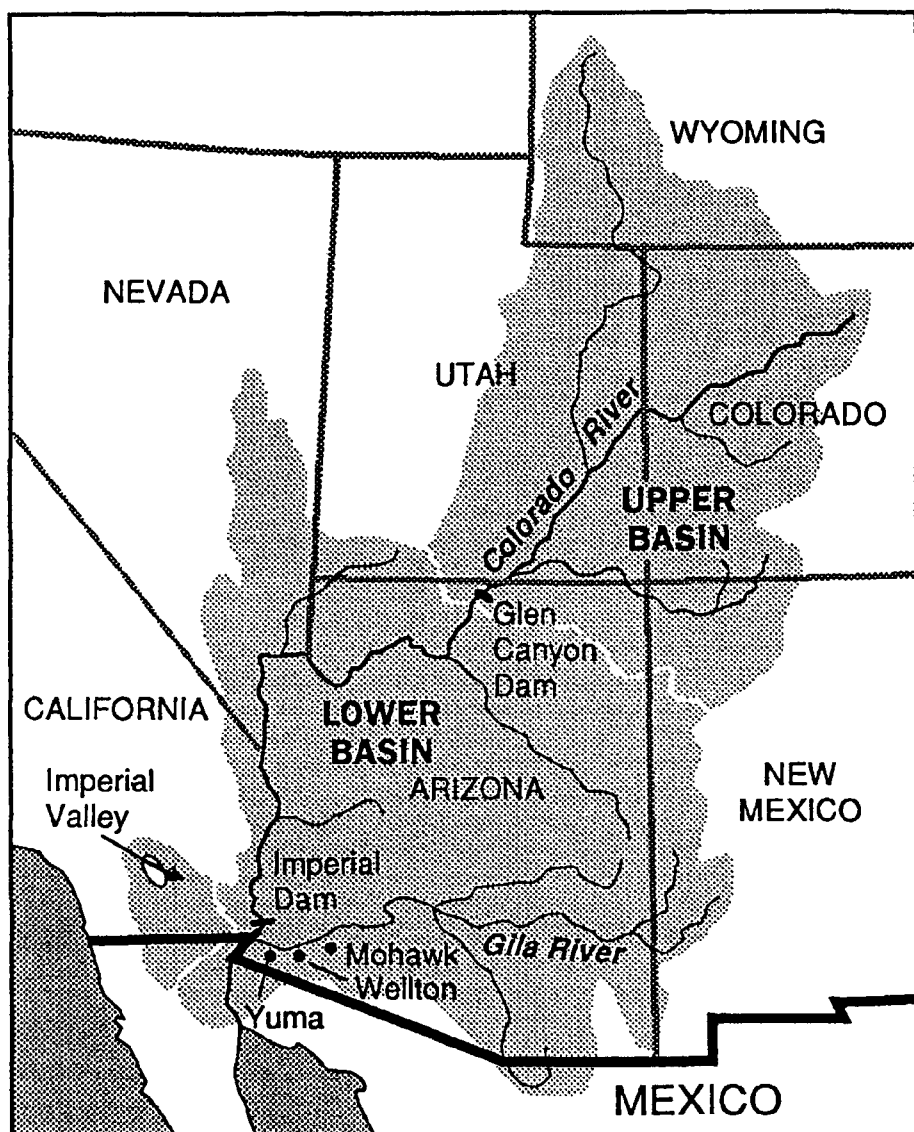
11. *Defenders of Wildlife v. Babbitt*, No. 00-1544 (D.D.C. filed June 28, 2000).

12. Colorado River Interim Surplus Guidelines, 66 Fed. Reg. 7772 (2001). The interim surplus criteria (or

and until our government funds water management and long-term planning up front, we are always going to have stop-gap measures. We can no longer afford that.

The people in this room, including Jill Warren, could be instrumental in telling our respective governments and legislators that long-term planning is necessary. We must start changing the behavior of water users. We must stop subsidizing so that people honestly understand the price of water. I loved the comment from Maria Elena Giner, who lived in Ciudad Juarez where they shut her water off and she does not use her political clout to turn it back on. That was excellent.

Once you realize that water is like your cell phone – that it is expensive if you waste it – you stop wasting it. These are not hard things for people to do. We just need to decide to do them. Hopefully, in a year or two, when we are sitting at some other conference or we are back in Mexicali agonizing over the Colorado Delta, we have made more progress than we have today. These are not new issues. We have been talking about them for ten or fifteen years. If we do not move faster, then shame on us for not doing more.



THE COLORADO RIVER DELTA

