

“Rule of Law and Public Participation in the Decision-Making Process in the Colorado River Basin;

IBWC, NGOs, and Courts in Mexico-US Water Treaty of 1944”

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1 Introduction

- In the Asian Region, there are several international rivers, including the Mekong, the Ganges, the Indus, and the Amur.
- Among the river mentioned, the Mekong seems to be one of the most promising river basins in the sense that there is a governance structure in this river basin, namely the Mekong River Committee, but even this river basin has a long way to go until it realizes sustainability and justice, having China and Myanmar as upstream riparian States while it has Lao PDR Cambodia, Thailand, and Vietnam as downstream States.
- To achieve sustainability and justice, the rule of law and public participation is indispensable.
- Besides diversity of political cultures, economic levels, languages and ethnicities among riparian states, geographic features – upstream-downstream relationship – seems almost impossible to overcome.

1 Introduction

- While multi-national environmental agreements, such as the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, look like a promising model, binational agreements are an indispensable component even in multinational framework.
- In the North American Continent, Mexico and the United States have come to a monumental agreement in 2012 through the Joint Colorado River Cooperative Process (JCRCPP) since 2008.
- JCRCPP was formed in response to the efforts of stakeholders, including the participation of NGO network, and is a formalized consultation process between the International Boundary and Water Commission (IBWC) of the United States and Comision Internacional de Limites y Agua (CILA) of Mexico.
- Minute 319 embodies the package of sustainable use of the river basin, namely, shortage and surplus sharing, reservoir storage, binational conservation projects, salinity and environmental flows.

1 Introduction

- This presentation tries to find out the necessary components of rule of law through the case study of the decision-making process in the Colorado River Basin up to Minute 319 in the following order.
- In Part II, it describes the domestic and international “Law of the River”, including the Colorado River Compact, the Boulder Canyon Project Act, Treaty between the United States of America and Mexico for the utilization of waters of the Colorado and Tijuana Rivers and of the Rio Grande (the 1944 US-Mexico Water Treaty), Arizona v. California and Minute 242.
- In Part III, it describes the decision-making process after Minute 306 and Quantification Settlement Agreement (QSA), and focuses on the formation of Minute 319 through JCRC.
- Finally, Part IV summarizes the paper and tries to describe the implications for other river basins including the Mekong in the Asian Region.

2. From Harmon Doctrine to the US-Mexico Water Treaty of 1944

2-1 The Basis of the Domestic and International “Law of the River”

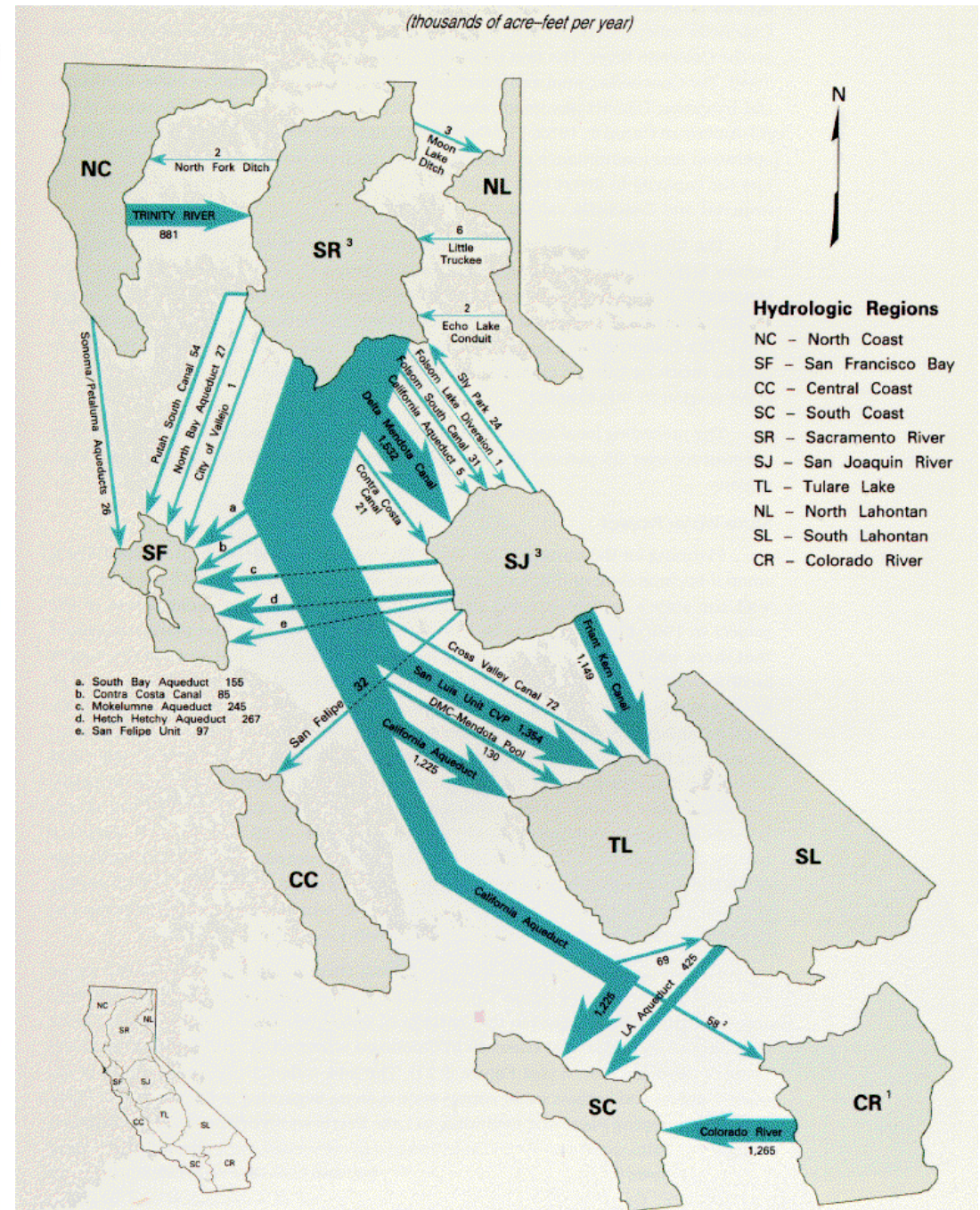
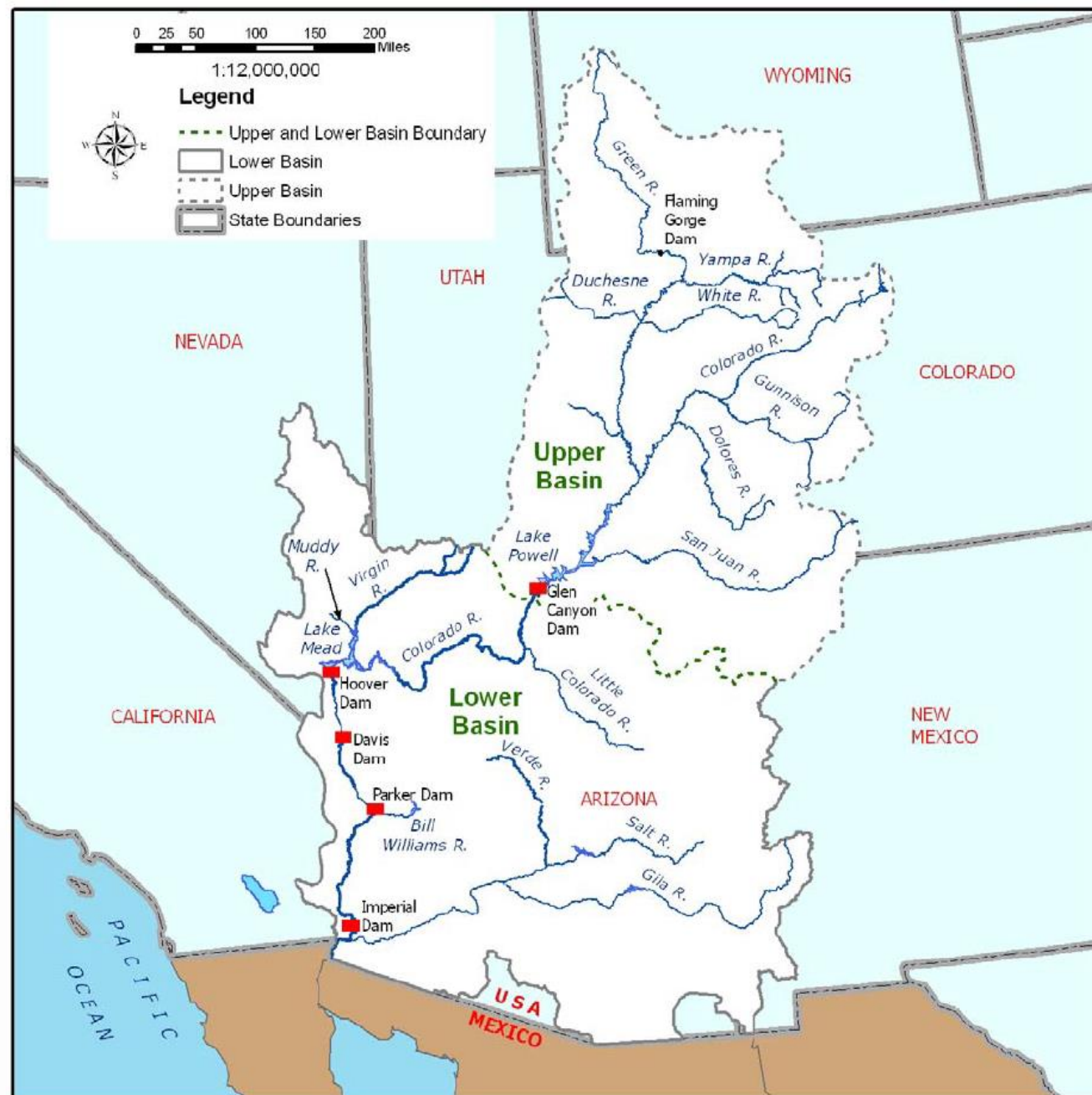
2-1-1 Formation of the National Border, The Colorado River, and Rio Grande

US is an upstream riparian in the Colorado River, but a downstream riparian in Rio Grande.

2. From Harmon Doctrine to the US-Mexico Water Treaty of 1944

- 2-1-2 The Birth of Key Players in the Colorado
- Imperial Irrigation District (IID) holds the water right of the largest (but unquantified) volume as well as of higher priority
 - the Salton Sea was formed in 1905 and its water level is maintained by the agricultural run-off from IID
- Metropolitan Water District of Southern California (MWD) serves water for cities in Southern California (LA, SD) but have lower priority
- Hoover Dam – The Water of the Colorado River is stored in the Glen Canyon and the Hoover Dam. Hoover Dam controls the water for IID and MWD





¹ Total California Colorado River Usage ² Exchange

³ Transfers from the Sacramento-San Joaquin Delta are taken from commingled waters originating in both the Sacramento River and San Joaquin River Regions.



2. From Harmon Doctrine to the US-Mexico Water Treaty of 1944

2-1-3 The Domestic law of the River

- The Colorado River Compact (1922)
- the Boulder Canyon Project Act (1928)
- Arizona v. California (1963, 1964, etc., consolidated in 2006)

Water Allocation			consumption	precipitation
United States		15.0		
Upper Basin States	Colorado	3.9		
	Utah	1.7		
	Wyoming	1.1		
	New Mexico	0.8		
	Arizona	0.1		
	subtotal	7.5	4	
Lower Basin States	Nevada	0.3	0.3	
	Arizona	2.8	2.8	
	California	4.4	5	
	subtotal	7.5	8.1	
Mexico		1.5	1.5	
Evaporation			2	
Return Flow			-1.5	
Total		16.5	14.1	14.3

CB, p. 985

2-1-3 The Domestic law of the River -Colorado River Compact and the Boulder Canyon Project Act Allocation in California

Priority	Parties of Contract	Acre-feet/annum	
1	Palo Verde Irrigation District	3,850,000	104,500
2	Yuma Project		25,000
3(a)	IID and lands in Imperial and Coachella Valleys		
3(b)	Palo Verde Irrigation District		
4	MWD and/or the City of LA and/or others on the coastal plain	550,000	
5(a)	MWD and/or the City of LA and/or others on the coastal plain	550,000	
5(b)	(City and/or County of San Diego)→MWD	112,000	
6(a)	IID and lands in Imperial and Coachella Valleys	300,000	
6(b)	Palo Verde Irrigation District 16,000 of mesa lands		
7	Agricultural Use	All remaining water	

2. From Harmon Doctrine to the US-Mexico Water Treaty of 1944

2-2 Diplomatic Negotiations and between the United States and Mexico

- Mexico pressured the United States and succeeded in forming the Treaty that allows equitable water allocation of water
 - by saying we will litigate you at the Court of International Arbitration
 - As well as bundling the Colorado River and Rio Grande at the moment when the United States was trying to end the World War II against the Axis.

2. From Harmon Doctrine to the US-Mexico Water Treaty of 1944

- 2-3 From the 1944 Water Treaty to Minute 242
- 2-3-1 The Content of the 1944 Water Treaty
 - Allocation of water of the Colorado River between Mexico (1.5 maf/year) and the United States (15 maf/year)
 - IBWC / CILA
 - Minute – interpretation of the Treaty, but later interpreted as requiring to consider the impact of water uses to the environment (intertemporal law) with simpler procedure than amending the treaty itself
- 2-3-2 Arizona v. California, “New Law” and the First Environmental Minute

3.Rebirth of the Colorado River Delta, the Stalemate and Minute 319

3-1 Rebirth of the Colorado River Delta and Growing Water Demand in the Basin

- In the early to mid-1980's and in the mid-1990's, "El Niño cycles produced heavy snow packs and spring floods, that surpassed the storage capacity of the reservoir system, leading to heavy flood release from American reservoirs."
- In each cycle, brief but substantial flood flows reached the Delta and "[t]he explosion of vegetation, wildlife, and fisheries that occurred as a result of these isolated flows of water shocked even the experts."
- It is an important stopover on the Pacific Flyway for more than 350 documented bird species. Notable endangered species, including the Yuma Clapper Rail, Desert Pupfish, Southern Willow Flycatcher, rely on the habitat in the Ciénega de Santa Clara.
- Pushed by the advocacy by EDF, IBWC finally adopted Minute 306 in 2000, but it was not easy to move on to the next step because of two factors.
 - Firstly, seven basin states and basin water users tried to improve the efficiency of water use, which can mean less water for the Delta.
 - Secondly, "IBWC/CILA did not take initiative at the begining to organize or facilitate the binational cooperation".

3. Rebirth of the Colorado River Delta, the Stalemate and Minute 319

3-2 Stalemate – “Quantification Settlement Agreement” (QSA)

- To improve the efficiency of water use, QSA was introduced
 - Let Agricultural Sector (IID) sell its water to Cities (MWD and San Diego)
 - Quantification of IID’s allocation was a prerequisite of the deal
 - (Mitigations [fine-tuning] were necessary – Next Slide) In 2001, California was given time to have water transfer in place in return for delivering surplus water over 4.4 maf/year for 15 years till 2016, so that California can gradually step down to 4.4 maf/year.
- QSA was designed as the basic instrument to put all of these deals together. QSA was a great idea but several fine-tunings were necessary.

3. Rebirth of the Colorado River Delta, the Stalemate and Minute 319

3-2 Stalemate – Quantification Settlement Agreements

- In other words, the condition to permit the transfer was a major issue for two reasons domestically;
 - to free up water by land-fallowing was opposed by the local community, because it can undermine the agricultural economy;
 - also, IID's "wasted" water was the major source of the Salton Sea, thus if IID conserved this water and sell it to MWD and SDCWA, the Salton Sea would become hypersaline which would violate Endangered Species Act and the lake bed would be exposed, which later became a major source of PM10 thus affecting Imperial County as well as violating the Clean Air Act.

3. Rebirth of the Colorado River Delta, the Stalemate and Minute 319

3-2 Stalemate –Binational Cooperation

- Internationally, “the changes in water operations ... – designed to capture greater percentage of water generated in high-flow years for use in the United States – would substantially reduce both frequency and volume of floods and unplanned releases of water that had reached Mexico and the Delta periodically since 1980.”
- The Bureau of Reclamation repeated the view that it lacked discretion to deliver additional water to Mexico under the 1944 US-Mexico Treaty and it was confirmed by *Defenders of Wildlife v. Norton* in 2003.
- Furthermore, lining of All-American Canal right next to the US-Mexico Border was intended to reduce “waste” or seepage on the side of the United States, but to reduce the recharge of aquifer on the Mexican side.
- *Consejo de Desarrollo Economico de Mexicali v. United States* (CDEM suit); Despite the defeat in the district court, CDEM, CURE and DCAP filed a successful motion with the Ninth Circuit for the temporary injunction halting further work on the lining appeal. However, the Ninth Circuit dismissed the case because of the intervening legislation in 2006.

3. Rebirth of the Colorado River Delta, the Stalemate and Minute 319

3-2 Stalemate – Binational Cooperation

- As for the second point, although the Colorado River Basin is shared internationally, the Delta ecosystem is overwhelmingly located in Mexico whereas water and silt come from the United States. As water managers and other stakeholders began to understand the value of the Delta, the Question of who is responsible for the conservation began to surface. Opposing perspective initially precluded an open dialogue at IBWC and CILA.
- A binational research projects and workshops organized by a partnership of organizations, including the Sonoran Institute, Pronatura Sonora, Environmental Defense Fund (EDF), and the University of Arizona, brought scientists, water managers and local resource users together.
- After NGOs with confrontative litigation strategy, such as **Defenders of Wildlife**, left the early Network, evolved network was formed by the Sonoran Institute, the Pronatura Sonora, EDF, and the Nature Conservancy. Workshops were held and a report titled **“Conservation Priorities in the Colorado River Delta”** was produced in 2005.
- The report ultimately identified fifteen priority areas, based not only on scientific information from the University of Arizona but on the inputs from **the local and the indigenous communities** on the existing small community projects.

Squire Patton Boggs & The Sonoran Institute



3. Rebirth of the Colorado River Delta, the Stalemate and Minute 319

3-2 Stalemate –Binational Cooperation

- Also, “[d]uring the period from 2000 to 2007, the Colorado River has experienced the worst drought conditions in approximately one hundred years of recorded history. During this period, storage in Colorado River reservoirs has dropped from nearly full to less than 55 percent of capacity as of September 30, 2007.”
- Thus, Department of Interior (and Basin States) modified the Interim Surplus Guidelines and put together **the Interim Shortage Guidelines**, adding the **Intentionally Created Surplus (ICS)** mechanism enabled with conjunctive operation of Lake Mead and Lake Powell and construction of new facilities as Drop 2 Reservoir.
- The evolved network was invited to propose one of two proposals in EIS alternatives and submitted a paper called **“Taking ICS to Mexico”**. The ICS Mechanism allows Lower Basin States to store water at Lake Mead created through extraordinary conservation measures, system efficiency improvements, importation and subsequent recovery in future years, based on **Lower Colorado River Basin Intentionally Created Surplus Forbearance Agreement (ICF Agreements)**.

3-3 The Decision-Making process to Minute 319 and Its Content (2007-2016)

- See conclusion

4. Conclusions; Toward Minute 32X and Implications for Other Parts of the World

- 4-1 Rule of Law among Counties and Sustainability
- Marc Reisner said
 - “The Colorado's modern notoriety, however; stems not from its wild rapids and plunging canyons but from the fact that it is the most legislated, most debated, and most litigated river in the entire world.”
- However, being able to litigate dispute has positive aspect, of course.

4. Conclusions; Toward Minute 32X and Implications for Other Parts of the World

- First of all, access to justice in international arbitrations gives equal power for both parties in theory as long as the legal capability is the same. That means downstream riparian is treated equally with the upstream riparian, which rarely happens in ordinary diplomatic negotiations.
- Also, in diplomatic negotiations with the United States, Mexico bundled two rivers together – the Colorado River and the Rio Grande; it is in the downstream in the former basin but in the upstream in the latter.

4. Conclusions; Toward Minute 32X and Implications for Other Parts of the World

- The Relationship between Mexico and the United States Started from Harmon Doctrine. The United States did not abide by the Chamizal Tract Arbitration in 1911 until 1963.
- However, after joining the Pan American Arbitration Treaty in 1929, both parties finally agreed on the treaty for equitable utilization of water in 1944, which embodies IBWC and Minute system, making the Colorado River and the Rio Grande as a package.
- It should be noted that the agreement came under the pressure from Mexico to bring the case to arbitration and at the critical moment during the World War II.
- In the face of the salinity crisis in 1960s, Minute 242, the first environmental minute, was agreed also after Mexico pressured the United States to litigate at ICJ.

4-2 Public Participation

- Secondly, access to justice for citizens and NGOs in domestic litigation does not solve all the disputes, but citizens, NGOs and corporations can choose whether or not to be confrontative or consultative with the government.
- And it is vice versa for the government, because it can choose which citizens, NGOs and corporations to confront or consult when necessary.
- After the “Data Processing Revolution” , NGOs in the United States took advantage of the standing and developed varieties of strategies and capabilities.
- EDF proposed the transfer of conserved water from IID to Southern California since 1983, triggering crises and opportunities in the Colorado River Basin on both sides of the border, namely QSA, the lining project of AAC, and Minute 306.

4-2 Public Participation

- The core network group in the Colorado River Basin took advantage of the diversity of strategies among NGOs by carefully building trust with IBWC and CILA through proposing technical alternatives such as “Conservation Priorities” and “Taking ICS to Mexico”. “Being able to litigate” is different from “litigating always”.
- Since the early network, key individuals, notably Jennifer Pit (EDF, policy and management) and Peter Culp (Squire Patton Boggs, J.D.), Francisco Zamora-Arroyo (the Sonoran Institute, Ph.D. in resource geology), and Osvel Hinojosa-Huerta (Pronatura, Ph.D. in biology) worked collaboratively while exhibited collaborative leadership. Also, they started from a small-scale community-based project (the Hardy River Project) and listed it as one of potential “Conservation Priorities” in 2005.

4-2 Public Participation

- Meanwhile, they have been invited by Reclamation to propose “Taking ICS to Mexico” as one of alternatives in EIS. In response to stakeholder efforts, IBWC and CILA have formalized a process for consultation (JCRCPP) in 2008.
- Also in 2008, the Delta Water Trust was established to raise fund to acquire necessary funding to purchase water rights and riparian corridor for habitat conservation.
- Through 2011, JCSRPP contributed to improve consultation skills between Reclamation and CONAQUA such as US allowing Mexican technicians to train the operation of the Reclamation’s Colorado River Support System (CRSS) model to have common factual footing, an indispensable part in reaching agreement.

4-2 Public Participation

- Finally, Minute 319 is used to link all of the related issues in a package – shortage and surplus sharing, reservoir storage, binational conservation projects, salinity and environmental flows – together to provide an appropriate and equitable balance of interests among the United States and Mexico.
- Its operation has come into effect on January 1st, 2013 and ends December 31st, in 2017.
- The Delta Water Trust is providing the base flow and working on the conservation project in the riparian land of the Delta, as a part of the Minute. Mexico and the United States have provided pulse flow once. The water reached the Gulf on May 15, 2014.
- However, there is no plan for the second pulse flow yet.

4-3 Concluding Remarks

- Upside of the decision-making process in the Colorado River Basin is NGOs were successful in getting involved in binational negotiation and the implementation of the policy produced from the process by sharing benefits and burdens with water right holders.
- Downside of this process is it could not involve local governments like Imperial County.
- “North American Model” has upsides and downsides considering the decision like Pulp Mill Case in ICJ, which declared an obligation of upstream riparian state to implement EIA. The stakeholders have to face both upside and downside when they negotiate the next Minute or “Minute 32X”.

Thank you!