No. 65, Original

IN THE

Supreme Court of the United States

October Term, 1986

STATE OF TEXAS,
Plaintiff,

v.

STATE OF NEW MEXICO,
Defendant,

UNITED STATES OF AMERICA,
Intervenor.

NEW MEXICO'S ANSWER BRIEF IN RESPONSE TO TEXAS' BRIEF IN SUPPORT OF EXCEPTION

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ARGUMENT

THE MASTER PROPERLY SUPPORTED THE PECOS RIVER COMMISSION'S DECISION NOT TO CHARGE NEW MEXICO WITH NEGATIVE DEPARTURES RESULTING FROM THE TRAINING DIKE AT McMILLAN RESERVOIR

The Master's finding that the 27,600 acre-feet of depletions at the state line from 1962 through 1983 which resulted from the increased irrigation supply made available in New Mexico by the McMillan training dike should be deducted from the negative departures in stateline flow, is correct for three reasons. First, the Pecos River Commission's decision regarding increased depletions due to McMillan dike was part of the

Commission's continuing effort to formulate a proper description of the 1947 condition. Second, there is no evidence to suggest that the Commission's actions constituted a limited "deal" acquiesced in by Texas, for only the period 1950-61. Third, the Commission's decision was within the scope of its congressionally ratified powers and, as such, should not be reviewed.

It should be noted that while New Mexico supports the Master's finding that the 27,600 acre-feet should be deducted from the negative departures at the state line, she maintains her objection to any accumulation of debits or credits under the Compact. Findings regarding past depletions are useful only to the extent that they help to identify a trend and the site of the depletion to enable a determination of the cause.

A. The Pecos River Commission properly took account of reduced leakage from McMillan Reservoir.

The Master's 1986 Report discusses the pertinent Commission meetings and the Joint Memorandum in detail; the events will not be repeated here except in pertinent part. 1986 Report at 11-17.

McMillan Dam was constructed in 1893. Unprecedented floods in 1941 and 1942 significantly increased leakage from the reservoir which, in part, was reflected as increased flow at the state line. In 1951 the Commission recommended that McMillan Reservoir be rehabilitated to reduce leakage from the reservoir in order to improve the use of Pecos River water. Stip. Exhibit 4(b) at 43 (Commission minutes of May 17, 1951). Accordingly, in 1954 a dike was constructed as a cooperative project of the State of New Mexico, the U.S. Bureau of Reclamation, and the Carlsbad Irrigation District. The dike was built along the eastern shoreline where extensive caverns had been created as a result of the 1941 and 1942 floods.

The dike reduced leakage, and the flow at the state line was decreased. In 1961 and again in 1962, the Commission decided how to treat the problem of the decreased stateline flows.

Texas characterizes this issue as one of determining whether depletions due to McMillan dike were caused by man's activities. In this simplistic view, any depletions due to the dike must necessarily be charged to New Mexico under the Compact definition of man's activities. Texas misses the point. As the Commission and the Master recognized, the problem is instead a matter of deciding which leakage condition should be used in defining the 1947 condition. Stip. Exhibit 4(b) at 238 (Commission minutes of January 31, 1961); 1986 Report at 11, 14. The dike merely restored the efficiency of McMillan Reservoir to that which was present during essentially all of the 1905-46 period used to define the 1947 condition, but materially reduced by the 1941 and 1942 floods. The Commission, acting within the scope of its congressionally ratified powers, decided that it was not the intent of the Compact to allow the disastrous floods to distort the definition of the 1947 condition upon which the Compact is based.

In response to the Commissioners' recommendation in their August 23, 1960 Joint Memorandum, the inflow-outflow subcommittee completed two routing studies, one which accounted for the effect of the training dike in determining the 1947 condition, and one which did not. Stip. Exhibit 4(b) at 241, 242, *supra.* The Commission adopted both studies and compared them in order to determine the amount of the increased depletions attributable to the dike. *Id.* at 245.

The Commission's decision to effectively redefine the 1947 condition to include the reduced leakage caused by the McMillan dike was legally sound under the circumstances. Even if, as the Master states, the Compact contained a latent ambiguity with respect to the depletions due to the training dike, that

ambiguity was resolved by the Commissioners' agreement. As the agency entrusted to administer the Compact, its interpretation of the Compact is entitled to substantial deference. 1986 Report at 18. Texas has failed to show how any of the Commission's actions were legally unsound to the extent that this Court should now step in and review them.

B. There is no evidence of any "deal" that the McMillan dike solution was limited to the 1950-61 period.

Texas claims that the Commission's decision not to charge New Mexico for the depletions due to McMillan dike stemmed from an accommodation or limited "deal" between Texas and New Mexico and was not intended to become a "permanent legal interpretation of the Compact." Exception of the State of Texas to Report of the Special Master and Brief in Support (Texas Brief) at 8, 11 (December 18, 1986). This claim is without foundation and results from a strained and incorrect reading of the record.

As the Master's Report states, the Commission discussed McMillan dike for the second time on November 9, 1962. 1986 Report at 14-17. At that meeting, Exhibit 1, which set forth inflow-outflow and departure data for the 1950-61 period, was circulated. Exhibit 1 is reproduced in the 1986 Report at 16. The minutes relate that the engineering advisory committee amended the exhibit by deleting the "second paragraph" and inserting as the last sentence of the first paragraph the sentence "Otherwise the above findings are arrived at in the same manner as described in the January 1961 report of the Engineering Advisory Committee." The Commission adopted the exhibit, as amended. Stip. Exhibit 4(b) at 258 (Commission minutes of November 9, 1962).

Exhibit 1 contained two tables of inflow-outflow calculations prepared by the engineering advisors. The first table listed the stateline departures of stream flows from the 1947

condition. The second table listed the departures resulting from McMillan dike. There are three unnumbered paragraphs between the two tables. The first paragraph is a footnote explaining changes in the table of stateline departures. The second paragraph states that the table of stateline departures does not reflect adjustments for certain groundwater depletions below Carlsbad. The third paragraph explains the second table, which lists departures resulting from McMillan dike.

Both Texas and the Master reason that because the first paragraph is a starred footnote, the deleted paragraph referred to in the minutes is actually the paragraph relating to the McMillan dike departures rather than the paragraph relating to depletions below Carlsbad. Texas uses this interpretation to bolster its contention that the Commission reversed its previous position that New Mexico not be charged for McMillan dike departures. Texas Brief at 11.

The record distinctly shows otherwise. At the November 8, 1962, meeting of the engineering advisory committee, it considered adjustments in stateline departures for McMillan dike and prepared an explanatory paragraph on the adjustments. The committee did not consider adjustments for depletions caused by groundwater pumping below Carlsbad. Stip. Exhibit 2 at 3 (Committee minutes of November 8, 1962). The next day, the engineering advisor for Texas requested the deletion of the second paragraph of Exhibit 1 because it "covers a matter not discussed" at the engineering advisory committee meeting on the previous day. Stip. Exhibit 7 at 62 (Transcript of November 9, 1962 Commission meeting). Thus, it is clear that the Texas advisor requested the engineering committee to delete the paragraph on adjustments for groundwater depletions below Carlsbad.

Further, the first and starred paragraph deals with findings submitted by the engineering advisory committee to the Commission in January 1961 and minor changes from certain values. The sentence to be added to the end of the "first paragraph"

likewise refers to the engineering advisory committee's submission to the Commission, and distinguishes the deviations made from the values listed in the 1961 engineering report from the findings made in accordance with that report.

It is inconceivable that the Commission would reverse itself on a matter of this importance without any further discussion or statement of intention. Regardless of which paragraph of Exhibit 1 the Commission intended to delete, the Master correctly analyzes the Commission's purpose. Neither deletion would manifest an intention to reverse the principle of not charging New Mexico for depletions resulting from the McMillan dike. 1986 Report at 17.

Texas has failed to produce any substantive evidence to show that she merely acquiesced in any sort of limited deal with New Mexico or that the Commission limited its interpretation of the appropriate treatment of McMillan dike leakage to past, not future, departures.[1] On the contrary, the administrative history of the Compact illustrates that the Commission has conclusively resolved the matter within the proper scope of its authority.

C. The Commission's actions on delivery obligations are dispositive.

The Master recognized that the Commission's agreement to exclude McMillan dike leakage from the 1947 condition is

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[1] In its definition of the 1947 condition, Texas Exhibit 68, which the Master's proposed decree would require to be used, incorporates the McMillan Reservoir leakage condition as it existed in the period 1946-52, that is, after the 1941 and 1942 floods and before the construction of the dike. This, of course, makes it necessary to adjust stateline flows in the future, as the Master has done for the 1962-83 period, to implement the Commission's action effectively redefining the 1947 condition by a proper accounting of the McMillan Reservoir leakage.

dispositive of this issue. In 1983 the Court concluded that it was not the "proper function" of its original jurisdiction to review decisions actually made by the Pecos River Commission. *Texas v. New Mexico,* 462 U.S. 554, 570 (1983). The Court reasoned that:

> If authorized representatives of the compacting States have reached an agreement within the scope of their congressionally ratified powers, recourse to this Court when one State has *second thoughts* is hardly 'necessary for the State's protection' . . . Absent *extraordinary cause,* we shall not review the Pecos River Commission's actions without a more precise mandate from Congress than either the Compact or 28 U.S.C. § 1251 provides.

Id. at 570-71 (footnote and citation omitted, emphasis added).

Clearly, the Court prefers mutual accommodation and agreement for the settlement of interstate disputes. *Id.* at 575; *Colorado v. Kansas,* 320 U.S. 383, 392 (1943). An unrestricted review of the actions of interstate compact commissions undercuts this means of resolving disputes. By imposing the burden of showing "extraordinary cause" upon the state that has "second thoughts," the Court strengthens this means of conflict resolution. This "second thoughts" rule is in accord with the policy of the Court that "original jurisdiction should be invoked sparingly." *Utah v. United States,* 394 U.S. 89, 95 (1969). Because Texas has failed to show "extraordinary cause," the Court should not review the Commission's decision to effectively redefine the 1947 condition with a proper accounting of the effects of the McMillan dike.

New Mexico urges the Court to overrule Texas' exception on the above-stated grounds.

NEW MEXICO'S RESPONSE TO TEXAS' OBJECTIONS TO PROPOSED DECREE

Texas requests certain changes in the Master's proposed decree. That both New Mexico and Texas have serious problems with the decree and have differing interpretations of the Master's intent, substantiates New Mexico's claim that the proposed decree is ambiguous, confusing, and unworkable.

1. Texas' requested change in Article II(B) of the proposed decree would require the Pecos River Commission to use in future administration all the hydrologic procedures in Texas Exhibit 79, regardless of any change in the condition of the Pecos River after 1983. Article II(B), with or without Texas' proposed revision, would in effect amend Article VI(c) of the Compact by prohibiting the Commission from changing the description of the river in order to correctly compute future index inflows or from adopting a more feasible method of river accounting.

2. There is an obvious error in the last line in Article IV in the Master's proposed decree. 1986 Report at A-2; New Mexico's Exceptions to the Report of the Special Master and Brief in Support of Exceptions at A-4 (December 19, 1986); Texas Brief at 6. Article IV requires water interest "on the balance of the amount New Mexico owes to Texas under Section II(B) of this Decree." Article II(B), or Section II(B)," of the proposed decree relates only to the index inflow component of the inflow-outflow equation and not to any obligation of New Mexico. Some inadvertence must be presumed. Texas requests that the reference to II(B) be changed to II(C), which sets forth the amount of past-due water New Mexico owes to Texas.

3. The Master's intent regarding the payment of water interest is unclear from the 1986 Report, and is correspondingly

unclear in Article IV of the proposed decree. Texas requests that water interest be charged in the last five years of the 10-year payment period in the proposed decree, arguing that the Master did not intend that the proposed decree would limit water interest to just the first five years of the 10-year payment period. *Id.* at 6-7.

Texas relies on two inconsistent statements in the Master's Report in support of its position. First, the Master indicates that water interest will be due only if New Mexico fails to act in good faith, and defines 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.

Id. at 7, *quoting,* 1986 Report at 37.

Then, the Master indicates that 80 percent of the annual minimum delivery obligation could be met each and every year for New Mexico to demonstrate good faith:

> if New Mexico meets 80% of its obligation during the first five years *and each year thereafter* a rebuttable presumption should exist that she acted in good faith.

Id., quoting, 1986 Report at 37 n.16 (emphasis added).

It is not clear under which scheme the Master intends that water interest be imposed on New Mexico. On the basis of the latter statement quoted above, New Mexico would have 10 years after the grace period to liquidate without interest 80 percent of the debit found by the Master and an indefinite period thereafter to liquidate without interest the remaining 20 percent of the debit.

Assuming (1) that the last line in Article IV is corrected as suggested by Texas by substituting II(C) for II(B) and (2)

that New Mexico did not meet at least 80 percent of the aggregate annual minimum delivery requirement at the end of the first five years of the 10-year payment period, it appears that under the proposed decree New Mexico would be charged with interest not only on all amounts undelivered during the first five-year period but also on the balance of the amount New Mexico owes to Texas during the last five years under the decree, regardless of whether the annual minimum delivery obligation was met in each of those years. On the other hand, if New Mexico delivers 80 percent of the aggregate annual minimum delivery requirement during the first five years, the Master's proposed decree would require no interest even if the annual minimum delivery requirement is not met in any subsequent year. The degree of confusion engendered by the proposed decree compels the conclusion that it is imprudent and unworkable.

No consideration of any of the foregoing is needed if the Court correctly finds that there is no provision for the payment of accrued debits under the Compact.

Respectfully submitted,

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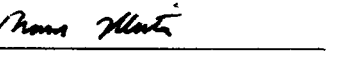

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