

No. 65, Original

IN THE
Supreme Court of the United States

October Term, 1987

STATE OF TEXAS,
Plaintiff,

v.

STATE OF NEW MEXICO,
Defendant,

UNITED STATES OF AMERICA,
Intervenor.

**NEW MEXICO'S EXCEPTIONS TO THE
REPORT OF THE SPECIAL MASTER AND
BRIEF IN SUPPORT OF EXCEPTIONS**

HAL STRATTON
Attorney General of New Mexico

HENRY M. BOHNHOFF
Chief Assistant Attorney General

PETER THOMAS WHITE *
ERIC RICHARD BIGGS
Special Assistant Attorneys General

New Mexico Interstate
Stream Commission
Bataan Memorial Building, Room 101
Santa Fe, New Mexico 87503
(505) 827-6150

**Counsel of Record*

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January 26, 1988

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**EXCEPTIONS TO THE
REPORT OF THE SPECIAL MASTER**

The State of New Mexico submits these exceptions to the Report of the Special Master, which was accepted for filing on December 7, 1987, and the Master's Proposed Amended Decree attached to the Report.

1. New Mexico objects to the assumption in the Master's proposed Pecos River Master's Manual that the law of the case has transformed an evidentiary presumption used to determine past shortfalls into an irrebuttable legal presumption that all future departures in stateline flows are due to manmade depletions chargeable to New Mexico. New Mexico also objects to

the Master's omission of provision for the accrual of shortfalls in his Proposed Amended Decree.

2. New Mexico objects to the presumption that all negative departures in stateline flows are caused by man's activities in New Mexico for the reasons that the manner in which Texas Exhibit 68 and the equations in Texas Exhibit 79 account for depletions due to natural causes does not make it possible to account for all departures from the 1947 condition as attributable to man's activities and, even in the 28-year period used to define the 1947 condition, there were substantial annual (18,400 acre-feet) and accumulated (89,200 acre-feet) departures that resulted from the vagaries of the Pecos River and cannot be attributed to man's activities.

New Mexico requests the Court to insert the man's activities accounting provisions in the Special Master's proposed Pecos River Master's Manual that were deleted from the proposed manual after this case was remanded to the Master in June 1987. If those provisions are not included in the manual, New Mexico requests the Court (1) to remand the case to the Master to determine, based upon the new evidence offered by New Mexico, whether it is hydrologically correct to presume that man's activities will cause future departures, or (2) to expressly reserve for decision by the River Master the question whether Texas Exhibit 68 and the procedures of the Manual recommended by the Master to calculate departures from the 1947 condition can establish a residual of departures attributable to man's activities by accounting for all non-manmade depletions.

Respectfully submitted,

HAL STRATTON

Attorney General of New Mexico

HENRY M. BOHNHOFF
Chief Assistant Attorney General

PETER THOMAS WHITE
ERIC RICHARD BIGGS
Special Assistant Attorneys General

New Mexico Interstate
Stream Commission
Bataan Memorial Building, Room 101
Santa Fe, New Mexico 87503
(505) 827-6150

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STATE OF TEXAS,
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**NEW MEXICO'S BRIEF IN SUPPORT OF
EXCEPTIONS TO THE REPORT OF
THE SPECIAL MASTER**

QUESTIONS PRESENTED

1. Whether an evidentiary presumption which was used to determine past shortfalls is the law of the case controlling all future determinations of shortfalls.

2. Whether the uncontradicted evidence offered by New Mexico to refute the presumption shows that it is clearly erroneous and would result in manifest injustice.

JURISDICTION

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

STATUTE INVOLVED

The Pecos River Compact, 63 Stat. 159 (1949), N.M. Stat. Ann. § 72-15-19 (1978), and Tex. Water Code Ann. § 43.010 (Vernon 1972). A copy of the Pecos River Compact is in Appendix A.

STATEMENT OF THE CASE

1. Proceedings Prior to the 1987 Opinion.

This original action was filed in the Supreme Court in 1974. Central to the argument between the states was New Mexico's obligation under Article III(a) of the Compact. Article III(a) provides that New Mexico shall not deplete the flow of the Pecos River by man's activities below an amount which would in subsequent years be equivalent to the flow available to Texas under the "1947 condition." The Compact did not specify the amount of water to be delivered to Texas under the 1947 condition because of the irregular flow of the river. 107 S.Ct. 2279, 2282 (1987).

In 1979 the former Special Master, Judge Breitenstein, established a legal definition for the 1947 condition. 1979 Report at 41. He concluded that neither state is bound by "the mistakes, uncertainties, and omissions" in the engineers' description of the 1947 condition at the time the Compact was signed. *Id.* at 38. The Court adopted the Master's definition of New Mexico's legal obligation under Article III(a). 446 U.S. 540 (1980).

In 1983 the Court ruled that the remaining “crucial question” in the case was whether New Mexico had fulfilled the obligations under Article III(a) of the Compact. 462 U.S. 554, 574, 575 (1983). That question necessarily involved two subsidiary questions. First, “what is the difference between the quantity of water Texas could have expected to receive in each year and the quantity it actually received?” The second, distinct question was “to what extent were the shortfalls due to ‘man’s activities in New Mexico?’” *Id.* at 575. In 1984 the Court summarily approved the Master’s recommendation that the 1947 condition equation and curve shown on Figure 1 of Texas Exhibit 68 fix the “numerical standards for the legal definition of the 1947 condition.” 467 U.S. 1238 (1984); 1984 Report at 18. The Master advised the Court that if the departures were negative, then it needed to determine whether they were the result of man’s activities. *Id.* at 2.

Special Master Charles J. Meyers succeeded Judge Breitenstein in 1984. 468 U.S. 1202 (1984). During Special Master Meyers’ tenure the states stipulated to various changes from the 1947 condition on the Pecos River. These stipulations were incorporated in Texas Exhibit 79, which computes the departures of stateline flows from the 1947 condition during the 1950-83 period. New Mexico contended before the Master that Texas Exhibit 79 answered only the first of the two questions which needed to be resolved to determine New Mexico’s compliance with the Compact. The question which remained, as the Court stated in 1983, was “to what extent were the shortfalls [shown by Texas Exhibit 79] due to ‘man’s activities in New Mexico?’” 462 U.S. at 575. The Master, however, refused to take evidence on the latter issue. Tr. at 241 (May 20, 1986). He found that the equations in Texas Exhibit 79 account for all natural losses and that the departures shown in the exhibit constitute New Mexico’s shortfall in the required deliveries under Article III(a) “unless New Mexico can show otherwise,”

which it had not done. 1986 Report at 10. The Master concluded that New Mexico should have delivered 340,100 acre-feet more water at the state line than Texas had received during the 1950-83 period. *Id.* at 31.

In exceptions to the Master's Report, New Mexico argued that the Master should have heard direct evidence on the extent to which departures were due to man's activities in New Mexico. The Court rejected New Mexico's exceptions and adopted the Master's calculations of the past shortfall chargeable to New Mexico. 107 S.Ct. at 2283.

2. Proceedings on Remand.

In 1987 the Court remanded the case to the Master and requested him to recommend an amendment to the Court's Final Decree specifying the duties of a River Master and the consequences of the River Master's determinations. The Court also invited suggestions for any other amendments to the decree. 107 S.Ct. at 2287.

The Master submitted a Report to the Court on November 30, 1987, which was ordered filed by the Court on December 7, 1987 (1987 Report). The 1987 Report recommends that the Court adopt the Proposed Amended Decree (proposed decree) which is attached to the Report and the Pecos River Master's Manual (manual), Texas Exhibit 108, which the Master submitted to the Court on December 4, 1987. The manual incorporates the agreements of the states and the Master's findings on disputed issues.

The Special Master's proposed decree requires the River Master to calculate, pursuant to the manual, New Mexico's delivery obligation under Article III(a) of the Compact on an annual basis, and any shortfall or overage in the amount of water delivered. Art. III.B.1 at 3. If the Article III(a) obligation is not met in any one year, New Mexico must deliver at

the state line the amount of the shortfall within nine months after the River Master's determination. Art. II.A.3 at 2. The River Master is authorized to modify the manual only upon motion by either party for good cause shown and subject to review by the Court. Art. III.C.2 at 4; Art. III.D.5 at 5. The Court retains jurisdiction to modify or amend the decree. Art. V at 6.

SUMMARY OF ARGUMENT

Although the River Master is required under the Master's proposed decree to use the methodology set forth in the manual to determine stateline deliveries, the River Master is also given limited authority to modify the manual. New Mexico supports these provisions in the proposed decree. It objects, however, to the legally binding presumption that is implicit in the recommended manual, that is, that all future departures are caused by man's activities.

At the October 15, 1987, hearing New Mexico offered evidence to rebut the presumption that all departures are caused by man's activities and requested the Master to include provisions in the manual that would authorize the River Master to determine whether man's activities caused departures. The Court's previous approval of the evidentiary presumption used by the Master to determine the 1950-83 shortfalls is not law of the case and does not transform it into an irrebuttable legal presumption for future determinations. New basic data and better hydrologic procedures could provide more adequate methodology for Compact administration in the future. The finality of decisions on events of the past should not constrain the River Master from determining whether man's activities cause future departures.

The Master should have found, based upon the uncontradicted evidence offered by New Mexico, that the vagaries of the

Pecos River make it impossible to presume that all future departures are caused by man's activities. The Master refused either to include the requested provisions in the manual or to reconsider his previous decision on the presumption. New Mexico therefore objects to the entry of the Master's proposed decree and manual.

ARGUMENT

I

**BECAUSE THE LAW OF THE CASE
DOCTRINE IS INAPPLICABLE TO FUTURE
FACTUAL DETERMINATIONS, THE MASTER
ERRED IN ASSUMING THAT THE DOCTRINE
COMPELLED HIM TO PRESUME THAT ALL
FUTURE DEPARTURES IN STATELINE FLOWS
ARE CHARGEABLE TO NEW MEXICO.**

New Mexico does not request the Court to reconsider any findings on past shortfalls. It asks the Court to ensure that in accordance with the Compact, New Mexico is not responsible for departures from the 1947 condition curve of Texas Exhibit 68 that are not or could not have been caused by man's activities in New Mexico. The Master's Report and proposed manual would impose that responsibility based upon an erroneous application of the law of the case doctrine.

A. The Master erred in refusing to consider evidence refuting the presumption that man's activities caused departures.

Article III(a) of the Pecos River Compact states New Mexico's obligation under the Compact. It provides that: "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.” (Emphasis added.) The Court has recognized that “whether a particular shortfall in state-line water deliveries is due to ‘man’s activities’” is “a critical qualification of New Mexico’s obligation to deliver water under Art. III(a) of the Compact.” 462 U.S. at 573 n.20.

When Judge Breitenstein recommended that Texas Exhibit 68 fix the standard for determining departures from the 1947 condition, he advised the Court that any negative departures should be investigated to determine whether they were the result of man’s activities. 1984 Report at 2, 18, *approved*, 467 U.S. at 1238. New Mexico acknowledges that Texas Exhibit 68 should control the determination of gross departures in the future.

Once the standard was fixed, the Court had to quantify departures from the 1947 condition. This was accomplished for the 1950-83 period in Texas Exhibit 79. New Mexico did not object to this exhibit, nor did it dispute the departures. Tr. at 99-103 (December 3, 1985). New Mexico acknowledges that the mathematical procedures and equations in Texas Exhibit 79 should guide future computations of departures unless there are changed circumstances or the procedures are found to be erroneous. Moreover, the Master’s findings, approved by the Court, on the 1950-83 shortfalls chargeable to New Mexico are final and binding on the states.

On remand, the Master ordered the states to submit a proposed amended decree and a manual by which a River Master could determine compliance with the compact. Texas’ proposed manual deleted all provisions in its previous manuals, Texas Exhibits 88 and 103, which referred to a two-phase accounting procedure and included an investigation of whether departures were due to man’s activities. *See* Texas Exhibit 88 paras. A.1, A.4, and C.1.b. at 1 and 18 (November 11, 1985); Texas Exhibit 103 paras. A.1, A.4, C.1.b. at 1 and 15 (June 2, 1986).

New Mexico's proposed manual included, with minor changes, the provisions that Texas deleted. *See* Appendix B. The deleted provisions authorize the River Master to determine whether man's activities caused departures. The Master, to the contrary, believed that because Texas Exhibit 79 accounted for all non-manmade depletions, any residual departure was the result of man's activities. Because the Master would not relitigate this issue, he said that New Mexico should be prepared to demonstrate that its arguments raised new issues of fact. Pretrial Order at 9 (October 12, 1987). New Mexico, however, continued to argue the "man's activities" question because the methodology used to compute stateline departures in Texas Exhibit 79 ignores the unpredictability and peculiarities of the Pecos. *See* Point II, *infra*; 107 S.Ct. at 2286; 1984 Report at 6. At the October 15, 1987, hearing New Mexico's witness, S.E. Reynolds, stated that "unless the accrual of very large shortfalls and credits is allowed, the compact cannot be equitably administered without diligent annual determinations of what part, if any, of the departures are demonstrably attributable to changes in depletions by man's activities in New Mexico." Tr. at 46. If the Master rejected a provision allowing the accumulation of departures, New Mexico requested him to reconsider the presumption that the equations in Texas Exhibit 79 take account of all depletions of the river except for manmade depletions. *Id.* at 30.

The Master decided that he would listen to New Mexico's evidence on the variations of departures of stateline flows for "the narrow purpose of the decree, but not for the purpose of the validity of — and my understanding of Texas Exhibit 79" *Id.* This decision was based on the Master's conclusion that the presumption of man's activities is the law of the case and "very unlikely to be undone — because I think the Supreme Court approved of it" *Id.* at 28. New Mexico contends that the Court's implied approval was limited to the

determinations of shortfalls for the 1950-83 period. The Court did not mandate that the presumption be used in all future determinations.

At the October 15, 1987, hearing New Mexico demonstrated that a presumption based on Texas Exhibit 79 could not be used to determine the cause of future departures. Given the presumption that it does, the exhibit burdens New Mexico with responsibility for what are not manmade departures. Reynolds first discussed Texas Exhibit 68, Figure 1, the curve and mathematical equation that define the 1947 condition. Tr. at 42-46. This curve was derived from a study of index inflows and routed outflows in the Pecos River between 1919 and 1946. Thus, the 1947 condition simply reflects man's activities during those years. Yet the curve itself is only a statistical average, not what actually happened during those years. Between 1919 and 1947, stateline flows varied as much as 28,000 acre-feet from the smoothed-out curve which is the 1947 condition, even though by definition the 1947 condition existed during the entire period. Tr. at 44-46; New Mexico Exhibit 137, Table 2 and Figure 1, reproduced in Appendix C. *See also* 1987 Report at 4.

This is not a variation on Heraclitus' paradox. It simply means that, given the unpredictability of the Pecos River's flow, there always will be "substantial positive and negative departures from the outflow calculated by using the equation," Tr. at 45, even in the absence of changes in man's activities. Moreover, "those variations will continue in the future." *Id.* Even assuming compliance with Article III(a) of the Compact, there still would have been substantial departures from the 1947 condition during the 1950-83 period. Tr. at 46-50; New Mexico Exhibit 137, Table 3 and Figure 3.

As a result, Texas Exhibit 79 would cause New Mexico inevitably to have shortfalls and overages over the years regardless

of man's activities. Tr. 45-46, 48-50. To remedy this problem in the future, New Mexico proposed two alternative solutions: (1) require the River Master to determine each year the extent to which any departures are attributable to man's activities, Tr. at 51-53, or (2) allow New Mexico to accumulate "debits" and "credits." Tr. at 46, 50. The Master did not consider this evidence. Instead he erroneously decided that the evidentiary presumption upon which he had relied to determine the past shortfall was the law of the case and would govern all future determinations. New Mexico takes exception to this decision. Although the Court had approved the Master's recommendation as to New Mexico's past shortfall, it never addressed the use of the Master's presumption to determine future shortfalls. The Master therefore erred in not considering New Mexico's evidence.

The Court's June 8, 1987, Opinion provides that the River Master's calculations "will include determinations of negative or positive departures from New Mexico's delivery obligation and such shortfalls or credits will be reflected in that State's later delivery obligations." 107 S.Ct. at 2287. The Master's proposed decree, however, would allow only the accrual of credits. A net shortfall determined for a water year would have to be satisfied within nine months of the River Master's determination of the shortfall and within six months of the River Master's approval of New Mexico's plan for the satisfaction of the shortfall. The six months would be those between irrigation seasons when rainfall and runoff are minimal. If shortfalls are not limited to amounts demonstrably attributable to man's activities, as in deleted manual provisions requested by New Mexico, the shortfalls could be very substantial. The shortfalls could be large enough to be difficult or impossible to satisfy in the six months between irrigation seasons even if shortfalls are limited to those clearly attributable to man's activities. Article IX of the Compact provides that in maintaining

flows at the state line New Mexico is required to apply the principle of prior appropriation. The senior rights in New Mexico are rights to the use of surface water. The junior rights are rights to the use of ground water. Tr. at 31, 38 (May 20, 1986). The termination of those junior rights would not cause an increase in the flow at the state line for several years. The Court's decree must allow either the accrual of both shortfalls and overages or a much longer time to satisfy any shortfall found by the River Master.

B. The law of the case doctrine cannot be applied to future factual determinations of departures chargeable to New Mexico.

The Master rejected New Mexico's uncontradicted evidence on legal grounds: "To be sure, the curve [Texas Exhibit 68, Figure 1] is not an exact representation of the scattered points it seeks to define. But it is law of the case." 1987 Report at 4. In doing so, the Master erred. The curve of Texas Exhibit 68 is a useful tool if properly employed.¹ See page 19 *infra*. But the presumption that any departure from it is attributable to a change in man's activities is not valid.

Both Texas and New Mexico acknowledge the inherent uncertainty in hydrology and the need to adjust judicial doctrines seeking finality of judgments in light of this uncertainty. The Supreme Court of New Mexico, for example, has described why cases involving hydrologic information should not be subjected to the usual rules of preclusion.

¹ At the October 15, 1987, hearing the Master expressed his understanding that the testimony of New Mexico's witness was a challenge to Texas Exhibit 68. Tr. at 67. The testimony presented was certainly not intended to challenge Texas Exhibit 68. That exhibit was in large measure based on stipulations of the parties.

[T]he hydrology of underground waters is not an exact science; new data is constantly being obtained which must be correlated with that which is already known, thereby necessitating the periodic revision of hydrographic formulas and maps. To a considerable degree, the hydrologist must arbitrarily, though scientifically, estimate the present and future quantity of water underlying a particular area. It is a tribute to the profession that a reasonable degree of accuracy is ordinarily achieved.

Cross v. Erickson, 72 N.M. 73, 76, 380 P.2d 520, 521 (1963).

Texas courts also have recognized the limitations of hydrology and the resulting need to insist upon flexibility rather than finality in cases involving water. In *Franklin v. Rainey*, 556 S.W.2d 583 (Tex. Civ. App. 1977), the court refused to apply res judicata to a prior decision that dealt with the flow of water. Res judicata should not apply, said the court, because "the flow of the water has substantially changed since [the prior] judgment was rendered." The court quoted with approval from *City of Lubbock v. Stubbs*, 160 Tex. 111, 115, 327 S.W.2d 411, 414 (1959), which stated that "[e]stoppel by judgment . . . does not prevent a re-examination of the same question between the same parties, where, in the interval, the facts have changed, or new facts have occurred which may alter the legal rights or relations of the parties." *Id.* at 585. See also *Matcha v. Mattox*, 711 S.W.2d 95, 100-01 (Tex. Civ. App. 1986) (discussing *Franklin v. Rainey* with approval).

The law of the case doctrine is a discretionary rule of practice. *Arizona v. California*, 460 U.S. 605, 618 (1983); *United States v. United States Smelting Refining & Mining Co.*, 339 U.S. 186, 199 (1950). Law of the case expresses the practice of courts generally, but certainly not always, to refuse to reopen what has been decided in previous orders in the same case by

the same court. *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). Given adequate showing that the previous decision was wrong, courts should not hesitate to change their minds. *See id.*

Moreover, law of the case should be carefully limited to apply only to issues actually and necessarily decided. This is especially germane in original actions, where flexibility to determine "questions which could not be disposed of at the time of an initial decree" is needed. *Arizona v. California*, 460 U.S. at 624. The "law of the case doctrine was understandably crafted with the course of the ordinary litigation in mind," not the Supreme Court's original jurisdiction. *Id.* at 618-19. Moreover, the doctrine is an "amorphous concept" which, as "most commonly" defined, applies only to a court's previous decision "upon a rule of law," not in regard to distinct factual questions. *Id.* at 619. The Supreme Court refused to "extrapolate wholesale law of the case into the situation of our original jurisdiction" in the 1983 *Arizona v. California* case because of the "intolerable" results which would occur under the circumstances. 460 U.S. at 619.

The Supreme Court acts as a trial court in the exercise of its original jurisdiction under Article III of the Constitution. Law of the case can be applied to prior rulings on a matter by trial courts. The law of the case doctrine, however, applies to determinations of questions of law, not to questions of fact. *Carpenter v. Durell*, 90 F.2d 57, 58 (6th Cir. 1937). A decision of a fact question does not generally become the law of the case, nor does it estop the parties on a second trial from showing the true state of facts. *See* 5 Am. Jur. 2d *Appeal and Error* § 755 (1962). *See also* 5B C.J.S. *Appeal and Error* § 1836 (1958) (remand for further evidence where the interests of justice will be served).

The Master's decision in the 1986 Report on the man's activities question was a determination of fact, not a legal

ruling. The Master decided that New Mexico had introduced no evidence to refute the technical conclusion that the negative departures shown in Texas Exhibit 79 were the result of man's activities in New Mexico. 1986 Report at 9. He made no decision whatsoever as to New Mexico's potential liability for shortfalls in the future. Since the latter question was not even in issue at the time of the Master's 1986 decision, the question could not have been necessary to that decision, which was affirmed by the Court in 1987. 107 S.Ct. at 2283.

On October 15, 1987, New Mexico presented uncontradicted evidence to show why depletions due to man's activities needed to be considered in the future, and was ready and willing to address means of doing so. Rather than considering evidence on the resolution of the question for the future, the Master simply resorted, improperly, to the law of the case. In so doing, the Master effectively precluded the River Master from considering whether man's activities caused departures in stateline flows, a significant part of the crucial question of New Mexico's obligation to Texas under Article III(a) of the Compact. 462 U.S. at 559.

New Mexico agrees that findings made as to New Mexico's past obligations to Texas under the Compact are *res judicata*. Texas Exhibit 79 is not, however, the law of the case in regard to New Mexico's future obligations. That exhibit quantifies New Mexico's obligations for the period prior to 1984, but is only a guideline for determining the respective rights and duties of New Mexico and Texas in the future. The livelihoods of thousands of existing water users in the Pecos River Basin in New Mexico may be affected. If a decision is to be made that could alter or deny those livelihoods, let it be based on a proper understanding of the facts and the law. *Cf. Colorado v. New Mexico*, 459 U.S. 176, 186-87 (1982). Let it not be founded on an incorrect, archaic and unnecessarily rigid application of a legal doctrine in order to avoid future evidentiary

hearings. The Master's refusal to reconsider his presumption or to expressly authorize the River Master to consider evidence on the point threatens New Mexico's future in the Pecos River Basin without an adequate hearing and without a justifiable basis for refusing to provide such a hearing.

II

THE MASTER ERRED IN PRESUMING THAT ALL DEPARTURES FROM THE 1947 CONDITION ARE CHARGEABLE TO NEW MEXICO BECAUSE SUBSTANTIAL ANNUAL AND ACCUMULATIVE DEPARTURES RESULT FROM THE VAGARIES OF THE RIVER.

The Master concluded that law of the case required his proposed decree to presume that all departures from the 1947 condition, calculated in accordance with Texas Exhibit 79, were attributable to man's activities. He did not make an independent finding of fact, based on the evidence, and instead refused "to reconsider the issue." 1987 Report at 9. Therefore, the Master's Report and proposed manual should not be reviewed on a clearly erroneous standard. *NLRB v. Alterman Transport Lines*, 587 F.2d 212 (5th Cir. 1979) (the clearly erroneous standard does not apply to findings made under an erroneous view of controlling legal principles). See also 5A J. Moore & J. Lucas, *Moore's Federal Practice* para. 53.12[5] at 53-131 (1987). Once having rejected the purely legal predicate to the Master's proposed decree, this Court independently should review the evidence. The Supreme Court, in the exercise of its original jurisdiction, has not given a cramped review to Special Master reports. *Arizona v. California*, 373 U.S. 546, 595-601 (1963).

A. Special Master Meyers ignored the conclusions of the Court and the previous Master that shortfalls due to man's activities must be determined.

Special Master Meyers gave no weight to previous Special Master statements that shortfalls due to man's activities must be determined. For example, Judge Breitenstein stated in his 1982 Report that continuation of this suit would require "[d]etermination of whether any negative departures resulted from man's activities." 1982 Report at 19. Judge Breitenstein also recommended in his 1984 Report that Texas Exhibit 68 be used "in the determination of New Mexico departures from the obligation imposed by the Pecos River Compact Art. III(a) There remains to be done in the case the determination of New Mexico's departures and, if they are negative, whether those departures are the result of man's activities." 1984 Report at 2, *approved*, 467 U.S. 1238 (1984).

The Master also gave no weight to this Court's statement in its 1983 Opinion:

It deserves emphasis that neither the Inflow-Outflow Manual in any of its past or projected versions nor the Texas "Double Mass Analysis" has anything to say about whether a particular shortfall in state-line water deliveries is due to "man's activities," *a critical qualification on New Mexico's obligation to deliver water under Art. III(a) of the Compact.*

462 U.S. at 573 n.20 (emphasis added).

In that same opinion the Court asked "to what extent were the shortfalls due to 'man's activities in New Mexico'?" *Id.* at 575.

B. Significant annual and accumulated departures will occur under the 1947 condition that cannot be chargeable to New Mexico.

As previously noted, New Mexico presented uncontradicted evidence at the October 15, 1987, hearing that Texas Exhibits 68 and 79, which together calculate departures from the 1947 condition, cannot establish a residual of departures attributable to man's activities by accounting for all non-manmade depletions. Texas Exhibit 68 was prepared using data on the yearly water supply, reservoir operations, beneficial uses of water and channel losses in the Pecos River Basin in New Mexico between 1919 and 1946. Those data defined the 1947 condition which was made the cornerstone of the Pecos River Compact by its Article III(a). The inflow-outflow equation of Texas Exhibit 68 is a mathematical smoothing of the inflow and outflow data for the 1919-46 period. Tr. at 45. The "inflow" of the equation is the sum of the measured flow below Alamogordo Dam and the computed flood inflow in the three reaches from Alamogordo Dam to the state line. The "outflow" of the equation is the residual stateline flow determined by an analytical study routing the inflow through the reservoirs, diversion works and reaches of the river from Alamogordo Dam to the state line.

Depletion of the stateline flow by man's activities during the period 1919-46, that is, under the 1947 condition, varied widely. The variations were a function of the water supply available for storage and use in New Mexico after losses due to natural causes. The supply available for storage and use was much greater if the flood inflows reached the river above the reservoirs, diversion works and losing channel reaches as they existed under the 1947 condition. If those inflows came in below those reservoirs, diversion works and losing channel

reaches, the supply was reduced.² As a result, the inflow-outflow data points plotted on Figure 1 of Texas Exhibit 68 would fall far above and below the line of the curve generated by the equation of Texas Exhibit 68. *See* 1987 Report at 4. Deviations of the 1947 condition data points from the curve of Texas Exhibit 68 are due to the "peculiarities of the Pecos," not to any error in stream flow measurements or the definition of man's activities under that condition.

The curve in Texas Exhibit 68 is a good mathematical representation of the scattered points therein. The points themselves faithfully represent the inflow and outflow under the 1947 condition. Therefore, New Mexico has not necessarily departed from the 1947 condition if the inflow-outflow points do not fall on the curve of Texas Exhibit 68 during the administration of the Compact. The scatter of the points plotted in Texas Exhibit 68 are not the result of inaccuracies. The scatter of points during the administrative period should not be presumed to result from departures from the 1947 condition. The former can be attributed only to the vagaries of the flow of the Pecos River. Tr. at 46, 60 (October 15, 1987). The latter are attributable to man's activities only if there is supporting evidence.

There can be significant, sustained departures from the inflow-outflow relationship of Texas Exhibit 68 which are not attributable to increased depletions by man's activities in New Mexico. Tr. at 46, 58. This is best illustrated by Table 2 and

² *See, e.g.,* 1979 Report at 15 (over 50 percent of the 1947 condition index inflows comes from flood inflows and the 1947 condition routing study does not weigh the impact of a flood inflow on the basis of point of occurrence); Master's Exhibit 27, Report of the Technical Assistant to the Special Master at 46 (December 1978) (a change in location of flood inflow could cause a departure).

Figure 2 of New Mexico Exhibit 137. *See* Appendix C. Figure 2 demonstrates that even under the 1947 condition, which is now defined by Texas Exhibit 68, there would be substantial, sustained departures. In the fourteen-year period between 1919 and 1932, the accumulated shortfall was approximately 90,000 acre-feet. In the following fourteen years between 1933 and 1946, the accumulated credits amounted to 114,000 acre-feet. Tr. at 46, 61. It is important to note that no part of those very large accumulated departures can be attributed to any depletions by man's activities other than those defined as a part of the 1947 condition and apportioned to New Mexico by Article III(a) of the Compact. Those departures, therefore, can only be due to the vagaries of the Pecos River stream flow. *See* Tr. at 46, 60. The evidence presented by New Mexico on October 15, 1987 stands uncontradicted.³

Under the Master's proposed decree, if the water flows, natural losses, reservoir operations and manmade depletions of the 1919-46 period repeated themselves, New Mexico would be required to forego 90,000 acre-feet of her 1947 condition beneficial consumptive uses during the first fourteen years of the period. During the next fourteen years, New Mexico would be allowed to deplete the stateline flow by a total of 114,000 acre-feet more than under the 1947 condition. It would be both financially and physically infeasible for New Mexico to increase and then decrease its manmade depletions in this manner. Yet this is precisely what the proposed decree both presumes and

³ At a previous hearing, Texas' expert witness testified that it is "more likely than not" that any negative departure determined by using Texas Exhibits 68 and 79 is attributable to man's activities. Tr. at 290, 291, 292 (May 21, 1986). However, a Texas witness also testified that the amount of water usable by New Mexico under the Compact can vary widely, irrespective of man's activities. *Id.* at 329. At the October 15, 1987, hearing Texas offered no evidence to rebut the testimony of New Mexico's witness and New Mexico Exhibit 137.

dictates. The Compact can be administered equitably only if the accrual of very large shortfalls and credits is allowed or the decree requires diligent annual determinations of what part, if any, of the negative departures is demonstrably attributable to man's activities in New Mexico.

C. It is logically invalid to presume that all departures are caused by manmade depletions.

The perhaps unintended thrust of the testimony of Dr. Murthy, Texas' witness, was that shortfalls or overages in the stateline flow are directly dependent on natural losses. Tr. at 329 (May 21, 1986). That is in principle quite correct, using the procedures of Texas Exhibit 68 and the Master's proposed manual. His testimony itself refutes the argument that all shortfalls determined using Texas Exhibits 68 and 79 are attributable to man's activities.

The Artesia to Damsite 3 reach alluded to in Dr. Murthy's testimony is the upper part of the Artesia to Carlsbad reach referred to in Texas Exhibit 79 and the Master's proposed manual. The flood inflow in that reach as determined by either Texas Exhibit 79 or the manual is equal to the "outflow" from the reach less the "inflow" to the reach. The inflow to the reach is comprised of the flow at the Artesia stream gage and the measured or estimated spring inflow. The outflow is comprised of the measured flow at the Carlsbad gage, change in reservoir storage, reservoir evaporation, channel losses and manmade diversions from the reach. Thus, under any given hydrologic situation, if the channel losses computed to determine flood inflow increase, the gaged outflow, the manmade diversions or some other outflow item will necessarily decrease and the computed flood inflow, which is a part of the index inflow to be used in Texas Exhibit 68, will remain the same. Departures from the 1947 condition outflow to state line can

be attributable to either natural causes or man's activities. And one cause cannot be distinguished from the other without a determination of both.

A hypothetical example illustrates the inequities created by the proposed decree. Assume that New Mexico met her Article III(a) obligation for water year 1990; and that the hydrology for the Artesia to Damsite 3 reach for the year 1990, including water storage and use, is perfectly replicated in water year 1991, except that channel losses have increased by 20,000 acre-feet that year in that reach. That is, all inflows to and uses from the reach in 1991 are identical to those in the year 1990, but the outflow has been decreased 20,000 acre-feet by channel losses in 1991.

In accordance with the manual, an adjustment would be made to account for the increased channel losses in order to compute the flood inflow for the reach. With that adjustment, the flood inflow would be determined to be exactly the same in the reach in 1991 as it was in 1990. If all other reaches of the river were the same as they were in 1990, the index inflow, and, therefore, the stateline outflow, as determined from the equation of Texas Exhibit 68, would be the same in 1991 as they were in 1990; but there would be 20,000 acre-feet less water available for use in New Mexico and delivery to Texas. Unless New Mexico reduced her beneficial consumptive use well below that allowed by the 1947 condition, the use of the Master's proposed manual would show a shortfall in New Mexico's delivery obligation. Under the Master's presumption, that shortfall would be erroneously attributed to man's activities in New Mexico.

The manner in which Texas Exhibit 68 and the Master's manual account for depletions due to natural causes, therefore, does not make it possible to assume that all departures from the 1947 condition are attributable to man's activities. For

this reason, a determination of any manmade depletions in excess of those under the 1947 condition is essential in the administration of Article III(a) of the Compact. Those depletions cannot be inferred from a study of changes in depletions by natural causes. If the depletions due to natural causes increase, New Mexico will be harmed by being made responsible for natural losses.

A prerequisite to the use of Texas Exhibit 68 to determine shortfalls or overdeliveries at the state line is a determination of flood inflows below Alamogordo Dam. The determination of flood inflows in the Alamogordo Dam to stateline reach requires quantification of depletions by man's activities such as reservoir storage, reservoir evaporation and manmade diversions. The Master relied on the testimony of Texas' expert, Dr. Murthy, to reject the notion that every year the River Master must determine the level of man's activities and their effect on the river's flow, and stated his belief that that task is as unnecessary as it is impossible. 1987 Report at 10. First, a determination of at least a part of depletions by man's activities is necessary to determine flood inflows, an ingredient essential to the use of Texas Exhibit 68. Second, if the task is indeed impossible, Article III(a) of the Compact is unenforceable.

If new or changed natural losses or manmade depletions on the river are recognized during the administrative period, the appropriate procedure is to, first, take those losses into account in computing flood inflows in the manner prescribed in the manual; second, determine the 1947 condition outflow using Texas Exhibit 68; and third, determine what part, if any, of the departure is attributable to man's activities.

D. It is feasible to determine whether future departures are due to man's activities.

Texas Exhibits 68 and 79 were not formulated in a way that makes it possible to distinguish depletions due to natural causes and depletions due to man's activities. Those causes of depletions can be distinguished only by careful, periodic review of the water storage, diversion and use operations in New Mexico. That task is neither as unnecessary nor as impossible as the Master has assumed, without basis, from the testimony of Dr. Murthy. *Cf.* 1987 Report at 10. It is not likely that a detailed review would be needed annually. The river gages, the abundance of records of major diversions in New Mexico and aerial photography would make periodic determination of depletions by man's activities readily feasible.

The minutes of the Pecos River Commission demonstrate that its members recognized the necessity to assess man's activities in New Mexico in administering the Compact and the feasibility of using aerial photography and related techniques in that administration. In 1949 the Commission adopted a program to undertake the administration of the Compact, including the inflow-outflow computations for the subreaches of the river, obtaining aerial photographs of river bottom lands and possibly all of the irrigated lands below Alamogordo Reservoir, delineating areas involving non-beneficial consumption of water and establishing a stream gaging program in cooperation with the U.S. Geological Survey. In 1950 the Commission directed its Engineering Advisory Committee to prepare specifications for aerial photographs along the mainstream and pertinent portions of the tributaries of the Pecos River. In 1952 the Commission formalized an agreement with Tipton and Associates for the preparation of tracings from the Pecos River aerial survey and field check survey. *Stip. Exhibit 4(b)* at 7, 23 and 48.

The Master's Report alludes to exchanges between him and New Mexico's witness Reynolds at the October 15, 1987, hearing. 1987 Report at 9; Tr. at 53-56 (October 15, 1987). The Master suggested in the hearing that a change of circumstance such as the increased channel losses in the hypothetical example given above would require modification of the manual, and the witness agreed. *Id.* at 55. The witness, in doing so, went on to point out that the manual change required would be the insertion of the provisions that would otherwise be deleted from the manual. *Id.* See paragraphs A.1 and A.4 in the earlier Texas manuals, Texas Exhibits 88 and 103, which are reproduced in Appendix B. New Mexico also requested the Master to insert the following paragraph:

Departures from the 1947 condition inflow-outflow relationship resulting from abnormal distribution of flood inflow or from other causes not attributable to beneficial consumptive uses of water in New Mexico shall not be accounted as depletions by man's activities.

See Pretrial Order at 11 (October 12, 1987).

The fundamental issue in this case is whether Texas Exhibit 68 and the proposed manual can be used to distinguish natural and manmade depletions. This issue can best be resolved by the Court's insertions of the deleted provisions.

CONCLUSION

The Court should adopt the Special Master's Proposed Amended Decree and insert in the proposed Pecos River Master's manual those provisions that provide for a determination of depletions due to man's activities in New Mexico. See Appendix B to New Mexico's Brief. If those provisions are not included in the manual, the Court should remand the case to

the Special Master to decide, based upon the new evidence offered by New Mexico, whether it is hydrologically correct to presume that all future departures determined in accordance with the procedures of the proposed manual are attributable to man's activities. As an alternative to remand, the Court could expressly reserve for decision by the River Master the question of whether Texas Exhibit 68 and the procedures in the Master's proposed manual make it possible to presume that all departures from the 1947 condition are attributable to man's activities. Finally, the Court should insert New Mexico's provision for the accrual of shortfalls in the Master's proposed amended decree. *See* Appendix D to New Mexico's Brief.

Respectfully submitted,

HAL STRATTON

Attorney General of New Mexico

HENRY M. BOHNHOFF

Chief Assistant Attorney General

PETER THOMAS WHITE

ERIC RICHARD BIGGS

Special Assistant Attorneys General

New Mexico Interstate

Stream Commission

Bataan Memorial Building, Room 101

Santa Fe, New Mexico 87503

(505) 827-6150

January 26, 1988

APPENDIX A

PECOS RIVER COMPACT

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 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 a 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 utilization of water salvaged and appropriated flood water apportioned by this Compact 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 Commissioner 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 expenses 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 water gaging 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. Perform 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 salvaged 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 appropriate 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 counter-parts 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.

JOHN H. BLISS
Commissioner for the State of New
Mexico

CHARLES H. MILLER
Commissioner for the State of Texas

APPROVED

BERKELEY JOHNSON
Representative of the United States of
America

APPENDIX B

Texas Exhibits 88 and 103: Texas' proposed Manual of Procedures to Compute Pecos River Compact Compliance. Reproduced from New Mexico's Proposed Pretrial Order at 10 (October 8, 1987).

- A.1. The accounting will normally be accomplished in two phases. First, an accounting is made to determine the departures of stateline flows of the Pecos River from the 1947 condition. Second, an accounting is made to determine the total depletions, resulting from man's activities in New Mexico, in the stateline deliveries below the amount which would give Texas a quantity of water equivalent to that available to Texas under the 1947 condition. [1]
- A.4. An analysis will then be made to determine the total depletions resulting from man's activities in New Mexico of the flow of the Pecos River at the New Mexico-Texas state line below an amount which would give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition. [2]
- C.1.b. The Compact anticipates that depletion by man's activities would be analyzed by one of two ways. When the 1947 condition natural channel losses and the flood inflow/outflow relationships are not well known, as in the reach upstream from Alamo-gordo Dam, [and on the Delaware River in Texas] depletion by man's activities can only be measured by changes in man's consumptive use from the consumptive use recognized under the 1947 condition. [for these two river segments] On the other hand, in the reach in New Mexico downstream

from Alamogordo Dam, the inflow-outflow relationships are established by the approved 1947 condition equation, and the depletions caused by man's activities *also* can be identified by adjusting the computed departures at the state line for increased natural losses. (Changes made by New Mexico.)

New Mexico requested the Special Master to insert the following provision from New Mexico's August 4, 1987 Manual of Procedures in the Pecos River Master's Manual.

- C.1.d. Departures from the 1947 condition inflow-outflow relationship resulting from abnormal distribution of flood inflow or from other causes not attributable to beneficial consumptive uses of water in New Mexico shall not be accounted as depletions by man's activities.

APPENDIX C

NEW MEXICO EXHIBIT 137

TABLE 2

Difference Between Routed Outflow And
Index Outflow From Texas Exhibit 68
(Departures from 1947 Condition Equation)

	Index ₁ Inflow	Routed ₂ Outflow	Index ₃ Outflow	Difference in Outflow Routed Minus Index	Accumulated Difference
1919-21	552.8	379.7	392.0	- 12.3	- 12.3
1920-22	327.5	189.7	186.1	+ 3.6	- 8.7
1921-23	363.2	197.2	215.6	- 18.4	- 27.1
1922-24	258.3	119.0	132.7	- 13.7	- 40.8
1923-25	271.0	127.4	142.1	- 14.7	- 55.5
1924-26	284.1	143.0	152.0	- 9.0	- 64.5
1925-27	278.1	139.6	147.4	- 7.8	- 72.3
1926-28	275.5	139.4	145.5	- 6.1	- 78.4
1927-29	231.1	118.5	113.3	+ 5.2	- 73.2
1928-30	262.9	129.5	136.1	- 6.6	- 79.8
1929-31	254.7	128.9	130.1	- 1.2	- 81.0
1930-32	332.2	181.7	189.9	- 8.2	- 89.2
1931-33	301.0	175.4	165.0	+ 10.4	- 78.8
1932-34	276.7	152.4	146.4	+ 6.0	- 72.8
1933-35	201.9	100.4	93.5	+ 6.9	- 65.9
1934-36	205.4	94.8	95.8	- 1.0	- 66.9
1935-37	351.8	218.2	206.0	+ 12.2	- 54.7
1936-38	379.4	230.5	229.4	+ 1.1	- 53.6
1937-39	381.1	233.8	230.9	+ 2.9	- 50.7
1938-40	246.9	120.2	124.5	- 4.3	- 55.0
1939-41	749.0	627.8	604.0	+ 23.8	- 31.2
1940-42	838.6	713.2	709.3	+ 3.9	- 27.3
1941-43	840.7	723.2	711.9	+ 11.3	- 16.0
1942-44	310.1	200.5	172.2	+ 28.3	+ 12.3
1943-45	202.4	103.5	93.8	+ 9.7	+ 22.0
1944-46	186.9	85.9	83.8	+ 2.1	+ 24.1

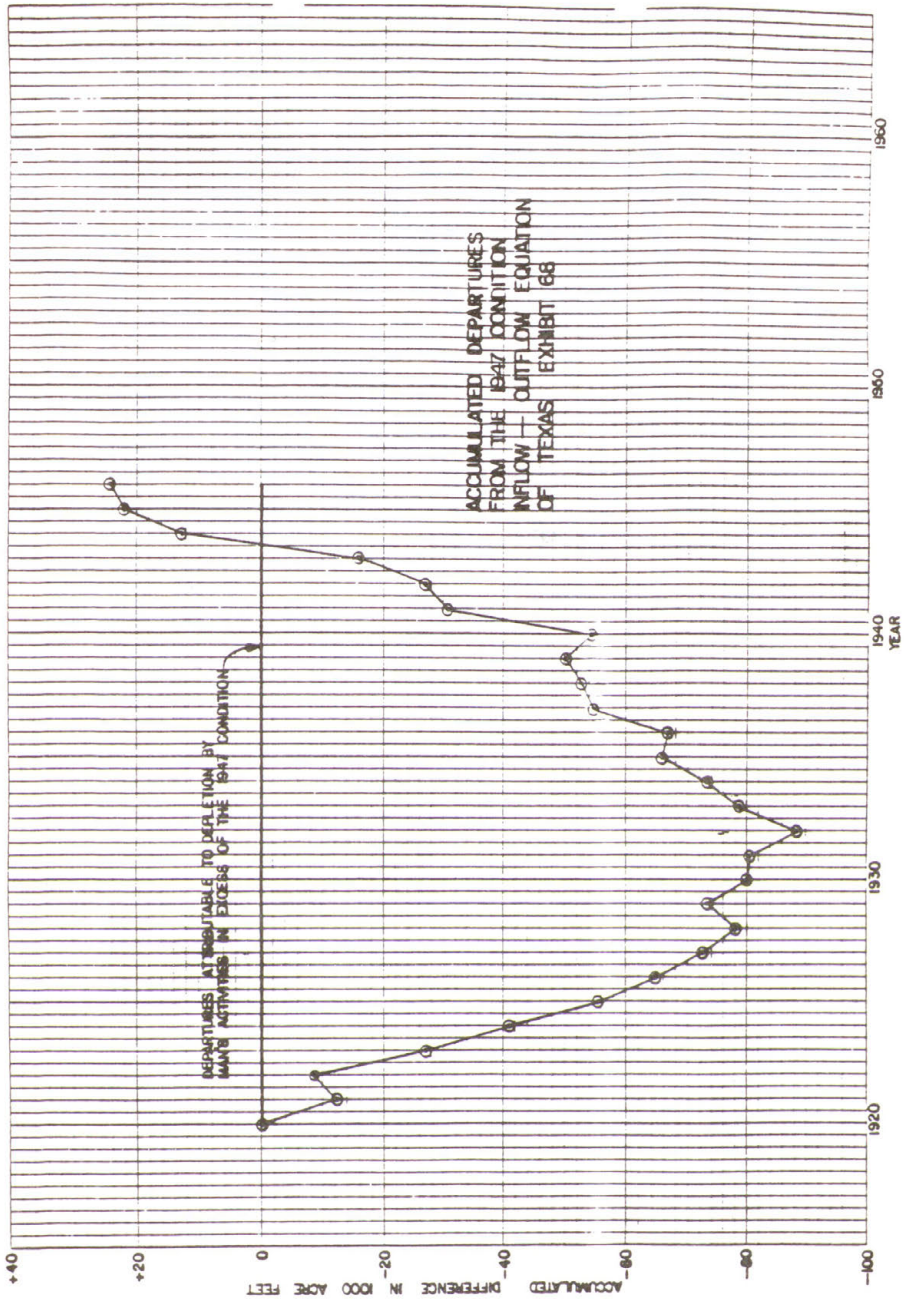
¹ Texas Exhibit 68, page C-73

² Texas Exhibit 68, page C-78

³ $Y = 0.0489892 X^{1.42318}$

NEW MEXICO EXHIBIT 137

FIGURE 2



APPENDIX D

New Mexico's requested Article II.C for Proposed Amended Decree. *See* New Mexico's Response to Special Master's Requests for Information at 6 (September 28, 1987).

Because of the unpredictability and peculiarities of the Pecos River, large positive and negative departures from the 1947 Condition not attributable to man's activities will occur from year to year. The River Master's calculations will include determinations of positive or negative departures from New Mexico's delivery obligation and such credits or shortfalls shall be reflected in New Mexico's later delivery obligation. New Mexico's shortfall accrued after 1986 shall never exceed 30 per cent of the total delivery obligation determined by the River Master or Commission in any period of five consecutive years. If New Mexico's accrued shortfall in any period of five consecutive years exceeds 30 per cent of its delivery obligation, New Mexico shall deliver the amount of water in excess of 30 per cent to Texas in the following year, if the River Master determines that the quantity is attributable to man's activities in New Mexico.

