



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

TEXAS' REPLY TO 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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INTRODUCTION

After the Court returned the case to the Special Master by its June 17, 1983, decision, 103 S.Ct. 2558, the Special Master decided the five issues that Texas and New Mexico had agreed needed to be resolved before a river routing study depicting the 1947 condition could be made. Master's 1984 Report, pp. 3-9; see Tr. vol. XLV for the states' agreement upon the five unresolved issues. In accordance with the Special Master's Order of November 10, 1983, Texas submitted a river routing study, Texas Exhibit 68; the Special Master disposed of New Mexico's objections to the Texas river routing study by his Order of January 9, 1984. Master's 1984 Report, pp. 9-16.

In his 1984 Report, the Special Master has recommended to the Court that Figure 1 and Table 1, Texas Exhibit 68, pp. 3 and 4, be used to determine New Mexico's delivery obligation under Compact Art. III(a). Master's 1984 Report, p. 3. New Mexico has asked the Court to remand the case to the Special

Master for findings on a hydrologic definition of the 1947 condition in the reach above Alamogordo Dam and a procedure for making adjustments to the measured flow at Alamogordo Dam for changes in depletion in the reach above Alamogordo Dam. Further, New Mexico requests, in the alternative, that her exception be sustained by adopting a proposed amendment to the Master's Recommendation.

In his Order of January 24, 1984, the Special Master denied New Mexico's request to modify his Order of January 9, 1984, by adding the same language that she now asks the Court to add to the Master's recommendation. Master's 1984 Report, p. 18. In denying New Mexico's request, the Master said:

We are determining the 1947 condition. Development above the 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.

Texas is in complete agreement with the Master's statement above and his recommendation to the Court. Not until her Motion to Clarify and Amend the Order of January 9, 1984, did New Mexico attempt to make the reach above Alamogordo Dam an issue in translating the legal definition of the 1947 condition into water quantities. New Mexico is attempting to confuse the issues and to cause further delay in the orderly resolution of the lawsuit. Texas asks the Court to affirm the Master's Report and Recommendation, to appoint a new Special Master, and to return the case for a final decision.

**THE COURT SHOULD ACCEPT THE SPECIAL
MASTER'S RECOMMENDATION THAT THE 1947
CONDITION AS THAT PHRASE IS USED IN
COMPACT ART. III(a) BE REPRESENTED BY
FIGURE 1 AND TABLE 1 OF TEXAS EXHIBIT 68.**

According to Art. III(a) of the Compact, New Mexico is obligated not to 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. The Special

Master has defined the phrase "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.

Since the Court's approval of the Master's definition, 446 U.S. 540, we have been attempting to translate the legal definition of the 1947 condition into water quantities to provide a numerical standard for measurement of compliance. See Master's Orders of December 29, 1981, March 31, 1982, September 28, 1983, and November 10, 1983.

Texas has prepared a routing study in accordance with the agreements between the states and the decisions of the Master depicting the 1947 condition by an index inflow-index outflow relationship curve and table. Texas Exhibit 68, Figure 1 and Table 1. The Texas study accounts for the man-made depletions resulting from the stage of development existing at the beginning of 1947 for the Pecos River above the New Mexico-Texas state line. The Texas routing study accounts for the 1947 condition depletions for the reach above Alamogordo Dam, the Upper Basin, by its adjustments made to the historic inflows into Alamogordo Reservoir. These adjustments are the same as those used in the S.D. 109¹ and RBD² routing studies. In Texas Exhibit 68, p. 13, Row 1, Texas uses the table of inflow to Alamogordo Reservoir adjusted to the 1947 condition depletions from Appendix 4 of RBD. See Stip. Ex. 8, Appendix 4; Texas Exhibit 68, pp. C-28 through C-34.

The Texas 1947 condition inflow-outflow relationship curve and table recommended by the Master are consistent with the S.D. 109 and RBD 1947 condition curve and table in that none were adjusted for positive or negative departures from the 1947

1. Report of the Chairman of the Senate Interior and Insular Affairs Committee, Senate Document 109, 81st Cong., 1st Session which is Stip. Ex. 1.

2. Review of Basic Data, Stip. Ex. 8

condition depletions in the Upper Basin. In fact, the Inflow-Outflow Manual contained in S.D. 109 discussed the reach above Alamogordo Dam and gives an inflow-outflow relationship curve, Plate 1, but neither describes how it was to be tied to or used with the inflow-outflow relationship curve for the reach below Alamogordo Dam, Plate 2, nor does the manual use Plate 1 in tabulating deliveries. Stip. Ex. 1, pp. 150-162.

When the RBD curve was used for determining New Mexico's delivery obligation in the 1961 and 1962 findings of the Pecos River Commission, New Mexico did not object to the use of the curve for not having been properly adjusted for any changes in the upper reach as she now complains concerning the Master's recommendation. Also, New Mexico has been arguing throughout this litigation that the RBD procedures and curve should be used in determining her delivery obligation. It is unclear to Texas why New Mexico waits to this late date to complain about a procedure that she previously accepted and argued should be used.

The work of the inflow-outflow subcommittee and the agreements to which New Mexico alludes in her brief were never approved by the Engineering Advisory Committee or the Commission. Further, the inflow-outflow curves for the Upper Basin prepared by the New Mexico engineers were not accepted by the Texas engineers for various reasons that are not found in the present record. When the New Mexico engineers were reviewing the 1947 condition basic data for the Upper Basin, Texas engineers were reviewing 1947 condition basic data for the Pecos River from the state line to Girvin, Texas. Stip. Ex. 4(b), Vol. 1, p. 258, Minutes of November 9, 1962. The data for the Upper Basin and the river below the state line would be helpful in determining and apportioning unappropriated floodwaters in accordance with Compact Arts. II(i) and III(f). The apportionment of unappropriated floodwaters, however, is not an issue in this case.

Texas submits that the work of the inflow-outflow subcommittee concerning the Upper Basin was for unappropriated floodwater computation and to enable the Commission to document additional depletions by man's activities occurring in that

reach for future Art. III(a) computations if new reservoirs were constructed or significant new water uses were authorized. This information is useful for determining the causes of departures. The precise procedures should be worked out during the causes of departure phase of the case.

Under the Compact, there is no mention of a positive departure, only maximum depletions. New Mexico has the obligation not to deplete by man's activities the flow at the state line below the 1947 condition. The compact obligation is not based on use, rather on depletions. Master's 1979 Report, pp. 2, 21, and 38. New Mexico's obligation is based on flows at the state line, not Alamogordo Dam. Art. III(a)

If the flow at Alamogordo Reservoir were believed to be depleted below the 1947 condition, we would look at the Upper Basin to see if the flow had been depleted by man's activities. During this process, we would derive the precise procedure for making this determination. This is the time that New Mexico's concern about the Upper Basin will be addressed. In the next phase of the trial, Texas will produce evidence that the flow below Alamogordo Dam during the period 1950-1980 has been approximately 70% of the 1947 condition flow. The question of increased flow resulting from reduced uses in the Upper Basin is speculative and will be addressed when we determine departures.

New Mexico has known since the Court's approval of the Master's definition of the 1947 condition that we have been attempting to translate the definition into water quantities. Several Orders of the Master since December 1981 specifically called for the states to propose procedures to translate the 1947 condition into a numerical standard for measurement of compliance. Master's Orders of December 29, 1981, March 31, 1982, September 28, 1983, and November 10, 1983.

In his Order of December 29, 1981, the Master ordered Texas to present a statement of basic facts, unmeasured values, and techniques to be used in the determination of the stream flows and other conditions in the Pecos Basin above the New Mexico-Texas state line; New Mexico was ordered to do the same. In its response, New Mexico did not mention any procedure, or the need for one, to adjust the flow at Alamogordo Dam for

changes in depletion in the Upper Basin. Throughout this period we have been working with the Alamogordo Dam to state line reach. New Mexico has never complained or attempted to introduce into this process any inflow-outflow relationship curves for the Upper Basin. Texas does not know why New Mexico has waited to this late date to interject a new issue into the process and further confuse the issue by proposing some ambiguous language to be added to the Master's recommendation. Delay can benefit only New Mexico.

CONCLUSION

The Master's recommendation properly translates the legal definition of the 1947 condition into a numerical standard for measurement of compliance. The Master correctly disposed of New Mexico's suggestion concerning the Upper Basin by his statement that development above Alamogordo Dam is for consideration in determination of the departure from the Art. III(a) obligation. Texas, therefore, urges the Court to affirm the Master's recommendation concerning the numerical standard for the determination of the 1947 obligation. Further, Texas requests that a new Special Master be appointed so that we can proceed to a resolution of the lawsuit as expeditiously as possible.

Respectfully submitted,

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