# CHAPTER 12: MISCELLANEOUS ACTS AND FEDERAL COURT DECISIONS

## Introduction

This chapter discusses the implementation of other Federal legislation of interest during the period 1979 through 2008. Included are acts regarding Salton Sea restoration and Federal actions to implement the Colorado River Floodway Protection Act, Public Law (Pub. L.) No. 99-450, 100 Stat. 1129 (1986) and the Act of December 22, 1944, Pub. L. No. 78-534, 58 Stat. 887 (Flood Control Act of 1944). This chapter also discusses Federal court decisions during the period from 1979 through 2008 relating to the Secretary of the Interior's management of the Colorado River and the Federal facilities constructed to store or convey Colorado River water. This chapter brings together often unrelated topics likely to be read independently of each other; for that reason, defined terms are repeated in each section.

## Salton Sea

The Salton Sea is the State of California's largest inland terminal lake. Located in Riverside and Imperial Counties, the Salton Sea occupies the lowest part of the Salton Basin. Water has filled the Salton Basin on several occasions in past centuries. The present Salton Sea was formed in 1905, when Colorado River floods breached an early irrigation diversion structure and flowed into the then-dry Salton Basin. In February 1907, the breach was closed by local agricultural interests and the Southern Pacific Railroad.

Subsequently, agricultural development in areas surrounding the Salton Sea expanded. In the 1920s the Federal government designated public lands located in and surrounding the Salton Sea as a repository to receive and store agricultural, surface, and subsurface drainage waters. The construction and completion of the All-American Canal and the Coachella Canal in the 1940s enabled further agricultural development in the area. The Salton Sea now receives the majority of its water from agricultural runoff from the Imperial, Coachella, and Mexicali Valleys, with a very small percentage of inflows derived from tributaries and direct precipitation. The total average annual inflow to the Salton Sea was estimated at 1,343,395 acre-feet in an October 2002 report entitled *Final Environmental Impact Report/Environmental Impact Statement, Imperial Irrigation District Water Conservation and Transfer Project.* This report also projected a decrease in future inflows of up to 300,000 acre-feet annually, due to water transfers from the Imperial Irrigation District (IID) in accordance with the development and potential adoption of a quantification settlement agreement. See

Chapter 6 for a discussion of the Colorado River Water Delivery Agreement: Federal Quantification Settlement Agreement (CRWDA or Federal QSA).

On December 31, 2008, the surface elevation of the Salton Sea was 230 feet below mean sea level (-230 feet msl).[1] At this elevation, the Salton Sea has a maximum depth of about 50 feet, with an estimated surface area of 232,000 acres (362 square miles). In addition to other Federal, State, and tribal ownership of lands in the area, approximately 80,000 acres of land adjacent to and under the Salton Sea are withdrawn for Bureau of Reclamation (Reclamation) project purposes.

Due to the nutrient-rich inflows from agricultural runoff, the Salton Sea became a highly productive fishery in the latter half of the 20th century, providing habitat for hundreds of migratory and resident bird species. Several species of fish were introduced and thrived. Tilapia, inadvertently and unexpectedly introduced in the 1960s from a commercial fish farm, dominated the fish community, providing an abundant forage base for the marine sport fish and fish-eating birds. These popular fisheries were a fundamental driver of the growing recreational use of the Salton Sea in the 1950s and 1960s.

Because the Salton Sea is an inland terminal body of water and has no outlet, inflows carrying approximately 4 million tons of salt annually caused salinity to gradually increase over time. By the late 1980s, increasing nutrient and salinity levels began to result in significant adverse effects to both fish and wildlife. In 1992, over 150,000 eared grebes died on the Salton Sea, capturing national attention. Numerous such events occurred in subsequent years. In 2003, a collapse of the sport fishery occurred, and by 2007, only tilapia had shown any recovery.

As of December 31, 2008, the salinity of the Salton Sea was approximately 50,000 milligrams/liter (mg/L). As water transfers are undertaken in accordance with the CRWDA (the Federal QSA), reductions in inflows are projected to accelerate salinity increases in the Salton Sea. In the absence of additional restoration measures, salinity levels of the Salton Sea are predicted to rise above 60,000 mg/L by 2017, a level at which no fisheries are expected to survive. See Bureau of Reclamation, *Salton Sea Study Status Report*, January 2003.

Studies regarding potential restoration methodologies for the Salton Sea have been conducted since the late 1960s. In October 1992, the Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, Title XI, 106 Stat. 4661 (1992) authorized the United States Department of the Interior to conduct research which would lead to the development of methods to reduce and control salinity, provide endangered species habitat, enhance fisheries, and protect recreational values of the Salton Sea. In 1993, IID, the Coachella Valley Water District (CVWD), and Imperial and Riverside Counties formed the Salton Sea

[1] Elevations below sea level are shown as negative numbers.

Authority, which worked with Reclamation and other Federal and California State entities to develop plans to improve water quality, stabilize water elevation, and enhance the Salton Sea's recreational and economic development potential.

In 1994, the Salton Sea Authority, Reclamation, and the California Department of Water Resources entered into an agreement for a cooperative study to assess the Salton Sea's status. A total of 54 salinity and elevation control restoration methods were evaluated and reported in the September 1997 *Salton Sea Alternative Evaluation Final Draft Report*; however, no specific restoration alternative was recommended for implementation due to a lack of sufficient site-specific studies involving location, size, operational details, and additional biological, chemical, and pathogenic information.

Subsequently, the Salton Sea Reclamation Act of 1998, Pub. L. No. 105-372, 112 Stat. 3377 (1998), authorized the Secretary of the Interior (Secretary), in cooperation with the Salton Sea Authority and the State of California, to complete all necessary studies and evaluations of various options that permit the continued use of the Salton Sea as an agricultural drainage repository while reducing and stabilizing the overall salinity and water surface elevation. In addition, the Salton Sea Reclamation Act authorized studies of various options which would reclaim long-term, healthy fish and wildlife resources and their habitats, and enhance the potential for recreational use and economic development. On January 27, 2000, the United States Department of the Interior transmitted to Congress and made available to the public several reports including:

- *Overview and Summary of Salton Sea Restoration Project Draft EIS/EIR*, January 2000, prepared by Reclamation in cooperation with the Salton Sea Authority

- *Draft Salton Sea Restoration Project Environmental Impact Statement/Environmental Impact Report*, January 2000, prepared by Tetra Tech, Inc., for the Salton Sea Authority and Reclamation

- *Strategic Science Plan Salton Sea Restoration Project*, January 2000, prepared by the Salton Sea Science Subcommittee of the Salton Sea Research Management Committee

- *Salton Sea Alternatives Final Preappraisal Report*, November 12, 1998, prepared by Reclamation

These documents provided a detailed description of the scope and results of scientific studies undertaken, analyzed the environmental impacts of various alternatives, and provided a summary of findings and recommendations for future actions.

In January 2003, Reclamation transmitted a status report to Congress entitled *Salton Sea Study Status Report*, examining various restoration proposals that considered future inflow reductions to the Salton Sea of up to 300,000 acre-feet per year. The Water Supply, Reliability and Environmental Improvement Act, Pub. L. No. 108-361, Title II, 118 Stat. 1701 (2004), directed the Secretary, through Reclamation, in coordination with the State of California and the Salton Sea Authority, to complete a feasibility study regarding Salton Sea restoration. Reclamation, in cooperation with the Natural Resources Agency of the State of California (California Natural Resources Agency) and the Salton Sea Authority, studied six restoration alternative concepts which were based on previous studies. The alternatives included dividing the Salton Sea with various barrier and dam designs, creating concentric lakes around the perimeter of the Salton Sea, providing habitat enhancement without marine lakes, and a "no action" alternative. Estimated cost of the alternatives ranged from $3.5 billion to $14 billion in 2006 dollars. The information from these studies was released by Reclamation in two reports: *Restoration of the Salton Sea Summary Report*, published in September 2007; and the more comprehensive *Restoration of the Salton Sea Final Report, Volumes I and II*, dated December 2007.

From 2002 through 2004, the California legislature enacted legislation supporting the implementation of a quantification settlement agreement and expressed its intent that the State of California undertake the restoration of the Salton Sea ecosystem. The California Natural Resources Agency, under the direction of the California Department of Water Resources and the California Department of Fish and Game, released the *Salton Sea Ecosystem Restoration Program Draft Programmatic Environmental Impact Report*, dated October 2006, and submitted to the State legislature the *Salton Sea Ecosystem Restoration Program Preferred Alternative Report and Funding Plan*, dated May 2007, including *Volume I: Final Programmatic Environmental Impact Report*, recommending a preferred restoration plan. The State of California's Legislative Analyst's Office released a report entitled *Restoring the Salton Sea*, dated January 24, 2008, analyzing the alternatives discussed in these reports.

As of December 31, 2008, Reclamation continued to provide technical information and expertise to the State of California, the Salton Sea Authority, and other interested stakeholders concerning potential restoration methods for the Salton Sea.

## Colorado River Floodway Protection Act

The Colorado River Floodway Protection Act (Floodway Protection Act), Pub. L. No. 99-450, 100 Stat. 1129 (1986), originated from concerns over damages incurred primarily within the Colorado River flood plain during the high flows of the early 1980s. Congress found it essential to establish and maintain an effective floodway in order to accomplish the multiple purposes of the dams and other control structures administered by the Secretary of the Interior (Secretary) on the Colorado River, and identified the need for coordinated Federal, State, and local action to limit floodway development.

The Floodway Protection Act established the Colorado River Floodway (Floodway) from Davis Dam to the Southerly International Boundary between the United States and the United Mexican States (Mexico), with the Floodway to be identified and depicted on maps submitted by the Secretary to Congress. The Floodway Protection Act directed the Secretary, in consultation with the seven Colorado River Basin States, the Colorado River Floodway Task Force (discussed below), and other interested parties, to complete a study of the tributary floodflows downstream of Davis Dam and to define the specific boundaries of the Floodway to accommodate either a one-in-one hundred year river flow, consisting of controlled releases and tributary inflow, or a flow of 40,000 cubic feet per second (cfs), whichever is greater. The Floodway Protection Act provides for a periodic review of the Floodway and allows for any required minor and technical modifications to the Floodway boundaries, after appropriate notice and consultations.

The Floodway Protection Act also established the Colorado River Floodway Task Force, which included representatives from other Federal agencies, Native American tribes and communities, States, counties, cities, water districts, and other organizations to advise the Secretary and Congress regarding:

- Means to restore and maintain the Floodway, including but not limited to, land transfers, relocations, or other changes in land management

- The necessity of additional Floodway management legislation at local, tribal, State, and Federal levels

- Development of specific design criteria for the creation of Floodway boundaries

- Review of mapping procedures for Floodway boundaries

- Whether compensation should be recommended in specific cases of hardship resulting from the impacts of the 1983 flood on property outside of the Floodway which could not reasonably have been foreseen

- The potential application of the Floodway on Indian lands and recommended legislation or regulations that might be needed to achieve the purposes of the Floodway, taking into consideration the special Federal status of Indian lands

In 1990, the Secretary filed maps with Congress depicting the Floodway. The final report of the Colorado River Floodway Task Force, entitled, *Final Report of* *the Secretary of the Interior to the Congress of the United States on the Colorado River Floodway Protection Act (October 1986; Public Law 99-450)*, was published in October 1992.

## Coordination with United States Department of the Army, Corps of Engineers, for Flood Control Operations for Hoover Dam, Alamo Dam, and Painted Rock Dam

### Hoover Dam

Flood control is one of the purposes of Hoover Dam and Lake Mead identified in the Boulder Canyon Project Act, Pub. L. No. 70-642, 45 Stat. 1057 (1928) (BCPA). The Act of December 22, 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) (Flood Control Act of 1944), directs the Secretary of War (now the Secretary of the Army) to prescribe regulations for the use of storage allocated for flood control or navigation for reservoirs constructed with Federal funds. These regulations were promulgated on October 13, 1978, and are set forth in 33 CFR § 208.11.

The regulations designate the Chief of Engineers of the United States Army Corps of Engineers (USACE) as the duly authorized representative of the Secretary of the Army, to exercise the authority set out in the Flood Control Act of 1944. In accordance with the regulations, the USACE published the *Water Control Manual for Flood Control, Hoover Dam and Lake Mead, Colorado River* (Water Control Manual) in December 1982. In order to ensure a clear understanding of the flood control regulations and of the information exchange required for the operation of Hoover Dam and Lake Mead, the Field Working Agreement between the Department of the Interior, Bureau of Reclamation, and the Department of the Army, Corps of Engineers, for Flood Control Operation of Hoover Dam and Lake Mead, Colorado River, Nevada-Arizona (Field Working Agreement) was signed by the Regional Director of the Bureau of Reclamation's (Reclamation) Lower Colorado Region and the Brigadier General, Division Engineer, of USACE's South Pacific Division in February 1984. The two parties agreed that the Field Working Agreement consummated the provisions of the Flood Control Act of 1944 and that Hoover Dam and Lake Mead would be operated in the interest of flood control in accordance with the water control plan detailed in the agreement.

Under the Field Working Agreement, the water control plan requires that:

- At all times, a minimum of 1,500,000 acre-feet of storage capacity be maintained at Lake Mead to provide storage space for the control of floods. If, however, the available flood control space diminishes at any time to less than 1,500,000 acre-feet, minimum flood control releases are prescribed to reduce the water in storage and achieve the minimum flood control space.[2]

- From August 1 through January 1, releases from Lake Mead be scheduled so that available storage space in Lake Mead on the first day of each of those months is no less than the required space specified. The available flood control storage space in Lake Mead may be reduced to a minimum of 1,500,000 acre-feet provided that the additional space is available in specified upstream reservoirs.

- From January 1 through July 31, minimum releases from Lake Mead be made to attain the August 1 flood control space requirement. These minimum releases are determined by a specified computational method using inflow forecasts provided by the National Weather Service's Colorado Basin River Forecasting Center located in Salt Lake City, Utah (originally called the Colorado River Forecasting Service).

After the high flows in the early 1980s, flood control releases from Lake Mead were not necessary until the late 1990s. Flood control releases were made in 1997, 1998, and 1999.

The Field Working Agreement also recognized that "Hoover Dam is but one of three major flood control reservoirs in the Lower Colorado River Basin." The USACE operates Alamo Dam on the Bill Williams River and Painted Rock Dam on the Gila River, and the Field Working Agreement calls for the coordinated operation of the three reservoirs to achieve flood control objectives.

### Alamo Dam

Alamo Dam is located in west-central Arizona on the Bill Williams River, approximately 39 miles upstream from the river's confluence with the Colorado River at Lake Havasu. Alamo Dam and Lake is a multiple-purpose facility with a total storage capacity of 1,361,247 acre-feet. Of the total storage capacity, approximately 76 percent (1,039,531 acre-feet) is allocated for flood control and spillway surcharge (the capacity of the reservoir above the spillway

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[2] The top of Hoover Dam is 1232 feet above mean sea level (msl). The top of the spillway gates when closed is 1205.40 feet and when fully raised to slow the flow of water is 1221.40 feet. The minimum flood control space required by the Field Working Agreement results in a minimum flood control pool with a base set at elevation 1219.61 feet and a ceiling set at 1229 feet. The base at elevation 1219.61 feet falls between the elevation of the top of the spillway gates in a closed position and the elevation in a fully raised position, and the ceiling at elevation 1229 feet falls above the elevation of the gates in a raised position. Specifically, using the elevation-storage capacity relationship in place in 1982 and elevation 1229.0 feet msl as the maximum design flood pool level as defined in the Water Control Manual, elevation 1221.61 feet msl is specified in the Field Working Agreement as the elevation of the start of the minimum flood control space resulting in approximately 1,218,000 acre-feet of the minimum flood control space being above elevation 1221.40, the top of the raised spillway gates.

gates). Releases from Alamo Dam ultimately enter Lake Havasu, which is formed by Parker Dam on the lower Colorado River.

The USACE coordinates flood control operations of Alamo Dam with Reclamation's Lower Colorado Region. Releases from Alamo, Parker, Davis, and Hoover dams are coordinated to minimize damage due to high flows downstream of Parker Dam. Because flood control releases from Alamo Dam may contribute to meeting water deliveries to water users in the United States and to the United Mexican States (Mexico), releases from these dams are also coordinated to conserve the water released from Alamo Dam for use in the United States and Mexico.

Several agencies with interest in the Bill Williams River and the operation of Alamo Dam formed the Bill Williams River Corridor Steering Committee, a partnership seeking ways to manage reservoir releases to meet human needs and maintain the health and sustainability of the downstream ecosystem. As of December 31, 2008, participating agencies included Arizona Game and Fish, Arizona State Parks, Arizona Department of Water Resources (advisory role), City of Scottsdale, The Nature Conservancy, USACE, Bureau of Land Management, Fish and Wildlife Service, and Reclamation.

### Painted Rock Dam

Painted Rock Dam is located on the Gila River approximately 115 miles upstream of the confluence with the Colorado River. Painted Rock Dam and Reservoir is a flood control facility with a total storage capacity of 2,491,700 acre-feet and is operated to provide protection for agricultural lands and communities downstream. Releases from Painted Rock Dam may reach the mainstream of the Colorado River upstream of Yuma, at the confluence of the Gila River and Colorado River.

The USACE coordinates flood control operations of Painted Rock Dam with Reclamation's Lower Colorado Region. Releases from Painted Rock, Imperial, Parker, Davis, and Hoover dams are coordinated to minimize damage due to high flows downstream of Imperial Dam when releases from Painted Rock Dam reach the mainstream of the Colorado River. Since flood control releases from Painted Rock Dam may contribute to meeting Mexico's scheduled water deliveries, releases from these dams are also coordinated to minimize flows in excess of Mexico's scheduled deliveries. See Chapter 4.

## Synopses of Miscellaneous Reported Federal Court Decisions

The Federal courts entered numerous decisions during the period from 1979 through 2008 relating to the management of the Colorado River and the Federal facilities constructed to store or convey Colorado River water. The following brief synopses of reported Federal court decisions are presented in chronological order simply to provide the reader with key elements of these judicial rulings. The descriptions are not an indication of the position of the United States Department of the Interior then or now on any particular issue.

### *Bryant* v. *Yellen*

The Imperial Irrigation District (IID), situated in Imperial Valley, California, obtained a right to the use of Colorado River water under California State law, putting the right to use before June 25, 1929, the effective date of the Boulder Canyon Project Act, Pub. L. No. 70-642, 45 Stat. 1057 (1928) (BCPA) which authorized the construction of Hoover Dam. A right to Colorado River water obtained and put to use under State law as of June 25, 1929, is termed a "present perfected right" in the Decree of the United States Supreme Court in *Arizona* v. *California*, 376 U.S. 340, 341 (1963) and is often referred to as a "PPR." IID's present perfected right is expressly recognized by the Supreme Court in the Supplemental Decree entered in *Arizona* v. *California*, 439 U.S. 419, 429 (1979), and in the Consolidated Decree entered in *Arizona* v. *California*, 547 U.S. 150, 175 (2006).

Individual farmers within IID initially put the State law water right to use by diverting water from the Colorado River within the United States and conveying the water to the Imperial Valley through the Alamo Canal. The Alamo Canal originated within the United States, ran through Mexican territory, and then turned north into the United States and the Imperial Valley. Prior to the construction of Hoover Dam, both the uncontrolled flows of the Colorado River, and the delivery of water through a canal, which ran in part through a foreign country, presented challenges to the farmers within IID.

The Federal reclamation program was authorized by the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (1902). This act was later amended and supplemented on multiple occasions. One such instance was the Omnibus Adjustment Act of 1926, Pub. L. No. 69-284, 44 Stat. 636 (1926) (1926 Act). Section 46 of the 1926 Act prohibited the delivery of reclamation project water to any irrigable land held in private ownership by one owner in excess of 160 irrigable acres and required such owners to execute recordable contracts for the sale of excess lands before such excess lands could receive project water.[3] In 1928, the BCPA further supplemented Federal reclamation law, authorizing the construction of features now known as Hoover Dam, Imperial Dam, and the All-American Canal, a canal to be situated entirely within the United States through which water would be delivered to Imperial Valley.

In 1932, pursuant to the BCPA, the Secretary of the Interior (Secretary) entered into a contract with IID providing for the construction of Imperial Dam and the All-American Canal, the repayment of construction costs, and the delivery of

[3] Note that other provisions of reclamation law also address acreage limitations, including, for example, Section 5 of the 1902 Act.

Colorado River water to IID. The Secretary took the position in 1933 in a letter to IID that the lands under irrigation within IID at the time the BCPA was passed and having a vested water right under State law were not subject to a Federal 160-acre limitation. This remained the position of the Secretary until 1964.

In 1964, the United States sought to impose the excess lands provision of the 1926 Act on all privately owned lands in IID, whether or not the lands had been irrigated under State law prior to June 25, 1929, the effective date of the BCPA. After unsuccessful attempts to secure an amendment to the 1932 contract, the United States filed suit in 1967 in the Federal district court in southern California against IID, seeking a declaratory judgment that the excess acreage limitation of Section 46 of the 1926 Act applied to all private lands in IID that received Colorado River water through the All-American Canal. The State of California and certain landowners within IID were granted leave to intervene.

The district court ruled against the Federal government in a decision reported at *United States* v. *Imperial Irrigation District*, 322 F. Supp. 11 (S.D. Cal. 1971) in which the district court held that "the land limitation provisions of reclamation law have no application to privately owned lands lying within the Imperial Irrigation District" and held that IID was not bound to observe such limitations in the delivery of Colorado River water to any of the privately owned lands within the boundaries of IID. *Id.* at 27. The United States did not appeal the decision. A group of Imperial Valley residents, who had been given leave to participate as *amici curiae*[4], and who desired to purchase the excess lands which might become available if Section 46 were held applicable, were ultimately granted leave to intervene and to pursue an appeal of the district court's decision to the United States Court of Appeals for the Ninth Circuit.

In a separate but contemporaneous lawsuit, a group of Imperial Valley residents brought suit in 1969 against the United States in the Federal district court in southern California seeking to compel the United States to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 in the deliveries of water to IID. That statutory provision provides that no right to the use of water for land in private ownership may be sold to a landowner "unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land." The district court granted partial summary judgment against the Federal government in a decision reported at *Yellen* v. *Hickel*, 335 F. Supp. 200 (S.D. Cal. 1971). Various landowners in Imperial Valley were granted leave to intervene and, after a full trial, the district court again ruled against the United States in a decision reported at *Yellen* v. *Hickel*, 352 F. Supp. 1300 (S.D. Cal. 1972) in which the district court held:

[4] A Latin term meaning literally "friend of the court" in the singular or "friends of the court" in the plural. The term refers to a person affected by or interested in a pending case, but not a party to it, who is permitted to file pleadings or participate in oral argument.

> The requirement of residency of Section 5 of the Reclamation Act of June 17, 1902, is a prerequisite to the receipt of Boulder Canyon project water in the Imperial Valley and imposes a condition on the receipt of such water.

*Id.* at 1318. Both the United States and intervening landowners appealed to the Ninth Circuit.

The Ninth Circuit consolidated the two appeals and entered a decision reported at *United States v. Imperial Irrigation District*, 559 F.2d 509 (9th Cir. 1977). With respect to the district court decision in the residency case, the Ninth Circuit reversed the decision and held that the plaintiffs seeking to enforce the residency requirement of Section 5 of the Reclamation Act of 1902 lacked standing to bring the suit against the United States, vacated the judgment, and directed the district court to dismiss the complaint. With respect to the district court decision in the excess lands case, the Ninth Circuit reversed the decision and upheld the application of the excess lands provision of the 1926 Act to deliveries to IID.[5] Review of the Ninth Circuit's decision with respect to the excess lands provision of the 1926 Act was sought from and granted by the United States Supreme Court.

The Supreme Court, in a decision reported at *Bryant* v. *Yellen*, 447 U.S. 352 (1980), began its analysis of the excess lands issue by observing that:

> On June 25, 1929, when the Project Act became effective, the District was diverting, transporting, and delivering water to 424,145 acres of privately owned and very productive farmland in Imperial Valley. Under neither state law nor private irrigation arrangements in existence in Imperial Valley prior to 1929 was there any restriction on the number of acres that a single landholder could own and irrigate.

*Id.* at 356 (footnotes omitted). The Supreme Court then reviewed the provisions of the BCPA, in particular, Section 6, which requires that the works authorized by the BCPA be used, among other purposes, for the "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact [of 1922]." *Id.* at 359. The court also reviewed section 14 which provides that the BCPA should be deemed supplemental to the reclamation law "which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided." *Id.* at 359-360.

The Supreme Court recognized that the 1926 Act was a statute amendatory of, or supplemental to, the Reclamation Act of 1902 and that Section 46 of the 1926 Act "forbade delivery of reclamation project water to any irrigable land held in private

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[5] The Ninth Circuit subsequently entered an order modifying this ruling to recognize the stipulation of the parties that the acreage limitation provisions of the reclamation law have no application to land owned by the State of California in its Imperial Water Fowl Management Area. *United States* v. *Imperial Irrigation District*, 595 F.2d 524 (9th Cir. 1979).

ownership by one owner in excess of 160 acres . . . ." *Id.* at 360 (footnote omitted). But, in considering the applicability of Section 46 to IID, the Supreme Court found that "the Court of Appeals failed to take adequate account of § 6 of the Project Act and its implementation in our opinion and decrees filed in the Arizona v California litigation." *Id.* at 370. In reaching this result, the Supreme Court looked to the 1963 decision in *Arizona* v. *California*:

> Arizona v California recognized that "one of the most significant limitations" on the Secretary's power under the Project Act was the requirement that he satisfy present perfected rights, a matter of great significance to those who had reduced their water rights to beneficial use prior to 1929.

*Id.* at 369 (citation omitted). The Supreme Court noted that:

> In the first place, it bears emphasizing that the § 6 perfected right is a water right originating under state law. In Arizona v California, we held that the Project Act vested in the Secretary the power to contract for project water deliveries independent of the direction of § 8 of the Reclamation Act to proceed in accordance with state law and of the admonition of § 18 of the Project Act not to interfere with state law. We nevertheless clearly recognized that § 6 of the Project Act, requiring satisfaction of present perfected rights, was an unavoidable limitation on the Secretary's power and that in providing for these rights the Secretary must take account of state law. In this respect, state law was not displaced by the Project Act and must be consulted in determining the content and characteristics of the water right that was adjudicated to the District by our decree.

*Id.* at 370-371 (citation and footnote omitted). The Supreme Court further noted that:

> Indeed, as a matter of state law, not only did the District's water right entitle it to deliver water to the farms in the District regardless of size, but also the right was equitably owned by the beneficiaries to whom the District was obligated to deliver water.

*Id.* at 371 (footnote omitted). The Supreme Court found that:

> These were important characteristics of the District's water right as of the effective date of the Project Act, and the question is whether Congress intended to effect serious changes in the nature of the water right by doing away with the District's privilege and duty to service farms regardless of their size. We are quite sure that Congress did not so intend and that to hold otherwise is to misunderstand the Project Act and the substantive meaning of "present perfected rights" as defined by this Court's decree.

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> Here, we are dealing with perfected rights protected by the Project Act; and because its water rights are to be interpreted in the light of state law, the District should now be as free of land limitations with respect to the land it was irrigating in 1929 as it was prior to the passage of the Project Act. To apply § 46 would go far toward emasculating the substance, under state law, of the water right decreed to the District, as well as substantially limiting its duties to, and the rights of, the farmer-beneficiaries in the District.
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> We consequently hold that the perfected water right decreed to the District may be exercised by it without regard to the land limitation provisions of § 46 of the 1926 Act or to any similar provisions of the reclamation laws.

*Id.* at 372-374 (footnotes omitted).

The Supreme Court declined to address the applicability of the excess lands provision of the 1926 Act to the approximately 14,000 acres of irrigated land within IID which were not under irrigation in 1929, noting that the record had yet to be developed with respect to these lands. *Id.* at 378-379. The judgment of the Ninth Circuit was reversed "with respect to those lands [within IID] that were irrigated on June 25, 1929 and with respect to which the District has been adjudicated to have a perfected water right as of that date." *Id.* at 379.

### ***Uncompahgre Valley Water Users Association* v. *Federal Energy Regulatory Commission***

In 1982, the Uncompahgre Water Users Association and Montrose Partners filed applications with the Federal Energy Regulatory Commission (FERC) for license to develop six small-scale hydroelectric power projects along the South Canal and the Montrose and Delta Canal of the Uncompahgre Valley Water System in the Uncompahgre Project, a Federal Reclamation project in Montrose County, Colorado. FERC dismissed the applications in 1984, and the petitioners appealed to the United States Court of Appeals for the Tenth Circuit in accordance with provisions of the Federal Power Act, Pub. L. No. 66-280, 41 Stat. 1067 (1920), as amended.

During the pendency of the appeal, the United States Department of the Interior, which had not been party to the proceedings before FERC, filed a letter on May 6, 1985, with FERC asserting that under the Act of June 22, 1938, Pub. L. No. 75-698, 52 Stat. 941 (1938 Act), the United States Department of the Interior has sole authority to develop the power potential on the Uncompahgre Project.

The 1938 Act states in pertinent part:

> That whenever a development of power is necessary for the irrigation of lands under the Uncompahgre Valley reclamation project, Colorado, or an opportunity is afforded for the development of power under said project, the Secretary of the Interior is authorized to enter into a contract

> for a period not exceeding forty years for the sale and development of any surplus power. The provisions of such contract shall be such as the said Secretary may deem to be equitable….

The question of whether the 1938 Act divested FERC's general licensing jurisdiction over hydropower development under the Federal Power Act with respect to the Uncompahgre Valley Reclamation Project was presented to the Tenth Circuit with the United States Department of the Interior participating as an *amicus curiae*[6]. In a decision reported at *Uncompahgre Valley Water Users Ass'n* v. *Federal Energy Regulatory Commission*, 785 F.2d 269 (10th Cir. 1986), the Tenth Circuit began its analysis with a review of pertinent Federal reclamation law:

> [T]he Act of 1938 is a Congressional enactment which covers a specific reclamation project established pursuant to the Reclamation Acts of 1902 and 1906. Indeed, the general language of the Act of June 22, 1938 is substantially similar to that of Section 5 of the amendatory Reclamation Act of April 16, 1906. Both of them authorize the Secretary of the Interior to engage in an effort to utilize the hydropower resources as an incidental activity on reclamation.

*Id.* at 273-274. In light of the substantial similarity between the 1938 Act and Section 5 of the Reclamation Act of April 16, 1906 (1906 Act), the Tenth Circuit further reviewed the language and legislative history of the 1906 Act and found:

> The language of Section 5 [of the 1906 Act] itself does not expressly authorize the Secretary of the Interior to undertake the construction of hydroelectric facilities in an irrigation project. The legislative history of the Act, however, demonstrates that Congress intended to confer upon the Secretary such authority in those situations where "the development of power is necessary and feasible for the pumping of water for irrigation" in the implementation of the reclamation projects.

*Id.* at 274 (footnote and citation omitted). The Tenth Circuit then reviewed the authorities bearing on FERC's jurisdiction, holding:

> However encompassing the general language of the Federal Power Act may be, it is equally clear that the 1938 Act is a specially-purposed enactment which contains provisions applicable only to a specific situation. When it is read in conjunction with the Act of 1906, the 1938 Act authorizes the Secretary of the Interior to contract with private entities for the development and sale of surplus water power when a development of such power facilities is essential for irrigation purposes at the Uncompahgre Valley Water System. Given the specific and circumscribed role in which the Secretary of the Interior may exercise to

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[6] A Latin term meaning literally "friend of the court" in the singular or "friends of the court" in the plural. The term refers to a person affected by or interested in a pending case, but not a party to it, who is permitted to file pleadings or participate in oral argument.

> dispose of surplus water power, we believe that our conclusion is supported by the principle of construction that the more specific legislation covering the given subject-matter will take precedence "over the general language of the same or another statute which might otherwise prove controlling." A different conclusion in sustaining the position urged by FERC here would eviscerate the vitality of the Act of 1938, rendering it a meaningless statute. We hold that FERC does not have the licensing jurisdiction to entertain an application for the development of the hydropower facilities at the Uncompahgre Valley Reclamation Project. Such function lies within the jurisdiction of the Department of the Interior, as provided by the Act of June 22, 1938, 52 Stat. 941, when a development of such power facilities is necessary for irrigation purposes, or an opportunity is afforded for the development of power at this Reclamation Project.

*Id.* at 275-276 (footnote and citation omitted). The Tenth Circuit vacated FERC's orders and dismissed the appeal. The Town of Norwood, which had been granted leave to intervene, sought and was denied review of the Tenth Circuit decision by the United States Supreme Court at *Town of Norwood* v. *Uncompahgre Valley Water Users Ass'n*, 479 U.S. 829 (1986).

This decision of the Tenth Circuit is also discussed in Chapter 13.

### *Laughlin River Tours, Inc.* v. *Bureau of Reclamation*

In 1987, Laughlin River Tours, Inc. (Laughlin) filed suit in the Federal district court in Nevada against the Bureau of Reclamation (Reclamation), challenging Reclamation's operation of Hoover and Davis Dams and seeking injunctive relief to compel Reclamation to release a minimum of 10,000 cubic feet per second (cfs) to meet the specific navigational requirements of the plaintiff. The district court ordered Laughlin to exhaust administrative remedies by applying to Reclamation's Regional Director for the Lower Colorado Region for an administrative determination in connection with the relief sought. Laughlin filed a request with the Regional Director for the release of 10,000 cfs, and the request was denied in an Administrative Decision dated September 19, 1988. The Administrative Decision was appealed to the Commissioner of Reclamation. The Commissioner denied the appeal in an Administrative Decision dated January 9, 1989. Laughlin then applied to the district court for review of the Administrative Decision, modifying the request for injunctive relief to seek the release of a minimum of 7,500 cfs.

Laughlin relied on Section 6 of the Boulder Canyon Project Act, Pub. L. No. 70-642, 45 Stat. 1057 (1928) (BCPA) which provides in pertinent part:

> That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power.

Laughlin contended that Reclamation's fluctuating releases were intended to accommodate the demands of peaking power operations and not navigation.

In a decision reported at *Laughlin River Tours, Inc.* v. *Bureau of Reclamation*, 730 F. Supp. 1522 (D. Nev. 1990), the district court reviewed the language of Section 6 of the BCPA and observed that: "Under the express provisions of the Act, controlling floods, improving navigation, and regulating the flow are the first priorities. The generation of energy as a means of financial support for the project is a lower priority." *Id.* at 1524.

The district court then analyzed the significance of the prioritization of purposes in Section 6, holding that:

> [T]he Bureau does not misconstrue the provisions of the Act when it does not read these priorities as requiring the Secretary to maximize the first set of purposes before establishing criteria to meet the second and third priorities. In short, each of the priorities is interdependent on the others, and the Secretary has broad discretion in meeting the needs of the second and third priorities as long as the Secretary continues to use the dam to improve navigation and does not place an undue burden on navigation along the river.

*Id.* at 1524. The district court further found that:

> The construction of Hoover, Davis, and Parker Dams substantially improved navigation throughout the course of the lower Colorado River as is reflected in the extensive historical analysis of navigation on the lower Colorado River set forth in the administrative decision.

*Id.* at 1525. The district court declined to find that the release of water to raise the depth of the river at one specific point in the river in order to improve navigation is required by the BCPA. *Id.* at 1525.

### *Central Arizona Irrigation and Drainage District* v. *Lujan*

On December 15, 1972, the Secretary of the Interior (Secretary) entered into a water service and repayment contract with the Central Arizona Water Conservation District (CAWCD) entitled Contract Between the United States and the Central Arizona Water Conservation District for Delivery of Water and Repayment of Costs of the Central Arizona Project (Master Repayment Contract). In 1983, the Secretary allocated water from the Central Arizona Project (CAP) and the Secretary and CAWCD thereafter entered into subcontracts with third parties for the use of CAP water. On December 1, 1988, the Secretary and CAWCD entered into Amendment No. 1 of the Master Repayment Contract to increase the ceiling for CAWCD's repayment obligation and for other purposes. The Master Repayment Contract, its Amendment No. 1, and the CAP water allocations are discussed in Chapter 5.

The Central Arizona Irrigation and Drainage District, the Maricopa-Stanfield Irrigation & Drainage District, and the New Magma Irrigation & Drainage District, each holding a CAP subcontract for non-Indian agricultural priority water under the Secretary's 1983 CAP allocations, filed suit in 1989 against the United States and CAWCD in Federal district court in Arizona. These irrigation districts challenged a provision in the Master Repayment Contract, as amended in 1988, which provided that CAP municipal and industrial (M&I) subcontractors could use their CAP M&I entitlements for ground water recharge to the extent the ground water recharge was consistent with Arizona law.

In a decision reported at *Central Arizona Irrigation and Drainage District* v. *Lujan*, 764 F. Supp. 582 (D. Ariz. 1991), the district court concluded that the irrigation districts lacked standing to assert the claim challenging the ground water recharge provision (*id.* at 586) but observed that, even if the plaintiffs had standing, summary judgment would still properly be granted, because "if M & I users are recharging their water allocations, they are *using* their water and there is simply none left over for agricultural users to take." *Id.* at 588 (emphasis in original).

Examining the interplay between Federal and State law, the district court noted:

> The allocation and preferences given to CAP water seems to be within the exclusive province of the Secretary of the Interior; once the preferences are already established, the possible *uses* of that water are governed by state law. Consequently, the Secretary of the Interior is authorized to allocate CAP water to M & I users. Then M & I users may use their water for any use authorized by Arizona law, including recharge.

*Id.* at 591 (emphasis in original).

The district court considered whether the inclusion of the recharge provision in the 1988 amendment to the Master Repayment Contract constituted a major Federal action under the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (NEPA) and concluded it did not. The district court found:

> The only federal action in the addition of the recharge provision is the federal government allowing its M & I users to recharge their water allocations consistent with Arizona law. The federal government is not doing the actual recharge. The subcontractors are doing the recharge pursuant to Arizona law. Whether or not any of the users will actually recharge their allocations is now out of the hands of the federal government. … Recharge is accomplished once the water has been diverted from the water supply system. The federal government has nothing to do with the recharge activities of its subcontractors.

*Id.* at 596. The district court further noted that the Federal Government was neither funding nor supervising the recharge projects. *Id.* at 597. The district court found that, under these circumstances, NEPA did not require a supplemental environmental impact statement or an environmental assessment. *Id.*

### *Southwest Center for Biological Diversity* v. *United States Bureau of Reclamation*

The Lake Mead delta is located at the north end of Lake Mead below the Grand Canyon in Mohave County, Arizona. Due to the relatively high flows of the Colorado River in the 1980s (see Chapter 2), this area was under water during routine operations of the lower Colorado River under the Law of the River until the late 1980s and early 1990s when, due to relatively dry years, the elevation level at Lake Mead dropped. With lower lake elevations, willow trees and other habitat grew in portions of the previously inundated area, and the southwestern willow flycatcher (Flycatcher) used this habitat for nesting purposes. In the mid-1990s, the elevation level of the water in Lake Mead began to rise, with an extended inundation of the Lake Mead delta in the late 1990s causing a loss of willows used by the Flycatcher for nesting. The Flycatcher was listed as an endangered species by the United States Fish and Wildlife Service (USFWS) in 1995 under the provisions of the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (ESA).

The Bureau of Reclamation (Reclamation) is responsible for certain activities in connection with the management of the lower Colorado River, including operation of Hoover Dam which regulates the elevation of Lake Mead. In 1995, Reclamation initiated informal consultation with the USFWS to determine whether its discretionary operations on the lower Colorado River over the next 5 years "may affect" the Flycatcher and several other endangered species. Reclamation issued a biological assessment in August 1996 and initiated formal consultation with the USFWS.

In January 1997, the USFWS issued a Draft Biological Opinion (1997 Draft BO) which proposed a reasonable and prudent alternative (RPA) that would require Reclamation to use the full scope of its authority and discretion to immediately protect and maintain the Lake Mead delta habitat (by maintaining certain Lake Mead elevations). If Reclamation were unable to implement this provision, Reclamation would be required to defer use of conservation space above elevation 2136 at Roosevelt Lake, Arizona, in order to maintain Flycatcher habitat there until suitable Flycatcher habitat could be developed elsewhere.

In response to the 1997 Draft BO, Reclamation advised the USFWS, which administers the ESA on behalf of the Secretary of the Interior (Secretary), that under existing law Reclamation lacked the discretion to reduce the level of Lake Mead, except for these specific purposes: river regulation, improvement of navigation, and flood control; irrigation and domestic uses, including the satisfaction of present perfected rights; and power generation.

The USFWS issued a Final Biological Opinion (1997 Final BO) in April 1997, concluding that Reclamation's operation of the lower Colorado River would jeopardize the Flycatcher. The 1997 Final BO did not require the protection of the Lake Mead delta habitat (or maintenance of a specific Lake Mead elevation), nor did it require Reclamation to defer use of conservation space at Roosevelt Lake. The RPA in the 1997 Final BO did require that Reclamation take actions to avoid jeopardy, including the immediate initiation of a program for the protection and restoration of approximately 1,400 acres of currently unprotected riparian habitat. If insufficient occupied habitat could be identified, Reclamation was to procure and protect high-value unoccupied habitat. The RPA further required the continued development of a 50-year Multi-Species Conservation Program (MSCP), with the goal of benefitting multiple species. The Lower Colorado River MSCP is discussed in Chapter 3.

The Southwest Center for Biological Diversity brought suit against Reclamation and the Secretary in Federal district court in Arizona in 1997, contending that the Secretary had failed to comply with the requirements of the ESA with respect to the Flycatcher. In particular, plaintiffs contended that the USFWS failed to set forth an RPA which would avoid jeopardy to the Flycatcher population in the Lake Mead delta.

Plaintiff sought injunctive relief, asking that the district court order Reclamation to lower Lake Mead to approximately 1178 feet above mean sea level (msl) in order to preserve the Lake Mead delta habitat. Plaintiff later amended the complaint to include a claim under the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946), challenging the RPA as arbitrary, capricious, and contrary to the ESA.

The district court dismissed the claims against Reclamation for lack of subject matter jurisdiction based on plaintiff's failure to comply with the notice requirements under the citizen suit provision of the ESA and denied the motion for preliminary injunction seeking to force Reclamation to lower the level of Lake Mead.

The seven Colorado River Basin States entered special appearances, expressly reserving their sovereign immunity under the Eleventh Amendment of the United States Constitution. The Basin States argued that they were necessary parties to the extent plaintiff sought to compel the release of water from Lake Mead to the detriment of the States' interests, that they could not be joined because of their Eleventh Amendment immunity, and, therefore, their absence would preclude judicial consideration of the drawdown of Lake Mead.

The district court, having dismissed the claims against Reclamation and denied the motion seeking to force Reclamation to lower Lake Mead, denied the Basin States' indispensable party motions as moot. The district court addressed the remaining claims against the Secretary relating to the Flycatcher population at the Lake Mead delta in a decision reported at *Southwest Center for Biological Diversity* v. *United States Bureau of Reclamation*, 6 F. Supp. 2d 1119 (D. Ariz. 1997).

The district court noted that plaintiffs were contending that the USFWS failed to set forth an RPA which is likely to alleviate jeopardy to the Lake Mead Flycatcher population, that the RPA proposes "only studies and totally speculative off-site future habitat protection, with no changes to the operation of Lake Mead," and that "the RPA is arbitrary and capricious because it fails to protect the Lake Mead habitat." *Id.* at 1129 (citation omitted).

In analyzing plaintiff's claims, the district court observed that:

> Plaintiff cites no authority supporting that the Service must propose an RPA which alleviates jeopardy as to each and every location that an endangered species is found and upon which Federal action impinges rather than proposing an RPA which, while not removing jeopardy as to a particular location, is reasonably likely to alleviate jeopardy to the species generally. … The Court does not conclude that the RPA was arbitrary merely because it does not protect the Lake Mead Flycatcher population.

*Id.* at 1129 (footnote omitted). The district court further stated that:

> The Court is mindful of the Flycatcher's precarious status as documented in the Final BO. Nevertheless, the Service has concluded that the loss of the Lake Mead habitat, although significant, will not jeopardize the Flycatcher if Reclamation complies with the RPA and the incidental take statement. Nor does the Service conclude that the loss of the Lake Mead habitat requires the immediate substitution of replacement habitat to successfully alleviate jeopardy to the Flycatcher. The RPA is not rendered arbitrary and capricious merely because it does not contemplate the preservation of the Lake Mead habitat or the replacement of that habitat before [lower Colorado River] operations continue.

*Id.* at 1131. The district court reviewed language in the 1997 Final BO which described the type of habitat to be acquired and concluded that the USFWS had "sufficiently identified the type of replacement habitat to be acquired and that the Service did not abuse its discretion in concluding that 1,400 acres of habitat suitable for Flycatchers could be acquired." *Id.* at 1132.

Finally, the district court concluded:

> With respect to Reclamation conferring with the Service, the implementing regulations provides [sic] that "[t]he Service will utilize the expertise of the Federal agency … in identifying [reasonable and prudent] alternatives." 50 C.F.R. §402.14(g)(5). In response to the Draft BO, Reclamation advised the Service that it lacked discretion to reduce the level of Lake Mead under the Law of the River. (Final BO

> at 8-10). The Final BO reflects that the change from the RPA in the Draft BO to that in the Final BO was the result of a clarification of Reclamation's discretion to decrease the level of Lake Mead. Although Plaintiff argues that the Service failed to independently determine the extent of Reclamation's discretion, even if Reclamation has complete discretion in the management of Lake Mead, the relevant inquiry is whether the RPA in the Final BO alleviates jeopardy. Although the RPA in the Final BO does not require the preservation of the Delta habitat, that does not *per se* render it arbitrary or capricious and this Court has concluded that the RPA is not otherwise arbitrary and capricious.

*Id.* at 1134. The district court granted summary judgment in favor of the Secretary. *Id.* at 1134. The Southwest Center for Biological Diversity filed an appeal with the United States Court of Appeals for the Ninth Circuit.

The district court's order was affirmed in a decision reported at *Southwest Center for Biological Diversity* v. *United States Bureau of Reclamation*, 143 F.3d 515 (9th Cir. 1998), in which the Ninth Circuit held that:

> First of all, under the ESA, the Secretary was not required to pick the first reasonable alternative the FWS came up with in formulating the RPA. The Secretary was not even required to pick the best alternative or the one that would most effectively protect the Flycatcher from jeopardy. … The Secretary need only have adopted a final RPA which complied with the jeopardy standard and which could be implemented by the agency.
>
> Secondly, under the ESA, the Secretary was not required to explain why he chose one RPA over another, or to justify his decision based solely on apolitical factors. Accordingly, the district court had no reason to address the possible factors that might have motivated the Secretary in rejecting the draft RPA or to address the merits of Southwest's argument that the Secretary improperly rejected the draft RPA based on Reclamation's bare assertion that it lacked the discretion to lower the water level at Lake Mead.
>
> The district court correctly held that the only relevant question before it for review was whether the Secretary acted arbitrarily and capriciously or abused his discretion in adopting the final RPA. In answering this question, the court had only to determine if the final RPA met the standards and requirements of the ESA. The court was not in a position to determine if the draft RPA should have been adopted or if it would have afforded the Flycatcher better protection.

*Id.* at 522-523 (citation and footnotes omitted).

A decision that also addresses the application of the ESA to Colorado River operations, *Defenders of Wildlife* v. *Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003), appeal dismissed, 74 F. App'x 63 (D. C. Cir. 2003), is discussed later in this chapter.

### *Maricopa-Stanfield Irrigation and Drainage District* v. *United States*

The Maricopa-Stanfield Irrigation & Drainage District, the Central Arizona Irrigation and Drainage District, and the New Magma Irrigation & Drainage District, each holding a Central Arizona Project (CAP) subcontract for specified percentages of non-Indian agricultural priority water under the Secretary of the Interior's (Secretary) 1983 CAP allocations (see Chapter 5), filed suit against the United States in 1994 in Federal district court in Arizona.

The suit alleged that the irrigation districts had rights to certain water in excess of the needs of the Ak-Chin Indian Community's water rights settlement as a result of the Act of October 19, 1984, Public Law (Pub. L.) No. 98-530, 98 Stat. 2698 (1984) (1984 Ak-Chin Act) and the 1983 CAP allocations, and further alleged that Congress in the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, Title XXXVII, 106 Stat. 4740 (1992) (SCAT Act), had taken the irrigation districts' rights to excess Ak-Chin water without just compensation. The Ak-Chin Indian Community water rights settlement, excess Ak-Chin water, and the San Carlos Apache Tribe water rights settlement are discussed in Chapter 10.

The district court ruled in favor of the irrigation districts on a motion for summary judgment. The United States appealed. The United States Court of Appeals for the Ninth Circuit reversed the district court in an opinion dated July 7, 1998, reported at *Maricopa-Stanfield Irrigation and Drainage District* v. *United States*, 147 F.3d 1168 (9th Cir. 1998), later withdrawn by order dated October 14, 1998. In a substantially rewritten substitute opinion, also dated October 14, 1998, reported at *Maricopa-Stanfield Irrigation and Drainage District* v. *United States*, 158 F.3d 428 (9th Cir. 1998), the Ninth Circuit again reversed the district court. In the October 1998 opinion, the Ninth Circuit observed that:

> The Boulder Canyon Project Act of 1928 parceled water among the Lower Basin states, allotting Arizona 2.8 million AF annually. This Act also gave the Secretary of the Interior broad administrative authority over the water, including the power to apportion water within the states. The Supreme Court confirmed the Lower Basin apportionment in 1963 and recognized the breadth of the Secretary's discretion to allocate Colorado River water.

*Id.* at 430-431 (citations and footnote omitted). The Ninth Circuit then reviewed the process under which CAP entitlements were obtained:

> The Secretary was left to devise and implement a system for determining how and to whom CAP water would be sold. The Secretary settled upon

> an allocation-contract mechanism for distributing CAP water. First, in 1983, the Secretary apportioned the right to purchase CAP water by way of general allocations to three priority pools, in descending order of priority: Indian tribes, municipal and industrial users, and non-Indian agricultural users. *See* CAP Water Allocations, [48] Fed. Reg. 12446-49 (1993 [sic]) (the "1983 notice"). Within those pools, the Secretary allotted CAP water to specific users. Second, after the CAP water was allocated, the allottees could purchase CAP water by way of subcontracts with the United States and the CAWCD. These contracts—and not the allocations themselves—determined how much water CAP allottees actually were entitled to receive.

*Id.* at 431 (footnotes omitted).

The Ninth Circuit then observed that the 1984 Ak-Chin Act identified sources of water that, in the aggregate, exceeded the Ak-Chin Indian Community's entitlement under the settlement and required the Secretary to allocate the excess Ak-Chin water "on an interim basis to the Central Arizona Project." *Id.* at 432. The Ninth Circuit found that the excess Ak-Chin water had remained in the CAP for 8 years and that, in 1992 in the SCAT Act, Congress provided for the excess Ak-Chin water to be reallocated to the San Carlos Apache Tribe as part of the Tribe's water settlement. *Id.* at 432.

The Ninth Circuit considered the irrigation districts' allegation that "by reallocating the excess Ak-Chin water to the CAP, the 1984 Ak-Chin Act automatically reallocated that water to the non-Indian agricultural pool, which water the Districts had purchased under their 1984 subcontracts" (*id.* at 434) and the districts' allegation that "Congress abrogated their subcontracts with the CAWCD by directing the Secretary to reallocate the excess Ak-Chin water to the San Carlos Apache Tribe in the SCAT Act" (*id.* at 435).

The Ninth Circuit reviewed the 1983 allocation, the irrigation districts' 1983 CAP subcontracts, and the 1984 Ak-Chin Act and determined that the 1984 statute's requirement that the Secretary allocate the excess Ak-Chin water to the CAP did not, given the lack of additional specificity, support an interpretation that the water was to be made available to the irrigation districts:

> Neither Congress nor the Secretary ever equated the CAP with one priority pool or a particular user. Whenever Congress has wished to allot water to a specific CAP priority pool or CAP user, it has used clear language to do so. Congress's failure to designate a specific user or user class convinces us that, even if the excess Ak-Chin water generally was available to the [irrigation] Districts before 1992, the Ak-Chin Settlement Act conferred upon them no protectable property interest.

*Id.* at 436 (footnote and citation omitted). The Ninth Circuit reviewed the statutory objectives of the CAP and the policies underlying the 1983 allocation, noting that "[a]nticipating urban growth and a concomitant decline in agriculture in Arizona, the Secretary gave cities and tribes more secure water entitlements than those possessed by the non-Indian agricultural users" (*id.* at 436-437) and finding that:

> These [CAP] purposes are best served by cycling CAP water allocations rights through the whole priority structure rather than by vesting them at the lowest level of that structure, particularly because the non-Indian agricultural pool historically has underutilized its allotments, and has been able to pay less than the other pools for the water that it has utilized.

*Id.* at 437 (citation omitted). The Ninth Circuit held that: "The Districts' interpretation of the Ak-Chin Settlement Act as giving them a permanent priority entitlement to the excess Ak-Chin water is simply untenable in light of these [CAP] objectives." *Id.* at 437.

The Ninth Circuit further held that nothing in the 1984 Ak-Chin Act prevented the Secretary from reallocating CAP water from the CAP to a particular CAP user or demonstrated that Congress relinquished its own prerogative to order a reallocation:

> [E]ven if the Districts somehow did acquire a provisional right to the excess Ak-Chin water allotment, they have not demonstrated that Congress intended for that right to be irrevocable. Congress did not foreclose the Secretary's discretion, and it did not relinquish its own legislative prerogative. For these reasons, we conclude that the Districts have demonstrated no protected property interest in the excess Ak-Chin water allocation.

*Id.* at 439.

The irrigation districts sought and were denied review of the Ninth Circuit decision by the United States Supreme Court. *Maricopa-Stanfield Irrigation and Drainage District* v. *United States*, 526 U.S. 1130 (1999).

### *Central Arizona Water Conservation District* v. *United States*

The decision of the Federal district court in Arizona reported at *Central Arizona Water Conservation District* v. *United States,* 32 F. Supp. 2d 1117 (D. Ariz. 1998), is discussed in Chapter 5.

### *Mohave Valley Irrigation & Drainage District* v. *Norton*

The Mohave Valley Irrigation & Drainage District (MVIDD) entered into a water delivery contract with the Secretary of the Interior (Secretary) in 1968 for the delivery of up to 51,000 acre-feet per year of Colorado River water, later reduced in 1979 in accordance with the terms of the contract to a 41,000 acre-feet per year entitlement. The Bureau of Reclamation interpreted the language of the 1968 contract to mean the 41,000 acre-feet entitlement was inclusive of water pumped within MVIDD by holders of present perfected rights (PPRs) to Colorado River water. MVIDD interpreted the contract to mean the 41,000 acre-feet entitlement was exclusive of the PPRs. MVIDD brought suit against the Secretary in 1995 in the Federal district court in Arizona. The district court ruled in favor of the Secretary and MVIDD appealed to the United States Court of Appeals for the Ninth Circuit.

In a decision reported at *Mohave Valley Irrigation & Drainage District* v. *Norton*, 244 F.3d 1164 (9th Cir. 2001), the Ninth Circuit noted that the United States Supreme Court in *Arizona* v. *California*, 376 U.S. 340, 341 (1964) had defined present perfected rights as follows:

> [Any water right] acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works …[as well as] rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use.

*Id.* at 1165. The Ninth Circuit noted that: "The [District's 1968] contract does not explicitly mention the impact of water deliveries to holders of PPRs located within the District's boundaries." *Id.* The Ninth Circuit considered "whether a reasonable person would find the contract's terms to be ambiguous" (*id.* at 1165-1166) and found that "[o]n its face, the contract language supports Interior's interpretation" (*id.* at 1166). In support of this conclusion, the Ninth Circuit noted that the 1968 water delivery contract "broadly defines the District" as follows:

> [T]hat area of land in Mohave County, formally included within the Mohave Valley Irrigation and Drainage District … [except] those lands that are within the external boundaries of the District but which have been excluded from the District pursuant to resolution or any order of a court of proper jurisdiction….

*Id.* The Ninth Circuit further noted that:

> There is no judicial decision excluding the areas belonging to holders of PPRs from the scope of the definition of water delivered to the District, nor does the contract language itself make any exceptions for holders of PPRs.

*Id.* The Ninth Circuit then noted that the 1968 water delivery contract defined "water delivered" to be:

> [A]ll water pumped by the District or by any other person, firm, or Corporation, from wells located within or outside the District for use within the District or from wells located within the District for use outside the District….

*Id.* The Ninth Circuit observed that "[t]he breadth of the definitions of 'water delivered' and 'District' lends support to the view that the contract's allocation of water makes no exception for water delivered to PPR holders." *Id.* The Ninth Circuit affirmed the district court's decision, and MVIDD sought and was denied review by the United States Supreme Court. *Mohave Valley Irrigation and Drainage District* v. *Norton*, 534 U.S. 1041 (2001).

### *Defenders of Wildlife* v. *Norton*

As discussed in the synopsis of *Southwest Center for Biological Diversity* v. *United States Bureau of Reclamation* earlier in this chapter, in 1995, the Bureau of Reclamation (Reclamation) began to evaluate whether its routine, ongoing discretionary operations "may affect" listed species and designated critical habitats along the lower Colorado River. Reclamation initiated informal consultation with the United States Fish and Wildlife Service (USFWS) with respect to these operations and initiated negotiations with the States of Arizona, California, and Nevada and other interested parties over a comprehensive, long-term Multi-Species Conservation Program (MSCP). The Lower Colorado River MSCP is discussed in Chapter 3.

Reclamation, in a March 1996 Draft Biological Assessment (Draft BA) developed under the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (ESA), initially defined the action area for its lower Colorado River operations as extending from the full pool elevation level of Lake Mead to the Southerly International Border with the United Mexican States (Mexico), analyzing the effect of its operations on protected species within that area for the next 5 years or until the adoption of an MSCP, whichever occurred first.

The USFWS responded to the Draft BA by directing Reclamation to analyze impacts on Mexican populations of the yuma clapper rail, the southwestern willow flycatcher (Flycatcher), and the desert pupfish and to seek consultation with the National Marine Fisheries Service (NMFS) with respect to two marine species in the Gulf of California, the totoaba bass and vaquita harbor porpoise because, from the perspective of the USFWS, these species were found within the project area or within the area of effects from the action under consultation.

The August 1996 Final Biological Assessment (Final BA) analyzed the effects of Reclamation's operations on species in both the United States and parts of Mexico. Reclamation described its discretionary operations and its nondiscretionary operations in the Final BA. Reclamation found that its discretionary operations would have no effect on the vaquita harbor porpoise and desert pupfish, and that the yuma clapper rail was not likely to be adversely affected. Among the species that the Final BA concluded might be affected by discretionary operations were the totoaba bass and the Flycatcher, the former of which is classified as endemic to Mexico and the latter classified as migrant. Reclamation requested formal consultation for the Flycatcher. The Final BA did not request consultation for the totoaba bass, concluding that no formal consultation was required in light of Reclamation's lack of discretion over water deliveries to or within Mexico such that Reclamation had virtually no ability to reverse conditions in the Colorado River delta. The NMFS concurred.

In January 1997, the USFWS issued a draft biological opinion and, in April 1997, issued a Final Biological Opinion (1997 Final BO) with respect to the nonmarine species, concluding that Reclamation's operations over the next 5 years could jeopardize species within the United States but not in Mexico. The 1997 Final BO concluded that the operations could jeopardize the Flycatcher, but not the yuma clapper rail, and that the risk to the Flycatcher was not in Mexico but in the United States relating to Reclamation's plans to allow Lake Mead to rise to predrought lake levels, inundating Lake Mead Flycatcher habitat which had developed during the drought (see discussion of the effect of varying Lake Mead elevations on flycatcher habitat earlier in this chapter under *Southwest Center for Biological Diversity* v. *United States Bureau of Reclamation*).

The 1997 Final BO was challenged in Federal district court in Arizona with respect to the reasonable and prudent alternative (RPA) relating to the Flycatcher population in the Lake Mead delta. The RPA was upheld in *Southwest Center for Biological Diversity* v. *United States Bureau of Reclamation*, 6 F. Supp. 2d 1119 (D. Ariz. 1997), *aff'd*, 143 F.3d 515 (9th Cir. 1998), discussed earlier in this chapter.

In June 2000, four American and four Mexican environmental groups brought suit against Reclamation, the USFWS, and the NMFS in Federal district court in the District of Columbia challenging the 1997 Final BO on the basis that a long-term recovery plan for the Flycatcher had not been adopted and on the basis that these Federal agencies had failed to comply with the consultation requirements of the ESA with regard to effects to ESA-protected species located in the Colorado River delta in Mexico. The Colorado River delta is located in Mexico at the mouth of the Colorado River where the river flows into the Gulf of Mexico. Several entities sought and were denied leave to intervene as of right. Many entities filed briefs in the case as *amici curiae*[7].

During the pendency of the proceedings before the United States District Court, the 5-year period of coverage under the 1997 consultation expired. In May 2002, Reclamation informed the court it had reinitiated consultation with the USFWS concerning its lower Colorado River operations. The consultation resulted in a Supplemental Biological Assessment (Supplemental BA), which incorporated the same distinctions between discretionary and nondiscretionary activities as the Final BA, and further resulted in a Supplemental Biological Opinion (Supplemental BO). The Supplemental BO concluded that Reclamation's operations were not likely to jeopardize the continued existence of the Flycatcher

[7] A Latin term meaning literally "friend of the court" in the singular or "friends of the court" in the plural. The term refers to a person affected by or interested in a pending case, but not a party to it, who is permitted to file pleadings or participate in oral argument.

or yuma clapper rail. The District Court referred to this process as the "reinitiated consultation" in its 2003 decision described below.

In the 2003 decision reported at *Defenders of Wildlife* v. *Norton*, 257 F. Supp. 2d 53 (D.D.C. 2003), the district court began by noting:

> During the pendency of this suit, defendants completed a recovery plan for the Southwestern Willow Flycatcher, mooting plaintiffs' claim that the defendants had failed to issue the recovery plan and leaving just one claim -- that the defendants failed to satisfy the consultation requirements of the ESA with regard to protected species in the Colorado River Delta in Mexico.

*Id.* at 57. In its analysis of the remaining claim, the district court began with a review of the Law of the River, holding that:

> The Bureau of Reclamation, which built and/or operates all of the American dams in the lower basin and serves as custodian of the river for the Secretary of the Interior, is responsible for delivering water to the lower basin states and to Mexico in accordance with the Compact, the Treaty, the Supreme Court injunction, and contracts with recipients. After all those obligations are fulfilled, little if any water actually reaches the Gulf of California in a normal year. River flows generally reach the delta only in years of flooding, although, in the 1980's, even those sporadic amounts helped to restore significant habitat.

*Id.* at 58. The district court then focused on the extent of Reclamation's discretionary control over river flows in light of the Law of the River, observing that:

> [B]oth the reinitiated consultation and the previous one in 1995-1997 defined the action area for analysis as Lake Mead to the Southerly International Border and examined the effects on species primarily in the parts of Mexico that received river flows subject to Reclamation's discretionary control. Thus, the issue presented here is whether Reclamation's duty of consultation under the ESA extends to operations affecting extra-territorial species in parts of the delta that are downstream from river flows over which Reclamation has no discretionary control.

*Id.* at 61-62. In considering whether Reclamation's duty of consultation extended to operations affecting species in the Colorado River delta in Mexico, the district court reviewed numerous authorities bearing on the issue, concluding that:

> The record contains no suggestion of a way, with or without consultation, for Reclamation to ensure that more water reaches the listed species in the delta. The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those limitations or expand Reclamation's authority.

*Id.* at 67-68. The district court held that: "Reclamation does not have the discretion to manipulate water delivery in the United States in order to create excess releases for the delta." *Id.* at 68.

The district court concluded with this observation:

> The parties have not addressed the question of deference to the agency's interpretation of the Law of the River, but at the very least, *Skidmore* deference should be accorded to Reclamation's interpretation of its duties and its scope of discretion in carrying out those duties under the Law of the River. Acknowledging such deference in this case may give rise to a concern that agencies will increasingly rely on 50 C.F.R. § 402.03 to avoid ESA consultation duties, but it seems unlikely that any case will present facts that more clearly make any agency's actions nondiscretionary than this one: a Supreme Court injunction, an international treaty, federal statutes, and contracts between the government and water users that account for every acre foot of lower Colorado River water.

*Id.* at 69 (citations omitted).

Entities which had sought and been denied leave to intervene as of right in the district court proceedings filed an appeal from the order denying their motion to intervene. The United States Court of Appeals for the District of Columbia Circuit dismissed the appeal as moot when the plaintiff environmental groups did not appeal the district court's decision on the merits. *Defenders of Wildlife* v. *Norton*, 74 F. App'x 63 (D. C. Cir. 2003).

### *Consejo de Desarrollo Economico de Mexicali, AC* v. *United States*

The All-American Canal (AAC), authorized under the Boulder Canyon Project Act, Pub. L. No. 70-642, 45 Stat. 1057 (1928), delivers Colorado River water to the Imperial Valley in California. The Act of November 17, 1988, Pub. L. No. 100-675, 102 Stat. 4000 (1988) (1988 Act) authorized the lining of portions of the AAC to reduce seepage. The AAC Lining Project is discussed in Chapter 5.

The Bureau of Reclamation (Reclamation) conducted environmental studies and, in accordance with the National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (NEPA), in 1994, issued a Final Environmental Impact Statement (FEIS) relating to the proposed lining. Reclamation approved the Record of Decision authorizing the AAC Lining Project on July 29, 1994. In 1999, Reclamation conducted a reexamination of the FEIS and determined that no new significant information changed the initial analysis, so that a Supplemental Environmental Impact Statement (SEIS) was not required. Contracts were entered into in 2003 among the United States, California water agencies, and

Indian Bands relating to the financing and construction of the AAC Lining Project and the allocation of the conserved water. See discussion of California agreements in Chapter 6.

Reclamation also undertook compliance activities under the Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (ESA). In 1996, Reclamation obtained a conference opinion from the United States Fish and Wildlife Service (USFWS) regarding the effects of the AAC Lining Project on the Peirson's milk-vetch. In 2004, Reclamation requested that the USFWS confirm the 1996 conference opinion as a biological opinion.

In July 2005, suit was filed against the United States, the Secretary of the Interior and the Commissioner of Reclamation in Federal district court in Nevada asserting multiple claims. The plaintiffs in this lawsuit were: the Consejo de Desarrollo Economico de Mexicali, A.C. (CDEM), a nonprofit organization of business and civic leaders in the Mexicali Valley, Baja California, Mexico; the Citizens United for Resources and the Environment (CURE), a California nonprofit organization; and the Desert Citizens Against Pollution, a California nonprofit organization. Additional parties, including Upper and Lower Basin States, participated in the litigation as intervenors and as *amici curiae*[8]. The suit alleged that recharge from the AAC was necessary to sustain the Mexicali Aquifer which underlies the Imperial Valley in California and the Mexicali Valley in the United Mexican States (Mexico). Plaintiffs sought to enjoin the United States from lining portions of the AAC in Imperial Valley, California.

Plaintiffs alleged: (1) that water users in Mexico acquired rights to AAC seepage through various prescriptive theories, (2) that the AAC seepage is not a part of Mexico's Colorado River water allotment under the 1944 Mexican Water Treaty; (3) that Reclamation's approval of the AAC Lining Project constituted an unconstitutional deprivation of rights without due process of law; and (4) that Reclamation's approval of the AAC Lining Project violated environmental statutes of the United States. With respect to ESA, the plaintiffs contended that Reclamation failed to properly evaluate the effects of the canal lining project on listed species, failed to reinitiate formal consultation because of new information that lining the canal will affect listed species and habitats, and failed to authorize a take of endangered fish and wildlife species within the United States. With respect to NEPA, the plaintiffs contended that Reclamation violated NEPA because new information and circumstances concerning the lining project's environmental impacts require Reclamation to prepare a supplement to the 1994 FEIS.

In November 2005, Reclamation issued a Biological Analysis for the All-American Canal Lining Project, Potential Species Impact in the Republic of

[8] A Latin term meaning literally "friend of the court" in the singular or "friends of the court" in the plural. The term refers to a person affected by or interested in a pending case, but not a party to it, who is permitted to file pleadings or participate in oral argument.

Mexico. By memorandum dated January 10, 2006, the USFWS confirmed the 1996 conference opinion regarding the effects of the AAC Lining Project on the Peirson's milk-vetch as a biological opinion, on the basis that no significant new information or changes existed that would alter the prior opinion. By memorandum to Reclamation dated January 11, 2006, after review of the November 2005 Biological Analysis, the USFWS concluded that Reclamation was not required to undergo ESA Section 7 consultation with the USFWS regarding transboundary effects (that is, effects to ESA-listed species beyond the border of the United States). On January 12, 2006, Reclamation issued a Supplemental Information Report (SIR) regarding the lining project. Reclamation concluded that no significant new circumstances or information relevant to environmental concerns and bearing on the lining project or its impacts had occurred since completion of the 1994 FEIS.

The district court thereafter disposed of the claims alleged in the *Consejo de Desarrollo Economico de Mexicali AC* litigation in three decisions issued February 8, June 23, and July 3, 2006.

In the February 8, 2006, decision reported at *Consejo de Desarrollo Economico de Mexicali, AC* v. *United States*, 417 F. Supp. 2d 1176 (D. Nev. 2006), the district court first addressed whether the plaintiffs had standing to meet the legal requirements for subject matter jurisdiction to enable the court to consider their claims against the United States. With respect to CDEM's due process claims under the United States Constitution, the district court ruled that CDEM did not have standing because "Fifth Amendment protections do not extend to aliens outside of United States territory." *Id.* at 1183. In particular, the court held:

> Because the source of Counts 1 through 4 is the Fifth Amendment of the United States Constitution and CDEM and its members reside outside the territory of the United States, the Court does not have jurisdiction over those claims. The Fifth Amendment does not grant persons in CDEM and its members' position a right to judicial relief as they are aliens outside the United States sovereign territory. Therefore, CDEM lacks standing to assert Counts 1 through 4.

*Id.* at 1184. With respect to CDEM's claims to Colorado River seepage water, the district court held that CDEM lacked standing to enforce such claims because rights to the seepage water from the AAC are governed by the Treaty between the United States of America and Mexico, Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, signed on February 3, 1944, 59 Stat. 1219 (Mexican Water Treaty), and because the court lacked power to enforce the claims of individuals under an international treaty.

With respect to whether the Mexican Water Treaty governed Colorado River seepage water from the AAC, the district court held that:

> The Treaty's allotment to Mexico of water from the Colorado River includes sub-surface waters derived from the Colorado River. Because the Colorado River feeds the All-American Canal, the Canal is part of the Colorado River System. Thus, the Treaty governs the Defendants' obligation vís-a-vís seepage water from the All-American Canal.

*Id.* at 1184 (citation to record omitted). The district court held that CDEM as an individual entity did not have standing in that "the 1944 Water Treaty allocates all water derived from the Colorado River and the Court cannot enforce individual rights under the Treaty because individuals do not have standing to bring suit under the Treaty." *Id.* at 1183. The district court further held that because "[o]nly parties to a treaty may seek enforcement of the treaty and may do so only through diplomatic means" the district court lacked jurisdiction to hear the claims. *Id.* at 1184.

The district court further held that neither CDEM nor CURE had either the organizational standing or the associational standing required under Federal law to pursue claims under the ESA, under the Migratory Bird Treaty Act, Pub. L. No. 65-186, 40 Stat. 755 (1918), or under the 1988 Act authorizing the lining of the canal. *Id.* at 1186-1188.

The district court dismissed the claims associated with the Fifth Amendment, the Mexican Water Treaty, the ESA, the Migratory Bird Treaty Act, and the 1988 Act for lack of standing. Plaintiffs filed an amended complaint.

In the June 23, 2006, decision reported at *Consejo de Desarrollo Economico de Mexicali, AC* v. *United States*, 438 F. Supp. 2d 1194 (D. Nev. 2006), the district court dismissed the claims set forth in the amended complaint with the exception of those claims in which all plaintiffs asserted violations of NEPA for failure to issue an SEIS and plaintiff CURE asserted a violation of the ESA.

In the July 3, 2006, decision reported at *Consejo de Desarrollo Economico de Mexicali, AC* v. *United States*, 438 F. Supp. 2d 1207 (D. Nev. 2006), the district court disposed of procedural and evidentiary matters and then addressed the remaining claims. With respect to NEPA, the district court addressed the contentions that the Federal agencies violated NEPA by failing to issue a SEIS in light of alleged significant new information, circumstances, and substantial changes, holding:

> Based on the facts here and absent a clear statutory intent to the contrary, NEPA does not apply to the All-American Canal lining project's environmental impacts in Mexico. Although the agency action of constructing and lining a new section of the All-American Canal will occur within the United States, the projects' effects on the Andrade Mesa Wetlands, the Mexican Yuma Clapper Rail population, the socio-economic situation in Mexico, groundwater in the Mexicali Valley, seepage flow to the New River in Mexico, and air quality in Mexico will occur outside United States territory in Mexico, a sovereign nation over

> which Congress lacks legislative control. Nor will the loss of seepage water from the canal, result in impacts within the United States directly traceable to agency action, as discussed below. Additionally, Reclamation assessed impacts in Mexico and so Reclamation has not failed completely to undertake an environmental assessment. Accordingly, NEPA does not require Reclamation to issue a SEIS examining the All-American Canal project's impacts in Mexico.

*Id.* at 1235-1236 (citation to administrative record and footnote omitted).

With respect to transboundary and domestic impacts, the district court further held:

> That Mexico may choose to divert its share of Colorado River water to areas other than the Andrade Mesa Wetlands or the Mexicali Aquifer, or that Mexico may choose to accelerate the rate at which it pumps water from the aquifer, is outside of Defendants' control. Moreover, Defendants do not have any authority to force Mexico to implement mitigation measures that would alleviate the increased salinity, decreased groundwater, or loss of wetlands in Mexico that might occur because of the lining project. Therefore, any impacts the loss of the seepage water may have on Mexico and resulting impacts in the United States are not within agency control but are within the control of Mexico pursuant to decisions it makes regarding its own water resources.

*Id.* at 1238. The district court then held that "because the impacts in Mexico are beyond agency control and their impacts within the United States are too speculative, NEPA's 'rule of reason' does not require Reclamation to prepare a SEIS regarding those impacts." *Id.*

With respect to domestic impacts, the district court reviewed the administrative record to determine whether Reclamation's conclusion in the 2006 SIR that there were no significant new circumstances or information bearing on the AAC Lining Project was arbitrary or capricious. The district court concluded that "Reclamation did not act arbitrarily or capriciously when it concluded no significant new information or circumstances existed concerning the project's Salton Sea impacts" (*id.* at 1241), that "Reclamation's conclusion that the substitution of escape-ladders for the escape ridges is not a substantial change impacting human safety is not arbitrary or capricious" (*id.* at 1243), and that:

> Reclamation articulated a rational conclusion that the [reclassification] of the Imperial Valley [from a moderate to serious nonattainment area for certain air particulates] was not a significant new circumstance or information related to environmental concerns.

*Id.* at 1245.

Addressing plaintiff CURE's ESA claims, the district court examined statutory and regulatory provisions and the decisions of other courts to determine whether, in the present case, Congress intended the ESA's formal consultation requirement to apply extraterritorially and held that:

> Plaintiff CURE asserts the lining project will threaten the Yuma Clapper Rail because lining the canal will divert seepage water from the Andrade Mesa Wetlands. The impact to the listed species or its habitat will occur outside of United States territory. Furthermore, for the same reasons Reclamation lacks control over extraterritorial impacts and their rebounding effects in the United States under NEPA, Reclamation and FWS lack control over impacts to the Andrade Mesa Wetlands and the Yuma Clapper Rail under the ESA. The situation here is similar to that in *Defenders of Wildlife v. Norton*, where the district court held section 7(a) did not require consultation because "[t]he record contain[ed] no suggestion of a way, with or without consultation, for Reclamation to ensure that more water reaches the listed species in the delta. The formulas established by the Law of the River strictly limit Reclamation's authority to release additional waters to Mexico, and Section 7(a)(2) of the ESA does not loosen those restrictions or expand Reclamation's authority." As discussed previously, the 1944 Water Treaty limits Mexico's share of Colorado River water. Therefore, even with consultation, Reclamation has no authority to ensure more water reaches the Andrade Mesa Wetlands and the Yuma Clapper Rail. Accordingly, Section 7(a) of the ESA, 16 U.S.C. § 1536(a), does not require Reclamation to consult with the FWS regarding the lining project's impacts on listed species and their habitat located outside of the United States, including the Yuma Clapper Rail and the Andrade Mesa Wetlands.

*Id.* at 1247 (citation omitted).

Plaintiffs appealed the district court's decisions to the United States Court of Appeals for the Ninth Circuit and obtained an injunction from the Ninth Circuit pending appeal. After the merits of the appeal were briefed and argued, Congress enacted the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, Subtitle J – All American Canal Projects, 120 Stat. 3046 (2006) (2006 Act). Section 395 of the 2006 Act states, in pertinent part, that:

> Notwithstanding any other provision of law, upon the date of enactment of this Act, the Secretary shall, without delay, carry out the All American Canal Lining Project identified – (1) as the preferred alternative in the record of decision for that project, dated July 29, 1994; and (2) in the allocation agreement allocating water from the All American Canal Lining Project, entered into as of October 10 2003.

Section 397 of the 2006 Act states that:

> The Treaty between the United States of America and Mexico relating to the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande, and supplementary protocol signed November 14, 1944, signed at Washington February 3, 1944 (59 Stat. 1219) is the exclusive authority for identifying, considering, analyzing, or addressing impacts occurring outside the boundary of the United States of works constructed, acquired, or used within the territorial limits of the United States.

Both Sections 395 and 397 are appended to this volume.

In a decision reported at *Consejo de Desarrollo Economico de Mexicali, A.C.* v. *United States*, 482 F.3d 1157 (2007), the Ninth Circuit analyzed the language of Sections 395 and 397 and considered plaintiff's objections to the application of these sections to the instant case, concluding that "the 2006 Act renders the claims based on past violations of NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Settlement Act [1988 Act] moot." *Id.* at 1174.

This litigation is further discussed in Chapter 5.

# Chapter 12: List of References


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