



No. 65 Original

**In The
Supreme Court of the United States**

October 10, 1986

**The State of Texas,
Plaintiff**

vs.

**The State of New Mexico,
Defendant**

and

**United States of America,
Intervenor**

**Brief of Amicus Curiae
Red Bluff Water Power Control District
In Support of the Recommendations
of the Special Master**

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Table of Contents

<u>Description</u>	<u>Page</u>
TABLE OF CONTENTS.....	i, ii
TABLE OF AUTHORITIES.....	iii
INTRODUCTION AND STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	4
POINT I.....	5
Potential hardship to <i>Amici</i> should not prohibit the Supreme Court of the United States from granting the relief recommended by the Special Master	
POINT II.....	10
Granting the relief recommended by the Special Master would not violate the Eleventh Amendment.	
POINT III.....	13
The Special Master's remedy of payback is a proper remedy for New Mexico's departure from the terms of the Pecos River Compact.	

<u>Description</u>	<u>Page</u>
A.....	13
<p>The Pecos River Compact is a contract between the State of Texas and the State of New Mexico with the authority of federal law.</p>	
B.....	16
<p>The repayment remedy recommended by the Special Master is an appropriate remedy for New Mexico's departure from the Pecos River Compact and is a valid application of contract damages.</p>	
CONCLUSION.....	18

Table of Authorities

<u>Description</u>	<u>Page</u>
CONSTITUTIONAL PROVISIONS	
U.S. CONST., Amend. XI.....	5,11,12
INTERSTATE COMPACTS	
Pecos River Compact, Article VIII.....	12
CASES	
<i>Colorado v. Kansas</i> , 206 U.S. 46, 117 (1907).....	6,13
<i>Colorado v. Kansas</i> , 320 U.S.383 (1943).....	6,7,8
<i>Colorado v. New Mexico</i> , 459 U.S. 176 (1982).....	13
<i>Cort v. Ash</i> , 422 U.S. 66 (1975).....	16
<i>Green v. Biddle</i> , 8 Wheat (21 U.S.) (1823).....	15,17
<i>Kentucky v. Indiana</i> , 281 U.S. 163, (1930).....	16,17
<i>North Dakota v. Minnesota</i> , 263 U.S. 365 (1923).....	11
<i>Sporhase v. Nebraska</i> , 458 U.S. 941, 956-957 (1982).....	13
<i>Texas v. New Mexico</i> , 462 U.S. 554, 564 (1983).....	15
<i>Texas Water Rights Commission v. Wright</i> , 464 S.W.2d 642 (1971).....	12
<i>Virginia v. West Virginia</i> , 246 U.S. 565 (1917).....	17
<i>West Virginia ex. rel. Dyer v. Sims</i> , 341 U.S. 22 (1951).....	14

STATUTES

TEX. WATER CODE ANN. chapter 11, subchapter G (Vernon Pamph. Supp. 1987).....	1
TEX. WATER CODE ANN. § 11.021-11.022, 11.121 (Vernon Pamph. Supp. 1987).....	11,12
TEX. WATER CODE ANN. 11.025 (Vernon Pamph Supp. 1987).....	12

INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

A. *Amicus Curiae*

Amicus Curiae, Red Bluff Water Power Control District, is a political subdivision of the State of Texas created in 1934. By virtue of a "Master Contract" executed in March, 1934, Red Bluff Water Power Control District is composed of, and has succeeded to the water rights of, Loving County Water Improvement District No. 1, Reeves County Water Improvement District No. 2, Ward County Water Improvement Districts Nos. 2 and 3, Ward County Irrigation District No. 1, and Pecos County Water Improvement Districts Nos. 2 and 3. Red Bluff Water Power Control District is the owner and operator of Red Bluff Reservoir, a 300,000 acre-foot capacity reservoir constructed in 1936 and located approximately ten miles south of the Texas-New Mexico state line on the Pecos River. The Pecos River and Red Bluff Reservoir are the sole source of water for irrigation in the counties served by Red Bluff Water Power Control District and its member districts.

Texas adjudicated the water rights of Red Bluff Water Power Control District in 1985. The adjudication is based on legal development of the water rights and the extent to which they have been exercised. The proceedings were conducted pursuant to the Water Rights Adjudication Act, TEX. WATER CODE ANN. chapter 11, subchapter G (Vernon Pamph. Supp. 1987). To summarize Red Bluff Water Power Control District's water rights as finally determined, they are:

a. The right to maintain Red Bluff dam and reservoir on the Pecos River and impound therein 300,000 acre-feet of water for irrigation and hydroelectric generation purposes, and;

b. The right to divert and use water for irrigation to the extent of 292,500 acre-feet per annum to irrigate 145,000 acres of land, which water may come either from releases from the reservoir or from inflows originating below the dam.

B. Detriment to *Amicus Curiae*

In the years prior to and after the completion of the Red Bluff reservoir, extensive irrigated farming activities were conducted on the land served by the Red Bluff Water Power Control District and its member districts. Lush crops of cotton, alfalfa, and vegetable crops were raised in the areas irrigated by the districts and the agricultural economy flourished. (Tr. 389-391, 5/21/86). Between 1934 and 1939 an average of 19,981 acres of land were irrigated with water furnished by the Red Bluff Water Power Control District, with 32,028 acres of land being irrigated in 1940. (Tx. Ex. 11a, tables 76, 83).

On December 3, 1948 the State of Texas and the State of New Mexico signed the Pecos River Compact in order to resolve existing and future controversies and to divide and apportion the water of the Pecos River. The State of New Mexico agreed that it would not deplete by man's activities the flow of water in the Pecos River at the Texas-New Mexico state line below the amount which would give to Texas the quantity of water equivalent to that available to Texas under the

"1947 condition." As stated by the Special Master, "the bargain struck in the Compact allowed New Mexico to retain the benefits of past development in the Pecos River Basin during the pre-Compact period. Sen Doc. 109, Stip. Exh. 1 at 3-8. But in return, New Mexico had to forego increased uses by man after 1947." Despite the agreement, as found by the Special Master, New Mexico did not keep its side of the bargain.

The Special Master has determined that the State of New Mexico has, over a period of years, breached her duties under the Pecos River Compact by permitting and countenancing prohibited depletions by man's activities of the waters of the Pecos River, such that there has been a cumulative reduction in the quantity of water that New Mexico had compacted to deliver to the Texas-New Mexico state line. The Special Master concluded that the total negative departure from the 1947 condition resulting from man's activities and chargeable to New Mexico, for the period from 1950 to 1983, was 340,000 acre-feet of water and has recommended that New Mexico deliver to Texas that quantity of water over a period of ten years, at a minimum rate of 34,010 acre-feet per year.

Red Bluff Water Power Control District, its member districts, and their constituents have been significantly affected by the actions of the State of New Mexico which have been contrary to the obligations imposed by the Pecos River Compact. These activities and departures have significantly lessened inflows of water in the Pecos River and have reduced the firm yield of Red Bluff Reservoir, resulting in a substantial

impairment to the agricultural economy in the four counties served by Red Bluff Water Power Control District and its member districts. (Tx. Ex. 79; Tr. 397-399, 5/21/86; Special Master's Report at 30).

Numerous persons in these counties have suffered serious economic losses due to the lack of water to irrigate farmland, and thousands of acres of land which were once green with irrigated crops are now no more than dusty fields. (Tr. 397-399, 5/21/86). In at least one of the districts, Ward County Water Improvement District No. 3, no farming activities have been conducted at all in recent years due to the lack of water, although the district has maintained its headgates and diversions facilities in anticipation of the time when water would again flow from New Mexico. (*Id.* at 400-401). Depressed conditions and economic hardship in the counties served by the Red Bluff Water Power Control District, caused by New Mexico's departure from the 1947 condition, would be improved if New Mexico were required to comply with the agreements it entered into when it signed the Pecos River Compact, and to repay what it has kept from Texas from 1950 to 1983. (Tr. 404-405, 5/21/86).

SUMMARY OF THE ARGUMENT

Potential hardship on the New Mexico municipalities which have filed an *Amici Curiae* brief and other New Mexico citizens residing in the Pecos River Basin in New Mexico, should not prohibit the Supreme Court of the United States from granting the relief recommended by the Special Master.

The interests of Texas and her citizens have been significantly affected by the actions of the State of New Mexico contrary to the Pecos River Compact, while New Mexico has been much better off because of the departures.

The relief recommended by the Special Master does not violate the Eleventh Amendment to the United States Constitution, since requiring New Mexico to repay water which was withheld from Texas contrary to the obligations imposed by the Pecos River Compact would not constitute an invasion of New Mexico's property in order to compensate individual citizens residing in Texas. The relief recommended by the Special Master would only require New Mexico to repay water that belongs to Texas by virtue of the Pecos River Compact and which New Mexico has kept from Texas.

The Pecos River Compact is a contract between the State of Texas and the State of New Mexico with the authority of federal law. The relief recommended by the Special Master is not inconsistent with the terms of the Pecos River Compact and is a proper remedy for New Mexico's breach of its obligations under the Pecos River Compact. To conclude otherwise would deprive Texas of the relief to which she is entitled.

POINT I

Potential hardship to *Amici* should not prohibit the Supreme Court of the United States from granting the relief recommended by the Special Master, which compensates Texas for water withheld by New Mexico contrary to its obligations under the Pecos River Compact.

Amici have asserted that the Court should not order the relief recommended by the Special Master because of the potential hardship such relief might impose upon them. *Amici* relies upon the Court's opinion in *Colorado v. Kansas*, 320 U.S. 383 (1943), a non-compact, equitable apportionment case and one of a series of litigations involving the two states' respective rights in the Arkansas River. The Court had previously dismissed an Original Bill filed by Kansas seeking to restrain Colorado from diverting, or permitting anyone under her authority from diverting, waters of the Arkansas River within Colorado, because Kansas had failed to present sufficient evidence to the Court demonstrating that it was entitled to the relief it requested. *Colorado v. Kansas*, 206 U.S. 46, 117 (1907).

As noted by the Court in the latter suit: "In our former decision we ruled that Kansas was not entitled to a specific share of the waters as they flowed in a state of nature, that it did not appear that Colorado had appropriated more than her equitable share of the flow, and that if Kansas were later to be accorded relief, she must show additional takings working serious injuries to her substantial interests." *Colorado v. Kansas*, 320 U.S. 383, 391-392 (1943). It was obvious to the

Court in the first proceeding however, that if the depletion of the waters of the Arkansas River continued to increase there would come a time when Kansas could rightfully call for relief against the action of Colorado. 206 U.S. at 117-118.

In the later case, Kansas alleged that in the interim since the Court's prior decision, Colorado users had increased their appropriations and diversions, and threatened to further increase them, to the injury of the Kansas users. *Colorado v. Kansas*, 320 U.S. 383, 388 (1943). The Court again held however, that Kansas failed to sustain her burden of proof because she did not demonstrate that Colorado's use of the waters of the Arkansas River had materially increased, and that the increase worked a serious detriment to the substantial interests of Kansas. *Id.* at 400. In rejecting Kansas' claim that Colorado had substantially and injuriously aggravated conditions which had existed in Kansas at the time of the prior suit, this Court reaffirmed the standard of review it would apply in *equitable apportionment* cases:

The lower State is not entitled to have the stream flow as it would in nature regardless of need or use. If, then, the upper State is devoting the water to a beneficial use, the question to be decided, in the light of existing conditions in both States, is whether, and to what extent, her action injures the lower States and her citizens by depriving them of a like, or an equally valuable, beneficial use.

Id. at 393. In determining whether a 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" *Id.* at 394.

It is proper for the Court to consider, in equitable apportionment cases as the New Mexico *Amici* have stated, the injuries to existing uses and economic interests in all of the affected States. No relief, retroactive or prospective, was granted by the Court in *Colorado v. Kansas* because the evidence did not disclose that Kansas had significant interests which had been seriously affected by Colorado's use of the waters of the Arkansas River. *Id.* at 398-399. On the other hand, Colorado had a substantial investments in canals, reservoirs, and farms which had grown steadily due to irrigation. The Court noted that granting Kansas' requested relief would inflict serious damage on existing agricultural interests in Colorado and would operate to deprive some citizens of their means of support. *Id.* at 393.

The issues and facts presented to the Court in *Colorado v. Kansas* are distinguishable from the issues and facts that exist in the controversy between the State of Texas and the State of New Mexico that is now presented to the Court for resolution. As note by Mr. Justice Douglas, the Court's opinion in *Colorado v. Kansas*, is limited to the facts presented to the Court. *See Nebraska v. Wyoming*, 325 U.S. 589, 610-611 (1945). The differences extend beyond the mere fact that *Colorado v. Kansas* involved a non-compact, equitable apportionment and the present controversy involves a State's failure to deliver a specified amount of water which it had agreed to deliver pursuant to a binding compact with another State. Assuming that the application of a weighing test is

proper, the evidence discloses, and the Special Master recognized, that the lower basin State, Texas has suffered serious damage to an existing and bountiful agricultural community, whereas New Mexico's irrigation practices and agricultural economy have flourished because New Mexico "has had the advantage of more than its equitable share of water during the period 1950 to 1983." (Tx. Ex. 79; Tr. 397-399, 5/21/86; Special Master's Report at 42).

After the release of the Special Master's report which recommended requiring New Mexico to repay to Texas the water which it had failed to deliver pursuant to its compact obligations, New Mexico requested a hearing on the issue of New Mexico's ability to comply with that requirement and the economic hardship it would impose. At the hearing, New Mexico presented evidence on the economic loss that would be incurred if New Mexico were required to shut down pumpage in the Roswell basin of the Pecos River. The Special Master was not persuaded by this testimony and noted:

With regard to secondary impacts, I am quite skeptical of their validity, a skepticism that appeared to be shared to some extent by New Mexico's economic expert, Dr. Snyder, *see* Tr. 197-198 (5/20/86), as well as by Texas' economic expert, Mr. Wright, *see* Tr. 376-379 (5/20/86). . . . While New Mexico will undoubtedly suffer some economic loss from being required to deliver water to Texas, the amount is too speculative to quantify.

(Special Master's report at 34). Assuming that the Court is bound to consider potential hardship to New Mexico, then

apparent that New Mexico has failed to sustain her burden of proof in this regard.

The New Mexico *Amici's* assertion that their water rights will be cut off if the Court adopts the water payback remedy recommended by the Special Master was also rejected by the Special Master:

While it is clear that prior appropriation governs any *curtailment* of water rights by New Mexico to meet its Article III(a) and repayment obligation under the proposed relief, curtailment is not the only method of internal ordering open to New Mexico. As disclosed in the testimony of the New Mexico State Engineer on cross-examination, it is possible for New Mexico to purchase or condemn water rights and then (i) pump the water directly into the river in the case of ground water rights or (ii) curtail diversions in case of surface water rights. *See* Testimony of Stephen E. Reynolds, Tr. 56-60 (5/20/86). . . . Thus it is clear that New Mexico has other means of meeting a deliver obligations than curtailment of pumpage by junior rights holders in the Roswell Basin.

(Special Master's Report at 34-35). The Court is not asked, however, to provide a specific way for the shortages New Mexico has caused to be repaid. Rather, once the Court concludes the extent of the shortages, New Mexico has the flexibility to redress them in whatever way she should choose.

POINT II

Granting the relief recommended by the Special Master would not violate the Eleventh Amendment.

Under the Eleventh Amendment to the United States Constitution, the Supreme Court of the United States is without jurisdiction to award damages to individual citizens of one State for injuries caused by another State. The New Mexico *Amici* relies upon this Court's decision in *North Dakota v. Minnesota*, 263 U.S. 365 (1923), in arguing that the Court is prohibited by the Eleventh Amendment from awarding damages to Texas for New Mexico's departure from its obligations imposed by the Pecos River Compact. The New Mexico *Amici's* reliance upon the Eleventh Amendment is misplaced. The New Mexico *Amici* cannot argue on the one hand as they have, that the waters of the Pecos River which originate in New Mexico "[are] the property of the State," while arguing on the other hand that the award of water damages to Texas is prohibited because Texas appropriators would benefit from the water. Such an argument ignores both the provisions of the Pecos River Compact and Texas law.

Texas law provides that the "water of the ordinary flow, underflow, and tides of every flowing river, natural stream, and lake, and of every bay or arm of the Gulf of Mexico, and the storm water, floodwater, and rainwater of every river, natural stream, canyon, ravine, depression, and watershed in the state is the *property* of the state." TEX. WATER CODE ANN. § 11.021 (Vernon Pamph. Supp. 1987). The right to

use state water may be acquired by appropriation, after application to the Texas Water Commission. *Id.* §§ 11.022, 11.121. However, the fact that Texas may grant rights of use to its citizens does not diminish the fact that the water does not lose its character as state water when appropriated pursuant to rights granted under permits issued by the Texas Water Commission. *Texas Water Rights Commission v. Wright*, 464 S.W.2d 642, 647 (1971) (the right to use state water may be acquired by appropriation, but the State is at all times the owner of the corpus of the water subject only to the exhaustion of the corpus as a result of beneficial use). See TEX. WATER CODE ANN. § 11.025 (Vernon Pamph Supp. 1987) (a right to use state water under a permit or a certified filing is limited not only to the amount specifically appropriated but also to the amount which is being or can be beneficially used . . .).

The Pecos River Compact also implicitly acknowledges the nature of Texas' interest in the waters of the Pecos River: "the provisions of the Pecos River Compact may not interfere with the right or power of either state to regulate within its boundaries the appropriation, use and control of water." Pecos River Compact, Article VIII.

If the Eleventh Amendment argument is accepted, the Court would eliminate or at least seriously hinder its power of equitable apportionment, because the Eleventh Amendment applies not only to the recovery of damages by citizens of one state from another state, but applies to "any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State U.S. CONST.

Amend. XI. If the Eleventh Amendment argument had been adopted by the Court in its equitable apportionment cases, there would never had been an instance where the Court would have been able to sustain its jurisdiction, because of the individual rights in the interstate water at issue. But as held by the Court in *Colorado v. New Mexico*, 459 U.S. 176, 182n.9 (1982), the Court is able to sustain its jurisdiction in spite of the Eleventh Amendment challenges, because of substantial interests of the state in its water resources:

Because the State of Colorado has a substantial interest in the outcome of this suit, New Mexico may not invoke its Eleventh Amendment immunity from federal actions by citizens of another State. The portion of the Vermejo River in Colorado is owned by the State in trust for its citizens. . . . While C.F. & I. will most likely be the primary user of any water diverted from the Vermejo River, other Colorado citizens may jointly use the water or purchase water rights in the future. In any event, Colorado surely has a sovereign interest in the beneficial effects of a diversion on the general prosperity of the State. Faced with a similar set of circumstances in *Kansas v. Colorado*, 206 U.S. 46, 99, 27 S.Ct. 655, 688, 51 L.Ed. 956 (1907), we concluded that "(t)he controversey rises . . . above a mere question of local private right and involves the matter of state interest and must be considered from that standpoint."

A state's interest in its water does not exist in a vacuum, but rather exists in main part due to the state's sovereignty over its natural resources and its interest in protecting the rights of its citizens. See, e.g., *Sporhase v. Nebraska*, 458 U.S. 941, 956-957 (1982). The compelling state interests which were recognized by the Court in *Colorado v. New Mexico* and *Kansas v. Colorado* in rejecting the Eleventh Amendment

argument, are just as valid in the present controversy and provide the basis for the Court's jurisdiction in ordering the implementation of the remedy recommended by the Special Master.

POINT III

The Special Master's remedy of payback is a proper remedy for New Mexico's departure from the terms of the Pecos River Compact.

- A. The Pecos River Compact is a contract between the State of Texas and the State of New Mexico with the authority of federal law.

At the May 21, 1986 hearing on remedies, New Mexico asserted for the first time that the Pecos River Compact does not authorize relief for past diversions from the obligations created by the compact. Specifically, New Mexico argued, and the New Mexico *Amici* submits, that the common law of contracts does not apply to the obligations created under the compact, therefore the remedy of repayment is improper. The New Mexico *Amici* reject the Special Master's interpretation of the Court's opinion in *West Virginia ex. rel. Dyer v. Sims*, 341 U.S. 22 (1951), and appear to misinterpret Mr. Justice Brennan's statement in the Court's previous opinion in his proceeding (congressional consent transforms an interstate compact into a law of the United States). The New Mexico *Amici* imply that compacts are not contracts subject to contractual remedies, arguing that after Congressional consent, a compact becomes a federal statute.

Interstate compacts are created when two or more states enact essentially identical statutes that establish and define the compact and what it is to do. All contracts consist of an offer and acceptance. In the case of interstate compacts, both the offer and acceptance exist in the form of legislative acts. The New Mexico *Amici* do not question the fact that a contract is created when two or more states enter into a compact because the Court has conclusively resolved that issue. The New Mexico *Amici* however, views the consent of Congress to an interstate compact as a metamorphic act, which transforms a contract between two or more states into a federal law to be interpreted the same as federal statutes.

The Court has indeed often held, as stated by Mr. Justice Brennan, that "congressional consent transforms an interstate compact within this clause into a law of the United States." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). However, the Court has expressly recognized the contractual nature of an interstate compact, and the fact that a congressionally approved compact has the effect of federal law for jurisdictional purposes does not change the compact's original contractual character:

If we attend to the definition of a contract, which is the agreement of two or more parties, to do or not to do certain acts, it must be obvious that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous

Green v. Biddle, 8 Wheat (21 U.S.) 1, 92 (1823). In acknowledging the Court's jurisdiction to determine controverted issues arising under an interstate compact, Chief

Justice Holmes later stated that the:

Court has the authority and duty to determine for itself all questions that pertain to the obligations of the contract alleged. The fact that the solution of these questions may involve the determination of the effect of the local legislation of either State, as well as of acts of Congress which are said to authorize the contract, in no way affects the duty of this Court to act as the final, constitutional arbiter in deciding the questions properly presented.

Kentucky v. Indiana, 281 U.S. 163, 176 (1930).

- B. The repayment remedy recommended by the Special Master is an appropriate remedy for New Mexico's departure from the Pecos River Compact and is a valid application of contract damages.

At the May 21, 1986 hearing on remedies, New Mexico also argued that the Pecos River Compact, by its express terms, does not contemplate an accumulation of debits and credits, or a repayment to Texas of accumulated negative departures from the 1947 condition. The New Mexico *Amici* insist that the remedy recommended by the Special Master may only be "inferred from the statute itself or its legislative history," and requests the Court to apply the four-part test for determining whether a remedy in favor of private parties other than the Federal government or public parties is implicit in a statute not expressly providing for a private remedy, which the Court established in *Cort v. Ash*, 422 U.S. 66 (1975). The New Mexico *Amici* argue that the remedy "must be found within the statute and cannot be brought in from without the statute because the Pecos River Compact is a federal law, and

not a contract.

The Court has not only determined that an interstate compact imposes a contractual obligation between the contracting States, *see Green v. Biddle* and *Kentucky v. Indiana, supra*, the Court has in fact recognized that contractual remedies may be granted for a State's breach of its compact. In *Virginia v. West Virginia*, 246 U.S. 565 (1917), the Court addressed its jurisdiction to enforce a contract made by the two states wherein West Virginia assumed a portion of Virginia's debt. In a prior suit Virginia invoked the jurisdiction of the Court to enforce the contract and judgment was issued for Virginia in the amount of \$12, 393,929.50 with interest. *Id.* at 589. The Court noted that the judgment was based on three propositions, one of which was the fact that the "obligation of West Virginia was the subject of a contract between the two States, made with the consent of Congress" *Id.* The Court then addressed the "question of power to enforce against a State when admitted into the Union a contract entered into by it with another State with the consent of Congress . . ." *Id.* at 593.

Chief Justice White stated on behalf of the Court that a power exists to enforce against a State its duty under its contract with another State and to prevent it from doing wrong to that State. If no such power existed, the Chief Justice wrote, "the government under the Constitution would not be an indissoluble union of indestructible States each having the potency with impunity to wrong or degrade another -- a result which would inevitably lead to a destruction of the union

between them." *Id.* at 602. The Court must have jurisdiction to compel a State's obedience to the duties it assumes by entering into an interstate compact. In fact, in its previous opinion in this proceeding, the Court acknowledged its jurisdiction to compel New Mexico's compliance with the Pecos River Compact when it stated: "Texas' right to invoke the original jurisdiction of this Court was an important part of the context in which the Compact was framed; indeed, the threat of such litigation undoubtedly contributed to New Mexico's willingness to enter into a compact." *Texas v. New Mexico*, 462 U.S. 554, 569 (1983).

Mr. Justice Brennan also stated that in the absence of an expression provision or other clear indication that a bargain to that effect was made, the Court "shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Id.* at 569-570. If Texas' only remedy under the Pecos River Compact was to obtain a judicial determination that New Mexico had violated the terms of the compact by failing to deliver the quantity of water it had agreed to, and New Mexico was only instructed to deliver that amount in the future, New Mexico's obligations would be illusory. The Court has previously concluded however, that "It is difficult to perceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purpose, avoid at will." *Id.* at 569.

CONCLUSION

The Special Master has recommended a remedy which is consistent with the Eleventh Amendment to the United States Constitution. Although application of a "weighing of interests test" may not be proper in this proceeding, New Mexico has failed to sustain its burden to show that imposition of the repayment would result in hardship to the New Mexico *Amici* and other New Mexico citizens such that would render the granting of the remedy recommended by the Special Master inappropriate. Potential economic hardship a factor which the Court Considers in an equitable apportionment, is not a defense in a proceeding involving a state's failure to deliver water pursuant to an interstate compact.

The Pecos River Compact is a contract between the State of Texas and the State of New Mexico and the Court has jurisdiction to impose the remedy recommended by the Special Master for a breach of that contract. *Amicus Curiae*, Red Bluff Water Power Control District requests the Court to approve the repayment remedy recommended by the Special Master.

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