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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 MOTION FOR LEAVE TO  
FILE REPLY BRIEF AND REPLY ON  
EXCEPTIONS TO SPECIAL MASTER'S REPORT**

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NEW MEXICO'S MOTION  
FOR LEAVE TO FILE REPLY BRIEF

Pursuant to Rules 9.2 and 9.6 of the Rules of the Supreme Court of the United States, New Mexico requests the Court for leave to file the attached Reply Brief. In support whereof, New Mexico states:

1. New Mexico filed Exceptions to the Report of the Special Master and Brief in Support of Exceptions on January 26, 1988. Texas' Reply to New Mexico's Exceptions was filed on or about February 25, 1988, and was received by New Mexico February 29, 1988.

2. Texas' Reply is based on an erroneous legal theory and distorts the nature of the proceedings and the state of the evidence.

3. Texas' Reply makes assertions about New Mexico's factual and legal posture which are incorrect and prejudicial.

4. A decision of this Court based upon the assertions recited in Texas' Reply would be highly injurious to established property interests in New Mexico and to the livelihood of New Mexico's citizens.

WHEREFORE, New Mexico moves the Court for leave to file the attached New Mexico's Reply on Exceptions to Special Master.

Respectfully submitted,

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**NEW MEXICO'S REPLY  
ON EXCEPTIONS TO SPECIAL  
MASTER'S REPORT**

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New Mexico submits this reply in response to Texas' Reply to New Mexico's Exceptions (Texas' Reply), dated February 25, 1988, and received by New Mexico February 29, 1988.

**SUMMARY OF ARGUMENT**

Texas' Reply disregards the substance of New Mexico's concerns and distorts the issues before the Court. New Mexico does not challenge the adjudication of its obligation to Texas, or the calculation of the quantity owed for past shortfalls. When the Court approved the Special Master's calculation of

past underdeliveries of water under the Pecos River Compact, it remanded the remedies question to the Special Master for future consideration, and enjoined New Mexico to comply with its Article III(a) obligation in the future. *Texas v. New Mexico*, 107 S. Ct. 2279, 2283-86 (1987). The Special Master's 1987 Report addressed "the regime that will govern the river from 1987 forward." 1987 Report at 1. In doing so, the Master made a serious legal error, to New Mexico's prejudice. To deny New Mexico an opportunity to seek redress, as Texas urges, would be unconscionable.

### ARGUMENT

New Mexico does not challenge the Court's 1987 decision, and Texas is mistaken to suggest otherwise. *See* Texas' Reply at 3. The Court's 1987 decision is res judicata concerning New Mexico's past obligations to Texas. The distinction between past and future compliance, however, has always been inherent in the Court's treatment of this case. *See, e.g.*, 107 S. Ct. at 2283; 462 U.S. 554, 574-75 (1983). What the Court in 1987 did not do, and what the Special Master has recommended in his 1987 Report that the Court do, is to implement *future* determinations of New Mexico's compliance with its obligations under the Compact by utilizing a legal presumption. *See* 1987 Report at 4-5.

To do this, the Special Master returned to the presumption he had utilized previously to conclude that the departures derived from Table 2 of Texas Exhibit 79 were all due to man's activities in New Mexico, and were therefore all chargeable to New Mexico. *See* 1987 Report at 9; 1986 Report at 8-9. Texas, in its Reply, states that "no such presumption is being made," though "New Mexico persists in asserting" otherwise. Texas' Reply at 6 n.4. The fact is that the Special Master himself has referred to "the presumption that the accumulated negative departures from the 1947 condition, presented in



Table 2 of the exhibit, are a result of man's activities." 1986 Report at 8. The Master also decided that the departures shown in Texas Exhibit 79 constituted "New Mexico's shortfall in the required deliveries under Article III(a) unless New Mexico can show otherwise," which in the course of a burden of proof dispute it had not done. *Id.* at 10. In his 1987 Report, the Master considered his previous determinations to be the law of the case and rejected New Mexico's uncontradicted evidence that the methodology used to compute stateline departures in Texas Exhibit 79 discounts the unpredictability and peculiarities of the Pecos. 1987 Report at 4-5; see Tr. at 28 (October 15, 1987).

New Mexico does not seek to reopen the issue of its liability for past underdeliveries to Texas; that issue is over and done with. What is at hand here is an inquiry into whether the law of the case doctrine requires that techniques and inferences which had been approved by the Court's 1987 opinion to determine past shortfalls must be used to determine shortfalls in the future. In requiring for the future the tools developed for the past, the Special Master has made a profound error.

The man's activities presumption tends to exaggerate New Mexico's future liability for underdeliveries, and potential credits for overdeliveries. Simply stated, the presumption assumes that because Texas Exhibit 79's methodology accounts for all natural losses, any residual negative departure is due to man's activities. New Mexico's evidence at the October 15, 1987 hearing conclusively demonstrated that the presumption is faulty. Use of this presumption distorts New Mexico's obligation and will cause vast and irreparable harm to New Mexico. *Cf. Wisconsin v. Illinois*, 281 U.S. 179, 200 (1930) (plaintiffs' claims "should not be pressed to a logical extreme without regard to relative suffering"). Over a period of years, the presumption will harm both states and will make the Compact unworkable. The Court should not mandate the use of

Texas Exhibit 79 without allowing any subsequent procedure to determine or even address what part, if any, of future negative departures is attributable to man's activities. If the Court were to countenance the consequences of this new use of the Special Master's presumption, grave inequities to New Mexico would result.

Texas argues for an unthinking and inappropriate reliance on principles of finality. Texas relies exclusively on *Arizona v. California*, 460 U.S. 605 (1983), to support its argument that New Mexico is foreclosed from raising its concerns. *See* Texas' Reply at 6-7. *Arizona v. California* supports New Mexico, not Texas. *Arizona v. California* dealt with the finality of the past adjudication of water rights, and whether Indian interests were adequately represented by the United States in that adjudication, not with the standards for enforcing rights in the future. *See id.* at 625-28. *Compare id.* with *Oklahoma v. Texas*, 256 U. S. 70, 78 (1921). New Mexico is not asking the Court to "reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made," 460 U.S. at 623-24, but to allow the Special Master or River Master to consider for the first time the appropriate techniques by which to measure New Mexico's future compliance with the Compact. This will encourage the stability of Western water law, not the reverse. *See id.* at 620.

While "[a] court's decision to reconsider a prior ruling before the case becomes final . . . is ultimately a matter of 'good sense,'" and "federal courts have traditionally thought that correcting a manifest injustice was reason enough to reconsider a prior ruling," courts "have regarded finality concerns as less compelling when the question at issue has never actually been contested." *Id.* at 644 (Brennan, J., dissenting) (citing *Hartford Life Ins. Co. v. Blincoe*, 255 U.S. 129, 136 (1921); 1B J. Moore & T. Currier, *Moore's Federal Practice* paras. 0.404[1], 0.404[10] at 408, 573 (1984)). Moreover,

when what is sought is not the reconsideration of a court's prior ruling at all, but consideration of methods by which the enforcement of previously declared rights may take place, standards of finality do not apply. *See North Carolina R.R. Co. v. Story*, 268 U.S. 288, 292-94 (1925) (res judicata did not bar a suit to enjoin enforcement of a judgment); *Monroe Div., Litton Business Systems v. DeBari*, 562 F.2d 30, 33 (10th Cir. 1977) (Breitenstein, J.) (after entry of injunction, collateral estoppel did not bar defendant's right to be heard on his claim for damages resulting from wrongful injunction); *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 100-01, 678 P.2d 1170 (1984) (laches did not bar District from seeking to enforce senior water right priority based on 1935 decree).

An example will illustrate the practical unworkability as well as the legal error and unfairness inherent in Texas' position. Assume that New Mexico were to take whatever action were necessary to comply with the Court's decree in this case. If the Special Master's presumption continued to apply, any further departures automatically would be considered to be due to man's activities. If there is a maldistribution of flood inflows, liabilities may result to New Mexico which it could not control and for which its citizens would have to suffer to the unearned benefit of Texas. *See* Special Master's October 15, 1979 Report at 15. This inequity would be inimical to the principles of equitable apportionment and interstate comity which informed the Compact, *see* Art. I, and the Supreme Court's admonition that an original action "is to be considered in the untechnical spirit proper for dealing with a quasi-international controversy," because "[a] State is superior to the forms it may require of its citizens." *Virginia v. West Virginia*, 220 U.S. 1, 27-28 (1911). *See Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (interstate water controversies "involve the interests of quasi-sovereigns, present complicated

and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule”) (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 (1943)).

Texas seriously misunderstands New Mexico’s argument concerning the accumulation of shortfalls. New Mexico did not include that argument “perfunctorily,” as Texas suggests; it is an essential alternative to provide for flexibility in administration of the widely varying flows of the river, if the problem of proving the extent to which man’s activities cause stateline departures is not resolved. The accumulation of shortfalls, however, would not in itself solve that problem. Texas states that New Mexico opposes an annual accounting of shortfalls and repayment. Texas’ Reply at 3. New Mexico does not oppose an annual accounting, though it does oppose an annual repayment of shortfalls without accrual.

It is incorrect to assert that under New Mexico’s plan Texas would be permanently deprived of 30% of its entitlement. The plan would require that New Mexico’s *total* shortfall accrued after 1986 shall never exceed 30% of the delivery obligation in *any* period of five consecutive years. The shortfall in excess of 30% would be repaid the following year. There is nothing in the Compact, its history, or previous Court decisions which would counsel against adoption of this plan. The Court’s 1987 decision allows for it. *See* 107 S. Ct. at 2287 (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”). Prudent Compact administration certainly does not counsel against the plan’s adoption; it favors it.

Texas accuses New Mexico of constructing a technical veneer to obscure its argument. To the contrary, Texas is ignoring the technical and legal reality of the case by attempting to hide behind an overly simplistic and erroneous reading

of a single Supreme Court precedent. Texas' argument exalts form over substance. This case is not about *res judicata*, but about whether the law of the case requires that an evidentiary or logical presumption, used to resolve one set of facts, should be applied to different sets of facts as they arise in the future. Texas seeks to set in stone methodology that New Mexico has proved faulty by uncontested evidence. If Texas' argument is accepted, the efforts of the states in negotiating the Compact in an attempt to live equitably with the vagaries of the Pecos will be negated, New Mexico and its citizens will suffer, and this nation's interest in just resolutions of Compact Clause disputes in the original jurisdiction of the Court will be harmed.

### CONCLUSION

For all the above reasons, New Mexico's exceptions to the 1987 Report of the Special Master should be sustained.

Respectfully submitted,

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