

DEC 2 1987

JOSEPH F. SPANIOL, JR.
CLERK

NO. 65 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant,

THE UNITED STATES OF AMERICA,

Intervenor.

CHARLES J. MEYERS, SPECIAL MASTER

REPORT

November , 1987

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I

INTRODUCTION

In July, 1986, I filed a Report in this case proposing findings, conclusions and a decree that would bring an end to this litigation, at least for the time being. But I also expressed concern that the case would be back in court before long, for two reasons: (1) New Mexico would have difficulty in repaying, in water, the 340,100 acre feet I found she owed Texas, and (2) disputes over future deliveries would wind up in litigation, since the Pecos River Commission could not be expected to be any more effective in the future than it had been in the past. To solve these problems, I suggested that the Court might wish to consider a judgment for money damages to remedy past shortfalls and the appointment of a River Master to administer the decree in the future. Both suggestions were adopted, and the case was remanded to me to consider the question of remedy and "to recommend an amendment to the decree, specifying . . . the duties of the River Master and the consequences of his determinations. Any other suggestions for amendments should also be called to our attention." 107 S. Ct. 2279, 2287 (1987). I have set the remedies question for trial in February of 1988. By agreement, the parties have included in the issues to be tried the shortfall, if any, for the period 1984 through 1986. Those three years will be tacked on to the administrative period of 1950 through 1983, which was the subject of this Court's decision on June 8, 1987.

This Report addresses the regime that will govern the river from 1987 forward. More particularly, it recommends an Amended Decree which, in addition to enjoining New Mexico to comply with her Article III(a) obligation, provides for the appointment of a River Master, sets forth the River Master's duties and powers and the consequences of the River Master's determinations, and incorporates the Pecos River Master's Manual to guide the River Master in performing his or her

duties. Before turning to specific points in the proposed Amended Decree and the Manual, I draw to the Court's attention the desirability of appointing a River Master and entering a decree this Term of Court, despite the press of other business. Water year 1987 will be the first year to which the new regime applies. Under the proposed Amended Decree, the River Master will make his determinations for water year 1987 in 1988, and New Mexico must satisfy any shortfall for 1987 by March 31, 1989. Adherence to this schedule will best be accomplished by having a River Master in place as early as possible in 1988. This suggests a hearing on exceptions to this Report this Term, if at all possible. The proposed Amended Decree presumes that it will take effect in 1988.

II

THE PROPOSED AMENDED DECREE

It is my recommendation that the proposed Amended Decree replace the June 8, 1987 Decree set forth in 107 S. Ct. at 2287, so that a complete charter for the enforcement of the Court's judgment is available in one place for the River Master. The proposed Amended Decree includes, of course, the substance of the Court's June 8, 1987 Decree.

Several components of the proposed Amended Decree deserve brief comment. Since the data required for the calculation of New Mexico's delivery obligation for a given year are not available until the year following, the Amended Decree directs the River Master to make determinations for a particular "water year" in the following year, termed the "accounting year." If, in the accounting year, New Mexico is found to have fallen short of her delivery obligation, the Amended Decree allows her through March of the year following the accounting year to make up the deficiency. New Mexico objects to this provision and proposes instead that she be

allowed to accumulate credits and shortfalls year to year and be deemed in default only when total accrued shortfalls exceed thirty percent of her delivery obligation for any five-year period, and then only to that extent. She offers several arguments in support of this proposal.

First, New Mexico takes the position that, since the flow of the Pecos is highly variable, she may be asked to bear heavy delivery burdens at large economic cost. She argues that such costs would be unnecessary if the delivery obligation was smoothed out over a longer period than the yearly delivery requirement contemplated in the proposed Amended Decree. I am not persuaded. While it is desirable to avoid unduly heavy delivery requirements, a 30% rule measured over a five-year accounting period creates unacceptable risk, in my view. The probabilities are very high that New Mexico would fall farther and farther behind in her III(a) obligation over time. A review of Table 2 in Texas Exhibit 79 (p. 5) shows mounting deficits over time despite intermittent positive departures. Under her proposal, it seems very likely that early in the administration of the decree — indeed, quite possibly at the end of the first five years — New Mexico would be in debt for 30% of her accumulated Article III(a) obligation. On the average, for the period 1950-1983, she was in default by 10,000 acre feet per year. So long as the principle survives that New Mexico owes water to Texas under the Compact, the only sure, or even probable, way of honoring that principle is to make the delivery obligation an annual one. The Court has clearly indicated that the remedy of money damages, if appropriate at all, is an extraordinary, one-time solution to an exceedingly difficult remedial problem and that future performance is to be in kind. 107 S. Ct. at 2285-86.

Second, New Mexico argues that the Court recognized in its June 1987 opinion that it was impracticable to expect New Mexico to satisfy shortfalls on an annual basis. As evidence thereof, New Mexico cites language in the opinion to the effect

that “shortfalls or credits will be reflected in [New Mexico’s] later delivery obligations.” 107 S. Ct. at 2287. New Mexico urges that her proposal for accumulation of credits and shortfalls is consistent with this language. I do not read the language as intending to suggest that New Mexico should not be required to keep herself current. Such a reading is completely at odds with the Court’s view that in the future, Texas should receive its water. The Court had before it a clear example of the pitfalls of accumulation — a debt so large that payment in water could be exceedingly difficult.

Finally, New Mexico argues that even if she holds man’s activities to the 1947 level, there will still be negative departures from the 1947 condition that are properly attributable only to “the vagaries in the flow of the Pecos River.” As support for this proposition, New Mexico cites the fact that the 1947 condition curve itself, Figure 1 of Texas Exhibit 68 (p. 3), represents a number of scattered points, none falling exactly on the curve and all reflecting man-made uses at the permissible 1947 level. In the future, the argument goes, we can expect similar departures from the curve without changes in man’s activities. To be sure, the curve is not an exact representation of the scattered points it seeks to define. But it is the law of the case. Nearly four years ago, my predecessor concluded that “the curve of relationship shown by Texas Figure 1 on p. 3 of Texas Exhibit 68 and the accompanying Table 1 on p. 4 correctly quantify the obligation of New Mexico to Texas as the same is stated in Compact Article III(a), as implemented by the Master’s decision of August 13, 1979, and approved by the Supreme Court in its decision reported at 446 U.S. 540.” Report and Recommendation, filed 2/27/84, at p. 13. This conclusion was approved by the Court. 467 U.S. 1238 (1984). Even if the point was not settled, I see no other way to administer this Compact. The 1947 condition, as defined in these proceedings, has to be translated into a water quantity to provide a numerical standard for measurement of compliance,

and this necessarily involves a margin of error. I might add that the margin of error here is not one-sided: Texas suffers equally when the curve errs on the side of understating the Article III(a) obligation. Tr. pp. 44-46, 61 (10/15/87).

The proposed Amended Decree affords New Mexico maximum flexibility in determining how to satisfy any shortfall. The state is given the opportunity, with respect to each year of shortfall, to submit a plan as to how she will remedy the shortfall. The plan must identify the source of the make-up water and specify a delivery schedule so that satisfaction of the shortfall can be verified, but New Mexico is given the freedom to determine the sources of the make-up water and (within certain limits) the timing of its delivery. Moreover, those determinations may change from year to year as circumstances vary. New Mexico is not seriously constrained by Article IX of the Compact, which requires application of "the principle of prior appropriation within New Mexico"; with or without this provision she would have been compelled to honor intrastate priorities in providing the water to satisfy Article III(a). But she remains free to buy, lease or otherwise obtain the necessary water, so long as priorities are not disturbed.

The Amended Decree anticipates that satisfaction of any shortfall will be determined by means of the procedures and equations set forth in the Manual. In other words, a calculation will be performed using the Manual to determine the amount of water that can be presumed to arrive at State line as a result of the specific actions proposed by New Mexico. If that amount equals the amount of the shortfall, New Mexico's actions will be deemed to satisfy the shortfall. Given the fungibility of water, this was thought to be the best way of ensuring that State line flows are actually increased by the amount of a shortfall, while still allowing New Mexico to engage in private ordering to satisfy the shortfall. Any arrangement which contemplates simply gauging the flow at State line to verify delivery of make-up water is unworkable. No physical means of distinguishing

make-up water from III(a) obligation water exists; calculations alone can make the distinction.

The River Master's duties are set out in some detail in the Amended Decree. Unless and until a change is proposed in the Manual, the River Master's function is largely ministerial, although some judgment may be required from time to time in the selection of numerical values. The need for sound judgment will arise when one party seeks to modify the Manual without the concurrence of the other party. The Amended Decree does not empower the River Master to initiate changes in the Manual. It was thought to be more cost effective to leave the initiative to the parties, since their experts will have to evaluate a proposed change in any event. Moreover, there is no need to incur the risk of a bureaucratic build-up in the name of research in the office of the River Master. On the other hand, the River Master is correctly delegated the power to decide in the first instance the propriety of proposed but contested changes in the Manual. For the most part, these proposed changes are likely to raise technical issues of hydrology or statistics, as to which the River Master will have expertise. Because of that expertise, the recommended standard of review is whether the River Master's findings or conclusions are clearly erroneous. Of course, a change agreed to by both parties, whether proposed through the Pecos River Commission or directly to the River Master, is binding.

Finally, the Amended Decree recommends the dismissal of the United States from this action without prejudice. At the request of the Solicitor General, the United States was excused from participation in the proceedings at an early stage. I informed the Solicitor General of my intention to recommend dismissal and he interposed no objection in his written reply.

III

THE PECOS RIVER MASTER'S MANUAL

The parties have agreed on all of the provisions in the Manual except one — the provision dealing with the accounting for depletions caused by McMillan Dike. In addition, New Mexico objects to the absence from the Manual of provisions which she contends would have required a separate determination of the depletions resulting from man's activities in New Mexico. At a hearing on October 15, 1987, evidence was presented on these two issues and, following the hearing, post-hearing briefs were submitted. Based on the evidence and argument, I find that New Mexico should not be charged for the salvage accomplished by the Dike in the past which will be continued in the future upon the completion of Brantley Reservoir. I have also concluded that removal of references in the Manual to man's activities was entirely appropriate. Submitted with this Report is Texas Exhibit 108, which incorporates the agreements of the parties and my findings with respect to the disputed issues.

A. Brantley Reservoir and McMillan Training Dike.

As set forth in my July 1986 Report, the McMillan Training Dike was constructed in 1954 for the purpose of reducing leakage from McMillan Reservoir and was successful in doing so. The Report recommended that New Mexico not be charged for the salvage accomplished by the Dike, and the Court accepted that recommendation. July 1986 Report, pp. 11-22, 31. Brantley Reservoir will replace McMillan Reservoir and is expected to be completed in 1988. When that occurs, McMillan Dam will be breached and the Dike will no longer serve any function except in cases of extreme flood. Tr. 40-42 (10/15/87).

Texas argues that since water will no longer be salvaged by the Dike once McMillan Dam is breached, the Manual should provide for the elimination of the credit to New Mexico at that time. I think this argument misapprehends the basis for the

credit. The flood in the winter of 1941-42 washed away natural sealing materials in McMillan Reservoir and left caverns and crevices in its east side, through which large quantities of water escaped. The 1947 condition reflected those losses. When the Dike was completed in 1954, the losses were reduced, but the inflow-outflow equations then in effect did not take account of this change in the 1947 condition. When the Pecos River Commission agreed in 1961 to credit the salvage, it authorized a change in the 1947 condition. That change was quantified by the Commission itself for the period 1950-1961, when it agreed that the savings were 48,000 acre feet. For the period 1962-1983, there was no agreement by the Commission on the quantity in acre feet that was salvaged, but Texas herself, through the testimony of an expert, Dr. V. R. Krishna Murthy, established an equation for calculating the savings for the later period. Dr. Murthy's calculation showed savings of 27,600 acre feet, which I proposed be credited to New Mexico. July 1986 Report, pp. 21-22. The Court adopted the recommendation. Thus, Dr. Murthy's equation became part of the Manual, and I have concluded that it should remain a part of the Manual.

The testimony of New Mexico's State Engineer, S. E. Reynolds, at the October 15, 1987 hearing was not at odds with this conclusion. While Mr. Reynolds agreed that the Dike would no longer serve the physical function of impeding losses from McMillan after the dam is breached, he did testify to his understanding that the Commission changed the inflow-outflow equation to reflect its decision not to charge New Mexico with the salvage accomplished by the Dike. Tr. 70-75 (10/15/87). Whatever the Supreme Court may have decided about the 1947 condition in 1984 when it approved the Special Master's conclusions regarding Figure 1 of Texas Exhibit 68, the Court decided in 1987 that the salvage accomplished by the Dike should not be charged to New Mexico, presumably for the reason advanced in my Report (pp. 11-22) that the 1947 condition was modified by action of the Commission. Since the

Commission's action provides no reason to distinguish between the 1950-1983 period and the 1987-forward period, the Texas contention is rejected.

B. Depletions Attributable to Man's Activities.

In its post-hearing brief, filed October 27, 1987, New Mexico argues strenuously, as it did at the October 15, 1987 hearing, that certain of the departures from the 1947 condition are due to the vagaries of the flow of the river and not to man's activities in New Mexico. As with its 30% proposal for administering the Compact, New Mexico's argument is that the 1947 condition curve is not completely accurate in representing the 1947 condition, and thus New Mexico should not be held responsible for departures from the curve absent a determination that the departures are due to man's activities. (New Mexico presents this proposal as an alternative to its 30% proposal. She contends that one or the other is necessary to address the problem of the erratic flow of the river.)

New Mexico realizes that this argument is a direct attack on the findings and conclusions recommended in my July 1986 Report and adopted by the Court in June 1987. I stated in my Report that I accepted the testimony of Dr. Murthy that his equations, as embodied in Texas Exhibit 79, accounted for all the natural losses in the system and that the remaining losses were thus attributable to man's activities. I am not prepared to reconsider this issue, although I recognize that a change in physical circumstances may provide a basis in the future for an application by New Mexico to the River Master, the Pecos River Commission, or the Court for a change in the inflow-outflow equation. For example, in his testimony on October 15, 1987, Mr. Reynolds hypothesized a sudden increase in channel losses from one year to the next of 20,000 acre feet, owing to proliferation of salt cedars and deterioration of the channel. Tr. 53-56 (10/15/87). I suggested that such a change would require modification of the Manual and the witness seemed to agree. *Id.* at 55.

The inflow-outflow equation is not a formulation by an Einstein of an immutable law of physics; it expresses a relationship between inflows to the river and outflows at the state line, taking account of various natural losses before imputing the outflow that would have occurred under the 1947 condition. A flood like that in the winter of 1941-42 or a plague of salt cedars may require changes in the equation. With the Amended Decree in place and the River Master in office, a mechanism is available for making appropriate changes. I reject completely the notion that every year the River Master must determine the level of man's activities and their effect on the river's flow. If Dr. Murthy is correct, as I believe him to be, the task is as unnecessary as it is impossible.

New Mexico also objects to the deletion from Texas Exhibit 108 of language which was included in Texas Exhibit 103 and which related to the determination of the total depletions resulting from man's activities. New Mexico argues that Texas should be precluded from changing its theory of accounting at this late date. I am confident that Texas Exhibit 108 reflects no such change, and thus I reject New Mexico's argument.

During my service as Special Master, Texas has consistently taken the position that the calculations prescribed in Texas Exhibits 68, 79, and 103 account for all natural depletions of the stream so that any residual departure from the 1947 condition can be presumed to be the result of man's activities. It is true that Texas Exhibit 103 was submitted after Texas was informed that I had accepted her accounting theory, and yet it included provisions calling for a determination of depletions resulting from man's activities. Texas explains the inclusion of these provisions as nothing more than a contingency in case the Court refused to accept its theory and instead required a separate accounting. I accept this explanation as entirely rational and credible. Furthermore, I do not believe that New

Mexico was misled by the presence of the language in Texas Exhibit 103. New Mexico has known at least since March 18, 1986, when my Draft Report was circulated, that in my view Dr. Murthy's equations account for all natural losses, leaving residual losses to be attributed to man's activities in New Mexico.

The proposed Amended Decree and the Pecos River Master's Manual are submitted with this Report, and they incorporate the proposed findings and conclusions stated above.

Denver, Colorado, November, 1987.

Charles J. Meyers
Special Master

PROPOSED AMENDED DECREE

PROPOSED AMENDED DECREE

IT IS ORDERED, ADJUDGED AND DECREED THAT

I

DEFINITIONS

A. For purposes of this Decree:

1. "Accounting year" is the calendar year during which the River Master makes the calculations required by Article III.B.1. below; "water year" is the calendar year immediately preceding the accounting year.

2. "Manual" is the Pecos River Master's Manual, admitted into evidence as Texas Exhibit 108 and attached to this Decree as an integral part hereof. The Manual may be modified from time to time in accordance with the terms of this Decree.

3. "Overage" is the amount of water delivered by New Mexico in any water year which exceeded the Article III(a) obligation for that year.

4. "Shortfall" is the amount by which the water delivered by New Mexico in any water year fell short of the Article III(a) obligation for that year.

II

INJUNCTION

A. The State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined:

1. To comply with Article III(a) of the Pecos River Compact and to meet the obligation thereof by delivering water to Texas at State line as prescribed in this Decree.

2. Within thirty (30) days of receipt of a Final Report of the River Master identifying a shortfall, to submit to the River Master a proposed plan providing for verifiable action by New Mexico that will increase the amount of water at State line prior to March 31st of the year following the accounting year by the amount of the shortfall. In order to identify the incremental amount of water being delivered to Texas to satisfy a prior shortfall, the plan shall:

(a) Identify the specific actions to be taken by New Mexico to increase the amount of water flowing to Texas, including, if applicable, the points at which water will enter the river or diversions will be curtailed;

(b) Specify the dates and times the actions will be taken;

(c) Provide a calculation under the procedures and equations set forth in the Manual of the amount of water that can be presumed to arrive at State line as a result of the actions;

(d) Identify the means by which the actions can be verified and provide assurances that documents and data necessary for verification will be submitted to the River Master within thirty (30) days from the date the actions are taken;

(e) Provide guarantees that the water to be delivered pursuant to the plan will not be diverted within New Mexico.

3. To comply prior to March 31st of the year following the accounting year with the terms of an Approved Plan to remedy any shortfall. Compliance with an Approved Plan will be deemed to satisfy the shortfall. Subject to the review provided in Article III.D. of this Decree,

the calculations made pursuant to Article II.A.2(c), as approved by the River Master, shall be determinative of the amount of water delivered at State line.

III

RIVER MASTER

A. *Appointment.* The appointment of a River Master will be made by an Order of Appointment in the form attached hereto as Exhibit A.

B. *Duties.* The River Master shall perform the following duties:

1. Calculate in accounting year 1988, beginning with water year 1987, and continuing every year thereafter, pursuant to the methodology set forth in the Manual:

- a. The Article III(a) obligation;

- b. Any shortfall or overage, which calculation shall disregard deliveries of water pursuant to an Approved Plan;

- c. The net shortfall, if any, after subtracting any overages accumulated in previous years, beginning with water year 1987.

2. Deliver to the parties a Preliminary Report setting forth the tentative results of the calculations required by Section III.B.1. of this Decree by May 15th of the accounting year;

3. Consider any written objections to the Preliminary Report submitted by the parties prior to June 15th of the accounting year;

4. Deliver to the parties a Final Report setting forth the final results of the calculations required by Section III.B.1. of this Decree by July 1st of the accounting year;

5. Review any plan proposed by New Mexico pursuant to Article II.A.2. of this Decree for its efficacy in satisfying any shortfall and consider any written objections to the plan which are submitted by Texas by September 1st of the accounting year;

6. Modify the proposed plan as is deemed necessary to ensure satisfaction of the shortfall and deliver to the parties such Approved Plan by October 1st of the accounting year;

7. Deliver to the parties and file with this Court a Compliance Report by June 1st of the year following any accounting year in which there is an Approved Plan, which report shall include a finding of New Mexico's compliance or non-compliance with the terms of the Approved Plan and the reasons for such finding.

C. Modification of Manual.

1. The River Master shall modify the Manual in accordance with any written agreement of the parties. Such written agreement shall state the effective date of the modification and whether it is to be retroactive. If retroactive, the agreement shall specify the procedures for making the retroactive adjustments.

2. Absent written agreement of the parties, upon motion by either party and for good cause shown, the River Master may modify the Manual. Opposition to any such motion shall be submitted to the River Master in writing within thirty (30) days after service of the motion or within such extended time as may be allowed by the River Master. Additional written submissions and any oral presentation will be at the River Master's discretion. The River Master may adopt, reject, or amend the proposed modification and shall serve upon the parties his or her written Modification Determination and the grounds therefor. The River Master may also defer decision on a

proposed modification, but if no action is taken within one (1) year of its submission, the motion shall be deemed denied.

3. A modification of the Manual by motion shall be first applicable to the water year in which the modification becomes effective.

D. *Effect of River Master's Determination.* Unless stayed by this Court, any Final Report, Approved Plan, Compliance Report, or Modification Determination (hereinafter, collectively, "Final Determination") shall be effective upon its adoption, and shall be subject to review by this Court only on a showing that the Final Determination is clearly erroneous. A party seeking review of a Final Determination must file a motion with the clerk of this Court within thirty (30) days of its adoption, which motion shall set forth the Final Determination on which review is sought and a concise statement of the basis of the claim that the Final Determination is clearly erroneous.

E. *Authority of Pecos River Commission.* Nothing in this Decree is intended to displace the authority of the Pecos River Commission to administer the Pecos River Compact, and if the Commissioners reach agreement on any matter, the parties shall advise the Court and seek an appropriate amendment to this Decree.

F. *Communication with River Master.* *Ex parte* communications with the River Master are forbidden. Any written communication with the River Master by motion or otherwise shall be simultaneously served by mail on the opposing party. Any oral communication with the River Master shall be made in the presence of the opposing party, whether by telephone conference call or in person.

G. *Distribution of Costs.* The compensation of, and the costs and expenses incurred by, the River Master shall be approved by the Court and borne equally by the State of Texas and the State of New Mexico.

IV

DISMISSAL OF UNITED STATES

A. The United States is dismissed from this proceeding without prejudice.

V

RETENTION OF JURISDICTION

Any of the parties may apply at the foot of this Decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

EXHIBIT A

ORDER APPOINTING RIVER MASTER

IT IS ORDERED that [name] be and he/she hereby is appointed River Master of the Pecos River for the purpose of performing the duties set forth in the Amended Decree of [date].

IT IS FURTHER ORDERED that [name], as River Master, shall have the power and authority to subpoena information or data, compiled in reasonably usable form, which he/she deems necessary or desirable for the proper and efficient performance of his/her duties.

IT IS FURTHER ORDERED that the River Master is allowed his/her necessary expenses and reasonable fees for his/her services, statements for which shall be submitted quarterly to the Court for its approval. Upon Court approval, such statements will be paid by the State of New Mexico and the State of Texas.

IT IS FURTHER ORDERED that if the position of River Master becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court.

