

ON PERFECT STORMS AND  
SACRED COWS OF COLLABORATION,  
COMMENTS ON BRADLEY KARKKAINEN,  
*GETTING TO “LET’S TALK”*: LEGAL AND  
NATURAL DESTABILIZATIONS AND THE  
FUTURE OF REGIONAL COLLABORATION<sup>1</sup>

Kirk Emerson

As an environmental conflict resolution practitioner, I found Professor Karkkainen’s paper<sup>2</sup> of considerable interest. I think extending Sabel and Simon’s destabilization rights theory to environmental and natural resources law in general rings true. In fact, we are working on a case right now, recovery planning in the Missouri River Basin, which was induced by judicial decisions surrounding the inadequacy of the Army Corps of Engineer’s response to the U.S. Fish and Wildlife Service’s Biological Opinion regarding protected species in the upper Missouri River Basin. This has led to a significant investment by the Corps and other federal agencies in the planning of a collaborative recovery planning process involving eight states, twenty-six tribes, and a raft of up and downstream stakeholder interests that have been engaged in competitive, power-based bargaining since the time of Lewis and Clark.<sup>3</sup>

First, I must confess that I do not see a wholesale destabilization of the Law of the River occurring without that perfect storm Karkkainen described that would unleash simultaneous legal battles and extreme natural and anthropogenic events. The Law of the River is so complex and interconnected, it would take an extraordinary effort and series of events at many levels to dismantle it entirely. And that might not be a good thing. It is worth noting that many facets of this complex body of laws did indeed derive from past efforts to adjudicate and negotiate multiple interests, flawed as some of those efforts may have been.

If indeed we arrive at the perfect storm for destabilization of part or all of the Law of the River, it could actually lead to a strengthening of the federal role in water allocation and management, instead of some power-sharing, state-based or stakeholder driven collaborative process or institution. The interstate

<sup>1</sup> These comments are the author’s own and do not represent the official position of the U.S. Institute for Environmental Conflict Resolution or the Morris K. Udall Foundation.

<sup>2</sup> Bradley C. Karkkainen, *Getting to “Let’s Talk”*: *Legal and Natural Destabilizations and the Future of Regional Collaboration*, 8 NEV. L.J. 811 (2008).

<sup>3</sup> For an excellent overview of the challenges facing collaboration on the Missouri River, I recommend BILL LAMBRECHT, *BIG MUDDY BLUES: TRUE TALES AND TWISTED POLITICS ALONG LEWIS AND CLARK’S MISSOURI RIVER* (2005).

competition and economic dislocations that would ensue might well return us to a command and control regime needed to restore order and predictability. National crises and emergencies, as we have seen most recently, are often the cause, or become the rationale, for strengthening the hand of the federal executive branch.

There are many examples of collaboration and assisted negotiation that have been occurring in the subregions of the Colorado River for some time, notably the Glen Canyon Dam Adaptive Management process. I would argue that these collaborative efforts are made possible in part because there are some legal certainties—sufficiently clear and commonly understood—that allow for this interest-based bargaining to occur. Were the legal mainstem of the Law of the River completely destabilized, these subregional collaborative efforts would also be disrupted and could lead to a diminution of collaboration in the basin, not necessarily an increase.

That said, there are several areas that remain murky and muddled within the current legal regime, and this can make it difficult to reach agreement through settlement talks, mediation, or collaborative management efforts. This calls to mind another theory of legal shifts, one that Carol Rose referred to some time ago in her great article on crystals and mud.<sup>4</sup> Briefly, laws initially arise (be it judge-made or legislative) to clarify rights and remedies. They are in their infancy rather blunt instruments with few exceptions. Over time, the unintended consequences of the law become known, exceptions and exemptions start to emerge, and the law evolves from its early bright line simplicity—crystals if you will—into a messy brew, or mud, that makes implementation—be it timely enforcement, or adaptation to innovations or new circumstances—increasingly costly. This then leads to regime change of some kind and a new crystalline law emerges and the cycle continues.

I think this is one way to describe the condition of the law of the Colorado River today and perhaps also to describe the challenges of current ongoing collaborative efforts. They are getting bogged down in the mud of the increasingly complex and arcane structures of rights and regulations. Perhaps the destabilization rights approach will be the trick to transform mud back into crystals and start the cycle anew. But it will also jeopardize many earnest efforts at collaboration that have and are occurring.

A useful concept to consider when exploring the effects of exercising destabilization rights, be they in the hands of creative plaintiffs or federal executives, is BATNA (“best alternative to a negotiated agreement”), borrowing from the language of alternative dispute resolution (“ADR”). Challenging or threatening to challenge the existing legal regime changes stakeholders’ BATNAs and their incentives to collaborate or negotiate. What Secretary Babbitt did in listing the California gnatcatcher and what the then U.S. Attorney, Dexter Lehtinen, did by challenging the State of Florida on water quality standards is akin to what Secretary Norton did in 2004 in challenging the basin states to come up with an agreement on how to operate Lakes Powell and Mead under low reservoir conditions and share shortages. Secretary Norton set a deadline for the basin states to come up with a plan, punishable by the Bureau

<sup>4</sup> Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

of Reclamation coming up with its own plan. This created uncertainties for the basin states, diminished the likelihood of success if they continued to play by the old rules, and changed the odds in favor of negotiating interests through collaboration. Moreover, the Secretary's initial threat did not in fact succeed in spurring collaboration among the basin states at the start. The basin states did not reach agreement by the imposed deadline of April 2005 set forth by the Secretary. As a result, in June of that year, the Secretary published notice in the Federal Register to begin the public environmental impact statement process. The states did indeed come up with some consensus recommendations a year later, and in mid-December 2007 a final shortage agreement was signed by Secretary Dirk Kempthorne.

Even if such opportunities for destabilization occur and do move stakeholders to the table, that does not guarantee that collaboration will lead to better and more enduring institutional arrangements, or ones that can be implemented and sustained. There seems to be an unstated presumption in Karkkainen's paper that once destabilized, new and inevitably better institutions will rise from the ashes through some collaboration phoenix. Some of the notable hallmarks in collaborative management and restoration efforts (for example, the Chesapeake Bay, the Everglades, the Cal-Fed/Bay Delta, and perhaps others closer at hand) find their roots in judicial, legislative, and/or political challenges to previous management regimes (or lack thereof). After five, ten, fifteen years at some of these collaborative processes, however, people are beginning to ask, "Where's the beef?" Are there on-the-ground environmental gains being achieved through collaboration or new collaborative governance structures? Now, this may be to collaboration advocates an unfair question since it is rarely asked about the results of litigation strategies or administrative law. But the question of performance is inevitable and increasingly worthy, I think, of attention.

We have begun asking just these kinds of questions at the U.S. Institute for Environmental Conflict Resolution together with other federal agencies, researchers, and practitioners with whom we work. We are learning a lot about the complexity of evaluating collaboration and conflict resolution, the need for multiple measures of success, and how to look at the antecedent conditions that improve the likelihood of success for collaborative processes. We need to examine more rigorously, however, regional collaborative resource management efforts. Collaboration in and of itself does not necessarily deliver more realistic and reliable, durable yet adaptable, or fair institutional arrangements.

To start, we might look more carefully at some of the sacred cows of interest-based negotiation and collaborative problem solving and how well they are transferring to longer-term collaborative processes. Let me mention three such hallowed principles that might warrant reconsideration.

First, there has been longstanding agreement in the field of environmental conflict resolution and other applications of ADR in employment and contracts disputes that parties should come together of their own volition. They should be at the table because it serves their interests, not because they are coerced to be there. No one should have to give up their rights to pursue alternative courses of action as a condition for negotiation. Self-determination of all par-

ties is the underlying principle here that motivates the parties to share and optimize their collective interests through reaching voluntary agreements.

The example I referred to earlier of the Interior Secretary's threat to the basin states to reach a shortage agreement is arguably a coercive act. And judges ordering parties to mediation is likewise a form of legal compulsion. With respect to complex, seemingly intractable disputes such as contending interests in Colorado River water, effective collaboration might well benefit from stronger incentives that move people toward constructive joint solutions, sooner than later. We need to examine a fuller range of legal, financial, and institutional incentives for inspiring collaboration.

A second sacred cow of the collaborative problem-solving field is the emphasis on parties. Just get the right parties together and they will reach a "win-win" agreement. Of course, the emphasis on engaging all the parties affected by or interested in a given public decision or action is essential. But I wonder if it has come at the cost of ignoring the critical role of leadership in these processes: not only the leadership of those making the final decision, but of those leading the negotiations, representing the interests at stake. Collaboration simply cannot work if leaders do not commit upfront to honoring the potential for the negotiated outcome and do not adequately participate (directly or through delegates) in the process. How leaders can do this to their advantage, using their authority rather than giving it up, is worthy of far more attention than we have paid in the past.

Finally, another area where we, as practitioners, have placed much emphasis in the past is on the goal of reaching an agreement. To the extent collaborative resource management has drawn from ADR and mutual gains bargaining models, the focus has been on negotiating discrete agreements concerning specific problems or disputes. As such, we have been following a process-dominated model for problem solving, and it is this model that has been blended with adaptive management. However, we are dealing with resource challenges that inherently attract contending interests and demand ongoing decision making to manage. Should we not be looking more carefully at institutional design and organizational development theory for models of longer-term sustainable management structures? How many examples do we have of federal advisory committees with poorly designed representation and decision-making rules? Or inadequately managed (though often well facilitated) processes with weak institutional linkages to decision makers and decision-making authority? Institutional design, as well as good process management, is needed for effective collaboration.

In sum, I suggest that "Getting to Let's Talk" is probably not enough. I agree the question is not "whether" there will be regional collaboration in the Colorado basin, and Karkkainen's paper provides a reasonable theoretical framework for answering the question of "why" this will occur. The next question before us is "How?" How do we make existing collaboration more effective? How do we assure that any destabilization will indeed lead to constructive change? How do we assure that opportunities for effective collaboration are optimized?

On a final note, I really appreciated the discussion of the *Mono Lake* case (decided over twenty years ago). It got me wondering if indeed that was the

public trust doctrine's last stand. Perhaps the likely natural and anthropogenic crises that Karkkainen describes for the Colorado River region will be appreciated at future law school conferences such as this for reinvigorating the public trust doctrine through collaborative engagement. Perhaps a resetting of the balance between property rights and the public interest is in store for us. Perhaps it is time for the next crystal to emerge.