

Transboundary Waters: The Rio Grande as an International River

The Rio Grande flows for approximately 1,900 miles from the mountains in Colorado to the Gulf of Mexico. Its waters are shared by three states, Colorado, New Mexico and Texas; by two countries, the United States and Mexico; and, with numerous Native American Tribes and Pueblos. It is a *successive international watercourse* flowing in the United States, crossing the international border, and flowing to Mexico where it becomes a *contiguous international watercourse*, forming the border and shared by both the United States and Mexico.

New Mexico is in the middle of the course of the Rio Grande, dependent on water deliveries from Colorado upstream and with obligations to Texas and Mexico downstream. At the turn of the 20th Century, the New Mexico Territorial Government was in the middle of the controversy that determined the authority of state and federal governments to control and allocate water resources and that led to the 1906 Rio Grande Convention between the United States and Mexico. Today, New Mexico is in the middle of the United States' obligations to deliver water to Mexico with the dams of the Elephant Butte and the Caballo reservoirs squarely within New Mexico, more than 100 miles from the United States border with Mexico.

The Rio Grande is divided into two major river reaches and has different legal regimes for each. New Mexico is primarily concerned with the Rio Grande from the headwaters in Colorado to Ft. Quitman in Texas, a distance of approximately 670 miles. This section of the river is the subject of the 1906 Rio Grande Convention [hereinafter Treaty] between the United States and Mexico. The lower section of the Rio Grande from Ft. Quitman to the Gulf of Mexico is the subject of the 1944 Rivers Treaty between the United States and Mexico; the 1944 Rivers Treaty also includes the Colorado and Tijuana Rivers.

As with many international and interstate rivers, the Rio Grande's history, particularly that leading up to the 1906 Rio

“The Rio Grande is the fifth longest river in the United States and among the top twenty in the world. It extends from the San Juan Mountains of Colorado to the Gulf of Mexico (1,901 miles) and forms a 1,255 mile segment of the border between the United States and Mexico.”

International Boundary &
Water Commission
<http://www.ibwc.state.gov/CRP/riogrande.htm>

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“The great lengths to which the United States was willing to go in fulfillment of its ‘moral obligation’ to provide Mexico with a fair share of Rio Grande waters suggest that regardless of its formal reliance on the Harmon Doctrine, it did not consider itself free to exhaust the flow of the Rio Grande before it reached Mexico.”

STEPHEN C. McCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES*, 2nd ed. 102 (2007).

Grande Convention, helps explain the law of the river today.

History

The migration to settle lands in the Western United States greatly increased the demand for irrigation water. It is estimated that irrigated acreage in the San Luis Valley in Colorado, near the headwaters of the Rio Grande and in the New Mexico Territory, expanded by 196,000 acres between 1880 and 1896. This increased demand in combination with drought conditions left the Rio Grande dry at El Paso and Juarez.

With no water to irrigate the fields that had been cultivated for centuries, the Mexican government lodged formal complaints with the United States beginning in 1894. The Mexican government asserted that the water rights in the Juarez region had priority over the newer uses in the San Luis Valley in Colorado. The United States asked the Attorney General to examine its legal obligation to deliver water downstream to Mexico. Attorney General Judson Harmon opined that the United States is within its legal right to completely deplete the flow of the Rio Grande, earning the attribution of his name on the doctrine of absolute sovereignty. The Harmon Doctrine is used today primarily by upstream states that assert complete control over watercourses, but it was not used by the United States during the negotiations with Mexico.

In addition to demands for the United States to restore the flow of the Rio Grande to

Mexico, the Mexican government filed claims for damages for approximately \$70 million. The decline in the Juarez population between 1875 and 1894 from 20,000 to 10,000 is also attributed to the lack of water in the Rio Grande.

The farmers in the El Paso Valley in the United States experienced the same water shortages as the farmers in Mexico. Civic leaders, landowners and speculators in El Paso began promoting an international dam to capture flood flows and to secure the irrigation supply for both sides of the border. The dam site proposed by the El Paso interests would cause a significant portion of the Mesilla Valley in southern New Mexico to be inundated.

During this same time period, entrepreneurs and land promoters in the Territory of New Mexico garnered financial backing from a British company to build a dam on the Rio Grande at Elephant Butte. The Rio Grande Dam & Irrigation Company planned a private, for-profit enterprise to provide water within an irrigation district. Elephant Butte Dam was authorized by the Territorial government, and in 1895 the Company received a right-of-way from the U.S. General Land Office to build the dam on public lands.

The Elephant Butte Dam and the International Dam at El Paso were not compatible projects. They represented changing federal policies, with the Elephant Butte Dam reflecting policy from the late 19th Century when the United States promoted private enterprise to settle the West and the International Dam representing the Progressive Era of federal involvement, if not control, over land and water in the Western United States.

The El Paso interests and Progressive policies prevailed within the federal government, and the United States initiated litigation to invalidate the rights of the Rio Grande Dam & Irrigation Company. The United States alleged that the proposed Elephant Butte Dam would interfere with navigation on the Rio Grande. If the courts determined that

the Rio Grande was navigable, the federal government had jurisdiction under the Commerce Clause to regulate the water use; if not, the states may do so, or in this case, the Territorial government of New Mexico. The United States used the claim of navigability and years of litigation to bankrupt the private Rio Grande Dam and Irrigation Company and wrestle control of the waters of the Rio Grande away from the private company and the Territory of New Mexico.

In 1902 Congress passed the Reclamation Act providing federal funds, engineering expertise, and federal authority over waters in the Western United States, primarily to benefit public lands. The Reclamation Service, now the Bureau of Reclamation, highlighted its scientific and engineering expertise at the 1904 National Irrigation Congress held in El Paso to which it invited representatives from Mexico. Reclamation presented a new proposal for apportionment of the Rio Grande recognizing the relationship among the uses in the Mesilla Valley, irrigation in the El Paso Valley, and the Mexican claims against the United States. The Reclamation plan was proposed to resolve all of these issues.

The Reclamation engineering studies indicated the best site for a reservoir was at Engle, New Mexico, downstream, but very near, the site proposed by the Rio Grande Dam and Irrigation Company. Reclamation proposed that the water stored at the Engle Dam be apportioned to serve lands currently and historically under irrigation as well as 110,000 new potentially irrigable acres in New Mexico, 20,000 acres in Texas above El Paso, and 50,000 acres below El Paso in both the United States and Mexico. The Reclamation proposal was discussed extensively and approved by the representatives of the New Mexico, Texas and Mexican governments at the 1904 National Irrigation Congress.

In 1905 Congress passed an “Act Relating to the construction of a dam and reservoir on the Rio Grande, in New Mexico, for the

impounding of the flood waters of said river for purposes of irrigation.” The history of the Act indicates that its purpose was to supply irrigation to lands as agreed upon at the 1904 National Irrigation Congress. However, the Act does not mention Mexico, and it does not apportion the water to be supplied by the dam other than to say that the water is for lands in New Mexico and Texas which “can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise....,” leaving considerable discretion to the Reclamation Service.

The federal legislation was prompted by a desire to settle water controversies with Mexico, but was also proposed to settle disputes in New Mexico that arose because of competing policies for water development: one favoring private companies and the other maintaining federal oversight. The ultimate solution on the Rio Grande was federal oversight and control of the large infrastructure with local irrigation associations representing the users.

This history of conflict and compromise over the Rio Grande provides the background explanation for the provisions of the 1906 Rio Grande Convention.

1906 Rio Grande Convention

The 1906 Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande [hereinafter 1906 Rio Grande Convention] was possible because of the Reclamation studies that led to the informal agreements reached at the 1904 National Irrigation Congress which, in turn, were the basis of the 1905 Congressional authorization for the dam at Engle, New Mexico.

The 1906 Rio Grande Convention required that the United States construct “the proposed storage dam near Engle, New Mexico, and the distributing system” to deliver 60,000 acre-feet of water annually in the bed of the Rio Grande at the headworks of the Old Mexican Canal near Juarez,

“The United States of America and the United States of Mexico being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversy between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a Convention for these purposes...”

—Preamble, 1906 Rio Grande Convention

Mexico. Deliveries are made according to a monthly schedule peaking at 12,000 acre feet per month in April, May, and June.

The delivery of water is made at no cost to Mexico. The United States agreed to pay the full cost of constructing the dam at Engle and associated delivery works. In 1906 the Reclamation Service was in the process of entering repayment contracts with the irrigation water user associations in New Mexico and Texas for their portion of the cost for the Engle Dam, leaving only those costs associated with the deliveries to Mexico to be paid by a congressional appropriation. In consideration for delivery of water, Mexico waived all claims to water between the Mexican Canal and Ft. Quitman and declared all claims against the United States arising from the upstream diversions to be fully settled.

The Rio Grande below Ft. Quitman depends on inflow from tributaries in Mexico. The apportionment of this section of the river was made in the 1944 Rivers Treaty between the United States and Mexico that also apportioned the Colorado and Tijuana Rivers. The 1906 Rio Grande Convention is a foundational agreement for the 1944 Rivers Treaty, and for the principles of equitable and reasonable utilization that were codified in 1997 United Nations Convention on the Non-navigational Uses of International Watercourses.

1944 Rivers Treaty and the IBWC

The Colorado River was the next source of tension over water between the United States and Mexico. Mexico is at the farthest downstream point on the Colorado River in a very arid region dependent on water flow from the United States.

Mexico indicated its unwillingness to negotiate on the Colorado River unless the Rio Grande below Fort Quitman was included because farmers in Texas wanted an assured water supply from the tributaries flowing from Mexico. The result is a comprehensive treaty covering all shared watercourses: the 1944 Treaty between the United States and Mexico for the Utilization of the Waters of the Colorado and Tijuana Rivers and of the Rio Grande (Rio Bravo) from Fort Quitman, Texas, to the Gulf of Mexico [hereinafter 1944 Rivers Treaty].

The 1944 Rivers Treaty added responsibility for border water to the International Border Commission's authority and renamed the organization, the International Border and Water Commission [hereinafter IBWC]. The IBWC consists of an engineer from each country and such advisors as each country chooses.

The IBWC has considerable discretion and unique authority as an international institution. Under its original functions as a border commission, the IBWC can issue Minutes establishing and delimiting the border between the United States and Mexico. The Minutes are effective and binding on both countries unless objected to by either country or as otherwise required by the Minute.

Through the IBWC, the United States and Mexico have constructed joint projects such as dams, bridges and sanitation facilities; set water quality standards such as those for salinity; and adjusted water delivery schedules in response to emergency situations. The broad authority of the IBWC, which has been in effect for over 70 years, permits water management to adapt to changing conditions.

Legal Principles and Hierarchy of Laws

An understanding of the hierarchy of laws in the United States puts the 1906 Rio Grande Convention in perspective with other principles of New Mexico water law. If the law is viewed as a pyramid, the Constitution of the United States provides the structure. International treaties and the laws of the United States are at the pinnacle because Article VI describes them as “the supreme law of the land.”

Under of the Supremacy Clause, one of the first priorities on the Rio Grande is to satisfy the rights and obligations under the 1906 Rio Grande Convention. Native American Tribes and Pueblos, *acequias*, individuals and other entities have water rights recognized by the state law system as having priority dates earlier than the rights of Mexico under 1906 Rio Grande Convention. Some scholars assert that the rights contained in international treaties have legal supremacy.

The waters of the Rio Grande are also subject to the rights and obligations of the Rio Grande Compact among New Mexico, Colorado and Texas. States may enter into compacts for the allocation and sharing of waters, and bind their respective states, but Congress must approve each compact. Article I of the U.S. Constitution limits the powers of states and Section 10 of Article I provides that “No State shall, without the consent of Congress, . . . enter into any Agreement or compact with another State. . . .” The Congressional action of Consent makes a compact between states a federal law. Under the Supremacy Clause, not only are treaties the supreme law of the land, but the Laws of the United States are also “the supreme Law of the Land; and the Judges in every State shall be bound thereby.”

What does this pyramid mean for water matters within New Mexico? The rights of most water users in New Mexico are based on the state law of prior appropriation or on federal law. Water users in New Mexico have rights to the water that is legally available for appropriation after satisfying the international and interstate Compact requirements.

Current Issues

Global and local studies indicate that climate change will, and may already be, affecting water supplies on both sides of the border by increasing the variability, decreasing the precipitation, and increasing the evaporation. The mixture of snow and rain is changing as is the timing of snowmelt. These factors contribute to the management complexities for the Rio Grande and delivery to rights holders within the State.

Groundwater basins are crossed by international borders. Groundwater utilization should follow the same international legal principles of equitable and reasonable utilization as for surface water, however the mechanisms for this are not yet in place. The IBWC included two paragraphs on border groundwaters in Minute 242 issued in 1973. Minute 242 sets limits on pumping near San Luis on the Arizona-Sonora border “pending conclusion . . . of a comprehensive agreement on groundwater in the border areas. . . .” and contains a broad statement that the United States and Mexico will consult with each other prior to undertaking new surface or groundwater developments that might adversely affect the other country.

As with the surface waters of the Rio Grande in the early 20th century, scientific knowledge and willing negotiations are needed to develop the mechanisms to share border groundwaters. The objective of the 2006 United States-Mexico Transboundary Aquifer Assessment Act is to “systematically assess priority transboundary aquifers” in order to better utilize this valuable water resource along the border. This is a start to the process.

“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

— U.S. CONST., art. VI, cl. 2.

Conclusion

The New Mexico Legislature is concerned, from year-to-year, about meeting the day-to-day needs for water within the State. The efforts are complex and increasingly difficult as demand increases and supply fluctuates. As surface water in the Rio Grande is allocated and re-allocated, the demand for water continues placing increasing stress on groundwater resources.

How to share the groundwater aquifers that cross the international border is a pressing issue. International negotiations are the exclusive province of the federal government. However, the history of the 1906 Rio Grande Convention teaches that resolution of issues of local water availability pursued through state officials may establish the framework for resolution of such international issues.

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