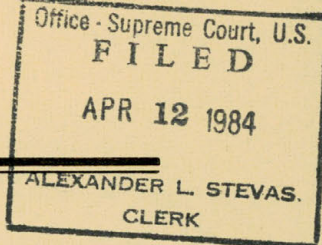


No. 65, Original



IN THE
Supreme Court of the United States

October Term, 1983

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant,

UNITED STATES OF AMERICA,

Intervenor.

NEW MEXICO'S MOTION TO REMAND OR,
IN THE ALTERNATIVE, EXCEPTION TO THE
REPORT OF THE SPECIAL MASTER AND
BRIEF IN SUPPORT OF MOTION OR EXCEPTION

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April 12, 1984

No. 65, Original

IN THE
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October Term, 1983

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

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Intervenor.

**NEW MEXICO'S MOTION TO REMAND
OR, IN THE ALTERNATIVE, EXCEPTION TO THE
REPORT OF THE SPECIAL MASTER**

On remand from the Court's June 17, 1983 Opinion, 103 S. Ct. 2558, the Special Master decided the five hydrologic issues on the 1947 condition of the Pecos River below Alamo-gordo Dam. The State of New Mexico does not object to those findings. New Mexico, however, requests the Court to either

remand the Report of the Special Master for further proceedings and findings or, in the alternative, to sustain New Mexico's exception to the Master's recommendation on the grounds that it omits the upper reach of the Pecos River from the hydrologic description of the 1947 condition and uncertainly defines the procedures for determining departures of New Mexico's state line delivery from the 1947 condition.

The Master makes the following Recommendation to the Court:

"In accordance with Compact Art. III(a), 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 the quantity of water represented by Figure 1 and Table 1 of Texas Exhibit 68, pp. 3 and 4." January 16, 1984 Report at 3 (1984 Report).

New Mexico requested the Master to clarify and amend this recommendation by adding the following proviso:

"provided that in determining the index inflow in the use of Texas Exhibit 68 an appropriate adjustment shall be made for any departures from the 1947 condition depletions in the reach of the Pecos River above Alamogordo Dam." January 20, 1984 Motion to Amend and Clarify.

The Master denied New Mexico's motion.

In support of this motion or exception New Mexico states:

1. Article III(a) of the Pecos River Compact imposes on New Mexico an obligation not to deplete by man's activities the state line flow of the Pecos River below that available to Texas under the 1947 condition.
2. The Court approved the Master's legal definition of the '1947 condition' as follows:

"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 and from the augmented Fort Sumner and Carlsbad acreage." September 7, 1979 Report at 3, *approved*, 446 U.S. 540.

3. The recommendation of the Master's 1984 Report attempts to translate the legal definition of the 1947 condition into a hydrological description of the 1947 condition of the Pecos River.

4. The Master's recommendation only describes, however, the 1947 condition for the reach of the Pecos River between Alamogordo Dam and the New Mexico-Texas state line.

5. The Pecos River Compact applies the 1947 condition to the entire Pecos River Basin in New Mexico including the reach of the river above Alamogordo Dam.

6. If the determination of departures from the 1947 condition is made using only the inflow-outflow curve for the reach below Alamogordo Dam and, on the one hand, there is no credit for positive departure of outflow from the reach above Alamogordo Dam under the 1947 condition, then New Mexico would be compelled to satisfy a higher obligation than is required by the Pecos River Compact. If there is no adjustment, on the other hand, for negative departure of outflow from the reach above Alamogordo Dam, Texas would receive less water than she is entitled to under the Compact.

WHEREFORE the State of New Mexico requests the Court to either remand the Report of the Special Master for findings on the hydrologic definition of the 1947 condition of the Pecos River above Alamogordo Dam and the procedures for making adjustments to the measured flow at Alamogordo Dam for changes in depletion in the reach above Alamogordo Dam or, in the alternative, sustain New Mexico's exception to the

Master's recommendation by adopting the amendment proposed in New Mexico's January 20, 1984 Motion.

Respectfully submitted.

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April 12, 1984

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No. 65, Original

IN THE
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October Term, 1983

STATE OF TEXAS,
v. *Plaintiff,*
STATE OF NEW MEXICO,
Defendant,
UNITED STATES OF AMERICA,
Intervenor.

BRIEF IN SUPPORT OF MOTION OR EXCEPTION

QUESTIONS PRESENTED

Whether the 1947 condition applies to the entire Pecos River and, if so, whether the measured inflow to the reach of the Pecos River below Alamogordo Dam should be adjusted to reflect departures from the 1947 condition depletions in the reach of the river above Alamogordo Dam?

JURISDICTION

The original jurisdiction of the Court was invoked under Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U.S.C. §1251(a).

STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), N.M. Stat. Ann. §72-15-19 (1978), and Tex. Water Code Ann. §42.010 (Vernon 1972). The pertinent provisions of the Pecos River Compact appear in the Appendix to this brief.

STATEMENT OF THE CASE

A. The History of the Compact.

The Pecos River Compact states that: "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." Article III(a).

The Compact defines the 1947 condition as that "situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Article II(g). The 'Pecos River Basin' means "all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas." Article II(b).¹ The Report of the Engineering Advisory Committee is that report approved and adopted by

¹ See also the transcript of the December 3, 1948 meeting of the Pecos River Compact Commission reprinted in S. Doc. No. 109, 81st Cong., 1st Sess. 112 (1949) (S. Doc. 109).

the compact commission at its December 3, 1948 meeting. Article II(f).²

In the Report of the Engineering Advisory Committee the Pecos River Basin is divided into three parts: the upper basin, which consists of the drainage area above Alamogordo Reservoir; the middle basin, which comprises the drainage area between Alamogordo Reservoir and the New Mexico-Texas state line; and the lower basin, which comprises the drainage area in Texas. S. Doc. 109 at 2; *see also* the Special Master's September 7, 1979 Report at 6; Appendix at 3a — Map of the Pecos River Basin.

The Engineering Advisory Committee's routing study for the 1947 condition sought to reflect, as nearly as possible, the "present [1947] conditions on the river" with the exception of some projected additional use of water by the Carlsbad and Fort Sumner irrigation projects. S. Doc. 109 at xxvi, 70. The "present conditions on the river" include the irrigated area of approximately 14,800 acres in the upper basin of the Pecos River.³

The Report of the Engineering Advisory Committee recommended that the inflow-outflow method be used to determine whether New Mexico had delivered water to Texas in an amount equivalent to that available to Texas under the 1947

² The Engineering Advisory Committee's Report consists of three volumes: (1) the January 1948 Report of the Engineering Advisory Committee, (2) the Supplement to Report dated August 1948 with additions of November 9, 1948, and (3) the Manual of Inflow-Outflow Methods of Measuring Changes in Stream Flow Depletion dated December 3, 1948, hereinafter Inflow-Outflow Manual. The three volumes of the Report are reprinted in S. Doc. 109.

³ *Id.* at xxx, 2, 13, 152; *see also* Stip. Ex. 11(b) the Report of the National Resources Planning Board, Regional Planning, Part X at 93 (June 1942).

condition. Article VI(c). This method uses mathematical curves to correlate index inflows and measured outflows for specific reaches of the Pecos River in New Mexico.

The Engineering Advisory Committee found that the correlation curves on Plates Nos. 1 and 2 in the Inflow-Outflow Manual provide "a control for essentially the entire river basin" in New Mexico and can be used to determine "over-all changes" in depletions on the river. S. Doc. 109 at 156. Plate No. 1 shows a correlation curve for much of the reach of the river above Alamogordo Dam. Plate No. 2 shows a correlation curve for the middle reach of the river from Alamogordo Dam to the state line.

The committee recommended that the Pecos River be divided into smaller sub-reaches in order to determine by inflow-outflow methods any changes in depletion within the sub-reaches. The upper basin was divided into two sub-reaches: above Santa Rosa gage and between Santa Rosa gage and Alamogordo Dam. The middle basin was divided into four sub-reaches. *Id.* at 151. The committee also recommended that additional gaging stations be established for the reach of the river above Santa Rosa gage in order to develop a "satisfactory" correlation curve for that reach. *Id.* at 152. This correlation curve is "important to measure any change in depletion of the flow of the river due to any cause above Santa Rosa." *Id.* Additional gaging stations have been established. Stip. Ex.4 at 22: Minutes of January 19, 1950 meeting.

The committee concluded that until additional gaging stations are established, the middle basin inflow should be made up of the actual recorded flow of the river immediately below Alamogordo Dam and estimated flood inflows. *Id.* at 155. In order to permit administration of the Compact to begin, the committee provided the Commission with a correlation curve and a set of tables for the reach of the river between Alamogordo Dam and the state line. 103 S. Ct. 2558, 2569-70 (1983).

The committee also recommended that the Commission establish a correlation curve for the reach between Santa Rosa gage and Alamogordo Dam. It stated that it is important to determine an inflow-outflow relationship for this reach in order to measure any change which might occur in the depletion of water on account of the growth of vegetation at the head of Alamogordo Reservoir. *Id.* at 159.

In explaining the inflow-outflow method specified under Article VI(c), Royce J. Tipton, chairman of the Engineering Advisory Committee, stated that the Commission may "perfect more nearly" the correlation curves in the Engineering Advisory Committee Report. S. Doc. No. 109 at 117. During the administration of the Compact, the Commission attempted to perfect the correlation curves for the reaches of the river in the upper and middle basins.

At the second meeting of the Pecos River Commission, it decided to proceed with inflow-outflow computations for the river reaches listed in the Inflow-Outflow Manual, which included the reaches of the river above Alamogordo Dam. Stip. Ex. 4 at 7: Minutes of December 9, 1949 meeting; S. Doc. 109 at 151. From 1949 to 1971 the Engineering Advisory Committee worked on establishing and refining the inflow-outflow computations for all of the reaches of the Pecos River including those above Alamogordo Dam. Stip. Ex. 4 at 27, 174, 233-34 and 248, 256, 341-43, 381-82: Minutes of the January 19, 1950, July 29, 1957, January 31, 1961, November 9, 1962, January 23, 1969, and January 28, 1971 meetings.

In 1971 the New Mexico representatives on the Engineering Advisory Committee reported to the Commission that the administrative computations must take into account all departures from the inflow-outflow relationships for the reaches of the river above Alamogordo Dam. They reasoned, on the one hand, that if adjustments for negative departures from the 1947

condition outflows for the upper reaches of the Pecos River are not made it would be possible for New Mexico to greatly increase man-made depletions above Alamogordo Dam and thus reduce the amount of water that has to be delivered to the state line under the 1947 condition. On the other hand, if there are no adjustments for positive departures from the 1947 condition outflows for the upper reaches of the Pecos River, New Mexico would not be credited for any reduced depletions in those reaches. The New Mexico engineering representatives reported to the Commission that the outflow from the reach above Santa Rosa during the period 1950-69 was 410,000 acre-feet in excess of the 1947 condition outflow as determined from the inflow-outflow relation tentatively established in the Report of the Engineering Advisory Committee. S. Doc. No. 109 Plate 1 at 153; Stip. Ex. 4 at 395; Minutes of the January 28, 1971 meeting. The New Mexico engineers stated that there was evidence indicating that the positive departure for this reach resulted from a decline in the beneficial consumptive use of water after 1947. *Id.* at 397-98; New Mexico Exhibit 38.

In 1972 the Commission directed the Engineering Advisory Committee to complete the review of basic data and to complete the inflow-outflow manual which would include the upper reaches of the river. The New Mexico representative on the inflow-outflow subcommittee of the Engineering Advisory Committee was given the assignment of drafting an approach for determining the 1947 conditions for the river above Alamogordo Dam. The New Mexico representative's report to the subcommittee included inflow-outflow curves for the above Santa Rosa and Santa Rosa-Alamogordo Dam reaches of the upper basin. Stip. Ex. 4 at 439; Minutes of the September 18, 1972 subcommittee meeting. The engineers on the subcommittee agreed that both of the curves for the reaches above Alamogordo Dam and the curve for the reach below Alamogordo Dam should be tied together. Stip. Ex. 6:

Minutes of the February 7, 1973 subcommittee meeting. The Pecos River Commission never resolved this question. New Mexico now fears that the Master's January 16, 1984 Report and January 24, 1984 Supplemental Report may be construed to have finally decided that reaches above Alamogordo Dam and below Alamogordo Dam need not be tied together, especially since the Master has been relieved of his duties in this case.

B. The Litigation.

The 1983 Opinion of the Court stated that the crucial question that remains to be decided in this case is whether New Mexico has fulfilled her obligation under Article III(a) of the Pecos River Compact. There are two subsidiary questions. First, what is the difference between the quantity of water Texas could have expected to receive under the "proper definition of the 1947 condition" and the quantity it actually received from 1962 to the present? Second, to what extent were shortfalls in deliveries to Texas caused by man's activities in New Mexico? 103 S. Ct. at 2571.

On remand the Special Master decided the five hydrologic issues required in order to draw an inflow-outflow curve representing the 1947 condition for the Pecos River below Alamogordo Dam. 1984 Report at 3-10; Texas Exhibit 68. New Mexico does not object to those findings or the curve for that reach of the river.

The Master has not determined, under the first subsidiary question, whether or to what extent there have been departures in state line deliveries under the 1947 condition. The Master previously found that the Inflow-Outflow Manual must be modified and corrected. September 7, 1979 Report at 47; September 10, 1982 Report at 8, 11. Before departures can be computed an inflow-outflow manual will have to be drafted.

The new manual must include inflow-outflow curves for the reaches of the river above Alamogordo Dam and directions on how to make adjustments for changes in depletions in the upper reaches of the river in determining the index inflow in the use of Texas Exhibit 68. Evidence has been introduced concerning the reach of the Pecos River above Alamogordo Dam. 12 Tr. 1074-78 (March 6, 1978); 13 Tr. 1274-80 (March 7, 1978); New Mexico Exhibit 38; Texas Exhibit 41 at 45-46.

The Master's January 9, 1984 Order could be construed as having found that New Mexico's delivery obligation under the Compact is defined solely by the inflow-outflow curve and table for the reach of the Pecos River below Alamogordo Dam. 1984 Report at 11-16. On January 20, 1984 New Mexico submitted a Motion requesting the Master to clarify and amend the January 9, 1984 Order. The Master's Supplemental Report dated January 24, 1984 denied the motion. *Id.* at 18. Texas did not respond to the motion.

The Master's denial of New Mexico's motion left uncertain the resolution of the matter raised by the motion.

ARGUMENT

THE MASTER ERRED IN FINDING THAT THE INFLOW-OUTFLOW CURVE AND TABLE IN TEXAS EXHIBIT 68 FIXED THE NUMERICAL STANDARDS FOR THE LEGAL DEFINITION OF THE 1947 CONDITION BECAUSE THE CURVE AND TABLE REPRESENT ONLY THE 1947 CONDITION FOR THE MIDDLE BASIN NOT THE UPPER BASIN OF THE PECOS RIVER.

The Master's January 24, 1984 Supplemental Report denied New Mexico's Motion to Clarify and Amend the January 9, 1984 Order. The Master stated that the purpose of the January 9 Order was "to fix numerical standards for the legal definition of the 1947 condition as that phrase was used in

Compact Art. III(a)." 1984 Report at 18. The January 9 Order stated that the revised river routing study, Texas Exhibit 68, was intended "to translate into water quantities the '1947 Condition' as that term is used in the Compact Art. III(a)" *Id.* at 11. The Master stated in support of the denial of New Mexico's motion that:

"We are determining the 1947 condition. Development above Alamogordo Dam, if any, is for consideration in determination of the departures from the Art. III(a) obligation. It is not pertinent to the determination of the 1947 obligation. The Motion to Clarify and Amend is denied." *Id.* at 18.

The Court approved the Master's legal definition of the 1947 condition. 446 U.S. 540. The current phase of the case is directed at a quantification of New Mexico's delivery obligation under the 1947 condition as defined. Development above Alamogordo Dam, as that development existed in 1947, is a fundamental part of the 1947 condition. Although the 1947 condition of development above Alamogordo Dam is accounted for in the table and curve which the Master recommends for use in determining departures in the delivery of water at the state line, any change in that development since 1947 must be evaluated to determine New Mexico's performance under the Compact.

Article VIII of the Compact guarantees to each state the right to regulate within its boundaries the appropriation, use, and control of water, not inconsistent with its obligations under the Compact. Accordingly, New Mexico can reduce uses below Alamogordo Dam and increase uses above Alamogordo Dam, or vice versa, so long as New Mexico continues to meet her obligation to deliver water at the state line. Such changes in place of use would require procedures for adjusting the measured flow below Alamogordo Dam to account for changes in

depletion by man's activities in the basin above Alamogordo Dam.

The Master did not determine the 1947 condition inflow-outflow relationship for the basin above Alamogordo Dam and it is not clear to New Mexico that he recognizes the need to do so. That determination must be made before departures from the inflow-outflow relationship for the Alamogordo Dam to state line reach are determined. If the determination of departures at the state line from the 1947 condition is made using only the inflow-outflow curve for the reach below Alamogordo Dam, without adjustment for positive departures from the 1947 condition inflow-outflow relation above Alamogordo Dam, New Mexico would be required to deliver more water to the state line than is required by the Pecos River Compact. If, on the other hand, there is no adjustment for negative departures of outflow from the reach above Alamogordo Dam, Texas would receive less water than she is entitled to under the Compact. Consequently, if it is not determined at this stage of the proceedings whether and how adjustments for changes in depletions in the reach above Alamogordo Dam should be made, the next stage of the proceedings will necessarily involve erroneous determinations of departures at the state line.

CONCLUSION

The Master's Report should be remanded for further proceedings to determine the 1947 condition inflow-outflow relationship for the Pecos River above Alamogordo Dam and appropriate procedures for determining departures from the 1947 condition since 1947. In the alternative, the Master's recommended finding should be amended, as suggested in

New Mexico's January 20, 1984 motion, to provide that appropriate adjustments shall be made in the index inflows at Alamogordo Dam to account for any departures from the 1947 condition depletions in the Pecos River above Alamogordo Dam.

Respectfully submitted.

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April 12, 1984

APPENDIX

* * *

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

* * *

(f) The term "Report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January, 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

* * *

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, 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.

* * *

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

* * *

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

* * *

MAP OF THE PECOS RIVER BASIN IN NEW MEXICO

