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Robert H. Abrams

Florida A&M University College of Law, robert.abrams@famuh.edu

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The Return of the Pecos River Compact

by Robert H. Abrams

State of Texas
v.
State of New Mexico
(Docket No. 65-Original)
Argued April 29, 1987

ISSUES

The issues in this case are highly specialized ones relating to the unusual situation in which one state has failed by a rather wide margin to meet water delivery obligations fixed by an interstate compact. Specifically, the United States Supreme Court is reviewing a recommendation of a Special Master calling for in kind repayment of water as the remedy for past under-deliveries of water. Mixed with the review of the recommended remedy are some narrow factual questions relating to the extent of New Mexico's under-delivery of water.

FACTS

This case has a venerable history as do many interstate water disputes. The history can be condensed and simplified by noting the basic underlying problem is that in the arid Pecos River region, there is not enough water to meet all of the demands for its use. The usual means by which western water allocation is made deals with this problem by creating a system of priorities of use based on the priority in time of the initiation of the use. The watchwords of this branch of law (prior appropriation law) are: "Prior in time is prior in right."

The myriad difficulties in this case begin from the fact that the waters of the Pecos are interstate waters, rising in New Mexico and flowing into Texas. Both states have long maintained independent prior appropriation systems which creates the possibility that the total rights granted to individuals by the two states greatly exceed the available flow of the river. Although New Mexico as the upstream state enjoys a superior physical position, the United States Supreme Court has long required that in the absence of an agreed sharing of interstate water courses, it would impose an equitable apportionment of the waters. This comports with com-

mon intuitions about the essential equality of states in the American federal system.

Texas and New Mexico in 1949 did enter into an agreement regarding the sharing of the river and cast it in the form of an interstate water compact. Compacts are a special form of agreement between states that are authorized by the United States Constitution and require congressional ratification. The Pecos River Compact, however, was somewhat flawed from its inception—the two states failed to provide an unambiguous method for quantification of the sharing arrangement which called for Texas to receive "a quantity of water equivalent to that available to Texas under the 1947 condition." The 1947 condition was, in turn, defined by reference to a series of technical working papers that were both complex and internally inconsistent. Worse yet, the compact provided a potential for deadlock by having only two voting members of the compact commission, one representing each of the two states.

Mother Nature also played a role in the demise of the agreement. For reasons that remain unexplained in the various court documents, flows in the Pecos have never reached the baseline levels that were part and parcel of the assumptions from which New Mexico's delivery obligation was to be calculated. As a result, in virtually every year after 1947, New Mexico failed to deliver to Texas the amount of water Texas felt was its due. Eventually, Texas lost faith in the ability of the compact commission to reach a result satisfactory to it and sued New Mexico by invoking the original jurisdiction of the United States Supreme Court. Twice before, the United States Supreme Court has received reports from Special Masters and rendered opinions regarding the Pecos River Compact. Most recently, in 1983, the Court held that it was not free to reform the compact to avert the impasse created by the ill-advised voting scheme and the Court remanded the case to the Special Master to consider the issue which the Court felt was justiciable and within its authority to decide—"whether New Mexico is in compliance with obligations imposed by the Pecos River Compact."

On remand, Special Master Charles Meyers found that New Mexico had failed to comply, eventually calculating the cumulative shortfall as being 340,100 acre-feet of water. He further recommended repayment in kind over a ten-year period. To ward off procrastination in the repayment, he also recommended that the United

States Supreme Court impose "water interest," an in-kind penalty that would be added to the obligation in the event New Mexico failed to meet the recommended repayment schedule.

BACKGROUND AND SIGNIFICANCE

Most interstate water compacts have proved more effective than the Pecos River Compact which is the subject of this case. As a result, issues like those here presented have not arisen with the same starkness or lack of guidance as to their proper resolution. As a legal matter, therefore, the case is of limited general significance, although the novelty of the remedial issues provides the case with some interest to water law scholars. Mixed with those arcane legal issues are a number of mundane factual issues relating to the alleged failure of the state of New Mexico to live up to its water delivery obligations under the Pecos River Compact.

There is one more significant aspect to the case. Intertwined with the legal arguments about remedies is the proposition that granting the relief recommended by the Special Master will cause a great deal of hardship in New Mexico that overshadows any possible benefit of increased deliveries to Texas. In other legal contexts, this same issue is labeled the "balancing of the equities" doctrine and is employed by courts deciding on whether an injunction should issue. New Mexico urges its application here and makes a plausible claim that the relief recommended will indeed cause major harm to a number of New Mexico municipalities. As noted above, the impact of the proposed remedy would be to increase the total amount of Pecos River water that New Mexico would have to permit to flow past the state line into Texas. At the present time, it appears likely that any increase in New Mexico's Pecos River water delivery obligations will entail a reduction in New Mexico water use. In this way the outcome of the case will directly affect the lives of people in New Mexico who rely on the water of the Pecos for irrigation and other uses.

ARGUMENTS

For the State of Texas (Counsel of Record, Renea Hicks, P.O. Box 12548, Austin, TX 78711-2548; telephone (512) 463-2012)

1. Texas objects to the master's finding that departures from New Mexico's delivery obligations caused by a training dike in the McMillan Reservoir will not be characterized as depletions caused by human activities.
2. Texas, in the hearing before the Special Master, proved the extent to which departures in the delivery obligation were caused by human activities and New Mexico offered no rebuttal of those proofs.
3. The Pecos River Compact and the Supreme Court's

previous decisions in this case establish that New Mexico must repay the water it illegally withheld from Texas for the 1950-1983 period.

4. The Special Master's water repayment schedule is proper and is based on a consideration of all the relevant factors.

For the State of New Mexico (Counsel of Record, Peter Thomas White, Bataan Memorial Building, Room 101, Santa Fe, NM 87503; telephone (505) 827-6150)

1. New Mexico objects to the finding of a total under-delivery of 340,100 acre-feet because the Special Master failed to hold an evidentiary hearing on the extent to which the deficiency was due to human activities in New Mexico.
2. New Mexico objects to the Special Master's conclusion that retroactive relief is required in the absence of any compact provision requiring the payment of past delivery shortfalls.
3. New Mexico objects to the relief recommended by the Special Master in that it fails to balance the equities of the benefit to Texas and the harm to New Mexico.
4. New Mexico objects to the imposition of water interest payments as being unsupported by any relevant legal doctrines.
5. The Special Master correctly determined that the negative departures associated with the training dike at the McMillan Reservoir are not chargeable to New Mexico.

AMICUS ARGUMENTS

In Support of the State of Texas

- Red Bluff Water Power Control District argued that:
1. Potential hardship to amici should not deter the grant of in-kind repayment of past under-deliveries.
 2. Granting the recommended relief would not violate the Eleventh Amendment.
 3. Because the compact is like a contract, the repayment remedy is an appropriate measure of the damages suffered by Texas.

In Support of the State of New Mexico

The Incorporated Municipalities of Alamogordo, Artesia, Capitan, Pecos, Rowell, Ruidoso, Ruidoso Downs and Santa Rosa, New Mexico, jointly argue:

1. The hardship among these amici will be severe if the repayment recommended by the Special Master is enforced and relative hardship is a relevant factor in granting relief in interstate cases of this kind.
2. Because the compact is a federal law obligation rather than a typical contract, the repayment remedy is inappropriate.