

RAINBOW BRIDGE LITIGATION
(slide illustrated)

Ival V. Goslin
Upper Colorado River Commission

Wyoming Water Development Association

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Background

In 1956 the Congress authorized the construction of Glen Canyon Dam forming Lake Powell as part of the basin-wide Colorado River Storage project in Wyoming, Utah, New Mexico and Colorado. ^{1/} Glen Canyon Dam and powerplant cost about \$250 million. Reimbursable interest charges, costs of fish and wild-life and recreation features will bring the total expenditure to over \$300 million. A power transmission line, almost complete, will cost another \$160 million.

Associated with Glen Canyon Dam and Lake Powell, as part of an overall Colorado River Storage project, are three other large water storage facilities, Flaming Gorge on Green River in Wyoming and Utah, and Navajo, and Curecanti storage reservoirs, that cost about \$255 million. There are about 25 participating water-development projects that will cost \$1.304 billion. Among these are the Lyman, Savery-Pot Hook, and Seedskadee projects in Wyoming. Another two dozen or more water projects in the four States are also under authorized study for future development. Among these are the Green River diversion in Wyoming. All of the participating, water-development projects are made possible because Lake Powell and Glen Canyon powerplant have the capacity to store water during years of above-average flows for release during low water years, and to mint dollars from hydro-electric power production to pay the costs of other projects that are beyond the ability of water users to repay.

Lake Powell was intended to provide over 80% of the storage capacity necessary for the upper division States to deliver 75 million acre-feet per 10 years to Nevada, California, and Arizona; while at the same time using, by exchange, water from streamflow in the upper basin States--in Wyoming, for instance. As an illustration of the magnitude and value of the storage function of Lake Powell the flow of the river from the upper to the lower basin in 1934 amounted to only 4.4 million acre-feet. In another year like 1934 the water stored in Lake Powell would be available to meet the compact guarantee by the upper basin never to cause the flow of the river to the lower basin to fall below 75 million acre-feet in any period of 10 consecutive years.

As you proceed up Bridge Creek toward the arch, it appears to grow larger until it dominates the scene.

The tree-covered mountain in the background is Navajo Mountain, a sacred mountain to the Navajo Indians, and the source of the water that flows down Bridge Creek and under the Rainbow to the Colorado River intermittently during the year. Bridge Creek is not a live stream except during storms and spring runoff.

An aerial view of Rainbow Bridge and immediate surroundings is very impressive. Don't let this view fool you. The bridge spans 278 feet and rises 309 feet above the creek bed. Its crest has a minimum thickness of 42 feet--equivalent to the distance between the two 30-yard lines on a football field--or enough width for a good highway. According to the National Park Service the arch is "large enough to straddle the Capitol in Washington, D. C." The arch appears relatively insignificant only because massive sandstone cliffs surround it. Rainbow Bridge National Monument, with an area of 160 acres, was created by proclamation by President Taft on May 30, 1910.

This arch and the 160-acres of rocks of the national monument are the roots of one of the most important problems currently faced by the citizens of Wyoming, Utah, New Mexico, and Colorado who are interested in the future of their States. At the designed maximum water level, elevation 3700 feet, a small arm of Lake Powell will be in the 160-acre monument in a rocky gorge beneath the sandstone arch.

The Early Lawsuit

In 1962-63, while Glen Canyon Dam was still under construction, the National Parks Association, the Sierra Club, et al., brought suit against the Secretary of the Interior to force him to build protective works to keep Lake Powell from entering the Rainbow Bridge National Monument, or, to hold the level of the reservoir low enough that water could not get into the monument.^{5/} This case was dismissed by the U. S. District Court on the grounds that the plaintiffs did not have standing to sue. Times have changed since 1963. Many lawsuits are being entered almost daily by various organizations and groups claiming injury or purporting to protect the public's interests. Courts now are not dismissing many cases of this type for lack of legal "standing to sue."

In 1963, when the water was boiling in controversy over the filling of Lake Powell, the Solicitor of the Department of the Interior wrote an opinion advising the Secretary that he need not defer filling the lake pending the construction of barrier dams to keep water from entering the monument.^{6/}

The Pending Lawsuit

In November, 1970, Friends of the Earth, an eastern conservation club; Wasatch Mountain Club, a Utah non-profit corporation; and Kenneth G. Sleight, a tour guide, filed suit against the Commissioner of the Bureau of Reclamation and the Secretary of the Interior to compel them to limit the level of Lake Powell to 3,600 feet above mean sea level in order to prevent water from entering Rainbow Bridge National Monument. ^{7/} This limitation would require the lake to be operated 100 feet below the level for which Glen Canyon Dam is constructed and would decrease the capacity of the lake approximately one-half. There would be 12.3 million acre-feet of empty reservoir space.

The plaintiffs allege that

"Damage to Rainbow Bridge from fluctuating standing water beneath it will occur. The destruction of natural vegetation, the waterlines left on the canyon walls during reservoir drawdown, and the reduction in the height above water of Rainbow Bridge by the height of the water beneath will impair the monument. Constant wetting and drying the foundation sandstone supporting Rainbow Bridge may over time weaken the structure of the bridge to a point where it may crumble."

The legal basis on which plaintiffs rest their claim is in sections 1 and 3 of the Colorado River Storage Project Act ^{8/} which provide:

Section 1

". . . That as part of the Glen Canyon Unit, the Secretary of the Interior shall take adequate protective measures to preclude impairment of Rainbow Bridge National Monument."

Section 3

"It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument."

The proviso of section 1 specifically protects Rainbow Bridge by stating that "adequate protective measures" should be taken to prevent damage to it.

The language of section 3 expressing the intent of the Congress applied to Echo Park and Split Mountain dams, which, prior to the 1956 Act, had been promoted for construction on Green River in Dinosaur National Monument in Utah. Congress in its committee reports made the point clear that section 3 was related to Echo Park Dam. ^{9/}

To effectuate the section 1 proviso to "take adequate protective measures" with respect to Rainbow Bridge National Monument, Congress would have had to appropriate \$20 million or more in 1959 dollars. (The figure today would be more like \$35-\$45 million.) "Protective measures" were understood by witnesses representing both the conservationists and the Department of the Interior at hearings before the Appropriations Committee to be some type of "works," namely, barrier dams and related structures outside the monument. At no time was there a suggestion that "protective measures" embraced a reservoir reduced in size.

The intent of one Congress may be changed by a later Congress. This is exactly what happened. With the full knowledge that water would invade the monument, Congress for three consecutive years refused to appropriate funds requested by the Secretary of the Interior and conservationists for "protective measures," because the "works" were too expensive for the benefits to be received. Congress had determined that the presence of a static body of water within the narrow rock channel under the Rainbow would do no structural damage to it.

Was Congress correct? Certainly! Water of the reservoir at elevation 3700 will still be 21 feet below the lowest abutment of the Rainbow. The water will be confined within a narrow, rock channel incised in dense, very hard Kayenta sandstone, a rock much more stable and resistant than the softer Navajo sandstone in the arch. When the lake is full the water will be 46 feet deep in this narrow channel. The foundations of the bridge are already saturated with spring water. Thus, the addition of the lake water will cause no additional structural damage. In fact, the presence of a quiescent body of water may prolong the life of Rainbow Bridge. So far as winds are concerned, wave effects will be minimal within the confines of the narrow channel. The Park Service will not allow boats in the immediate vicinity. Certainly the effects of a static lake will be many times less than the erosive action of the dynamic stream that cascades rocks and debris down the channel cutting it deeper and wider each year.

Congress in subsequent appropriation acts inserted a provision "that no part of the funds herein appropriated shall be available for construction or operation of facilities to prevent waters of Lake Powell from entering any national monument." This language is contained in all of the appropriation acts since 1961, including the appropriation act for 1972. The Legislative history regarding these appropriation acts clearly indicates that it is the expressed intention of Congress not to expend funds for the protection "works."

The law says that "adequate protective measures" shall be taken "to preclude impairment of the Rainbow Bridge National Monument." The language does not refer to impairment of the principle that no water from man-made lakes

shall encroach upon any unit of a national monument, as many well-meaning individuals fool themselves into believing. If the language of section 3 was ever intended to refer to Glen Canyon Dam and Rainbow Bridge, which it was not, Congress effectively abrogated that principle by its subsequent actions:

First, for 12 years, 1961 through 1972, Congress has not only precluded the construction of "protective measures" but has also told the Secretary in Appropriation Acts that he cannot use taxpayers' money to operate facilities to cause the reservoir to stay out of Rainbow Bridge National Monument.

Second, simultaneously with its refusal to appropriate funds for the construction of "adequate protective measures" Congress continued to appropriate funds for completing Glen Canyon Dam to its full design height to impound Lake Powell to elevation 3700 feet, again with the knowledge that water would penetrate through the monument's boundaries.

Third, in recent legislation, Congress in four different laws ^{10/} has consistently upheld the principle that Lake Powell must be operated to its maximum capacity. Congress has done this by authorizing construction of 12 additional projects costing over \$1.3 billion in the four upper basin States. The water supply for these 12 authorized projects depends upon Lake Powell filling to elevation 3700 feet.

Fourth, Congress has also authorized feasibility investigations on numerous other water projects in Wyoming, Colorado, and Utah. ^{11/} Congress predicated its authorization of each of these feasibility investigations upon hydrologic data derived from operations of Lake Powell to full condition at elevation 3700 feet. In Wyoming, the Green River development plan illustrates this point.

Fifth, in the Colorado River Basin Project Act of 1968 the Secretary of the Interior was directed by the Congress to operate Lake Powell and Lake Mead in an equitable manner. In the Law, Congress even spelled out definitive guidelines for equalizing storage which literally require that if the effective capacity of Lake Powell were reduced one-half, the Secretary would have to reduce water stored in Lake Mead one-half. ^{12/} Congress could not have intended such a ridiculous operation, which would waste millions of acre-feet of water annually.

What do the plaintiffs in this lawsuit, want? It is elementary law that a court cannot appropriate money--not even to provide "adequate protective measures" for Rainbow Bridge National Monument. The reservoir this summer exceeded elevation 3622 feet. The plaintiffs, as outlined in their claim for relief, are really seeking a declaratory judgment and injunctive action to prevent

Lake Powell from rising above elevation 3600 feet--or 22 feet less than its maximum level this summer. At elevation 3606 feet the reservoir crossed the boundary of the 160-acre national monument. During the past summer the water extended over 600 feet into the monument. At elevation 3654 feet it will wet the bottom of the channel under the sandstone Rainbow.

Effects on Upper Basin States

If Lake Powell were to be operated to not exceed a maximum water surface elevation of 3600 feet above mean sea level, as set forth by the plaintiffs, the consumptive use of water available to the upper basin States would be reduced by another 1 - 1 1/2 million acre-feet--in addition to the already existing 20% reduction below their compact apportionment due to a water-deficient river--a disaster of major proportions.

Wyoming, Colorado, and Utah, with Lake Powell limited to elevation 3600 feet, would lose almost one-fifth of the water available to them with Lake Powell operated to its design level 3700 feet. Their consumptive use of Colorado River water would be reduced 37% below their compact apportionments. Wyoming would face serious curtailment of her future agricultural, municipal, industrial, and water-based recreational development. The truth and importance of the motto of the Wyoming Water Development Association, "Water Is Wyoming's Gold--Use It or Lose It," suddenly assumes paramount importance. What if Wyoming hasn't used it? Trouble of the first water! You can bet that the other six basin States will not cough up water for expansion in Wyoming.

Colorado, almost immediately, would be in the untenable position of being forced to decide which types of water development--municipal, industrial, agricultural, recreational--she would forego. Colorado would face shortages ranging from one-half million to one million acre-feet of water.

Utah would encounter a situation similar to that of Colorado. A water shortage would have to be applied to one or more of the following elements of water usage: presently operating projects, projects currently under construction, projects authorized by Congress, the Kaiparowits powerplant under investigation. There would be no water left for hundreds of thousands of acre-feet of valid water rights on file with the State Engineer under State law. Even more serious might be the fact that many desirable and necessary Utah water developments would be in jeopardy. Included, might be some, such as the half-billion-dollar Central Utah Project, that are currently under construction. This jeopardy could suddenly become very real. The Indians have agreed to defer the development of their water projects until year 2005, in order to guarantee a water supply now for the Central Utah Project and the Kaiparowits powerplant. ¹³ Imagine the

results on Utah, if you can, if the Indians were to suddenly realize that with Lake Powell limited to elevation 3600 feet they might be left with an empty water trough in year 2005. You could certainly expect them to immediately initiate and develop their paramount federal water rights in order to protect them from encroachment by their white brothers.

At the lower 3600 foot elevation, New Mexico would be irreparably injured by a shortage of 25% in water supply for the almost completed San Juan-Chama Project that will convey water to Albuquerque, for the under-construction Navajo Indian Irrigation Project, and for two powerplants relying on contracts for water. 14/

Effect on Upper Colorado River Basin Fund

Power production at Glen Canyon Dam would be reduced if Lake Powell is held below elevation 3600 feet. Reduced power revenues could not repay costs of presently constructed and authorized power and water projects within the time limit specified by law. A projected Upper Colorado River Basin Fund for future water development in the four States would also be cut by \$375,000,000.

Effects on Seven Colorado River Basin States

The dam--and its spillway--were constructed to operate a reservoir to elevation 3700 feet. There is no spillway that would permit efficient operation of the lake under elevation 3600 feet. To install one would require millions of dollars--perhaps as much as \$20 - \$40 million--to modify a dam to penalize the economic future of Wyoming, New Mexico, Utah, and Colorado by hundreds of millions of dollars every year. Furthermore, if a spillway were constructed, due to the loss of 12.3 million acre-feet of storage capacity, there would be millions of acre-feet of water wasted into the Gulf of California. Does this make sense on an already water-deficient river? Further, loss of "head" due to reservoir drawdowns many feet below elevation 3600 feet (required in anticipation of each annual spring runoff) would preclude generation of huge quantities of hydro-electric power worth millions of dollars.

On June 8, 1970 the Secretary of the Interior announced his decision to continue to operate under the initial Lake Powell filling criteria 15/ and the Coordinated Long-Range Reservoir Operating Criteria required by law. 16/

Under the filling criteria the Secretary extracts money from the Upper Colorado River Basin Fund to pay contractors for Hoover Dam power for diminutions in energy generation attributed to the initial filling of upper basin storage

reservoirs. The end of the initial filling period was defined as the date when Lake Powell first reached elevation 3700 feet, and Lake Mead was simultaneously at or above elevation 1146 feet, or May 31, 1987, whichever occurs first. If the plaintiffs win the lawsuit, Lake Powell can never reach elevation 3700 feet. Under this situation the upper basin States will have to demand that the filling criteria be terminated immediately.

If Lake Powell is forced to be operated at elevations not to exceed 3600 feet, water will be spilled periodically from the Colorado River Basin into the ocean. How could the upper basin States be expected to continue to comply with the obligation to meet water delivery requirements under the Colorado River Compact? The primary purpose of Lake Powell is to make those compact water deliveries possible. Under this set of circumstances the Secretary can expect to meet the upper basin States in the Supreme Court under section 14 of the Colorado River Storage Project Act for not complying with the operating criteria specified by law and other aspects of the "law of the river." Nevada, California, and Arizona could be expected to resist this lawsuit. The upper basin States might also decide to ask for a legal determination of their obligation to deliver water under the Mexican Treaty. This question has always been in dispute between the upper and lower basins. Its legal answer would assume even greater importance with the loss of half the Lake Powell storage capacity.

The chaos, confusion, and bitterness that would result would make the Arizona v. California lawsuit appear to be an old-fashioned Irish wake. We don't want that kind of fight among the States on the Colorado River. That type of lawsuit does not create a single drop of water. The cooperation of recent years among the representatives of the seven States has been productive. Several important problems are currently on their way to resolution under joint efforts. The seven States cannot afford to substitute adversary proceedings for cooperation. This lesson has been learned.

Status of Litigation

Since the filing of the complaint there have been several legal procedural motions by both parties. Among them are motions to dismiss on the part of the defendants and motions for summary judgment on the part of the plaintiffs. Because of the great economic impact on the upper basin, the States of Colorado, New Mexico, Utah, and Wyoming, have expressed intense interest in the suit. The State of Colorado, the Colorado River Water Conservation District, and the Southwestern Colorado Water Conservation District have entered motions to intervene as defendants. Others should follow.

On May 18, 1971, in response to a motion by defendants, the Judge of the United States District Court for the District of Columbia transferred the case

to the United States District Court for the District of Utah. The change of venue was made pursuant to a law which provides that a district court may transfer a case to any other district in which the action might have originally been brought. The District Court for the District of Utah was clearly a court in which the case might have been brought, because it is where the real property involved in the action is located. A court order to transfer cannot be appealed to a higher court. Therefore, on May 26, 1971 the plaintiffs filed a motion for a special writ of mandamus with the Circuit Court of Appeals for the District of Columbia directing the district court to vacate its order and to retain jurisdiction in the case. The Sierra Club joined Friends of the Earth in the petition for a writ of mandamus, by submitting a brief amicus curiae. The Circuit Court of Appeals granted the motion of the Sierra Club to file its brief amicus curiae and denied the plaintiffs petition for a writ of mandamus. The case remains in the District Court for the District of Utah. On September 13th, Friends of the Earth filed a brief resisting intervention by the State entities on the grounds that such parties do not have an interest in the case.

The next move will probably be a court hearing and ruling on the petitions to intervene.

If the plaintiffs win in the district court, the States will have no choice but to carry this case to the U. S. Supreme Court, or initiate another lawsuit directly in that court to force the river to be operated in compliance with the two interstate compacts and other documents that constitute the "law of the river." The possibilities are interesting.

Footnotes

1. Colorado River Storage Project Act (Act of April 11, 1956, ch. 203, 70 Stat. 105).
2. Colorado River Compact, Art. III (c).
3. Water Supplies of the Colorado River; Tipton and Kalmbach, Inc., July 1965.
4. Proclamation of May 30, 1910 by President William H. Taft
5. Civil Action No. 3904-62 in U. S. District Court for the District of Columbia.
6. 70 Interior Decisions 200 (March 18, 1963).
7. Civil Action 3273-70 in U. S. District Court for the District of Columbia.
8. Colorado River Storage Project Act; Act of April 11, 1956, P.L. 485, 84th Cong., 70 Stat. 105, 43 U.S.C. 620 and 620 (b).
9. Supplemental Report (Part 2) No. 1087, to accompany H. R. 3383, 84th Congress, Second Session.
10. Navajo Indian Irrigation Project and San Juan-Chama Project Act; Act of June 13, 1962, P.L. 87-483 (76 Stat. 96).
Fryingpan-Arkansas Project Act; Act of August 16, 1962, P.L. 87-590 (76 Stat. 389)
Savery-Pot Hook, Bostwick Park, Fruitland Mesa Projects Act; Act of Sept. 2, 1964, P.L. 88-568 (78 Stat. 852).
Colorado River Basin Project Act; Act of September 30, 1968, P.L. 90-537 (82 Stat. 885) Sec. 501 (a).
11. Colorado River Basin Project Act, op. cit.
12. Colorado River Basin Project Act, op. cit., Sec. 602.
13. Commitments to Ute Indian Tribe of the Uintah and Ouray Indian Reservation under agreement dated Sept. 30, 1965 (Contract No. 14-06-W-194).
14. Navajo Reservoir, New Mexico - Water Delivery Contracts; Act of March 22, 1968, P. L. 90-272 (82 Stat. 52).
15. General Principles to Govern, and Operating Criteria for, Glen Canyon Reservoir (Lake Powell) and Lake Mead During the Lake Powell Filling Period (27 F.R. 6851), July 19, 1962.
16. Colorado River Basin Project Act; Act of Sept. 30, 1968, P.L. 90-537 (82 Stat. 885) Sec. 602.