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MEXICO'S COMPLIANCE WITH THE 1994 WATER TREATY BETWEEN THE UNITED STATES AND MEXICO: A TEXAS PERSPECTIVE

JILL WARREN

INTRODUCTION

While the treaty between the United States and Mexico that governs the utilization of waters of the Colorado, Tijuana, and Rio Grande rivers ("Treaty of 1944") is an international treaty, Texans are a primary beneficiary of its terms and have a significant interest in its enforcement. Texans and their elected representatives are concerned that one party to the Treaty of 1944—the country of Mexico—is not abiding by its terms of the treaty and that the other party to the Treaty of 1944—the United States—has not been able to reach a diplomatic or legal resolution to Mexico's delinquencies.

South Texans depend on the water flows from Mexico to Texas that are mandated by the Treaty of 1944 to sustain its agricultural economy and to protect and preserve its ecology. The Texas economy and ecology are being placed at great risk by Mexico's failure to deliver at least 350,000 acre-feet of water to the United States each year, as required by the Treaty of 1944.

THE TREATY OF 1944 IS FAIR AND CLEAR

The Treaty of 1944 is fair in its obligations and clear in its application. The treaty equitably distributes between the United States and Mexico the waters of the Rio Grande River from Fort Quitman, Texas, to the Gulf of Mexico. The United States is required to transfer certain waters to Mexico and Mexico is required to transfer certain waters to Texas. This division of water employs a constant methodology

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1. This article is a transcription of a debate between Jill Warren, in her capacity as a private lawyer and interested Texas resident, and Ambassador Alberto Szekely, Special Adviser to the Minister of Foreign Affairs of Mexico and Transboundary Water Negotiator, at the United States-Mexico Law Institute 11th Annual Conference on September 20, 2002 in Santa Fe, New Mexico. The positions and arguments herein are those of the author and not necessarily those of elected or appointed officials in Texas.

2. An acre-foot is the volume of water that would cover one acre of land with water one foot deep, or 325,851 gallons. The International Boundary and Water Commission (IBWC) accounts for the international waters using metric measure. Using this system, one cubic meter is equivalent to 0.81071 acre-feet.

3. Treaty of 1944, supra note 1, at art. 4.

4. The Rio Grande River is also known as the Rio Bravo River in Mexico and is referred to as both the Rio Grande and Rio Bravo in the Treaty of 1944. See generally Treaty of 1944, supra note 1.

5. Treaty of 1944, supra note 1, at art. 4.

6. Id.
from year to year,\textsuperscript{7} and the treaty fairly and consistently allocates to each party a portion of water from many sources so that we may plan for release well in advance.

The United States and Mexico’s obligations under these provisions are so fair and clear that the parties were able to plan for releases and abide by the terms of the Treaty of 1944 for each five-year cycle beginning in 1968 and continuing through 1992.\textsuperscript{8}

\textbf{THE UNITED STATES HAS CONSISTENTLY MET ITS TREATY OBLIGATIONS; MEXICO HAS NOT}

For the life of the treaty, the United States has remained current in its obligations to Mexico to release waters required by the treaty, but since 1992, Mexico has accumulated a 1.476 million acre-feet deficit in its obligations under the treaty.\textsuperscript{9} The debt emanates from the treaty provision that requires Mexico to allocate to the United States at least 350,000 acre-feet per year from the Rio Conchos.\textsuperscript{10} Due to the accumulation of this debt over the last decade, South Texas is lacking 482.5 billion gallons of water that it has planned to use for farming, municipal uses, and to keep the ecology of the Rio Grande healthy and safe.\textsuperscript{11}

\textbf{THE HARM CAUSED BY MEXICO’S BREACH}

Mexico’s refusal to pay its water debt to the United States and to adequately address the root causes of the debt accrual has resulted in the critical reduction of agriculture production and severe financial losses to the farmers in the lower Rio Grande Valley of Texas. The Valley has lost 30,000 jobs since 1992, with an estimated 1,720 Texas farmers losing $11 million in crop sales per year.\textsuperscript{12} A Texas A&M University study revealed a $1 billion loss over the last ten years to the Rio Grande Valley as a result of the water debt, and the Texas Comptroller of Public Accounts reports that in 2002 South Texas would have gained 3,000 jobs and $80 million in personal income if Mexico had delivered the water required by the treaty.\textsuperscript{13} Crops cannot be planted, citrus trees are being plowed up, and farmers are losing their land and going bankrupt.

At the same time, Mexico has increased the total acreage under irrigation and replaced its typical crops of grains, soybeans, and cotton with more profitable crops of alfalfa, melons, fruits, and nuts, which are more water-intensive crops than

\textsuperscript{7} Id.


\textsuperscript{9} Id. at Table 3.

\textsuperscript{10} Treaty of 1944, \textit{supra} note 1, at art. 4.

\textsuperscript{11} USIBWC Report, \textit{supra} note 8, at Table 3.


previously produced in the state of Chihuahua. From 1995 to 1999, producers in Chihuahua have increased acreage under irrigation by more than 3% and are planting crops that use more water.

There is hard evidence that instead of paying the United States the water it owes, Mexico is expanding its irrigated acreage and planting more water-intensive crops. Mexico argues that it is using ground water rather than surface water for this expanded irrigation. However, that method is just as harmful to the United States as the use of surface water, because ground water irrigation will also reduce the flow of water from the Rio Conchos basin into the Rio Grande River. Thus, Mexico is holding water that rightfully belongs to Texas to expand its fields, while Texas farmers are going bankrupt and losing their land.

THE UNITED STATES' EFFORTS TO NEGOTIATE REPAYMENT AND LONG-TERM COMPLIANCE WITH THE TREATY

Since 1997, the United States section of the International Boundary and Water Commission (IBWC) has diplomatically urged Mexico to target its annual water obligation to the United States as a high national priority. Mexico has never adopted a system for making regularly scheduled payments to the United States in accordance with the treaty. Mexico’s treaty obligation is not currently a factor in its water use planning and strategy.

After a February 16, 2001, meeting between President George W. Bush and President Vicente Fox Quesada held in San Cristobal, Guanajuato, Minute No. 307 was adopted by the United States and Mexico sections of the IBWC. Under Minute 307, the United States and Mexico agreed to a framework of actions by Mexico committed to ensure that 600,000 acre-feet of water would be provided to the United States by September 30, 2001, based on runoff scenarios described in the agreement. Minute 307 also provided for continued discussions between the United States and Mexico, through the IBWC, to “develop additional measures that


15. Id.

16. Id. at 2, 4.

17. Id.


20. Id. at recommendation 2.
the Government of Mexico will undertake to cover the outstanding prior cycle deficit and on any other measures that they consider necessary concerning the last year of the current cycle" by December 2001. Finally, Minute 307 called for cooperation by the two governments concerning drought management and sustainable management of the Rio Grande basin from Fort Quitman to the Falcon Dam.

By February 2002, Mexico had paid only 427,000 acre-feet of the required 600,000 acre-feet under Minute 307. Therefore, the IBWC continued technical talks with Mexico seeking to gain Mexico’s compliance with Minute 307. President Bush raised the outstanding water deficit issue with President Fox during a March 22, 2002 meeting in Monterrey and urged Mexico to make immediate deliveries of water to the United States to begin satisfying the treaty obligation. Analysis by technical experts revealed that Mexico has enough water to comply with Minute 307, but simply refuses.

On May 20, 2002, President Fox and the Comisión Nacional de Agua (CNA) of Mexico announced another proposal to pay off its water debt to the United States within five years. The proposal called for Mexico to increase its annual water payment to the United States for the next five years, but the proposal did not detail how it would pay the deficit or from where it would draw the water. Specifics of the plan were promised by May 30, 2002, but were never provided to the United States.

Since the May 20, 2002, agreement never materialized, officials from the United States Department of State ("State Department") negotiated with Mexican officials Minute Order 308 on June 29, 2002. Under Minute 308, Mexico transferred 90,000 acre-feet of water to the United States, a mere 6% of its total debt of 1.5 million acre-feet. Both governments agreed to urge funding of agriculture and municipal water conservation projects in the Rio Grande basin, and the IBWC discussions will continue on Mexico’s water debt repayment from the last cycles.

**A Texas Team Effort**

Texans and their elected officials are rightfully frustrated by this course of events. The United States and Mexico reach agreements, but Mexico does not fulfill the terms of those agreements. The Texas leadership team is running a full-court press on officials of the United States and Mexico to attempt to force a solution to this
devastating problem. The Governor of Texas Rick Perry, the Texas Secretary of State Gwyn Shea, and the Texas Agriculture Commissioner Susan Combs have been vocal advocates for the State of Texas to the State Department, to Mexico, and to the media. The Texas Commission on Environmental Quality and the Texas Water Development Board, state agencies responsible for environmental protection and planning, have provided their technical expertise to state officials. Further, the Attorney General of Texas John Cornyn created the Rio Grande Water Rights Task Force, a legal team in his office to assess Texas rights and remedies for Mexico's treaty breaches. The legal task force shares information with Texas diplomatic leaders to ensure a coordinated response.

**PRESIDENT FOX’S EFFORTS TO ADVANCE THE DEBATE**

Recently, Mexican President Vicente Fox Quesada announced he would invest $2.2 billion annually in new infrastructure and other measures to update Mexico's water supply network and stem growing disputes over shrinking water supplies. President Fox said the new investment would focus on water works in the border region. Specifically, he wants to build more efficient water lines and treatment plants to use Mexico's water more efficiently. He pledged to boost the amount of wastewater Mexico treats and reuses from one-third to two-thirds by the year 2006. President Fox also suggested, based on the fact that most Mexican farmers currently do not pay for the water they use, that customers should be charged a realistic price for water and should be required to become more efficient.

Mexico's current level of government investment in water infrastructure and efficiency measure is about $1.3 billion annually. President Fox has stated that he will attempt to acquire the additional $900,000 needed to get to $2.2 billion in investment with credits or grants from international agencies, such as the North American Development Bank. President Fox has acknowledged, "For many years, we have irrationally abused our natural resources. Now is the time to stop and reverse this trend." Improved infrastructure to reduce waste, improve wastewater treatment and reuse programs, as well as introducing the market principle of fair payment to encourage efficiency, are laudable efforts that should be employed on both sides of the border. If President Fox implements this $2.2 billion per year plan, the situation will improve over the long term. However, Texans must still demand that Mexico comply with the requirements of the Treaty of 1944 on an ongoing basis by making...
regularly scheduled water releases, paying its past debt, and keeping current on its treaty obligations.

TEXANS HIGH AND DRY AT THE END OF ANOTHER FIVE-YEAR TREATY CYCLE

On October 2, 2002, a second five-year cycle of the Treaty of 1944 will expire with Mexico in breach of its obligations under the Treaty. As previously discussed, the 350,000 acre-feet per year water payment requirement operates in five-year cycles. In each five-year cycle, Mexico must release an average of 350,000 acre-feet per year for a total of 1.75 million acre-feet over the complete cycle. Mexico incurred a deficit in these deliveries during the 1992 to 1997 five-year cycle. According to the Treaty of 1944, that deficit must be repaid in the next five-year cycle, in addition to water payments required to keep current on its obligations during the current five-year cycle. Absent a payment of almost 1.5 million acre-feet of water by Mexico to the United States, Mexico will have failed to repay the past cycle debt and will be in default of the treaty.

As the critical deadline approaches, Mexican officials have taken the troubling stance that they can continue to roll over that debt to new five-year cycles indefinitely. Nothing in the treaty or any subsequent Minute Order supports this theory. In fact, the plain language of the Treaty of 1944 and Minute No. 234 make clear that "deficiency in a cycle of five consecutive years from the said tributaries shall be made up in the following five-year cycle, together with any quantity of water which is needed to avoid a deficiency in the aforesaid following cycle ...." Mexico's treaty obligation is unambiguous: the deficit water must be paid by October 2, 2002. The State Department must use all of the arrows in its quiver to protect the Texas victims of Mexico's lapses. When Mexico argues that it does not have water to give, the United States must challenge that assertion with sound data to the contrary and develop a remedy to compensate Texans who are suffering at Mexico's hands.

CONCLUSION

Texans consider Mexico a friend and ally. Today, the United States enjoys unprecedented levels of friendship and cooperation with Mexico. Mexican President Vicente Fox Quesada should be commended for his diligent and committed effort in contributing to the strong relationships Mexico and the United States currently share. Yet, even the American Ambassador to Mexico Jeffrey Davidow stated that Mexico is not fulfilling its obligations under the Treaty of

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41. Treaty of 1944, supra note 1, at art. 4.
42. Id.
43. USIBWC Report, supra note 8, at Table 3.
44. Treaty of 1944, supra note 1, at art. 4.
He warned that Mexico’s deficit was causing significant problems for farmers in Texas.

While this is primarily a South Texas and a border region issue, it deserves the attention of all Texans including Texas’ elected leaders. Texas leaders have an obligation to apply pressure on Mexico in every way reasonably possible to ensure that Texas interests are fully represented before the IBWC and in all State Department negotiations. The South Texas and border regions are critically dependent on the Rio Grande for adequate water supplies, especially when nature fails to supply the necessary rainfall. The present water transfer shortfall is causing hardship for area farmers, citrus growers, and other water users, pushing them into economic distress and even bankruptcy.

The United States’ friendship with Mexico calls for an answer that is diplomatic, but Texans call for an answer that is swift. All parties involved must be committed to helping to deliver both.
