FILE COPY

No. 65, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF TEXAS,
Plaintiff

v.

STATE OF NEW MEXICO,
Defendant

UNITED STATES OF AMERICA,
Intervenor

NEW MEXICO'S REPLY TO TEXAS' AND THE UNITED STATES' EXCEPTIONS AND BRIEFS IN SUPPORT OF EXCEPTIONS TO THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER.

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TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

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INTRODUCTION

Texas, in her exceptions and brief, supports the Master's recommendation that the Court add a third party tie-breaker to the Pecos River Commission. Alternatively, Texas argues that the Court may make the Commission's decisions on methods and

findings under the Compact. The United States excepts to the Master's recommendation that the Court appoint a tie-breaker to the Commission, but argues that the Court may make certain Commission findings. [1]

Their arguments focus on the lack of Commission action since Texas repudiated the Commission findings and began this lawsuit. Texas and the United States are, however, fixing on the wrong period and therefore proposing the wrong solutions. They should be concerned with the Commission findings that precipitated this lawsuit. The Commission's inaction pending resolution of the dispute is not the problem; it is the result of the problem. The solution is not the introduction of a third decision-maker to make findings to fill the gap, but rather judicial review of the Commission findings that Texas repudiated, causing the gap.

Until recently, the Commission's findings have been the focus of this case. The Commission's adoption of the Review of Basic Data has been the subject of the last eight years of litigation. Texas began this lawsuit with a repudiation of the Review of Basic Data. In the first phase of the suit, Texas challenged the Commission's authority to adopt the Review of Basic Data. When Texas lost in the first phase, 446 U.S. 540 (1980), she challenged piecemeal the elements of the Review of Basic Data. Now that she has relinquished all but a handful of her piecemeal challenges, she is attempting to change the direction of the suit by introducing a new method and asking the Court for administrative findings.

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[1]As used in this reply, "Texas Brief" refers to the Texas Exceptions to the Report of the Special Master and Brief in Support Thereof, filed in this case in December 1982. "United States Brief" refers to the Exception of the United States and Supporting Memorandum, filed in December 1982. "New Mexico Brief" refers to New Mexico's Exceptions to the Report of the Special Master and Brief in Support of Exceptions, also filed in December 1982.

Last year Texas proposed to the Master a new method of administration that she had devised to replace the Review of Basic Data. She asks the Court to adopt it, to apply it and to make findings using it. Texas Brief at 11-15. As justification, she asserts the Commission has not made findings for many years and that, therefore, the Court has an obligation to make findings for the Commission. Texas fails to mention that the reason the Commission has not made findings for many years is because it has been awaiting, at Texas' suggestion, the resolution of her lawsuit. Stip. Ex. 4 at 490-91, 505 (Commission meetings, Feb. 20, 1975, March 11, 1976). Having dragged out and delayed resolution of the dispute, *see e.g.,* Master's Report and Recommendations at 9-10 (filed October 18, 1982), Texas is not in a position to point to the delay and demand that the Court fill the gap.

Texas' aims are obvious. She once repudiated the Review of Basic Data and now would not be averse to having the Court forget the Review of Basic Data and make the Commission's findings anew. The Court, however, is not in a position to bypass review of the Commission's findings and instead make findings anew. It is not an administrative agency, and under Article III of the United States Constitution, the Court may exercise judicial functions only.

The Court should exercise its judicial functions by completing its review of any remaining disputes over the Commission findings. Then the Commission could go back to work and fill the gap created by this extended litigation. The longer the suit stretches, the more vulnerable New Mexico becomes to arguments such as the one Texas now makes, dismissing the Commission's findings as distant and irrelevant. New Mexico asks the Court to return the lawsuit to its proper course.

I. THE COURT SHOULD ACCEPT THE MASTER'S RECOMMENDATION THAT IT DENY TEXAS' MOTION TO SUBSTITUTE TEXAS' DOUBLE MASS ANALYSIS FOR THE RIVER ROUTING SPECIFIED UNDER THE COMPACT BECAUSE:

A. UNDER THE PECOS RIVER COMPACT AND THE UNITED STATES CONSTITUTION, THE COURT IS NOT AUTHORIZED TO SUBSTITUTE TEXAS' DOUBLE MASS ANALYSIS FOR THE RIVER ROUTING SPECIFIED UNDER THE COMPACT; AND

B. TEXAS' DOUBLE MASS ANALYSIS AS APPLIED TO THE PECOS RIVER IS ARBITRARY AND INACCURATE AND THEREFORE DOES NOT GIVE EFFECT TO THE APPORTIONMENT IN THE COMPACT.

In 1982 Texas asked the Master to change the method of administration specified in the Pecos River Compact from river routing to Texas' double mass analysis.[2] The Master rejected Texas' request and recommended to this Court that Texas' motion be denied, without prejudice to the Pecos River Commission's consideration of Texas' double mass approach. Report and Recommendations at 2 (filed Oct. 18, 1982). Texas objects to the recommendation to deny her motion. Texas Exceptions to the Report and Recommendations of the Special Master (filed Dec. 1982).

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[2] Texas' Motion to Use the Double Mass Inflow-Outflow Method to Account for Stream Flows in the Determination of the 1947 Condition Base Relationship (dated Jan. 15, 1982); *see also* Texas' Paragraph 4(b) Submission (dated April 13, 1981).

The Master, however, acted properly in recommending that the motion to substitute double mass analysis for river routing under the Compact be denied, without prejudice to Commission consideration. Only the Commission is authorized to change the method of administering the Compact; neither the Compact nor the United States Constitution allows the Court to do so. Moreover, the double mass analysis that Texas would impose on New Mexico through the Court is arbitrary and inaccurate and therefore does not give effect to the Compact apportionment of Pecos River waters.

A. Under the Pecos River Compact and the United States Constitution, the Court is Not Authorized to Substitute Texas' Double Mass Analysis for the River Routing Specified Under the Compact.

Texas' double mass analysis is not the method prescribed by the Compact for use in administering the water allocation. The Compact specifies instead: "the inflow-outflow method, as described in the Report of the Engineering Advisory Committee." Article VI(c). The inflow-outflow method described in the Report of the Engineering Advisory Committee is river routing. The Court is not authorized to change the method from a river routing process to a double mass analysis.

River routing is a detailed process accounting for every gain and loss to the river, "get [ting] down to estimates of what losses occur, why they occur, what gains occur, whether they are base inflow, whether they are surface runoff and the like." 39 Tr. 3732 l. 4-6 (Testimony of Lyman R. Flook, independent expert testifying for New Mexico).[3] The compacting states

[3] *See also* New Mexico Exhibit 54 at 6 (New Mexico's Statement Regarding Basic Facts, Unmeasured Values and Techniques for Determining Stream Flows as Required by the Special Master's December 29, 1981 Order, dated February 19, 1982).

selected the step-by-step detail of river routing to account for the difficult and variable Pecos River. Accounting accurately for stream flow in the Pecos River is the key to allocating water as prescribed by the Pecos River Compact.

The double mass analysis that Texas now proposes is not a river routing process and lacks the detailed accounting that characterizes river routing. It concerns itself with only two points on the river: an upstream gage, in this case at Alamogordo (or Sumner) Reservoir, and a downstream gage at the state line. It plots the cumulative flow at the upstream gage versus the cumulative flow at the downstream gage. *See e.g.,* Texas Exhibit 41 at 6 (Charnes and Heaney, Double Mass Inflow-Outflow Analysis of the Pecos River Compact 1947 Condition, final version dated Jan. 18, 1982).

When Texas first introduced the double mass analysis, she hailed it as "a new method of accounting";[4] but now Texas suggests that the double mass analysis was authorized by the Pecos River Compact. Texas argues that the Compact calls for use of an inflow-outflow method and the double mass analysis is an inflow-outflow method. Texas Brief at 12, 14.

Texas is wrong. The Compact does not require the use of just any inflow-outflow method: it requires the use of "*the* inflow-outflow method, *as described in the Report of the Engineering Advisory Committee.*" Article VI(c) (emphasis added). The language, read on its face and in context,[5] prescribes the use of one specific method: the inflow-outflow method as described in

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[4] Letter to Master dated April 13, 1981, accompanying Texas' Paragraph 4(b) Submission.

[5] Courts, of course, look first to the language of a statute to determine its meaning. *E.g., United States v. Turkette,* 452 U.S. 576, 580 (1981); *United States v. Oregon,* 366 U.S. 643, 648 (1961). That language should be read in context. *E.g., Richards v. United States,* 369 U.S. 1, 11 (1962).

the Report of the Engineering Advisory Committee. The inflow-outflow method there described is a process of river routing. The Report of the Engineering Advisory Committee in no way describes Texas' double mass analysis nor is there any evidence that the Compact negotiators even considered such a method. Texas' double mass analysis is, therefore, not the inflow-outflow method described in the Report of the Engineering Advisory Committee and prescribed by Article VI(c) of the Compact.

Furthermore, the Court may not substitute Texas' double mass analysis for the river routing prescribed by the Compact. Texas argues that the Court has the authority to change the method specified in the Compact, but she errs. Texas Brief at 14 ("[T]here is no question that the Court can substitute the double mass analysis for river routing"). The method specified in the Compact for measuring stream flows may be changed by the Pecos River Commission, but not by the Court.

The compacting parties authorized the Commission, upon the agreement of Texas and New Mexico, to perfect or change the method. Article VI(c) of Pecos River Compact provides the inflow-outflow method as described in the Report of the Engineering Advisory Committee shall be used "[u]nless and until a more feasible method is devised and adopted by the Commission." *See also* S. Doc. No. 109 at 116, 117 ("[T]he commission has full authority to change the method, or to perfect the technique. . . .") (Mr. Tipton's explanation of the Compact). [6] They so authorized the Commission because they wanted to allow for improvements or changes without requiring

[6] Compact history is a valid tool for interpreting a compact, *e.g.*, *Arizona v. California*, 292 U.S. 341, 359-60 (1934), particularly where, as here, the negotiators specifically adopted the provisions of the Compact as explained by Mr. Tipton. *E.g.*, S. Doc. No. 109 at 114, 119, 121.

formal Compact amendment.[7] The Commission has never changed the method but once refined and corrected it by adopting the Review of Basic Data on the unanimous vote of the Commission. Stip. Ex. 4 at 247-48 (Commission meeting, Jan. 31, 1961).

If the Court were now to change the method prescribed in the Compact from river routing to Texas' double mass analysis, it would in effect be rewriting the Compact. It would be deleting and substituting prescriptive language in Article VI. Judicial revision of the language in the Compact would constitute an unlawful intrusion into the legislative domain, both state and federal. *E.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,* 435 U.S. 519 (1978); *Southern Steamship Co. v. NLRB,* 316 U.S. 31 (1942); *California ex rel. Younger v. Tahoe Regional Planning Agency,* 516 F.2d 215 (9th Cir.), *cert. denied,* 423 U.S. 868 (1975). *See also* New Mexico Brief at 16-18.

Alternatively, if instead of rewriting the Compact, the Court simply took the place of the Commission in making the substitution, the Court would be unlawfully usurping administrative functions delegated to an interstate agency. The Compact delegates to the Pecos River Commission, not the Supreme Court, the authority to change the method specified in

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[7] Mr. Tipton, explaining the Compact on December 3, 1948, before its ratification, stated:

> We are having difficulty now in regard to one compact which involves three States, one of them being the State of Texas, where we are trying to change the schedule without changing rights and obligations. It appears that we will have to go to the legislature to change the schedule. The way the Pecos compact is written, the commission has full authority to change the method, or to perfect the technique, so long as what is done by the commission is something directed at the determination of the obligation under (a) [Article III(a) of the Compact].

S. Doc. No. 109 at 117.

the Compact. Article VI(c); S. Doc. No. 109 at 116, 117 (Mr. Tipton's explanation of the Compact). The Court has historically respected such statutory delegations. *E.g., Arizona v. California,* 373 U.S. 546, 593 (1963).[8] If the Court were now to take on the administrative function delegated to the Commission, it would be exceeding its authority under Article III of the Constitution, which permits the Court to perform only judicial, not administrative, functions.[9] *Federal Radio Commission v. General Electric Co.,* 281 U.S. 464 (1930); *Keller v. Potomac Electric Power Co.,* 261 U.S. 428 (1923). *See also* New Mexico Brief at 33-35.

Texas is thus urging the Court to take action contrary to the language of the Compact and beyond the judicial power. The Master properly rejected Texas' request and the Court should accept the Master's recommendation because the double mass analysis is not the method specified by the Compact and the Court lacks the authority to substitute it for the method specified by the Compact.

B. Texas' Double Mass Analysis as Applied to the Pecos River is Arbitrary and Inaccurate and Therefore Does not Give Effect to the Apportionment in the Compact.

The double mass analysis is, in any event, faulty and ill-suited to administration under the Pecos River Compact. Texas repeatedly advises the Court that the double mass analysis is accurate, Texas Brief at 12, 14, 15; but she fails to mention that the double mass analysis was vigorously criticized as a grossly

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[8] There the Court reversed the Master's decision apportioning shortages between states on the Colorado River because the Boulder Canyon Project Act charged the Secretary of the Interior with that responsibility; and, although he had not exercised it, the choice was his, "not the Master's or even ours." 373 U.S. at 593.

[9] The United States also takes the position that the Court may not change the method under Article VI(c) of the Compact. United States Brief at 7, 9 n. 4.

inaccurate tool for administering the Pecos River. 39 Tr. 3718-3759 (March 9, 1982); New Mexico Exhibit 50 (Review of the Texas Double Mass Proposal). It has numerous flaws, two of which are described below.

1. Texas' double mass analysis does not accurately depict the 1947 condition, which is the basis of the apportionment.

Lyman Flook, an independent expert testifying for New Mexico, reviewed Texas' double mass analysis and concluded: "I do not believe that [the double mass analysis] does establish the 1947 condition . . . ." 39 Tr. 3733 l. 21-22 (March 9, 1982). The "1947 condition" is the basis of the equitable apportionment under Article III(a) of the Pecos River Compact:

> New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

In resolving the basic dispute in this case as to the meaning of the 1947 condition, the Master said:

> The 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 . . . .

Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 41 (filed Oct. 15, 1979). The Court agreed with the Master. 446 U.S. 540 (1980).

For the purpose of Compact administration the 1947 condition was arithmetically described in a river routing study accounting for actual, annual historic water supplies, adjusted to

reflect the conditions existing on the river in 1947. The initial routing study was divided into six sections, three of which represented the operation of reservoirs and three of which dealt with gains and losses in different stretches of the river channel. These sections were further broken down into 40 columns showing discrete effects of the regulation of water in the river's three reservoirs and describing various aspects of inflows to and depletions from the various stretches of the river. The routing study imposed on each of these columns the actual water supply for the 29 year period 1919-1947, and depicted the supply in each year, describing its source in snowmelt, precipitation, and ground water contribution, and illustrating its beneficial and non-beneficial use through the course of the river. Cut vertically by the 40 columns and horizontally by each year of record, the study contained 1160 individual pieces of hydrologic information, each revealing the behavior of each annual water supply as if that supply had moved down the river under the 1947 condition. [10]

The purpose of the routing study was to provide a graphic index of the historic inflows to be used as an indication of the outflows at the state line under the 1947 conditions. Accordingly, for administrative purposes, the routing study was used to construct a curve correlating the three-year running average of the index inflows against the three-year running average of the

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[10] This 40 column chart with the 1160 pieces of information appears in Appendix B to the Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979). The chart represents the river routing as corrected by the Review of Basic Data.

Texas in the first phase of this case challenged the Commission's authority to make the corrections contained in the Review of Basic Data. The Master rejected Texas' challenge. He decided that the Review of Basic Data "recognizes, rather than detracts from, the obligation. It endeavors to supply a workable means of determining whether there has been a departure from the required deliveries to Texas." Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact at 41 (filed Oct. 15, 1979), *aff'd*, 446 U.S. 540 (1980).

routed outflows under the 1947 condition. This curve, the essence of the apportionment, is called Plate 2. *See* Stip. Ex. 5, Item 6 (Plate 2).

Variations from the base relationship of Plate 2 in the post-Compact, administrative period were to have been identified by subsequently calculating the sum of the index inflows in three-year running averages in order to ascertain from Plate 2 what the outflow should have been under the 1947 condition. By determining index inflow, and using Plate 2, it becomes a simple task to ascertain the indicated outflow under the 1947 condition. Thus determined, the apportioned outflow can be compared to the measured outflow. An increased outflow would result from water salvaged or decreased beneficial use by man's activities, and a decreased outflow would result from additional depletion by beneficial consumptive use or by non-beneficial losses. Under Article III(a) of the Compact, New Mexico is responsible for the additional depletions caused by man's activities in New Mexico. In other words, New Mexico could not make new uses of water which would deplete the flows Texas would have received in any year under the 1947 condition.

The 1947 condition was thus translated into water quantities to provide the numerical standard for measuring compliance through the routing procedure described above. Texas now wants the Court to change the standard of measurement by using her "double mass analysis method to translate the water quantities into a numerical standard." Texas Brief at 11-12. A Court ordered substitution of Texas' double mass analysis for the river routing procedure under the Compact would, however, be tantamount to rewriting the Compact; that substitution would significantly change the apportionment upon which the Compact is based because the double mass analysis does not depict the 1947 condition which is the basis of the apportionment in the Compact.

As found by the Master, adopted by the Court, and explained above, the apportionment made by the Compact is founded upon the stage of development in New Mexico under the 1947 condition. Texas' proposed double mass diagram, however, does not depict the 1947 condition for a range of flows, as does Plate 2, described above. It does not show the river's historic response to an imposed 1947 condition, as does the routing study. Instead, it is a cumulative plot of the superficial relation between annual historic conditions dating from 1915, without applying the 1947 condition. It is constructed from data points which illustrate the river's response to historical conditions, not the 1947 condition. *See e.g.*, New Mexico Exhibit 50 at 1-2, 7-8; 39 Tr. 3733-34, 3747, 3754-55 (Testimony of Lyman R. Flook, March 9, 1982). Thus in asking the Court to impose the double mass analysis, Texas is in effect asking the Court to change the apportionment in the Compact from one based on a specific stage of development (the 1947 condition) to one based on changing development which historically expanded to the 1947 condition. This change would increase New Mexico's delivery obligation by about 50,000 acre-feet a year when compared to the method upon which the Commission's findings are based. *See* New Mexico Exhibit 50, Figure 3.

Because the double mass analysis does not accurately depict the 1947 condition, it does not provide a valid measure for giving effect to the Compact obligation. It not only detracts from that obligation, it changes that obligation through the failure of its mathematical standard to define the 1947 condition, which is the basis of the apportionment in the Compact.

2. The flows at the two gaging points that Texas uses for the double mass relationship are not causally related.

An independent and equally critical failing in Texas' double mass analysis is the lack of causal relation between the two points being measured. Alamogordo Reservoir, the upstream point in the double mass analysis, receives inflow from 21 percent

of the Pecos River drainage. New Mexico Exhibit 50 at 1. In the 300 miles between Alamogordo Reservoir and the state line, the river can and does dry up completely. *Id.* In the extreme, there could be no flow at Alamogordo and yet considerable flow in the Pecos River at the state line because of accretions of water to the river below Alamogordo Reservoir. 39 Tr. 3738-40 (Testimony of Lyman R. Flook, March 9, 1982); New Mexico Exhibit 50. The water appearing at the state line thus does not necessarily come from Alamogordo Reservoir. There is no causal relationship between the amount of water flowing past Alamogordo Reservoir and the amount appearing at the state line.

A method lacking a causal relation between the two points being related will create only an arbitrary delivery obligation and system of administration. Exactly that kind of obligation and administration would be imposed by using the double mass analysis. Texas explains that on the average, New Mexico would have to deliver to Texas at the downstream gage, at the state line, an amount of water 1.22 times that which flowed past the upstream gage at the Alamogordo Reservoir. Texas Brief at 13.

Not only is the alleged relationship invalid, but also the entire method is inappropriate to accounting for stream flows on the Pecos River. A straight-line percentage basis delivery obligation, like Texas' 1.22 figure, is ill-suited to the Pecos River. The engineer advisors to those negotiating the Compact refused to recommend allocation of Pecos River water on a straight-line basis because that type of allocation could not be fairly applied to the Pecos River:

> A compact based on an allocation of water on a straight-line percentage basis is not feasible or practical. The flow of water at any point in a given stream, under natural conditions, does not bear a straight-line relation to the inflow to the stream above that point.

S. Doc. No. 109 at xxxiii-xxxiv.

By contrast the routing method embodied in the Compact accounts for the water as it moves down the river. In the channel between Alamogordo Reservoir and McMillan Reservoir, for example, the routing method analyzes diversions to the Ft. Sumner Irrigation District, returns flows to the river, channel losses, inflow from ground water aquifers, inflow from surface drainage, depletion by irrigators who pump directly from the river, and non-beneficial depletion by phreatophytes. Compared to double mass analysis, river routing is specific and thorough.

Texas' double mass analysis, unlike river routing, produces a fortuitous and inaccurate standard, one not reflecting the complexities of the Pecos River and therefore not fairly allocating its waters. Use of the double mass analysis would detract from efforts to give effect to the obligation under the Compact and would thus undermine the Court's earlier decision in this case. *Texas v. New Mexico*, 446 U.S. 540 (1980), *aff'g* Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact (filed Oct. 15, 1979). Texas' double mass analysis should therefore be rejected.

In summary, the Master properly refused to recommend that the Court substitute Texas' double mass analysis for that specified in the Compact, first, because the Court could not make the substitution without exceeding its Article III powers and intruding on the legislative and administrative domain and on state sovereignty; and, second, because Texas' double mass analysis produces an arbitrary and invalid delivery obligation which does not reflect the 1947 condition or the complexities of the Pecos River.

II. TEXAS' REQUEST THAT THE COURT DISREGARD THE PECOS RIVER COMMISSION'S PAST DECISIONS AND INSTEAD MAKE NEW ADMINISTRATIVE DECISIONS IN ITS PLACE SHOULD BE REJECTED BECAUSE THE COURT CANNOT MAKE THE NEW DECISIONS WITHOUT EXCEEDING THE JUDICIAL POWER.

This lawsuit arose out of Texas' unilateral repudiation in 1974 of the Review of Basic Data, *see* New Mexico Brief at 3-7, which had been adopted by the Commission in 1961, Stip. Ex. 4 at 247-48 (Commission meeting, Jan. 31, 1961), and used to reach further findings of fact in 1962. Stip. Ex. 4 at 256-57 (Commission meeting, Nov. 9, 1962). Now that the disputes on the Review of Basic Data are almost over, *see* p. 24, *infra,* Texas is steering the Court away from final resolution of those disputes and pushing the Court to impose new methods and make all new decisions under the Compact. *See* Texas Brief at 4-15. In so doing, Texas asks the Court to intercede on her behalf in the administration of the Compact, making administrative or legislative changes or both, well in excess of the Court's judicial functions under Article III of the Constitution.

A. The Court May Not Make Anew the Administrative Decisions Delegated to the Commission Without Exceeding Its Jurisdiction Under Article III of the Constitution.

Texas has little concern with the limits of judicial power. Earlier she suggested there was no line separating the judicial from the legislative function. [11] Now she argues there is no line

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[11] When the Master asked whether judicial adoption of Texas' double mass analysis would constitute an unauthorized revision of the Compact, Texas assured the Master it would not and went on to say that "rewriting the Compact may be within the judicial power." Master's Exhibit 22 at 4 (letter dated July 22, 1981 to Master from counsel for Texas).

separating the judicial from the administrative function. The line between administrative and judicial power is so fuzzy, Texas says, that there no longer is any distinction between the exercise of the two. Texas Brief at 7-8 ("This court has held repeatedly that the Constitution forbids Article III courts from exercising administrative functions, but it has never clearly defined the difference between judicial and administrative functions"). A party need only claim it seeks enforcement of a federal law, Texas argues, to justify the Court's doing or redoing administrative action entirely. [12] Texas Brief at 8-9.

The line between judicial and administrative action may appear fuzzy in some instances and nonexistent to Texas, but it is quite clear from which side of the line Article III courts derive their lawful jurisdiction. A plaintiff's broad plea to enforce a federal law does not license a judicial foray into the administrative domain.

Courts, for example, do not administer government benefits programs on a plea to enforce a federal law. *National Coal Association v. Marshall*, 510 F.Supp. 803 (D.D.C. 1981). [13] They do not conduct investigations, using administrative

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[12] To support this proposition, Texas relies on one case: *United States v. First City National Bank of Houston*, 386 U.S. 361 (1967). That case does not stand for the proposition that courts may usurp administrative functions. The case involved the question of an antitrust violation, which is and has long been essentially a judicial task. 386 U.S. at 369. Courts have not given presumptive weight to agency actions in antitrust suits. "Congress put such suits on a different axis than was familiar in administrative procedure." 386 U.S. at 367.

[13] Plaintiff there argued that it sought only to require defendants to follow the Act and their own regulations, and it stated this end could be accomplished by the court issuing a "fairly simple series of guidelines and declarations." 510 F.Supp at 806. The court refused, saying: "Preparing these 'directives and guidelines' would require the Court to manage the [Black Lung Benefits] Program and its large numbers of executive branch employees who process the tens of thousands of claims." 510 F.Supp. at 806.

agencies as an investigative arm. *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 332-33 (1976) (per curiam) (courts may not dictate to the agency the methods, procedures and time for investigation and order the results of the investigation to be reported directly to the court). They do not write rules and require agencies to adopt them, *Colorado Public Interest Research Group v. Hills*, 420 F.Supp. 582, 586 (D. Colo. 1976) ("[I]t is not this court's function to draft rules and regulations for administrative agencies to be submitted to them for promulgation"); nor do they issue administrative licenses or permits. *Florida Power & Light Co. v. Costle*, 650 F.2d 579, 590 (5th Cir. 1981); *Midwest Truck Lines, Ltd. v. ICC*, 269 F.Supp. 554, 567 (D.D.C. 1967) (three-judge district court). Courts have, thus, been able to distinguish judicial from administrative actions, recognizing those beyond the powers and qualifications of the court.

Here the Court would be undertaking administrative rather than judicial functions if it did what Texas asks it to do. It would be supplanting the Pecos River Compact Commission and administering the water allocation program in its place. The Pecos River Compact Commission is, by definition, the interstate administrative agency created to administer the Compact. Articles II(d) and V(a). As the Master observed earlier, "The Compact is not self executing. It requires continuing administration of an inconstant stream." Report of Special Master on Obligation of New Mexico to Texas Under Pecos River Compact at 34 (filed Oct. 15, 1979). The Compact therefore delegates to the Commission the authority to supplement the data in the Report of the Engineering Advisory Committee, Article VI(a); to change the method to be used in administering the allocation, Article VI(c); to make findings as to deliveries of water, depletions of water, water salvage and numerous other technical matters, Article V(d); and to do all things necessary and proper to administer the allocation of water under the Compact. Article V(d). Texas would have the Court take on all these functions, changing the method of administering

the Compact, preparing a new inflow-outflow manual, making findings as to water deliveries and depletions and taking other steps that are part of administering the Compact.

The Court cannot do what Texas asks. There is action the Court may take: the Court has the authority to review Commission findings under Article V(f) of the Compact. It may interpret the meaning of terms in the Compact. The Court may not, however, administer the Compact in place of the Commission as if it were the Commission, without improperly invading administrative functions in violation of Article III of the United States Constitution. *Federal Radio Commission v. General Electric Co.*, 281 U.S. 464 (1930); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428 (1923); *see also* New Mexico Brief at 33-35.

Texas justifies her position not only by denying the existence of a distinction between administrative and judicial functions but also by quoting from *Green v. Biddle*, 21 U.S. (8 Wheat.) 1 (1823), out of context. Texas Brief at 6-7. The quote as used suggests that the Court had authority to make administrative decisions for the Compact tribunal in *Green v. Biddle* because the Compact tribunal was without appointed members. The parallel Texas seeks to draw is that the Pecos River Commission, which is not now making findings, is like the not-yet-appointed tribunal in *Green v. Biddle*, so this Court may proceed to make the Pecos River Compact Commission's decisions. *Green v. Biddle*, however, does not stand for the proposition suggested. First, the Compact tribunal there was not an administrative agency established to carry out the Compact, as is the Pecos River Commission, but rather an arbiter of disputes. Secondly, the tribunal was to be appointed only to resolve disputes between states, and the dispute before the Court was between private parties, not states. Third, the Pecos River Commission is not, in any event, similar to the not-yet-appointed tribunal in *Green v. Biddle* because it is fully constituted and operating; only the administration of water allocation is stayed, pending resolution

of this lawsuit, which in turn grew out of a dispute over Commission decisions. *Green v. Biddle* is not, therefore, sound basis for the proposition that this Court has authority to usurp the Pecos River Commission's role and take on the administration of the water allocation program under the Pecos River Compact.

The United States similarly suggests the Court may make administrative decisions, United States Brief at 8-16; but the United States has not been an active participant in this case, United States Brief at 5 n. 3, and appears to have some misunderstandings of factual and technical elements of the case. For example, the United States on the one hand advises the Court that the decision on the method to be used in measuring stream flows is the sole province of the Pecos River Commission. United States Brief at 7, 9 n. 4. The United States on the other hand says that "proposing a method for measurement of depletions . . . [is among] proper judicial functions." United States Brief at 5. A stream flow accounting method is a unified system which addresses depletions. The method for measuring stream flow is also the method for measuring depletions.

The United States' lack of active participation in the case is perhaps what led the United States to suggest that primary jurisdiction and architect certification cases provide guidance on Article III jurisdictional issues. The United States minimizes the significance of what the Court is being asked to undertake. The Court is not dealing with simple certification of performance. Nor is the question one of whether the Court would benefit by obtaining a preliminary agency decision on a question of statutory or regulatory interpretation or other similar issue over which the Court has jurisdiction.

Instead, the Court is being asked to revise and administer the water allocation program under the Pecos River Compact, for which purpose an interstate administrative agency was established; and if the primary jurisdiction analogy applies, then

the Court puts itself in the business of administering all agency programs. The administrative agency role in program development would become a matter of judicial deference, under the primary jurisdiction doctrine, and not legislative delegation, as it is now.

The problem with using the doctrine of primary jurisdiction is that it presupposes the Court has jurisdiction to administer the program; here the question is whether the Court has that jurisdiction. The doctrine of primary jurisdiction does not create jurisdiction where none exists: "it is not technically a question of 'jurisdiction' but rather a matter of judicial self restraint" where jurisdiction is concurrent. *Weidberg v. American Airlines,* 336 F.Supp. 406, 409 (D. Ill. 1972). Where there is no jurisdiction in either the reviewing court or the lower body, the doctrine of primary jurisdiction does not apply. *E.g., Armstrong v. Maple Leaf Apartments,* 508 F.2d 518 (10th Cir. 1974); *People's Telephone Cooperative v. Southwestern Bell Telephone Co.,* 399 F.Supp. 561 (D. Texas 1975). Here there is no jurisdiction in the Supreme Court to assume the administrative functions of the Pecos River Compact Commission. The issue is, therefore, the fundamental one of jurisdiction, and the doctrine of primary jurisdiction is not a relevant consideration.

The Court need not, in any event, consider taking the extreme steps and causing the extreme results posed by the United States and Texas arguments, because in urging the Court to make the decisions delegated to the Commission, the United States and Texas are addressing the wrong problem. They are trying to remedy the lack of Commission findings during the period of dispute and litigation instead of examining the Commission findings that caused the dispute and litigation. This lawsuit arose from and because of Commission decisions, particularly the Commission's adoption of the Review of Basic Data. Review of those decisions is within the traditional judicial function. Pending resolution of the lawsuit, the Commission has in effect stayed

further action, at Texas' suggestion. Stip. Ex. 4 at 490-91, 505 (Commission meetings, Feb. 20, 1975, March 11, 1976). If the Court completes the review of the Commission decisions which Texas disputed and which led her to pursue this lawsuit, then the Commission can return to its work.

B. The Court Need Not Make Administrative Decisions for the Commission but Need Only Review the Findings that the Commission Made, Which it Can Validly Do Under Article III of the Constitution.

The document at the base of this dispute is the Review of Basic Data. The United States does not mention the Review of Basic Data, nor, remarkably enough, does Texas. Texas talks about the 1947 routing study and her double mass analysis, but never mentions the existence of the Review of Basic Data. *See e.g.*, Texas Brief at 11, 14. Even when discussing the March 1982 trial, Texas does not tell the Court that Texas Exhibit 48 and New Mexico Exhibit 54 were based on the Review of Basic Data, and that the disputes between the states on those exhibits were the same as the disputes between the states over the Review of Basic Data under Paragraph 4(b) of the 1977 Pre-Trial Order. [14] *See* Texas Brief at 3.

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[14] In 1980 four disputed issues remained under Paragraph 4(b). Each corresponded to a disputed issue between Texas Exhibit 48 and New Mexico Exhibit 54 at the March 1982 trial.

Paragraph 4(b), 1977 Pre-Trial Order	March 1982 Trial	Issue
Para. 4(b)(4)	Col. 13 of routing study	base inflow between Acme and Artesia
Para. 4(b)(5)	Col. 11	channel loss versus flow relationship from Alamogordo (Sumner) Reservoir to Acme
Para. 4(b)(8)	Col. 17	loss v. flow relationship from Artesia to Damsite #3
Para. 4(b)(11)	Col. 45	depletion between Carlsbad and state line

Although she recognizes that the Commission made findings, Texas insists she does not seek review of those findings, only enforcement of the Compact. Texas Brief at 8,15. If Texas in honesty does not challenge the findings, this lawsuit is over for the Court already interpreted the meaning of the "1947 condition" in Article III(a) of the Compact in the first phase of the suit; and the second phase, the challenge to the elements of the Review of Basic Data, would then also be over. The Review of Basic Data would be undisputed and accepted under Article V(f) of the Compact. Texas, however, does not seem to accept the findings; instead, she seeks to ignore them.

Through all these years, New Mexico has looked to and relied on the Commission findings. The Commission adopted the Review of Basic Data for use "in *all actions and findings of the Commission* . . . ." Stip. Ex. 4 at 247 (Commission meeting, Jan. 31, 1961) (emphasis added). The Commission made findings which indicated New Mexico was complying with her delivery obligations under the Compact. Stip. Ex. 4 at 256-57 (Commission meeting, Nov. 9, 1962). The Commission has never changed or withdrawn the Review of Basic Data or decided that New Mexico was violating the Compact.

New Mexico relied on the Commission findings because she understood the Compact to be binding. Article XV ("This Compact shall become binding and obligatory when it shall have been ratified"). New Mexico was of the belief that unanimous Commission action under the Compact could not be unilaterally repudiated, just as the Compact may not be unilaterally repudiated. *See West Virginia ex rel. Dyer v. Sims,* 341 U.S. 22 (1951); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). The Compact provision requiring unanimity for Commission action would be useless if one state were free to ignore her previous commitment to the Commission's action. It was only a matter of time, New Mexico thought, until the Court would direct Texas to honor her Compact commitments.

Now that almost a decade has passed and the disputes on the Review of Basic Data are narrowed to a mere handful, Texas is suddenly ignoring the Review of Basic Data and asking the Court to impose and apply a new method.

The Review of Basic Data, however, is the proper subject of this suit so long as Texas continues to challenge the Commission findings. The dispute on the Review of Basic Data is almost over. In 1980, Texas agreed to use all except four of the elements of the Review of Basic Data. 25 Tr. 3293 (October 20, 1980 hearing) (counsel for Texas stated: "Texas has agreed essentially to utilize the Review of Basic Data in virtually all instances. We have the four draft studies that were submitted, indicating the areas of disagreement"). [15]In July of 1982, Texas repeated: "there are but a few areas in which disagreement between the State [sic] remain concerning the river routing method." Texas' Statement in Response to the Special Master's Order dated July 29, 1982 at 2-3 (dated August 20, 1982).

Moreover, Texas earlier stated in open court that if she had an opportunity to present evidence on her double mass method and if the Master, after hearing the evidence, was dissatisfied with the method, Texas would simply accept the Review of Basic Data. 25 Tr. 3371-72, 3374, 3378 (July 27, 1981 hearing). Texas has now had her evidentiary hearing on the double mass method and the Master was dissatisfied with it. Report and Recommendations at 2, 21 (filed Oct. 18, 1982). If Texas honors her commitment to the Court, the disputes about the Review of Basic Data are over; if Texas does not honor her commitment to the Court, only a handful of disputes remain. These the Court should review and decide, to bring this lawsuit to an end and to allow the Commission to administer the Compact.

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[15]*See also* Master's Exhibits 12, 17, 18; Affidavit of Carl L. Slingerland, dated December 11, 1981, Para. 9 (Affidavit attached to New Mexico's Objections to Special Master's Order of December 1, 1981, dated Dec. 15, 1981).

The longer the Court waits, the more vulnerable New Mexico becomes to Texas' diversionary tactics, such as proposing the double mass analysis; to Texas' dismissal of what happened in 1961 and 1962 as so long ago that it no longer matters; and to Texas' threat to try to get more water for years past, 44 Tr. 4417 (March 16, 1982), despite Texas' responsibility for the years of delay in resolving this dispute. *See e.g.,* Master's Report and Recommendations at 9-10 (filed Oct. 18, 1982).

New Mexico therefore urges the Court to return this case to the Master with direction to complete his review of the Commission's findings, with a view to returning the matter then to the Commission for administration of the Pecos River Compact. If, however, no justiciable issues remain for review, the case should be dismissed and the Commission allowed to resume its work.

Respectfully submitted,

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