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INTRODUCTION: COLLABORATION GOOD OR BAD: HOW IS IT WORKING ON THE COLORADO RIVER?

Jean R. Sternlight*

Collaboration has two meanings. These days we mostly think of the “good” meaning: working together, cooperatively, to accomplish a goal. But, when persons were described as “collaborators” in the World War II era, the term was not meant as a compliment but rather as a pejorative.¹ In recent years, collaboration has come to be fashionable as a means to resolve public disputes such as those pertaining to environmental issues and natural resources. Such collaboration may include work groups, stakeholder input, market-based solutions, and negotiated rulemaking. Yet, paralleling the difference between the two definitions of collaboration, similarly the success of these collaborative approaches is contested. Some sing the praises of collaboration—a peaceful, non-litigious means of resolving disputes that can be quicker, better, and more effective than alternative approaches such as litigation or top-down orders. Yet others fear that collaboration serves a negative purpose—allowing powerful parties to impose their will on weaker parties and to avoid legal strictures. In the environmental context, specifically, some express the fear that collaborative approaches may not adequately protect the environment or the interests of less powerful groups, and urge that the clout and precedent of the public lawmaking processes and courtroom are often needed to achieve the best results.

The Saltman Center for Conflict Resolution decided to host a conference, in the fall of 2007, to focus on the uses of collaboration to resolve environmental and natural resource disputes pertaining to the Colorado River. This issue is very personal to us here in the West, and particularly in Las Vegas. Residing in a desert we spend a great deal of time thinking and talking about water, and the lack thereof. Driving past Lake Mead, the ever-shrinking reservoir holding Colorado River water restrained by the Hoover Dam, we invariably notice the white rings on the side marking higher water days of not too long ago. Drought has enhanced conflicts that already existed as to which jurisdictions and which categories of users should have higher priority claims to the limited water resource. Nor is consumption and use of water the only environmental or natural resource dispute spawned by the Colorado River. Conflicts also exist as to

* Michael & Sonja Saltman Professor of Law, University of Nevada, Las Vegas & Director Saltman Center for Conflict Resolution. I thank Michael and Sonja Saltman, the staff of the Saltman Center for Conflict Resolution, and the Boyd School of Law for making this conference possible. I thank Professor Bret Birdsong for helping in the planning and organization of the event.

¹ See Collaborationism – Wikipedia, <http://en.wikipedia.org/wiki/Collaborationism> (last visited May 18, 2008) (explaining that collaboration may refer to cooperating with an enemy occupying one’s country or to cooperating with evil forces such as Nazis more broadly).

what are the most appropriate recreational, agricultural, and residential uses of surrounding lands, and what steps need to be taken to protect animals and plants that inhabit the region.

As conference organizers we were highly aware that significant differences of opinion exist regarding the extent to which collaborative approaches are an effective means of resolving the sorts of environmental disputes that surround an important natural resource such as the Colorado River. We knew that environmentalists and professors of environmental law are often skeptical of the collaborative approach, and that dispute resolution professionals and academics are typically more enthusiastic about collaboration. Our goal, in hosting the conference, was not to reach a final resolution to this debate but rather to get beyond simplistic rhetoric and instead foster a sophisticated conversation in which persons on all sides of these issues could share their views. We thought that by focusing on a particular set of environmental disputes, those involving the Colorado River, we would ensure that the speakers addressed themselves to specifics, rather than talking in more general terms.

The one-day conference that took place on October 12, 2007, certainly met our goals.² Although speakers and attendees may not have left with a shared viewpoint, we are confident that all left with a more nuanced understanding of both the advantages and disadvantages of various approaches to collaboration. The conference was a success due to the extremely high quality of all of our speakers, and due to those speakers' willingness to listen to and learn from one another.

This written version of the conference now builds upon the live event. We are most fortunate that many (unfortunately not all) of the speakers were able to contribute articles to comprise this written version of the Symposium. In their papers, presenters have expanded on their oral remarks and responded to points made by others during the conference. Like the live Symposium, this written Symposium is organized around several major themes.

In the first session Professor Bradley Karkkainen, an expert in environmental and natural resource law, presented a paper entitled *Getting to "Let's Talk": Legal and Natural Destabilizations and the Future of Regional Collaboration*.³ Drawing on the theoretical work of Charles Sabel and William Simon,⁴ asserting that "public law litigation is moving away from the model of 'command-and-control' style judicial intervention, toward what they call a 'destabilization rights' approach," Karkkainen focuses on the extent to which judges have increasingly sought to "blow the whistle" on statutory or constitutional violations, thereby "pull[ing] the plug on"—or "destabilizing"—an offending institution, but then effectively remanding the precise design of a solution to administrative bodies.⁵ Professor Karkkainen urges, however, that litigation is not the only event that can trigger destabilization of existing rights

² The full program for this event is available at http://www.law.unlv.edu/pdf/Colorado_Conference.pdf.

³ Bradley C. Karkkainen, *Getting to "Let's Talk": Legal and Natural Destabilizations and the Future of Regional Collaboration*, 8 NEV. L.J. 811 (2008).

⁴ Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

⁵ Karkkainen, *supra* note 3, at 811.

and institutions, pointing out that natural and human actions can also cause such shifts. He predicts that the coming drought-generated destabilization on the Colorado “will provoke fierce and sometimes cutthroat competition, but also a new round of collaboration.”⁶

One respondent to Professor Karkkainen was Dr. Kirk Emerson, Director of the U.S. Institute for Environmental Conflict Resolution.⁷ She notes that while, as a practitioner of environmental conflict resolution, she finds that Karkkainen’s analysis generally “rings true,”⁸ she also sees that destabilization of established rights could lead to less rather than more collaboration.⁹ She suggests that collaboration is often made possible because of the existence of legal certainty, and inspired by the recognition that results obtained through collaboration may be superior to the results that might otherwise ensue.¹⁰ At the same time, Emerson recognizes that collaboration alone does not necessarily deliver better solutions than other approaches to conflict resolution.¹¹

A second commentator on Professor Karkkainen’s work was Professor Carrie Menkel-Meadow, a renowned expert in the field of conflict resolution.¹² Like Emerson, Menkel-Meadow expresses general support for Karkkainen’s ideas but also offers some “quibbles”¹³ and some amplification. Menkel-Meadow’s two most significant differences with Karkkainen are to emphasize that even some of the classic public law litigation often involved substantial collaboration,¹⁴ and that “sophisticated dispute resolution scholars” (as opposed to dispute resolution populists) do not in fact use the phrasing “win-win” because they recognize that it is rarely possible for two or more disputants to all improve their situation.¹⁵ As for amplification, she provides some very useful thoughts on factors encouraging collaborative processes,¹⁶ impediments to collaborative processes,¹⁷ challenges in the use of collaborative processes,¹⁸ and suggestions for meeting the challenges and encouraging collaborative processes.¹⁹

The second session was headed by Professor Bret Birdsong, a recognized authority in natural resource law, who presented a talk alliteratively entitled *Séances, Ciénegas,²⁰ and Slop: Can Collaboration Save the Delta?*²¹ Focus-

⁶ *Id.* at 812.

⁷ Kirk Emerson, *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, 8 NEV. L.J. 830 (2008).

⁸ *Id.* at 830.

⁹ *Id.*

¹⁰ *Id.* at 831.

¹¹ *Id.* at 832.

¹² Carrie Menkel-Meadow, *Getting to “Let’s Talk”: Comments on Collaborative Environmental Dispute Resolution Processes*, 8 NEV. L.J. 835 (2008).

¹³ *Id.* at 837.

¹⁴ *Id.* at 837-38.

¹⁵ *Id.* at 839.

¹⁶ *Id.* at 840-45.

¹⁷ *Id.* at 845-46.

¹⁸ *Id.* at 846-48.

¹⁹ *Id.* at 848-52.

²⁰ A “ciénega” is a swamp. MERRIAM-WEBSTER’S SPANISH-ENGLISH DICTIONARY 58 (1998).

ing on the Colorado River Delta, located in Mexico, Birdsong explains that water allocation decisions made upstream in the United States have severely contributed to the decline of the delta, thereby harming both environmental and farming interests related to the delta. While Birdsong sees collaboration as essential and inevitable, as means to allocate the river water,²² he also urges that “[c]ollaboration alone, without structuring the legal and economic framework for policymaking to provide specifically for the goal of protecting the delta, is unlikely to move much water downstream to where it’s needed to save the imperiled delta.”²³ He fears, specifically, that the more powerful interests in the United States will be able to collaborate with one another to continue to deprive Mexico and the delta of much-needed water.²⁴ While not optimistic regarding solutions, Birdsong urges that, at minimum, the process be “tweaked” to allow environmental stakeholders and Mexico to play a greater role in collaborative processes pertaining to the river.²⁵

One respondent to Professor Birdsong’s paper was Dr. Francisco Zamora-Arroyo,²⁶ Director of the Upper Gulf of California Legacy Program at the Sonoran Institute.²⁷ Together with several co-authors,²⁸ Zamora questions aspects of Professor Birdsong’s premise, urging that “in many instances the collaboration process has promoted the development of innovative legal and economic frameworks to advance the conservation and sustainable development of the Delta.”²⁹ Indeed, Zamora and his co-authors find “renewed hope” for the delta in that “[i]nternational recognition of the Delta’s ecological and socioeconomic importance has never been higher.”³⁰ Thus, they explain, a variety of governmental and non-governmental groups have recently been working together on a variety of projects geared to help protect and restore the delta.³¹ Zamora and his co-authors state that conditions of the delta, while still problematic, have improved thanks to such collaboration.³²

At lunch we were privileged to hear a keynote address given by Patricia Mulroy, General Manager of the Southern Nevada Water Authority.³³ One of the best-known and respected governmental leaders in the field of water use, Mulroy shared her unique perspectives on some of the serious water issues facing Las Vegas and the American Southwest more generally. She focused, in particular, on the Department of the Interior’s approval of guidelines governing

²¹ Bret C. Birdsong, *Séances, Ciénegas, and Slop: Can Collaboration Save the Delta?*, 8 NEV. L.J. 853 (2008).

²² *Id.* at 853.

²³ *Id.*

²⁴ *Id.* at 867.

²⁵ *Id.* at 868.

²⁶ Francisco Zamora-Arroyo et al., *Collaboration in Mexico: Renewed Hope for the Colorado River Delta*, 8 NEV. L.J. 871 (2008).

²⁷ The Sonoran Institute describes its mission as “to inspire and enable community decisions and public policies that respect the land and people of western North America.” Sonoran Institute, <http://www.sonoran.org> (follow “About Us” hyperlink) (last visited May 18, 2008).

²⁸ The co-authors are Osvel Hinojosa-Huerta, Edith Santiago, Emily Brott, and Peter Culp.

²⁹ Zamora-Arroyo et al., *supra* note 26, at 872.

³⁰ *Id.* at 871.

³¹ *Id.* at 872.

³² *Id.*

³³ Patricia Mulroy, *Collaboration and the Colorado River Compact*, 8 NEV. L.J. 890 (2008).

allocation of water shortages on the Colorado River.³⁴ She explained that the guidelines were the product of decades-long interaction and collaboration between the seven basin states all bordering on the Colorado River.³⁵ While recognizing that the history of the Colorado River has at times been “tortuous,”³⁶ involving court cases as well as negotiations and agreements,³⁷ Mulroy is largely sanguine about the seven states’ ability to work together on solving their problems:

By embracing the need for cooperation and partnership . . . , balancing our competing needs and demands, and reaching out to share our experiences and solutions with others who are facing similar challenges, the seven basin states are setting new standards for resource management that will see our communities—and the Colorado River—through events such as the drought and climate change well into the future.³⁸

Our first afternoon session was led by Professor Joseph Feller, an environmental law scholar and activist, who spoke on *Collaborative Management of Glen Canyon Dam: The Elevation of Social Engineering over Law*.³⁹ By far the most negative of all the speakers with respect to collaboration, Professor Feller urges that the Glen Canyon Dam Adaptive Management Program has improperly substituted collaborative decisionmaking for the hierarchy of priorities created by law, thereby facilitating non-compliance with the Endangered Species Act by the federal Bureau of Reclamation.⁴⁰ He contends that while “adaptive management,” a process of flexible management that adjusts to new developments, is “consistent with the laws governing dam operations,”⁴¹ in contrast, “[t]he program’s emphasis on seeking collaboration and consensus among stakeholders is neither supported by existing law nor necessitated by the concept of adaptive management.”⁴² Feller, therefore, concludes that while the concept of collaboration and consensus may be attractive to many, “we must not forget that ours is a government of laws, and that citizens have a right to expect that agencies will respect those laws, even when they require outcomes that displease large and powerful elements of the agencies’ constituencies.”⁴³ In Feller’s view, neglect of the law has facilitated non-compliance with the Endangered Species Act and caused harm to many fish and wildlife.⁴⁴

Writing in response, Professor Alejandro Camacho, an expert in regulatory innovation, is far more upbeat than Professor Feller about the potential role of collaboration in the regulation and management of natural resources,⁴⁵ but

³⁴ The guidelines were not actually signed until December 13, 2007, a few months after the conference was held.

³⁵ Mulroy, *supra* note 33, at 892.

³⁶ *Id.* at 893.

³⁷ *Id.*

³⁸ *Id.* at 895.

³⁹ Joseph M. Feller, *Collaborative Management of Glen Canyon Dam: The Elevation of Social Engineering over Law*, 8 NEV. L.J. 896 (2008).

⁴⁰ *Id.* at 898.

⁴¹ *Id.* at 939.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 898.

⁴⁵ Professor Camacho notes that in prior work he has argued that “meaningful stakeholder participation should serve a central role in the management of natural resources and the regulation of land use and that regulatory processes should account for the uncertainty inher-

nonetheless agrees that there are significant problems in the way in which the Glen Canyon collaborative program in particular has been implemented.⁴⁶ He finds that in setting up the Glen Canyon Dam program Congress paid insufficient attention to key issues such as balancing competing priorities of water, power, and the environment;⁴⁷ setting transparent measurable regulatory targets;⁴⁸ monitoring and adapting the successes of the regulatory program itself;⁴⁹ and structuring the collaborative process.⁵⁰ Yet, despite these flaws in the end, Professor Camacho sees the Glen Canyon Dam Adaptive Management Program as a learning opportunity that can help improve future experimental and collaborative processes, rather than an indictment of the collaborative enterprise.⁵¹

The fourth session was led by Professor Douglas L. Grant, a renowned water law expert, who presented a paper entitled *Collaborative Solutions to Colorado River Water Shortages: The Basin States' Proposal and Beyond*.⁵² Explaining that the river “has been gripped since 2000 by the worst drought in over a century of recordkeeping,”⁵³ Professor Grant focuses on how the seven basin states dependent on that water have collaborated to try to deal with the crisis. He relates that following a request in 2005 by the Bureau of Reclamation for public input regarding how best to deal with the alarming decline in water levels, all seven river basin states within two years submitted a joint proposal to deal with the shortages.⁵⁴ A revised version of that proposal became the foundation of interim guidelines issued by the Secretary of the Interior, leading Professor Grant to call the basin states' collaboration “a remarkable achievement by parties that have not always gotten along regarding management of the Colorado River.”⁵⁵ In his paper, Grant shows why the changes set out in the new interim guidelines will make all seven states better

ent in regulatory decisions by making such processes more adaptive.” Alejandro E. Camacho, *Beyond Conjecture: Learning About Ecosystem Management from the Glen Canyon Dam Experiment*, 8 NEV. L.J. 942, 943 (2008). At the live conference, we also heard responses from Dennis Kubly, Chief of the Adaptive Management Group who works on the Glen Canyon Dam, and Mary Orton, who helps facilitate collaborative efforts with respect to the Glen Canyon and elsewhere. Both Kubly and Orton were also far more upbeat than Professor Feller about the successes of the Glen Canyon Dam Adaptive Management program.

⁴⁶ *Id.* at 944.

⁴⁷ *Id.* at 949.

⁴⁸ *Id.* at 953.

⁴⁹ *Id.* at 955.

⁵⁰ *Id.* at 960. For example, Camacho notes that because the Secretary of the Interior's Designee has the power to authorize votes by a two-thirds majority, rather than by consensus, the numerical makeup of the working group becomes critical. He wonders whether there was a logic to having six Native American tribe representatives, for example, but only two local environmental groups. *Id.* at 959.

⁵¹ *Id.* at 962-63.

⁵² Douglas L. Grant, *Collaborative Solutions to Colorado River Water Shortages: The Basin States' Proposal and Beyond*, 8 NEV. L.J. 964 (2008).

⁵³ *Id.* at 964.

⁵⁴ *Id.* at 964-65.

⁵⁵ *Id.* at 965.

off,⁵⁶ and then goes on to advance additional strategies for promoting future collaboration.⁵⁷

Professor Sandra Zellmer's response to Professor Grant's paper focuses on market-based means to promote collaboration with respect to water use.⁵⁸ An expert in natural resource law, Zellmer considers such approaches as water banking and forbearance agreements,⁵⁹ asking whether traditional doctrines barring "speculation" with respect to water pose an insuperable barrier to such market-based approaches.⁶⁰ As Zellmer explains, although speculation is not inherently evil, "the near universal distrust of concentrated power over resources in the developing West" gave rise to a "universal prohibition against speculation in water resources."⁶¹ After exploring the anti-speculation doctrine in detail, Zellmer concludes that while it does indeed "pose an obstacle to some kinds of collaborative agreements,"⁶² the doctrine also serves important public purposes.⁶³ Fortunately, finds Zellmer, there are sufficient exceptions to the anti-speculation doctrine to allow for many market-based collaborative agreements with respect to water use.⁶⁴

The final session consisted of a presentation made by Professor Robert Adler.⁶⁵ Author of a book on restoring Colorado River ecosystems,⁶⁶ Adler explains that he has "long been a fan of collaborative processes," has participated in several, and has written about many others.⁶⁷ Yet, says Adler, such

laudable goal[s] 'getting along,' or improving relationships, or avoiding litigation, cannot be our *only* goal when the fate of one of the world's great riparian and estuarine ecosystems is at stake, as well as the welfare of tens of millions of people who rely on the river for water, power, recreation, and other purposes.⁶⁸

Thus, observes Adler, at times "collaborative efforts can . . . become counter-productive if they exalt relationship building *over* the fundamental goal of resolving the conflicts in some way in order to achieve an acceptable overall future."⁶⁹ Reliance on politics or litigation can be preferable to collaboration, asserts Adler, if the result of collaboration "is avoiding rather than resolving core value disputes."⁷⁰ After analyzing three major attempts at collaboration

⁵⁶ *Id.* at 979-80.

⁵⁷ *Id.* at 984-92.

⁵⁸ Sandra Zellmer, *The Anti-Speculation Doctrine and Its Implications for Collaborative Water Management*, 8 NEV. L.J. 994 (2008).

⁵⁹ *Id.* at 1019-22.

⁶⁰ Zellmer defines speculation as "the act of acquiring a resource for the purpose of subsequent use or resale, in hopes of profiting from future price fluctuations." *Id.* at 997.

⁶¹ *Id.* at 998.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Robert W. Adler, *An Ecosystem Perspective on Collaboration for the Colorado River*, 8 NEV. L.J. 1031 (2008).

⁶⁶ ROBERT W. ADLER, *RESTORING COLORADO RIVER ECOSYSTEMS: A TROUBLED SENSE OF IMMENSITY* (2007).

⁶⁷ Adler, *supra* note 65, at 1031-32.

⁶⁸ *Id.* at 1032.

⁶⁹ *Id.* at 1033.

⁷⁰ *Id.*

with respect to the Colorado River, and finding them all wanting,⁷¹ Adler proposes a “third alternative,”⁷² which essentially requires broadening the collaborative process to include a larger geographic area, more stakeholders, and consideration of more issues.⁷³ That is, rather than focus exclusively on the Colorado River, collaborators should, for example, consider potential alternative sources of water, energy, and recreation.⁷⁴

Having heard all the presentations at the live conference, and read all the written remarks that are part of this written Symposium, I am simultaneously impressed, depressed, and inspired. I am extremely impressed not only by the quality of the various submissions, but also by the sophistication with which the authors approached their topics. As an organizer of the conference, I started from the operating assumption that those speakers coming from an environmentalist perspective would criticize collaboration, and that those speakers coming from the world of collaboration would sing its praises. Yet, in fact all the writers were far more nuanced in their approach. They typically found some positives and some negatives, and tried to take the conversation to a sophisticated level regarding when and why collaboration can be expected to either work or fail. At the same time, I have to admit to being rather depressed as to both the physical state of the Colorado River and its environs, and also the nature of some of the collaborative efforts that have been attempted with respect to the river. Many of the panelists agree that we still need to improve our collaboration efforts substantially in order for them to be deemed fully effective. And, on the third hand, I have to say that I nonetheless remain in the end optimistic as to the future of such collaborative endeavors. While we clearly have work to do, we equally clearly have made good strides and have people such as our panelists asking the right questions and making good recommendations. We cannot stop the drought, or its dire physical consequences for all species dependent on its abundance, but in the end I am hopeful that by working together in a thoughtful manner we can learn to deal with these problems effectively. I believe that if we are careful we can ensure that such cooperative efforts reflect the best rather than the worst definition of “collaboration.”

⁷¹ *Id.* at 1034-42.

⁷² By the “third alternative” he means “a third way” that is “not a combination of the other two ways,” but rather “a different way.” *Id.* at 1031 (citing David Carradine in RICHARD KEHL, BREATHING ON YOUR OWN, QUOTATIONS FOR INDEPENDENT THINKERS 198 (2001)).

⁷³ *Id.* at 1043.

⁷⁴ *Id.* at 1043-44.