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TEXAS V. NEW MEXICO: IT'S TIME TO CORRECT SOME JUDICIAL MISTAKES

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My remarks are going to be pretty general and I am going to make a couple of predictions. I am free to do that because I am not counsel of record for the case, although I am quite familiar with it. The Texas v. New Mexico case, in my view, is a case that is wrongly decided for a couple of reasons that I will explain. I also think that the judicial decree regarding future deliveries is not workable now, through nobody's fault really.

The background, as probably most of you know, begins in 1923 when it became clear that there were great economic advantages to Texas and New Mexico to harness the erratic flows of the Pecos River. By 1948, after a lot of difficult negotiations, an Interstate Compact was developed. The main goal of most compacts is to try to clearly regulate the quantity of water that exchanges between states. According to Steve Reynolds, the international, historical methodology for resolving interstate water disputes has been war. War between states is not permitted by our constitution, so compacts are

enacted. The Pecos River Compact was a good faith attempt to try to resolve the question of water allocation.

You can allocate water by percentage or you can do it by taking the total annual flow and divide that amount by a percentage as they do in the Upper Colorado River Compact. There is no numerical amount. You can also allocate water by specific amounts, as in the Colorado River Compact, where the upper basin is obligated to deliver 7.5 million acre-feet per year to the lower basin. That is it.

The Pecos River Compact drafters did not select any of these options. Rather, they used language aimed at promoting water conservation, but which is unfortunate in its effect. It said simply that New Mexico must deliver a certain amount of water, in fact, the amount under the conditions prevailing in 1947; that is, based on man's activities at that time. The activities of man in the future are not allowed to encroach upon that delivery obligation. Thus, New Mexico may not divert or take out of the

river by its own activities, by man's activities, an amount of water that takes it below the 1947 conditions.

The compact was doomed from the beginning for two reasons. One reason is that it has a built-in gridlock. The compact has a commissioner from Texas, a commissioner from New Mexico, and a federal commissioner who can not vote. Even with that unusual political setup, the compact worked pretty well and people worked to try to understand the vagaries of the river and what the 1947 condition meant. Indeed, there was an engineering water input/output or inflow/outflow model developed to try to define exactly what that meant, what the river did in terms of water deliveries. Unfortunately, that model was in error. Until 1970, there was a tremendous debate about how much water New Mexico was obligated to deliver and how the river responded. Indeed, the official engineering study on which the compact was based was itself in error. Since it was in error, they were deadlocked between New Mexico's obligation to deliver and Texas's right to receive.

In 1974, Texas filed a suit asserting that due to man's increased activities, New Mexico had underdelivered by well over a million acre-feet in the previous years. New Mexico took the contrary position and said the underdelivered amount was only approximately 52,000 acre-feet. New Mexico had a different theory for determining how much water was to be delivered and whether or not we might be held responsible.

A lot of history went on between then and now, but ultimately, Special Master Meyers, a fine man, former dean of the Law School at Stanford University, who was a personal friend of mine, made a ruling I think was fundamentally in error. I think the Supreme Court will some day rule that he was in error.

What was the error? The Pecos River Compact does not have a debit/credit provision. It does not say you get a water judgement if one state gets behind in its deliveries for a few years. It does not say credit has to be given if New Mexico gets ahead by man's activities somehow creating some water. It is simply silent on that point, as are the majority of compacts in the country as well as all equitable enforcement decrees. The latter is an example of when the Supreme Court equitably divides up the river.

If it is the case that the court can imply debit/credit, then in the future, all compacts and all equitable enforcement decrees entitle one state, the downstream state, to run to court to sue for retro-

active relief. And if compacts are indeed like contracts, there will be a statute of limitations. Any lawyer who wants to avoid malpractice will be suing to get this decree from the Supreme Court water judgement. I do not think the Supreme Court will like that role at all. The original jurisdiction of the United States Supreme Court has traditionally been very narrow. I do not think there should have been retroactive relief. However, I think Hank Bohnhoff will talk about the details of the retroactive-undelivery relief that New Mexico was obligated to pay by what I think was the incorrect decision.

The other part of this decision deals with the calculation of man's activities. New Mexico only has to be responsible for those underdeliveries caused by man's activities. How do we know how much man causes? How much does man change the river? There are not a lot of ways to try to figure that out. Do we take some aerial photographs and look at how many different things men have done on the river? Can you develop an equation? One was developed and accepted by the special master that said we are going to figure out how much was done by excluding everything else. How much was lost to evaporation? How much was lost to phreatophytes? How much was lost to all other non-man activities? Subtract that from the amount of water that did not go down the river, and the balance had to be caused by man. The New Mexico men who were losing money not farming during that same period, because they didn't have any water or were doing other things, would be surprised to know they caused all that activity.

Simply put, the final decree from Special Master Meyers, which was confirmed by the Supreme Court twice, required a number of things. One, was the retroactive relief which has now been settled. The other is the prospective relief--how does New Mexico come into compliance with the compact? I have looked at the exhibits, and I am not saying I know that much hydrology, but if you look at how the Pecos River works, it is a very strange and difficult river. Because of its flood flows, because of the positions of the gaging stations, it goes in trends. The river will overdeliver for five or six years at a time and then it will underdeliver for five or six years at a time while man's activities have not basically changed. The decree as it is presently framed, requires almost immediate responsive annualized credits or debits for repayment of water. That would mean, if the decree actually were enforced, for five or six years at a time there would be overdeliveries. New Mexico would get credit for these overdeliveries even though man's activities did

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not change. However, New Mexico would be charged for underdeliveries that were not in fact attributable to New Mexico when the river underdelivers.

My prediction is that, although New Mexico will do everything possible to comply with that decree in good faith, I believe the river master is going to have a very difficult time--and I have met him, he is a tremendous guy, bright and talented, and you are lucky to have him there--but he is going to have a very hard time figuring out how to make what happens by trends on the river comply with what the decree requires.

I predict the Supreme Court will reject this case as to its holding, regarding its debit/credit implications in compacts and other cases when everybody runs to the Supreme Court. For example, Kansas is suing Colorado for damages. Secondly, I think there is going to have to be some real good faith consideration as to how to figure out what to do with this river. Since it does not do what sometimes we say it does, the current decree will not work. Thank you.