

PRESENTED AT
2015 Texas Water Law Institute

October 29-30, 2015
Radisson Hotel and Suites, Austin, TX

Case Law Update

Emily Willms Rogers

Claudia Russell

Author Contact Information:

Emily Willms Rogers &
Claudia Russell
Bickerstaff Heath Delgado Acosta LLP
3711 S. MoPac Expressway
Bld. 1, Suite 300
erogers@bickerstaff.com
crussell@bickerstaff.com
512-472-8021

Case Law Update

This case law update provides information about litigation that has occurred or is occurring around the state and before the Texas Commission on Environmental Quality (TCEQ) and the Public Utility Commission of Texas (PUC). These cases cover topics related to surface and groundwater rights, water and sewer utility matters, ratemaking proceedings, water quality permitting matters, questions of standing, issues regarding flooding, and open meetings and open records. The information in this paper is intended to provide a brief explanation of the case or dispute and information about any decision that may have been reached. Many of the cases listed in this summary are still pending or are the subject of on-going appeals.

Surface Water Cases:

***Kansas v. Nebraska*, 135 S.Ct. 1042 (2015).**

Kansas, Nebraska, and Colorado entered into the Republican River Compact, which was approved in 1943, to apportion the “virgin water originating in” the Republican River Basin. In 1998, Kansas filed an original petition with the United States Supreme Court contending that Nebraska’s increased groundwater pumping was subject to regulation by the Compact to the extent that it depleted stream flow in the basin. The Court agreed and the parties negotiated a settlement in 2002. In 2007, following the first post-Settlement accounting period, Kansas petitioned the Supreme Court for monetary and injunctive relief claiming that Nebraska had substantially exceeded its water allocation. Nebraska requested an amendment to a portion of the settlement agreement so that “allocations of water will faithfully reflect the parties’ intent expressed in the settlement agreement and Compact.” The matter was referred to a special master who recommended for Kansas a partial disgorgement but no injunction and for Nebraska a reform to the settlement agreement.

The Supreme Court agreed and held: (1) Nebraska knowingly exposed Kansas to a substantial risk of receiving less water than provided for in the Compact, and thus knowingly failed to comply with the obligations of the settlement agreement; (2) the order requiring Nebraska to disgorge \$1.8 million for Nebraska’s additional gain from its breach of the Compact was a fair and equitable remedy; (3) Kansas was not entitled to an injunction ordering Nebraska to comply with the Compact and settlement agreement; and (4) the settlement agreement’s accounting procedures could be amended to ensure that Nebraska’s consumption of imported water from outside the Republican River basin would not count toward its allotment under the Compact.

***Texas v. New Mexico*, Original No. 141.**

On January 24, 2014, the United States Supreme Court granted the State of Texas’ motion for leave to file a bill of complaint. Texas complains that the State of New Mexico has depleted Texas’ equitable appointment of water under the Rio Grande Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically

connected to the Rio Grande downstream of Elephant Butte Reservoir. By allowing New Mexico water users to intercept surface water and hydrologically connected groundwater below Elephant Butte in excess of what is allowed under the Compact, deliveries to Texas cannot be assured, and such uses have diminished Rio Grande Project return flows and decreased water available to Rio Grande Project beneficiaries, to the detriment of Texas.

On March 31, 2014, the Court granted the United States' motion for leave to intervene as a plaintiff. In its motion, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact including: (1) the United States' ability to set diversion allocations for the Rio Grande Project under the 2008 Operating Agreement; (2) the U.S.'s interest in ensuring that New Mexico water users who do not have contracts or authorizations with the Department of the Interior do not intercept Project water or otherwise interfere with the delivery of the water to the Project beneficiaries; and (3) the U.S.'s interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligations.

New Mexico filed a motion to dismiss Texas' complaint and the United States' complaint in intervention on April 30, 2014. The Court appointed A. Gregory Grimsal, Esquire, of New Orleans, Louisiana, as Special Master on November 3, 2014. Oral arguments on New Mexico's motion and the responses to the motion were heard by the Special Master on August 19, 2015.

***The Aransas Project v. Shaw*, 775 F.3d 641 (2014).**

The Aransas Project Case is a suit brought against the TCEQ alleging that the agency's management of water rights and freshwater inflows into the bays caused a take of the endangered whooping crane. On December 15, 2014, the Fifth Circuit Court of Appeals issued a revised opinion in *The Aransas Project v. Shaw* case, superseding its June 2014 opinion. See *The Aransas Project v. Shaw*, 775 F.3d 641 (5th Cir. 2014). The Fifth Circuit reversed the trial court's decision holding that the agency's issuance and administration of water rights did not foreseeably and proximately cause deaths of whooping cranes. *Id.* The Aransas Project filed its petition for a writ of certiorari with the United States Supreme Court on May 16, 2015. On June 22, 2015, the United States Supreme Court denied the petition. See *The Aransas Project v. Shaw*, 135 S.Ct. 2859 (Mem.) (2015).

***Guadalupe-Blanco River Auth. v. Texas Attorney General*, 2015 WL 868871 (Tex. App. – Austin 2015, pet. filed) (mem. op., not designated for publication).**

The Guadalupe-Blanco River Authority (GBRA) filed a suit under the Expedited Declaratory Judgment Act (Act) alleging that the San Antonio Water System (SAWS) improperly filed an application with the TCEQ that would significantly diminish the amount of water available for GBRA's water project in the Lower Guadalupe River Basin by allowing SAWS to reuse effluent that it had previously discharged and used. GBRA claimed that SAWS application creates a cloud over the revenue pledge made by GBRA

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First appeared as part of the conference materials for the
2015 Texas Water Law Institute session

"Case Law Update"