Denver Law Review

Volume 22 | Issue 3 Article 1

January 1945

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DICTA

Vol. XXII MARCH, 1945 No. 3

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The House of Delegates of the American Bar Association, at its recent meeting in Chicago, adopted a resolution which in effect opposed ratification of the treaty between the United States and the Republic of Mexico for the utilization of the waters of the Colorado, Rio Grande and Tiajuana Rivers, all international streams.

The resolution recites that a treaty is pending before the Senate providing, among other things,

> "for the administrative determination with finality of all disputes and private rights in connection with the execution of provisions for the apportionment of waters of the Rio Grande, Colorado and Tiajuana Rivers and the operation of public works."

It is resolved that the House of Delegates disapproves:

> "the novel creation by international treaty of a domestic administrative agency exercising legislative and judicial powers respecting persons and property within the territorial limits of the United States without legislative control or judicial review."

It is then further resolved that the Committee on Administrative Law is authorized to oppose the ratification of the treaty by the Senate,

> "except upon reservation of the normal legislative and judicial controls upon the application of the proposed treaty or regulations made in pursuance thereof to persons and property within the territorial limits of the United States."

The report of the Committee on Administrative Law concludes thus:

> "* * * it appears that the apportionment of the waters on the affected river systems within each country is to be left to the respective national commissioner. There is thus created a domestic administrative agency, authorized to apportion private rights to waters in large arid regions of the United States and settle with finality all disputes whether arising from such apportionment or the maintenance or operation of works, under a treaty terminable only upon the joint consent of the two countries and administered subject to the normal control of neither the legislative or judicial branches of the government of the United States.

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"Since—wholly apart from the international aspect of the proposed treaty—it appears to subject domestic private rights and disputes involving such rights solely to determination by an administrative agency, the foregoing resolutions are proposed. The Special Committee on Administrative Law takes no position respecting the substantive provisions of the proposed treaty nor to its international aspects."

Such criticism cannot be honestly made by anyone familiar with the terms of the treaty itself or with the physical conditions existing on the Colorado River, especially on that portion of the river at the international boundary.

The treaty referred to was signed at Washington on February 3, 1944, and is now before the Committee on Foreign Relations of the United States Senate. The treaty provisions with respect to the Colorado River were arrived at after months of negotiation. The Department of State was assisted in the negotiations by competent engineers of long experience in these matters. In fact, for a period of more than two years representatives of the Department of State consulted freely with the Committee of Sixteen representing the seven Colorado River Basin states and the power interests, and the treaty provisions finally arrived at were well within the limits recommended by the representatives of these states, except representatives of certain interests in the State of California.

The resolution above referred to of the American Bar Association purports not to make any recommendations or take any position relative to the substantive provisions of the proposed treaty or to its international aspects. It purports to deal solely with the powers of the Commission which is given general administration of the treaty provisions. However, the determination of the powers and duties of the Commission cannot be very well determined or understood without some knowledge of the substantive provisions of the proposed treaty and without consideration of its international aspects.

That portion of the proposed treaty from which the powers and duties of the Commission are derived will be found in Article II of the treaty. The Commission referred to is the International Boundary and Water Commission of the United States and Mexico, and is described in Article II of the treaty as follows:

"The International Boundary Commission established pursuant to the provisions of the Convention between the United States and Mexico signed in Washington, March 1, 1899, to facilitate the carrying out of the provisions contained in the treaty of November 12, 1884, and to avoid difficulties occasioned by reason of the changes which take place in the beds of the Rio Grande and the Colorado Rivers, shall hereafter be known as the International Boundary and Water Commission of the United States and Mexico, which shall continue to function for the

entire period during which the present treaty shall continue in force. Accordingly, the term of the Convention of March 1, 1899, shall be considered to be indefinitely extended and the Convention of November 21, 1900, between the United States and Mexico regarding that Convention shall be considered completely terminated."

The next paragraph of Article II is as follows:

"The application of the present treaty, the regulation and exercise of the rights and obligations which the two governments assume thereunder, and the settlement of all disputes to which its observation and execution may give rise, are hereby entrusted to the International Boundary and Water Commission, which shall function in conformity with the powers and limitations set forth in this treaty."

A cursory reading of this paragraph might read into it implications of broad powers. However, a careful consideration of the language carries no such implications. The language: "which shall function in conformity with the powers and limitations set forth in this treaty," would limit the powers of the Commission to such as are set forth in the treaty. In other words, if the specific power is not to be found in the treaty none will be implied.

The next paragraph of Article 2 deals primarily with the composition of the Commission. It is given the status of an international body and shall consist of a United States Section and a Mexican Section. The head of each section shall be an "Engineer Commissioner." It then provides: "Wherever there are provisions in this treaty for joint action or joint agreement *by the two governments* or for the furnishing of reports, studies or plans to the two governments, or similar provisions, it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Affairs of Mexico." This language would seem to make it clear that the powers of the Commission itself are somewhat narrowly circumscribed. In other words, where the treaty provides for joint action or joint agreement by the two governments, or for the furnishing of reports, studies or plans to the two governments, such questions shall be handled by or through the Department of State of the United States and the Ministry of Foreign Affairs of Mexico. Apparently the sole powers of the Commission in such respects are limited to mere recommendations, without power to bind either government or the citizens of either government.

The 4th paragraph of Article II has to do with the employees of the Commission and authorizes the Commission or either of its two sections to employ such assistants and engineering and legal advisers as it may deem necessary. Diplomatic status is accorded the Commissioners designated by each government. The Commissioners, two principal engineers, a legal adviser and a secretary designated by each government as

members of its section of the Commission, shall be entitled to enjoy in the territory of the other country the privileges and immunities accorded to diplomatic officers. The Commission and its personnel are granted the right to freely carry out their observations, studies and field work in the territory of each country.

There would appear to be nothing in the above paragraph to cause alarm or apprehension.

The next or 5th paragraph of Article II is the one defining the jurisdiction of the Commission. That jurisdiction is defined as follows:

"The jurisdiction of the Commission shall extend to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado Rivers, to the land boundary between the two countries, and to works located upon their common boundary, each Section of the Commission retaining jurisdiction over that part of the works located within the limits of its own country. Neither Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent *of the Government of the latter.*"

The first limitation on the jurisdiction of the Commission is that it "shall extend to the limitrophe parts" of the two rivers, that is, to those parts of the two rivers lying on the border of the two countries.

Second, to the land boundary between the two countries, and

Third, to works located upon their common boundary.

This section specifically provides that each section of the Commission shall retain jurisdiction over that part of the *works* located within the limits of its own country. Then it is provided that neither section shall assume jurisdiction or control over works located within the limits of the country of the other without the *express consent of the Government* of the latter. If the government gives its express consent, that express consent would necessarily have to be given in the only way a government can consent—through the powers of Congress under the constitution or through powers conferred by the constitution or Congress upon the executive department of the government.

If the powers of the Commission extend to the determination of purely private or domestic rights in the United States those powers must be sought for elsewhere than in Article II of the treaty itself, defining the jurisdiction of the Commission.

A reading of the treaty itself would seem to make it clear that the jurisdiction of the Commission has a territorial limitation, that is, its jurisdiction is limited and confined to the discharge of purely international functions along the Mexican boundary and its jurisdiction over works is confined to those on or along the boundary which are concerned exclusively with the discharge of treaty functions. Even as to these functions, works entirely within the United States are not subject to the control or jurisdiction of Mexico, nor are works located wholly within

Mexico subject to the jurisdiction or control of the section of the Commission in the United States. It should be clear that there is left to the interior agencies of the government the control and operation of those interior facilities which are to be used only in part for the performance of treaty functions. From the above language it is also clear that the two governments as such exercise an absolute veto power over the decisions of the Commission.

Certain works necessary for the execution of the treaty are specifically provided for, such as the international dams on the Rio Grande and Davis Dam on the Colorado.

The Commission is also authorized to investigate and recommend the construction of other works, such as flood control works on the Colorado below Imperial Dam, but no such works can be built without the joint agreement of the two governments.

The resolution of the House of Delegates of the American Bar Association was apparently based upon a memorandum signed by Robert W. Kenney, Attorney General of California, in reference to the powers and duties of the International Boundary and Water Commission of the United States and Mexico as proposed by the pending treaty. Judging from the similarity of language contained in the resolution and in the brief of General Kenney, it seems evident that the House of Delegates adopted, without much study or consideration, the brief of the Attorney General of California opposing the treaty.

The sweeping conclusions of Attorney General Kenney are reached by a misapplication of the language appearing in Article II which requires that acts done and determinations reached by the Commission are "subject to the approval of the two Governments." Likewise, the provision that "Wherever there are provisions in the treaty for joint action or joint agreement by the two governments or for furnishing reports, studies or plans to the two governments, or similar provisions, it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Affairs of Mexico." These provisions are brushed away with the broad general statement that "All provisions that any action or agreement shall be subject to the approval of the two governments means, so far as the United States is concerned, subject to approval by the Department of State. Neither Congress nor the Senate will have any voice in the matter."

We submit that the language appearing in the treaty does not permit of any such construction or conclusions. It will be noted in the second paragraph of Article II above referred to that the language of the treaty is "Such questions shall be *handled by or through* the Department of State of the United States and the Ministry of Foreign Affairs of Mexico."

We have heretofore quoted the 5th paragraph of Article II on page 8, which defines the jurisdiction of the Commission. It contains this language: "Neither Section shall assume jurisdiction or control over works located within the limits of the country of the other without the express consent of the *government* of the latter." Throughout the treaty it is repeated many times over that certain acts done and determinations reached by the Commission are subject to the approval of the two *governments*. However, because the treaty provides (paragraph 3 of Article II, page 7) that "wherever there are provisions in this treaty for joint action or joint agreement by the two governments or for the furnishing of reports, studies or plans to the two governments, or similar provisions, it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Affairs of Mexico," General Kenney reaches the conclusion that this means that the Secretary of State of the United States would conclusively pass on the matter, to the exclusion of the President or Congress.

We submit that throughout the treaty where the words "the Governments" or "approved by the Governments" appear, they mean the government, and it is unfair to substitute "Secretary of State" for the word "Government" wherever it appears in the treaty. It simply means that the Department of State is the agency of the government through which such matters are handled, and where the approval of the President or of the Senate or of the Congress is necessary under our constitution and the powers conferred by it, the Secretary of State would be required to handle the matter through his department by seeing that it took the proper course. That is exactly what the Secretary of State did in the negotiation of the treaty. He negotiated it, reached agreements with the representatives of the Republic of Mexico, and then submitted it to the President of the United States, who in turn submitted it to the Senate for its advice and consent.

In Article XXIV, paragraph (d), the Commission is authorized "to settle all differences that may arise between the two governments with respect to the interpretation or application of this treaty subject to the approval of the two governments." From his language the Kenney brief reaches the broad conclusion that this completely divests the courts of all jurisdiction, that it involves the private rights of citizens and local public agencies of the United States, and that either the Commission or the Secretary of State would be the final arbiter of the matters in dispute. Again the language "subject to the approval of the two governments" is completely ignored and misconstrued.

In Article XIX, where it is provided that "the two governments shall conclude such special agreements as may be necessary," etc., the writer of the brief insists that in place of the two governments the treaty

means the Secretary of State of the United States and the Ministry of Foreign Affairs of Mexico.

In Article XIII, part 3, the Commission is directed to study, investigate and prepare plans for flood control on the lower Colorado between Imperial Dam and the Gulf of California. In the Kenney brief it is said: "Here again the two governments agree to construct, through their respective Sections of the Commission, such works as may be recommended by the Commission and approved by the two governments, each government to pay the cost of the work constructed by it. It is understood that approval by the two governments, so far as the United States is concerned, means approval by the Department of State, without limitation or restriction."

A reading of the Kenney brief will show that in every instance where the words government, the two governments, or approved by the two governments appear, the writer of the brief invariably substituted the Department of State or the Secretary of State as the proper and appropriate meaning of that language.

In the Kenney brief no distinction is made between that portion of the treaty where the two governments agree specifically to construct certain works, as in Article XII of part 3, page 13, and the provisions of the treaty where the Commission is to study, investigate and prepare plans for flood control, etc., and report to the two governments the works which should be built, the estimated cost thereof, and the part of the works to be constructed by each government.

In Article XII there is a definite agreement on the part of the two governments to construct certain works. Under paragraph (A) Mexico agrees to construct at its expense within a period of five years from the date of the entry into force of the treaty a main diversion structure at the international boundary line. Mexico agrees to construct other works, such as levees and interior drainage facilities which in the opinion of the Commission shall be necessary to protect land within the United States against damage from flood, etc. On the other hand, in subparagraph (B) of Article XII, the United States specifically agrees within a period of five years from the date of entry into force of the treaty to construct in its own territory and at its expense and thereafter operate and maintain the Davis storage dam and reservoir, and, in paragraph (C), other works, including certain works connected with the Pilot Knob Wasteway. Other works are designated in paragraph (D) of Article XII.

As to these works which the two governments specifically agree to construct, it is true that the provisions are binding upon both governments without the approval of any other agencies of either government. If Congress should fail to make the necessary appropriation or authorization it would amount to a breach of the treaty. The treaty should not

be ratified by the Senate unless the Senate is convinced that these works are necessary in order to carry out the terms of the treaty.

However, as to the provisions of Article XIII and other works referred to in the treaty, none of them can be constructed without the approval of both governments. In other words, even if the Commissioner of the United States section and the Department of State should both recommend the construction of other works, Congress could approve or disapprove without abrogating the treaty or violating its provisions.

The resolution, as well as the memorandum of Attorney General Kenney, ignores the fundamental conception of water administration in the arid West. The language of the treaty in reference to its administrative features can be better understood by keeping such things in mind. I quote the following from a memorandum prepared by Jean S. Breitenstein, of Denver, Colorado:

"Agricultural development in the arid and semi-arid West is dependent upon the use of water for irrigation. The source of such water is found, almost entirely, in interstate streams and their tributaries. Water is diverted from these streams by proceeding in conformity with the law of the state in which the diversion is made. Claims of excessive use by an upper state to the detriment of the lower state have resulted in many interstate controversies which have been determined by the Supreme Court of the United States. The governing principle in such cases is the rule that there must be an equitable apportionment between the states of the benefits resulting from the flow of the interstate stream (see *Kansas v. Colorado*, 206 U. S. 46; *Colorado v. Kansas*, 320 U. S. 383). However, a decision of the United States Supreme Court is not the only method of apportioning rights between states. The same end may be accomplished by an interstate compact ratified by the legislatures of the affected states and consented to by the Congress of the United States in conformity with Article I, Section 10, Clause 3 of the federal constitution. Examples of the use of this method are the Colorado River Compact between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the Rio Grande Compact between Colorado, New Mexico and Texas.

Whichever method of apportionment is applied, the result is the same. All water users in the affected states are bound (*Kansas v. Colorado*, 206 U. S. 46-85; *Wyoming v. Colorado*, 259 U. S. 419, 468; *Nebraska v. Wyoming*, 295 U. S. 40, 43). In litigation in the Supreme Court or in compact negotiation and ratification the state represents and acts for all its water users.

The question very naturally arises as to the power of a state to affect either by compact or by litigation the rights of water users. For example, can a state by compact agree to an apportionment which has the effect of depriving a water user of water which would be available to

him if the entire stream flow were administered in his state? This point was decided by the United States Supreme Court in the case of *Hinderlider v. La Plata, etc.*, 304 U. S. 92. There a Colorado water user claimed that he was wrongfully deprived of water by the action of Colorado officials in administering the La Plata River, on which Colorado had a compact with New Mexico, in such a manner that he was deprived of water that would have been available to him except for the requirements of the compact. The court held that the compact determined the equitable share of each state and that the right which the water user had applied only to water within the determined Colorado share. Stated otherwise, the asserted Colorado right did not apply to water which, under the compact, belonged to New Mexico.

Thus the existing system is that private rights are acquired under state law and such state law applies only to the state's equitable share of stream flow.

One important refinement of this system must be mentioned. The development of the West has required the construction of enormous reservoirs to store water appearing at times of floods or peak flows for use at other times. The magnitude of such projects has been such that in recent years they have been undertaken by the United States under the Reclamation Act, the Boulder Canyon Project and similar legislation. Rights to the use of such stored water are obtained by contract with the appropriate federal agency. Usually such a contract runs to some municipal or quasi-municipal corporation, organized under state law, which in turn contracts directly with the actual water users.

Along the Colorado River the United States has constructed Boulder and Parker dams. The use of impounded water is governed by contracts between the Secretary of the Interior and (a) certain California interests, (b) Arizona, and (c) Nevada. All of such contracts specifically provide, as required by the Boulder Canyon Project Act, that the use of the water is subject to the availability thereof under the Colorado River Compact.

With the possible exception of Indian rights which are relatively small, all private rights to the use of the waters of the affected streams are dependent upon state laws or upon contracts with the United States.

The inquiry is then resolved into a determination of how these private rights are affected by the pending treaty. At the outset it should be noted that neither the International Boundary Commission nor either commissioner is given any power whatsoever with respect to the determination of such rights or the administration of the stream in respect to such rights. Since the Commission and the commissioners have only such powers as are delegated by treaty, and no general powers, the only possible conclusion is that both the Commission and the commissioners are powerless to make any apportionment of water as between private users

whether they be appropriators under state law or the holders of contracts with the United States. Those opposing the ratification can point to no provision of the treaty which delegates to the Commission or the commissioners the power and authority to fix private rights. On this point there can be absolutely no doubt whatsoever.

The treaty defines the extent of the rights of the two nations. It does not define, or attempt to authorize any body or person to define, any private rights of any nature.

The treaty will operate in the same way as the La Plata River compact which was before the United States Supreme Court in the case of *Hinderlider v. La Plata, etc.*, supra. The rights of the two nations having been fixed by the treaty, the domestic laws of each nation operate to regulate private rights within such nation. The only difference between the situation presented in the Hinderlider case and that involved in the proposed treaty is that the Supreme Court of the United States sits as a final arbiter of disputes involving interstate rights to the waters of interstate streams within the boundaries of the United States. There is presently no international tribunal of comparable nature to pass upon a dispute which might arise over the operation of a treaty between two sovereigns.

The International Boundary Commission is set up to provide an administrative method of giving effect to the treaty. It will operate to assure the delivery to Mexico of the amounts of water to which the treaty declares that Mexico is entitled.

Considering the situation on the Colorado River, the Commission has the duty of making delivery to Mexico of the water belonging to that nation. In practice this duty will be fulfilled by the placing of appropriate water release orders with the operators of Boulder, Parker and Davis dams. Water so released will be earmarked for delivery to Mexico and will not be subject to use in the United States. It cannot be presumed that the Commission will exceed its powers and request the release of more water than is required to satisfy the Mexican share. If such an improper request should be made by the Commission and if the responsible officials in charge of the reservoirs, i. e., the Secretary of the Interior and his subordinates, threaten, or assume to honor such an improper request, there can be no question of the right of the affected water users in the United States to seek and obtain appropriate relief through the regular court procedure. Also, if the upper basin violates the Colorado River Compact by failing to permit the passage to the lower basin of the amount of water required by the Colorado River Compact, the affected state of the lower basin could bring suit in the Supreme Court of the United States against the offending state or states. There can be no doubt of the right of one state to sue another for breach of an interstate compact (see *Kentucky v. Indiana*, 281 U. S. 163).

It may have been represented to the Committee on Administrative Law that the pending treaty jeopardizes California rights, and accordingly it may be appropriate to review the California situation. The Boulder Canyon Project Act (43 USCA 617 (C)) required California to limit its use of water designated by the compact as III (a) to 4,400,000 acre feet annually. Rights of California to water in excess of this amount must be satisfied out of surplus which under the compact may not be apportioned until 1963; California has secured the Secretary of the Interior contracts calling for 5,362,000 acre feet of water annually, subject to the availability thereof under the Colorado River Compact. Clearly, 962,000 acre feet of this annual amount must come out of surplus. By Article III (c) of the compact water determined to be the share of Mexico shall come first out of surplus and then one-half from the allotted share of each basin. Since rights to the surplus may not be determined until 1963, the California right is subject not only to the Mexican right but also to such other rights within the United States as may accrue and be recognized.

The point is that so far as the 962,000 acre feet of water called for by the California junior contracts is concerned, the infirmity of those contracts existed at the time of their execution. The speculative rights of the contract holders certainly can rise no higher than did the right of the water user in the case of *Hinderlider v. La Plata,* supra. No water user of the United States can have a right under any United States law or contract to water belonging to Mexico.

The Commission can do nothing to affect the rights of the United States water users. These are determined by interstate compact, by state law, and by contract. Hence, the findings of the Committee on Administrative Law that the Commission is not "subject to the normal controls of either the legislative or judicial branches of the government of the United States" is utterly meaningless. There is no need for legislative or judicial control of action which the Commission is powerless to take. The Committee's conclusion can be explained only on the basis of (1) an assumption that the Commission will exceed its powers and (2) an assumption that the states, the contract holders, and long established interior agencies of the United States will supinely submit to such unlawful action. The aggressive attitude of the states in asserting and defending their jurisdiction over the streams within their borders, the brilliant and bellicose assertion of their rights by the California contract holders, and the well known jealousy of the federal administrative agencies when a prospective infringement of prerogatives appears, all persuade quite conclusively that the Commission would be most unsuccessful if it were to attempt to extend its powers beyond those specifically authorized in the treaty.

The foregoing presentation is, of course, unnecessary to lawyers.

They all know that public officials are presumed to do their duty—and not either to exceed it or to neglect it. The presumption applies to the International Boundary Commission and to each commissioner.

In conclusion one further matter should be mentioned. The committee points out that the treaty is terminable only upon the joint consent of the two governments. Apparently the purpose of such statement is to raise doubt of the wisdom of the treaty making a division of the water in perpetuity. The purpose of the treaty is to define the Mexican right for all time and thus to remove the uncertainty which now threatens the security of every user within the United States of the water of the affected border streams. This threat would be ever present if the treaty were subject to periodic readjustment. As the upstream nation, the rights of the United States are effectively protected only by a permanent definition of rights. The United States is merely recognizing the same principle as is recognized by the states of the Union which have compacted between themselves in regard to the use of the water of interstate streams of the West.

The generality of the foregoing criticism of the resolution and report is required by the general nature of those documents. It is believed with confidence that a specific answer could be made to every specific factual situation or argument that could be advanced in their support.

Midwinter Meeting of Denver and Colorado Bar Associations

A joint midwinter meeting and institute of the Denver and Colorado Bar Associations was held at the Shirley-Savoy Hotel, Denver, on February 24, 1945, with 200 members of the associations in attendance. During the morning the Board of Governors and several committees of the Colorado Bar Association held meetings. At the noon luncheon Benjamin E. Sweet, president of the Colorado Bar Association, presided and introduced Milton J. Keegan, president of the Denver Bar Association, who introduced David A. Simmons, of Houston, president of the American Bar Association. Allen Moore, Chairman of the Legislative Committee of the Colorado Bar Association, presided over a panel discussion of the matters before the 35th General Assembly, and participated in by Senator Averill C. Johnson of Las Animas, Chairman of the Judiciary Committee of the Senate; Representative William Albion Carlson of Greeley, Chairman of the Judiciary Committee of the House; Senator Charles E. Blaine of Delta, Chairman of the Constitutional Amendments Committee of the Senate; Representative Clifford E. Morgan of Denver, Chairman of the Constitutional Amendments Committee of the House; William E. Hutton, Chairman of the Legislative Com-