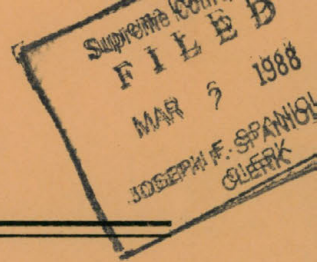


No. 65, Original



In The
Supreme Court of the United States
OCTOBER TERM, 1987

STATE OF TEXAS,

Plaintiff,

V.

STATE OF NEW MEXICO,

Defendant.

Texas' Reply To New Mexico's Exceptions

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Texas replies to New Mexico's exceptions to the Special Master's Report filed on December 7, 1987 ("1987 Report"). Citations to transcribed Special Master proceedings will be to the transcript page, followed by the date of the proceeding.

STATEMENT OF THE CASE

Filed in 1974, this original action about the Pecos River Compact's apportionment of the waters of the Pecos River between Texas and New Mexico proceeded as a unified case until last Term. Then, in a unanimous decision, the Court bifurcated the case into a part about the past -- remedies for past delivery shortfalls -- and a part about the present and future -- a decree to insure that New Mexico meets its Compact delivery obligations. *Texas v. New Mexico*, 107 S.Ct. 2279 (1987). The issue of remedies for past shortfalls remains with the River Master and is scheduled for trial in mid-May of this year.

At the conclusion of its opinion, the Court entered a decree ("1987 Decree") enjoining New Mexico to comply with its obligations under Article III(a) of the Compact and to determine its compliance using two exhibits, Texas Exhibits 68 and 79.¹ An invitation for suggested amendments to the 1987 Decree prefaced its entry. 107 S.Ct. at 2287. Now before the Court is the Special Master's response to the invitation, in the form of a Proposed Amended Decree, to which Texas takes no exception.²

The Proposed Amended Decree requires an annual calculation by the River Master to determine New Mexico's water delivery obligation and any shortfall, using Texas Exhibit 108 ("Manual"). The calculations are to be completed by July 1st of each accounting year -- that is, six months after the end of the year (called the water year) for which the

¹ The Court apparently intended to adopt the Special Master's 1986 proposed decree (Appendix A of his 1986 Report) except for the portions about repayment of past shortfalls in water; however, the 1987 Decree omits six words from Article II(b) of the 1986 proposed decree, possibly through a clerical error. With the omitted words inserted in italics and without the concluding paragraph retaining jurisdiction, the 1987 Decree provides:

It is Ordered, Adjudged and Decreed that the State of New Mexico, its officers, attorneys, agents, and employees are hereby enjoined:

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

(B) To calculate the Index Inflow component of the inflow-outflow *equation by using the inflow-outflow* and channel loss equations contained in Texas Exhibit 79, modified to reflect the Court's decision of June 8, 1987, as to man-made depletions chargeable to New Mexico. "Index Inflow" shall mean the 3-year progressive average of "annual flood inflows" as those terms are defined in Texas Exhibit 79, Table 2, p. 5.

² Texas also has no objection to the recommendation in the Special Master's memorandum of January 27, 1988, to the Court that Dr. Neil S. Grigg be appointed Pecos River Master.

calculations are being performed. If a shortfall is determined, New Mexico must repay the water to Texas within nine months of the determination -- that is, fifteen months after the end of the water year. The River Master may modify the Manual upon motion by either state if the movant shows good cause.

In its exceptions, New Mexico objects to two aspects of the Proposed Amended Decree. It opposes an annual accounting and repayment of its Compact obligations.³ It also disagrees with the Manual's method for resolving the extent to which departures from its delivery obligations are attributable to "man's activities." Based on these objections, New Mexico argues that the 1987 Decree should be amended differently than recommended by the River Master. As an alternative to amending the 1987 Decree as it requests, New Mexico asks the Court either to return the case to the Special Master for new evidence on the issue of man's activities or to leave the issue for the River Master.

SUMMARY OF ARGUMENT

The two issues New Mexico raises in its exceptions were decided adversely to it less than a year ago by the Court. New Mexico's challenges really are to last Term's decision in this case, not to the Special Master's 1987 Report.

³ Texas addresses the issue in Part II of this reply despite its doubts about whether New Mexico is seriously asking the Court to consider it. The second sentence of its first exception objects to the Proposed Amended Decree's omission of a provision for the accrual of shortfalls, yet none of the headings or subheadings of the supporting brief refers to this issue, and the brief's text makes only three glancing references to it. New Mexico's 1988 Exceptions, at 10 (sentence fragment about New Mexico's alternate proposal on accrual to Special Master); 10-11 (paragraph with references to accrual issue); and 20 (sentence fragment about alternative of accrual). The brief concludes with a sentence requesting the inclusion of an accrual provision. *Id.*, at 25.

Recently, in *Arizona v. California*, 460 U.S. 605 (1983), the Court delineated finality principles applicable to interstate water disputes within the Court's original jurisdiction. The principles apply with even greater force in this case and compel the overruling of New Mexico's exceptions.

New Mexico's central complaint is that the method used to determine the extent to which future departures are attributable to man's activities, and thus chargeable to New Mexico, is wrong. It raised the identical complaint last year, and the Court rejected it. Without presenting any new facts on the question, New Mexico once again asks the Court to reject the Special Master's recommendation on methodology. As explained in *Arizona v. California*, in original actions the Court does not reconsider the correctness of previous factual determinations.

New Mexico perfunctorily argues that it should be allowed to accumulate shortfalls over at least five years and never have to repay thirty percent of them. It offers no legal justification for its argument which, if adopted, would run counter to the Compact and last Term's decision and decree. All require an annual accounting and complete fulfillment of New Mexico's Compact delivery obligations, not a delayed seventy percent fulfillment. Reconsideration of the issue is unwarranted.

ARGUMENT

I.

New Mexico has offered no basis for reopening the issue resolved last Term of the proper method for calculating the portion of departures attributable to man's activities, and under principles of finality applicable to original actions, the question is settled for this litigation.

Stripped of the technical veneer of its arguments, New Mexico seeks only one thing: a reopening of the central issue the Court resolved against it just last Term in this same case. Its challenge is to last year's decision, not the 1987 Report. This statement is not merely a convenient oversimplification by Texas to avoid a bothersome issue. As the Special Master observed:

New Mexico realizes that this argument [about the proper method to determine depletions due to man's activities] is a direct attack on the findings and conclusions recommended in my July 1986 Report and adopted by the Court in June 1987....

1987 Report, at 9.

New Mexico acknowledged this point repeatedly during the hearing before the Special Master on the Proposed Amended Decree. For example, its counsel flatly stated that New Mexico was asking the Special Master to "reconsider" his previous determination about how to determine departures attributable to man's activities. Tr. 29-30 (10/15/87); *see also* Tr. 31 (10/15/87) (acknowledging Special Master's view that 1986 Report's treatment of Texas Exhibit 79 extended to Texas Exhibit 107, the precursor to the Manual). New Mexico's chief water official was the only witness during this phase of the case. He testified that New Mexico was offering no new factual evidence, only a reanalysis of old evidence in the case. Tr. 86 (10/15/87).

Further, acknowledgement that New Mexico is seeking to reopen a freshly decided issue occurs when its brief complains that the Special Master "refused...to reconsider his previous decision" on what is mislabeled as the "presumption" about man's activities. New Mexico's 1988 Exceptions, at 6. This

argument crystallizes the issue actually raised -- the reopening of the man's activities issue already resolved by the Court. New Mexico's assertion at the outset of its legal argument that it is not requesting the Court to "reconsider any findings on past shortfalls[.]" *id.*, is somewhat disingenuous; it is requesting the Court to reconsider the established methodological basis for those findings.

Briefly summarized, the methodology used in Texas Exhibit 79 to make the determinations about New Mexico's delivery obligations was to develop equations and procedures that accounted for all natural losses in the Pecos River system in New Mexico, thereby making the remaining losses attributable to man's activities by force of logic. See 1987 Report, at 9; see also 1986 Report, at 8-10. ⁴ It is undisputed that the Manual, Texas Exhibit 108, employs the identical methodology. Insofar as the argument raised by New Mexico is concerned, the only difference between Texas Exhibit 79 and the Manual is that one applies the methodology to past departures and the other applies it to future departures. The difference is irrelevant to the question of whether last Term's decision approving the methodology should be revisited.

Principles of finality in interstate water disputes within the Court's original jurisdiction were explained in *Arizona v. California*, 460 U.S. 605 (1983), where the Court rejected efforts to reopen issues that had been determined nearly twenty years earlier in the same case. The Court resisted wholesale

⁴ New Mexico persists in asserting that the Special Master is "presuming" that all departures are attributable to man's activities. New Mexico's 1988 Exceptions, at 6 and 15 (argument headings). It bears repeating that no such presumption is being made. Instead, departures due to man's activities are being established by accounting for all other -- that is, natural -- losses. The point is so well-established that New Mexico's persistent reargument of it is troubling because the likelihood is that, unless directed otherwise by the Court, New Mexico will revive the argument before the River Master, who will not be a lawyer familiar with finality principles.

incorporation of law of the case doctrine into original jurisdiction cases because it would undermine "to an intolerable extent the finality of...decrees in original actions[.]" *Id.*, at 619. The case's statutory rather than equitable base, the presence in the existing decree of a provision retaining jurisdiction, and the importance of fixed calculations in water rights cases were the important elements leading the Court to its conclusion. The Court observed:

Our long history of resolving disputes over...water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made.

Id., at 623-24.

Here, as in *Arizona v. California*, the Court is confronted with an effort to reopen an issue that already has been resolved and embodied in a decree which contains a provision retaining jurisdiction. Here, as in *Arizona v. California*, this effort to reopen is made in an interstate water dispute within the Court's original jurisdiction which rests primarily on a statutory base -- the Compact -- rather than an equitable one. The applicability of the *Arizona v. California* finality doctrine is even clearer in this case. The decree which New Mexico seeks to reopen is much fresher. The only reason New Mexico offers for reopening is that, by reanalyzing pre-existing evidence, it thinks it can establish a point it failed to establish less than a year ago. There is no basis for reopening the issue of how to compute the effect of man's activities on departures from New Mexico's delivery obligations. A method has been established and adopted for the case and incorporated into the Manual which will govern the River Master. Revision of it now risks unravelling all the agreements embodied in the Manual.

II.

The Compact and last Term's decision require future annual accountings and reject the concept that New Mexico may accrue water debts to Texas over several years and only repay a limited portion of them.

As already noted, *supra* at 3 n.3, New Mexico makes an unenthusiastic argument that it should not be subject to an annual accounting of its delivery obligation and repayment of any shortfalls within fifteen months of the end of the water year during which the water originally was to have been delivered. The Compact itself, its history, explicit statements and implicit holdings in last Term's decision, as well as prudent administration of the Compact, all operate to rebuff New Mexico's effort.

Article VI(b) of the Compact itself contemplates annual accountings using progressive three-year averages. The historical background of the Compact reveals a similar emphasis on the fact that the Compact creates a legally enforceable annual delivery obligation. Mr. Tipton, the Chair of the Engineering Advisory Committee at the time the Compact was negotiated, explained Article III(a):

What it means is that of a given inflow Texas will receive *each year* essentially the same proportion which she received under the "1947 condition."

Subparagraph (a) of article III is a *firm obligation* on the part of New Mexico to see that Texas receives that quantity of water...

Stip. Exh. 1, S. Doc. 109 (81st Cong., 1st Sess. (1949), at 116 (emphasis added).

Last Term's decision in this case directed the appointment of a River Master to make calculations on delivery obligations "annually". 107 S.Ct. at 2287. This explicit rejection of the point for which New Mexico now argues accompanied another rejection of New Mexico's current argument. New Mexico's second exception to the 1986 Report was premised on its claim that the Compact "does not provide for an annual accounting..." New Mexico's 1987 Exceptions, at 24. The Court overruled this exception. 107 S.Ct. at 2283-84.

Finally, prudent Compact administration counsels rejection of New Mexico's argument. As the Special Master explains, the only realistic way of honoring the established principle that New Mexico must deliver water to Texas under the Compact is "to make the delivery obligation an annual one." 1987 Report, at 3. Under any other approach, given its history of consistent underdeliveries, New Mexico would fall so far behind that it could never hope to repay Texas the accumulated water debt. *Id.*

New Mexico's specific proposal for the accrual of water debt actually goes far beyond an argument for the simple accrual of debt. See New Mexico's 1988 Exceptions, Appendix D. It seeks the forgiveness of all shortfalls that do not exceed thirty percent of its delivery obligations for five consecutive years. Nowhere in its perfunctory treatment of the accrual issue does New Mexico point to a Compact provision that in any way could be read to justify this approach. Being even further astray from the field covered by the Compact than the already rejected shortfall accrual effort, this accrual and forgiveness effort also must fail.

CONCLUSION

For the foregoing reasons, the exceptions of the State of New Mexico to the 1987 Report of the Special Master should be overruled.

Respectfully submitted,

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