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Coordinated Water Management in a Basin with Erratic Surface Supplies: The Law North and South of the Pecos

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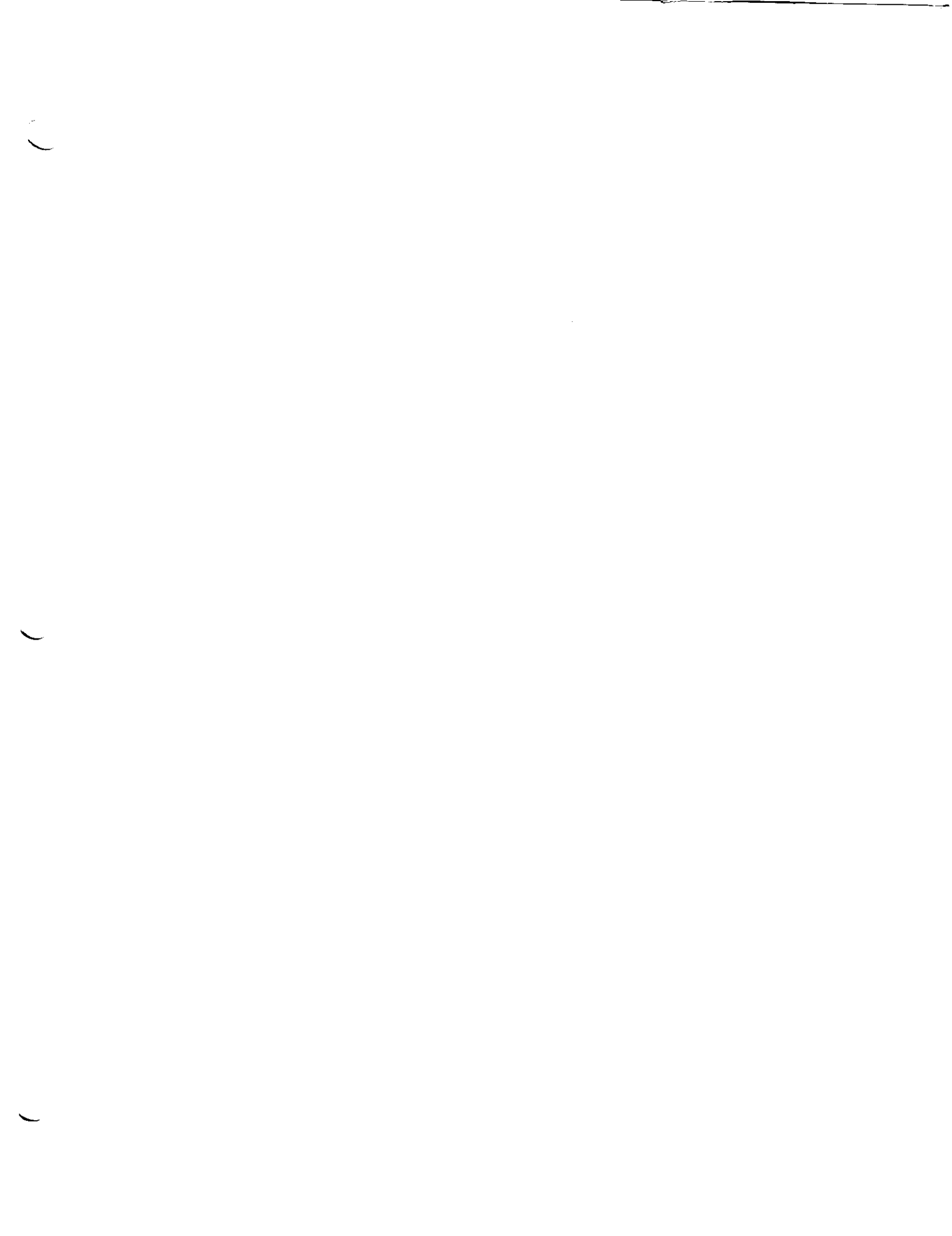
Coordinated Water Management in a Basin with Erratic
Surface Supplies: The Law North and South of the Pecos

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Boundaries and Water: Allocation and Use
of a Shared Resource

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Coordinated Water Management
in a Basin with Erratic Surface Supplies:
The Law North and South of the Pecos

Charles T. DuMars*

I. Introduction

A. Summary

B. General References

1. Elliott, Texas' Interstate Water Compacts, 17 St. Mary's L.J. 1241 (1986).

2. Note, "Breach" of an Interstate Water Compact: Texas v. New Mexico, 28 Nat. Resources J. 849 (1988).

3. Comment, Texas v. New Mexico: The Pecos River Compact Litigation, 20 Nat. Resources J. 395 (1980).

* Professor DuMars would like to acknowledge the excellent assistance of Catherine L. Butcher, Law Student, University of New Mexico School of Law in preparing this outline.

Information not found in the sources listed below each section is footnoted.

II. Interstate Compacts

Controversies involving apportionment of interstate waters may be resolved by petition to the Supreme Court invoking its original jurisdiction or by adoption of an interstate compact. An interstate compact is an agreement signed by the states' representatives which has been through the legal process of each state and approved by Congress, as required by Article I, Sec. 10, "No State shall, without the consent of Congress ... enter into any Agreement or Compact with another State" The

compact is obligatory upon the citizens of all signatories. Final authority to pass on its meaning and validity rests with the Supreme Court.

Sources:

1. J. MUYS, INTERSTATE WATER COMPACTS -- THE INTERSTATE COMPACT AND FEDERAL-INTERSTATE COMPACT (National Water Commission, Report NWC-L-71-011, Legal Study 14, July 1971).
2. F. ZIMMERMANN & M. WENDELL, THE LAW AND USE OF INTERSTATE COMPACTS (1976).
3. 2 R. CLARK, WATERS AND WATER RIGHTS, §§ 132, 133 (1967).
4. R. LINGLE & D. LINFORD, THE PECOS RIVER COMMISSION OF NEW MEXICO AND TEXAS. A REPORT OF A DECADE OF PROGRESS, 106-119 (1961).
5. ELLIOTT, supra, at 1241-125.
6. Annotation, Constitutionality, Construction, and Application of Compacts and Statutes involving Co-operation between States, 134 A.L.R. 1411, 1412 (1941).
7. Hinderlier v. La Plata Co., 304 U.S. 92 (1938).
8. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).
9. 72 AM. JUR. 2D States § 5 (1972).

III. Pecos River Basin Hydrology

The Pecos River rises in the north-central mountains of New Mexico and flows southward for 435 miles in New Mexico till it joins the Rio Grande 320 miles into Texas near Comstock, Texas. The river can be divided into three basins. The Upper Basin is

comprised of the headwaters and tributaries above Alamogordo Reservoir. The Middle Basin is the portion of the river which flows from Alamogordo Reservoir to the New Mexico-Texas state line. The Lower Basin, consisting of the river drainage in Texas, extends from Red Bluff Reservoir, which regulates the river in Texas, to the Rio Grande.

The annual flow of the Pecos River is largely composed of flash flood water. This flood water carries a large quantity of topsoil that contributes to declines in reservoir capacity by silting and increases in the saline content of the waters.

The Pecos River may be completely dry for a period of weeks as it makes its way over central New Mexico. Groundwater aquifers supply much of the flow of the Pecos below Alamogordo Dam. The flow received by Texas varies year to year based on beneficial consumption in New Mexico, precipitation, evaporation in the reservoirs, and nonbeneficial consumption by salt cedars and other phreatophytes.

Sources:

1. NATURAL RESOURCES PLANNING BOARD, REGIONAL PLANNING, PART X: THE PECOS RIVER JOINT INVESTIGATION IN THE PECOS RIVER BASIN IN NEW MEXICO AND TEXAS -- SUMMARY, ANALYSES, AND FINDINGS (1942).
2. R. LINGLE & D. LINFORD, supra, at 3-19.
3. S. Doc. No. 109, 81st Cong., 1st Sess. (1949).
4. Texas v. New Mexico, 462 U.S. 554-557 (1983).

IV. The Pecos River Compact

A. Early negotiations

The Pecos River Compact grew out of New Mexico and Texas' concern with the quantity of river flow available to both states and how to equitably divide that flow to meet irrigation requirements in New Mexico and Texas. Texas' attempt to build the Red Bluff Reservoir near the Texas-New Mexico state line led to the creation of the Pecos River Compact Commission in 1923. Although a compact was adopted by the Commissioners and the legislatures of both states, the governor of New Mexico vetoed the compact based upon a fear that the compact might interfere with the rights of irrigators. Subsequent negotiations in the 1920s were unsuccessful in establishing an interstate compact. However, negotiations did result in the construction of the Red Bluff Reservoir in Texas and the Alamogordo Dam in New Mexico.

Acute problems with salinity and water supply resulted in a fact-finding investigation being conducted of the Pecos River Basin water resources in 1939. The report detailing the engineering advisory committee's findings provided data for new compact negotiations.

Sources:

1. NATURAL RESOURCES PLANNING BOARD, supra p. 3.
2. S. Doc. No. 109, supra p. 3.
3. R. LINGLE & D. LINFORD, supra p. 2, at 120-134.

B. Compact created

Congress recognized the value of an interstate compact to solve New Mexico and Texas' water problems and gave its

consent in 1929 to the states to negotiate and to enter into a compact to apportion the waters of the Pecos River. (H. Res. 6496, 70th Cong., 2d Sess., 70 CONG. REC. 4799, 4840 (1929)). Consent was granted upon condition that a representative from the Department of the Interior participate. Id.

With the results of the Joint Investigation and a Manual of Inflow-Outflow Methods of Measuring Changes in Stream-Flow Depletion (Inflow-Outflow Manual) also prepared by the engineering advisory committee, a second Compact Commission was created in 1942. The Pecos River Compact was successfully negotiated and Congress gave its approval in 1949.

Sources:

1. S. Doc. No. 109, supra p. 3.
2. R. LINGLE & D. LINFORD, supra p. 3, at 135-139.
3. I. CLARK, WATER IN NEW MEXICO: A HISTORY OF ITS MANAGEMENT & USE 537-538 (1987).

4. Texas v. New Mexico, 462 U.S. at 557-559.

C. Terms of the compact

The purposes of the Compact are several: to equitably divide and apportion the use of the River's waters; to encourage interstate harmony and prevent controversies; to protect development existing within the states; to facilitate construction for water salvaging, efficient water use, and flood protection. Provisions of the Compact designate methods and means for the apportionment of flood waters and salvaged water and for determining whether New Mexico depletes by "man's activities" the Pecos River flow below an amount equivalent to what Texas received "under the 1947 condition."

The Compact creates a commission to make findings of fact in order to administer the Compact, as well as gather and analyze data on the stream. This "Pecos River Commission" is composed of voting representatives from New Mexico and Texas and a nonvoting representative of the United States.

Sources:

1. S. Doc. No. 109, supra p. 3.
2. R. LINGLE & D. LINFORD, supra p. 3, at 140-174.
3. I. CLARK, supra p. 2, at 538-539.
4. Texas v. New Mexico, 462 U.S. at 558-560.

D. Operation of the compact

1. Commission action

The Commission achieved some successes in its first 15 years of operation such as studying effects of various proposals and securing authorization and funding for beneficial projects. Unfortunately, an error was discovered in the Inflow-Outflow Manual. As a result, the 1947 conditions of the river upon which New Mexico's yearly delivery of water to Texas under the Compact was supposed to be based were not accurately described. A Review of Basic Data was commissioned and a new Inflow-Outflow Manual drafted. New Mexico's shortfall of water delivery to Texas was determined to be approximately 53,000 feet.

Sources:

1. R. LINGLE & D. LINFORD, supra p. 3, at 175-236.
2. I. CLARK, supra p. 2, at 539-542.
3. Texas v. New Mexico, 462 U.S. at 560-561.

2. Commission inaction

The effectiveness of the Compact to facilitate resolving serious disputes became apparent in 1970. Texas alleged New Mexico had caused a shortage in expected delivery of water (based upon 1947 conditions) because of man-made reductions by groundwater pumping. The Texas Commissioner insisted that the shortage in delivery should be calculated using the original Inflow-Outflow Manual to determine 1947 conditions, 1.1 million-acre-feet, and the New Mexico Commissioner insisted that the corrected data in the Review of Basic Data be used, 53,000 acre-feet. This lack of agreement between the Commission's two voting members made the Commission and the Compact unable to function.

Sources:

1. I. CLARK, supra p. 2, at 540-541.
2. New Mexico v. Texas, 462 U.S. at 561-562.

V. Pecos River Compact Litigation

A. Texas v. New Mexico -- 1947 condition debated

Texas filed suit in the Supreme Court in 1947 alleging New Mexico had breached the Compact by "countenancing and permitting depletions by man's activities ... in excess of 1,200,000 acre-feet from the equivalent available under the 1947 condition...." (Texas v. New Mexico, 462 U.S. at 562). A special master was appointed (Texas v. New Mexico, 423 U.S. 942 (1975)) recommending in his first report in 1980 that a new Inflow-Outflow Manual be prepared to reflect the man-made depletions which existed at the beginning of the year 1947. The Court agreed.

Source:

1. Texas v. New Mexico, 446 U.S. 540 (1980).

B. Texas v. New Mexico -- 1947 condition calculated

The Special Master submitted another report in 1982 after accepting evidence on the corrections necessary to give an accurate description of 1947 conditions and thus New Mexico's obligation under the Compact.

Although the Special Master recommended that a tie-breaking third-party representative be appointed to the Commission if Texas and New Mexico could not agree on an alternative procedure, the Court found such a remedy inconsistent with the Compact's express terms and testing the "limits of proper judicial functions." Instead, the Court accepted the alternative recommendation that the suit continue as "presently framed" and returned the case for further consideration of the 1947 condition and whether the shortfalls were due to man's activities in New Mexico in violation of the Compact. The Court also agreed with the Special Master and rejected an alternative method proposed by Texas of calculating the 1947 condition as not close enough to the Compact's requirement of an inflow-outflow method.

Source:

1. Texas v. New Mexico, 462 U.S. at 554-576.

C. Texas v. New Mexico -- Shortfall determined

The Court found New Mexico liable for 340,100 acre-feet of water, as recommended by a new Special Master, based upon the inflow-outflow methodology the Court approved in 1984. The

Court disagreed, however, with the Special Master's rejection of monetary damages as a possible method of payment.

Although the Court found New Mexico had acted in good faith in not fulfilling its duty due to the uncertainty of its obligation, such good faith was found not to relieve New Mexico of its obligation. The question of how the obligation should be remedied was returned to the Special Master for his further consideration so that a monetary remedy could be considered in addition to water payments over a ten-year period. In addition, the Court appointed a River Master on the recommendation of the Special Master to determine the apportionment of the river in the future as required by the approved inflow-outflow methodology.

Source:

1. Texas v. New Mexico, 482 U.S. 124 (1987).

