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Malissa Hathaway McKeith

David H. Getches

Jaime Palafox

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PANEL DISCUSSION ON THE FUTURE OF THE COLORADO RIVER DELTA

MODERATOR: MALISSA HATHAWAY MCKEITH, ESQ.*

PANELISTS: DAVID GETCHES, ESQ.; LIC. JAIME PALAFOX

DAVID GETCHES: I will pose some questions for everyone here to ponder.

The Colorado River Delta problem may not be solvable by the present cast of characters acting alone. There is no table set for solution.

The problem has been brought to light not by governments, but by non-governmental organizations and scientists. Non-governmental organizations in the United States, like Environmental Defense,¹ Defenders of Wildlife,² and Southwest Rivers,³ along with Mexican environmental groups, and scientists who have worked in the Delta have all helped bring the issue forward.

What is the position of the United States? The United States listens to what the seven Colorado River basin states want. The basin states are in denial about the need to address water supply issues for the Colorado Delta. Mexico, on the other hand, depends on U.S. economy and chooses its battles carefully. Consequently, it seems that other border issues are eclipsing the Colorado Delta water issue.

Given these realities, my questions for everybody here are: Is the Delta issue really solvable at this time? How do you get people engaged? Or is this a lost cause?

JESSE BOYD:⁴ Ms. McKeith, I am sorry I made you choke.

MALISSA HATHAWAY MCKEITH: It is okay. I like people I do not agree with better than the ones who agree with me.

BOYD: Honestly, I agree with you, almost 100%. I was born in Las Vegas, New Mexico, and grew up in Cuba, New Mexico. I identify more with the people and the culture of the Rio Grande than I do with the current administration of the United States, much like I am sure the people of the northern Mexico border region relate to this culture more than they do with the culture of Mexico City. When I say watershed management is a solution, I am not referring to a new governmental entity. Rather, I am referring to a way to streamline the process, make policy on a watershed basis, and not try to shove policy into preexisting immovable legal schemes that are almost impossible to change and to make mesh. So if you can get together on a watershed basis, set policy in a democratic way with the people who consider the watershed their home, as opposed to non-governmental organizations

1. Environmental Defense is dedicated to protecting the environmental rights of all people, including future generations. Among these rights are clean air and water, healthy and nourishing food, and a flourishing ecosystem. For more information see <http://www.environmentaldefense.org/home.cfm>.

2. Defenders of Wildlife is dedicated to the protection of all native wild animals and plants in their natural communities. They focus on the accelerating rate of extinction of species and the associated loss of biological diversity, and habitat alteration and destruction. Defenders of Wildlife also advocates new approaches to wildlife conservation that will help keep species from becoming endangered. Their programs encourage protection of entire ecosystems and interconnected habitats while protecting predators that serve as *indicator* species for ecosystem health. For more information see <http://www.defenders.org/>.

3. Southwest Rivers is dedicated to protecting and restoring the river ecosystems of the Colorado River watershed. To meet this mission, we think, strategize, communicate, advocate, and act on a comprehensive watershed level. By refocusing management back on the watershed as the prime unit, we will reveal the wisdom of restoring a single, functioning river system that will ensure a sustainable future for all living creatures in the heart of the West. For more information see <http://www.southwestrivers.org/>.

4. Jesse Boyd is a third year law student at the University of New Mexico in Albuquerque.

or other entities saying, well, this is what you guys should do, then you are getting somewhere.

JAIME PALAFOX: Let me give you an example of how things get done: NAFTA's passage. In 1992 the Mexican government made a huge effort to implement the treaty. It was clear to anyone working in the government that NAFTA was the top priority. But even though this was Mexico's stance, it was not the case in the United States, especially when the administration changed in the middle of negotiations. A new president came in and wanted something more, or at least had different views on environmental issues. This posed a problem to Mexico's government. You have NAFTA and you had an agreement with a former administration that was totally opposed to the new administration's views. Then there were increasing environmental concerns, which stemmed from the first environmental side agreement of NAFTA that had been proposed by Mexico. In addition, the new U.S. administration involved many non-governmental organizations.

So what did Mexico do right? Mexico acted very pragmatically in choosing constituencies who had similar interests, and who shared their views. You should use your constituencies wherever you need more power. And that was what Mexico was doing. For example, Defenders of Wildlife shares Mexico's views on the Colorado River issue, but does not share Mexico's views on the tuna-dolphin trade dispute. Thus, Mexico took what it could use from that situation. The environmental side agreements to NAFTA came into force eight years ago.

When dealing with water issues of the Colorado River and its environmental component, there are constituencies in most U.S. congressional districts that care about environmental issues. These constituencies should be used to move issues forward.

Although I have cited the strategy that was used on a broad agreement such as NAFTA, I recognize that the Colorado River is different. The Colorado Delta is a very small issue. Creating new institutions would engender problems but there are existing institutions that have not used their full potential.

MCKEITH: I agree 100% with the watershed management mentioned by Mr. Boyd. The International Boundary and Water Commission,⁵ Border Environment Cooperation Commission,⁶ North American Development Bank,⁷ and other border entities should have watershed management included in their policies.

I love idealism, but I live in the real world. As much as I hope to see those things accomplished, I am also very aware of the fact that decisions often get made because of convergences of relationships. If I can have a drink with somebody at the Hay

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

6. The Border Environment Cooperation Commission (BECC) identifies, supports, evaluates, and certifies affordable environmental infrastructure projects, as a bi-national team, to improve the quality of life for the people in the U.S.-Mexico border region, now and in the future in an open public process. For more information see <http://www.cocef.org/>.

7. The North American Development Bank (NADB) is an international financial institution established and capitalized in equal parts by the United States and Mexico for the purpose of financing environmental infrastructure projects. All NADB-financed environmental projects must be certified by the Border Environment Cooperation Commission (BECC), be related to potable water supply, wastewater treatment or municipal solid waste management and be located within the border region. For more information see <http://www.nadbank.org/>.

Adams Hotel in Washington, D.C., because I have some access to that person, maybe I will influence a decision in my favor.

It is a shame that public policy in the United States and in Mexico is largely based on access, lobbying, and luck. I would prefer grassroots. I would love people to decide to conserve water simply because they choose not to waste. In my family, we conserved electricity because my mother grew up on a ranch where it was scarce. Today, we recycle everything. It is a pain, but it is how I was raised. Regular human beings could solve these problems without government, and we could have watershed management if we were all a little bit less greedy. But again, I live in the real world and I have to play the game that works.

After twenty years of practicing law, I know that the best way to move the basin states, or the federal government to get people to give Mexico 30,000 acre-feet of water is to convince them it is in their best interest – not out of generosity but because they want the Defenders of Wildlife to go away. Or if I can lease water rights from farmers who are willing to temporarily give up land that is marginal farmland the Comisión Nacional de Aguas⁸ does not want in production, there may be water for the Delta. Thus, I may be able to induce people to contribute water regardless of their motives. I do not want a new governmental agency, but I would like the existing governmental agencies to incorporate the values expressed here.

BOYD: Then we are on the same page.

JOHN WALSH:⁹ My question will reveal that I am not a water lawyer. When I heard Professor Getches giving his presentation, it seemed like there was a much larger problem even than the one you have been struggling with. If, over the past 400 years, the total average flow of the Colorado River is 13.5 million acre-feet, and the United States has allocated 16.5 million acre-feet of water to the basin states and Mexico, does that not mean that at some level, we need to reduce those allocations?

MCKEITH: Go on a big diet? The water diet, I call it. Yes.

GETCHES: The short answer to your question is that we eventually must recognize the physical reality that the Colorado River does not produce enough water annually to meet all the legal commitments. We have legally contrived the allocations among the states in the United States and made promises to Mexico that cannot be met with the water nature provides, even with the benefit of vast storage facilities. In Colorado, where you and I are from, we have not developed all of the water to which we are legally entitled. We have as an officially stated purpose to use every drop of our allocations. In reality it is not there to use during many years! But we refuse to recognize that.

MCKEITH: The last question goes to Bill DeBuys.

BILL DEBUYS:¹⁰ All three of you made the point that sometimes solutions are found when provoked by crisis. The big crises of the past were geopolitical crises like World War II and the oil squeeze in the 70s. Today's crisis on the Rio Bravo and Rio Grande may provoke some kind of trading of water among those with water

8. Comisión Nacional de Aguas's (National Water Commission) mission is to administer and preserve national waters, with the participation of the community to achieve sustainable use of resources. For more information see <http://www.cna.gob.mx/portal/inicial.asp>.

9. John Walsh is an attorney in Hill and Robbins PC in Denver, Colorado.

10. Bill DeBuys is a writer and conservationist in Santa Fe, New Mexico.

entitlements.¹¹ That creates hope for the Colorado Delta. But the smart money probably says that we are on the brink of multi-year sustained drought within the Colorado basin. If we are not already in it, then we may soon be. It is counterintuitive to think that shortage of water within the basin might help free up water for the Delta. But can you imagine some failure of California to make progress on its commitment to reduce the amount of water it is using to its 4.4 million acre-feet annual entitlement from the Colorado River creating the crisis that could open the way to freeing up water or finding water for the Delta?

MCKEITH: Tom Levy represents the Coachella Water District in California,¹² and those who know Mr. Levy know he is probably the smartest guy in the basin states. Mr. Levy says we should give them water in the Delta because he does not want to see the day when the United States wants to extradite some drug dealer from Mexico and trades his water to Mexico to accomplish that. Historically the only time we freed up water for Mexico, whether there was a shortage or not, was when the United States needed something - World War II for example. Then, in 1973 the same thing happened when Kissinger discovered the border and its water problems. In the future, some other national self-interest will force us to do the right thing. That is the shame of it.

But yes, the only reason a shortage could promote more conservation of water is if we decide we are going to put market systems in place. That will also be an incentive to reclaim and reuse water for every new house in California. Perhaps the reality of shortage will make the decision-makers in our community step up and make these things happen. If we stepped up, it would provide political cover for the poor guys who have to get reelected on their local water boards, and that could create change in both countries.

There is enough water, but we really waste so much of it. We must stop wasting, which might happen if all of a sudden California's water commitment plan fell through and people in Los Angeles actually could not water their lawn every day, and their golf courses went brown.

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

12. The mission of the Coachella Valley Water District is to meet the water related needs of the people through dedicated employees providing high quality at reasonable cost. For more information see <http://www.cvwd.org/>.

BIOGRAPHICAL SUMMARIES

Malissa Hathaway McKeith is a partner of Loeb & Loeb, LLP in Los Angeles, California. She practices environmental and land use law including water law, habitat preservation and flood plain management. She previously served on the Governor's Flood Plain Management Task Force and the California Fish and Game Commission. Ms. McKeith received a law degree from the University of San Francisco.

David H. Getches is the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado School of Law. He formerly served as Executive Director of the Colorado Department of Natural Resources. He is on governing boards of The Wilderness Society, Defenders of Wildlife, Grand Canyon Trust, and Rocky Mountain Mineral Law Foundation and on advisory boards for the University of Colorado Natural Resources Law Center, Utton Transboundary Resources Center of the University of New Mexico, American Rivers, and Trust for Public Land. Professor Getches is a graduate of Occidental College and the University of Southern California School of Law. He is a member of the bars of California, Washington, D.C., and Colorado.

Jaime Palafox is a member of Skadden, Arps, Slate, Meagher & Flom, LLP, Washington, D.C. Lic. Palafox works in the Environmental Practice Group on matters related to Latin American transactions. His professional emphasis includes review of environmental impact issues pertaining to the siting of new facilities, including energy-related projects, and environmental due diligence of manufacturing and maquiladora operations in Mexico. He received a Licenciado en Derecho in 1990 from the Universidad Iberoamericana in Mexico. He received an LLM in 1991 and a Doctorate in Juridical Sciences in 2000 from Georgetown University Law Center. He is licensed to practice law in Mexico and New York.

