2013 California Water Law Symposium

*The All-American Canal: Opportunity for Cooperation in Transnational Water Apportionment.*

**3:30 p.m. Saturday, January 26th**

**Theme**: What is the current status of US-Mexico transnational water apportionment; and how did we get here based on past negotiations, the AAC litigation, and post-AAC litigation negotiations?

**Guiding Questions**: What are the key factors that led up to conflict and what are the most important factors that have (or can) lead to resolution?

General Format: (75 minutes)

* Alexandra and Tovah will introduce the panelists and moderator (3 minutes)
* Panel moderator, Paul Kibel, will briefly introduce the topic (5 minutes)
* Panelist presentation (10 minutes each)
* Moderator and audience questions for the panelist (27 minutes)

Sequence and Content:

1. Alexandra and Tovah

* Introduction for each panelists and moderator by primary affiliation
* Moderator: Paul Kibel, Golden Gate University School of Law
* Panelists:
  + Peter Reich, Whittier Law School
  + Tony Rossmann, Rossmann & Moore, LLP (now at UN FAO)
  + Malissa McKeith, Lewis Brisbois Bisgaard & Smith LLP
  + Bob Snow, Office of the Solicitor, US Department of the Interior

1. Paul Kibel

* Set up the topic with a general background on:
  + Law of the River generally
  + Basic structure of the 1944 US-Mexico Water Treaty as it relates to the Colorado River
  + U.S.-Mexico salt controversies (for the Colorado River) of the 1960s/1970s
  + How the AAC lining project related to the IID-San Diego transfer and the QSA.

1. Peter Reich

* WATER LAW DOCTRINE IN THE BINATIONAL HISTORY OF THE AAC  
    
  I. Spanish-Mexican vs. U.S. groundwater law (including differences from surface rights and relationship to land ownership).  
    
  II. Contracts for water rights and development in the Imperial/Mexicali Valleys, 1896-1907 (Huntington Library Land & Water Title Collection).  
    
  III. All-American Canal impetus and authorization, 1910s-20s (legal problems re prior water conveyances through Mexico).  
    
  IV. Report of International Water Commission, 1930 (discussions between Mexico and the U.S. re canal's effects on binational water rights).  
    
  V. Dependence of Mexican agriculture on canal, 1940s-2000.  
    
  VI. The future: litigation or diplomacy?

1. Malissa McKeith

* Lining project and Consejo case (summary and doctrinal issues).
* Petitioner’s view of the conflict and resulting litigation
* Public participation in Mexico: public policy versus legal issues.
* NEPA and ESA claims
* Earthquake
* Why litigation was strategic versus going to the IBWC

1. Bob Snow

* NEPA litigation: US, Mexico, and transboundary EAs. Where these comprehensive?
* Recalibrating the US-Mexico relationship. Drivers – personnel of U.S. ambassador, regional partners, and NGOs community. The break between environmental community, building capacity, water trust, and biodiversity litigation approach.

I. Overview of Management of Colorado River  
- Role of the Secretary of the Interior  
  
II. All-American Canal Lining Project  
- Authorization & Purpose (1988)  
- Env. documentation (1996)  
- Financial resolution and final design (2003-05)  
  
III. Litigation (direct litigation and related matters)  
- SWCBD v. DOI (9th Cir. 1997) (domestic ESA)  
- DOW v. DOI (D.D.C. 2003) (no duty to consult under Sec. 7 on potential impacts in Mexican Delta)  
- CDEM v. DOI (D. NV. & 9th Cir. 2007) (no NEPA/ESA duty to consider impacts in Mexico; on appeal, Congressional direction to proceed makes project non-discretionary)  
  
IV. Colorado River Binational Cooperative Efforts Through 2012 - Context of Historic Cooperative Agreements  
- Min. 306 to 1944 Treaty (2000)  
- Joint Statement DOI/Mexico (2007)  
- Joint Declaration DOI/Mexico (2009)  
- Minute 316 - Pilot Run of Yuma Desalting Plant  
- Minute 317 - Binational Process for Cooperation  
- Minute 318 - Humanitarian response to April 2010 Earthquake  
- Minute 319 - Interim Cooperative Measures through 2017  
- Operational elements  
- Infrastructure improvements in Mexico  
- Environmental flow agreements (base & pulse flows)  
  
V. Next Steps in the Cooperative Process under Min. 319  
- 2013 - Science planning for “pulse flows” to Mexican Delta  
- 2014 - Target for release of 105,000 kaf “pulse flow” to evaluate effect of flows in riparian corridor (limitrophe and Mexican reach)  
- 2016 - Target date for compilation of longer term comprehensive Minute

1. Tony Rossmann

* Standing issues in federal litigation as measure of respect/disrespect.

I. Realities from a Worldwide Perspective

A. De-allocation, not re-allocation, is the future.

B. Primacy of agriculture: Fiat Panis.

C. International borders matter.

D. Ecological and economic ones matter more.

II. Lessons from the AAC Experience.

A. Indispensable role of the federal government.

B. Indispensable role of the Mexican government.

C. Limitations on and effectiveness of private (civic and NGO) initiative.

D. (Failed) duty of national governments to respect and invite all constituencies.

E. AAC Divide: it's east-west (ecological/economic), not north-south (nationalities).

* What implications does this all have for transboundary aquifers? (great set up for a 2014 WLS panel!)

1. Paul Kibel

* Panelists Q & A
* Questions to the entire panel: (i) what does the experience with the AAC controversy suggest about the effectiveness of the IBWC?; (ii) on a practical level, to what extent will Minute 319 affect the water resources at issue in the AAC controversy (e.g. Mexicali Aquifer, Andrada Mesa wetlands)?

1. Audience Participation

* Q & A