

1991

## Three Southwestern States Battle Over Canadian (River) Water

Robert H. Abrams

*Florida A&M University College of Law*, [robert.abrams@famuedu](mailto:robert.abrams@famuedu)

Follow this and additional works at: <http://commons.law.famuedu/faculty-research>



Part of the [Environmental Law Commons](#), and the [Water Law Commons](#)

---

### Recommended Citation

Robert H. Abrams, Three Southwestern States Battle Over Canadian (River) Water, 1990-91 Preview U.S. Sup. Ct. Cas. 298 (1991)

This Article is brought to you for free and open access by the Faculty Works at Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Journal Publications by an authorized administrator of Scholarly Commons @ FAMU Law. For more information, please contact [linda.barrette@famuedu](mailto:linda.barrette@famuedu).

## *Three Southwestern states battle over Canadian (River) water*

by Robert H. Abrams

---

### States of Oklahoma and Texas

v.

### State of New Mexico

(Docket No. 109, Original)

*Argument Date: April 16, 1991*

---

#### ISSUES

This case presents questions regarding the proper sharing of the waters of the Canadian River between New Mexico and its downstream neighbors, Texas and Oklahoma. The principal issue in this case is whether New Mexico, by its 1984 enlargement of the Ute Dam and subsequent operation of that dam and others, violated the Canadian River Compact of 1952 ("the Compact"). Article IV(b) of the Compact expressly limits to 200,000 acre-feet of water the total amount of Canadian River water that can be placed in "conservation storage" by New Mexico at any one time. To measure whether New Mexico has exceeded that limit, it is necessary to determine whether water stored for siltation control, recreation enhancement and certain other purposes are to be counted as a part of "conservation storage."

#### FACTS

The main branch of the Canadian River, with which this case is principally concerned, rises in the southeastern portion of Colorado near the border with New Mexico. The water flows south into New Mexico and then turns east, passing through the panhandle of Texas and thence into Oklahoma where it joins the Arkansas River on its way to the Mississippi River. Use of the Canadian River was begun in New Mexico at an earlier date than in Texas and Oklahoma. A major water project featuring the Conchas Dam near Tucumcari, New Mexico, was completed in the early 1940s. In the late 1940s, a major reclamation project on the Canadian River was proposed near Sanford, Texas. Eventually, due to the concerns of New Mexico, the authorization of the Sanford Project became tied to the entry of the three states into a Canadian River Compact allocating the water of the mainstem of the Canadian and

a major tributary, the North Canadian River. By 1952, the states reached an agreement, enacted it in state legislation and received congressional approval.

As recounted by Special Master Jerome Mays, the negotiation of several key Compact provisions was hurried at the end. As a result, some potential imprecision existed regarding the translation of the engineering agreement into the legal terms of the Compact. In general, the key limitation on New Mexico, the upstream state, was a limitation on storage of water, rather than a quantified delivery obligation. More specifically, Article IV(a) of the Compact gave New Mexico the "free and unrestricted use of all waters originating in the drainage basin of the Canadian River above Conchas Dam," and Article IV(b) added to that a like provision for all waters below that dam, "provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of the Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet." The term "conservation storage" is defined in Article II(d) of the Compact. It "means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them."

For approximately 30 years, New Mexico did nothing inconsistent with the limitation on conservation storage. With the completion in 1984 of the enlargement of the New Mexico-funded Ute Dam (located about 45 miles below the Conchas Dam near Logan, New Mexico), however, Texas and Oklahoma claimed that New Mexico was in violation of the Compact. As enlarged, the Ute Dam had a total capacity of 272,800 acre-feet of water.

New Mexico claims that it is not in violation of the Compact, noting that its management and operation of the Ute Reservoir includes components that are not governed by Article IV(b), and sediment control components that are expressly excluded from conservation storage by the terms of the Compact. Most fundamentally, New Mexico claims that two-thirds of the water behind Ute Dam, some 108,900 acre-feet, originated above the Conchas Dam and was spilled by that dam. Accordingly, New Mexico claims, that water is governed by Article IV(a) and is not subject to regulation under Article IV(b).

Beyond that, New Mexico makes two claims relating to

---

*Robert H. Abrams is professor of law at Wayne State University School of Law, Detroit, MI 48202; telephone (313) 577-3935.*

sediment control. First, it asserts that all of the reservoir's dead storage (10,900 acre-feet) is water used exclusively for siltation control. (Dead storage is water impounded at a level below the lowest outlet of the dam that cannot be released other than by pumping.) Second, New Mexico claims that it manages an additional 25,100 acre feet as a desilting pool, another form of sediment control. The maintenance of a desilting pool in this case is accomplished by making no releases from the lower reaches of the reservoir. This ensures that the releases actually made do not agitate the collected sediment, and thereby protects water quality and fishery in the Canadian River below the Ute Dam. Simultaneously, maintaining the desilting pool creates a continuously available flat-water recreation area of the reservoir. The remaining water stored behind the Ute Dam is conceded by New Mexico to be conservation storage, but its amount is well below the Compact limitation.

Needless to say, Oklahoma and Texas do not share New Mexico's view of the matter. In 1987, after the dispute about the Ute Dam had persisted without resolution for more than three years, Texas and Oklahoma filed an original action in the U.S. Supreme Court alleging that New Mexico was in violation of the Canadian River Compact.

#### **BACKGROUND AND SIGNIFICANCE**

Interstate compacts are one of the three major legal devices by which the water of interstate rivers is allocated to the states through which those rivers run. Interstate water allocation compacts have been employed to divide the use of more than two dozen interstate rivers. Together with congressional apportionment and equitable apportionment by the Supreme Court, these three devices in effect divide the beneficial use of the river among the affected states.

Interstate compacts are, in a legal sense, the most unusual of the three devices. Compacts are formed in a two-step process, requiring both the agreement of the affected states (usually cast in the form of parallel state legislation), and ratification by Congress. The congressional role is constitutionally required by the interstate commerce clause (Article I, sec. 10, cl. 3). Absent such ratification, states generally are not allowed to enter into agreements with one another for fear that such agreements might work to the detriment of the nation or of sister states not party to the agreement. Once ratified, interstate compacts become federal law and bind the compacting states strictly to the terms of the compact.

In most regards, the issues in this case are of narrow interest, concerning few observers other than the actual and intended users of Canadian River water in the three disputant states. Even in the three states, the water presently in controversy is not a large quantity, and there appears to be little likelihood of major changes in water use no matter what the outcome of this case. For example, were the Special Master's calculations and interpretations adopted in full by the U.S. Supreme Court, and were New Mexico to prevail only on its two claims of exemption for

sediment control, New Mexico would be in breach of the Compact, but by only 1,800 acre-feet.

The Special Master, Jerome Muys, a respected expert in the field of interstate compacts, however, finds a broader potential importance to this case. He sees in this case the seeds of an important precedent in the field of state obligations to undertake good-faith negotiations to resolve compact disputes as an implicit obligation of entering into an interstate compact. His Report expounds such a duty, and his recommendations, should they be adopted, impose such a duty. Like the Canadian River Compact or the recently litigated Pecos River Compact, other interstate compacts have a similar potential to degenerate into impasse and disputes, usually as a result of either unforeseen circumstances or faulty compact drafting. A duty of good-faith negotiation, like that urged in the Special Master's Report, might prevent some of those disputes from triggering litigation in the United States Supreme Court.

#### **ARGUMENTS**

***For the State of Oklahoma, taking exception, in part, to the Report of the Special Master (Counsel of Record, R. Thomas Lay, 3801 Classen Blvd., STE 100, Oklahoma City, OK 73118; telephone (405) 528-0191):***

1. The limitation on conservation storage in Article IV(b) should be interpreted to apply to the physical capacity of reservoirs, not to water in storage.

***For the State of Texas, taking exception, in part, to the Report of the Special Master (Counsel of Record, D. Paul Elliott, Assistant Attorney General, PO Box 12548, Austin, TX 78711-2548; telephone (512) 463-2012):***

1. The case should not be remanded to the Special Master for consideration of whether the desilting pool should be construed to be storage for siltation control and therefore not be counted toward the limitation under Article IV(b). The record is already adequate to indicate that water in the desilting pool should be counted toward the Article IV(b) limitation.
2. The Supreme Court should not articulate a series of procedural requirements and guidelines recommended by the Special Master for state conduct in interstate compact litigation. To do so would be unduly burdensome on the affected states.

***For the State of New Mexico, taking exception, in part, to the Report of the Special Master (Counsel of Record, Eric Richard Biggs, Special Assistant Attorney General, New Mexico Interstate Stream Commission, PO Box 25102, Bataan Memorial Building, Room 101, Santa Fe, NM 87504-5102; telephone (505) 827-6150):***

1. Most of the water in storage is "spilled" Article IV(a) water from above the Conchas Dam and therefore is not to be counted toward violation of the Article IV(b) allocation.
2. The plain language of the Canadian River Compact, es-

pecially the language granting New Mexico free use of all water originating above Conchas Dam, should be given effect. Further, parole evidence should not be received to impeach the plain meaning of the Compact's terms when the Compact language is clear on its face.

3. There has not yet been any determination of whether New Mexico is in breach of the Compact, and the portions of the Special Master's Recommended Findings

that refer to breach are inappropriate and should be withdrawn.

4. A good-faith bargaining requirement is counterproductive and will not reduce interstate compact litigation.
5. Selective application of the doctrine of primary jurisdiction could be beneficial and lead to resolution of technical issues by compact commissions.
6. Texas' request for sanctions against New Mexico is wholly baseless.



OF UNITED STATES SUPREME COURT CASES

American Bar Association, 750 North Lake Shore Drive, Chicago, Illinois 60611

First Class Mail  
U.S. Postage  
PAID  
American Bar  
Association

C070 00004579 01SC  
NORTHWESTERN UNIV LAW LIB  
ABA PERMANENT COLLECTION  
357 E CHICAGO AVE  
CHICAGO IL 60611