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Robert Abrams

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WATER LAW

Under the Pecos River Compact, Can Texas’s Allocation of Water Be Charged for Evaporation of Floodwaters Stored in an Upstream Reservoir Located in New Mexico?

CASE AT A GLANCE

The 1949 Pecos River Compact allocates the river’s water between Texas and New Mexico. In an earlier phase of this original jurisdiction litigation, concluded roughly 30 years ago, the Supreme Court resolved issues regarding how the states’ obligations were to be calculated. The Compact allocation involves a highly technical formula that depends on measurements of the river’s inflow and outflow in each water year. To effectuate its decision going forward, the Court retained jurisdiction and appointed a River Master to oversee the annual quantification of New Mexico’s delivery obligation. The current dispute arose when in fall of 2014, Tropical Storm Odile caused heavy and widespread rainfall in the Pecos River Basin. Texas requested that water be stored in the Brantley Reservoir in New Mexico because the Red Bluff Reservoir in Texas was already full. When the flood risk abated in 2015, the Bureau of Reclamation (the operator of the Brantley Reservoir) began releases that continued throughout 2015 even though Texas remained unable to store that water in the Red Bluff Reservoir. As a result, more than 40,000 acre-feet of water released from Brantley flowed downstream without any benefit to Texas. This case involves the claim by New Mexico, eventually agreed to by the River Master, that New Mexico should be given a credit toward the calculation of its 2014 and 2015 delivery obligations for evaporative losses from the Brantley Reservoir associated with the extra stored floodwater. Eventually, in the 2018 and 2019 Water Year Reports, the Water Master recognized the credits and began to apply them retroactively to lower the amount of New Mexico’s delivery obligations.

Texas v. New Mexico
Docket No. 65, Original

Argument Date: **October 5, 2020** From: **Reports of the Pecos River Master**

by Robert “Bo” Abrams

Florida A & M University College of Law, Orlando, FL

Issues

1. Is New Mexico barred from seeking a credit for the evaporation losses by not immediately seeking the credit in the water year calculations immediately proximate in time to the storage and evaporative losses?
2. Is the Pecos River Master’s determination to treat certain water stored at the Brantley Dam as “unappropriated flood waters,” which led to the award of a credit to New Mexico for evaporative losses of the Texas portion of those stored waters, clearly erroneous?

Facts

The Pecos River rises in east central New Mexico and flows in a generally southeasterly direction through New Mexico into and through west Texas after which it empties into the Rio Grande. In 1949, the two states entered into an interstate water compact to allocate the use of the river's water between the two states. Typical of the interstate water compacts of that era, its principal operative feature was a water delivery obligation of the upstream state, New Mexico. Among its less typical features were a very complex method for determining the delivery obligation that used as a baseline the "1947 condition," but relied on less than fully explained methods for calculating the inflows and outflows that were to be used to ascertain that condition and set each year's delivery obligation.

Within a few years, the methodology for calculating the delivery obligation led to a dispute wherein Texas claimed that New Mexico significantly under-delivered each year. The states were unable to resolve the dispute within the Compact framework, in part because the Compact commission had only two voting members, one from each state, and a unanimous vote was needed to make any adjustments. Seeking to break the impasse, Texas invoked the original jurisdiction of the Supreme Court where it eventually won a major victory. The Court, in 1982, ruled that New Mexico had under-delivered for a period of years. That litigation persisted as the states argued over the remedy, whether it would be in kind (that is, delivery of water in excess of New Mexico's delivery obligation) or whether money damages could be awarded. Eventually, after a second Supreme Court opinion, a monetary settlement was reached. In addition to the payment to Texas, New Mexico had to reduce its own water uses to meet the higher delivery obligation. New Mexico did that by retiring a portion of its irrigation uses in the region. Estimates of the cost to New Mexico of the purchased retirement of irrigated farms was more than \$100 million.

Returning to the present dispute before the Court, Article II(i) of the Compact, foreseeing the possibility of unusually wet years, defines "unappropriated flood waters," and Article XII of the Compact "taxes" each state for their share of those waters "incident to the diversion, impounding, or conveyance of water in one state for use in the other state," with charges to the latter state. Given the topography, although written in generic terms, New Mexico's upstream and up-gradient position makes this a provision that charges Texas for losses of water (principally evaporation) incurred by the United States in making

water controlled by the U.S. reclamation projects in New Mexico available for use in Texas.

A part of the Supreme Court's decree that put an end to the initial dispute included retention of jurisdiction and the appointment of a River Master, Dr. Neil Grigg (who remains in service as the River Master today), to calculate the annual delivery obligation of New Mexico. For almost three decades, the water allocation process on the Pecos worked well enough that all disputes between Texas and New Mexico were settled by negotiation. In fall of 2014, the late-season Tropical Storm Odile drenched the region causing considerable flooding. As a response, the Bureau of Reclamation (Bureau), at Texas's request (unopposed by New Mexico), began exercising authority related to flood control, impounding as much water as possible behind Brantley Dam.

Case Analysis

At this point the states' characterization of events varies even though there is little disagreement about what happened. The normal procedure is that the River Master compiles an annual report that considers all the data related to the water year just ended. In that report, the River Master calculates New Mexico's delivery obligation for the recently concluded year and compares that amount to the amount actually delivered, creating either a water debit or a water credit that is applied to increase or decrease the next year's deliveries. Once filed, the states have limited time to file objections to the report with the River Master, and after any such objections are ruled upon by the River Master, the report is finalized and filed with the Supreme Court, a filing which triggers a deadline for making objection to the report to the Court itself.

In this case, Texas, as noted above, initiated the request for water to be held in Brantley in 2014 after Tropical Storm Odile. Both the United States and New Mexico agreed to that, although New Mexico's written agreement to the proposal stated that evaporative losses for water stored "should be borne by Texas." Approximately 51,000 acre-feet were stored pursuant to that arrangement. The Final 2015 River Master's Report (covering the 2014 water year) did not give New Mexico a credit for evaporative losses attributable to the stored floodwater. Instead, the report noted that the matter was under discussion between the two states and that a later correction could be made in relation to the impact of unappropriated floodwaters on the 2014 water year deliveries.

The storage of floodwater continued into 2015. Beginning

in March of 2015, however, the Bureau informed the states that the flood emergency had ended and with it the Bureau's authority to store water for flood control had ceased. Texas asked that the storage be continued, principally because it would have no way to beneficially use the water released from Brantley. In March of 2015, and throughout almost all of 2015, the Red Bluff Dam in Texas remained full or near full. In part this was due to its substantially reduced storage capacity and in part because the wet conditions in Texas had delayed spring planting lowering the demand for irrigation water. In spite of the Texas request, the Bureau of Reclamation began releases of water from Brantley in March. For the first few months, the rate of release was tempered to permit repairs to downstream bridges that had been weakened or damaged in the post-Odile flooding. By the end of 2015, water supplies in the region had returned to normal levels. The effect of the Bureau's action given the lack of downstream storage in Red Bluff Reservoir meant that the vast majority of water released from Brantley in 2015 added no benefit to Texas. With talks between the states about how to account for evaporative losses from Brantley still ongoing throughout 2016, the 2016 River Master's Report covering 2015 also took no account of the 2014 and 2015 claims by New Mexico that it should receive a credit for evaporative losses of the stored floodwaters at Brantley in the year attributable to water held for the benefit of Texas.

Toward the end of 2016, technical meetings of the states and the River Master seem to have reached a point at which Texas conceded that the waters in question had been stored for the benefit of Texas, leaving only two items to be finalized: where in the spreadsheet to include the evaporative losses and a detailed calculation of their actual amount. This apparent agreement was noted by the River Master in relation to those meetings, but was not mentioned in the River Master's 2016 Preliminary or Final Report. For a time, Texas failed to respond to a proposed joint amendment propounded by New Mexico that would incorporate the "agreement." Then, in January 2017, as characterized by a heading in New Mexico's Response in the Supreme Court, "Texas Reverse[d] Its Position" and rejected the entire conceptual framework. Despite the urging of the River Master, the two states were unable to agree and formally submitted the dispute to the River Master who ruled on it in September of 2018. The ruling, in the main, favored New Mexico, treating losses after March 15, 2015, when the flood emergency ended as water stored in New Mexico for the benefit of Texas, and

charging evaporation from Brantley Reservoir from that date forward to Texas, thereby generating a credit for New Mexico.

As a procedural matter, the parties agree that the "clearly erroneous" standard of review is applicable to findings of fact by the River Master. Issues of law are to be reviewed *de novo*.

Significance

This case is of very limited interest for those outside of the Pecos River Valley. The issues it presents are unique to the Pecos River Compact. Even further, the events that gave rise to the dispute, to this point in time, are unique in Pecos River Compact history. With climate instability increasing, rain events similar to Tropical Storm Odile may recur. That possibility, combined with Texas's continuing gradual loss of storage capacity behind Red Bluff Dam due to siltation, makes possible the repetition of this issue in the Pecos River Valley. For that reason, the possibility of a similar situation arising in the future may impart a degree of regional significance to this case for those affected by the availability of Pecos River water in New Mexico and Texas.

Even conceding the possibility of repetition, the contested credit given to New Mexico is not particularly large in water allocation terms, 16,627 acre-feet. To try to put that in perspective, a 2002 study of agricultural water use in the Lower Pecos River Valley in New Mexico allows some insight into the stakes. Water duties (the amount of water applied annually for irrigation) in the region ranged from 2.7 to 3.5 acre-feet per acre, indicating that the credit amount is roughly enough to irrigate 5,000 acres. That same study calculated the net value of the water at approximately \$100 per acre-foot. While those values are dated and Pecos River water may be more valuable in Texas than in southern New Mexico, the amount in dispute as it relates to the credit in issue is at most several million dollars.

Robert "Bo" Abrams is Professor of Law at Florida A & M University College of Law. He can be reached at 407.254.4001 or Robert.abrams@famuedu.

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ATTORNEYS FOR THE PARTIES

For Plaintiff Texas (Kyle D. Hawkins, 512.936.1700)

For Defendant New Mexico (Jeffrey J. Wechsler,
505.476.0512)

AMICUS BRIEFS

United States (Noel J Francisco, Solicitor General,
202.514.2217)