

Bravery in the Face of Bureaucracy:

The Negotiation and Completion of Minute 319

Definition of the Problem

A series of compacts, Supreme Court decrees, a treaty, and a host of federal laws and administrative regulations that govern the interstate and international use, management, and allocation of the Colorado River (CR) water supply, the collection of which is known as the Law of the River. The foundation of this law the Colorado River Compact of 1922, an agreement between the seven basin states and the federal government to divide the flows between the Upper Basin (UB) and the Lower Basin (LB).¹ The UB states (Colorado, New Mexico, Utah and Wyoming) are each apportioned a percentage of the allocation under the Upper Colorado River Basin Compact of 1948.² The LB states (Arizona, California and Nevada) are apportioned their share through federal law.³ Each of the States has full ownership and control of the water in its state, subject to compacts and international agreements.

In 1944, the United States (US) entered into a treaty with Mexico regarding distribution of CR water.⁴ The U.S. must deliver 1.5 million acre-feet of water to Mexico every year. If there is sufficient supply to deliver Mexico's treaty allocation and that apportioned within the U.S., the UB and LB share equally in providing water for the Treaty. The U.S. International Boundary and Water Commission (IBWC) and the Mexico Comisión Internacional de Límites y Aguas (CILA) oversee implementation of the Treaty. The Commission adopts "Minutes," which are formal operational agreements between the two nations.

There are two large reservoirs on the CR: Lake Mead and Lake Powell. Under the control of the Bureau of Reclamation acting on behalf of the Secretary of the Interior, Lake Mead holds and release water for the three LB states. Lake Powell act as a "bank account" for the four UB states to allow them to utilize available water supplies while helping ensure they met the terms of the CR Compact. Releases made to the LB from Lake Powell are based on statutes and agreements among the Basin States. Due to those large reservoirs, the States were able to weather a drought for some time. However, as a continuing drought worsened, Lakes Mead and Powell were quickly draining, increasing the risk of a Compact crisis among the States. If Lake Mead reached a certain low level, it would be physically unable to release water. Lower levels in Lake Powell would make it impossible to deliver water to the LB, as well as impede the ability to supply water to run power generators at Glen Canyon Dam, which generates significant amounts of low-cost electricity for the western states. Power revenues from hydropower generation at Glen Canyon Dam also fund important environmental programs on the CR, including endangered species programs, salinity control programs, and an environmental program to protect the Grand Canyon.⁵

In 2007, the States and the federal government agreed to temporarily change reservoir operations in order to lessen the effects of the drought.⁶ In developing the new operational guidelines, it became apparent that any measures would only be partially successful unless Mexico participated in the effort. Mexico needed to be part and parcel of any agreement to temporary operations of the river, but that would not be easy.

From 2001 until the present day (2019), the CR system has experienced the most severe drought in recorded history. The Colorado River basin drains over 250,000 square miles, including seven states (Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming) and the country of Mexico. It provides water to over 40 million people and 5.5 million acres of irrigated agriculture. The basin has an economic value of \$1.4 trillion annually.

Negotiations are rarely easy, and international negotiations are especially challenging. Mexican and American environmental entities led in the United States by the Environmental Defense Fund approached both nations regarding possible environmental projects in the CR in Mexico. They sought more water in the river for ecological health and proposed an experimental pulse flow to see if CR water could flow to the Delta in the Sea of Cortez, something that had not happened in decades. At the same time, the Bureau of Reclamation and the Basin States proposed talks with Mexico regarding ways to sustain the CR and its reservoirs during the continuing drought. Although Mexico was reluctant to engage in negotiations that may reduce its Treaty deliveries, it did want to pursue joint environmental projects with the United States to revive the CR in Mexico, and was very interested in learning and being involved in programs that would sustain water supplies going forward.

Without Mexico's participation, the United States and Basin States feared that the "extraordinary drought" provision of the 1944 Treaty would have to be invoked.⁷ This provision provides that in the case of an "extraordinary drought," the United States can decrease deliveries to Mexico in proportion to shortages taken within the United States. The term "extraordinary drought" is not defined beyond the terms of this provision in the treaty. There had been and continues to be a long-running conflict on the Rio Grande between the United States and Mexico about the use of this provision as it applies to that portion of the Treaty. The Bureau of Reclamation and the Basin States wanted to avoid such conflict when considering CR supplies. The use of that provision would also trigger conflict between the UB and the LB, since the CR Compact also provides for specific instructions in the event there is a deficiency in the CR system that makes it difficult to make treaty deliveries. What constitute a deficiency under the Compact has not been defined, and the provision has never been invoked. To do so would cause considerable controversy and probably litigation among the Basin States.

Under national and international protocol, only representatives from the two federal governments sat at the table for the negotiations. Interpreters provide translations of each statement, even if the parties are fluent in the other language. The Bureau of Reclamation consulted with the Basin States outside of the negotiations and obtained their consent on each step in the proposed Minute. The successful conclusion to Minute 318 provided a framework and backdrop for negotiations regarding the drought.

The goal of the United States for negotiating what became Minute 319 was to convince Mexico to share in the shortages on the CR because of the drought. Mexico's goal was to convince the United States to share in any surpluses on the CR and to develop projects in Mexico to improve the environment around the CR. Negotiations began under the standard protocol, with the Basin State representatives sequestered in a separate room. Negotiations were difficult, and no progress was made. Completely dissatisfied with being outside the room, the Basin States pressed the U.S. representatives to allow them at the table or at least in the room as observers. Mexico balked at the idea.

At this point it helps to understand the basics of water law in both nations to understand their positions. In Mexico, the federal government (CONAGUA) controls water and water and grants rights. Permits for water rights are renewed every few years. In the United States, each state owns and controls water within its boundaries. Water rights are obtained through either a court or administrative agency and held in perpetuity, unless forfeited or abandoned. In order to share water in interstate rivers, States have entered into compacts (approved by Congress) to apportion the water among them. State water users are subject to curtailment of their water rights in order to meet their State's compact obligations. Therefore, the United States is unable to commit the Basin States' water or its use without their consent. Neither the Mexican federal government nor the U.S. State Department liked the idea of changing protocol for this negotiation. Consequently, negotiations stalled.

Possible Strategies and Solutions

There were several options available to the United States and Mexico:

1. End negotiations, which would not satisfy goals of both nations.
2. Continue to negotiate without the Basin States at the table, which was unacceptable to the Basin States that owned the CR water in their States.
3. Allow the Basin States to observe negotiations, but not participate, which would help the Basin States understand the needs and positions of Mexico; but this still could not be successful without agreement of the Basin States that the control of water
4. Allow the Basin States to participate in the negotiations, which became the eventual solution.

Strategies and Implementation

One aspect that both nations and the Basin States could agree on was that more technical information and analysis was needed. A technical work group, consisting of Basin State advisers, was formed to provide more information. Its work would provide a common technical platform to inform further discussions and strengthen the developing international partnership to combat drought on the CR.

Both sides took it upon themselves to understand the technical, legal, and policy structures regarding the CR in each nation. Invited by the Bureau of Reclamation and the Basin States, representatives of Mexico toured the U.S. portion of the CR and heard from each State about its own water law and policy. Then Secretary of the Interior Ken Salazar and Bureau of Reclamation Commissioner Michael Connor, both fluent in Spanish, talked with their counterparts and the Mexican ambassador to explain why the Basin States had to be involved in the conversation. Commissioner Roberto Salmón of CILA understood the necessity of having the Basin States at the table and approached the Mexican government to relax the international protocol. By pressing his point, he put his position at risk. Within the United States, Secretary Salazar and Commissioner Edward Drusina of IBWC convinced the State Department to try the new format for negotiations.

Then Mother Nature added some incentive and a resolution. On Easter Sunday in 2010, an earthquake of magnitude of 7.2 occurred in the Mexican CR basin, destroying diversion structures and canals. Mexico would lose the opportunity to use its Treaty entitlement until repairs were made. The United

States offered to store the water in Lake Mead for a few years. The storage of Mexico's water in the United States was unprecedented. The agreement was codified in Minute 318, which strengthened the two nations' partnership on the CR.⁸

Finally, both sides agreed to allow the Basin States into the negotiations. The environmental entities also pushed to be allowed at the table. It was their work on joint environmental projects that encouraged the two nations to sit down and talk about the CR. They had expertise and were willing to put resources on the table to move the projects forward. The Basin States objected to the NGOs' participation because they did not own or control the water in each state. A compromise was reached in which NGO representatives participated in the U.S. strategy sessions and were consulted at every turn.

By adding representatives from each of the Basin States, the number of people at the table grew too large to be productive, and the protocol of using translators became cumbersome and ineffective. Translators were not trained in the nuances of the technical and legal issues, and sometimes did not convey the correct message. The groups reached another compromise, again standing in the face of protocol.

A small group (12–15) was chosen to pursue the negotiations and periodically report to the larger group on progress and to answer policy questions. The small group negotiated in English, since most of the Mexican representatives were fluent in English, while several on the U.S. side were fluent in Spanish. A translator was available for those who were not bilingual. This avoided unintended misinterpretations. Meetings alternated between the United States and Mexico. The Mexican CILA and American IBWC Commissioners and the Bureau of Reclamation Commissioner were on hand at every meeting. However, in another brave move, they did not attend the negotiation sessions, trusting their representatives and understanding how their presence could add complications. The Commissioners were available to answer policy questions or assist in breaking a stalemate.

Time pressures in the political arena also played a role. Negotiators on both sides spent considerable time and political capital educating and convincing their superiors to suspend international protocol. Negotiations proceeded slowly until the summer of 2012, when Mexican elections ushered in a new president and administration. In Mexico, voting occurs in July, but the new administration takes over in December of the same year. The United States was having its own presidential election in November of that year, which meant there a possible change in administrations. Negotiators realized that a deal could be compromised by losing momentum and having to educate new leaders. This provided the motivation to finalize negotiations of Minute 319 before the end of 2012.

Results

On November 20, 2012, IBWC and CILA Commissioners signed Minute 319. They had made Compromises, and all agreed that the CR benefited significantly. The U.S. and Basin States secured Mexico's agreement to share in shortages, and Mexico secured the agreement of the United States to share in surpluses, allow storage in reservoirs above the border, and set forth a mechanism for infrastructure improvements. The environmental community secured the agreement of both nations to participate in environmental projects that would benefit the CR in Mexico by keeping more water in the river. Minute 319 also provided for a pulse flow experiment that released a significant amount of water from Lake Mead. The pulse flow re-watered many areas of the CR that had been dry for decades. New

flora and fauna developed, adding to a healthier river environment. Finally, the flow made it to the Colorado River Delta in the Sea of Cortez for the first time in 60 years.⁹

Analysis and Evaluation

The problem defined was twofold: how to sustain reservoir levels on the CR by sharing shortages with Mexico, and how to protect the CR environs in Mexico. Lifelong partnerships and an atmosphere of trust developed from the negotiations and success of Minute 319. However, the drought continued, and the interim measures taken in the United States and Mexico were not enough to protect declining reservoir levels. Encouraged by the Secretary of the Interior, the Basin States pursued drought contingency plans that were more restrictive than before. Again, Mexico's participation was crucial.

Under this framework, Mexico and the United States began to negotiate a new Minute. Because of their earlier hard work, both nations came to the table understanding each other's legal and policy positions. Negotiations began in an atmosphere of trust.

After the Minute 319 negotiations, Mexico received much internal criticism for not allowing its own Basin State entities at the table; learning from that, Mexican Basin States (Baja California and Sonora) participated in the negotiations of the new Minute. In Minute 323, Mexico agreed to a drought plan, accepting more shortages, contingent on the Basin States implementing their own drought contingency plans and extending the effective date of Minute 319. Presidential politics again played a role in helping to finalize the international agreement. In 2016, negotiations were stalled. The United States elected a new president who had made disparaging comments about Mexico. Both nations again realized the need to finish negotiations before a change of administration occurred in the United States. An agreement was struck the day after the U.S. elections, with the understanding that drought contingency plans would be implemented by the Basin States. However, details took time to sort out; Minute 323 was signed the next year, with the support of both Mexican and American administrations.

The approach of setting aside international protocol had been successful. It took the ingenuity of public servants on both sides of the border to successfully conclude the negotiations. Bureaucratic procedures for negotiation between two entities are typically developed to assist in an efficient negotiation and protect all involved. Yet, strictly following those procedures can lead to complications, as discussed above. The officials who understood the critical need of the CR due to the drought and who realized that standard protocols would not lead to successful negotiations or improvement of the CR environment deserve much credit.

Lessons Learned

There is a good reason for establishing protocols in any negotiation situation. However, if that protocol obstructs progress in reaching the ultimate goal, leaders must consider other options. It is important to understand the role, responsibility, and importance of a multilevel framework in crafting policy solutions to manage water resources. Further, trust must be established and maintained among the different levels of government and communities for a successful negotiation of this magnitude. That trust must carry over to new operational agreements in the management of water resources in the CR.

The Players

Basin States: Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming. The waters in each state are owned and regulated by that state.

Upper Colorado River Commission (UCRC): An administrative body created by the Upper Colorado River Basin Compact, consisting of a representative from each state (Colorado, New Mexico, Utah, and Wyoming) and the federal government. It administers the UB Compact among the states.

The Bureau of Reclamation (Reclamation): A federal agency in the Department of the Interior (Interior) that acts on behalf of the Secretary on the CR; owns and operates the large reservoirs and power facilities on the CR. Reclamation is required to obtain water rights under state water law. The Secretary administers the CR Compact allocations in the LB and, therefore, is considered the “water master” of the LB. Michael Connor was the Commissioner for Reclamation, and Secretary Ken Salazar headed the U.S. Department of the Interior at the time of negotiations.

The Mexican National Water Commission (Comisión Nacional del Agua [CONAGUA]): Mexican agency governing water rights and policy.

International Boundary and Water Commission: International agency created by the Treaty of 1944; consists of two offices, U.S. (IBWC) and Mexican (Comisión Internacional de Límites y Aguas [CILA]), headed by Commissioner Edward Drusina and Roberto Salmón, respectively.

U.S. Department of State and Mexican Foreign Relations Ministry: Administrative agencies responsible for international relations and overseeing, to the extent necessary, their respective sections of the IBWC.

Timeline

1922	Colorado River Compact
1928	Boulder Canyon Project Act
1944	Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande
1948	Upper Colorado River Compact
1964	<i>Arizona v. California</i> U.S. Supreme Court decree
2010	Negotiations begin on Minute 319
April 2010	Earthquake in CR in Mexico
June 2010	Minute 317 (Conceptual Framework for U.S.–Mexico Cooperative Actions)
Dec. 2010	Minute 318 (Adjustment of Delivery Schedules due to earthquake)
July 2012	Mexican presidential election

Nov. 2012	U.S. presidential election
Nov. 2012	Minute 319 signed
2015	Negotiations begin for Minute 323
2016	Donald Trump elected U.S. president
2017	Minute 323 signed

¹ The Lower Basin consists mostly of Arizona, California, and Nevada. Small parts of New Mexico and Utah are also included in the lower basin. The Upper Basin consists mostly of Colorado, New Mexico, Utah, and Wyoming, with a small part of Arizona.

² The Upper Colorado River Compact distributes the water on a percentage basis: Colorado 51.75%, New Mexico 11.25%, Utah 23%, Wyoming 14%. Arizona is apportioned 50,000 acre-feet annually.

³ In *Arizona v. California*, [373 U.S. 546], the U.S. Supreme Court determined that the Boulder Canyon Project Act of 1928 (43 U.S.C. § 617) apportioned the LB as follows: California—4.4 million acre-feet a year (maf/y); Arizona—2.85 maf/y; Nevada—0.3 maf/y.

⁴ Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande of 1944.

⁵ Upper Colorado River Endangered Species Program, San Juan Endangered Species Program, Colorado River Salinity Control Act [Public Law 93-320], Grand Canyon Protection Act [Public Law 102-575].

⁶ Bureau of Reclamation (USBR), “Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead,” Bureau of Reclamation. 2007, <https://www.usbr.gov/lc/region/programs/strategies.html>.

⁷ International Boundary & Water Commission (IBWC), “Utilization of Waters of Colorado and Tijuana Rivers and the Rio Grande,” 1944, https://www.ibwc.gov/Treaties_Minutes/treaties.html.

⁸ A “Minute” to the Treaty is an agreement between the nations on the practical operation of the Treaty. It is not an amendment to the Treaty.

⁹ In the 1990s, the flows reached the Delta due to some intense rainstorms.