PEACE ON THE RIVER IN CALIFORNIA? NOT QUITE
Legal and Institutional Issues Remaining After the QSA

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Let me at once alleviate the apprehensions of our sister states' representatives that in place of Utah Congressman Cannon you are going to hear a Californian's perspective on California's history. I am literally but quite by accident a native San Franciscan, due to my father's career in the Merchant Marine; but six weeks after birth my mother and I moved back to the city to which she had emigrated as a young girl from Italy. In fact my first two homes were located figuratively and nearly literally in the shadow of Fenway Park. As painfully brought home again this past autumn, for my entire life I have known the constant challenge of co-existing with those Yankees who have more power, money, population, and occasionally arrogance. I can speak from empathy for the six other basin states here.

This morning let me attempt to bring three messages from the California experience since we last gathered here a year ago. First let me describe California's progress since that time. Second, let me assert that contrary to the statement of our recent Governor on October 10, followed by the Secretary six days later, peace is not quite at hand – and describe the outstanding legal challenges. Finally, let me identify four larger institutional and legal issues that have emerged from the California experience, and that we must address together in the coming years.

Thirty-five years ago Joan Didion, in *Slouching Toward Bethlehem* (1968), expressed a tense but optimistic view of her native state – "that things had better work here, because here beneath that immense bleached sky, is where we run out of continent." Ms. Didion is of course more qualified than I to speak as California-born; her great-great grandmother joined the original Donner Party, though having the good sense to turn right at the Humboldt Sink; she, her parents, and her nephew and neice all graduated from our Berkeley campus.

This year from the perspective of her Manhattan exile Joan Didion expressed a more sanguine view of California, which she richly describes in her just-published memoir, *Where I Was From* (2003): "A good deal about California does not, on its own preferred terms, add up." That of course is our Colorado

River theme and my theme this morning: that since 1963 California's apportionment of 4.4 has not added up to urban Southern California acting as though it had the 5.2 that would keep the Colorado River Aqueduct full. Not that Metropolitan has not valiantly tried to address that reality – but nonetheless finding itself constantly frustrated by reallocation of water back to the Owens Valley and Mono Lake, Governor Reagan's Wild and Scenic Rivers, ESA restraints in the Delta, and no Peripheral Canal.

We all know of Secretary Babbitt's program to start 1 January 2003 to wean California gradually over a 15-year period, with available surplus as the reward for a 4.4 plan. Key to this plan was the anticipated win-win IID San Diego transfer; the farmers would be paid to produce the same crops more efficiently, and San Diego would obtain its own secure, high priority supply. The skunk in the deal turned out to be the Salton Sea; what had in past decades been seen as a waste of excess ag runoff to flood the sea, now became the inflow that sustained the wildlife at the sea, and prevented an exposed shoreline with potential to match Owens Dry Lake as the worst source of PM_{10} emissions in the United States.

This time last year the California Water Resources Control Board wrapped up its transfer proceeding, requiring stabilization of the Salton Sea for 15 years; earlier the Legislature on the same terms authorized the taking of otherwise "fully protected" endangered species. At the end of the year, however, IID departed from the QSA that had been renegotiated in October 2002; it insisted on fallowing for only 15 years, and on "off ramps" from the transfer if the economic or environmental costs became too high. Metropolitan and Coachella declined to go along.

Thus on California's failure to meet the Babbitt deadline, the new Secretary through her assistant Bennett Raley in January imposed a "duty" on IID's 2003 consumption by lumping together the alternative acreage and acre-foot quantifications of IID's present perfected rights in the 1979 *Arizona v. California* supplemental decree. "Interim surplus" was eliminated not as a physical phenomenon but a political one. Water cut back from IID was made available to Metropolitan. IID challenged the action against it, and when Interior attempted to justify its action as a part 417 beneficial use determination, Judge Whelan of the San Diego federal court sustained IID. The court restored IID's deliveries and ordered Interior to produce a proper 417 determination if it wished to proceed.

Assistant Secretary Raley concurrently wrote to California DWR Director Hannigan that the "historical position of the department is that direct delivery of Colorado River water to the Salton Sea is not an authorized beneficial use." When both the draft and final 417 determinations emerged from the Bureau's Lower Colorado Director, the 67-page document did not mention the words "Salton Sea"

once, even though that resource alone explained why the Bureau and IID were at odds in the first place; but the Bureau must have had the sea in mind in nonetheless asserting that "drainage flows from IID no longer are available for other authorized uses or users." Interior was not giving IID credit for the advantages its outflows would provide to the sea. I will return to this circumstance momentarily.

As the summer proceeded, it seemed that our state finally resolved that the QSA "had better work here." California may not have been running out of continent, but we were running out of surplus Colorado water and apparently about to run out of Governor Davis' tenure. These circumstances produced the ultimately consented-to QSA, which in my view is attributed to two significant breakthroughs:

1. By agreement and then legislation, the State capped the water districts' liability for Salton Sea environmental costs and agreed to assume the remainder. State funds were created by IID making available over the next 15 years an additional block of 1.6 maf, which DWR would purchase at $175 an acre-foot and then sell to others (presumably Metropolitan) at $250. This margin would produce over the 15 years an additional $300,000,000 for the environment. At the same time, presumably the State itself could devote part of its purchased water to the sea. This purchase would thus not make of it a "direct delivery" of IID's allocation to the sea, enabling Interior an elegant retreat from its hard line on the beneficiality of Salton Sea use. In the end, the consumers and beneficiaries of the QSA, rather than all California taxpayers or IID itself, would fund mitigation expenses.

2. By elliptical language and construction the Secretary and IID essentially agreed that Interior would not through year 2037 institute another beneficial use determination against the district, absent "unique circumstances." This was accomplished in paragraph 8b2 of the Colorado River Water Delivery Agreement, in which the parties recognized that one purpose for the QSA and transfer was to reduce future 417 determinations to unique circumstances, and then to specify that in any future 417 determination the Secretary will base her reasons on the purposes of the quantification and transfer. While much debate followed in the Imperial Valley as to the adequacy of this language and assurance, my own conclusion is that its literal interpretation provides reasonable protection for IID, but more importantly the political commitment of IID to the transfer and QSA will politically foreclose a future Secretary from reading that text to the contrary.

Thus on 10 October the QSA was signed, wrapping up 72 years of unfinished business from the 1931 California Seven Party Agreement. (Let us pause long enough to recognize that even with its shortcomings California's

successful Colorado River quantification will represent one of the great legacies of the Davis administration.) The same day the Secretary by facsimile executed the Colorado River Water Delivery Agreement. Six days later at Hoover Dam the parties re-signed in the presence of each other. There Secretary Norton declared, as had Governor Davis the week before, "Peace on the River."

But once again California on its own terms did not quite add up. In contrast to the negotiations and legislative drafting in year 2002, the County of Imperial and dissident Imperial Valley farmers were excluded from the sessions that produced the final QSA and accompanying three senate bills. The county, for example, had much less than a day's notice of the bill terms before they were acted upon. In the county's views, the promised socio-economic and air quality impact mitigations were not deemed assured. Dissenting farmers questioned IID's "Dutch auction" that pitted farmers against each other in bidding for transfer participation, the district's fallowing plan, and ultimately whether individual farmers would get enough out of the deal.

Within a month of the QSA and transfer signing, the County of Imperial instituted California Environmental Quality Act (CEQA) actions against both the transfer and QSA. (Earlier in the year the County had brought a placeholder CEQA claim against the state water board, when it acted to render the initial approval of the 2002 transfer. The two air quality management districts with jurisdiction over the Salton Sea had similarly filed against the state board.) Dissident farmers brought actions to challenge not only CEQA compliance but also the underlying validity of the transfer and QSA terms. An ad-hoc environmental group also brought a CEQA action. But litigation was not confined to outsiders; IID took the initiative to file its own lawsuit under the California validation statute, seeking to confirm the legality of the QSA and transfer, and by subsequent amendment the federal-state water delivery agreement as well. Significantly, the litigants do not include mainline environmental groups (which Governor Davis' team *did* bring into the final QSA and legislative drafting); and except if included in IID's lawsuit, no federal claims have yet been raised.

My profession is law and not psychology and I cannot assess the motivations of all these litigants. As Imperial County's special counsel, however, I can speak for the county and point out that our two suits were accompanied by a press advisory that made clear they were necessitated as placeholders to stop a short statute of limitations and keep the county's options open to secure voluntary resolution of our needs. We expressly recognized the deep reliance of California and the other Basin states on the QSA. Imperial County does not seek to undo it as the preferred remedy. Much more modestly we seek connections between the promised mitigation and the county's prerogative to define and enforce that mitigation. I am encouraged to report that the county and QSA parties have

already conducted one meeting. The key to resolution: the water districts' willingness to modify socio-economic coverage to accommodate the concerns of the county, expressly recognized in the transfer as the third-party beneficiary of those terms; and the water districts' willingness to recognize that in the end the air quality districts will determine and enforce air quality mitigations, and be compensated for the cost of that exercise. Appropriate to our venue today, the county and air districts merely read Matthew 22:21 and ask the water districts to "render unto Caesar the things that are Caesar's."

Having brought us up to the present moment, let me now leave this assembly with four institutional and legal questions that have become patent in our California venture, and which all of us in the Basin must address together in the coming years. (I put aside as lawyer and teacher of law the operational question of whether as anticipated the next 15 years will bring a viable and permanent Salton Sea solution.)

1. The standing of counties, other local regulators, and environmental interests – essentially all non-contractors with the Secretary – to raise and participate in resolution of their so-called "third party" concerns. This question refers to direct negotiations, participation in administrative proceedings, and ultimately judicial review. Imperial County was told early in 2003 that in order to participate in the QSA renegotiations it would need to acquire a water right. Just two days ago I received in behalf of Imperial County the Secretary's formal notice terminating the IID part 417 review, but also reminding the county that as a non-contractor it had no right to participate in that review at the Secretarial level. One can argue the letter of the law of standing, but we cannot avoid the policy and practical consequences of deliberately excluding participation. During the 2002 California water board and legislative deliberations, local governments and environmental advocates were accorded full procedural recognition, which laid the groundwork for California's near-complete success in 2003. The fact of present challenges to the QSA flows directly from the 2003 decision to exclude. As both SNWA Chair Amanda Cyphers and General Gerald Galloway agreed earlier this morning, we cannot address our contemporary needs on the Colorado without bringing everyone to the table.

2. The role of state law in the Law of the River -- particularly in the Lower Basin, with the federal interest inherent in the construction of Hoover Dam and the All American Canal, and delegated authority to the Secretary of Interior. The 1963 *Arizona v. California* opinion includes this one sentence, that can fairly be read to refer to both interstate and intrastate allocation: "State law has no place." A lot of folks still read that dictum as scripture, indeed their prime scripture, their John 3:16. But the Court in its 1978 ruling in *California v. United States* not only disavowed the cases on which that sentence in *Arizona* was built;

the Court disavowed the *Arizona* language itself. In the 1982 *California v. U.S.* remand, and in the then-latest *Alpine* decision written one year later, the Ninth Circuit expressly held that in determining beneficial use under the Reclamation Act we look primarily to state law. The author of those two opinions: then Circuit Judge Anthony Kennedy. In my view the best reading of where the Court is today: state law governs beneficial use in the Colorado, absent a clear Congressional mandate, because that is what the supreme federal law requires.

Keep in mind that the 1964 *Arizona* decree provides that all Colorado River uses within a state – even federal and wildlife protection ones – are charged to that state. If any state -- such as California, which has historically regarded the use of water to sustain saline lake ecology as beneficial; or Colorado, which just this year recognized instream uses as beneficial – wants to devote part of its apportionment to such uses, who are the other states to complain? Yes, at bottom a residual federal authority can prevent a rogue state from committing universally-recognized waste. But is it wasteful to sustain the nation's second most productive avian habitat, or prevent a regional air quality heath hazard?

3. Authorized use of Colorado River water to sustain the Salton Sea (or other habitat) under federal law alone. We recognize that the "clear Congressional mandate" throughout the Basin includes Compact and Boulder Canyon Project Act terms ("reasonable beneficial," "domestic and agricultural"), which in the Lower Basin are also applicable to each individual Secretarial contractor. Do these terms embrace wildlife and environmental protection? The short answer is that the 1964 decree categorizes wildlife protection as all of these. And at the time of the *Arizona* decisions, Special Master Rifkind catalogued United States purchases of IID water for the sole purpose of protecting Salton Sea wildlife. Historically the Department of Interior has regarded this use of IID water as legitimate.

4. Federal responsibilities at the Salton Sea. Two specific federal mandates remain unfulfilled at the Salton Sea: Interior's duty under the Salton Sea Restoration Act to produce a plan for the sea by the year 2001, and Interior's duty to comply with the Endangered Species Act in administration of the Lower Colorado. The reasoning that the *Silvery Minnow* case applied to the 1968 Colorado River Storage Act creates under the 1928 Project Act an identical duty to operate the river for species protection. If NEPA operates as a statutory overlay to the Law of the River, why not ESA? This mandate imposes a vexing dual responsibility on the Secretary, at once to enforce the ESA and also administer the 1964 decree. But the Department of Justice's Kelly Johnson this morning stated it well, and no further elaboration is needed: "as water master of the Colorado, USBR must obviously comply with the ESA." Yet consider this additional perspective: Boulder Dam was constructed to end the floods that periodically over

the centuries filled the Salton Sea; does not that fact of federal construction imply a federal responsibility to sustain the sea in its natural, pre-project condition?

So let us in conclusion agree that a good deal about California does not on its own preferred terms add up. But as General Galloway just reminded us, can we not say the same of our entire basin, or indeed nation? Let me in closing invoke another great writer, a person closer to me than Joan Didion, colleague, guide, and friend Wallace Stegner, who once held that "California is just like the United States, only more so." To me the most important of Wally's words are the ones "just like." None of us can cast the first stone for failing to add up, but all of us must keep trying to erase that shortcoming.