No. 109, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF OKLAHOMA and
STATE OF TEXAS,
Plaintiffs,

v.

STATE OF NEW MEXICO,
Defendant.

NEW MEXICO'S BRIEF IN OPPOSITION TO THE OKLAHOMA AND TEXAS MOTION FOR LEAVE TO FILE COMPLAINT

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On April 16, 1987, the State of New Mexico was served copies of the Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion filed by the State of Oklahoma and the State of Texas. New Mexico submits this brief in opposition to the motion pursuant to Supreme Court Rule 9.5. New Mexico received a ten-day extension of time to file a response, so that this brief is timely.

SUMMARY OF ARGUMENT

New Mexico opposes the motion because there is no actual controversy between the states to invoke the Court's jurisdiction under Article III of the Constitution and 28 U.S.C. § 1251(a)(1) (1982). There is no actual or threatened impairment of the rights of Oklahoma and Texas, but merely the assumed, possible invasion of such rights. The Supreme Court should not issue a declaratory decree on technical questions, such as the meaning of terms in the Canadian River Compact, 66 Stat. 74 (1952). New Mexico has not violated the Compact; consequently, there is no controversy between the states that needs resolution, and litigation is unnecessary.

Oklahoma and Texas assert that New Mexico's violation of the Canadian River Compact has caused direct and irreparable harm. They further state that the violation has impaired substantially the yield of Lake Meredith in Texas and its ability to supply drinking water and other municipal and industrial requirements. Brief in Support of the Oklahoma and Texas Motion for Leave to File Complaint (Oklahoma-Texas Brief) at 23-24, 29-31.[1]

New Mexico could not have violated the Compact, under any interpretation of the Compact, before the enlargement of Ute Reservoir in 1984. After the enlargement, there could have

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[1] Oklahoma and Texas allege that New Mexico's "violation" of the Compact contributed to a reduction in the flow of the Canadian River into Oklahoma from 591 to 84 cubic feet per second. Given that New Mexico had never stored in reservoirs in the drainage basin below Conchas Dam more than 183,300 acre-feet of water from *all* sources as of the date Oklahoma and Texas filed their complaint and motion, the allegation is without foundation because the Compact could not have been violated.

been a violation of the Compact only if the New Mexico Interstate Stream Commission, the state agency authorized to construct and manage the dam, had ignored the criteria which that agency had adopted for the dam's operation so as to ensure compliance with the Compact. It did not do so, as shown below.

STATEMENT OF FACTS

Oklahoma and Texas assert that New Mexico has violated the Canadian River Compact by: (1) having storage capacity in excess of 200,000 acre-feet available in the drainage basin of the Canadian River below Conchas Dam in New Mexico, Oklahoma-Texas Brief at 27; (2) having a sediment control pool at Ute Reservoir that is not dedicated solely to sediment control, Oklahoma-Texas Brief at 26-27; and (3) threatening to build and use additional reservoirs on the Canadian River, Oklahoma-Texas Brief at 28.

The following facts are salient. The New Mexico Legislature authorized the construction of Ute Dam and Reservoir in 1957. The initial stage was completed in 1963 with a reservoir capacity of 109,600 acre-feet. In 1984 the reservoir was enlarged to a total capacity of 272,800 acre-feet. The current capacity to store water is estimated to be 246,600 acre-feet. The remainder, at least 26,200 acre-feet, is filled by sediment.[2] Currently, New Mexico is storing in Ute Reservoir an estimated 180,900 acre-feet of water originating above Conchas Dam. The maximum amount of water originating in the Canadian River basin below Conchas Dam stored in all reservoirs below the dam in New Mexico is estimated to have been 121,400 acre-feet, occurring on March 6, 1987. The amounts of water actually stored in Ute Reservoir since 1963 are set forth in Appendix A.

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[2] *See infra* note 8.

1. Conservation Storage Capacity in Excess of 200,000 Acre-Feet Is Authorized by the Compact

Oklahoma and Texas argue that New Mexico is in violation of the Compact by having storage capacity in excess of 200,000 acre-feet available for conservation storage. Two Compact provisions specifically allow New Mexico to maintain conservation storage capacity in excess of 200,000 acre-feet.

Article IV(a) of the Compact[3] allows the use of conservation storage capacity in excess of 200,000 acre-feet in Ute Reservoir for the storage of water originating *above* Conchas Dam. On May 16, 1987, with an estimated 180,900 acre-feet of water that had spilled or been released from Conchas Dam in storage in Ute Reservoir, the inflow of water originating above and below Conchas Dam resulted in an uncontrolled spill from Ute Reservoir, even though the outlet gates had been opened fully for five weeks. The total amount of water originating in the Canadian River basin below Conchas Dam stored in Ute Reservoir has been estimated to be only about 65,700 acre-feet on May 16, 1987. Appendix B is a chart setting out the content of Ute Reservoir on relevant dates. A schematic representation of Ute Reservoir content as it relates to the operating criteria for the reservoir is attached as Appendix C.

Article VII of the Compact[4] clearly contemplates that New Mexico is entitled to have more than 200,000 acre-feet of

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[3] Article IV(a) states:
"New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River above Conchas Dam."

[4] Article VII states:
"The commission may permit New Mexico to impound more water than the amount set forth in Article IV and may permit Texas to impound more water than the amount set forth in Article V; provided, that no state shall thereby be deprived of water needed for beneficial use; provided further that each such permission shall be for a limited period

(Cont. on p. 5)

conservation storage capacity for waters originating below Conchas Dam to take advantage of Canadian River Commission permission to impound more water than the amount set forth in Article IV. Article VII would be meaningless if New Mexico is not allowed to have storage capacity available to take advantage of Article VII's provisions.

2. The Ute Reservoir Sediment Control Pool Is Not Conservation Storage Under the Compact

Oklahoma and Texas contend because New Mexico allows recreation on the pool of water at Ute Reservoir dedicated to sediment control, that pool of water is "conservation storage" for the reason it is not used solely for sediment control. Oklahoma-Texas Brief at 26-27.[5]

Oklahoma and Texas fail to consider how New Mexico has addressed sediment control at Ute Reservoir. It is important to understand the operating criteria which the Interstate Stream Commission first adopted for the operation of Ute Reservoir in 1984. These criteria were updated in 1985. The 1984 and 1985 criteria were furnished to the Canadian River Commission.

In designing works such as the Ute Dam and Reservoir, the usual first step is to determine the practicable storage capacity at the site selected. In the course of design development, the

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[4] (Cont. from p. 4)

not exceeding twelve (12) months; and provided further that no state or user of water within any state shall thereby acquire any right to the continued use of any such quantity of water so permitted to be impounded."

[5] The fact that Ute Reservoir is storing at least an estimated 180,900 acre-feet of water originating above Conchas Dam makes the Oklahoma and Texas argument on this point moot. *See* page 4 *supra.* The merits of the argument by Oklahoma and Texas are addressed here.

storage space is allocated to various functions. Dead storage capacity is that capacity below the outlet works or the pumping plants to be used to take water from the reservoir. Inactive storage capacity is that capacity established by operating criteria below which no water will be released or withdrawn from storage. The average annual sediment inflow is estimated and a capacity adequate for 50 to 100 years of sediment inflow usually is allocated for sediment control. A part of the sediment control capacity is designated "inactive," creating a minimum pool of water to enhance sediment retention. This improves downstream channel conditions and provides reasonably silt-free water for domestic, municipal and industrial uses. The latter purpose is particularly important where water is to be withdrawn from the reservoir for those uses by pumping plants, as is the case at Ute Reservoir.[6]

Operating criteria usually are formulated to control storage space allocation. The rules formulated for Ute Reservoir in 1984 and revised in 1985 ensure against any violation of Article IV(b) of the Canadian River Compact.[7] In 1984, the total capacity of Ute Reservoir was 272,800 acre-feet. The operating criteria for Ute Reservoir establish a sediment control pool at elevation 3741.6 feet above sea level to desilt water for domestic, municipal, irrigation and industrial uses. In 1984, the reservoir's capacity to store water above the sediment control pool at elevation 3741.6 was 210,600 acre-feet. Under

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[6] Space also may be allocated to flood control based on projected flood flows and the downstream need for flood protection. No space in the Ute Reservoir is allocated for flood control.

[7] Article IV(b) states:

"New Mexico shall have free and unrestricted use of all waters originating in the drainage basin of Canadian River in New Mexico below Conchas Dam, provided that the amount of conservation storage in New Mexico available for impounding these waters which originate in the drainage basin of Canadian River below Conchas Dam shall be limited to an aggregate of two hundred thousand (200,000) acre-feet."

the Ute Reservoir operating criteria the maximum conservation storage capacity in Ute Reservoir after enlargement was and is never more than 197,700 acre-feet. This results in a difference of 12,900 acre-feet from the reservoir's total capacity to store water above the sediment control pool. Based upon the average inflow for the 1939-83 period, the 12,900 acre-feet of space will be filled by sediment deposition by about 1995. It would have been unreasonable for New Mexico not to include capacity for future sediment deposition in Ute Reservoir up to the practicable storage limitation of the site.

The capacity of Ute Reservoir below elevation 3741.6 is 49,900 acre-feet. Of that capacity, an estimated 13,900 acre-feet was occupied by sediment at the end of 1983, leaving a sediment control pool of 36,000 acre-feet at that time.[8] The volume of the sediment control pool is not accountable as a part of conservation storage because it is not *available* under the operating criteria for release for "domestic, municipal, irrigation and industrial uses," or any other uses. Compact Article II(d).[9] Storage for sediment control is expressly excluded from the definition of conservation storage. *Id.* Because recreation is allowed on the sediment control pool, Oklahoma and Texas contend that the capacity below that level must be accounted as conservation storage. New Mexico could meet this contention by simply raising the outlet works and installing

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[8] Sediment in Ute Reservoir above elevation 3741.6 occupied 12,300 acre-feet of the capacity of the reservoir at the end of 1983. Total sediment in the reservoir at that time occupied 26,200 acre-feet of the capacity.

[9] Article II(d) states:
"The term 'conservation storage' means that portion of the capacity of reservoirs available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses, or any of them, and it excludes any portion of the capacity of reservoirs allocated solely to flood control, power production and sediment control, or any of them."

any future pumping plant at a level above the minimum or sediment control pool. But their contention is without merit given the terms of the Compact and invites no subterfuge.

Because the purpose of storage below elevation 3741.6 is for sediment control, and the water stored is not available for release, recreational and fish and wildlife uses of water below that elevation do not change sediment control storage into conservation storage. The fallacy of the Oklahoma and Texas position is made clear by comparing incidental recreational use of a minimum power pool or a flood control pool. Such use clearly would not change the character of that storage. Because "conservation storage" can be limited by operating criteria, New Mexico is in compliance with the Compact unless and until those criteria are ignored.

3. Other Reservoirs Below Conchas Dam Pose No Violation of the Compact

There are eleven reservoirs, other than Ute Reservoir, within the drainage basin of the Canadian River below Conchas Dam with capacities greater than 100 acre-feet. Eight reservoirs with a total capacity of approximately 2,300 acre-feet make water available for release for irrigation use. Three reservoirs are maintained to their maximum controlled capacity of approximately 4,500 acre-feet for recreation, fish and wildlife, and stock watering purposes.

Because the capacities of the first eight reservoirs noted above constitute "conservation storage" as defined by the Compact, New Mexico's operating criteria provide that no more than 197,700 (200,000 – 2,300) acre-feet of the capacity of Ute Reservoir may be allocated to conservation storage. Factually, no portion of the capacities of the three remaining reservoirs is available for the storage of water for subsequent release for domestic, municipal, irrigation and industrial uses.

On the other hand, it cannot be said that any portion of the capacity of these three reservoirs is allocated solely to flood control, power production, or sediment control. These facts lead to the conclusion that there is a hiatus in the Compact definition of "conservation storage" that results in no part of the capacity of the three reservoirs falling within the definition of conservation storage and no part of the capacity of those reservoirs that is specifically excluded from that definition. Because the present magnitude of the storage capacity involved would be so small after deducting the volumes of sediment deposited, whether the remaining capacity should be accounted as conservation storage is of little moment.

Oklahoma and Texas assert that New Mexico is threatening to build additional reservoirs with resultant harm to Texas and Oklahoma. Oklahoma-Texas Brief at 28. This allegation is based on a 1986 Notice of Intention to Make Formal Application for Permit filed by the Interstate Stream Commission for waters of the Canadian River below Conchas Dam. The Notice of Intention cannot be construed to indicate an intention to develop conservation storage for waters originating below Conchas Dam in excess of the 200,000 acre-feet authorized by the Compact. With average water supply, by about 1995, sediment deposition will take up so much of the storage capacity of Ute Reservoir that it would be physically impossible for New Mexico to have more than 197,700 acre-feet of storage capacity above the minimum or sediment control pool. The notice does reserve to the Interstate Stream Commission the right to develop additional conservation storage, as necessary, to offset sediment deposition. New Mexico currently has no plans to proceed with development under the notice, or funds to develop such plans.

ARGUMENT

The original jurisdiction of the Supreme Court should be invoked sparingly and the Court is obligated to exercise it only in appropriate cases. A state must have a serious claim necessary for its protection. *Arizona v. New Mexico,* 425 U.S. 794, 796-97 (1976); *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972). *See also Massachusetts v. Missouri,* 308 U.S. 1, 15 (1939). The Court cannot issue declaratory decrees. An original action may be dismissed if it is based not on any "actual or threatened impairment" of a right but upon "assumed potential invasions" of a right. If there is no allegation of definite physical acts which are interfering or will interfere with a state's right to make further appropriations of water, the complaint should be dismissed without prejudice. *Arizona v. California,* 283 U.S. 423, 462-64 (1931). *De minimis non curat lex.*

New Mexico has never stored more than 200,000 acre-feet of water originating in the Canadian River basin below Conchas Dam. New Mexico has adopted operating criteria for Ute Reservoir which prohibit its "conservation storage" of more than 197,700 acre-feet for water originating below Conchas Dam. In fact, New Mexico is now storing at least 180,900 acre-feet of water originating above Conchas Dam at Ute Reservoir. Given these facts, the issues raised by Oklahoma and Texas are without merit. *See Alabama v. Texas,* 347 U.S. 272 (1954).

CONCLUSION

For all the above reasons, New Mexico requests the Court either to deny without prejudice the Oklahoma and Texas Motion for Leave to File Complaint or to order Oklahoma

and Texas to make a more definite statement in their complaint on the nature and extent of any alleged past, present or future injury to their rights under the Canadian River Compact.

Respectfully submitted,

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June 25, 1987

MONTH END RESERVOIR CONTENTS

UTE RESERVOIR

UNITS = ACRE-FEET

	TOTAL STORAGE											
YEAR	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1963					7,530	10,250	11,750	23,150	25,500	24,940	24,520	24,100
1964	24,100	24,520	24,520	23,970	24,520	23,420	22,620	23,970	32,380	31,200	30,700	30,700
1965	30,370	30,050	30,530	29,410	33,600	68,790	83,050	109,200	105,500	90,510	87,260	86,550
1966	86,190	86,550	85,490	84,430	83,050	90,880	95,340	110,000 *	107,900	105,500	104,300	103,100
1967	102,300	101,500	100,300	98,400	103,100	109,200	109,600	109,200	109,200	100,300	96,100	95,720
1968	95,340	94,970	94,590	94,210	92,720	91,240	93,470	99,560	98,020	97,250	95,720	94,970
1969	94,210	94,210	93,090	92,350	102,700	109,200	109,600	110,000 *	106,300	99,170	100,300	100,300
1970	100,700	100,300	99,950	103,100	101,900	99,950	101,300	97,630	97,630	96,100	94,970	94,210
1971	93,090	92,720	92,350	91,980	98,020	98,400	99,170	98,020	96,480	95,720	96,480	96,100
1972	95,720	94,590	93,470	91,980	90,880	90,140	106,300	109,600	100,300	99,170	99,560	99,560
1973	99,170	99,170	99,170	100,700	99,950	99,170	102,300	99,170	98,400	97,630	94,970	93,840
1974	94,590	93,910	92,910	91,430	89,560	87,220	85,420	86,300	87,690	90,950	89,560	89,200
1975	89,240	89,340	88,690	87,400	86,330	89,020	93,170	92,910	91,980	89,850	88,870	88,330
1976	87,620	87,290	85,350	84,850	83,770	83,670	89,560	88,010	91,350	89,490	88,480	87,720
1977	70,750	70,590	69,270	74,360	82,850	82,010	81,070	85,460	79,580	77,930	76,540	75,360
1978	75,000	74,800	74,190	72,430	71,820	78,300	77,070	75,270	73,390	71,540	77,530	76,800
1979	76,700	76,740	76,110	75,790	81,380	82,280	84,180	91,010 *	89,640	87,800	83,000	82,420
1980	78,970	69,550	68,870	69,600	74,390	73,070	71,030	73,360	76,940	75,530	75,040	74,550
1981	74,190	73,810	73,290	68,400	68,220	66,800	67,630	89,070	83,720	82,600	81,900	81,310
1982	80,900	80,630	79,850	78,600	82,940	91,600 *	93,560 *	85,570	71,030	62,720	45,800	41,860
1983	39,720	39,100	39,480	36,900	37,080	37,920	36,420	35,170	34,560	34,720	33,530	33,610
1984	32,500	32,370	32,200	31,940	31,400	32,780	32,690	41,050	40,340	42,600	43,000	43,600
1985	43,700	44,000	45,700	46,100	49,900	51,000	49,600	52,800	52,700	75,770	75,430	75,080
1986	76,460	77,150	76,810	76,120	75,770	88,430	86,180	86,920	94,240	95,430	108,420	108,860
1987	111,090	120,890	162,270	205,310	248,200 *							
MEAN	77,193	77,031	78,269	79,573	80,063	76,448	78,420	82,183	81,032	79,768	78,833	78,244

* RESERVOIR WAS SPILLING

NOTE: AREA-CAPACITY TABLE DATED DECEMBER 1963 IN EFFECT FROM JANUARY 1963 THROUGH DECEMBER 1976.
(TOTAL STORAGE CAPACITY AT SPILLWAY CREST 109,600 AF)
AREA-CAPACITY TABLE BASED ON DECEMBER 1975-JANUARY 1976 RESURVEY IN EFFECT FROM JANUARY 1977 THROUGH DECEMBER 1983.
(TOTAL STORAGE CAPACITY AT SPILLWAY CREST 90,500 AF)
AREA-CAPACITY TABLE BASED ON 1983 RESURVEY IN EFFECT FROM JANUARY 1984 THROUGH THE PRESENT.
(TOTAL STORAGE CAPACITY AT SPILLWAY CREST 246,600 AF)

APPENDIX A

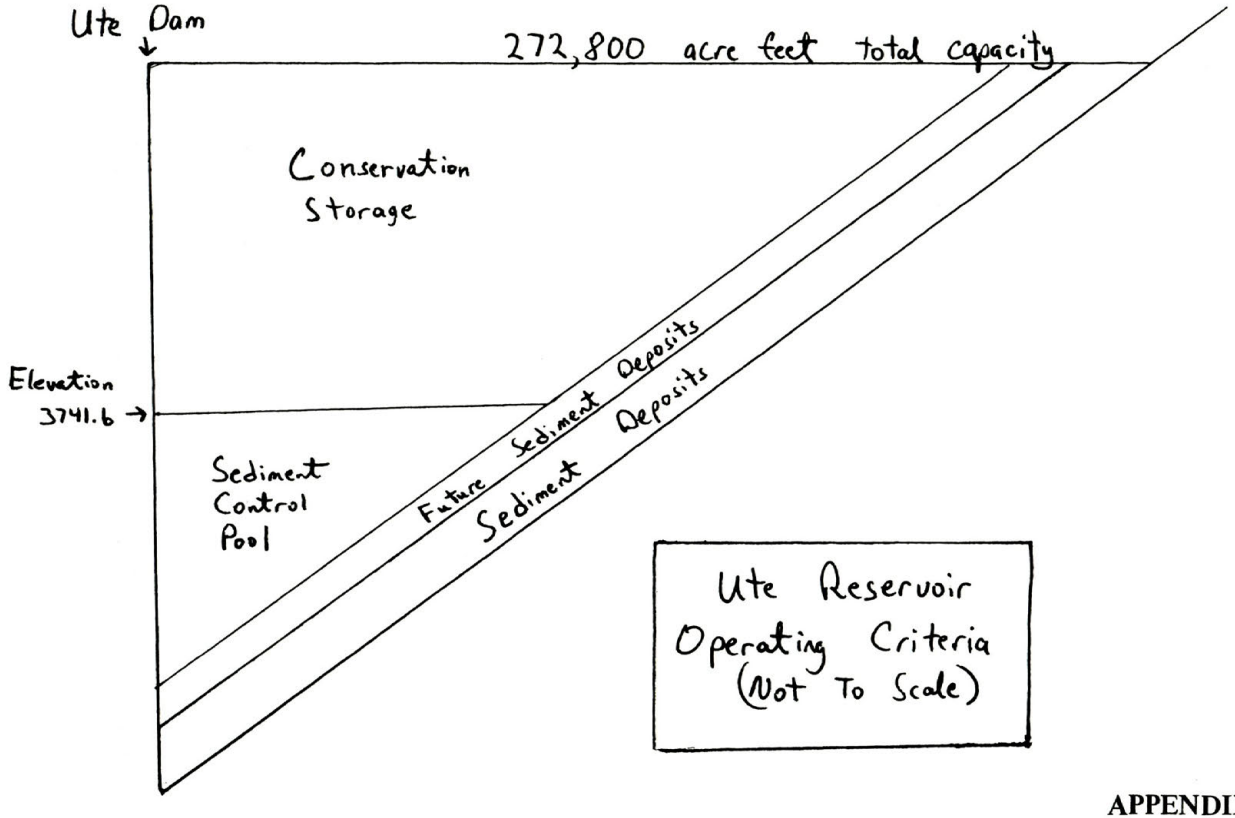
UTE RESERVOIR

Date	Remarks	Ute Reservoir Content*		
		Total	Water Originating Above Conchas	Water Originating Below Conchas
Feb. 6, 1987	Conchas Reservoir fills, spill & release commence	112,500	0	112,500
March 6	Maximum storage of water originating below Conchas	126,400	11,800	114,600
April 8	Release from Ute Reservoir begun	172,400	59,000	113,400
April 16	Date of Texas and Oklahoma Complaint	176,500	71,900	104,600
May 16	Ute Reservoir spills	246,600	180,900	65,700

* Includes water below elevation 3741.6.

NOTE: All data are either estimated or provisional.

APPENDIX B


Ute Dam
272,800 acre feet total capacity
Conservation Storage
Elevation 3741.6
Sediment Control Pool
Future Sediment Deposits
Sediment Deposits
Ute Reservoir Operating Criteria (Not To Scale)

APPENDIX C