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# LEGAL CONSIDERATIONS, INTERPRETATIONS AND PROJECTIONS OF MINUTE 242\*

JUAN BARONA LOBATO\*\*

Minute 242 can be considered from many angles, the technical, legal, political, and historical. Its many consequences and implications, which although separate, constitute a whole, may also be considered.<sup>1</sup>

In these remarks the writer intends to present a short explanation of the significance and capacity of the bilateral agreement between Mexico and the United States which is contained in Minute 242 of the International Boundary and Water Commission.<sup>2</sup> Also, he hopes to point out some of the implications and objectives of this agreement, which is the definitive and permanent solution to the international problem of the salinity of the water of the Colorado River which is sent to Mexico.

As you know, after more than a decade of studies, negotiations, and joint declarations at the highest levels, the International Boundary and Water Commission met in the office of the Chancellery of Foreign Relations in Mexico City. The objective of the meeting, which was held in compliance with the instructions which the commissioners of Mexico and the United States received from their respective governments, was the incorporation of the joint recommendations proposed by the negotiators and approved by the Presidents of Mexico and the United States into a Minute.

To understand the importance of this agreement, it is necessary to realize that the artificially-caused salinity of the water of the Colorado River delivered to Mexico since October 1961, has been a problem of the highest priority. It has occupied the attention of the Government and the people of Mexico in their relations with the United States from the time it began until this Minute was signed.

During the course of the negotiations the position of Mexico has been invariably based on the following principles:

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1. The concepts and opinions expressed herein do not in any manner represent the official position of the Mexican Government nor that of the Secretary of Foreign Affairs; rather, they are the personal opinions of the author.

2. Printed in this issue at p. 2.

- a. Compliance with the provisions of the Treaty of 1944;<sup>3</sup>
- b. Respect for the rights of coriparians in an international river basin as recognized and applied at national and international levels;
- c. Solid legal principles;
- d. The desire of the Mexican government to protect the rights and interests of those Mexicans directly affected in the Mexicali Valley.

The long-desired permanent and definitive solution to the international problem of the salinity of the water of the Colorado River took a practical and legal form of expression in Minute 242 on August 30, 1973.

The joint recommendations proposed by Licenciado Emilio O. Rabasa, Secretary of Foreign Relations in Mexico, and Ambassador Herbert Brownell, Special Representative of President Richard M. Nixon, were incorporated into this Minute of the International Boundary and Water Commission.

With this background, let us formulate some comments about the significance, success, and projections suggested by this Minute. Minute 242 of the Commission is a completely obligatory executive agreement, in accordance with the requirements established by the agreements which founded the Commission, and in order to be acceptable to the two governments. Actually, the approval of the two governments had been indicated by the formal diplomatic notes exchanged by the Secretary of Foreign Relations of Mexico and the Ambassador of the United States. This action took place immediately following the signing of the Minute by the Commissioners and their respective secretaries on August 30, 1973.

The agreement interprets and clarifies certain terms of the Treaty of 1944. The Treaty mentions these objectives in its own preamble in general terms: "considering that the utilization of these waters for . . . purposes [other than navigation] is desirable in the interests of both countries . . . in order to obtain the most complete and satisfactory utilization thereof. . . ." Later, Article 3 establishes and provides a hierarchy of intended uses for the waters of the Colorado River:<sup>4</sup>

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3. Treaty with Mexico Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Feb. 3, 1944, 59 Stat. 1219 (1945), T.S. No. 994 (effective Nov. 8, 1945) (Tratado con los Estados Unidos de América para la Distribución de Aguas Internacionales de los Ríos Bravo, Colorado y Tijuana, 3 de febrero de 1944, Diario Oficial, 30 de enero de 1946) [hereinafter cited as Water Treaty of 1944].

4. Water Treaty of 1944, art. 3: "In matters in which the Commission may be called upon to make provision for the joint use of international waters, the following order of preferences shall serve as a guide:

1. Domestic and municipal uses.

....

1. Domestic and municipal uses
2. Agriculture and stockraising
3. Electric power
4. Other industrial uses
5. Navigation
6. Fishing and hunting
7. Any other beneficial uses

These uses imply quality standards, particularly the first two and the last. Therefore, any unilateral action which impairs these beneficial uses results in a violation of the Treaty. After a careful examination of the water quality requirements of Mexico, the Treaty should be revised to include what has been carefully and precisely established as the maximum salinity acceptable for the uses established by the Treaty.

In this manner, Mexico, as the final recipient of the Lower Colorado River Basin water, would be assured not only a dependable volume of water for beneficial use in irrigating agriculture, or for other satisfactory and useful purposes, but also a dependable quality.

To insure the quality of water for the future, any possibility of ambiguity must be avoided, so that once a tolerable degree of salinity is determined, it may never be exceeded.

In Point 1 of the Minute an agreement was made to put an end to the regulations of the last provisional agreement of the Commission, Minute 241.<sup>5</sup> The two previous minutes dealing with the salinity problem, 218<sup>6</sup> and 241, contained transitory measures to alleviate the situation but not to resolve it. Minute 242, on the other hand, provides for definitive corrective measures with one exception we will point out.

One of these measures consists of an obligation by the United States to construct a concrete-lined extension of the Wellton-Mohawk drain, from Morelos Dam in the United States to the international boundary between Sonora and Arizona. Similarly, a reciprocal obligation of Mexico will be to complete this concrete-lined drain from the international boundary to the Santa Clara Slough in the Gulf of California. This will be at the expense of the United States, with a reciprocal grant by Mexico permitting the United States to

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7. Any other beneficial uses which may be determined by the Commission.

All of the foregoing uses shall be subject to any sanitary measures or works which may be mutually agreed upon by the two Governments, which hereby agree to give preferential attention to the solution of all border sanitation problems."

5. Minute 241, 67 Dep't of State Bull. 197-99 (Aug. 14, 1972).

6. Minute 218, 4 Int'l Legal Materials 545 (1965); 52 Dep't of State Bull. 555 (April 12, 1965).

discharge the saline drainage waters of the Wellton-Mohawk through this drain.<sup>7</sup>

In this same provision a most important condition is stipulated. This is a preventive measure to preclude the use of this drain for discharging contaminating residues other than salt. In effect, the disposal of radioactive materials or nuclear waste through this canal is prohibited. But, as a means of avoiding future difficulties, in addition to that stipulation, it is clearly implied that the only use of this canal will be for the discharge of saline drainage waters from the Wellton-Mohawk and other similarly contaminated sources. This Point goes even further by stipulating that the United States will not acquire navigation rights, nor any other easement or privilege incident to the drain.

Point Five of the Minute contains the compromise between the two governments which had the immediate effect of limiting the pumping of ground water in their respective territories within eight kilometers or five miles of the boundary between Sonora and Arizona near San Luis to a volume of 197,358 cubic meters, or 160,000 acre-feet a year.

In addition, Point Five provides that in the future Mexico and the United States will conclude an agreement in the general interest concerning the use of ground water in the frontier zone. This is a novel agreement, and one of great consequence. In the progressive doctrinal evolution of conventional international law, the formulation of laws concerning subsurface waters constitutes a novel proposition. These principles foresee that the future will be based, we believe, on analogous principles similar to those which regulate the basins of international rivers; that is, a just, equitable, reasonable, and beneficial distribution so that those who hold the rights to surface lands and waters will also be able to make good use of the underlying water supplies.

This provision also establishes the procedure of prior consultation as a means of avoiding future conflicts. Thus, Mexico and the United States, before undertaking any program which might have an adverse effect on the other country, whether it be the development of surface or groundwaters in the frontier region or a substantial modification of those programs which are now in operation, must hold consultations with the other government. If prior consultation does not take place, the offending project cannot be implemented. It is understood that these consultations will be held through the International

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7. Minute 242, § 4. Reprinted in this issue at p. 2.

Boundary and Water Commission, or through normal diplomatic channels.

It seems pertinent to point out that Minute 242 provides a practical solution to two delicate matters which confronted the negotiators. The first of these issues, which required great tact in its solution, concerned the recognition of the principle of legal responsibility of the state for illegal contamination caused by its citizens: in this case, the extraction of brackish ground water in the Wellton-Mohawk District which was then allowed to flow down the Colorado River where it caused extensive damage. The second matter concerned the consequences of that action, or whether reparations or compensation should be paid.

For many reasons which were predominantly of a political character as indicated by the United States negotiators, it was extremely difficult to make the United States acknowledge her responsibility for the pollution and the resultant damage. It should be noted that the United States position on the first issue was supported by its interpretation of the Treaty of 1944, which, in the opinion of the United States, did not specify the quality of the water which should have been sent to Mexico. On the second matter of reimbursement to Mexico, the United States negotiators all agreed that payment would imply a recognition of responsibility. Both difficulties were satisfactorily overcome by Minute 242. In effect, the Minute established the principle *sic utere tuo*<sup>8</sup> as part of the Treaty of 1944. With respect to compensation for the damage cause by the salt pollution, the United States found a form of escape in the three following measures. The United States agreed:

- a. To bear the cost of constructing a concrete-lined drain which would convey the runoff of Wellton-Mohawk from the boundary of Sonora and Arizona to the Santa Clara Slough in Mexican territory;<sup>9</sup>
- b. To use its influence to help Mexico obtain soft, long-term loans from international lending institutions for rehabilitation of the Mexicali Valley;<sup>10</sup> and,
- c. To provide "non-reimbursable assistance"<sup>11</sup> (an elegant way of saying that the United States will appropriate funds for the development of programs of rehabilitation, including tile drainage, which

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8. The legal maxim of *sic utere tuo ut alienum non laedas* means, "Use your own property in such a manner as not to injure that of another." Blacks Law Dictionary 1551 (Rev. 4th ed. 1968) citing E. Coke, Reports, pt. 9, at \*59; 1 W. Blackstone, Commentaries \*306. [Ed.]

9. Minute 242, § 4. Reprinted in this issue at p. 2.

10. *Id.* § 7.

11. *Id.*

will benefit those who were directly affected, the farmers of the Mexicali Valley).

As the Treaty of 1944 requires, Minute 242 contains a conditional clause, approved by both governments, which provides:

... that the provisions which are dependent for their implementation on the construction of works or on other measures which require expenditure of funds by the United States, shall become effective upon the notification by the United States to Mexico of the authorization by the United States Congress of said funds, which will be sought promptly.<sup>12</sup>

This conditional clause is perfectly understandable and is fully justified, since in all international compromises the contracting parties have to take into account their respective constitutional systems, divisions of power, distributions of authority, and even administrative organizations. In addition, the clause reiterates the principle agreed upon in the resolution of the Senate of the United States of April 18, 1945, in which the Senate ratified the Treaty of 1944.<sup>13</sup> This resolution contained the clarifications and interpretations relevant to that treaty, and, by the formal exchange of notes this resolution became incorporated in the Treaty by reference.

It is wise to acknowledge that, although this administrative agreement is not perfect, nonetheless it constitutes, from a pragmatic and legal point of view, the permanent and definitive solution to the problem of salinity and puts an end to the dispute about the quality of water which is sent to Mexico. Now the quality, as well as the volume and the uses of the water, must be in compliance with the Treaty.

In conclusion, permit me to formulate some brief comments on another subject. In reference to the chapter of international law relative to international rivers and their basins, it should be pointed out that Minute 242 establishes an important precedent. It is very probable that the principles established therein will be incorporated into other international agreements. Thus, once more Mexico and the United States, in addition to having resolved a bilateral problem in a satisfactory manner, will have succeeded in a greater achievement in the development of the law of humanity for the benefit of the International Community.

It is also worthwhile to mention that in the executive agreement contained in Minute 242 a matter appears which should be discussed

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12. *Id.* § 10.

13. 59 Stat. 1263.

in the context of the development of conventional international law, and should be conveniently put into codified form. This is the need for regulation of the rights to subsurface waters which exist in contiguous states for the equitable, reasonable, and useful advantage of all. This fits perfectly within a more amplified general context, the profound conviction that the patrimony of our planet should be equitably divided.