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# The (Almost) All-American Canal: *Consejo de Desarrollo Economico de Mexicali v. United States* and the Pursuit of Environmental Justice in Transboundary Resource Management

*Nicole Ries*[*]

*Since its construction in 1940, the All-American Canal (AAC) could hardly be considered "All-American." Instead, for over sixty years a substantial portion of the AAC water seeped from the canal into the ground and crossed the border into northern Mexico. In the mid-1990s, the United States Bureau of Reclamation developed a project to replace a portion of the AAC with a parallel, concrete-lined canal, which will prevent this water-seepage loss and recover the water for use by hundreds of thousands of Southern Californians. At the same time, however, the lining project is expected to cut off the water supply to farmers in the Mexicali Valley who have been using the water for irrigation for decades, and will also dry up a flow of seepage water that has been sustaining wetlands habitat in the Colorado River Delta. In 2006, a coalition of community and environmental groups in the United States and Mexico brought suit in federal court against the Bureau of Reclamation to halt further construction on the project. Yet their claims were ultimately precluded by a 1944 treaty that fixed the apportionment of Colorado River water between the United States and Mexico and intervening legislation passed in December of 2006 mandating that the project proceed "without delay." The rigid terms of these acts provided no room for the courts to devise a flexible or equitable remedy for those harmed by the unilateral lining project. This Note argues that the disposition of the CDEM litigation, while perhaps proper as a legal matter, is unsatisfying. The material and social investment the people of the Mexicali Valley expended on reliance of the seepage water from the AAC, whether or not*

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*buttressed by a viable legal claim, should not be so easily disregarded. Instead, bordering nations should develop legal regimes that can adapt to changed circumstances and adjust obligations over time. This would encourage parallel rather than unilateral action by riparian states, and prevent private parties from needing to resort to litigation to advocate for their rights to shared resources.*

I. "Here is the land where life is written in water." ..... 493
II. The (Almost) All-American Canal ..... 495
A. The Imperial Valley's Lifeline ..... 495
B. The Bureau of Reclamation Lining Project ..... 496
C. Allocation of Colorado River Water between the United States and Mexico ..... 498
1. The 1944 Treaty ..... 498
2. The IBWC and Minute 242 ..... 500
D. The Lining Project's Effects on the Mexicali Valley ..... 501
E. The Lining Project's Ecological Impact ..... 502
III. The *CDEM* Lawsuit's Journey Through the Federal Courts ..... 504
A. *CDEM* at the District Court of Nevada ..... 504
1. *CDEM I*: The Eight Initial Claims for Relief ..... 504
a. Water Rights Claims ..... 505
b. Statutory Claims ..... 505
2. *CDEM II*: Dismissal of Six Claims of the Amended Complaint ..... 506
3. *CDEM III*: Decision on the Merits on the NEPA and ESA Claims ..... 507
a. Administrative Requirements and Agency Actions ..... 507
b. NEPA Violations (Count Five) ..... 508
c. ESA Violations (Count Six) ..... 509
d. Extra-territoriality and Executive Order 12,114 ..... 510
4. The District Court's Grant of Summary Judgment for the Defendants ..... 511
5. Appeal to the Ninth Circuit ..... 512
B. The Intervening Legislation: The Tax Relief and Health Care Act of 2006 ..... 515
C. The Dismissal of the *CDEM* Litigation by the Ninth Circuit Court of Appeals ..... 516
1. Constitutionality of the 2006 Act ..... 516
2. Statutory Reach of the 2006 Act ..... 517
3. Jurisdictional Dismissal of Claims One through Four ..... 517
D. The End of the Line ..... 518
IV. Balancing the Equities: Domestic Constraints on Transboundary Environmental Justice ..... 518

A. The External Sources of Authority at Play in the *CDEM* Litigation ..... 519
1. The 1944 Treaty Provided the U.S. with a Sovereign Immunity Defense ..... 519
2. The 2006 Rider Expressed Congress' Intent to Exempt the Lining Project from Further Environmental Assessment ..... 520
B. Cooperation, Not Litigation ..... 522
1. The IBWC is Institutionally Inadequate in the Absence of Coordinated Action by Both the U.S. and Mexico ..... 523
2. The U.S.–Mexico Stalemate ..... 524
C. Environmental Justice? ..... 527

## I. "HERE IS THE LAND WHERE LIFE IS WRITTEN IN WATER."[1]

When construction workers in June 2007 began pouring 23 miles of concrete into the ground to create a new lined portion of the All-American Canal (AAC),[2] the United States government took a final step towards making the canal truly "All-American." The AAC, one of the world's largest irrigation canals, carries water from the Colorado River to the Imperial Valley in California. In its current state, however, the canal defies its designation as "All-American." Instead, for over sixty years, a substantial portion of the AAC water has seeped from the canal into the ground and crossed the border into northern Mexico. The United States Bureau of Reclamation (BOR) thus developed the AAC lining project to replace a portion of the canal with a parallel, concrete-lined canal, which will prevent this water-seepage loss to Mexico and recover the water for use by hundreds of thousands of Southern Californians.

Although the water that seeps across the border into Mexico may *escape* from the AAC, the water is not "truly lost."[3] The leakage recharges the Mexicali Aquifer, which farmers in the Mexicali Valley use for irrigation. During the almost seventy years since the canal was constructed, these farmers have built an agricultural and industrial economy in the Valley, which supports the livelihood of nearly 1.3 million Mexicali residents. The lining project, therefore, will allow the BOR to "conserve" the seepage for use by Californians, but at the direct expense of a Mexican community that developed largely "in reliance on the water."[4] In addition, the concrete lining will dry up a flow of seepage water that has been sustaining wetlands, habitat, and

1. Consejo de Desarrollo Economico de Mexicali v. United States, 482 F.3d 1157, 1162 (9th Cir. 2007) [hereinafter *CDEM IV*] (quoting Colorado Poet Laureate Thomas H. Ferril).

2. *See* Todd Shields, *All-American Canal Lining Project: Presentation to United States International Boundary Water Commission* (2007), http://www.ibwc.state.gov/Files/CR_CF_AllAmericanCanalUpd_120307.pdf.

3. *See* Matt Jenkins, *The Efficiency Paradox*, 39.2 HIGH COUNTRY NEWS 8, Feb. 5, 2007, at 13

4. *CDEM IV*, 482 F.3d at 1163.

endangered species in the Colorado River Delta, which will threaten the Delta's already precarious ecosystem.

These projected effects prompted a coalition of community and environmental groups from the United States and Mexico to bring suit in federal court against the BOR in an attempt to halt the project and force the BOR to more adequately consider the project's effects on both the residents of Mexicali and the Colorado River Delta.[5] By the time *Consejo de Desarrollo Economico de Mexicali v. United States* (*CDEM*) reached the Ninth Circuit on appeal, however, the federal courts could provide no recourse to the coalition in its attempt to solve the stalemate over the AAC seepage. In December of 2006, while the case was on appeal to the Ninth Circuit, Congress passed intervening legislation mandating that the project proceed "without delay."[6] According to the court, this legislation, combined with a 1944 treaty that fixed the apportionment of Colorado River water between the two nations,[7] extinguished the *CDEM* plaintiffs' claims about the negative effects of the project.[8] The legislative and executive branches had made the United States' claim to the AAC seepage water, and there was no decision on the merits left for a federal court to make.[9]

Writing for the Ninth Circuit panel, Judge Sidney Thomas put the 22 months of litigation over the AAC in context by invoking the famous words of Mark Twain: "In the West," he explained, "'whiskey is for drinking; water is for fighting over.'"[10] And this fight, he concluded, was not to be waged in federal court.

The legal disposition of the *CDEM* litigation is not particularly remarkable. Half of the plaintiffs' claims were dismissed in accordance with the explicit act of Congress, and the other half on straightforward jurisdictional grounds. What is captivating instead is how *un*satisfactory this legal disposition stands in the face of the story that compelled it. Commentators have called the conflict over the All-American Canal "one of the most intractable problems in border groundwater management."[11] Yet the BOR, by relying on a strictly

5. *See* Consejo de Desarrollo Economico de Mexicali v. United States, 417 F. Supp. 2d 1176 (D. Nev. 2006) [hereinafter *CDEM I*]; Consejo de Desarrollo Economico de Mexicali v. United States, 438 F. Supp. 2d 1194 (D. Nev. 2006) [hereinafter *CDEM II*]; Consejo de Desarrollo Economico de Mexicali v. United States, 438 F. Supp. 2d 1207 (D. Nev. 2006) [hereinafter *CDEM III*]; *CDEM IV*, 482 F.3d 1157.

6. Tax Relief and Health Care Act of 2006 § 395(a), Pub. L. No. 109-432, 120 Stat. 2922 (2006) [hereinafter 2006 Act].

7. Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Nov. 8, 1945, 59 Stat. 1219 [hereinafter 1944 Treaty].

8. *CDEM IV*, 482 F.3d at 1169–72.

9. *See id.*

10. *Id.* at 1162.

11. Sandra Dibble, *Worries over water: Mexicali Valley farmers fear groundwater loss when U.S. lines canal*, SAN DIEGO UNION-TRIBUNE, July 6, 2004, at A1 (quoting Colorado State University professor Stephen Mumme).

domestic legal framework, was able to deny responsibility for the transboundary impacts of its operations. The BOR's decision to consider the project a unilateral one may have been proper as a matter of U.S. environmental law. However, the story behind the *CDEM* litigation underscores the inadequacy of this approach as a matter of U.S. policy. The material and social investment the people of the Mexicali Valley expended in reliance on the seepage water from the AAC, whether or not buttressed by a viable legal claim, should not be so easily disregarded. Nor should a government agency be able to so swiftly disregard the detrimental ecological impact of its resource management projects the moment those effects cross a national boundary.

This Note recounts the *CDEM* plaintiffs' journey through the federal courts in their attempt to prevent the harm the BOR lining project will inevitably cause to the communities who rely on the AAC seepage. In doing so, I hope to demonstrate that post hoc domestic litigation is an insufficient mechanism for consideration of the equities implicated by unilateral resource management projects with potential transboundary effects. Assessing and managing the transnational effects of resource management projects require a political will plainly absent in the case of the All-American Canal. Rather, the problem is "less one of technical fixes than of borders and horizons,"[12] and resolution can only be broached through diplomatic cooperation and collective action. Otherwise the result, like that reached in the All-American Canal dispute, will inevitably favor sovereignty and rigidity over equity or environmental justice.

## II. THE (ALMOST) ALL-AMERICAN CANAL

*"[E]ither you bring the water to California, or you bring California to the water."*

– Judge Thomas, *CDEM IV*[13]

### *A. The Imperial Valley's Lifeline*

The Imperial Valley lies in Southern California, 50 miles west of the Colorado River between the Mexican border and the Salton Sea. An "inhospitable," arid geologic sink, the Valley depends on water from the Colorado River to sustain itself.[14] Until the AAC was completed in 1940, a transboundary canal system diverted Colorado River water across the Mexican

12. Jenkins, *supra* note 3, at 13.

13. *CDEM IV*, 482 F.3d at 1162–63 (paraphrasing *Chinatown* (Paramount 1974)).

14. COMMITTEE ON WESTERN WATER MANAGEMENT, NATIONAL RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT 234, 236 (1992); *see generally* U.S. Bureau of Reclamation, *Boulder Canyon Project: All American Canal System*, http://www.usbr.gov/dataweb/html/allamcanal.html (last visited July 26, 2008).

border before turning North again to water the fields of the Imperial Valley.[15] The idea to construct a new canal can be traced back to the 1920s, when increasing tensions between the United States and Mexico, fueled by fears that Mexico might appropriate the diverted water, encouraged political action to contain the canal wholly within U.S. borders.[16] In 1928, Congress authorized the Secretary of the Interior to construct the current canal, this time "located entirely within the United States."[17] Today, the AAC runs for 80 miles and carries 3.1 million acre-feet of Colorado River water to nine cities and 500,000 acres of agricultural lands throughout the Imperial Valley. The canal is the Imperial Valley's "lifeline" from the Colorado River.[18]

Although Congress considered the idea of lining the AAC when it was constructed, it ultimately chose an "earthen and porous design."[19] This allowed a substantial amount water to seep into northern Mexico, recharging the Mexicali Aquifer and providing a reservoir of groundwater to the Mexicali Valley. It is estimated the AAC loses up to 100,000 acre-feet per year in seepage—90 percent of which crosses under the international boundary.[20] While the seepage first caused flooding in the Mexicali Valley, Mexican farmers were able to "turn[] the improbable scourge into a windfall" by building their own irrigation system to capture the leakage with the aid of the Mexican government.[21] As a result, the water that leaks from the AAC "has not been truly lost."[22] Instead, the residents and businesses of the Mexicali Valley have developed a large metropolitan community largely "in reliance on the water."[23]

### *B. The Bureau of Reclamation Lining Project*

As rapid population growth in Southern California led the state to use more than its allotment of Colorado River water, officials began searching for

15. Jeffrey Kishel, *Lining the All-American Canal: Legal Problems and Physical Solutions*, 33 NAT. RESOURCES J. 697, 704 (1993).

16. *CDEM IV*, 482 F.3d at 1162–63. For a historical background discussing the transboundary canal system and the tensions that gave rise to the All-American Canal, see Kishel, *supra* note 15, at 699–704.

17. Boulder Canyon Project Act of 1928, 45 Stat. 1057 (codified at 43 U.S.C. § 617 (1928)). The Boulder Canyon Project Act authorized the Secretary of the Interior to construct the canal.

18. Imperial Irrigation District Water Department, *All American Canal*, http://www.iid.com/Water_Index.php? pid=174 (last visited July 26, 2008).

19. *CDEM IV*, 482 F.3d at 1163. According to CDEM, Congress favored this design despite "full knowledge that seven percent of its volume would seep into northern Mexico." Opening Brief of Appellant Consejo de Desarrollo Economico de Mexicali, A.C. at 6, *CDEM IV*, 482 F.3d 1157 (No. 06-16345), 2006 WL 3380586 [hereinafter CDEM Brief].

20. *See* U.S. BUREAU OF RECLAMATION, SUPPLEMENTAL INFORMATION REPORT: ALL-AMERICAN LINING PROJECT 3.3.1.1 (2006), *available at* http://www.usbr.gov/lc/region/programs/AAC/SIR_1-12-06.pdf [hereinafter SIR].

21. Jenkins, *supra* note 3, at 8.

22. *Id.* at 12.

23. *CDEM IV*, 482 F.3d at 1163.

new sources of water in order to recover "every drop of water [they could] legally appropriate."[24] With drought looming in the west, California joined with the other Colorado River Basin states to "turn[] their collective weight toward ironing out every last inefficiency on the river."[25] Thus, when the federal government ordered California to limit its use of Colorado River water to comply with its allocated amount negotiated between the Basin states, recovering the seepage lost to Mexico from the AAC became an attractive solution.[26]

In 1988, Congress passed the San Luis Rey Indian Water Rights Settlement Act, authorizing the Secretary of the Interior to choose a method to recover the seepage lost to Mexico through the AAC.[27] The Secretary considered three options, as well as a "no action option," and undertook environmental studies to consider the impact of the project.[28] In 1994, the BOR approved the chosen project, which would result in the construction of a parallel, concrete-lined canal to replace 23 miles of the unlined AAC. The lining project is expected to recover 67,700 acre-feet per year of Colorado River water currently lost to seepage.[29] Officials estimate that the lining project, in combination with a concurrent lining project in the Coachella valley, will deliver enough water to sustain 154,000 homes a year for 110 years.[30]

The 1988 Settlement Act required the project be paid for by entities benefiting from the conserved water, rather than by the federal government.[31] Funding was not actually negotiated until fifteen years later when all seven Colorado River Basin states signed on to a 2003 federally mandated agreement

24. Dibble 2004, *supra* note 11 (quoting Colorado State University professor Stephen Mumme); *see also* Larry Rohter, *Canal Project Sets Off U.S.–Mexico Clash Over Water for Border Regions*, N.Y. TIMES, Oct. 1, 1989.

25. Jenkins, *supra* note 3, at 12.

26. *See* Consolidated Decree Ariz. v. California, 547 U.S. 150 (2006); Answering Brief for the United States at 12, *CDEM IV*, 482 F.3d 1157 (No. 06-16345) [hereinafter U.S. Brief] (on file with author).

27. San Luis Rey Indian Water Rights Settlement Act, Pub. L. No. 100-675, § 203, 102 Stat. 4000 (1988) [hereinafter 1988 Settlement Act]. According to CDEM, objections based on Mexicali's dependence on the seepage led Congress to provide flexibility in the statute. *See* CDEM Brief, *supra* note 19, at 9–10.

28. *CDEM IV*, 482 F.3d at 1164. The options available to the Secretary were: "[1] constructing a parallel lined canal [the option eventually selected], [2] lining the existing canal, or [3] constructing seepage recovery facilities such as a well-field between the [AAC] and the border." *Id.* All federal agencies are required by NEPA when proposing any "major Federal action[] significantly affecting the human environment," to include a "detailed statement" of the environmental impact of the proposed action and potential alternatives. 42 U.S.C. § 4332(2)(C) (2006); U.S. Brief, *supra* note 27, at 16.

29. Imperial Irrigation District Water Department, *All American Canal Lining Project*, http://www.iid.com/Water_Index.php?pid=64 (last visited July 26, 2008).

30. Gig Conaughton, *Canal-lining project meets new obstacles*, NORTH COUNTY TIMES (Escondido, Cal.), April 20, 2006; *see also* Gig Conaughton, *Challenge to canal lining could undermine San Diego water plans*, NORTH COUNTY TIMES (Escondido, Cal.), July 28, 2005.

31. 1988 Settlement Act, *supra* note 27, at § 203(c), (e). This provision is consistent with the "United States' longstanding practice of requiring beneficiaries of Reclamation projects to provide funding." U.S. Brief, *supra* note 27, at 19.

aimed at decreasing California's draw on the Colorado River.[32] As part of the deal, California agreed to pay for the lining project as one way to begin to live within its apportionment of Colorado River water.[33]

Pursuant to the 2003 agreement, the Metropolitan Water District (MWD) in San Diego County will divert the conserved AAC water for use in Southern California.[34] MWD will pay for some of the conservation projects in exchange for a share of the water granted to it by the Imperial Irrigation District (IID).[35] The San Diego County Water Authority (SDCWA) agreed to assume responsibility for lining the canal, in exchange for the right to purchase "billions of gallons of water" from the IID to provide water for its rising population for the next 110 years.[36] In this way, the recovered seepage will be used to meet the needs of a growing municipal population in Southern California. Mexicali's loss "will be San Diego County's gain," as the water previously used to "irrigate fields of wheat, alfalfa, cotton and green onions in the Mexicali Valley will be sent to San Diego County."[37] By 2020, it is projected that water saved from lining the AAC and the Coachella valley will represent nine percent of the San Diego district's overall supply.[38]

### *C. Allocation of Colorado River Water between the United States and Mexico*

#### *1. The 1944 Treaty*

The dispute over the AAC lining project largely hinged on conflicting interpretations of the 1944 "Treaty Between the United States of America and Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande," which provided for a fixed allocation of Colorado River water from the United States to Mexico.[39] The need for a bilateral treaty

32. *See* Quantification Settlement Agreement for the Colorado River, 14 CAL. WATER L. & POL'Y RPTR. 67, 69 (2003); *CDEM III*, 438 F. Supp. 2d at 1217–18.

33. *See* Sandra Dibble, *Canal plan spells trouble for Mexican crops*, SAN DIEGO UNION-TRIBUNE, Oct. 30, 2006, at A1. The concrete lining of the All-American Canal is wedded to the Quantification Settlement Agreement signed by four water agencies in October 2003.

34. John H. Coghlin, *All-American Canal Project Sparks Test Case for Transboundary Groundwater Law*, 14 B.C. INT'L & COMP. L. REV. 159, 171–72 (1991). Metropolitan Water District has a lower priority for the water than Imperial Irrigation District (IID) under the Seven Party Agreement of 1931, and because IID water is used for agricultural purposes and is thus subsidized by the federal government, there is little incentive for Imperial Valley farmers to invest in their own conservation projects. *Id.*

35. *Id.*

36. Gig Conaughton, *Imperial Valley canal-lining project moves forward*, NORTH COUNTY TIMES (Escondido, Cal.), January 12, 2006.

37. Dibble 2004, *supra* note 11.

38. Benjamin Spillman, *Paving the way for water savings*, THE DESERT SUN (Palm Springs, Cal.), April 5, 2006, at A1.

39. 1944 Treaty, *supra* note 7.

came about in response to the developing "Law of the River"—the series of accords designed to regulate domestic use between the Colorado River Basin states within the United States.[40] The Upper Basin states (Colorado, Utah, New Mexico and Wyoming) and the Lower Basin states (Arizona, Nevada and California) signed the Colorado River Compact of 1922 which apportioned 7.5 million acre feet of water annually to the Lower Basin states to preclude conflict over appropriation rights.[41] That allotment was further apportioned among the Lower Basin states by the Boulder Canyon Project Act of 1928, which authorized the construction of the AAC to aid in the delivery of the allocations provided for in the Act.[42] In 1963, the U.S. Supreme Court ruled that the Boulder Canyon Project Act of 1928 would constitute the "binding equitable apportionment of the river."[43]

To safeguard this domestic apportionment, "[i]n an era of greater cooperation between Mexico and the United States,"[44] the two countries signed the 1944 Treaty, which addressed the use and control of the Colorado and Tijuana Rivers as well as the Rio Grande. The Treaty implemented an "equitable apportionment scheme" which was based on Mexico's *future*, rather than established, needs.[45] It requires the United States to deliver 1.5 million acre feet of Colorado River water "from any and all sources" to Mexico annually at designated diversion points on the international boundary.[46] The Treaty also commits the United States to delivering an additional 200,000 acre-feet in any year in which there is a surplus of water "in excess of the amount necessary to supply uses in the United States and the guaranteed quantity . . . to Mexico."[47]

In addition to its allocation provisions, the Treaty provides that "Mexico shall acquire *no right beyond that provided by this subparagraph* by the use of

40. *CDEM IV*, 482 F.3d at 1163; Colorado River Compact of 1922, ch. 72, 42 Stat. 171 (1921).

41. *CDEM IV*, 482 F.3d at 1163.

42. Boulder Canyon Project Act, 45 Stat. 1057 (codified at 43 U.S.C. § 617 (1928)).

43. Douglas L. Hayes, *The All-American Canal Lining Project: A Catalyst For Rational and Comprehensive Groundwater Management on the United States–Mexico Border*, 31 NAT. RESOURCES J. 803, 807 (1991) (describing Decree, Arizona v. California, 376 U.S. 340 (1964)). For a complete discussion of the series of accords that make up the "Law of the River," see William H. Swan, *New Developments on the Colorado River*, *in* WATER LAW: TRENDS, POLICIES AND PRACTICE 338–39 (Kathleen Marion Carr & James D. Crammond eds. 1995).

44. Alfonso Cortez-Lara & Maria Rosa Garcia-Acevedo, *The Lining of the All-American Canal: The Forgotten Voices*, 40 NAT. RESOURCES J. 261, 265 (2000).

45. Hayes, *supra* note 44, at 814. In its negotiations over the 1944 Treaty, the Mexican delegation demanded that the treaty cover, "[d]elivery to Mexico of an annual volume of the waters of the Colorado River determined by the proportion between the amounts now used, the urban and farm requirements existing in the valley of the river in the territory of the two countries, and the reasonable and just possibilities of extension of the said requirements in the future." Charles J. Meyers & Richard L. Noble, *The Colorado River: The Treaty with Mexico*, 19 STAN. L. REV. 367, 374 (1967) (quoting Memorandum, Mexican Embassy to the Department of State, 1941:7 FOREIGN REL. U.S. 371, 379 (1962)).

46. 1944 Treaty, *supra* note 7, at art. 10.

47. *Id.*

the waters of the Colorado River system, for any purpose whatsoever, in excess of 1,500,000 acre feet . . . annually."[48] As developed, the 1944 Treaty and the Law of the River combined to generate "an extremely rigid system of water rights that purports to divide the entire flow of the Colorado—and then some—among the water interests in the United States and Mexico."[49]

The 1944 Treaty was the result of extensive negotiations between the United States and Mexico, each attempting to safeguard their access to Colorado River water. Mexico's delegation aimed to prevent the United States from arbitrarily cutting off the water flow into Mexico. During the negotiations, Mexico criticized the United States' current over-use of Colorado River water, and expressed its desire to have a treaty that would "satisfy the principle of International Law" that "a country, in the exercise of its sovereignty, must not cause harm to its neighbor, a thing which has occurred, in the case of Mexico, as a result of the use which the United States of America has been making [of Colorado River water]."[50]

On the other side, it was important to the United States that they use the treaty as a mechanism to "promptly quantif[y] and limit[]" Mexican claims.[51] The U.S. delegation feared that expansion of Mexican diversions in the absence of a treaty might create "some equitable right" which the United States would be "forced to recognize."[52] Indeed, the longer the countries waited to form a treaty, the more Colorado River water Mexico would use, and the harder it would be to reach an agreement on appropriation. The United States also hoped that guaranteeing Mexico water from the Colorado would lend credibility to its "Good Neighbor policy" during World War II.[53] Thus, by limiting further use to a quantified amount based on future needs, the United States was able to recognize Mexico's right to water from the Colorado while safeguarding the allotments apportioned by its own domestic Law of the River.

### *2. The IBWC and Minute 242*

The 1944 Treaty additionally established the International Boundary and Water Commission (IBWC), an international body consisting of a Mexican Section and United States Section.[54] The IBWC was vested with responsibility for "[t]he application of the present Treaty, the regulation and exercise of the rights and obligations which the two Governments assume thereunder, and the

48. *Id.* (emphasis added).

49. Robert Jerome Glennon & Peter W. Culp, *The Last Green Lagoon: How and Why the Bush Administration Should Save the Colorado River Delta*, 28 ECOLOGY L.Q. 903, 912 (2002).

50. Memorandum, Mexican Embassy to the Department of State, 1941:7 FOREIGN REL. U.S. 371, 379–80 (1962), *quoted in* Meyers & Noble, *supra* note 46, at 375.

51. Meyers & Noble, *supra* note 46, at 405.

52. *Id.* at 397 (internal citation omitted).

53. EVAN RAY WARD, BORDER OASIS: WATER AND THE POLITICAL ECOLOGY OF THE COLORADO RIVER DELTA 1940–1975 31 (2003).

54. 1944 Treaty, *supra* note 7, art. 2; *see* Meyers & Noble, *supra* note 46, at 387.

settlement of all disputes to which its observance and execution may give rise."[55]

The IBWC played its most significant role in 1973, when increased salinity of the waters delivered under the Treaty caused severe agricultural problems for Mexico.[56] Although the 1944 Treaty did not address the *quality* of the water that would be provided, Mexicali farmers lobbied their government to protest the salinity problems to the United States through the IBWC.[57] Faced with the risk of international and domestic litigation, the United States chose not to "insist on its right to deliver polluted water."[58] Instead, the IBWC facilitated the agreement known as "Minute 242" which set water quality standards and obligated the United States to construct a desalinization plant.[59]

### *D. The Lining Project's Effects on the Mexicali Valley*

*"If there is no water, there is no life."*
– Carlos Gonzalez, Mexicali Valley farmer[60]

With its current structure, seepage water from the AAC "commingles with groundwater from other sources and is pumped for agricultural use in the Mexicali Valley."[61] According to the plaintiffs in *CDEM*, nearly 1.3 million residents of the Mexicali Valley depend on the groundwater from the Mexicali Aquifer, and the community has expended considerable resources to create an infrastructure of pumping facilities and conveyance equipment that deliver the water for drinking and irrigation.[62] One commentator notes that "[t]hese groundwater flows have enabled the Mexicali Valley to be one of Mexico's most productive agricultural zones, producing and exporting wheat, cotton, vegetables, and animal fodder."[63] The AAC lining project will result in a reduction of recharge to the aquifer by 70 million cubic meters per year,[64] which some estimate will affect more than 86,000 acres of cropland in the region.[65]

55. 1944 Treaty, *supra* note 7, art. 2.

56. Hayes, *supra* note 44, at 817. For an in depth discussion of water quality negotiations and conflict between the U.S. and Mexico, see Meyers & Noble, *supra* note 46, at 409–411.

57. Meyers & Noble, *supra* note 46, at 409.

58. *Id.* at 410 (further explaining that "[f]or the United States as a nation to escape litigation on jurisdictional grounds could have involved extreme embarrassment").

59. Agreement Confirming Minute No. 242 of the International Boundary and Water Commission, U.S.–Mexico, Aug. 30, 1973, 24 U.S.T. 1968 [hereinafter Minute 242].

60. Chris Kraul & Tony Perry, *Rift Runs Deep in Water War*, LA TIMES, May 4, 2002, at A1.

61. ROD, *supra* note 64, at 6.

62. *CDEM IV*, 482 F.3d at 1163.

63. Jenny Huang, Note, *Finding Flow: The Need for a Dynamic Approach to Water Allocation*, 81 N.Y.U. L. Rev. 734, 741 (2006).

64. Bill Hume, *Canal Fight Shows Water Conservation Has Consequences*, ALBUQUERQUE J., Feb. 24, 1999, at A10.

65. Dibble 2006, *supra* note 34.

Agriculture accounts for 94.5 percent of the water consumed in Northern Baja California, which also contains two of northern Mexico's fastest growing urban centers, Mexicali and Tijuana (approximately 100 miles west of the Mexicali Valley).[66] According to one account, the AAC lining project will eventually cut off direct water flow to 34,700 acres, which support more than 7,100 Mexican families,[67] thereby "turn[ing] off the spigot for 25,000 people."[68] Furthermore, without the seeping water from the AAC to dilute the water in the aquifer which contains more saline, the quality of irrigation water mined from wells is expected to degrade considerably. Thus certain crops that are sensitive to salt will be unsustainable in the area.[69] Says one observer: "It's a case of history be damned to the people on both sides of the border and all along the river who have staked their lives on farming, fishing, ranching and recreation."[70] Ironically, farmers in Mexicali have threatened that if they "cannot till the fields . . . they will cross the border, illegally if they have to, in droves."[71]

### *E. The Lining Project's Ecological Impact*

> *"As overlooked as the Mexicali Valley is in the broader affairs of the Colorado River, there is a spot farther down the line that the dealmakers have ignored outright. It is the Colorado River Delta—a netherworld where, before Dams, the river created nearly 2 million acres of lush wetlands as it flowed toward and into the Sea of Cortez."*[72]

The Colorado River Delta, which was once abundant with wetlands, forests and lagoons, has been "violently transformed" by the hydrological engineering that makes up the modern Colorado River system.[73] By 1980 many environmentalists concluded that the Delta was "effectively dead, or at least damaged beyond repair."[74] Yet these gloomy proclamations proved untrue. Flood flows from American reservoirs in the mid-1980s and 1990s allowed the Delta's riparian habitat to rebound, and over time the Delta has "survived . . . on agricultural wastewater."[75] The Delta now plays a vital ecological role in both the United States and Mexico, providing habitat for "resident populations of wildlife, nourish[ing] marine fisheries in the Gulf of California, and form[ing] a critical link in the Pacific Flyway for birds flying north from

66. Hayes, *supra* note 44, at 803, 808.

67. Kelly, *supra* note 63 (quoting Mexicali economist Enrique Rovirosa).

68. Randal C. Archibold, *Border Fight Focuses on Water, Not Immigration*, N.Y. TIMES, July 7, 2006, at A1.

69. Dibble 2004, *supra* note 11 (quoting Julio Navarro, head of Mexicali's irrigation district).

70. Kelly, *supra* note 63.

71. Archibold, *supra* note 76.

72. Jenkins, *supra* note 3, at 11.

73. Glennon & Culp, *supra* note 49, at 905–06.

74. *Id.* at 907.

75. *Id.* at 907–08.

Central America."[76] However, as it stands, the Delta's regenerative capacity "is currently being stretched to its limit,"[77] and "along the river, the habitat for fish, birds and other wildlife is near collapse."[78] It is anticipated that the AAC lining project, which will restrict the ability of the seepage to reach the Delta's wetlands, will threaten the already precarious ecosystem of the Delta.

In particular, the wetland vegetation on Mexicali's Andrade Mesa grows along the canal and provides habitat for various species of wildlife, including the Yuma clapper rail, a bird listed as endangered under the Endangered Species Act.[79] According to Mexico's environmental ministry, the Andrade Mesa Wetlands is home to more than 100 bird species and is a key habitat for several endangered species.[80] Both the BOR and the United States Fish and Wildlife Service (FWS) have acknowledged the environmental significance of the wetlands, recognizing that although they were "artificially formed and maintained, their presence is nevertheless important for various species of wildlife."[81]

When the BOR lines the All-American Canal, the wetlands, which are nourished and sustained by the seepage from the AAC, are at risk of drying out and disappearing.[82] The net loss of habitat for the Yuma clapper rail is estimated to be approximately 314 acres, which represents one percent of the worldwide habitat of the species.[83] In fact, it was the importance of these wetlands that forced the BOR to forgo the concrete lining of another portion of the canal based on the need to preserve "smaller wetlands located *in the U.S.*"[84] In addition to the anticipated effects the project will have on the Colorado Delta, the water cut off from the lining project will also have an impact on recharge of the Salton Sea, which is also known as an "essential bird and wildlife habitat."[85]

Even though it is recognized that without a "legally guaranteed flow of water, the Delta will inevitably be pushed—permanently—past its ecological limits,"[86] there is currently no legal protection for water needed to sustain the habitats of the Delta. The Law of the River has itself been criticized as a

76. Jenkins, *supra* note 3, at 11.

77. Glennon & Culp, *supra* note 49, at 909.

78. Kelly, *supra* note 63.

79. ROD, *supra* note 64, at 4.

80. Sandra Dibble, *Wetlands become a focus in debate over canal lining*, SAN DIEGO UNION-TRIBUNE, June 6, 2005, at A1.

81. Opening Brief of Appellant Citizens United for Resources and the Environment at 8, *CDEM IV*, 482 F.3d 1157 (No. 06-16345), 2006 WL 3380587 [hereinafter CURE Brief] (emphasis omitted) (quoting Fish & Wildlife Service, *Memorandum: Endangered Species Act Considerations in Mexico for the All-American Canal Lining Project*, *in* SIR, *supra* note 20, Attachment C at 3, *available at* http://www.usbr.gov/lc/region/programs/AAC/AttC.pdf [hereinafter FWS Memo]).

82. Kelly, *supra* note 63.

83. CURE Brief, *supra* note 81, at 9 (quoting FWS Memo, *supra* note 81).

84. *Id.* (emphasis added).

85. *Id.* at 13.

86. Glennon & Culp, *supra* note 41, at 909–10.

"system that is highly prejudiced against 'wasting' water on environmental concerns and the ecosystem of the Delta."[87] The BOR, by neglecting, or at least underemphasizing the environmental impacts of the AAC lining project *on both sides of the border*, has allowed the project's design to institutionalize that prejudice without accepting responsibility for the grave threat the project poses to the subsistence of the Delta.

## III. THE *CDEM* LAWSUIT'S JOURNEY THROUGH THE FEDERAL COURTS

From February to December of 2006, community and environmental groups pushed a series of challenges to the AAC lining project through the federal courts.[88] These advocates sought to persuade the courts that the economic and environmental impacts of the lining project on the community of Mexicali and the Colorado River ecosystem were sufficiently grave that the BOR should be enjoined from carrying forward with the project. Ultimately, however, adherence to the terms of the 1944 Treaty, in combination with legislation passed by Congress in the final days of 2006,[89] precluded the courts from being able to provide a legal remedy to those adversely affected by the project.[90] Consequently, in December of 2006, after a year of litigation, the Ninth Circuit dismissed the coalition's claims and the BOR was permitted to proceed with the lining project as designed in 1994.[91]

### *A.* CDEM *at the District Court of Nevada*

#### *1.* CDEM I*: The Eight Initial Claims for Relief*

In February of 2006, three organizations came together to challenge the final authorization of the AAC lining project: Consejo de Desarrollo Economico de Mexicali (CDEM), a "non-profit organization of business and civic leaders promoting sustainable economic growth to improve the quality of life for the 1.3 million citizens in the Mexicali Valley"; Citizens United for Resources and the Environment (CURE), "a California non-profit organization promoting multi-disciplinary research and implementation of balanced land use and resource management decisions"; and Desert Citizens Against Pollution (DCAP), "a California non-profit organization dedicated to environmental health and justice."[92]

87. *Id.* at 912.

88. *See CDEM I*, 417 F. Supp. 2d 1176; *CDEM II*, 438 F. Supp. 2d 1194; *CDEM III*, 438 F. Supp. 2d 1207; *CDEM IV*, 482 F.3d at 1162.

89. *See* 2006 Act, *supra* note 6.

90. *CDEM IV*, 1168–72.

91. *Id.* at 1174.

92. *CDEM I*, 417 F. Supp. 2d at 1180–81.

The original action included eight claims, four based on the water rights of the class of Mexican users and four based on violations of United States environmental statutes.

*a. Water Rights Claims*

Counts One through Four, brought exclusively by CDEM, alleged: (1) the unconstitutional deprivation of water rights without due process of law; (2) a constitutional tort against the Secretary and Commissioner of the BOR for acting to usurp the Mexicali residents' water rights; (3) water rights violations under the doctrines of equitable apportionment or equitable use (claiming that the Secretary and Commissioner had an affirmative duty to configure and implement the lining project in a manner that would result in the "reasonable utilization of the water resources in the Mexicali Valley"); and (4) estoppel based on economic and environmental interests in the Mexicali Valley from 63 years of seepage that had recharged the Mexicali Aquifer.[93]

The District Court of Nevada never reached the merits of these claims. Judge Philip Pro concluded that CDEM lacked standing to assert Counts One through Four because Fifth Amendment Due Process protections do not extend to "aliens outside of United States territory" and because the 1944 Treaty between the United States and Mexico does not provide individuals with standing to assert rights under the Treaty.[94] Although CDEM argued that the Treaty governs only surface water deliveries, not groundwater use, the district court agreed with the United States' position that the Treaty's allotment *includes* "sub-surface waters derived from the Colorado River."[95] Moreover, because "only parties to a treaty may seek enforcement of the treaty and may do so only through diplomatic means," CDEM could not assert any rights under the Treaty.[96]

*b. Statutory Claims*

Count Five, brought by all three plaintiff groups, claimed BOR had acted in violation of the National Environmental Protection Act (NEPA) and the Administrative Procedures Act (APA) for failing to prepare a Supplemental Environmental Impact Statement (SEIS) despite the existence of significant new circumstances bearing on the proposed project since the initial Final Environmental Impact Statement (FEIS) was issued in 1994.[97]

93. *Id.* at 1181.

94. *Id.* at 1183.

95. *Id.* at 1184. According to CDEM, this finding was "despite unanimous scholarly authority to the contrary and an explicit contrary statement by the U.S. and Mexico in Section 5 of Minute 242." CDEM Brief, *supra* note 19, at 4.

96. *CDEM I*, 417 F. Supp. 2d at 1185.

97. *See id.* at 1181.

Counts Six through Eight were brought jointly by CDEM and CURE, and alleged: (6) a violation of the Endangered Species Act (ESA) for failing to evaluate properly the effects of the canal lining project on listed species, failing to reinitiate formal consultation because of new information, and failing to authorize a "taking" of endangered species within the United States; (7) the unlawful taking of a listed migratory bird species in violation of the Migratory Bird Treaty Act (MBTA), and failure to promulgate regulations excepting the agency from the Act's requirements; (8) a violation of the San Luis Indian Water Rights Settlement Act.[98] Again, the court never reached the merits on these claims, concluding that neither CDEM nor CURE had asserted sufficient associational standing.[99]

*2.* CDEM II*: Dismissal of Six Claims of the Amended Complaint*

Upon dismissal of the majority of their claims, the *CDEM* plaintiffs filed an Amended Complaint, this time addressing the standing issue.[100] Again, Judge Pro dismissed CDEM's Counts One through Four of the amended complaint for lack of standing, reaffirming his prior holding that the Fifth Amendment has no extra-territorial application, and rejecting CDEM's argument it had standing to assert Fifth Amendment claims because some of its members are United States citizens.[101] Judge Pro also dismissed Counts Seven and Eight as time-barred under the six-year statute of limitations. He reasoned that plaintiffs "knew or had reason to know that the construction and lining of the new All-American Canal" would have impact on the listed migratory bird, the environment, the special status species, and Mexico as of 1994—more than twelve years before the suit.[102] A portion of Count Five (the NEPA count) was also dismissed as time-barred, to the extent the claim challenged the adequacy of the 1994 FEIS.[103] Only the NEPA claim based on the BOR's failure to issue

98. *Id.*

99. *Id.* at 1187–88 (concluding that "CDEM and CURE have failed to demonstrate that their members would have standing to sue on their own . . . [b]ecause CDEM and CURE have not alleged that at least one of their members have suffered an injury in fact fairly traceable to the United States' alleged violation of the ESA, Migratory Bird Treaty Act, and San Luis Rey Act").

100. *CDEM II*, 438 F. Supp. 2d at 1197. In addition to the three plaintiffs, the City of Calexico was granted leave to intervene in support of Count 5 (the NEPA claim), and the Imperial Irrigation District, the San Diego County Water Authority, the Central Arizona Water Conservation District, and the State of Nevada and two of its water agencies were granted leave to intervene in defense of all eight claims. *See id.* at 1197 n.1.

101. *Id.* at 1198–1200. CDEM also attempted to assert standing for Claims 1, 3, and 4 under the APA. However, because they did not invoke the APA in their second round of pleadings, the court dismissed this attempt. *Id.* at 1201.

102. *Id.* at 1205.

103. *Id.* at 1206.

a SEIS (Count Five) and CURE's claim of violation of the ESA (Count Six) survived Judge Pro's ruling.[104]

### *3.* CDEM III*: Decision on the Merits on the NEPA and ESA Claims*

On these remaining claims, the plaintiffs moved for summary judgment. CDEM and CURE, along with the intervening party the City of Calexico, argued that the BOR violated NEPA by failing to issue a SEIS despite significant new information and circumstances, and that the BOR should have considered the extra-territorial impacts of the project on the environment across the border in Mexicali.[105] Additionally, CURE argued new information existed requiring the BOR "to reinitiate formal consultation with FWS under the ESA."[106]

#### *a. Administrative Requirements and Agency Actions*

NEPA requires the BOR to consider all environmental effects of its proposed action in an Environmental Impact Statement (EIS) that includes a "detailed statement" of the environmental impact of the proposed action and potential alternatives.[107] NEPA also requires the agency to "rigorously explore and objectively evaluate all reasonable alternatives" to its proposed actions and "include appropriate mitigation measures not already included in the proposed action or alternatives."[108]

In compliance with NEPA, the BOR approved a Record of Decision (ROD) authorizing the lining project in 1994, filed an accompanying FEIS with the EPA, and published notice in the Federal Register.[109] In the ROD, the BOR justified its choice by explaining that the chosen project alternative "has the lowest construction cost estimate, uses a well established construction method, and would have the shortest construction period."[110] The BOR recognized that the project "could potentially cause significant impacts to the environment."[111] The FEIS therefore included funding of $100,000 for habitat restoration work, "to ensure the Project does not cause an adverse change to wildlife habitat along the Colorado River."[112]

In addition to the requirements described above, NEPA imposes on federal agencies "a continuing duty to supplement existing . . . EISs in response to

104. *See CDEM III*, 438 F. Supp. 2d at 1219. The court concluded that CDEM had failed to show that the environmental interests it sought to protect were connection to its organizational purpose, and thus dismissed CDEM from Count 6 on standing grounds. *CDEM II* at 1203.

105. *CDEM III*, 438 F. Supp. 2d at 1219.

106. *Id.*

107. 42 U.S.C. § 4332(2)(C) (2006).

108. 40 C.F.R. § 1502.14 (2001).

109. *CDEM I*, 417 F. Supp. 2d at 1180; 59 Fed. Reg. 18,573-03.

110. ROD, *supra* note 64, at 3.

111. *Id.*

112. *Id.* at 5.

'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,'"[113] and to "continue to take a 'hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.'"[114] In particular, the White House Council on Environmental Quality (CEQ) regulations require agencies to prepare supplements to an EIS if (1) the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or (2) there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.[115] During the years the lining project was delayed, the BOR "conducted a re-examination of the [1994] FEIS in 1999, but determined that no new significant information changed the initial analysis and thus a supplemental environmental impact statement (SEIS) was not required."[116]

In response to the *CDEM* lawsuit, the BOR issued a Supplemental Information Report (SIR) which again concluded that the BOR had no duty to prepare a SEIS.[117] The BOR asserted in the SIR that the project would have no new or significantly different environmental impacts, and that there were "no significant new circumstances or information relevant to environmental concerns."[118] The *CDEM* plaintiffs disagreed. Their NEPA complaint emphasized that "[d]espite ten years in mothballs, and despite significantly changed circumstances and new information, no public review or comment was permitted on the resurrected [p]roject."[119]

*b. NEPA Violations (Count Five)*

In particular, the plaintiffs argued that five new circumstances warranted the preparation of a SEIS:

> (1) the discovery of the Andrade Mesa Wetlands in Mexico and its importance as a habitat for the endangered Yuma Clapper Rail after preparation of the FEIS;
>
> (2) the anticipated transborder socio-economic impacts from the water loss, which had been altered and exacerbated since the FEIS by demographic changes and the passage of NAFTA;
>
> (3) new reports suggesting possible unexplored impacts on the Salton Sea;

113. *CDEM III*, 438 F. Supp. 2d at 1239 (quoting Idaho Sporting Cong., Inc. v. Alexander, 222 F.3d 562, 566 n.2 (9th Cir. 2000) (quoting 40 C.F.R. § 1502.9(c)(1)(ii) (2008))).

114. *Id.* (quoting Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000) (quoting Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989)).

115. SIR, *supra* note 21, at 2.1.1 (quoting National Environmental Policy Act–Regulations, 43 Fed. Reg. 55,978, § 1502.9(c) (Nov. 29, 1978)).

116. *CDEM IV*, 482 F.3d at 1165.

117. SIR, *supra* note 21, at Exec. Summary.

118. *Id.*

119. CURE Brief, *supra* note 81, at 5–6.

(4) alterations in the project plan with regard to human safety mechanisms designed to prevent drowning; and

(5) changes in the air quality condition of the [a]ffected region.[120]

According to CURE, it was not until 2002 that the seepage-dependent Andrade Mesa Wetlands and the species inhabited there were fully discovered.[121] It was therefore unknown at the time of the initial FEIS that the project would have such significant effects on the bird habitat and in particular the Yuma clapper rail. In addition, the plaintiffs criticized the BOR for "neither acknowledg[ing] nor consider[ing]" the socio-economic impacts the project would have in the Mexicali Valley.[122] Among the negative effects of the project, CURE pointed to the "loss of farm-worker jobs, revenue to U.S. and Mexican farmers, and air pollution due to dust from dried-up fields."[123] As such, the plaintiffs argued, the BOR should have considered in a SEIS the "impact on agriculture if the seepage is diverted or the rebounding impacts in the U.S. in terms of reduced importation of winter vegetables, increased immigration and less consumption by Mexican citizens in Calexico and the Imperial Valley."[124]

*c. ESA Violations (Count Six)*

In the second remaining claim, CURE argued that the discovery of the Andrade Mesa Wetlands constituted "new information" requiring the BOR to "re-initiate formal consultation with FWS" under Section 7 of the ESA.[125] Following the filing of the *CDEM* lawsuit, the BOR "issued a biological analysis for the Lining Project regarding the Potential Species Impact" in Mexico, which it transmitted to the FWS.[126] The FWS responded by finding the BOR's analysis unnecessary under Section 7 because the impacts being considered were taking place in foreign territory.[127] Once the FWS found the Project "would not adversely impact the Yuma clapper rail within the United States," the agency ended its analysis.[128]

120. *CDEM IV*, 482 F.3d at 1166.

121. CURE Brief, *supra* note 81, at 7.

122. *Id.* at 10.

123. *Id.* at 11.

124. *Id.* at 12–13 (citations omitted).

125. *CDEM III*, 438 F. Supp. 2d at 1245. Section 7 of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." 16 U.S.C. § 1536(a)(2) (2006).

126. *CDEM IV*, 482 F.3d at 1166.

127. *See CDEM III*, 438 F. Supp. 2d at 1219.

128. *See* U.S. Brief, *supra* note 27, at 26.

*d. Extra-territoriality and Executive Order 12,114*

A contested issue in the NEPA and ESA claims was whether the BOR should have examined the extra-territorial effects of the lining project.[129] Although the BOR did study the environmental impact of the canal-lining project, "its assessment stopped at the Mexican border."[130] In fact, the administrative record was "silent as to [the Andrade Mesa] wetlands" until the *CDEM* lawsuit.[131] According to the BOR, because of the Andrade Mesa's location in Mexico, it "could not carry out an on-site inventory of the 'occurrence, distribution, and status' of ESA-listed species, but instead relied on information made available by Mexico, the [U.S. Section of the] IBWC, and non-governmental organizations."[132]

The BOR reiterated that NEPA did not require it to undergo extensive transboundary environmental review, maintaining it is not the policy of the United States under NEPA to do so.[133] Executive Order 12,114, promulgated in 1979, however, imposes additional obligations on federal agencies meant to "further[] the purpose of [NEPA], with respect to the environment outside the United States."[134] Pursuant to the Order, every federal agency taking "major Federal actions . . . having significant effects on the environment outside the geographical borders of the United States" must consult with the State Department and CEQ concerning what procedures the agency intends to implement to comply with the Order.[135] The Order asserts jurisdiction over "major Federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action."[136] For such actions, the agency must prepare either "bilateral or multilateral environmental studies, relevant or related to the proposed action, . . . [or] concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents."[137] The Order explicitly asserts that it is not to be "construed to create a cause of action," however, so the court could not judicially enforce its requirements against the BOR.[138]

In compliance with the Executive Order, the BOR undertook some analysis of impacts in Mexico. Yet it explained that the U.S. Section of the IBWC had "advised [the BOR] to limit dissemination of information regarding project impacts to Mexico to avoid jeopardizing the consultation and

129. *See CDEM III*, 438 F. Supp. 2d at 1226.
130. Dibble 2005, *supra* note 88.
131. CURE Brief, *supra* note 81, at 10.
132. U.S. Brief, *supra* note 27, at 23 (citing SIR, *supra* note 21).
133. SIR, *supra* note 20, at 2.2.2.
134. Exec. Order No. 12,114, 44 Fed. Reg. 1957, § 1-1 (Jan. 4, 1979).
135. *Id.* at § 2-1.
136. *Id.* at § 2-3(b).
137. *Id.* at § 2-4(a)(ii)–(iii).
138. *Id.* at § 3-1.

diplomatic relations with Mexico."[139] The BOR thus justified its limited assessment by couching it in terms of international diplomacy. It reiterated the view that NEPA did not require such an analysis, and that "Mexico alone manages all water that passes the international boundary and is ultimately responsible for whether water reaches the Delta."[140] The BOR echoed its policy in the 2006 SIR, stating that "the statutory provisions of NEPA . . . do not require assessment of environmental impacts within [Mexico]," although it did provide a minimal description of "groundwater and groundwater quality impacts in Mexico."[141]

*4. The District Court's Grant of Summary Judgment for the Defendants*

Instead of avoiding the NEPA extra-territoriality question by applying the political question doctrine as the United States advocated in its briefs, the court addressed "whether NEPA requires federal agencies to examine extraterritorial impacts."[142] Judge Pro recognized the presumptive rule of statutory interpretation that "[a]cts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested."[143] Yet, he also recognized past decisions extending NEPA's reach to areas where U.S. conduct within its borders impacted "an area over which the United States maintains legislative control."[144]

The court examined precedent regarding the extra-territorial reach of NEPA and concluded that NEPA did not require the BOR to fully assess the project's impacts on Mexico.[145] Judge Pro distinguished the case from *Environmental Defense Fund v. Massey*,[146] where the D.C. Circuit ruled NEPA applies to U.S. agency conduct whenever agency decision-making occurs within the United States, even as to impacts outside the country. In *Massey* the court noted that "Congress, when enacting NEPA, was concerned with worldwide as well as domestic problems facing the environment."[147] Consideration of extra-territorial impacts under NEPA was urged when such consideration would not produce any "conflict with foreign law or threat to foreign policy."[148] Subsequent cases applying the *Massey* standard concluded that NEPA did not apply to nuclear reactors shipped to and operated solely in

139. *Quoted in* U.S. Brief, *supra* note 27, at 22.

140. Glennon & Culp, *supra* note 49, at 955 (citing United States Department of the Interior, Final Environmental Impact Statement, Colorado River Surplus Criteria (2000), *available at* http://www.usbr.gov/lc/region/g4000/surplus/SURPLUS_FEIS.html#tabletop).

141. SIR, *supra* note 21, at 2.2.2, quoted in U.S. Brief, *supra* note 27, at 22.

142. *CDEM III*, 438 F. Supp. 2d at 1233.

143. *Id.* at 1234 (quoting Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993)).

144. *Id.* at 1235.

145. *Id.* at 1235–36.

146. Envtl. Def. Fund v. Massey, 986 F.2d 528, 531 (D.C. Cir. 1993).

147. *Id.* at 536 (referring to 42 U.S.C. § 4332(2)(F) (2006): federal agencies required to "recognize the worldwide and long-range character of environmental problems").

148. *Id.* at 536.

the Philippines,[149] but did apply to Canadian impacts from the Alaskan pipeline because of "the ongoing control exercised by the United States" over the pipeline.[150]

In *CDEM*, the district court concluded that NEPA did not require the BOR to issue a SEIS examining the project's impacts on Mexico because, unlike *Massey*, the effects of the AAC lining project would occur "outside United States territory in Mexico, a sovereign nation over which Congress lacks legislative control."[151] Judge Pro also considered the potential transboundary effects of the project *within* the United States "too speculative to support causation."[152] Overall, the court held that the BOR's decisions were "not arbitrary or capricious," and the court granted summary judgment on behalf of the defendants.[153]

Regarding the ESA claim, Judge Pro concluded that FWS lacked control over impacts to the Andrade Mesa Wetlands and the Yuma Clapper Rail under the ESA because the impact to the listed species and its habitat would occur outside the United States territory.[154] The court granted the defendant's motion for summary judgment on the ESA claims because CURE failed to "point to a genuine issue of material fact triggering [BOR]'s duty to reinitiate consultation with FWS."[155]

Ultimately, the court denied each of the plaintiffs' summary judgment motions, thereby authorizing the lining project to continue.[156]

### *5. Appeal to the Ninth Circuit*

Despite their defeat in the district court, CDEM, CURE and DCAP filed successful motions with the Ninth Circuit for a temporary injunction halting further work on the lining project pending appeal.[157] The Ninth Circuit halted all planned construction of the AAC and provided a second chance for the plaintiffs to assert their rights to the water and to further environmental review. On Counts One through Four, CDEM emphasized that the District Court failed to consider the estoppel claim based on acquisition of property rights through prescription and beneficial use, and vigorously reiterated its Fifth Amendment takings claim.[158] CDEM argued that the district court "entirely ignored CDEM's . . . argument that individuals in Mexico can, and did, acquire rights

149. Natural Res. Def. Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345, 1367 (D.C. Cir. 1981).

150. *Id.* at 1367 (distinguishing the case before it from that in Wilderness Soc'y v. Morton, 463 F.2d 1261 (D.C. Cir. 1972)).

151. *CDEM III*, 438 F. Supp. 2d at 1235.

152. *Id.* at 1237.

153. *Id.* at 1245, 1251.

154. *Id.* at 1247.

155. *Id.* at 1251.

156. *Id.*

157. *See CDEM IV*, 482 F.3d at 1162.

158. CDEM Brief, *supra* note 19, at 13–14.

to th[e] groundwater seepage."[159] CDEM further claimed that the Treaty was executed "with ample knowledge by the U.S." of the seepage crossing the border from the AAC,[160] and accordingly, "the Treaty could be construed as requiring maintenance of the underground flow that existed at the time the treaty was made."[161] When the Treaty is read "in context," CDEM argued, the district court's "sweeping conclusion that the Treaty covers groundwater is a dangerous excursion into international relations which is not compelled (or supported) by the Treaty's wording."[162]

The United States responded by raising a sovereign immunity defense, reiterating that the seepage water was surface water governed by the 1944 Treaty, and that CDEM's claims presented "non-justiciable political questions,"[163] which meant the court had no subject-matter jurisdiction to hear Counts One through Four.[164]

On the NEPA claim (Count Five), CURE again argued that the BOR failed to give the significant environmental developments the "hard look" required by NEPA, and that the district court's approval of the BOR's disregard for the transboundary impacts of the project was a misapplication of NEPA.[165] According to CURE, the BOR was required by NEPA jurisprudence as well as CEQ guidance rules to consider foreign environmental impacts in a SEIS to supplement its "stale FEIS."[166] CURE criticized the district court's NEPA assessment, arguing that "[t]he fact that an agency has no 'legislative control' over a foreign country does not diminish the benefit of informing decision-makers of the knowable environmental consequences in a shared eco-system so that they can adopt changes in the U.S. that will mitigate those damages."[167]

CURE also renewed its ESA claim, arguing that the BOR must do "all it can in the U.S. to conserve [endangered] species, even if some modification to the Project is needed,"[168] and that the district court erred in granting summary judgment based "solely on 'extra-territoriality' concerns."[169]

159. *Id.* at 3.
160. *Id.* at 7.
161. Kishel, *supra* note 15, at 707.
162. CDEM Brief, *supra* note 19, at 39.
163. *See* U.S. Brief, *supra* note 27, at 31.
164. *Id.* at 30.
165. CURE Brief, *supra* note 81, at 23, 27.
166. *Id.* at 32–33. The CEQ guidance rules state: "NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States. Such effects are best identified during the scoping state, and should be analyzed to the best of the agency's ability using reasonably available information." CEQ, COUNCIL ON ENVIRONMENTAL QUALITY GUIDANCE ON NEPA ANALYSES FOR TRANSBOUNDARY IMPACTS (1997), *available at* http://ceq.hss.doe.gov/NEPA/regs/transguide.html. Since the guidance was issued in 1997, three years after the FEIS for the lining project was published, argued CURE, the BOR did not have the benefit of the guidance at the time it prepared its FEIS and needed to supplement it to consider the transboundary effects of the project. CURE Brief, *supra* note 81, at 31–32.
167. CURE Brief, *supra* note 81, at 35.
168. *Id.* at 47.
169. *Id.* at 48.

In response, the United States reiterated its view that NEPA "does not expressly direct the study of transboundary effects like those at issue [in the litigation]."[170] In addition, although Executive Order 12,114 does require the study of such impacts, the Order does so "*without* an attendant cause of action."[171] Therefore, the government argued, because the Executive Order "represents the 'United States government's *exclusive* and complete determination' of the procedural obligations to be taken by federal agencies, with respect to impacts on the 'environment outside the United States,'" the Order represents the President's determination that "NEPA does not mandate review of extraterritorial impacts of U.S. based projects."[172] The government also emphasized that the 1997 CEQ guidance is non-binding, and entitled to deference only "to the extent of its 'power to persuade,'"[173] which in light of the Executive Order, was minimal.[174]

The City of Calexico also joined the appeal to the Ninth Circuit as intervenor for the plaintiffs. The City argued that there had been "substantial bi-national environmental and economic change in the region due in large part to the North American Free Trade Agreement (NAFTA)" which wasn't entered into until 1994, and that such changes were not addressed in the 1994 FEIS or subsequent documents produced by the BOR.[175] Because the BOR did not thoroughly study or discuss the "effects on the aquifer and its resulting secondary effects on the City of Calexico," the City argued that the BOR neglected to give appropriate weight to the "inter-dependence" and significant changes that had occurred along the border *within the United States* as a result of NAFTA.[176] These additional considerations mandated that the BOR issue a SEIS, this time considering the extra-territorial impact of its project.

In 2000, the Ninth Circuit proclaimed: "[W]e have repeatedly warned that once an agency determines that new information is significant, it must prepare a supplemental EA or EIS; SIRs cannot serve as a substitute."[177] In a subsequent case the court concluded that "the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction."[178] These statements, combined with the issuance of the temporary injunction by the motions panel, offered promise that the court might require the BOR to go back and reevaluate the environmental and transboundary effects of the AAC lining project before proceeding. The court may also have decided it was plausible as

170. U.S. Brief, *supra* note 27, at 32.

171. *Id*.

172. *Id.* at 56 (quoting Exec. Order No. 12,114, 44 Fed. Reg. 1957, § 1-1 (Jan. 4, 1979)).

173. *Quoting* Christensen v. Harris County, 529 U.S. 576, 587 (2000).

174. U.S. Brief, *supra* note 27, at 62–63.

175. City of Calexico's Joinder and Opening Brief at 2–3, *CDEM IV*, 482 F.3d 1157 (No. 06-16345), 2006 WL 3380585.

176. *Id.* at 11–12.

177. *Idaho Sporting Cong.*, 222 F.3d at 566.

178. High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 642 (9th Cir. 2004) (quoting Am. Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983)).

a matter of statutory interpretation that the BOR's decision not to assess extra-territorial impacts was unreasonable.

However, in December of 2006, before the Ninth Circuit had the chance to rule on the appeal, Congress passed a legislative rider that fundamentally diminished the plaintiffs' claims on appeal and rendered the majority of them moot.

### *B. The Intervening Legislation: The Tax Relief and Health Care Act of 2006*

Within months after the motions panel granted the injunction halting work on the project, Congress enacted the Tax Relief and Health Care Act of 2006 (2006 Act), a "274-page omnibus tax bill," which included a section ordering the completion of the All-American Canal lining project.[179] The 2006 Act provided:

> *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.[180]

The Act further provided that the treaty between the United States and Mexico pertaining to the allotment of water from the Colorado River was

> 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.[181]

California Senator Dianne Feinstein, Nevada Senator Harry Reid, and Arizona Senator Jon Kyl were "instrumental" in the passage of this congressional rider,[182] which the San Diego County Water Authority (SDCWA) pushed since the beginning of the *CDEM* litigation.[183]

Proponents in San Diego saw the bill as "basically restating [Congress's] prior support of the project."[184] Officials expected that the legislation, "[b]y making the project mandatory, or non-discretionary," would halt the *CDEM* litigation, which would in turn "save millions in taxpayer and ratepayer dollars

179. *CDEM IV*, 482 F.3d (describing the 2006 Act, *supra* note 6.).

180. 2006 Act, *supra* note 6, at § 395 (emphasis added).

181. *Id.* at § 397.

182. News Release, San Diego County Water Authority, Congress Acts to Restart Canal Lining Project (Dec. 11, 2006), *available at* http://www.sdcwa.org/news/2006_1211bill_canallining.phtml [hereinafter SDCWA News Release].

183. The SDCWA is the agency responsible for supplying water to San Diego residents, and agreed to assume responsibility for the lining project as part of its deal to buy the conserved water from the Imperial Valley. Conaughton 2005, *supra* note 30.

184. Gig Conaughton, *Congress jumps into canal-lining controversy*, NORTH COUNTY TIMES (Escondido, Cal.), Dec. 12, 2006 (quoting Ken Carpi, congressional lobbyist for the San Diego Water Authority).

by eliminating additional construction delays and litigation expenses."[185] Said one observer: "[the bill] appeared to tell the courts to butt out of the debate by saying existing U.S.–Mexico treaties should settle water disputes between Mexico and the United States."[186]

In response to the 2006 Act, the United States filed a motion to vacate the injunction and remand the action to the district court with instructions that Counts Five through Eight (those based on NEPA, ESA, MBTA, and the Settlement Act) be dismissed as moot, a motion which the *CDEM* plaintiffs "vigorously opposed."[187]

### *C. The Dismissal of the* CDEM *Litigation by the Ninth Circuit Court of Appeals*

According to mootness doctrine, "[i]f legislation passing constitutional muster is enacted while a case is pending on appeal that makes it impossible for the court to grant any effectual relief, the appeal must be dismissed as moot."[188] In an opinion by Judge Thomas, the Ninth Circuit panel held that the 2006 Act fit squarely within this paradigm. The court's conclusion that the 2006 Act indeed rendered the *CDEM* plaintiffs' claims moot was based on two subsidiary analyses: (1) that, contrary to the plaintiffs' assertion, the 2006 Act passed constitutional muster; and (2) that the effect of the Act, properly construed, made it impossible for the court to fashion effective relief.[189]

#### *1. Constitutionality of the 2006 Act*

The *CDEM* plaintiffs brought several constitutional objections to the statute in an attempt to persuade the court that it not use the rider to strike down their statutory claims.[190] The court, however, found none persuasive.[191] The 2006 Act, the court concluded, did not violate the Tenth Amendment, nor did it invade the judiciary's Article III powers by dictating a specific result in the pending judicial case.[192] In addition, the plaintiffs lacked standing to bring an Equal Protection claim based on discrimination against Latinos, and the court held "non-justiciable" the issue of whether Congress' decision not to hold a hearing on the legislation constituted a violation of Desert Citizen's members' due process rights.[193] In sum, the court decided the Act did not impose any

185. SDCWA News Release, *supra* note 190 (internal punctuation omitted).
186. Conaughton Dec. 2006, *supra* note 184.
187. *CDEM IV*, 482 F.3d at 1162.
188. *Id.* at 1168 (citing Paulson v. City of San Diego, 475 F.3d 1047, 1048 (9th Cir. 2006).
189. *Id.* at 1168–72.
190. *See id.* at 1166.
191. *Id.* at 1170.
192. *Id.*
193. *Id.* at 1171–72.

unconstitutional burdens on the classes represented by the *CDEM* plaintiffs, and could not be struck down on those grounds.

*2. Statutory Reach of the 2006 Act*

Judge Thomas then examined the statutory reach of the 2006 Act as applied to the lining project. He concluded that the language of the statute directing the BOR to proceed "without delay" and "not withstanding any other provision of law" served to exempt the lining project from compliance with any other federal law, including those laws behind the plaintiffs' environmental claims.[194]

If Congress so intends, it has the power to "moot a pending controversy by enacting new legislation."[195] As such, in *Stop H-3 Association v. Dole*, the Ninth Circuit held that Congress is free to exempt local projects from national environmental laws, and in doing so, moot a pending controversy.[196] *Stop H-3* and subsequent cases established the principle that "[a]ssuming it uses constitutional means, Congress may exempt specific projects from the requirements of environmental laws."[197] According to the Ninth Circuit in *CDEM*, this is precisely what Congress accomplished with the 2006 Act. Although the phrase "not withstanding any other provision of law" is not always construed literally, when paired with the language directing that the project proceed "without delay," the phrase expressed Congress' clear intent to exempt the project from the reach of those environmental statutes that would delay implementation.[198] According to the court's "common sense construction," the Act rendered moot the claims based on NEPA, ESA, the Migratory Bird Treaty Act, and the Settlement Act, each of which would delay commencement of the project if granted.[199] Thus the 2006 Act effectively operated to exempt the lining project from the reach of each environmental statute at issue in the litigation.

*3. Jurisdictional Dismissal of Claims One through Four*

Judge Thomas then proceeded to explain that, while the remaining claims (Counts One through Four in *CDEM I* and *II*) were not affected by the 2006 Act, they were matters beyond the subject matter jurisdiction of the Nevada District Court.[200] The court construed the first Count (unconstitutional

194. *Id.* at 1168–69 (quoting 2006 Act, *supra* note 6).

195. Stop H-3 Ass'n v. Dole, 870 F.2d 1419, 1432 (9th Cir. 1989).

196. *Id*.

197. *CDEM IV*, 482 F.3d at 1168. *See also* Sierra Club v. U.S. Forest Serv., 93 F.3d 610 (9th Cir. 1996); Mt. Graham Coal. v. Thomas, 89 F.3d 554 (9th Cir. 1996); Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441 (9th Cir. 1992).

198. *CDEM IV*, 482 F.3d at 1169 (quoting 2006 Act, *supra* note 6).

199. *Id*.

200. *Id.* at 1172.

deprivation of property) as a takings claim, which is a matter that must be litigated before the Court of Federal Claims, and not the District of Nevada.[201] The court also rejected the plaintiffs' *Bivens* claims against the Secretary and the Commissioner, as such a suit may not be brought against an individual in his or her official capacity, and the United States had not consented to its officials being sued in their official capacities.[202] The last two claims were swiftly dismissed, not on standing this time, but on the grounds of sovereign immunity.[203]

### *D. The End of the Line*

The Ninth Circuit dismissal confirmed that Congress's intent that the AAC lining project be carried forward represented the final authority on the matter. Congressional action thus preempted any further discussion of whether NEPA or the ESA required, or should require, an assessment of the potentially detrimental transboundary effects of agency actions. The Ninth Circuit further affirmed that the 1944 Treaty was indeed the "exclusive authority"[204] for assessing equitable water rights claims between the United States and Mexico. Despite whatever prospect for success the court may have recognized in issuing a preliminary injunction in 2006, it ultimately yielded to congressional mandate. This left the plaintiffs without any legal claims to the AAC seepage or any mechanisms to challenge the BOR's disregard for the transboundary effects of the project.

## IV. BALANCING THE EQUITIES: DOMESTIC CONSTRAINTS ON TRANSBOUNDARY ENVIRONMENTAL JUSTICE

By the time the *CDEM* litigation reached the Ninth Circuit, explicit legislative acts precluded the court from reaching a decision on the merits of the case. Rather than assess the case on the persuasiveness of the plaintiffs' arguments as an equitable matter, the court deferred to the terms of the 1944 Treaty and the explicit reference to the AAC project in the 2006 appropriations bill. The rigid terms of these acts provided no room for the courts to devise a flexible or equitable remedy for those harmed by the unilateral lining project.

The outcome of the *CDEM* litigation provides a fitting example of why disputes over transboundary resources are best resolved through diplomacy by the executive and legislative branches, and not by courts in the course of litigation. This is especially true when water allocation and management is rigidly constrained by judicially-enforced agreements that assert unequivocally what will constitute "equitable" apportionment of shared resources over time.

201. *Id.* at 1172–73.
202. *Id.* at 1173.
203. *Id.* at 1173–74.
204. *See* 2006 Act, *supra* note 6, at § 397.

These arrangements leave courts with little power or discretion to determine whether actions taken pursuant to those agreements yield inequitable results.

### *A. The External Sources of Authority at Play in the* CDEM *Litigation*

#### *1. The 1944 Treaty Provided the U.S. with a Sovereign Immunity Defense*

The combination of the judgment by the *CDEM* district court and the assertion by Congress that the AAC seepage is Colorado River surface water covered by the terms of the 1944 Treaty ultimately precluded any water rights claims by those affected by the project. Because the Treaty provides no individual rights to water covered by it, the Ninth Circuit was left with little choice but to dismiss the claim on the grounds of sovereign immunity.

Under one view, as an equitable matter "the United States does not have a clear right under American legal precedent to line the AAC and harm Mexicans who have put the water to beneficial use for 25 years."[205] Indeed, the court may have considered whether, under U.S. law, the seepage was rightfully appropriated water that the United States had the right to recapture, or if the loss through the canal instead constituted abandonment. Yet Mexico, the true "party" to the water allocation agreement in the treaty, was absent for the majority of the *CDEM* litigation. Because the 1944 Treaty provided no individual rights to water users, the citizens of Mexicali could not rely on U.S. water law to assert their rights to the seepage.[206] Thus the court's holding that the AAC seepage was water covered by the terms of the Treaty extinguished the water rights claims, and the United States could claim sovereign immunity against any claims of entitlement.

Given the preclusive effects of the Treaty over any water classified as *surface* water, the *CDEM* plaintiffs put forth a claim that the AAC seepage was instead *ground*water, excluded by the terms of the Treaty.[207] The district court was unpersuaded, concluding that the Treaty's allotment of water to Mexico on its face "includes sub-surface waters derived from the Colorado River."[208] In its appeal to the Ninth Circuit, CDEM argued that this "sweeping conclusion that the Treaty covers groundwater is a dangerous excursion into international relations which is not compelled (or supported) by the Treaty's wording when read in context."[209] However, the position of the United States throughout the AAC dispute demonstrates that this "excursion into international relations" had already been undertaken, resulting in the precise outcome the plaintiffs argued the court should refuse to facilitate.

205. Hayes, *supra* note 44, at 821.
206. *See CDEM II*, 438 F. Supp. 2d at 1201.
207. *See id.* at 1200–01; CDEM Brief, *supra* note 19, at 39.
208. *CDEM II*, 438 F. Supp. 2d at 1200.
209. CDEM Brief, *supra* note 19, at 39.

Despite the propriety of the judgment that "[n]othing in the 1944 U.S.–Mexico water treaty entitles Mexican farmers . . . to the water," argued one commentator, "their interests should have been taken into account."[210] Yet the court was bound to interpret the Treaty in accordance with Congress' instructions, which left little opportunity to do so. Although the interpretation of the Treaty might certainly be different if the matter were handled by an international court or submitted to international arbitration,[211] neither country appears willing to push the dispute through such channels, making such a resolution unlikely.

*2. The 2006 Rider Expressed Congress' Intent to Exempt the Lining Project from Further Environmental Assessment*

The *CDEM* plaintiffs viewed the 2006 rider as a "desperate and outrageous attempt to prevent the court or a governor from negotiating a better solution."[212] The provision regarding the AAC lining project, although buried in the unrelated 2006 Tax Relief and Healthcare Act, nonetheless operated as an unequivocal mandate by Congress that the project be carried forward without further environmental assessment. This maneuver was not outside Congress' legislative province, and the legislation effectively rendered the plaintiffs' claims moot.

The granting of the temporary injunction by the Ninth Circuit panel in 2006 indicated "either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of the hardships tips in [the plaintiffs'] favor."[213] This suggests the court likely found at least some piece of the plaintiffs' NEPA and ESA claims to be deserving of argument on the merits. As in *Idaho Sporting Congress, Inc. v. Alexander*, where the Ninth Circuit reiterated the standard for rejecting the use of a SIR, the 2006 SIR issued by the BOR was prepared "in response to litigation, years after the original decisions . . . were made," and the "decision making process was not formally reopened and no administrative appeal of the SIRs was permitted."[214] It is therefore plausible that, absent the 2006 rider, the court may have required the BOR to adhere more strictly to NEPA's requirement that decisions be made "only after responsible decisionmakers had

210. Dibble 2004, *supra* note 11 (citing Rick Van Schoik, managing director of the Southwest Center for Environmental Research and Policy at San Diego State University).

211. For example, in an international forum, Mexico might be able to argue for a more flexible interpretation of the 1944 Treaty to comport with principles of international law. *See, e.g.*, Gabcikovo-Nagymaros Project (Hungary/Slovakia), Judgment, 1997 I.C.J. 7 (Sept. 25) (finding that performance obligations of the Treaty had been "overtaken by events," at 77, and confirming a state's "basic right to an equitable and reasonable sharing of the resources of an international watercourse," at 54).

212. Sandra Dibble, *Congress OKs bill to speed lining of All-American Canal*, SAN DIEGO UNION-TRIBUNE, Dec. 12, 2006, at A4 (quoting CURE President Malissa Hathaway McKeith).

213. *Idaho Sporting Cong.*, 222 F.3d at 565.

214. *Id.* at 568.

fully adverted to the environmental consequences of the actions, and had decided that the public benefits flowing from the actions outweighed their environmental costs."[215] In accordance with this requirement, the court may have mandated further inquiry into the environmental effects of the lining project.

Congress's actions in the winter of 2006 were certainly disappointing to the *CDEM* plaintiffs and those who viewed the temporary injunction as a sign that the Ninth Circuit might be willing to review the case on its merits. They were not, however, beyond the reach of Congress's powers as a legislative body, or (arguably) unwise as a matter of political pragmatism. Domestic pressures demanded swift resolution of the AAC dispute and state representatives and interest groups in the west successfully lobbied Congress to direct that the project be carried forward in the most expedient manner possible. As is "often the case," these groups used their "political clout to shape their government's position vis-à-vis neighboring states."[216] This result is hardly surprising, given the prominence of "substantial state political influence in the crafting of federal law and administrative practice in national water policy."[217]

In *Stop H-3 Association v. Dole*, similar legislation ordered construction of an interstate highway to "proceed to completion notwithstanding [section 4(f) of the Department of Transportation Act of 1966]" which required the Secretary of Transportation to undertake significant assessment of reasonable and prudent alternatives to building federal highways through public parks.[218] That statement, according to *Stop H-3*, constituted an "explicit policy articulation" by Congress "that prompt completion of the entire Interstate System is a matter of national importance."[219] The Ninth Circuit concluded (1) that no authority forbids Congress from "carving out a local exception to national policy;" (2) that sufficient authority existed to "support Congress' ability to moot a pending controversy by enacting new legislation;" and (3) that the legislation was "substantially related to the achievement of important governmental purposes."[220] Similarly in *CDEM*, Congress used this "notwithstanding" language to exempt the AAC project from further environmental review which would necessarily "delay" the lining project's implementation.

215. *Massey*, 986 F.2d at 532 (quoting Jones v. D.C. Redevelopment Land Agency, 499 F.2d 502, 512 (D.C. Cir. 1974)).

216. EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE 48 (2002).

217. Stephen P. Mumme, *Advancing Binational Cooperation in Transboundary Aquifer Management on the U.S.–Mexico Border*, 16 COLO. J. INT'L ENVTL. L. & POL'Y 77, 88 (2005).

218. 870 F.2d at 1425 (citing 23 U.S.C. § 138 (2006)).

219. *Id.* at 1428.

220. *Id.* at 1430–32.

Furthermore, because Congress did not "impermissibly direct[] certain findings in pending litigation, without changing any underlying law,"[221] the Ninth Circuit concluded the 2006 Act did not violate separation of powers principles.[222] As the court in *CDEM IV* explained, "Congress may change the substantive law governing a pending case so long as it does not 'direct any particular findings of fact or application of law, old or new, to fact.'"[223] As long as Congress does so expressly, this is no less true when the legislation is enacted through an appropriations measure, rather than explicit exempting legislation.[224] In fact, the use of the appropriations process to exempt "special interest projects" from environmental legislation is well documented, and is "especially prevalent" in the environmental arena.[225]

The interest groups that lobbied Congress to attach the AAC rider to the 2006 appropriations bill effectively removed the NEPA and ESA contentions from the court's jurisdiction. The Act provided the BOR with a shield from further legal challenge, signaling that its decision not to investigate or consider transboundary effects of the lining project was an acceptable one. According to those who benefited from the 2006 Act, the bill "confirm[ed] . . . that diplomacy, not litigation is the proper forum to address international environmental issues."[226] The result in *CDEM* indicates that, in the face of domestic pressure, environmental statutes fail to offer sufficient protection against transboundary environmental harms absent the political will to make the issue one for international collective action.

### *B. Cooperation, Not Litigation*

Prior to the *CDEM* litigation, some thought that Minute 242, which utilized diplomacy and the IBWC to solve the salinity dispute between the United States and Mexico, might serve as "a model for resolution of the disputes arising from the [AAC] lining project."[227] Once U.S. law proved inadequate to provide a remedy to those adversely affected by the project, however, *CDEM* became a persuasive example of why "traditional ex post dispute and litigation mechanisms are no longer adequate" to resolve water-

221. Ecology Ctr. v. Castaneda, 426 F.3d 1144, 1148 (9th Cir. 2005) (quoting Gray v. First Winthop Corp., 989 F.2d 1564, 1568 (9th Cir. 1993)).

222. *See* United States v. Sioux Nation of Indians, 448 U.S. 371, 404 (1980) (finding that the statute "prescribed a rule of decision in a case pending before the courts").

223. *CDEM IV*, 482 F.3d at 1170 (quoting Robertson v. Seattle Audubon Soc'y, 503 U.S. 429, 438 (1992)).

224. *See* Tenn. Valley Auth. v. Hill, 437 U.S. 153, 189–90 (1978) (finding the legislation did not serve to exempt the project in question from the requirements of the ESA because "[t]here is nothing in the appropriations measures, as passed, which states that the [project] was to be completed irrespective of the requirements of the Endangered Species Act").

225. Sandra Beth Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 486 (1997).

226. SDCWA News Release, *supra* note 190 (quoting Daniel Hentschke, general counsel).

227. Kishel, *supra* note 15, at 707.

related disputes.[228] In particular, scholars have recognized that "[c]onventional legal dispute resolution mechanisms" like the litigation tactics advanced by the *CDEM* plaintiffs to no avail "are not suitable mechanisms for fashioning an optimal technical solution for groundwater management in the transboundary region."[229] Instead, bordering nations should develop legal regimes that can adapt to changed circumstances and adjust obligations over time. This would encourage parallel, rather than unilateral action by riparian states, and prevent private parties from needing to resort to litigation to advocate for their rights to shared resources.

*1. The IBWC Is Institutionally Inadequate in the Absence of Coordinated Action by Both the U.S. and Mexico*

The United States and Mexico sought to give weight to the *purposes* of the 1944 Treaty through diplomatic channels when they adopted Minute 242 in 1966, rather than allowing the controversy to center on the Treaty's precise legal terms.[230] Unlike in *CDEM*, the two nations used the IBWC and bilateral negotiation to come to a shared solution, which prevented either side from needing to resort to litigation. Many hoped that this approach utilized by the IBWC would "offer[] a useful indication of the kind of approach the United States and Mexico may take to resolve the [AAC lining] dispute."[231] Although it has "acquired a reputation as an effective diplomatic and administrative agency in a world with few examples of institutionalized transboundary cooperation,"[232] the IBWC has played a limited role in the AAC lining dispute.

Since its creation, the IBWC has been the "primary conduit for decisions and funding on U.S.–Mexico water issues."[233] However, while the U.S. and Mexico sections of the Commission act jointly, "each develops its negotiating position through the political processes of its own country."[234] This makes the IBWC highly susceptible to domestic pressures and policy positions. Historically, "when matters reach the federal level, the position of the U.S. section of the IBWC is aimed toward maximizing U.S. benefits, even if this undercuts Mexican interests."[235] Thus one commentator describes the U.S. Section of the IBWC as a "virtual congressional agency."[236] As a result, the IBWC is best suited to facilitate "*parallel* national action on water-related

228. Huang, *supra* note 63, at 734.

229. Kishel, *supra* note 15, at 717.

230. *See* Meyers & Noble, *supra* note 46, at 418.

231. Kishel, *supra* note 15, at 709.

232. HELEN INGRAM, NANCY K. LANEY & DAVID M. GILLILAN, DIVIDED WATERS: BRIDGING THE U.S.–MEXICO BORDER 181 (1995) [hereinafter DIVIDED WATERS].

233. Pamela M. Doughman, *Discourses and Water in the U.S.–Mexico Border Region*, *in* JOACHIN BLATTER & HELEN INGRAM, REFLECTIONS ON WATER: NEW APPROACHES TO TRANSBOUNDARY CONFLICTS AND COOPERATION 191 (2001) [hereinafter REFLECTIONS ON WATER].

234. DIVIDED WATERS, *supra* note 232, at 181.

235. *Id*. at 193.

236. Mumme, *supra* note 225, at 89.

problems,"[237] and appears institutionally incapable of negotiating bilateral decision-making when domestic politics mandate incompatible solutions.

In the AAC dispute, the U.S. government's framing of the lining project as a unilateral action provided the U.S. Section of the IBWC little room to negotiate with its Mexican counterpart. The Secretary to the Section explained, "[w]hat we are saying is that the United States Government considers the waters in the All-American Canal to be United States waters, diverted to the United States under the 1944 treaty."[238] Without the political pressure from Mexico, or the Mexican government intervening to assert the Mexicali users' rights to the seepage, the Mexico Section of the IBWC had little to bring forward in terms of a "negotiating position." Once the AAC lining project was so vigorously pursued as a unilateral action by the United States, there was no option of parallel action to be facilitated by the IBWC.

### *2. The U.S.–Mexico Stalemate*

Although Mexico has consistently opposed the lining project, the United States has "maintained that it has a right to go ahead with the project without Mexican consent."[239] As a result, the United States and Mexico stand at a stalemate over the terms of the 1944 Treaty, and "both parties stand to lose valuable water resources and harm fragile wetlands."[240] Although negotiation would be a much more effective mechanism to solve the dispute,[241] the United States seems unwilling to negotiate its position regarding the AAC in any meaningful way.[242] As a lawyer for the San Diego County Water Authority (the entity that perhaps stands most to benefit from the AAC lining project) explained: "The Colorado River is fully appropriated. There is no other water to give around. It's done. . . . Everybody knows what they have. And Mexico's trying to get more than they have."[243] To the water-users in the United States, the AAC was nothing more than a "leaky, 10-year old garden hose" and the residents of Mexicali "an unimaginably tactless neighbor."[244] This notion of

237. DIVIDED WATERS, *supra* note 232, at 181.

238. Rohter, *supra* note 24 (quoting Manuel R. Ybarra).

239. Dibble 2004, *supra* note 11.

240. Huang, *supra* note 63, at 742.

241. Benvenisti points out that "most water-related disputes have been resolved by negotiation and not by litigation. Their satisfactory resolution by litigation in a handful of cases cannot conceal the fact that this mode suffers from fundamental deficiencies, and that the preferred mode is negotiation." Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 AM. J. INT'L L. 384, 400 (1996).

242. Although the government in *CDEM* argued that it had engaged in negotiation, these attempts reflect the same unwavering position regarding the 1944 Treaty. For example, as part of its "negotiation," the IBWC offered to forego the project in exchange for an agreement from Mexico to provide California with the same amount of water the project would conserve, from Mexico's treaty allocation. *See* U.S. Brief, *supra* note 27, at 15.

243. Jenkins, *supra* note 3, at 11 (quoting Dan Hentschke, counsel for SDCWA).

244. *Id.* at 11 (citing Dan Hentschke).

"up-gradient sovereignty"[245] meant that, absent diplomatic pressure from Mexico, the United States had no incentive to take Mexican interests into account.

Within the United States, "[w]ater is a fighting matter not only among but within Western states."[246] This puts enormous pressure on federal decisionmaking about resource management. As a result, and understandably from their perspective, leaders charged with regulating water interests within the United States "historically have been hesitant to give Mexico one drop more than absolutely necessary."[247] The U.S. government views the waters flowing through the AAC, regardless of their endpoint, as the exclusive property of the United States. The U.S. Section of the IBWC's position thus remained that "[t]he United States has the right to take *whatever measures it wants* to conserve those waters."[248]

From CDEM's perspective, the unilateral action taken in the AAC lining project, and the U.S. government's "outright ignorance" of the impacts the project is expected to have, "is yet one more chapter in the story of its blinkered attitude toward Mexico."[249] The internal dynamics and domestic pressures within the United States have had an overwhelming influence on the BOR and the U.S. Section of the IBWC's decisionmaking processes. The Mexican government, on the other hand, made little effort to assert the interests of its citizens in this debate, despite the potential diplomatic and international law arguments at its disposal. Instead of advocating for a favorable interpretation of the 1944 Treaty, Mexico deferred to its "blanket policy" during the mid-1990s that there would be "no controversy with the United States" while the North American Free Trade Agreement was being finalized.[250] This may help explain why there was no Mexican voice present in AAC discussions, and why the project's implementation never reached the level of negotiation or cooperation.

Against this backdrop, domestic litigation provided a remarkably weak mechanism for resolution of this stalemate. This is not, however, the fault of the courts. Instead, Mexico and the United States, "rather than undertaking the path of anticipation, compromise, and adjustment, wherein appropriate modifications will be put into place to provide needed flexibility,"[251] have held fast to their rigid interpretations of water allocation under the 1944 Treaty. This water allocation approach has been criticized for "fail[ing] to account for changed circumstances, rely[ing] on inadequate ex post dispute resolution mechanisms, and creat[ing] institutions with minimal flexibility and

245. Hayes, *supra* note 44, at 806 (internal quotation marks omitted).
246. DIVIDED WATERS, *supra* note 232, at 8.
247. *Id.*
248. *Id.* (emphasis added).
249. Jenkins, *supra* note 3, at 11 (citing René Acuña, Executive Director of CDEM).
250. Hume, *supra* note 64.
251. Swan, *supra* note 43, at 343.

authority."[252] The AAC dispute is emblematic of each of these problems: the rigidity of the 1944 Treaty, the inadequacy of the *CDEM* litigation, and the institutional impotence of the IBWC meant that the result of the dispute was essentially predetermined to favor the interests of those on the United States side of the border.

At a broader level, the *CDEM* litigation also demonstrates the inadequacy of "law" in its traditional form, to facilitate cooperation in the utilization of water resources. When the 1944 Treaty was being negotiated, Assistant Secretary of State Dean Acheson stressed the State Department's interest in effecting a settlement which would further "Good Neighbor Policy." As Acheson understood the situation,

> our government simply could not afford to let this question of the Colorado River water continue unsettled to plague our relations with Mexico for years to come. If this treaty should be defeated and if subsequently Mexico should request that the matter be arbitrated, I do not see how as a matter of policy—entirely aside from treaties and legal precedents—we in the Department . . . or you in the Senate could refuse such a request. There would be too much at stake in relation both to Mexico and to our total aims in the field of foreign affairs to justify our refusing to do so for any reason.[253]

Yet some sixty years later, Mexico's right to Colorado River water, which was indisputably recognized by the drafters of the 1944 Treaty, has been rigidly relegated to the outdated terms of the Treaty. The United States regards the 1944 Treaty as a fixed allocation of the parties' water rights, allowing the government to frame its positions in legal terms, and gravely overshadowing the collective nature of the problem.

In his article *Collective Action in the Utilization of Shared Freshwater*, Eyal Benvenisti argues that the sharing of transboundary resources such as water from the Colorado should be managed by bilateral cooperation, "recognized as a long term effort based on collective action for an indefinite time period, rather than as a discrete transaction in which a treaty specifying quantities or shares must be signed and ratified."[254] According to Benvenisti's formulation, a legal regime should instead:

- concentrate on means for enhancing cooperation;
- address factors that inhibit cooperation to reduce their influence;
- increase mutuality between riparians; and

252. Huang, *supra* note 63, at 747.

253. Meyers & Noble, *supra* note 46, at 406 (quoting *Hearings on the Treaty With Mexico Relating to the Utilization of the Waters of Certain Rivers Before the Senate Committee on Foreign Relations*, 79th Cong., 1st Sess., pt. 5, at 1761 (1945) (statement of Dean Acheson, Assistant Secretary of State)).

254. Benvenisti, *supra* note 241 at 399–400.

- make commitments to cooperate more concretely by implementing procedures for adapting the riparians' obligations to changed circumstances.[255]

In the AAC case, however, domestic pressures made the United States unwilling to consider subsequent developments in water usage south of the border or to make a "commitment[] to cooperate."[256] The BOR and the Colorado Basin states saw the AAC lining project as a "conservation" project, with little attention paid to where the conserved water was being taken *from*. As a result, "[t]he possibility of incorporating the opinions of Mexican users in the Mexicali Valley in the decision making process was simply not a consideration."[257]

Unilateral projects undertaken in border regions can be especially harmful in the absence of open communication and a commitment to recognize the potential rights of neighboring communities affected by those projects.[258] Without this legal regime in place, the prospect of adapting the riparians' obligations in consideration of the competing claims to the AAC seepage appear disappointingly slim.

### *C. Environmental Justice?*

The series of conflicts and variety of interests at stake over the AAC lining project illustrate that "[a] close link exists between water, equity, and social engineering."[259] It is certainly true that in the management of natural resources, "questions of allocation usually entail making value judgments among competing demands."[260] However, arrangements like the 1944 Treaty, which may be considered "equitable" at the time of their conception, institutionalize such value judgments with little to no flexibility in providing for changes in equity over time. The flow of water is a vital concern for communities on *both* sides of the border. As a matter of basic fairness, many communities have equally compelling claims to this seepage water, and their livelihoods may in fact depend on it. Contingent on the resolution of this dispute are "not only the very lives of the people of the Imperial Valley . . . but also their social welfare, their culture, and their ability to pursue and attain happiness and success."[261]

It is a cornerstone of international law that in utilizing international watercourses located within their territories, nations are obligated to take "all appropriate measures not to cause significant harm to other watercourse

255. *Id.* at 400 (formatting added).

256. *Id.*

257. Cortez-Lara & Garcia-Acevedo, *supra* note 44, at 273.

258. *See* WARD, *supra* note 53, at 151.

259. Maria Rosa Garcia-Acevedo, *The Confluence of Water, Patterns of Settlement, and Constructions of the Border in the Imperial and Mexicali Valleys (1900–1999)*, *in* REFLECTIONS ON WATER, *supra* note 233, at 58.

260. BENVENISTI, *supra* note 224, at 102.

261. Garcia-Acevedo, *supra* note 259, at 58 (quoting writer Otis B. Tout).

[s]tates."[262] This guiding principle is then factored into the standard of "equitable and reasonable utilization and participation by States in the uses of international water resources," and put into effect through cooperation, including "[t]he exchange of relevant information, consultations and negotiations."[263] Implementation of this doctrine, founded on the concept of limited territorial sovereignty has proved particularly troubling for the neighboring nations of the United States and Mexico.[264] Rather than viewing international water resources between the nations as shared property, what Benvenisti calls the "community-in-waters" approach,[265] both countries continue to view water resources as property of the individual riparians. This individualized property view means that the only limits on the use of the water are vague concepts like "the principle of good neighborliness."[266] As a result, reaching "equitable" arrangements has consistently proved contentious, and "[p]erceptions of inequity in the allocation of water from the Colorado River and Rio Grande have long plagued U.S. relations with Mexico."[267]

The material and social investment that the people of the Mexicali Valley expended on reliance of the seepage water from the AAC, whether or not buttressed by a viable legal claim, should not be so easily disregarded. The seepage had a very real effect on the livelihoods of the Mexicali community. For example, as early as 1953, one farmer explained, "Instead of saving money or getting drunk, I bought small pieces of land . . . and we forgot about investing in a truck to return to the interior of Mexico."[268] In contrast to the salinity crisis in the 1960s, when grassroots organizations, local officials and even the academic community pressured their governments to resolve the crisis and stabilize the water quality in the region,[269] the particularized interests of the communities in the AAC dispute were not represented at this level.

The costs at stake in the dispute over the AAC reveal how complex, and essential, it is to make an accurate assessment of the "equitable" piece of "equitable utilization" when rights to water are at stake. By framing the AAC

262. Chusei Yamada, *Shared natural resources: first report on outlines*, ¶ 10, U.N. International Law Commission A/CN.4/533 (April 30, 2003) [hereinafter ILC Report].

263. *Id*. It is noteworthy that the International Law Commission, in its separate assessment of transboundary groundwaters, stated it "obvious that almost all the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses are also applicable to confined transboundary groundwaters." *Id.* at ¶ 20. Furthermore, in defining its concept of "international" water systems, the Commission notes that "[e]ven an aquifer that is located entirely within the territory of one State can be regarded as an international aquifer." Chusei Yamada, *Shared natural resources: first report on outlines*, ¶ 13, U.N. International Law Commission A/CN.4/533/Add.1 (June 30, 2003).

264. ILC Report, *supra* note 262, at ¶ 35.

265. Benvenisti, *supra* note 241, at 399, n.79.

266. *Id*. at 399.

267. DIVIDED WATERS, *supra* note 232, at 210.

268. WARD, *supra* note 43, at 37 (quoting Jorge Martinez Zepeda, *Entrevista al Sr. Juan Buenrostro Guerrero*, *in* MEXICALI: UNA HISTORIA (Instituto de Investigaciones Historicas ed., 1991)).

269. *See, e.g.*, WARD, *supra* note 43, at 66–72.

lining as a unilateral action by the United States, and construing NEPA to disregard the transnational effects of the project, the BOR undertook the project in an essentially "parochial manner."[270] Rather than pursuing a policy of commitment to sustainable development in the delta, the United States "largely externalized the environmental costs of water development from their calculations."[271] By allowing domestic politics to justify adherence to the fixed terms of the 1944 Treaty, the United States approached the region in a way that denies "the realities of a shared history, ecosystem, and regional identity."[272] According to one commentator: "The lessons of the history of the Imperial and the Mexicali Valleys suggest that it is an illusion to suppose that people control water."[273] The hardship brought upon the Mexicali farmers as a result of the AAC lining project proves that it is an illusion to suppose that water that defies national boundaries can be fairly "owned" or "allocated" within a legal regime that does not demand cooperation and communication between bordering sovereign states.

270. Dibble 2004, *supra* note 11 (quoting Rick Van Schoik).
271. Jenkins, *supra* note 3, at 12.
272. WARD, *supra* note 53, at 152.
273. Garcia-Acevedo, *supra* note 259, at 58.

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