

FORGING SOLUTIONS ON THE RIVER

ANTONIO ROSSMANN

Founder, ROSSMANN AND MOORE, LLP

Lecturer in Water Resources Law, University of California (Boalt Hall)

ar@landwater.com

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On our association's 60th anniversary you have invited one of your newest members to help you forge solutions that the Law of the River will require in the next 60 years. I bring two perspectives to your assignment. I am a relative newcomer; unlike many of you such as my close colleague Gary Weatherford, I did not grow up on the River or devote most of my life to it. In fact I did not – despite the accident of my San Francisco birth and choice of return to work there the past 34 years – even grow up in the West. My formative years were spent in the cities of the East, most particularly the one to which my mother emigrated as a ten-year old from Italy. At the classic fifth game of the 2003 Division Series, my neighbor in the Oakland Coliseum asked me when Red Sox fans lose the loyalty of their youth; the answer of course is never, the bond only increasing with time away. I am Susan Ward reincarnate – the protagonist of Wally Stegner's *Angle of Repose* – who came West on “a rather strenuous but temporary excursion” – and somehow wound up devoting most of a lifetime to our Western resources, still looking back. But while I have practiced the Law of the River only modestly for less than a decade, this year marks a quarter century of my teaching it.

Nonetheless, let me attempt to vindicate John Zebre's judgment that this bicoastal academic's perspective might bring some merit to our dialogue this morning. My Nevada colleague Jim Davenport claims he distrusts academics because they don't have a dog in the fight. (Jim and I still get along OK as advocates against Yucca Mountain.) But only an academic could look on the Law of the River as Pete Rose did on baseball – incredible that folks actually pay you to do something so much fun. Each year the River's unresolved questions only become harder and more delicious – for example:

Within a state's apportionment of Colorado River water, does state law determine beneficial use?

Even if the 1964 decree and 1944 treaty allow it, can the All American Canal be lined, unless preceded by transnational environmental assessment and by protection of an existing economy's reliance across the border?

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This essay honors Bill Stall, under whose thirty years of editorial leadership *The Los Angeles Times* has become the Nation's voice for Western mountains and waters.

If groundwater migrating from the All American Canal re-crosses the border as surface Mexican runoff into the Salton Sea, does it once again belong to IID?

Does it make a difference if Las Vegas taps the Virgin River 100 yards upstream of its terminus with, or one yard into, Lake Mead?

Can the Lower Division make a call on the Upper Division in year one of drought, year five, or must it wait till year ten?

Does the Secretary have the authority to make that call, or is it up to the states themselves?

Does the Secretary's federal prerogative in the Upper Basin match or come close to hers in the Lower Basin?

And a favorite, does the Congressional reservation of navigation as the primary purpose of the Compact, a condition of the 1928 ratification, imply a federal public trust in the River superseding contracts for water consumption and power production?

Intellectually inviting as these questions are, let's allow this opportunity to address their substance pass. On substance, as Justice Brandeis once observed, there is room for being 52 percent right, and 48 percent of you could therefore justifiably stand up and call me wrong on any answers to the questions just stated. The greater challenge lies in forging procedure, where in Brandeis' view fairness demands a 100 percent result. While I cannot measure up to the judge's expectation of perfection, let me still dare to present two proposals that I suspect will bring immediate disagreement but could well prove of enduring merit to meet our River community's needs in the next 60 years.

First, we should establish, by amendment to one compact and creation of a new one, two new interstate commissions: a Lower Colorado River Commission, and a basin-wide Colorado River Commission. Second, our federal government, paralleling the cooperative federalism and funding to the states under the Coastal Zone Management Act, should invest in comprehensive water and land use planning by each basin state, conducted through each state's enactment of an environmental assessment law.

Two New Colorado River Commissions

The Lower Basin deserves its own compact commission because in *Arizona v. California* both the majority and the dissenters were right. The majority exercised judicial statecraft when most needed, to quantify and liberate Arizona's share of the River, lest California create even greater unjustified expectations on the River through

the facilities California bargained for and received – to the injury not only of Arizona, but all Compact states. The majority also correctly discerned that in time of shortage, the River must be equitably apportioned according to existing short-term need rather than permanent apportionment ratios – the one point on which the Court wisely overruled Special Master Rifkind. But the four Justices dissenting with equal wisdom objected to reposing that awesome discretion to distribute short supplies in a single unelected but highly political appointee, the Secretary of Interior. Moreover, that discretion would (contrary to the majority’s premise) prove all but unreviewable in the original jurisdiction of the Supreme Court.

The Lower Division states should look to their Upper Division colleagues to discern a more acceptable means of addressing shortage – and for that matter, surplus. The Upper Colorado Compact creates among the four states and United States a five-member commission to determine the quantities and timing by which each state meets a Compact Article III call on the Upper Division. The commission’s discretion is bounded by specific conditions; but in the end their decision reflects cooperation and consensus among the states themselves. The upper compact’s four-vote rule does not compel unanimity, but it does specify that three states and Uncle Sam can manage an outlier, and that the United States’ approval is not needed if the four states themselves agree on how to meet their responsibilities.

If there is a proper declaration of shortage, the Lower Division States should agree to a similar voting plan to assign the shortage – that is, enabling the states by complete consensus to avoid federal intervention, but also allowing two states and the federal government to break a stalemate among the states themselves. (Why would a one state give up its power to block? Because each state has *no* power at present.) Because the shortage responsibilities devolve on the states themselves, the voting model of the Upper Colorado River Compact properly recommends itself to the Lower Basin as well, enabling the states to be masters of their own fate.

But as the record has shown in the past few years, not the assignment of shortage responsibilities, but the very declarations of shortage (and surplus) form the most sensitive and impacting decisions. California’s experience with 4.4 proves that in the end “shortage” and “surplus” are not hydrologic phenomena but political ones.

For that reason, a Lower Basin Commission should also be assigned the duty to declare shortage and surplus. But here the states should not be able to proceed entirely on their own, given the federal investment in the River and the federal, interstate interest in those determinations that affect the Upper Basin and ultimately the entire Nation. The three Lower Division States should be able to determine by majority, not unanimity, but only if they are joined by the United States. Federal consent should become a necessary but not sufficient condition; the Secretary deserves her say in behalf of us all, but to meet the proper objections of the Supreme Court dissenters, she cannot act alone.

The same considerations also argue for a basin-wide Colorado River Commission to make the refined judgments such as those now facing us, the coordinated operation of

Lakes Mead and Powell. Let us praise the Secretary for proceeding, assuming that she currently holds the power, to establish the basin-wide rules by consensus if possible. Her efforts resemble those practiced in Japan, where a single official, the minister of transport, sets the outflow from Lake Biwa and so influences an important ecological resource and water supply to 18 million people; the minister follows a rigorous consensus-building tradition. But there are differences in the two cultures that render Biwa-ko not quite the exemplar for the Colorado Basin: in Japan it would be unthinkable to force a decision without achieving consensus, and Lake Biwa is not surrounded by sovereign states in a federal system. At home the Secretary has made clear that as a last resort she will impose rules; and the states of the Colorado Basin not only govern the water resources within their jurisdictions, but are contractual parties to the River's Compact. Despite the Congressional authorization to the Secretary in the 1956 and 1968 Project Acts, the 1922 Compact framers did not likely anticipate that grant of authority to a single official, and their present-day successors in this room distrust it.

The recommended solution calls for the states to invest in self-help, through amendment to the Compact to create a basin-wide commission with authority over the basin-wide determinations. To recognize the valid interests of the Nation and the two basins into which the River has been apportioned, that commission could proceed on a dual-majority basis, taking action by concurrence of the Secretary and a majority of the Upper Division states and majority of the Lower Division states.

Creation of both proposed commissions could also avoid pushing the Law of the River to a breaking point. The Law has proven remarkably flexible to date in dealing with new and unanticipated conditions, but sharpened shortages and conflict in the decades ahead will pose greater challenges. An unresolved question may require relatively quick resolution. It is hard for me to discern that give the choice, you find it more distasteful to present a substantive dispute to Congress or to the Court. Sensibly, you fear the risks of both. A basin-wide commission patterned on the existing Upper Division one, on the other hand, empowered to make determinations that have prima facie validity while remaining subject to judicial review, could adjust and advance the Law of the River at minimum risk of upset. Most importantly, the decisions would be yours and not someone else's.

A Federal Investment in State Water and Land Use Planning

A few months ago I was asked to assess Interior's Water 2025 program for its effectiveness. The department advanced five realities that must be recognized to minimize future conflict: explosive population growth, water shortages, over-allocated watersheds, aging facilities, and ineffective crisis management. Interior proposes to address all but the first reality with its commendable but modest program of hardware improvements.

Let me suggest that our primary innovative federal investment be devoted instead to software, if you will, and that it dare also to address that first reality, explosive

population growth. To the list of realities supporting this investment, let me add the following:

Our distaste for centralized federal planning, and preference that each state oversee its own resources and govern its own future. (The truly libertarian of course find all public planning and oversight distasteful, but in the parlance of NEPA, that attitude does not realistically describe the “no action” alternative.)

New interests finally beginning – not completely, but getting there – to secure their places at the River’s table: local governments, and NGOs on both sides of the border.

Ever more sophisticated populations throughout the Basin, in both large and middle-sized cities, whose expectations include the right to become informed of, participate in, and influence their state’s decisions affecting their communities.

The lack, except in our most built-out state, of state environmental assessment laws to guide local and state planning and oversight.

And finally, to vitiate Interior’s failing to address the first reality of an exploding population, this provocative counter-reality: “population growth is not an immutable fact of life.”

Those last words are not mine, but authored by the California Court of Appeal in Sacramento, two months ago rejecting the state’s environmental assessment of the CALFED Bay-Delta improvement program, for failing to include and analyze an alternative of reduced rather than increased Delta exports. The project proponents argued that California’s projected population growth of 60 percent by 2020 committed the state to increase exports. The court inquired

if there is no water to support the growth, will it occur as projected? Population growth is not an immutable fact of life. Stable populations have been established in such states as New York, Pennsylvania, Connecticut, and Rhode Island. Inflow of new residents to California continues to exceed outflow because conditions in the state are conducive to population growth. One aspect of these conditions is the availability of water. However, as the state reaches the limit of available water and must seek other sources such as desalination, water will become more expensive to obtain and California’s appeal will lessen.

CALFED conducted its environmental analysis by assuming certain population growth in the State over the next 15 years and then finding ways to provide water to that population. But CALFED appears not to have considered, as an alternative, smaller water exports from the Bay-Delta region which might, in turn, lead to smaller population growth due to the unavailability of water to support such growth.... CALFED apparently assumed that the California population would grow as projected regardless of the availability of water and did not

consider whether, if less water was supplied, population growth would be affected accordingly, leading to less demand.

....

Those deciding the future of this state to the extent it depends upon the allocation of its most precious resource should be presented with all available choices. The [environmental assessment] should have included an alternative that assumed reduced water exports from the Bay-Delta region.

The court's pronouncement came just two weeks shy of the 100th anniversary of Los Angeles' first appropriative filing on the Owens River. What an ironic centennial celebration! Mulholland sold his aqueduct to the Los Angeles citizenry with the argument, "If we don't take the water, we won't need it." A century later the court now calls his bluff; don't take the water and you won't need it. In 1905 Mulholland's principal booster, *The Los Angeles Times*; in 2005, the court's principal booster, *The Los Angeles Times*. Read the paper's editorial of November 19: the water managers' "axiom is that people will come whether there's enough water or not. Now, finally, a court has challenged that mantra.... The court ruling may be heresy to the water engineers. In fact, it's the new reality."

This *Bay-Delta Programmatic* case deserves our attention not on the misconception that the court is ordering an end to population growth, but rather (in the court's words) that those empowered to allocate water use "should be presented with all available choices." The court is saying, we do have that choice, to encourage or discourage exponential population growth. After all, the peopling of the West resulted from the deliberate national decisions such as the homestead and desert land acts, and the transcontinental railroad, "to expunge from our vocabulary the legend 'Great American Desert,'" and thereby encourage and assist "the redemption of this immense landed estate." (Our Utah colleagues must recognize these words as those of their near-native son, Justice George Sutherland, in his *California-Oregon Power* decision that severed for the states' regulation the water rights on land released from the public domain.) Do we not still retain the national power to address, and moderate, an imbalance of population that threatens the well-being of our Basin and our Nation? Or do we continue to assume, until called by the *Bay Delta Programmatic* court, that today's population projections are inherently self-fulfilling?

The answer, it seems from here, is not whether we have the power to influence future population patterns, but whether we want to attempt its exercise. As Grady Gammage has just shown us, the assumption of exponential growth is coming under challenge not from outsiders, but from those in the temples of growth itself. And as his fellow Arizonan Herb Gunther reminded us in Santa Fe earlier this year, the motivation is not necessarily lack of water (we could expand urban use for hundreds of years if we didn't care about farming), but loss of quality of life – not just in the cities, but in the countryside. Los Angelenos can say, "Been there, done that"; the preservation of Owens Valley and Mono Lake originated in the high desert, but only became reality when the

Los Angeles City Council decided to vindicate the convictions (and outdoor passions) of its own constituents.

A constructive solution to our present predictions of exponential growth lies in the model of the Coastal Zone Management Act – an expression of federal policy for coastal protection, but honoring and funding the prerogative of each coastal state to choose that protection. Congress should fund a Colorado-Basin-wide program for each state to plan its Colorado River water future: how much does it want its cities and towns to grow, in say the next 40 years, and by the middle of the 21st century how much will each state adhere to my own University's aspiration, inscribed on the agriculture building at the Berkeley campus, "to rescue for human society the native values of rural life"? Asking those questions would enable the states to assess the remaining capacity in their share of the River, means to redistribute that share through conservation or transfers, and to discern credible population targets.

To ensure the participation of local governments and civic organizations in these state choices, the planning grants would obligate each state to adopt an environmental assessment law similar to NEPA (or CEQA in California). As federalized as the River has become, NEPA simply fails to embrace the state-law decisions that are envisioned here. Nor does NEPA cover significant local projects; the proposed pipeline from Lake Powell to St. George is one example. Presumably a NEPA assessment will address the impacts of granting right of way across federal land, but only a state assessment law would address the state-law decisions to dedicate a portion of the State's Colorado apportionment to that use, to build the pipeline, and to mitigate growth-inducing effects by local or state action within Utah.

By now your California colleagues are silently responding, "there he goes again" and hoping the rest of you will "stop him before he does it again"; that our California Environmental Quality Act has been nothing but a pain to water institutions in our state. But this law forced the City of Los Angeles to change from adversary to collaborator in the Owens Valley, and a generation ago to require mandatory water conservation that enables LA today to serve a third larger population on essentially its 1977 water budget. If there is one California law that has helped LA live within its water means and at peace with its neighbors – and both ecologically and politically redeem the city from the Babylonian fate to which its 20th-century critics had condemned it – it is CEQA.

And as exemplified by the *Bay-Delta Programmatic* decision, and an earlier one essentially declaring permanent shortage in our State Water Project – California's environmental quality act has taken the wraps off questions ripe and begging for answers.

Having practiced this law since its initial enforcement in our state supreme court 33 years ago, I remain convinced that rigorous environmental assessment, producing vigorous public participation, frames the structure on which yet to realize John Wesley Powell's vision for rational governance of the Colorado Basin – building out, in Stegner's words, Powell's "blueprint for a dryland democracy." That blueprint can and should

include each state's conscious decision of how it plans in decades ahead to use its share of the River, informed by the state's conscious anticipation of population it desires.

Motivation lies not only in sustaining our own communities; it also lies in proving to the entire Nation that we are prudent stewards of the River and Basin, that we have shown the foresight to anticipate and prevent the disaster of unsustainability. If my two proposals seem daring to my fellow Westerners, let me assure you they are seen as entirely sensible by my fellow Easterners. And as Katrina and 9/11 have proven in this short century, just as the 1928, 1956, and 1968 Project Acts proved in the past one, "in us there is no east or west, in us no north or south"; we have needed each other in the past, and without question like it or not will again.

Let me conclude by describing a revelation this summer, en route to my family's annual retreat in the Adirondack Mountains, visiting my wife's cousins in Binghamton, NY. Two of their sons had recently moved back from Phoenix, where they had lived for five exciting years while learning the building trades. What brought them East was their realization that what attracted them to the West – the open spaces, the landscapes, the dramatic meetings of land and water, the sanctuaries of "quiet seclusion and clean air ... where yards are wide, people few" -- had become more attainable, physically and economically, in upstate New York. Purchasing a landmark commercial building downtown for less than \$100,000, they are using their skills learned here to create loft apartments in a reviving city there. Their choice may not have been our choice, but let us praise the foresight and courage it represents; they are this century's pioneers. And like the pioneers two centuries back, their migration will produce benefits East and West.

So as a Nation let us invest in a strategy that preserves to each Basin state the power to respond to shortage and the power to respond to surplus; the ability to well inform its own citizenry and that of the Nation and the world of its water capabilities and limitations, enabling in the end intelligent choices by each individual and family; and ultimately each state's power to define consciously its own urban and rural communities. Let us fulfill the aspiration with which Justice Greg Hobbs concluded his remarks from this podium one year ago: "always the River at the heart of all possibility ... one body, one spirit, many futures."