No. 65 Original

In The
Supreme Court of the United States
October Term, 1986

THE STATE OF TEXAS
Plaintiff,

-vs-

THE STATE OF NEW MEXICO
Defendant

and

UNITED STATES OF AMERICA,
Intervenor

JOINT BRIEF OF AMICI CURIAE THE INCORPORATED MUNICIPALITIES OF ALAMOGORDO, ARTESIA, CAPITAN, PECOS, ROSWELL, RUIDOSO, RUIDOSO DOWNS AND SANTA ROSA, NEW MEXICO IN SUPPORT OF THE STATE OF NEW MEXICO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TREATISES

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICI CURIAE*

A. *AMICI CURIAE*

The *amici* are New Mexico communities with water rights located on the main stream and principal tributaries of the Pecos River. The water rights of these communities have been or are in the process of being adjudicated in a state court proceeding known as *State ex rel. S.E. Reynolds, State Engineer, vs. L.T. Lewis, et al.*, Chaves County District Court No. 20294 and 22600, Consolidated. The adjudication involves both the surface and underground waters of the Pecos River stream system. The water rights of some 3,000 owners have been provisionally adjudicated in that action. The rights of several thousand additional owners as well as federal and Indian rights remain to be adjudicated.

The water rights of the municipalities and their interests in this proceeding are summarized as follows:

1. City of Alamogordo:

The City of Alamogordo is a city of 29,000 people located in the Tularosa Basin which lies to the west of the Pecos drainage. The City owns and operates Bonito Reservoir, lying within the Pecos Basin in the Sacramento Mountains. Bonito Reservoir supplies Alamogordo and Holloman Air Force Base with water by means of a 70-mile pipeline. Other communities also have certain rights to take water from the pipeline. The City's surface water right amounts to approximately 1500 acre feet. Holloman Air Force Base is entitled to an equal amount from Bonito Reservoir.

The City's need for water far exceeds the 1500 acre feet the City is entitled to take from Bonito Reservoir. However, the reservoir water is very important to the City because of its purity It is much better quality water than is available to the City locally. Reservoir water is blended with lower quality waters to extend the amount of water of acceptable quality available for the City's 29,000 residents.

2. City of Artesia:

The City of Artesia is located on the Pecos River main stem in northern Eddy County, New Mexico. Eddy County borders the State of Texas on the North. The current population of Artesia is 13,500. Artesia furnishes municipal water to its residents and to about 1000 persons outside the City limits. In addition, the City sells water to oil refineries near Artesia. The City relies exclusively on groundwater from eight artesian wells.

3. Village of Capitan:

The Village of Capitan is located between Bonito Creek and Salado Creek, both tributaries of the Hondo River, which is the principal tributary of the Pecos, in Lincoln County, New Mexico. Its current population is estimated at between 1200 and 1300. The Village provides municipal water to all those persons through 658 water meters within the village and 10 meters outside the village limits. As a member of the Eagle Creek Inter-Community Water Users Association, the village has Eagle Creek as its principal source of water. The village is actually supplied water through the Bonito Pipeline, owned and controlled by the City of Alamogordo. The village compensates the City of Alamogordo by pumping from Eagle Creek into the Bonito Pipeline an amount of water equal to the amount received through the pipeline. Because Alamogordo can terminate this arrangement at almost any time, the village has obtained an adjudicated groundwater right to appropriate 75 acre feet per year. In view of the somewhat tenuous arrangement with the City of Alamogordo, the village will be relying more and more in the future on its groundwater right to supply domestic, sanitary and other municipal water to the present and future residents of the village.

4. Village of Pecos.

The Village of Pecos is located on the Pecos River in the upper reaches of its drainage in San Miguel County, New Mexico. The present population of the village is 1,050, all of whom receive their water through the municipal system. The water rights of the village have not yet been adjudicated in the *L.T. Lewis* case, *supra*. The village owns four wells which are

authorized to divert a total of 198.39 acre feet per annum. Recent contamination problems in some of the wells has substantially reduced the actual availability of water.

5. City of Roswell:

Roswell is located on the Hondo River in Chaves County, New Mexico. Its current population is about 45,000, making it one of the largest cities in the State of New Mexico. It supplies municipal water to all its inhabitants through a municipally owned system. The city obtains water from 10 artesian wells located around the city. These rights have been provisionally adjudicated in the *L.T. Lewis* case *supra. See, State ex rel., Reynolds vs. Crider*, 431 P.2d 45, 73 N.M. 312 (1967). The city has the right to appropriate a total of 23,458.56 acre feet per annum.

6. Village of Ruidoso:

The Village of Ruidoso is located on the Rio Ruidoso, a tributary of the Rio Hondo, the principal tributary of the Pecos, in Lincoln County, New Mexico. Its estimated population is 10,000, many of whom are not year-round residents, but who are connected to the municipal water supply system. A total of 6,683 water meters are served within the municipal limits. Approximately 90% of the 621,000,000 gallons delivered in 1985 was for domestic and sanitary use. The water rights of the village have been provisionally adjudicated in *L.T. Lewis, supra.* The village has rights to 249 acre feet per year from the Rio Ruidoso and several wells within the village. The village also belongs to the Eagle Creek Inter-community Water Users Association and thereby appropriates water from Eagle Creek into the municipal water supply system. The water is ultimately discharged to the Rio Ruidoso as wastewater from the village's sewage treatment plant. The Village then receives an effluent water credit for Eagle Creek, which in turn is utilized to divert an equal amount of water from the Rio Ruidoso. The village's Eagle Creek effluent credit usually constitutes 65-70% of the total amount of water available to the village to meet its needs.

7. The Village of Ruidoso Downs:

The Village of Ruidoso Downs is also located on the Rio

Ruidoso immediately east of the municipal limits of the village of Ruidoso. The current population is 1500 persons, all of whom are provided municipal water. The water rights of the village include the right to divert one-half of the flow of Hale Springs, up to 175 gallons per minute.

As its primary supply the village relies on two wells from which it is entitled to pump a total of 31 acre feet. These wells were initially adjudicated in the *L. T. Lewis* case for commercial use and later transferred to the village for municipal purposes.

8. The City of Santa Rosa:

The City of Santa Rosa is located on the upper reaches of the Pecos River mainstem in Guadalupe County, New Mexico. Its present population is 2,800, all of whom receive domestic and sanitation water through the municipal system. Santa Rosa's water rights have not yet been adjudicated in *L. T. Lewis, supra.* although the city is a recently named defendant. Its wells are recognized as having a total combined water right of 1366.89 acre feet per year.

B. Detriment to *Amici Curiae.*

The Special Master's Report (p. A-1) recommends that New Mexico deliver to Texas a total of 340,100 acre feet over a period of ten years at a minimum rate of 34,010 acre feet per year. New Mexico would have three years in which to commence performance of this minimum delivery requirement.

In addition, the Report recommends that New Mexico meet its annual requirement to Texas under the Pecos River Compact, Article III(a). In order to meet this requirement alone, New Mexico must deliver an average of 10,000 acre feet per year more than it has been able to deliver in the past. Total state line deliveries have averaged about 75,500 acre feet per year (p. 31).

Article IX of the Compact requires that the State of New Mexico maintain flows at the state line by application of the doctrine of prior appropriation. Article XVI, §2 of the New Mexico Constitution mandates that priority in time gives the better right to the use of the public waters.

New Mexico municipalities are bound by the prior

appropriation doctrine. Should this Court affirm the Special Master's report and adopt his recommended decree, total loss or severe curtailment of the water rights of the *amici* during the ten year repayment period will result. Effects upon the municipalities will not be uniform. It is evident, however, that to the extent these municipalities are required to forego existing water rights on which they rely for their municipal systems, they will be forced to seek acquisition of other, more senior rights. Great practical as well as economic difficulties will surely result. The effect upon one of the most basic services the municipalities provide for the health and general welfare of their residents promises to be severe.

Administration of the prior appropriation system, where, as here, there are vested, non-permitted rights, dating from before the era of statutory control of water rights (New Mexico statutory control of water rights began in 1907, See Ch. 49, N.M. Laws of 1907) depends upon priority of right, which in turn, depends upon adjudication of that priority by a court. *See, State v. Pecos Valley Artesian Conservancy District, L.T. Lewis, et al.*, 99 N.M. 699, 663 P.2d 358 (1983).

The Pecos River adjudication, (*L.T. Lewis, supra*), involving some 6,000 defendants has been proceeding on the Pecos River since 1978, having begun in the Roswell basin in the mid-1950s and subsequently expanded. In the absence of judicial determination of priorities, administration is not possible. It is also not possible for a municipality or any other water user to determine (a) whether it must acquire further water rights; (b) what water rights will be usable during a priority administration; (c) whether rights it might acquire will, in time of physical shortage of water, actually supply municipal demands.

The Southwest and particularly southeastern New Mexico is in a particularly delicate economic condition. For decades the economic lifeblood of the area has been the oil and gas industry. That industry is particularly depressed. Thus, the statistics shown in Texas Exhibit 101 are misleading, as they reflect an economy which no longer exists. The situation would be unbearably exacerbated by a requirement that the municipalities acquire new water rights to substitute for water rights they already have. In ordinary circumstances their present water rights would serve all their purposes quite well.

SUMMARY OF ARGUMENT

Hardship on *amici* and the public will be severe if the Court requires a water payback recommended by the Special Master. Hardship is a proper consideration in determining relief in favor of one state against another. The water rights of municipalities, up to 31,000 acre feet, will be cut off by adoption of the Master's decree. The Master's recommended decree fails to observe the considerations set forth by this Court in *Colorado v. Kansas*.

The Court is without jurisdiction under the Eleventh Amendment to require New Mexico to pay back past short deliveries of water under the Pecos River Compact. This limitation does not affect the ability of the Court to issue appropriate injunctions for prospective relief.

The Special Master erroneously created a contractual remedy of "payback" for Pecos River Compact underdeliveries. The Pecos River Compact is more properly construed as a federal law and not a contract. Contract remedies should therefore be unavailable. Remedies may be inferred from federal laws only if the test of *Cort v. Ash* is satisfied. The remedy of a water "payback" does not meet that test.

POINT I

HARDSHIP ON *AMICI*, WILL BE SEVERE IF THE COURT REQUIRES A PAYBACK. HARDSHIP IS A PROPER CONSIDERATION IN DETERMINING RELIEF IN FAVOR OF ONE STATE AGAINST ANOTHER

The effect of the Special Master's recommended decree will be to shut off most of the present water rights of these municipalities. (Tr. 34-41, 5/20/86.) Additionally, most water rights of non-municipal users for industrial and like uses within as well as outside of the cities, will suffer a like fate. The Special Master's decree would also shut down any junior non-irrigation rights as well as 170,000 acres of irrigation, approximately 90% of the total, most of which would gradually be restored to use (*id*; N.M. Ex. 123).

There is no preference in New Mexico water law for municipalities, nor are they immune from priority administration. *City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984). The record indicates the Special Master was not aware of this. (See Tr. 104, May 20, 1986.) He was aware of the extent of municipal rights (31,000 acre feet). See Tr. 41, 42, 5/20/86.

The Special Master has overlooked the inherent obligation of an equitable remedy to weigh the hardship and inconvenience to the affected public. Cf. *City of Harrisonville, Mo. v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334 (1933). The Special Master should have considered the disastrous effects of his recommendations upon New Mexico water users, including municipalities. This he did not do, as discussed, *infra.*

The Special Master says curtailment of water rights in New Mexico is not the only way she can deliver prior short deliveries to Texas. He suggests that New Mexico can purchase or condemn rights and then pump water into the river and curtail diversions of surface water in order to make water available to Texas to repay the past short deliveries. He further suggests shutting down all or part of the Carlsbad Irrigation District, see Report, p. 35:

> ...the Carlsbad Irrigation District alone diverted during the 1950-1983 period an average of 60,000 acre feet per year from the river (Tr. 86, 5/20/86). Thus it is clear that New Mexico has other means of meeting a delivery obligation than curtailment of pumpage by junior rights holders in the Roswell Basin.[1]

This simplistic approach overlooks the claimed 1887 priority of the Carlsbad Irrigation District, because Carlsbad could not

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[1] While cities may be legally able to condemn water rights with priorities sufficient to withstand the priority administration necessary to deliver water to Texas under the decree, current law does not permit the State to do so. The Special Master's citation and analysis of *Kaiser Steel Corporation v. W.S. Ranch Company*, 81 N.M. 414, 467 P.2d 986 (1970) for the proposition that the state may condemn water is wrong: the case stands for the proposition that pursuant to §72-1-5, N.M.S.A., 1978, private corporations or persons in New Mexico can, by condemnation, obtain *rights of way* to transport water they already own.

be shut down without shutting down all junior water users. See N.M. Const., art XVI, §2: "***Priority of Appropriation shall give the better right." Article IX of the Pecos River Compact requires adherence to that principle as well:

> In maintaining the flows at the New Mexico-Texas state line required by this compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

The oldest substantial block of water rights on the Pecos is in the Carlsbad Irrigation District. Those rights were adjudicated in the 1930s to the United States and it is not clear that they are subject to condemnation. Further, it is likely that these rights will be shut down as a part of priority administration. Tr. 34-41, 5/20/86. Absent a determination that the cities would be left with water in a priority administration, this Court should not order a payback which must, under the compact, be exacted in conformity with the law of prior appropriation. To do so would create a tremendous hardship on the municipalities.

Until the *inter se* portion of the adjudication is completed *State v. Pecos Valley Artesian Conservancy District, et al., supra*, 99 N.M. at 701, *State ex rel., Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) even the priority of the Carlsbad Irrigation District will not have been finally adjudicated. The case just cited holds that in New Mexico due process requires that each water right owner be given the opportunity in the adjudication process to challenge *inter se* the rights provisionally adjudicated to any other water right owner in the stream system. Only after that opportunity has been afforded is the adjudication complete. The *inter se* phase of the adjudication cannot occur until there has been a provisional adjudication between the state and the individual water users. That process, by which the rights of some 3,000 water rights claimants have been provisionally determined, is nearing completion, with the rights of another 3,000 defendants awaiting hydrographic survey and provisional determination. Included in the rights as yet unadjudicated are the rights of at least two of your *amici*, the City of Santa Rosa and the village of Pecos. The rights of the other municipalities are provisionally determined, but remain subject to *inter se*

challenge. All parties may assert *inter se* challenges to the provisional adjudications of other defendants when the action is ripe for that process.

The Carlsbad Irrigation District claims a priority of 1887. Until the *inter se* portion of the adjudication is completed, however, municipalities and other parties are not bound thereby and are entitled to challenge that priority.

If the Court should order a payback to Texas, the effect of the payback provision could be to require municipalities to acquire water they do not need. They would have to assume that the Carlsbad Irrigation District priority will be 1887, and acquire other rights with priorities earlier than 1887. However, as a result of an *inter se* challenge, for example, which results in a holding that the Carlsbad priority is not 1887, but, e.g., 1905, a city whose water rights have a 1900 priority would have expended immense amounts of money acquiring water rights with earlier priority dates than they need, and which are, accordingly, more expensive than necessary. Therefore the Court should allow New Mexico a reasonable time to sort out the complexities imposed by the prior appropriation system.

Colorado v. Kansas, 320 U.S. 383 (1943), was a non-compact equitable apportionment case, in which this Court had previously heard litigation between the same states on essentially the same issues. Kansas claimed that Colorado substantially and injuriously aggravated the conditions which existed at the time of the earlier suit.

This Court stated:

> We come now to the vital question whether Kansas has made good her claim to relief founded on the charge that Colorado has, since our prior decision, increased depletion of the water supply to the material damage of Kansas' substantial interests. The question must be answered in the light of rules of decision appropriate to the quality of the parties and the nature of the suit.
>
> *In such disputes as this, the court is conscious of the great and serious caution with which it is necessary to approach the inquiry whether a case is proved.* Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the actions of a state, for the burden on the complaining state is much

greater than that generally required to be borne by private parties. Before the Court will intervene *the case must be of a serious magnitude and fully and clearly proved.* And in determining whether one state is using, or threatening to use, more than its equitable share of the benefits of a stream, all the factors which create equities in favor of one state or the other must be weighed as of the date when the controversy is mooted.

On this record there can be no doubt that a decree such as the Master recommends...would *inflict serious damage on existing agricultural interests* in Colorado. *How great the injury would be it is difficult to determine, but certainly the proposed decree would operate to deprive some citizens of Colorado, to some extent, of their means of support. It might indeed result in the abandonment of valuable improvements and actual migration from farms.* Through practice of irrigation, Colorado's agriculture in the basin has grown steadily for fifty years. With this development has gone a large investment in canals, reservoirs, and farms. The progress has been open. The facts were of common knowledge.

...it is...evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action until Colorado filed the instant complaint in 1928.

These facts might well preclude the award of the relief [injunction] Kansas asks. But, in any event, they *gravely add to the burden she would otherwise bear, and must be weighed in estimating the equities of the case.*

320 U.S. at 393. (Emphases added.) No relief, retroactive *or* prospective was granted by the Court to Kansas under the facts in that case. Here the facts are even more compelling for denial of retroactive relief. The delay exceeds that in *Colorado v. Kansas, supra*, the "serious damage" to agricultural and other interests is comparable if not more severe. Here the relief recommended is substantially more harsh than that recommended by the Special Master in *Colorado v. Kansas, supra*, where it was recommended that *prospectively* Colorado have 5/6 and Kansas have 1/6 the "average annual dependable and fairly continuous water supply and flow" of the Arkansas River. Even that relief was rejected by the Court as too harsh. Far beyond

simple injunctive relief, the Special Master here has proposed a payback in kind in the nature of damages. *Amici* suggest that under the circumstances such relief is too harsh.

This Court's discussion in *Colorado v. Kansas, supra*, respecting burden of proof, and the Court's determination to consider factors outside of strict appropriation and equitable apportionment considerations are applicable to this case as well. It is much more painful to shut down or squeeze down an existing economy than one that never came into being (p. 96, Tr. 4/16/86). The willingness of the Court in *Colorado v. Kansas, supra*, to consider injury to the defendant and its inhabitants even though it was difficult to determine is significant here in light of the Special Master's statement that "While New Mexico will undoubtedly suffer some economic loss from being required to deliver water to Texas, the amount is too speculative to quantify."

The Special Master's report indicates a seemingly very small impact on the two counties principally impacted by his decision (p. 34):

> ...the economic loss to New Mexico for one of the scenarios presented, i.e., a delivery to Texas of 20,000 acre-feet per year...is equal to less than one percent of non farm income for the Roswell Basin.

Obviously, the impact on the non-farm economy is not going to be as great as the impact on the farm economy. The impact on the farm economy in the Roswell Basin will be tremendous. These communities depend in the long term on the farming economy. Additionally, there are non-farm water uses which will be directly and substantially impacted. *Amici* are the principal non-farm water users, but there are others as well. The Special Master failed entirely to notice these defects in the basis for Mr. Wright's testimony.

The Special Master failed to take notice of the result if all 31,000 acre feet of municipal uses were required to be replaced with pre-1887 rights at, e.g., $5,000.00 per acre foot. The result is $155,000,000.00, which remains, for New Mexico municipalities, a meaningful sum. If there is (as there must be) a direct impact on other non-agricultural rights, then the result is a many

fold increase in the percentage of income affected by the Court's action. See Tr. 383, 5/20/86.

POINT II

THE COURT IS WITHOUT JURISDICTION UNDER THE ELEVENTH AMENDMENT TO REQUIRE NEW MEXICO TO PAY BACK PAST SHORT DELIVERIES OF WATER UNDER THE PECOS RIVER COMPACT.

Under the Eleventh Amendment to the United States Constitution, this Court is without jurisdiction to entertain actions against a state by citizens of another state.

The Eleventh Amendment reads:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This Court has previously held that included in the jurisdictional limitation of the Eleventh Amendment are suits brought in the name of the state for the direct benefit of some of its citizens. *North Dakota v. Minnesota*, 263 U.S. 365 (1923). In general there is a distinction in original actions lying between suits brought on the one hand in the sovereign interest of the state as *parens patriae* of its citizens and on the other hand as a sovereign presenting and enforcing individual claims of its citizens as their trustee against a sister state. Only the former can be maintained consistently with the Eleventh Amendment.

In *North Dakota v. Minnesota, supra*, this Court said that where a drainage system built by Minnesota increased the flow of an interstate stream so that the water flooded farms in North Dakota, the latter state had "such an interest as quasi-sovereign in the comfort, health, and prosperity of its farmers that resort may be had to this Court for relief." In addition to an injunction, however, North Dakota requested a decree against Minnesota for damages of $5,000 for itself and $1,000,000 for its

inhabitants whose farms were injured. The Court said it could not award North Dakota damages for the benefit of such individuals in view of the Eleventh Amendment.

The Court said:

> The right of a state as parens patriae to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state. For this reason the prayer for a money decree for the damage done by the floods of 1915 and 1916 to the farms of individuals in the Bois de Sioux valley, is denied, for lack of jursidiction.

263 U.S. at 375, 376. *See* 3 Hutchins, *Water Rights Laws in the Nineteen Western States* 73, et seq.

Compare this Court's statement in *North Dakota v. Minnesota*, that "Indeed, it is inconceivable that North Dakota is prosecuting this damage feature of its suit without intending to pay over what it thus recovers to those entitled," with the statement of counsel for Texas in argument before the Special Master, April 16, 1986, p. 40:

> SPECIAL MASTER: Are you willing to take money?
>
> MR. HICKS: I think that we are willing to think about it and discuss it. One of the problems that we have, of course, is, the prime beneficiaries of the water coming down are the farmers of the Pecos River Basin. If money comes to Texas there is certain to be a battle over where the money goes and what account it goes into, especially since Texas is now in somewhat of a budget crisis because of the oil situation....
>
> ****
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> ...we do have a lot of the prime beneficiaries of the relief in water that we have to consider. We just haven't started balancing how that might be done.

More recently, this Court has distinguished invasion of the property of a state (usually its money) to assure future compliance with a substantive federal law from attempts to invade the State's property to compensate those adversely affected in the past by the State's actions. *Edelman v. Jordan* 415

U.S. 651 (1975). Such retrospective relief is expressly barred by the Eleventh Amendment. *Id.; Quern v. Jordan*, 440 U.S. 332 (1979)

New Mexico's water is not substantially different from her money, either as a matter of quality or quantity. It is the property of the State (N.M. Const., art. XVI, §2), and there is not an excessive amount of either. Simply stated, the Special Master is recommending that this Court invade the property of the State of New Mexico to pay past "water debts" for the benefit of specific citizens of Texas.

In *Colorado v. New Mexico (I)*, 459 U.S. 183 (1982), this Court held the Eleventh Amendment to be no bar to the assertion of rights to *future* diversions pursuant to equitable apportionment. This case is different. Here the question is whether the Eleventh Amendment bars the award of "water damages" for *past* underdeliveries, the sole purpose of which is to benefit a small number of downstream water users. The Eleventh Amendment does constitute a bar.

The Eleventh Amendment does not bar injunctive relief to enjoin future compliance, if it is found that there have been underdeliveries in the past. It only bars the remedy of payback. Therefore the Master's recommendation requiring a payback of water must be rejected.

It is evident that if Texas' claim were for money, she could only legitimately recover that money which would go to the benefit of all her citizens, for example by being paid to the State's treasurer and distributed by a corresponding reduction in the tax burden on all the citizens. In that circumstance, Texas would be acting in her *parens patrae* capacity. Examination of the statements of counsel for Texas establish that Texas is in fact attempting to present and enforce damage claims of its individual citizens against New Mexico.

To award Texas "water damages" for crop loss on behalf of the witness Walker or her parents or grandparents (Tr. 5/21/86, pp. 385, 386, 399) or for any other water user or erstwhile water user, such as the Master has recommended, in excess of current obligations, is barred by the jurisdictional limitations of the Eleventh Amendment. That amendment prohibits invasion of the State's property in an attempt to compensate individuals adversely affected in the past by the State's action.

POINT III

THE SPECIAL MASTER ERRONEOUSLY CREATED A REMEDY OF PAYBACK FOR PECOS RIVER COMPACT UNDERDELIVERIES

A. The Pecos River Compact is More Properly Construed as a Federal Law Than As a Contract. Contract Remedies Should Therefore Be Unavailable.

Although the Special Master stated in his Report (p. 39) that a compact is in effect a contract between two states, this does not appear to be the best interpretation upon closer analysis. He cites *West Virginia ex rel. Dyer v. Simms*, 341 U.S. 22 (1951), for his proposition. A close reading of that case, however, reveals that it was concerned with whether certain provisions of the West Virginia Constitution barred compliance with the Ohio Valley Sanitation Compact. The majority asserted the Court's power to interpret the West Virginia Constitution under such circumstances and held that the West Virginia constitutional provisions did not bar compliance with the compact. The question whether the compact was a contract or a federal statute was not addressed.

On the other hand, we have authority more to the point and much closer to home: the most recent opinion in this proceeding, *Texas v. New Mexico*, 462 U.S. 554 (1983), wherein Mr. Justice Brennan, speaking for a unanimous court, rejected the recommendation of the previous Special Master to have the Pecos River Compact in effect considered to be a contract and to be subject to the contractual remedy of reformation, specifically to change the voting rules for the Pecos River Commission. Justice Brennan responded to the recommendation as follows:

> Under the Compact Clause, two States may not conclude an agreement such as the Pecos River Compact without the consent of the United States Congress. However, once given, "*congressional intent transforms an interstate compact within this clause into a law of the United States.*" Cuyler v. Adams, 449 U.S. 433 (1981); see Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. 518, 566 (1852).

> One consequence of this metamorphosis is that unless the compact to which Congress consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.

462 U.S. at 564 (Emphasis added.) Thus, this Court has rejected already in this case the notion that the Pecos River Compact is a contract subject to contractual remedies such as reformation. The general rule and the law of this case are that once the Pecos River Compact was consented to by Congress, it became a federal law. The compact was transformed from an agreement between states into a law of the United States.

The remedy sought to be imposed by the Special Master must be inferred from the statute itself or its legislative history and not from the panoply of common law remedies that exist in contract cases, which is the method by which the Special Master reached his conclusion. The remedy, in other words, must be found within the statute and cannot be brought in from without the statute because the Compact is a federal law, not a contract.

B. Remedies May Be Inferred From Federal Laws Only If The Test of *Cort v. Ash* Is Satisfied. The Remedy of a Water Payback Does Not Meet That Test.

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court set out a four-part test for determining whether a remedy in favor of someone other than the Federal government is implicit in a statute not expressly providing one. Briefly, those factors are: (1) whether the plaintiff is one of the class for whose special benefit the statute was enacted; (2) whether there is an indication of legislative intent, explicit or implicit, to create such a remedy or to deny one; (3) whether it is consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) whether the cause of action is one traditionally relegated to State law. 422 U.S. at 78.

The two central factors in the present inquiry are the second and third, namely, whether there is any indication of *legislative* intent, explicit or implicit, either to create such a remedy or to deny one and whether it is consistent with the underlying

purpose of the legislative scheme to imply such a remedy for the plaintiff. Analysis of these factors requires reference to the compact itself and to its legislative history.

The Court has had occasion recently to discuss these two principles stating:

> And "unless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential pedicate for implication of a private remedy simply does not exist." Northwest Airlines, Inc., the Transport Workers, 451 U.S. 77 (1981). "The federal judiciary will not ingraft a remedy on a statute, no matter how salutory, that Congress did not intend to provide." California Sierra Club, 451 U.S. 287, 297 (1981).

Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. ____, 87 L.Ed.2d 96, 105 (June 27, 1985).

It is very significant that just ten years before the signing of the Pecos River Compact, the same two states signed and the U.S. Congress approved the Rio Grande Compact, which clearly provides for payback of accrued debits. *See* arts. I, VI, VII, Rio Grande Compact, §72-15-23, N.M.S.A., 1978; 53 Stat. 785 (1939). This is a clear indication that when Texas and New Mexico and the U.S. Congress omitted any reference to accrued debits and credits in the Pecos River Compact, they did so advisedly, being aware that they had a common history of providing expressly for accrual of debits and credits when it was their intention that there should be paybacks.

The analysis of the legislative history of the Compact by the State of New Mexico in its brief further confirms that no remedy of payback was intended by Congress. Therefore the payback remedy would appear to fail the second and third tests of *Cort v. Ash, supra.*

In addition to the persuasive statutory interpretation under *Cort v. Ash, supra*, it is appropriate to consider the additional reasoning of the Special Master in inferring a damage remedy.

The Special Master reasoned that New Mexico's position cannot be reconciled with the Court's order to the Special Master to determine for the period 1962 to the present New Mexico's

negative departure from its 1947 condition obligation. (Report, 39-40.) He says that no purpose would be served in spending considerable resources to determine the amount of past shortfalls if no remedies are available for the deficiency. On the contrary, a very real and necessary purpose is served by determining the amount of past shortfalls. That purpose is the need to determine, for the future, the average amount of additional water that needs to be provided at the state line. As the Special Master says, the amount of water due to Texas every year depends on factors that change every year.

Compliance in each and every year cannot be hoped for. As the Special Master points out very graphically, "the 1947 condition is a moving target, changing from year to year depending upon the amount of flood inflows into the Pecos River." (Report, p. 41.) The best that can be hoped for under these difficult circumstances is that there will be an average compliance over a number of years. Logically, then, in order to achieve average-year compliance with the Compact, the average by which flows undershoot the 1947 condition must be known. Without those calculations, it would be impossible to determine by what amount the State of New Mexico must increase its state line flows to come into compliance with the Compact. This would appear to be the reason that calculation of past shortfalls was required by this Court.

The Special Master also reasons that relief consisting solely of prospective compliance with Article III(a) of the Compact would be illusory. (Report, pp. 40, 41). His position appears to grow out of a confusion between the payback and the method for determining compliance. He asserts that the delivery obligation in one year is unrelated to the following year's obligation. While this is true, it does not seem to support his position that payback of past underdeliveries is the only non-illusory remedy available. In other words, the Special Master is correct that the obligation is not one that can be adjusted from year to year. But this does not support his position that paybacks must be required. Rather, it supports the proposition that compliance *vel non* must be judged over a long period and New Mexico should only be enjoined to bring its state line deliveries to an amount which would remove any average underdelivery. Average compliance is still very practical and constitutes a very real remedy under the

Compact, a remedy which, one might add, if the Special Master's finding that negative departures were caused by man's activities in New Mexico is accepted, will impose a great deal of hardship on New Mexico water users.

CONCLUSION

The Special Master has imposed a remedy upon New Mexico which not only violates the Eleventh Amendment to the United States Constitution, but would impose a severe hardship upon New Mexico water users in a manner and by means of a remedy not contemplated by the Congress in consenting to the Pecos River Compact. Clearly this Court can require future compliance with the Compact by New Mexico authorities. The result envisioned by the Special Master, however, is countenanced neither by federal law nor the decisions of this Court.

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CERTIFICATE OF SERVICE

We, the undersigned, hereby certify, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, that we are members of the Bar of this Court and are counsel of record for the Amici Curiae named in the foregoing Joint Brief of Amici Curiae in Support of the Position of the State of New Mexico, and that on the 17th day of December, 1986, we caused to be deposited the foregoing Joint Brief of Amici Curiae in the United States Post Office with first class postage prepaid, addressed to counsel of record as follows, being all counsel and parties required to be served:

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