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Panel Discussion: Claims of the United States and Mexico under the Treaty of 1944 and the Municipal Acquisition of Fresh Water Supplies in the Border Region

Authors

Jay F. Stein, Carlos Marin, Jill Warren, Alberto Szekely, Marilyn C. O'Leary, and Maria Elena Giner

PANEL: CLAIMS OF THE UNITED STATES AND MEXICO UNDER
THE TREATY OF 1944 AND THE MUNICIPAL ACQUISITION OF
FRESH WATER SUPPLIES IN THE BORDER REGION

MODERATOR: JAY F. STEIN, ESQ.*

PANELISTS: DEPUTY COMMISSIONER CARLOS MARIN, JILL
WARREN, ESQ., AMBASSADOR ALBERTO SZEKELY,
MARILYN O'LEARY, ESQ., MARIA ELENA GINER

STEPHANIE PINCETL:¹ I am struck by the similarities between the water issues between Mexico and the U.S. and internal water issues within the U.S. For example, the same kinds of questions emerge among users of the Klamath River Basin.² I think the fundamental issue is really proactive, long-term planning. Moreover, these allocations were made in a period when there was very little information about the long-term trends of water in the West. Would you comment about that? Because I do not think the situation between Mexico and the U.S. is that astonishingly different than among water users within the western United States or the Colorado River allocations among the states themselves. Thus, I think it is another example of our poor understanding of hydrology and distributions that were established at a time when we really did not know very much.

SZEKELY: I could not agree more, because that was precisely the tone of my presentation. In 1944, the water demand was but a fraction of the size of water availability, and now demand for water exceeds its availability. In addition, now we are told by scientists that there will be less water in the future, particularly as a result of global warming, and still both sides of the border continue to grow. We must reconcile these things and plan. So I agree fully with that intervention.

MARIN: Those are factors the U.S. government needs to work on in Minute 307³ and Minute 308.⁴ The critical part is what we consider two years back, and even currently, as the management of the system's water availability. The issue between the U.S. and Mexico is what we consider a good faith effort by Mexico in providing the necessary water in the lower Rio Grande. The drought situation in the lower Rio Grande Valley is severe. The main factor affecting the area is not necessarily the regional drought but the water that is generated in the northern part of the States of Texas and Chihuahua. Therefore, we must perform substantial long-range planning to prevent this from happening in the future. Again, the critical situation in the valley is hurting our relations now.

O'LEARY: We have many laboratories in which we can deal with these problems. We can look at the broader picture and then return to examine our own situations.

* A summary of the background of each of the participants in this panel follows on the last page of the panel discussion.

1. Stephanie Pincetl is a Research Associate Professor and coordinator of the Sustainable Cities program at the University of Southern California in Los Angeles.

2. See *Klamath Water Users Protective Ass'n. v. Patterson*, 204 F.3d 1206 (9th Cir. 1999).

3. Minute 307, Partial Coverage of Allocation of the Rio Grande Treaty Tributary Water Deficit From Fort Quitman to Falcon Dam, Mar. 16, 2001, available at <http://www.ibwc.state.gov/Files/Minutes/Min307.pdf>.

4. Minute 308, United States Allocation of Rio Grande Waters During the last Year of the Current Cycle, June 28, 2002, available at <http://www.ibwc.state.gov/Files/Minutes/Minute308.pdf>.

Today we are discussing how the U.S., Mexico, Texas, and New Mexico are preparing to fight over water and appropriating money to be able to do so, while in the middle Rio Grande within New Mexico there are disputes over allocations of water and endangered species between municipalities and irrigators.⁵ I also agree that planning, if possible, is really a solution to the problem as opposed to litigating these issues. Courts possess limited ability to rule on these things, but people who work cooperatively can come up with better solutions.

LORENZO ARRIAGA:⁶ Ambassador Szekely, Mexico has a different philosophy from the U.S. as to groundwater. In Mexico, according to the *Ley de Aguas Nacionales* (National Waters Law),⁷ the water is owned by the government whereas in the U.S. water is a private property right. Which would you say is easier to administer from a philosophical point of view?

SZEKELY: I spent many years of my professional life pressing the two governments and the International Boundary and Water Commission (IBWC) to comply with their mutual obligations on Minute 242,⁸ under which they committed themselves to negotiate a regime for governing the use and conservation of ground water. Minute 242 was adopted in 1972 and 30 years later we have not started those negotiations. I am happy to hear that Commissioner Carlos Ramirez⁹ is now talking about a ground water treaty, and the Draft Bellagio Treaty¹⁰ will make it easier for the two governments to sit down and not start from zero to negotiate this matter. I believe someone else here also said that the surface water is owned by the federal government. As a matter of fact, that water is administered by the federal government but it does not have the ownership, and the constitution provides as such.¹¹ Today in Mexico is the beginning of a rebellion by the states who want to change the legal regime of water. These states feel that the constitution of 1917 stole their water, gave it all to the country as a whole and that the federal government has illegally appropriated all the country's water. I am afraid that what will change in the first stage is that the states will own the water now instead of the federal government, which is not exactly what we need. Rather, Mexico needs a total revolution in our water legal system. We will need to borrow some experiences from the U.S. legal system to really move forward. I am not saying that we should imitate the U.S. legal system, because that system responds to a totally different reality. But certainly there are some aspects of the U.S. water legal system that we could introduce into ours. As in every other subject, we will need to work together to overcome our differences in principle and make our relationship a productive one.

5. See Tania Soussan, *Appeal Over Tiny Fish Has Big Implications*, ALBUQUERQUE JOURNAL, Jan. 13, 2003, at A1.

6. Lorenzo Arriaga, U.S.-Mexico Border Coordinator, United States Bureau of Reclamation.

7. LEY DE AGUAS NACIONALES, available at <http://www.cddhcu.gob.mx/leyinfo/16/1.htm>.

8. Minute 242, Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River. Aug. 30, 1973, available at <http://www.ibwc.state.gov/Files/Minutes/Min242.pdf>.

9. United States International Boundary Water Commissioner, appointed in July 2001.

10. Robert D. Hayton and Albert E. Utton, *The Bellagio Draft Treaty*, 29 Nat. Resources J. 663 (1989).

11. CONSTITUCIÓN POLITICA DE LOS ESTADOS UNIDOS MEXICANOS art. 27.

ARRIAGA: Ms. Giner, please reference the latest Border Environment Cooperation Commission (BECC) project that is undergoing review and funding through North American Development Bank (NADB) for water conservation projects on the Rio Conchos. Is it strictly for canal lining and irrigation system improvements, or can salt cedar¹² eradication be a viable project? Here in the Rio Grande Valley, up to 28% of the water is used in riparian vegetation such as salt cedar.

GINER: Regarding the Rio Conchos project, it includes the lining but it also includes on-site, actual farm improvements like drip irrigation. Therefore it is not limited to just the lining of the canals and the metering. With respect to your question, there would have to be a clear demonstration of water conservation efforts. If that can be clearly demonstrated then it would be eligible under our mandate expansion category.

WARREN: I would like to briefly comment on the salt cedar project. The Nature Conservancy¹³ in Texas is very interested in salt cedar eradication projects and has demonstrated in a very successful project on the Pecos River how much water an eradication project can put into the river.¹⁴ Their model is to poison the salt cedar with helicopters, and then go in and burn it. If it is burned initially, it grows back more prolific than it was before. Their estimates show that a salt cedar eradication project in the middle Rio Grande area would put 100,000 acre-feet of water or more into the river per year. Importantly, it is a very inexpensive proposition. The Pecos River project was completed for less than \$2 million dollars. A similar project could be done for the Rio Grande under \$5 million dollars and potentially a lot less than that. I think the state of Texas should really examine this as an easy way to get rid of a non-indigenous species. The environmental community is completely in favor of it as well because it is a non-indigenous species that is harming the natural ecology in the area. Those are types of proactive things that Texas can do on its own behalf to help the flow of the Rio Grande and help Mexico also.

JESSE BOYD:¹⁵ My question is about watershed management. Clearly everybody in the Rio Grande basin is all together on this. How can we create a political entity that has enforcement power to make both governments abdicate some sovereignty and transfer control of watershed management to some entity that will be sustainable? The Rio Grande basin is sustainable at this point, but it will not be for long. Are there any solutions?

12. Salt cedar is was originally planted in the United States to decrease overland flow and soil erosion. Today, salt cedar dominates the native vegetation and has detrimental impacts on river ecosystems. See Lindi Clayton, Charles R. Hart, & Terry Holder, *Pecos River System Ecosystem Monitoring Project Progress Report*, available at farwest.tamu.edu/rangemgt/pdfs/00bookpe.pdf.

13. The Nature Conservancy is a national private conservation organization that works with businesses and communities to conserve lands and waters and preserve biodiversity. See The Nature Conservancy, Texas Chapter, available at <http://nature.org/wherework/northamerica/states/texas/>.

14. See generally Texas Cooperative Extension Range Management, Pecos River Ecosystem Project available at <http://farwest.tamu.edu/rangemgt/prep.html>; see also New Mexico Association of Conservation Districts, NM Salt Cedar Control Project, available at <http://www.nm.nacdnet.org/page5.html>.

15. Jessie Boyd is a third-year law student at the University of New Mexico School of Law in Albuquerque.

SZEKELY: Enforcement at the international level is a very difficult area. At least there is some progress in the recent agreements made by the two governments. There is the idea that we should start by strengthen the IBWC, but at the same time, in Minute 308 there is already talk of creating a new institutional mechanism. It has been called the international advisory council or committee, which would ensure that each government is not only working on its own side, but also cooperatively. I am satisfied that the U.S. finally accepted that proposal. We have proposed both that mechanism and devising the bi-national sustainable management plan for the basin. We also have proposed a bi-national congress, which the U.S. section calls a bi-national summit, that will be open to the participation of all interested sectors. This is really a first, because historically the IBWC was not famous for its openness to society. Now it is through this congress that the commissions will finally open up widely to receive recommendations from many people who have worked on this subject throughout the decades. Not only were they making studies and recommendations, but they warned the two governments that we were going to find ourselves in this situation precisely at the end of the twentieth century and beginning of the twenty first century. So we may end up with such an institutional mechanism but ill be not as far as you are mentioning. Perhaps in the future there will be such a thing.

BOYD:Is there a framework for how to choose the delegates to the bi-national congress?

SZEKELY: The two governments and the two sections of the IBWC will start working on that. The Mexican government has mentioned that it would like to see this congress happening at the end of next year, but we are just beginning to talk about it. We will be in a position to answer questions like that very soon, I hope.

MARIN: Under Minute 308, the IBWC is obligated to enforce the requirements of that Minute. Thus, the commission is preparing our financial request so that both sides have equal staff to establish the guidelines for this advisory group. Of course, we want Texas participants, stakeholders, and maybe we can stretch this advisory group as far west as San Diego to cover the entire border area. It is a very promising group, and it probably will still be a few months before anything is formed. Our fiscal year ends in a few days also, and we are hoping to get the budget included in there to begin this process (As of January 2003, the USIBWC has not received its budget request but continues to work with the Mexican Section on this issue).

BIOGRAPHICAL SUMMARIES

Maria Elena Giner is the Border Environment Cooperation Commission's (BECC) Director of Technical Assistance and Quality Assurance. Giner is a registered engineer and has over 12 years of experience in the water and wastewater field. Her previous work experience in the public sector includes civil engineering positions at the Los Angeles Department of Water and Power and Metropolitan Water District of Southern California where she worked on water transmission, distribution, treatment, and reuse projects. She also has experience in the private sector as a design engineer for Carollo Engineers, a consulting firm that specializes in the water and wastewater field. Giner's projects included wastewater collection and treatment and water distribution projects. She joined the BECC in 1998 as project manager for the development of water, wastewater, and solid waste projects in New Mexico, West Texas, and Chihuahua. She has a Bachelor of Science in Civil Engineering from Loyola Marymount University, Los Angeles, California.

Carlos Marin, is Deputy Commissioner for the International Boundary & Water Commission, United States Section. Mr. Marin began working with the IBWC as a Staff Engineer in 1979. He has worked as a Division Engineer and currently is Principal Engineer, Operations Department which serves as the treaty officer and is a principal source of technical and political advice to the U.S. Commissioner concerning the agency's field operations. These operations include: Operations and maintenance of various flood control projects, power plants and reservoirs; water accounting; and hydrographic data and maintenance and reporting. Mr. Marin is a licensed professional engineer in the State of Texas. He received his Bachelor's Degree in Civil Engineering from the University of Texas, El Paso, in 1978.

Marilyn C. O'Leary, Esq. is Director of the Utton Transboundary Resources Center, and Professor of Water Resources at the University of New Mexico School of Law. Ms. O'Leary is currently Vice-President, of the Section on Natural Resources, Energy & Environmental Law, for the American Bar Association and Co-Chair. She serves on the Board of Directors of the North American Institute. She has published several books and articles including: *The Year in Review 2000*, "Electric Industry Restructuring, Finance, Mergers and Acquisitions", American Bar Association, Section of Environment, Energy & Resources Law and *Public Utility Regulation: the Social Control of Industry, Ch. VIII, with David B. Smith, Kluwer Academic Publishers, 1989*. Prior to directing the Utton Transboundary Resource Center, she was a shareholder at Eastham Johnson Monnheimer & Jontz, P.C. Ms. O'Leary has a B.A. from St. Mary's College, Notre Dame, Indiana, an M.A. from the University of New Mexico and the J.D. from the University of New Mexico, 1981. She is admitted to practice in New Mexico.

Jay F. Stein, Esq. is a shareholder in the Santa Fe firm of Stein & Brockmann, P.A., specializing in the practice of water law. Mr. Stein is Chair of the ABA Water Resources Committee. He served as a Special Assistant Attorney General for the New Mexico State Engineer Office between 1978-1985 where he represented the State of New Mexico in *Colorado v. New Mexico*, 459 U.S. 176 (1982) and 467 U.S. 310 (1984), a dispute over interstate waters between Colorado and New

Mexico, in federal-state issues involving the quantification of water rights on the Mescalero Apache Reservation, and in other matters. In private practice he has worked on a variety of interstate matters including *Nebraska v. Wyoming*, Original No. 108, a suit over the apportionment of the North Platte River among Colorado, Wyoming, and Nebraska, and in acquiring water rights for municipalities in New Mexico, including the border City of Las Cruces. He received a J.D. from the University of New Mexico School of Law and is admitted to practice in New Mexico.

Ambassador Alberto Szekely is a Career Ambassador, with the Mexican Foreign Service. Ambassador Szekely has served as Advisor to Mexican Foreign Minister and recently has been appointed Judge for the International Tribunal for the Law of the Sea. He continues to be a guest/visiting lecturer on International Law at a number of U.S. Law Schools (Arizona State, UNM, Johns Hopkins) while conducting a private international legal consulting business from Mexico City specializing in international environmental law, the law of the sea and transboundary resources issues including environmental zoning and land use planning, sustainable coastal development, environmental defense, water law, forestry law, protected areas and human rights. In 1998 he coordinated the Citizens Workshop for Legislative Proposals (The Rule of Law and Administration of Justice). He has published extensively in English and Spanish in Mexican, American and international journals. Ambassador Alberto Székely received the LL.B. National Autonomous University of Mexico School of Law, 1968; M.A. and M.A.L.D. Fletcher School of Law and Diplomacy, Tufts and Harvard Universities, 1969 & 1970; Ph.D. University of London, College of Laws, 1975.

Jill Warren, Esq. works as counsel in Austin office of Bracewell & Patterson LLP in the Government Relations and Strategy Group. Prior to joining Bracewell, she was Special Assistant Attorney General and Policy Director for Texas Attorney General John Cornyn. In that capacity she served on Attorney General Cornyn's Executive Management team as Policy Director and advised General Cornyn on public policy matters including consumer privacy and protection, critical infrastructure security, energy, technology, natural resources, and legislative issues. She chaired the Attorney General's Rio Grande Water Rights Task Force and authored the State Infrastructure Protection Advisory Committee's final report entitled *The Texas Infrastructure Protection Center: A State Model for Information Assurance and Information Sharing to Protect Critical Infrastructures* issued on March 25, 2002. She serves on The Council of State Governments Internet Privacy Advisory Board and is a Vice President and Director of the Texas Lyceum Association, a public policy think-tank that promotes constructive private sector, public sector, and individual responses to economic and social issues facing Texas and the nation. Ms. Warren received a Bachelor of Business Administration in Accounting from The University of Texas McCombs School of Business and a Doctor of Jurisprudence from The University of Texas School of Law. She is admitted to practice in Texas.