

The All-American Canal Lining Dispute: An American Resolution over Mexican Groundwater Rights?

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ABSTRACT

Recently, resistance to the All-American Canal Lining Project came from both sides of the border as a coalition of economic and environmental groups which used the United States legal system in an attempt to block the loss of water upon which a fragile ecosystem and Mexican farmers depend. Ultimately, the Lining Project was given official sanction by the US Congress following only superficial consultation with Mexico. This article examines and contrasts the legal framework within which the decision was made with popular understandings and explanations of the process as held by the Mexicali Valley's water managers. With important implications for future compensation claims and cross-border dispute resolution, it concludes that the decision to litigate in US courts did not formally include a key group, the agricultural water users of the Mexicali Valley. Nevertheless, the decision about the management of what had been understood by many, on both sides of the border, as a binational resource was made by the United States.

Keywords: 1. Transboundary water conflicts, 2. All-American Canal Lining Project, 3. litigation process, 4. agricultural water users, 5. Mexicali Valley.

RESUMEN

La oposición por parte de grupos del sector económico y ambiental de ambos lados de la frontera al proyecto estadounidense de revestimiento del Canal Todo Americano se hace manifiesta a través del uso del sistema legal de Estados Unidos en el intento de bloquear el proyecto que afecta el entorno natural y a los usuarios agrícolas en el lado mexicano. Finalmente, el proyecto fue aprobado por el Congreso estadounidense después de una consulta superficial con México. Este artículo examina y contrasta el marco legal en el cual la decisión fue tomada y también analiza el entendimiento y la explicación social del proceso desde la perspectiva de cuerpos gerenciales de los usuarios agrícolas del Valle de Mexicali. Con importantes implicaciones para futuros reclamos de compensación y resolución de conflictos transfronterizos, este trabajo concluye que la decisión de litigar en cortes estadounidenses no incluyó formalmente a un grupo clave de usuarios, los agricultores del Valle de Mexicali. Sin embargo, la decisión sobre lo que se entiende como manejo binacional de recursos hídricos, fue hecha sólo por Estados Unidos.

Palabras clave: 1. Conflictos por aguas transfronterizas, 2. proyecto de revestimiento del Canal Todo Americano, 3. proceso de litigio, 4. usuarios agrícolas del agua, 5. Valle de Mexicali.

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INTRODUCTION¹

Binational water resources management requires both fair negotiation and effective cooperation processes to resolve problems between the countries involved. The International Boundary and Water Commission (IBWC) was created in 1944 to structure and manage binational conflicts of water between the United States and Mexico. Although groundwater was not explicitly included in the scope of the *1944 Treaty*,² a subsequent agreement in 1973 committed the United States and Mexico to consultation processes prior to any actions affecting groundwater.³ For over 60 years, water seeping from the All-American Canal (AAC)⁴ has been feeding the surrounding environment, giving place to the formation of several wetland and terrestrial areas that now offer ecological significance. Also, water seepage is pumped from the aquifer by the farmers of the Mexicali Valley and used to irrigate crops mostly sold to buyers in the United States.

In 1983, however, the United States unilaterally announced ownership of the seepage water and in 1988 the United States Congress authorized the Department of the Interior to select a plan to recover the water for use by the Metropolitan Water District (MWD) of Southern California. The ensuing controversy was described by a *Los Angeles Times*⁵ reporter as a “potential water war between the United States and Mexico” (Kraul and Perry, 2002). This article examines the legal challenge brought against the All-American Canal lining project by a coalition of Mexican and American organizations, its resolution, and how the decision was understood in Mexicali by the water managers interviewed. It is hoped that lessons learned might be applied to better advance towards getting equitable water management along the border and specifically in the Mexicali-Imperial region.

¹The authors thank the anonymous reviewers as well as Dr. Stephen Mumme for their valuable suggestions to improving this material.

²Art. 10: “Mexico shall acquire no right beyond that provided by the use of the waters of the Colorado River system, for any purpose whatsoever, in excess of the 1 500 000 acre-feet granted annually”.

³Resolution number 6, Minute 242 of the *International Water Treaty* between the United States and Mexico.

⁴The All-American Canal begins its operation in 1942 as an independent hydraulic system from the prior Mexican-American canal named “El Alamo”. Since then this major canal delivers water to irrigate the Imperial Irrigation District. Ten years later, in 1952, the Mexican side built and put in operation the All-Mexican Canal known as Canal Reforma.

THE ALL-AMERICAN CANAL: HISTORICAL CONTEXT

Interest in using the Colorado River water to irrigate what is now the Imperial Valley of California dates back to the second phase of American expansionism, during the latter half of the nineteenth century. Under the supervision of enterprising pioneer Charles Rockwood, plans to build a diversion canal entirely within Mexican territory came to fruition at the turn of the century. As Cortez and García-Acevedo (2000) suggest, water was at the time perceived predominantly as a product, allowing binational distribution efforts to develop alongside the complementary notion of a permeable border. In this context, construction and management within Mexico presented a cost-effective alternative to building a canal in the United States. As a result, on May 14, 1901, the Colorado River was diverted into the new Alamo Canal, and water began flowing into the Imperial Valley on June 21, 1901 (Medina, 2006). Three years later, over 75 000 acres were being irrigated by 700 miles of canal, which were operated by nearly 8 000 regional settlers (BOR, 2008).

However, a combination of factors ultimately operated to shift the United States favor away from the use of the Alamo Canal and towards the construction of an internal canal as a wholly US hydraulic system. A series of floods from 1905-1907 devastated agricultural lands in the region, and exacerbated already existing financial and legal challenges faced by the canal's operating company. These floods also caused considerable alarm in the United States and, according to Cortez and García-Acevedo, marked a shift in thinking from water as product to water as crucial to national security. Whereas the canal's route through Mexico was not previously regarded as cause for concern, residents and policymakers in the United States began to perceive its location as a security risk that threatened United States control over Colorado River water (Cortez and García-Acevedo, 2000).

Hence, following the end of the First World War in 1918, Congress began focusing its attention on ways of regulating and apportioning the Colorado River flows for using water within the US portion of the natural basin. As concern grew among the Upper Basin states (Colorado, Utah, New Mexico, and Wyoming) that those of the Lower Basin (Arizona, Nevada, and California) would start to claim appropriation rights, the Colorado River Compact of 1922 was negotiated. This agreement apportioned 7.5 million acre feet per year to the Lower Basin states, and the *Boulder Canyon Project Act* of 1928 apportioned that allotment among the states of the Lower Basin. This growing body of regulations governing the waters of the Colorado River came to be known as the "Law of the River" .

Finally, concerns over territorial control of the canal were exacerbated by recognition that growing agricultural production in the Mexicali Valley would inevitably increase regional water demand (Medina, 2006). In particular, a 1904 concession granted by Mexico that allowed the operators of the Alamo Canal to deliver water as a public service utility also reserved for Mexico rights to half the water flowing through Mexicali. Residents of the Imperial Valley, which depended upon the imported water for urban as well as agricultural use, recognized that this water lost to Mexico could be regained if it flowed through the United States territory (Medina, 2006). It is in this context that plans for a diversion canal entirely within the United States territory were developed. Initially, resistance to the project came from a variety of sources.⁵ It is discernible that although water demand at those times was not a critical problem; nevertheless, the prospects for the regional economic development and population growth on the United States side of the border, particularly the coastal cities of southern California, made the water a valuable and contested resource. Ultimately, the canal was approved in order to deliver the Lower Basin water allocations as part of the *Boulder Canyon Project Act* of 1928. Thus, the All-American Canal officially began functioning in 1940 (BOR, 2008) and in 1942 it became the sole water source for Imperial Valley residents and farmlands (Superior Court of Imperial County, 2008).

In light of these changes, a water treaty was negotiated and signed by the United States and Mexico in 1944.⁶ With one significant addendum in 1973, the arrangements established by the *1944 Treaty* remain the governing framework for Colorado River Management between the United States and Mexico to this day. Under the treaty, the United States delivers 1.5 million acre feet of water per year to Mexico via designated diversion points on the border.⁷ Relevant to the current dispute, Article 10 of the treaty then states that “Mexico shall acquire no right beyond that provided by this subparagraph by the use of the waters of the Colorado River system, for any purpose whatsoever, in excess of the 1 500 000 acre feet” granted annually.

⁵Arizona legislators strongly opposed the plan, perhaps fearing the consequences should California’s water demands go unchecked. Opposition also came from Harry Chandler, owner of the *LA Times*, who had extensive business interests in agricultural lands in Mexicali (Medina, 2006).

⁶Treaty Between the United States of America & Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, 59 Stat. 1219, T.S. No. 994 (Nov. 8, 1945) [Hereinafter *1944 Treaty*].

⁷The United States is also required to deliver an additional 200 000 acre-feet in any year in which there is a surplus of water over and above what is needed to satisfy other obligations.

The *1944 Treaty* also established the International Boundary and Water Commission (IBWC) as a bilateral institution with the authority to resolve disputes under the Treaty. In 1973, the IBWC issued an official Minute which acknowledged that the issue of groundwater between the United States and Mexico was not governed by any existing agreement.⁸ Minute 242 also committed both countries to consult one another “prior to undertaking any new development of either the surface or the groundwater resources.”

This, then, was the state of the law surrounding cross-border Colorado River management when the United States government formally notified Mexico in 1983 that water seeping underground and across the border from the AAC is surface water apportioned to the United States by the *1944 Treaty*. Following this unilateral announcement of ownership over the seepage water, Congress passed a bill in 1988 which authorized the Secretary of the Interior to select one of three options for its recovery.⁹ After several environmental studies, a plan to construct a parallel lined canal for the portion in question was selected and received approval from the BOR in 1994.¹⁰

GROUNDWATER AND THE ALL-AMERICAN CANAL LINING PROJECT

Today, the All-American Canal delivers 2.59 million acre feet of water to the Imperial and Coachella Valleys per year (Herrera, *et al.*, 2006). En route, it passes through an area of sandy soils near the United States-Mexico border west of Yuma, Arizona in which its earthen and porous design allows for considerable seepage. Because the hydraulic gradient along this stretch is oriented towards Mexico, this seepage elevates the watertable between 40-80 feet and feeds the Colorado River aquifer in the Mexican side with an estimated 65 000 acre-feet volume of water per year (Herrera, *et al.*, 2006).¹¹ Initially, this seepage caused widespread flooding

⁸Agreement Confirming Minute No. 242 of the International Boundary and Water Commission, United States and México, 24 UST 1968 (Aug. 30, 1973). Under the *1944 Treaty*, the IBWC decisions are recorded in the form of minutes which, when approved, are binding instruments of international law. This is the only border institution that can actually enter into international agreements that bind their governments under international law (Brandt, 2005).

⁹*San Luis Rey Indian Water Rights Settlement Act*, Pub. L. No. 100-675, 102 Stat. 4000, § 203.

¹⁰BOR, Record of Decision (ROD), July 29, 1994.

¹¹García, López, and Navarro (2006) state that 81 000 acre-feet per year (a-f/y) seeps into the aquifer from the AAC but about 16 216 a-f/y is intercepted by the surface major drains named La Mesa and Culiacán. Comparing this data with that offered by Herrera, *et al.* (2006), it appears most likely that this figure is actually the amount of water that seeps into the aquifer from the AAC. Herrera, *et al.* (2006) estimate that the AAC seepage feeding the Mexicali's aquifer is around 65 000 a-f/y.

in the surroundings to the All-American Canal, particularly in the northern Mexicali Valley area.¹² In response, residents and businesses spent significant resources to build an infrastructure of draining (such as La Mesa and Culiacán drains) and pumping facilities and conveyance equipment in order to harness the water for drinking and irrigation. As a result, much of the region's productive activity is now dependent on this seepage as a major source of water for the area.

In addition to the 1.5 million acre feet of surface water provided to Mexico annually under the *1944 Treaty*, the Colorado River aquifer is the second primary source of water in the Mexicali Valley. The area which will be affected by groundwater loss as a result of United States recovery efforts includes nearly 3 000 acres of prime agricultural land in the northwest corner of the Mexicali Valley. In this area, the main source of irrigation water is the local aquifer, and the seepage from the AAC constitutes an important contribution in quality and quantity to the recharge of the Mexicali Valley's aquifer (García, López, and Navarro, 2006).¹³ The water which seeps from the AAC is "some of the highest quality water in the valley's northeast" (Herrera, *et al.*, 2006:60). As such, it helps dilute the otherwise salty water in the aquifer.

Accordingly, García, López, and Navarro (2006) postulate that the two most significant effects that the lining project will have on the region are a fourteen percent reduction in the total recharge to the Mexicali Valley aquifer and a noticeable increase in the concentration of dissolved salts. This latter change will affect crops that are intolerant of salt (such as green onions, alfalfa, asparagus, vine, fruit and summer vegetables), and consequently result in a loss of productivity. Thus, in order to maintain production, growers will have to use more expensive technologies and/or greater volumes of water, resulting in income reductions per surface unit (García, López, and Navarro, 2006). The authors conclude that the immediate and medium-term increase of soluble salts in the aquifer water "will result in a loss of nine percent of the area's production and an increase of 13 percent in energy costs, which in turn constitute 25 percent of the operational and maintenance costs of the hydro-agricultural infrastructure of the Mexicali Valley's Irrigation District 014" (p. 96).

¹²The Mexican Secretaría de Recursos Hidráulicos perform annual studies to evaluate watertable variations near the All-American Canal. In its study for the year 1965, it detected a new route for transboundary groundwater flows with a dominant north-south direction (formerly east-west, prior to the All-American Canal construction) and also noticed a persistent "water springs" phenomenon and the consequent flooding over agricultural areas of the north side of the Mexicali Valley (Román, 1991:106).

¹³The aquifer has a total recharge of 567 500 a-f/y, of which about 65 000 a-f/y comes from the AAC seepage. See García, López, and Navarro (2006); and Herrera, *et al.* (2006) supra note 10.

As required by federal law, potential environmental effects were taken into consideration when selecting the parallel lined canal option in 1994. However, while noting that the AAC project would result in a lowered watertable that would impact groundwater in Mexico, no further consideration was given to the potential impacts that the project would have on the environment or livelihoods in Mexico. Since then, two important developments suggest that the environmental impacts of the project in Mexico will be particularly profound. The first of these is the discovery of the Andrade Mesa wetlands in 2002. Using the same habitat classification system as used in the United States, this wetlands area covers over 8 000 acres, and is populated by numerous bird species and mesquite, among other things. While the exact nature of the relationship between the AAC and the Andrade wetlands is unknown, anecdotal evidence suggests that seepage water from the canal is a main source of its water (Zamora, Culp, and Hinojosa, 2006). This discovery has led many, including the plaintiffs in the case to be discussed below, to argue that a Supplemental Environmental Impact Statement (SEIS) should be researched and issued before continuing with the AAC Lining Project.

A related development is the discovery of a number of protected bird species in the wetlands. Of the 101 species of resident and migratory birds discovered so far, all are endangered and have federal protection status in the United States, 10 are protected in the state of California, and six are protected by Mexican law (Zamora, Culp, and Hinojosa, 2006). Of particular note is the presence of the Yuma Clapper Rail, which is endemic to the region and is classified as endangered in the United States and threatened in Mexico. The Black Rail considered endangered by Mexico and California and being considered for endangered listing in the United States, has also been documented in the wetlands. These latter two species raise particular concerns with regard to the AAC Lining Project because, according to Zamora, Culp, and Hinojosa (2006), concordant damage to the wetlands will “eliminate the second largest population of both subspecies in Mexico”. Thus, the AAC Lining Project will recover seepage water at the expense of Mexican farmers who depend upon an irrigation system that was constructed in response to an influx in groundwater as a result of the original canal. It will also have an as yet undefined impact on new and vibrant wetlands habitat about which information is only beginning to be gathered.

BINATIONAL NEGOTIATIONS

Following the decision to pursue construction of a parallel lined canal in order to recover seepage from the AAC, and in accordance with Minute 242, the United States engaged in a diplomatic interchange with Mexico regarding the plan. However, while the United States claims to have consulted Mexico extensively, Mexico has represented the process as cursory and insufficient. The exact nature and scope of these consultations is unclear. Yet it is clear that the transboundary impacts were not carefully evaluated by the studies performed by the United States.¹⁴

In addition, insufficient consultation is noted by García-Acevedo, who argues that although the IBWC has historically avoided groundwater issues, it has taken some token actions towards acknowledging the effects that the Lining Project will have on Mexico (2006:144). One suggestion made in May 2000 was that the United States might consider compensating Mexico for its losses. Nevertheless, following a commitment to fund the project by California in 1998, and subsequent confirmation of this plan in 2003, García-Acevedo contends that the IBWC agenda ceased to incorporate references to the repercussions expected in Mexico (García-Acevedo, 2006).

In 2005, the Mexican Environmental Secretary Alberto Cárdenas reported that US responses to *communiqués* sent to his counterpart, Secretary of the Interior Gale Norton, were not encouraging (Dibble, 2006).¹⁵ On the other hand, according to Robert Snow, an attorney for the Department of the Interior (DOI), President Bush discussed the Lining Project in early 2005 with former Mexican President Vicente Fox (Totten, 2006a:8; Totten, 2006b:10). It is also reported that Secretary of State Condoleezza Rice discussed it with the Mexican foreign minister (Totten, 2006a:8). While the nature of those discussions was not made public, they reportedly led to a series of multi-agency meetings (De la Parra, 2006:ix). Notably, however, the lawsuit discussed below brought all such dialogue between US and Mexican federal agencies to a halt, as the Department of Justice (DOJ) became the lead agency on all AAC-related discussions and only DOJ lawyers were authorized by the United States to speak on the matter (De la Parra, 2006:ix-xi).

¹⁴To illustrate this point, in 1986, the United States government “informed” the Mexican government about its plan to line the AAC in order to recover the seepage water and transfer it to coastal cities in southern California despite arguments made by the Mexican government through the Comisión Internacional de Límites y Aguas (CILA). The United States continued with the process and in 1988 authorized the funds to build a new lined canal parallel to the one that is currently in operation (Sánchez, 2006:xxi).

¹⁵See also De la Parra (2006:ix).

*THE NINTH CIRCUIT*¹⁶

In 2005, however, these local concerns were taken to a United States federal district court in the Ninth Circuit by a coalition of groups representing community and environmental interests on both sides of the border. The effort was spearheaded by the Consejo de Desarrollo Económico de Mexicali (CDEM), an urban-based civic and economic development corporation. Important co-plaintiffs in the suit included Citizens United for Resources and the Environment (CURE), a California based non-profit that focuses on sustainable development and resource management, and Desert Citizens Against Pollution, a community-based non-profit concerned with air quality and environmental justice. Remarkably, even the US town of Calexico intervened in the suit, joining a claim based on air quality concerns raised by the Lining Project. Seeking to enjoin the project as a violation of property rights and environmental interests, the case thus represented a truly international effort to access the US court system on behalf of cross-border economic and environmental interest groups.

The coalition of plaintiffs in this case brought about a total of eight claims against the Department of the Interior, the BOR, and relevant regional and local entities. Initially dismissed by the federal district court for a variety of technical deficiencies, new hope for their claims emerged when the Ninth Circuit enjoined the project from proceeding pending an appeal in 2006. Ultimately, however, the Court of Appeals found broader substantive grounds upon which to dismiss all eight claims, effectively foreclosing further legal challenges and insulating the Lining Project from judicial review.

Environmental Statutes

Counts 5-8 of the federal case were based upon environmental statutes. Because they were dealt with the most summarily and represented less immediate concerns to the water managers interviewed, they are addressed first. Count 5, which alleged

¹⁶The US Courts of Appeals are organized into 13 circuits. District courts are federal trial courts of first resort. When district court decisions are appealed, the appeal is heard by the Court of Appeals for the circuit in which the district is located. The Ninth Circuit Court of Appeals hears appeals from the district courts located in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

violations of the *National Environmental Policy Act* (NEPA), was brought by all of the plaintiffs. They argued that the Secretary of the Interior and the Commissioner of the BOR violated NEPA by failing to prepare a Supplementary Environmental Impact Statement (SEIS) despite significant new circumstances relevant to the proposed project. To this end, the plaintiffs pointed to five new, post-1994 circumstances that warranted a SEIS: the discovery of the Andrade Mesa Wetlands and its importance as an habitat for the endangered Yuma Clapper Rail; the anticipated transborder socio-economic impacts from the water loss, which they argued were exacerbated since the 1994 Final Environmental Impact Statement (FEIS) by demographic changes and the passage of NAFTA; new reports suggesting possible unexplored impacts on the Salton Sea; alterations in the project plan with regard to human safety mechanisms designed to prevent drowning; and changes in the air quality condition of the affected region (US *versus* Calexico, 438 F. Supp. 2d 1194).¹⁷

In a detailed opinion, the district court granted summary judgment for the defendants on two broad grounds. With regards to those circumstances cited as having an adverse impact on Mexico, the court found that a new SEIS was not required because those impacts would occur outside of the United States territory, in a sovereign nation over which Congress lacks legislative control.¹⁸ Essentially, the Court ruled that NEPA only governs those aspects of agency action that are contained within the territorial United States. With regard to the transboundary effects highlighted by the plaintiffs, such as reduced water flows to the Salton Sea, impacts on the Yuma Clapper Rail population in the United States, reduced trade and increased illegal immigration due to deteriorating socio-economic conditions, the Court concluded that any such transboundary impacts were too speculative to support causation. Finally, with regard to those purely internal impacts, such as direct brunt on the Salton Sea, public safety concerns regarding drowning precautions, and air quality concerns, the Court found in each instance that the BOR had taken rational evaluative action that compelled judicial deference.

¹⁷It was with respect to this latter circumstance that the City of Calexico was permitted to join as a plaintiff on this count.

¹⁸The Court concluded that because Congress lacked legislative authority, the environmental statutes could not have included Mexican territory in their mandates. The court also noted that seepage loss would not result in any significant impacts in the United States that could be directly traceable to BOR action. In addition, it pointed to the fact that, when looking at its options, the BOR had considered that the project would have effects in Mexico. The court seems to find this an indicator that the BOR had acted in good faith when selecting the lined canal option.

Count 6, brought by CURE and CDEM, argued that the discovery of the Andrade Mesa Wetlands was new information which required the federal agencies to re-initiate formal consultations with the Fish and Wildlife Service (FWS) under the *Endangered Species Act* (ESA). This was based on the argument that the project will result in the loss of critical habitat for the Yuma Clapper Rail and Peirson's Milk Vetch. The Court, however, dismissed CDEM's claim in this regard for lack of standing¹⁹ because the environmental interests asserted were not found to be germane to its stated organizational purpose of promoting the economic interests of Mexicali residents. This left the claim open as asserted by CURE. In an opinion issued several days later, however, the Court determined that the ESA, like NEPA, does not extend in application outside of the territorial US. With regard to the Peirson's Milk Vetch, the Court pointed to formal consultations that had occurred between the BOR and FWS in which the FWS concluded that the project will not jeopardize the plant. As such, no genuine issue was pleaded by CURE that implicated the duty to reinitiate consultations.

Counts 7-8 as brought by CDEM were also dismissed for lack of standing. CURE was able to proceed as a plaintiff on this claim, however. Count 7 alleged an unlawful taking of a migratory bird in violation of the *Migratory Bird Treaty Act* (MBTA), and violations of environmental requirements that were part of *San Luis Rey Indian Settlement Act*²⁰ were asserted in Count 8. Notably, all parties were in agreement that a six year statute of limitations applied to these claims under 28 *United States Code* (USC) § 2401(a). They disagreed, however, as to when the statute began to run. Ultimately, the court agreed with the defendants that time had begun accruing as of the 1994 Record of Decision (ROD) and accompanying Final Environmental Impact Statement (FEIS) issued by the BOR, because at that point the plaintiffs knew or had reason to know that the construction and lining of the new canal could effect an unlawful take of a listed migratory bird. As such, these counts were dismissed as untimely.

As noted above, however, an injunction was granted in the summer of 2006 and all of these claims went up on appeal. Initial oral arguments on the appeal were heard in early December 2006. Then, on December 8, 2006, Congress passed the *Tax Relief and Health Care Act* of 2006, an omnibus bill that received little

¹⁹"Standing" is a legal term that refers to the right of a party to bring a legal claim or seek judicial enforcement of a right or claim. In order "to have standing in federal court, a plaintiff must show 1) that the challenged conduct has caused the plaintiff actual injury, and 2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question" (Garner, 2004).

²⁰*San Luis Rey Indian Water Rights Settlement Act*, Pub.L. No. 100-675, 102 Stat. 4000, § 203.

opposition in either the House or Senate.²¹ It is at this point that the decision-making process was effectively removed from the courthouse and usurped by interested parties. Subtitle J of this bill consisted of provisions related to AAC projects. With important consequences for the Ninth Circuit appeal that was then pending, section 395 directs the Secretary of the Interior to implement the Lining Project without delay, and “notwithstanding any other provision of law”.²² This section also requires that any review or study of the implications of the Lining Project not delay the project.²³ Moreover, section 397 conclusively states that the *1944 Treaty* is the exclusive authority governing impacts occurring outside the United States of work relating to the Colorado, Tijuana, and Rio Grande Rivers conducted inside the United States.²⁴ According to San Diego County Water Authority (SDCWA) attorney Daniel Hentschke, Senators Dianne Feinstein from California, Harry Reid from Nevada, and John Kyl of Arizona were key players in attaching these riders to the bill (Hendricks, 2007). Most of the water to be saved by the project will go to the SDCWA, and the press has suggested that the SDCWA actively lobbied for inclusion of these provisions.

On the basis of this legislation, the United States filed a motion to vacate the injunction and to remand the case to the district court with instructions that the environmental claims be dismissed as moot. A second oral argument was held to consider the motion, and on April 6, 2007, the Court of Appeals in San Francisco issued its opinion. Because previous Ninth Circuit caselaw has held that Congress may exempt specific projects from the requirements of environmental laws, the

²¹The Bill was approved by the House on December 8, 2006 with a vote of 367-45 and passed the Senate on December 9, 2006 with a vote of 79-9.

²²§ 395 of H. R. 6111 (now Pub. Law. No. 109-432) reads: *a*) [...] Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All-American Canal Lining Project identified: *1*) as the preferred alternative in the record of decision for that project, dated July 29 1994; and *2*) in the allocation agreement allocating water from the All-American Canal Lining Project, entered into as of October 10, 2003.

²³*b*) [...] *(1)* [...] Subject to Paragraph; *(2)*, if a State conducts a review or study of the implications of the All-American Canal Lining Project as carried out under subsection *(a)*, upon request from the governor of the State, the Commissioner of Reclamation shall cooperate with the State, to the extent practicable, in carrying out the review or study. *(2)* Restriction of Delay. A review or study conducted by a State under paragraph *(1)* shall not delay the carrying out by the Secretary of the All-American Canal Lining Project.

²⁴§ 397 reads: The Treaty between the United States of America and Mexico relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, and supplementary protocol signed November 14, 1944, signed at Washington February 3, 1944 (59 Stat. 1219) is the exclusive authority for identifying, considering, analyzing, or addressing impacts occurring outside the boundary of the United States of works constructed, acquired, or used within the territorial limits of the United States.

three judge panel engaged in a process of statutory interpretation to determine whether or not Congress had intended that result. Noting that the phrase “notwithstanding any other provision of law” is not by itself necessarily enough to exempt a project from statutory regulations, the Court nonetheless found that this language, in combination with language directing the Lining Project to proceed “without delay” upon the enactment of the bill, indicated an intention on the part of Congress to exempt the project from environmental statutes that would delay its implementation. As such, it concluded that “proceeding along the usual course of resolving environmental disputes would be inconsistent” with the will of Congress that the BOR proceed “without delay”. According to the Court, “if Congress had intended for the Lining Project to proceed under the usual course of administrative proceedings, it would have been unnecessary for Congress to act at all” and “[t]he environmental challenges would have been resolved in due course”. Thus, because the challenges based on NEPA, the ESA, the MBTA, and the *Settlement Act* brought in Counts 5-8 would delay the Lining Project if relief were granted, the Court determined that the intervening legislation rendered them moot.

The Court was careful to note that this determination did not sanction absolutely lawless behavior in completing the project. To this end, it noted a previous case in which the Court held that the phrase “notwithstanding any other provision of law” did not require the agency in question to disregard all other laws but merely the environmental statutes at issue. Accordingly, the Court emphasized that the “common sense construction” of the 2006 Act referred only to “those laws that would delay the commencement of a project in derogation of express Congressional directive to proceed immediately or, in this case, without delay”. Thus, the Court preserved the requirement that the BOR comply with all other relevant regulations in completing the Project, while construing the 2006 Act as exempting the Lining Project from statutory claims based on NEPA, the ESA and the other environmental statutes in question. In so doing, the Ninth Circuit Court of Appeals essentially held that NEPA rules and the requirements codified in other environmental statutes can be arbitrarily suspended for specific projects.

Property rights

In spite of these implications, interviewees’ standpoints indicate that agricultural water users in the Mexicali Valley are primarily concerned with the effect that the project will have on their own ability to access groundwater in the region. As such,

it is useful to take a close look at the proprietary claims brought by the plaintiffs. Ultimately, a detailed analysis suggests that the decision to pursue these claims in US courts may have done more harm than good.

Brought by CDEM, the first four claims were raised on behalf of a class of beneficial users of the Mexicali Valley's aquifer. These claims were based on the Fifth Amendment and Common Law Property Rights. The first was a Fifth Amendment takings claim, alleging an unconstitutional deprivation of property by the government without due process of law.²⁵ Related to this, the second claim alleged that government officials acted in concert with others to deprive CDEM and the class of their water rights without due process of law. Counts 3 and 4 relied on common law theories of apportionment and estoppel²⁶ to argue that a property interest in the groundwater had developed over decades of its use, and legitimate reliance on it had been established by the same lengthy time period; as such, it would not only violate property rights but also lead to an inequitable result to deny the groundwater flow to Mexican users after 66 years of use. These arguments essentially claim that the rights to use the groundwater drawn from the Mexicali Valley's aquifer predate the Colorado River Compact of 1922 as well as the *1944 Treaty*. Moreover, they rely on the position taken by CDEM and the Mexican section of the IBWC that this water is not part of the *1944 Treaty* (Totten, 2006a:8).

The District Court dismissed these four claims in June 2006 because it determined that the plaintiffs lacked standing to bring them. Firstly, CDEM failed to show that any of its members were United States citizens, and its articles of incorporation prohibit membership of foreign persons. As such, none of the claims could be supported by the Fifth Amendment because it does not extend to aliens asserting property rights outside of the United States. Although not mentioned by the court, this resolution left open the possibility that water users affected by the project within United States territory, or United States citizens with affected interests in Mexico, may have had a valid Fifth Amendment takings claim.

²⁵Under US constitutional law, a taking occurs when the government actively or effectively acquires private property by ousting the owner, destroying the property, or severely impairing the utility of the property. When government action "directly interferes with or substantially disturbs the owner's use and enjoyment of the property", there is a taking (Garner, 2004). The Fifth Amendment to the US Constitution requires that fair compensation be paid in the event of a government taking.

²⁶"Apportionment" is a term for the division of rights between two or more persons or entities (Garner, 2004). "Estoppel" as used here refers to "[a]n affirmative defense alleging good-faith reliance on a misleading representation and an injury or detrimental change in position resulting from that reliance" (Garner, 2004).

Also significant in reference to the ongoing development of Colorado River law and approaches to its use was the district court's resolution of arguments raised by the defendant to the effect that the *1944 Treaty* governs groundwater allocation. Although CDEM argued that Minute 242 indicates that groundwater is in fact not governed by the *1944 Treaty*, the Court concluded that because the Treaty allocates Colorado River water 'from any and all sources' and denies Mexico any rights beyond those allocated therein, it effectively governs the defendants' obligations to Mexico regarding the AAC. Accordingly, because only parties to a Treaty may seek enforcement, the individuals in question did not have standing to bring claims based on it.²⁷ In disregarding the substantive questions surrounding groundwater raised by Minute 242, the court effectively licensed the United States to proceed without regard for consequences beyond those related to apportionment obligations outlined in the *1944 Treaty*. This decision essentially denied that Mexican water users have any cognizable interest in the groundwater upon which they have depended for over 60 years.

Upon appeal, in April 2007, a panel of three appellate judges for the Ninth Circuit affirmed the dismissal of counts 1-4. Yet, instead of the grounds cited by the lower court, the Court of Appeals determined that the Federal Court lacked subject matter jurisdiction over each count.²⁸ With regard to the first count, the Court determined that even assuming a cognizable property interest, a takings claim is premature until the plaintiffs have exhausted their rights under the *Tucker Act*. Essentially, the government is not prohibited from taking private property so long as it pays compensation, and claims for compensation are properly adjudicated under the *Tucker Act*. As such, it is not the Federal District Court but the Court of Federal Claims which had subject matter jurisdiction over the claim. Although the court made no mention, these claims have a six year statute of limitation. Because the decision to build a parallel lined canal was adopted and made public in 1994, these claims are therefore most likely barred as untimely at this point. Thus, any potential takings claims that remained open under the district court's ruling have now been effectively foreclosed.

²⁷Counts 1, 2, and 4 were also brought under the APA on the argument that CDEM only had to show that one of its members is an aggrieved person in order to have standing. However, their pleading failed to mention the APA or point to any agency action or administrative record to support the claims and thus did not sufficiently allege jurisdiction.

²⁸Subject-matter jurisdiction is "jurisdiction over the nature of the case and the type of relief sought; the extent to which a court can rule on the conduct of persons or the status of things" (Garner, 2004).

The Court of Appeals also found stronger grounds upon which to dismiss counts 2-4, by determining that the claims themselves were barred by sovereign immunity. Although federal case law provides a remedy for violations of constitutional rights committed by federal officials acting in their individual capacities, the court determined that Count 2 actually sought to enjoin official action and thus amounted to an action against the United States. Therefore, this claim, along with claims 3-4, were barred by sovereign immunity because the United States has not consented to being sued in these areas. Notably, CDEM argued that the *Administrative Procedure Act* (APA) waives sovereign immunity. However, the APA does not by itself impose substantive remedies. Instead, it requires another relevant statute to form the basis for the legal complaint that the government has acted unlawfully. Claims 3-4, however, relied on asserted common law water rights rather than statutory law. Consequently, the exception did not apply. Thus, rather than basing their decision on deficient standing, which would imply that the claims presented might be valid if brought by different plaintiffs or under different circumstances, the Court's application of sovereign immunity doctrine effectively precludes any future equitable apportionment, estoppel, and constitutional tort²⁹ claims brought by any plaintiffs against the DOI or BOR based on their official action with regard to Colorado River water management.

THE VIEWS OF MEXICAN IRRIGATION WATER MANAGERS

Seeking to understand how this legal process was perceived and understood by water users in Mexicali, we posed five questions to the Water Users Associations' managers (belonging to the Irrigation District 014, Colorado River, Baja California and Sonora) in early 2008:

- 1) How did you learn about the legal decision to proceed with the lining of the All-American Canal?
- 2) What is your understanding of how the legal case was resolved?
- 3) Do you believe the legal justifications offered?
- 4) How do you think the case would have been resolved if Congress had not intervened?
- 5) How do you explain the decision to water users?

²⁹A constitutional tort occurs when a state actor violates an individual's constitutional rights. Monetary relief can be sought through civil court action (Garner, 2004).

From these general questions, four noticeable themes emerged from interviews with three of the irrigation district's selected water managers.

¿Quiénes son los del CDEM? No, no se puede decir que son agricultores y tampoco que están afectados directamente como nosotros. Por ejemplo, Víctor Hermosillo, cabeza de la comisión del agua del CDEM no es ni agricultor, ni pobre, él es un empresario exitoso de la ciudad (Int_1, March 15, 2008).

The first emergent theme is that CDEM is not representative of agricultural water users and information was not regularly disseminated to them about the case. While one manager noted that representatives of CDEM had traveled to his irrigation module³⁰ to solicit contributions for legal funds, all three managers asserted that CDEM did not maintain regular contact or disseminate any information about the progress of the case. Any information that area users possessed about the progress of the Lining Project or the litigation surrounding it came from intermittent coverage in Mexicali newspapers, radio, and television news. Moreover, the litigation process was generally perceived as obscure. In addition, all three interviews suggest that water managers and users did not become involved due to lack of financial resources for actions of this kind as well as internal conflicts over approach.

Así que si no hubiera intervenido el Congreso de Estados Unidos y si nosotros nos hubiéramos involucrado más, seguramente también hubiéramos logrado una negociación o un plan conjunto de inversiones donde hubiera dinero del NADBank, por ejemplo (Int_2, March 17, 2008).

Another emergent theme is that a generalized acceptance exists among water managers that legal rights to the seepage water belong to the United States. Nevertheless, prior to the final court decision there was optimism that an equitable result was possible. Clearly more binational research and monitoring of changes of the aquifer size and quality need to be done and shared with the water users on both sides of the border.

³⁰An irrigation module represents an irrigated area delimited by hydraulic characteristics of irrigation and drainage canals systems and infrastructure operational organization. There are twenty three irrigation modules formed within the Irrigation District 014 whose extension varies from 5 000 to 15 000 hectares each.

[...] siempre había conflictos entre nosotros mismos: los gerentes de módulos de riego afectados [...] con los gerentes de la sociedad del distrito de riego. Unos (los segundos) pidiendo buscar maneras de lograr fondos para aumentar la eficiencia del riego en el valle y los otros (los primeros) pidiendo que interviniéramos más directamente en defender el agua para no perderla [...] (Int_3, March 19, 2008).

All three of the managers interviewed stressed their belief that the irrigation district should organize to solicit investment for infrastructure and efficiency improvements, and seek compensation from the United States for lost groundwater. They indicated that this approach has not been more broadly accepted by all water users, however, because many agricultural water users remain focused on their primary goal to protect and defend access to the local aquifer water that they have relied on for more than six decades. As such, internal conflicts have stymied attempts to work active and collectively towards either goal.

Expectations

Regarding the final decision to proceed with the All-American Canal Lining Project, irrigation water managers indicated that this result had been expected. In addition to recognizing Mexico's weak negotiating position, the interviewees revealed a general perception of the litigation as having been a contest between federal governments, with the United States having the legal rights as well as the resources to defend those rights. These negative expectations were reinforced by the fact that the canal and the original river water are located entirely within US territory, and legal rights to the water are believed to be allocated to the United States under the *1944 Treaty*. Nevertheless, the continuing hope was expressed that the United States will provide some compensation given the degree of dependence that Mexican farmers have on the water, and the fact that water problems, ultimately, affect both countries.

CONCLUSIONS. IMPLICATIONS FOR BORDER WATER DISPUTES

Synthesizing the findings of both these interviews and the analysis of the legal case brought in US federal courts, it appears that the use of internal litigation to advance water sharing in the case of the All-American Canal has potentially

impaired future prospects for constructive solutions and dialogue regarding compensation in two important ways.

First, the legal action has removed the IBWC from the process and fostered confrontation in place of consultation. As noted, initiation of the case effectively ended institutional dialogue about the Lining Project because from that point on only DOJ lawyers were authorized to speak on the matter. Moreover, it has also removed water management discussions from the local-regional to the national, federal institutional level. Although the US section of the IBWC is a federal institution, it is unique in that it is headquartered in El Paso, Texas, and is empowered to reach agreements with its Mexican counterpart, CILA, without coordination with national agencies in Washington, DC. As a result, pursuing resolution of the All-American Canal lining issue in Federal Court not only halted contemporaneous IBWC dialogue, but also effectively removed the issue from the scope of its institutional mandate.

Second, the litigation strategy pursued in this case did not effectively incorporate Mexican agricultural water users that were increasingly dependent on the groundwater after more than 60 years of use. The CDEM was not effectively in touch with agricultural water users, and internal conflicts and lack of resources amongst the irrigation modules in the Mexicali Valley prevented their successful participation in the litigation process. Ultimately, the course of civil action pursued within US courts resulted in a ruling that forecloses official compensation claims against the United States government. As such, it may in turn be used as an argument by US institutions in the future to rebut arguments for compensation. Thus, despite its promise as an international effort to access the United States court system on behalf of cross-border interests, litigation over the All-American Canal Lining Project not only failed to achieve positive results for Mexicali water uses, but also established additional structural barriers to future dialogue and cooperation.

Other Options

In finding that environmental statutes do not pose legitimate obstacles to a federal project with cross-border effects, the Ninth Circuit reinforced previous caselaw rejecting the extraterritorial extension of the *Endangered Species Act*.³¹ These deve-

³¹Defenders of Wildlife *versus* Norton, 257 F. Supp.

lopments have led political scientist Stephen Mumme to suggest that “domestic (such as US courts) venues are simply not hospitable venues for harm rectification where border water is concerned” (2008). Reflecting this conclusion, Mumme points out that on the US-Mexico border very little litigation has been filed on the basis of environmental concerns with federally sponsored developments in either country. An alternative to pursuing mutually beneficial remedies for cross-border water issues is to take such disputes to international venues such as the International Court of Justice (ICJ).

To date, however, water cases brought before the ICJ have focused primarily on maritime disputes over national boundaries and other issues of sovereignty. As such, no clear precedent for resolving border water disputes exists. The only pertinent case that the ICJ has decided concerning international waters was the Gab-Cikovo-Nagymaros Project case in which the ICJ determined that a treaty between Hungary and Slovakia to build a dam remained valid and binding.³² The ICJ does not have an enforcement mechanism, however, and the dispute between Hungary and Slovakia remains unresolved over a decade later. In addition, although the United Nations (UN) Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted by the UN General Assembly in 1997, it has not yet been ratified.³³ Thus, while it codifies equitable water use principles that are increasingly being invoked at the international level, the treaty itself does not constitute a binding international document. Instead, the principles contained therein are at best guidelines that are slowly contributing to the development of recognized international norms. Finally, Neir and Campana have noted that “engaging in a sharpened level of international dispute resolution may not always be in a country’s best interests” (2007:43). This conclusion is based on Mumme and Lybecker’s observations that a litigated outcome is unlikely to promote cooperation or achieve a sustainable water resources management (2006:186).

Accordingly, it is impossible to determine whether Mexican water users would have fared better in this case had their claims been advanced in an international forum. Most likely, the pursuit of water claims in an international venue would shut down cross-border institutional dialogue in much the same way as litigation

³²GabCikovo-Nagymaros Project (Hungary-Slovakia) (1997).

³³United Nations Convention on the Law of the Non-Navigational Use of Watercourses. Adopted by the General Assembly of the United Nations on May 21, 1997. Not yet in force. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

within the United States. The resolution of the All-American Canal Lining Project case, however, indicates that the United States will continue to act unilaterally to protect internal access to water where the claims advanced are based on equitable treatment rather than solid treaty law. As a result, it may be necessary to litigate these claims more forcefully in an international venue.

In the criminal context, Mexico has used the ICJ to challenge the United States action involving Mexican nationals condemned to death row without access to consular officials.³⁴ Notably, in 2004, the Court ruled that numerous convictions of Mexican citizens around the United States had violated the 1963 Vienna Convention, which allows for access to the consular officials of a convict's home country. However, although President George W. Bush accepted the decision of the ICJ and ordered the states to review the cases in question, the state of Texas has so far refused. This example highlights the major weakness of international forums; moreover, incorporation of international jurisprudence is often resisted and enforcement is difficult. Yet, despite the fact that international venues are weak when it comes to enforcement, "the domestic path is also weak if recent cases are indicative" (Mumme, 2008). In the end, a judgment upholding any of Mexico's water claims would increase international attention and give Mexico greater leverage in its relationship with the United States over border management decisions. Given the significance that these decisions have for lives and livelihoods in the border region, it may be worth it for Mexico to take a more oppositional stance and assert its right to equitable treatment at the international level.

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³⁴See *Avena and other Mexican Nationals (Mexico versus United States)* (2003). See also Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and other Mexican Nationals (Mexico versus United States)*, 2008.

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