

No. 65, Original

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW MEXICO,

Defendant.

Exception of the State of Texas
to Report of the Special Master and Brief in Support

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STATE OF TEXAS,

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**EXCEPTION TO THE REPORT OF
THE SPECIAL MASTER**

The Court ordered the July 31, 1986, Report of the Special Master filed on October 6, 1986. In this exception and the supporting brief, the report will be referred to as the 1986 Report.

Texas accepts the 1986 Report, except for one matter. Texas objects to the determination that, for the years 1962 through 1983, departures from New Mexico's delivery obligations to Texas under the Pecos River Compact caused by the existence of a training dike in the McMillan Reservoir ("McMillan dike") will not be characterized as depletions due to man's activities.

Respectfully submitted,

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STATE OF TEXAS,

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STATE OF NEW MEXICO,

Defendant.

BRIEF IN SUPPORT OF TEXAS' EXCEPTION

JURISDICTION

The original jurisdiction of the Court was invoked under Article III, Section 2, clause 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1).

STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), governs this case. Appendix A to the brief sets forth the Compact.

STATEMENT OF THE CASE

1986 Report

Three times in the past, the Court has received and ruled on reports from a Special Master in this case: in 446 U.S. 540 (1980), the Court ruled on the 1979 Report; in 462 U.S. 554 (1983), it ruled on the 1982 Report; and in 467 U.S. 1238 (1984), it ruled on the 1984 Report. Now, through its ruling on the 1986 Report, the Court will conclude the final phase of the litigation.

The Court's opinion in *Texas v. New Mexico*, 462 U.S. 554 (1983) ("1983 Pecos decision"), discusses the historical background to the litigation, *id.*, at 556-62, and it need not be repeated here. For present purposes, only a brief outline is needed of the litigation mileposts which have led to the presentation of the issues now before the Court.

Texas initiated the litigation in June, 1974, when it filed its complaint that New Mexico was violating its delivery obligations under the Pecos River Compact ("Compact"). New Mexico's delivery obligation is established by Article III(a) of the 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.

The Texas complaint was, and continues to be, that since 1950 New Mexico has not delivered Pecos River water to Texas at the New Mexico-Texas state line in accordance with its Article III(a) obligations.

In the final part of its 1983 Pecos decision, the Court marked the course for the rest of the litigation:

The crucial question that remains to be decided is ...: "[H]as New Mexico fulfilled her obligations under Article III(a) of the Pecos River Compact?" ... That question necessarily involves two subsidiary questions. First, under the proper definition of the "1947 condition," ... what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received? ... Second, to what extent were the shortfalls due to "man's activities in New Mexico"?

462 U.S. at 574-75. In addition to recommending remedies to insure future Compact compliance, the 1986 Report answers the Court's questions and explains the factual and legal bases for them. See 1986 Report 31 (table summarizing

answers).¹ Its conclusion is that, for the 1950-1983 period, New Mexico failed to deliver to Texas 340,100 acre-feet of water which Article III(a) of the Compact obligated it to deliver.

Texas takes exception to only one part of the Special Master's answer: the Special Master's conclusion that departures from New Mexico's Article III(a) obligations during the 1962-1983 period caused by the McMillan dike cannot be characterized as depletions due to man's activities. 1986 Report 18. If the Court sustains Texas' exception, then 27,600 acre-feet of water must be added to New Mexico's Article III(a) shortfall for the 1950-1983 period, resulting in its owing Texas 367,700 acre-feet of water for the period.

Proposed Decree

Before turning to legal argument on its exception to the 1986 Report, Texas needs to focus the Court's attention on one other matter pertinent to the case. The specificity and consequent enforceability of the final decree in this case are critical to Texas. Attached to the 1986 Report as Appendix A is a Proposed Decree prepared by the Special Master. As Texas understands it, the 1986 Report, not the Proposed Decree, is the reference point for any exceptions, and Texas has only one exception to the 1986 report. There are, however, three areas in which the 1986 Report is not fully reflected in the Proposed Decree. The three discrepancies appear to arise from inadvertence. They are discussed below.²

1. Prior to the 1986 Report, two elements leading to the answer to the first of the two subsidiary questions had been supplied. The proper definition of the 1947 condition was established by the Court's approval of the 1979 Report. 446 U.S. 540 (1980). The quantity of water Texas could have expected to receive under the 1947 condition each year of the 1950-1983 period was established by the Court's approval of the 1984 Report. 467 U.S. 1238 (1984). Column 5 of Table 2 on page 5 of stipulated Texas Exhibit 79 lists these quantities.

2. Attached to this brief as Appendix B is the Special Master's Proposed Decree, as it would be modified: (a) to correct for what Texas views as three inadvertent discrepancies between it and the 1986 Report; and (b) to reflect the sustaining of Texas' sole exception to the 1986 Report. The modifications are in bold-face type.

Discrepancy 1

In the last line of Section II(B), the phrase "and the other procedures" should be inserted before "contained in Tex. Exh. 79." The Section II(A) computation is a function of the calculation required in Section II(B). To complete the Section II(A) computation, more than just the "inflow-outflow and channel loss equations contained in Tex. Exh. 79" will be required, although they are the most significant factors in the computation. The "other procedures" used in Texas Exhibit 79, which was admitted into evidence by stipulation, also will be required.

The discussion in the text of the 1986 Report suggests that the omission was inadvertent. In the course of explaining how Texas Exhibit 79 had taken into account all natural depletions, thereby leaving only man-made depletions as the cause of New Mexico's delivery shortfall, the Special Master finds that "Dr. Murthy's testimony made it clear that the *procedures* followed in Tex. Exh. 79 accounted for all non-manmade depletions ..." 1986 Report 9 (emphasis added). Later, in discussing remedies, the Special Master recommends that an injunction issue "to utilize Tex. Exh. 79 ... as a basis for determining ... New Mexico's Article III(a) obligation ..." 1986 Report 46. No suggestion is made to limit the use to the inflow-outflow and channel loss equations. In fact, because the purpose is to provide a basis for determining the Article III(a) obligation and because all the Texas Exhibit 79 procedures must be used to complete that determination, the implication is that all the procedures should be used. It is for these reasons that Texas suggests the correction of this discrepancy.

Discrepancy 2

In the last line of Section IV of the Proposed Decree, "II(B)" should be changed to "II(C)". II(C), not II(B), sets forth the amount of past-due water New Mexico owes Texas.

Discrepancy 3

In Section IV, a second sentence should be added to establish, as the Special Master intended, that the water interest principle applies to each of the last five years of the pay back period,

as well as, in the aggregate, to the first five years of the pay back period. In his discussion of good faith and water interest, the Special Master defined good faith as

meeting at least 80% of the aggregate minimum delivery requirement for the first five years, *and the annual minimum delivery obligation each year thereafter.*

1986 Report 37 (emphasis added). *See also id.* n. 16 (“if New Mexico meets 80% of its obligation during the first five years *and each year thereafter*” (emphasis added)).

The Proposed Decree’s Section IV, as it now reads, does not reflect the 1986 Report because it does not extend the water interest principle to each of the last five years of the pay back period. For example, if New Mexico were to escape the imposition of water interest during the first five years of the pay back period by meeting the 80% good faith standard, but then, on the sixth year, fail to pay back 80% of its Annual Minimum Delivery Obligation, the Proposed Decree would not impose water interest, even though the text of the 1986 Report demonstrates that the Special Master recommends that it be imposed in such a situation.

SUMMARY OF ARGUMENT

The construction of the McMillan dike in 1954 caused less water to seep from the McMillan Reservoir. Consequently, less Pecos River water reached Texas than would have if the dike had never been constructed. For the relevant 1962-1983 period, the McMillan dike prevented 27,600 acre-feet of water from reaching Texas that would have under the 1947 condition of the river, which was a condition that did not include the dike’s existence.

Under Article III(a) of the Compact, these McMillan dike depletions are due to “man’s activities” and, consequently, must be charged to New Mexico. This legal conclusion is unaltered by the fact that, in 1961 and 1962, the Pecos River Commission made findings of fact that did not charge McMillan dike depletions to New Mexico for the *1950-1961 period*.

The 1961 and 1962 Commission findings did not purport to bind later Commissions to the same characterization of McMillan dike depletions when making findings for the years after 1961. Instead, the transcripts of the Commission meetings demonstrate that, despite an expressed displeasure with the characterization of the depletions, Texas acquiesced in it for the 1950-1961 period as an accommodation to New Mexico. That is, for now obscure reasons, Texas made a limited "deal" with New Mexico, notwithstanding the fact that the law did not require Texas to make it. New Mexico's efforts to convert the limited nature and duration of the accommodation into a permanent legal arrangement must fail.

Even if the Commission at the time had tried to permanently bind future Commissions' actions by an agreement so patently at odds with reality and the clear language of the Compact, it lacked the power to do so. That kind of action would constitute an amendment of the Compact. Under the Compact Clause of the Constitution, amendments can become effective only through ratification by the Texas and New Mexico legislatures and approval by Congress. None of these legislative steps has been taken since the initial Congressional approval of the Compact.

ARGUMENT

For the 1962-1983 Period, the 27,600 Acre-Feet of Departures from New Mexico's Article III(a) Delivery Obligations Caused by the McMillan Dike Are Depletions Due to Man's Activities and, Therefore, Are Chargeable Against New Mexico.

The McMillan Reservoir in New Mexico sits astride the Pecos River and impounds part of its flow. In 1954, the State of New Mexico, in cooperation with the United States Bureau of Reclamation and the New Mexico-based Carlsbad Irrigation District, built a dike along the reservoir's east side. Its purpose was to reduce seepage losses from the reservoir into a cavernous section located along the eastern shoreline. New Mexico State Engineer, *22nd Biennial Report*, at 53-54 (1956). The reduction in seepage losses caused by construction of the

McMillan dike resulted in less Pecos River water reaching Texas at the state line than would have reached it if the dike had not been built. For the 1962-1983 period, 27,600 acre-feet less water reached Texas as a result of the McMillan dike. 1986 Report 21-22.

Article III(a) of the Compact prohibits such depletions if they are due to "man's activities." Standing alone, the plain language of the Compact provides easy answers to any questions about the proper characterization and legal treatment of this 27,600 acre-feet of water. The McMillan dike was constructed by humans and, consequently, any depletions in the flow of the river at the state line are due to "man's activities." Because the McMillan dike did not exist until after 1947, the 1947 condition of the river—the benchmark of the Compact in general and Article III(a) in particular—cannot include the dike's existence and effects. Therefore, depletions due to the McMillan dike that are reflected at the state line mean that Texas is receiving less water due to man's activities than it would have under the 1947 condition. Because those depletions equal 27,600 acre-feet, New Mexico must be found to have fallen below its Article III(a) obligation by that amount.

The Compact makes the logic and its conclusion seemingly unassailable; yet, the Special Master rejects Texas' argument for the 1962-1983 period. 1986 Report 18. The rejection has two bases. First, he finds that the Court disposed of Texas' contention by holding in its 1983 Pecos decision that Commission actions on delivery obligations are dispositive. *Id.* Second, he finds that Pecos River Commission ("Commission") actions in 1961 and 1962 resolved the contention against Texas by placing a valid interpretive gloss on ambiguous Compact terms as they apply to the McMillan dike. *Id.* To understand the error in the Special Master's findings on this point, the Court must focus its attention on two crucial Commission meetings.

At its annual meetings in 1961 and 1962, the Commission, among other things, endeavored to determine the negative departures from New Mexico's Article III(a) delivery obligations for the 1950-1961 period. *See generally* Minutes of the Commission, January 31, 1961, Stip. Exh. 4(b) at 231-48; and Minutes of the Commission, November 9, 1962, Stip. Exh. 4(b)

at 256-58. For the first and, thus far, the only time in its history, the Commission reached an agreement on departures. It determined the negative departures for the 1950-1961 period. 1986 Report 4-6 (negative departures equalled 53,300 acre-feet).

The McMillan dike was one of the dominant concerns of the Commission during the 1961 and 1962 deliberations, because the negative departures for the 1950-1961 period could not be finally determined until any controversies about the dike were settled. The fullest exposition of the McMillan dike issue is found not in the minutes of the Commission meetings (Stip. Exh. 4(b)), but in the transcripts of the meetings (Stip. Exh. 7).

At the 1961 Commission meeting, a Joint Memorandum signed by the Commissioners for Texas and New Mexico and by the Chair of the Engineering Advisory Committee to the Commission was made part of the Commission record. In a discussion covering several pages, most of which is omitted here, the memorandum made the following observations:

Another troublesome problem is how to deal with the leakage at Lake McMillan. . . . There was quite a sudden change after the unprecedented flood flows of 1941 and 1942. . . . The question is should the actual leakage that was taking place under 1947 conditions be used . . . in defining the 1947 conditions or should present conditions be used, or should the leakage that was occurring prior to the flood of 1941 and 1942 be used.

The Commissioners recognize that *morally* New Mexico should not be penalized for an unusual act of nature such as occurred in 1941.

Transcript of the Commission, January 31, 1961, Stip. Exh. 7 at 30-31 (emphasis added). The memorandum concluded the McMillan dike discussion with a recommendation which made negative departures due to the dike not chargeable to New Mexico. *Id.* at 32.

A short time later in the meeting, Mr. Tipton, the Chair of the Engineering Advisory Committee, discussed the McMillan dike issue again. *Id.* at 46. He restated the position of Mr.

Reese, the New Mexico Commissioner, that New Mexico should not be charged for McMillan dike depletions, then pointedly noted “[t]hat Mr. Vandertulip [the Engineer Advisor to the Texas Commissioner] by no means at the moment agrees with that interpretation.” *Id.* at 46-47. The discussion of the McMillan dike issue ends obscurely with the passage of a motion encompassing several subjects, which, among other things, made findings of fact through the year 1959. *Id.* 52-53.

At its next meeting in 1962, in the midst of trying to determine the negative departures for the 1950-1961 period, the Commission once again took up the McMillan dike issue. Transcript of the Commission, November 9, 1962, Stip. Exh. 7 at 59-64. A document making tabulations for the relevant period was circulated, and the Engineer Advisor to the Texas Commissioner suggested deletion of part of it. *Id.* at 62. The Commission made the deletion, added a new sentence to the document, and adopted the document as findings of fact for the 1950-1961 period. *Id.* at 62-64.³ The paragraph deleted at Texas’ behest had dealt with the McMillan dike and had specified that departures due to the dike were not chargeable as a result of man’s activities. See Appendix C to this brief. Since the 1962 meeting, the Commission has not spoken again to the proper characterization of depletions due to the McMillan dike, and Texas has offered no further accommodations to New Mexico on this issue.

This spotlight on the 1961 and 1962 Commission meetings reveals a subtly different scene than depicted by the Special Master. In the Special Master’s view, the Texas Commissioner acquiesced to a permanent legal interpretation of ambiguous Compact provisions as they applied to the McMillan dike, thereby forever binding Texas to a legal result patently at odds with reality and Article III of the Compact. Nowhere do the Commission transcripts reflect that Texas viewed its agreement as being permanent. The period then under consideration

3. With some irrelevant omissions, the *unamended* version is reproduced by the Special Master. 1986 Report 16. Attached to this brief as Appendix C is the document with the Commission’s modifications highlighted. The part deleted pursuant to Texas’ suggestion is in italics. The part added after the foregoing deletion is in bold-face.

ended in 1961. Future departures were not even at issue. Twice during the discussions, the Commission was put on notice that the Texas Engineering Advisor did not agree with the characterization of the McMillan dike depletions. The Commission transcripts also fail to reflect that Texas viewed its agreement as one embodying a legal interpretation. A moral obligation was acknowledged, but the use of the word "morally" implies that the law—that is, the Compact—did not provide independent authority for the characterization adopted by the Commission.⁴ Finally, the relevant Compact provisions—"man's activities" and "1947 condition"—are not ambiguous in the McMillan dike context. Both the dike and the depletions resulting from it incontrovertably are due to man's activities. The 1947 condition of the river could not encompass the McMillan dike, which was not even constructed until 1954.

The better view is that, for reasons that remain obscure, the Texas Commissioner made an accommodation with New Mexico for a specific time period—1950-1961. In plain terms, Texas made a deal with New Mexico that, regardless of the Compact, it would not treat McMillan dike depletions as man's activities for the 1950-1961 period. The accommodation did not reach past 1961. Nothing was said about the future.

In other settings, the Court has refused to bind an agency forever to a legally unsound action ostensibly taken pursuant to a federal statute, or to an erroneous interpretation of a federal statute by one of the agency's officials or employees. In *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), the Court held that a federal agency was not bound by the actions and representations of one of its officials, even when there had been detrimental reliance on the representations. *See also Schweiker v. Hansen*, 450 U.S. 785 (1981). In *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180 (1957), the Court held:

4. Now, over twenty-five years later and with the advantage of hindsight, even the moral obligation is hard to discern. At least as early as 1949, it appears that the impact of the 1941 floods on the seepage from McMillan Reservoir was well known. *See* Sen. Doc. 109, Stip. Exh 1 at 3 ("high water of 1941 opened other holes in the reservoir") and 71 (noting increasing reservoir leakage since 1940). Thus, at the time the Compact bargain was struck, the parties seem to have been aware of the seepage conditions at the McMillan Reservoir, yet made no separate provision for them in the Compact.

the doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law.

353 U.S. at 183.

The general principle underlying these decisions is that the duty of lawmaking lies within the legislative realm, not the executive realm. *See, e.g., Dixon v. United States*, 381 U.S. 68, 73 (1965). Those individuals charged with enforcing laws or interpreting them for the public are not free to amend them in the course of employment through inadvertence or intention.

These principles apply here. The Compact is a federal law. *Texas v. New Mexico, supra*, 462 U.S. at 564. The members of the Commission it created are not empowered to amend it as they see fit. While they may be empowered to make "findings" about changes in depletions due to man's activities, *see* Compact, art. V(d)5, the findings are not conclusive in court, *id.*, art. V(f). The findings are supposed to be determinations of *past* depletions based upon historical data. *Id.*, art. VI(b). The power of the Commissioners to make findings does not include the power to permanently bind subsequent Commissions to agreements affecting determinations of future depletions, especially when the agreements contravene the plain language of the Compact. That would constitute an amendatory power not conferred on them by the Compact Clause of the Constitution, U.S. Const., Art. I, § 10, cl. 3.

The Commissioners did not try to make a permanently binding legal interpretation of the characterization of the McMillan dike depletions at the 1961 and 1962 annual meetings. If they had tried, they would have exceeded their legal authority under the Compact and the Compact Clause of the Constitution. They only reached an agreement and made findings for the 1950-1961 period. Thus, the Court is left with the straightforward logic and facts already discussed. *See* p. 9, *supra*. The McMillan dike depletions for the 1962-1983 period resulted in negative departures from the 1947 condition, and they are due to man's activities. In these circumstances, they are chargeable to New Mexico in the amount of 27,600 acre-feet.

CONCLUSION

For the foregoing reasons, the exception of the State of Texas to the 1986 Report should be sustained. In all other respects, the Court should adopt the recommendations in the 1986 Report.

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APPENDIX A

APPENDIX A

PECOS RIVER COMPACT

(63 Stat. 159, 160-165)

The State of New Mexico and the State of Texas, acting through their Commissioners, John H. Bliss for the State of New Mexico and Charles H. Miller for the State of Texas, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

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.

(c) "New Mexico" and "Texas" means the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the Administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(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.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

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.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for the utilization of water salvaged and unappropriated flood waters apportioned by this Company [sic] to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither new Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the United States. The President is hereby requested to designate such a Commissioner. If so designated, the Com-

missioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expense of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, clerical, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;
2. Locate, establish, construct, operate, maintain, and abandon watergaging stations, independently or in cooperation with appropriate governmental agencies;
3. Engage in studies of water supplies of the Pecos

River and its tributaries, independently or in cooperation with appropriate governmental agencies;

4. Collect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;

5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;

6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Performs all functions required of it by this Compact and do all things necessary, proper or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information within its possession at any time, and shall always provide free access to its records by the Governors of each of the states, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

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.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated flood waters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added

a quantity equal to the quantity of salvage water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated flood waters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated flood waters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

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.

ARTICLE IX

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.

ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as;

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards, shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminated at any time by appro-

priate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have executed three counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico, this 3rd day of December, 1948.

APPENDIX B

APPENDIX B
PROPOSED DECREE

IT IS ORDERED, ADJUDGED AND DECREED THAT

I. For purposes of this decree:

(A) "Annual Minimum Delivery Obligation" shall mean the annual amount of water owed by New Mexico to Texas under this decree over and above the Article III(a) obligation.

(B) "Index Inflow" shall mean the three year progressive average of "annual flood inflows" as those terms are defined in Tex. Exh. 79, Table 2 at page 5.

(C) "Water Interest" shall equal the return on one year treasury bills as of the date that it is determined that New Mexico has not met its obligations under this decree.

II. The State of New Mexico, its officers, attorneys, agents, and employees be and they are hereby severally enjoined:

(A) To comply with the Article III(a) obligation of the Pecos River Compact by delivering to Texas at state line each year an amount of water calculated in accordance with the inflow-outflow equation contained in Tex. Exh. 68 at page 2.

(B) To calculate the Index Inflow component of the inflow-outflow equation by using the inflow-outflow and channel loss equations and the other procedures contained in Tex. Exh. 79.¹

(C) To deliver to Texas at state line an additional amount of water aggregating 367,700 acre feet over a period of ten years as specified in Article III of this Decree and to deliver to Texas at state line not less than 36,770 acre feet of water per year for ten years to satisfy the Annual Minimum Delivery Obligation.

1. Tex. Exh. 79 will have to be modified to reflect decisions by the Court as to man-made depletions chargeable to New Mexico.

III. New Mexico is granted three years from the date of this Decree to commence performance of the Annual Minimum Delivery Obligation, provided that during the three-year period she demonstrates good faith by complying with the Article III(a) obligation in each of the three years. If New Mexico fails to demonstrate such good faith, New Mexico shall commence performance of the Annual Minimum Delivery Obligation of 36,770 acre feet at the beginning of the year next ensuing after the year of default in the Art. III(a) obligation.

IV. If New Mexico shall have failed to deliver to Texas at state line at the end of five years from the date specified in Article III of this Decree 147,080 acre feet of water (being eighty percent of 183,850 acre feet of water owed by New Mexico during this five-year period), New Mexico shall pay to Texas, in addition to any amounts owed under this Decree, Water Interest on all amounts undelivered during the five-year period as well as Water Interest on the balance of the amount New Mexico owes to Texas under Section II(C) of this Decree. If New Mexico shall have failed to deliver to Texas at state line at the end of the sixth, seventh, eighth, ninth, and tenth years from the date specified in Article III of this Decree 29,416 acre feet of water (being eighty percent of 36,770 acre feet of water owed by New Mexico during each of these years), New Mexico shall pay to Texas, in addition to any amounts owed under this Decree, Water Interest on all amounts undelivered during that year as well as Water Interest on the balance of the amount New Mexico owes to Texas under Section II(C) of this Decree.

V. [If an arbiter is appointed] The Pecos River Commission, its officers and employees [or, the River Master] are enjoined to make the calculations provided for in this Decree annually as promptly as data are available and to report the calculations to appropriate representatives of the State of New Mexico and the State of Texas.

APPENDIX C

APPENDIX C

**MINUTES OF THE COMMISSION,
NOVEMBER 9, 1962, STIP. EXH. 4(b) at p. 257**

[years 1950-56 omitted from the table]

| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
|------|-------|-------|-------|-------|--------|--------|-------|
| 1957 | 182.8 | 229.7 | 48.7 | 77.3 | 92.9 | -15.6 | +35.6 |
| 1958 | 379.2 | 243.9 | 148.7 | 78.1 | 100.0* | -21.9* | +13.7 |
| 1959 | 191.6 | 251.2 | 54.6 | 84.0 | 103.6* | -19.6* | -5.9 |
| 1960 | 310.3 | 293.7 | 108.6 | 104.0 | 128.2 | -24.2 | -30.1 |
| 1961 | 211.6 | 237.8 | 57.9 | 73.7 | 96.9 | -23.2 | -53.3 |

*The values in Columns 6 and 7 for the years 1958 and 1959 deviate slightly from those submitted to the Commission at its January 31, 1961 meeting. These small changes were brought about by minor arithmetic changes made in reviewing the flood inflow computation in these two years. It is recommended the above values be adopted as the official Commission values and replace those previously submitted.

The above table does not reflect adjustments for depletion, if any, which might have been caused below Carlsbad by pumping from the alluvium, with pumps constructed in 1947 or prior thereto. Otherwise the above findings are arrived at in the same manner as described in the January 1961 report of the Engineering Advisory Committee.

The amounts set forth in the table below are departures caused by the training dike completed at McMillan Reservoir in 1954. In accordance with the action of the Pecos River Commission at its January 1961 meeting, these departures are not chargeable as a result of mans [sic] activities. The Engineering Advisory Committee has made no determination of what part, if any, of the remainder of the amount shown on Column 7 is so chargeable.

| | <u>3-year Mean</u> | <u>Accumulation</u> |
|------------|------------------------|---------------------|
| 1955 | 2.7 | 2.7 |
| 1956 | 5.3 | 8.0 |
| 1957 | 8.0 | 16.0 |
| 1958 | 8.0 | 24.0 |
| 1959 | 8.0 | 32.0 |
| 1960 | 8.0 | 40.0 |
| 1961 | 8.0 | 48.0 |

