

River Report

Summer 2000

Governance in the Colorado River Basin Could a new commission improve management of the river?

By S. Joshua Newcom

Most would agree that accomplishing anything involving the Colorado River requires plotting a route over contentious, and oftentimes, litigious terrain. With myriad laws, rules, regulations, treaties and court rulings lining the decision pathway, it is no wonder that parties using the river can trip while trying to resolve issues facing the river. In other instances, a lack of clear communication among basin stakeholders could be blamed for tardiness in addressing pressing concerns such as water supply, water rights and endangered species. Oftentimes parties resign themselves to the court system rather than striking compromises or reaching consensus based solutions. Litigation can be an expensive, unpredictable and time consuming process.

There is no doubt that the past 75- plus years of evolving governance on the Colorado have left a fractured system within the river basin. Whereas, due to an act of Congress and the U.S. Supreme Court, users in the Lower Basin have their water allocation overseen by the "water master," a.k.a. the Secretary of the Interior, the Upper Basin has remained more distant from the authority of the Secretary. Instead, the states of Colorado, Wyoming, Utah and New Mexico opted to form the Upper Colorado River Commission under the 1948 Upper Colorado River Basin Compact. And while the Lower Basin states have intrastate bodies that advocate individual state viewpoints about river issues, there is no formal, interstate body in the Lower Basin that meets to discuss issues collectively.

In the past few decades, needs on the river have changed and new issues have moved to the forefront of the basin agenda. American Indian water rights, the environment, water marketing/ banking and reducing California's consumption of the Colorado River all have achieved prominence in the basin's "to do" list. However, direct representation for certain parties involved in these issues, including environmental and tribal voices, are non-existent on most contemporary governance platforms within the basin. Instead, both the states and the federal government are expected to represent these interests - representation that some in these communities contend is inadequate.

"The various processes in place on the Colorado River are more or less ad-hoc," said Stan Pollack, an attorney representing the Navajo Nation Indian Tribe. "I think the states have historically felt that they represent the tribes' interests and that tribal allocations are supposed to come out of the state. We don't accept that as the operating premise."

To some degree, new decision-making bodies have sprung up in recent years to provide avenues for more collaborative management of specific areas. One of the first (and structurally representative of what a seven-state commission could be), the Colorado River Basin Salinity Control Forum, was authorized by Congress to improve water quality in the river. The Glen Canyon Adaptive Management Work Group, possibly the

most inclusive of these recent platforms, was created to advise in improving the operations of Glen Canyon Dam. And, in what may be to date the closest approximation of a Lower Basin decision-making body, the group developing the Lower Colorado River Multi-Species Conservation Plan includes representatives from state, federal, tribal and (until 1999) environmental organizations. Most recently, the seven Colorado River Basin states have been negotiating the Interim Surplus Criteria to help California reduce its dependence on the river.

“The seven states are meeting almost every month,” said Jeff Fassett, Wyoming State Engineer. “We’ve almost established a commission already.”

However, a formal, basin-wide council, committee or commission designed to discuss the bevy of issues pertaining to the river, and extending to minority stakeholders, has never been formed. In this age of “Why can’t we all just get along?” the notion of a comprehensive commission continues to pique the interest of some as a forum for brainstorming, increasing communication, problem-solving and improving management of the river.

At the 1999 Colorado River Symposium hosted by the Water Education Foundation in Keystone, Colo., a number of speakers mentioned basin commissions - both for the Lower Basin states and the basin in its entirety, including representatives from Indian tribes and the environmental community. The recent negotiations between the states and Interior over interstate water banking and Interim Surplus Criteria may be what are prompting some of the leaders in the basin to discuss the concept of a permanent commission.

“A basin commission has not been established so far because the states have been at each other’s throats,” said Patricia Mulroy, general manager for the Southern Nevada Water Authority and an outspoken proponent of a commission, in particular, a commission among the Lower Basin states. “The states have never viewed the river as a shared resource and have instead viewed it as a resource of which they each have a unique, distinct piece with boundaries.

“Now those boundaries are starting to blur,” she said, citing recent developments with the proposed Interim Surplus Criteria being developed by an ad-hoc committee of the seven states.

Others, particularly in the environmental community, contend the Secretary is not using his power to its fullest extent in order to bring about necessary changes on the river, in effect, not representing environmental interests as he is empowered to do under the Endangered Species Act.

“I submit that the secretaries have had the power to act, but have affirmatively limited themselves to only those actions where they have been able to win consensus among nearly all of the basin’s interests,” said Thomas Graff, senior attorney at Environmental Defense.

And still others all but obviate the need for another governing body in the basin.

“To be honest, we really haven’t talked about that [a new commission] seriously,” said David Hayes, deputy secretary of Interior. “We’re not sure anything is broken and the experiences over the last couple of years have demonstrated that.”

“Proponents of a Colorado River Commission have decidedly conflicting views about its composition and role,” said John Leshy, solicitor for Interior. “Trying to resolve these fundamental differences would be a huge challenge, soaking up lots of energy and political capital.

“This administration has given the Colorado River enormous attention, but we’ve felt our efforts are more usefully directed toward resolving issues like weaning California from its overuse of the River, resolving Indian claims, and putting in place a structure to allow more flexibility in banking and transfers.”

Does the Colorado River Basin need a new commission to keep parties out of the courts and to gain consensus, or is the power of the Secretary enough to provide unanimity? If a new commission were to be created, what would it look like? Who would hold a seat on it? How much power would it have? Could it conflict with the role of the Secretary? This issue of River Report will examine these and other questions.