No. 65, Original

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1990

*****

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant.

*****

TEXAS' REPLY TO NEW MEXICO'S MOTION TO REVIEW THE RIVER MASTER'S FINAL REPORT FOR WATER YEAR 1990

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New Mexico has asked that the Court review the Pecos River Master's Final Report for the water year 1990 on the grounds that the River Master's finding on the total shortfall in water delivery for 1990 is clearly erroneous. New Mexico bases its claim for relief solely on an allegation that the final accounting used inconsistent losses for the same reach of the river and that such use resulted in legal error. Texas opposes New Mexico's motion and requests that it be denied.

BACKGROUND

The Pecos River Master issued his Final Report for Water Year 1990 (Final Report) on June 28, 1991, pursuant to the Court's Amended Decree at 485 U.S. 388 (1988). The River Master determined that New Mexico's delivery of Pecos River water to Texas in 1990 was 14,100 acre-feet less than its obligation that year under Article III(a) of the Pecos River Compact. Final Report at 1. This shortfall reduced the accumulated overage in delivery since 1987 from 41,700 acre-feet to 27,600 acre-feet. *Id.* New Mexico contends that an inconsistency in the channel losses used in the Final Report for a portion of the Artesia to Carlsbad reach of the river resulted in an overstatement of the shortfall by 1,300 acre-feet so that the accumulated overage should be 28,900 acre-feet. New Mexico contends that this inconsistency makes the Final Report clearly erroneous. New Mexico further claims that any accounting error that results in overstating its delivery obligation under the Compact is a legal error and therefore the Court's review is not limited to the clearly erroneous standard. For the reasons set out below, all of New Mexico's contentions are without merit and its motion should be denied.

SUMMARY OF ARGUMENT

The River Master did not base his accounting upon inconsistent channel losses. He properly performed the accounting for the 1990 Water Year under the terms of the River Master's Manual (Manual), which is part of the Court's Amended Decree. The River Master gave careful consideration to New Mexico's inconsistency argument and properly rejected it. His accounting is mathematically and logically valid and is neither clearly erroneous nor does it constitute legal error.

ARGUMENT

1. The River Master's Finding of the Total Shortfall in Water Delivery for 1990 is Not Based on Inconsistent Channel Losses for the Same Reach of the River.

New Mexico's delivery obligation is based on index inflow, which is the sum of the flood inflows in the Alamogordo Dam to state line reach and the adjusted flow of the Pecos River below Alamogordo Dam. Because the flood inflows cannot all be directly measured, the Pecos River Compact and the River Master's Manual prescribe methods and procedures to compute these quantities.

New Mexico claims that the River Master used inconsistent channel losses in the Artesia to Brantley Reservoir sub-reach of the river. Specifically, New Mexico claims that the River Master computed a channel loss of 10,800 acre-feet in calculating the outflows from this sub-reach, which differs from New Mexico's calculated channel loss of 3,000 acre-feet, in computing Major Johnson Springs new water inflows in the same sub-reach. Because New Mexico used calculations that appear to produce different channel losses in this sub-reach, it erroneously concluded that the River Master's calculations also produced inconsistent channel losses.

As discussed below, there is no inconsistency in the channel losses used in the Final Report for the computation of flood inflows and outflows in the Artesia to Carlsbad reach. New Mexico's alleged inconsistency results from its ignoring the local ungaged flood inflows which resulted in erroneous channel losses.

a. The River Master's calculation of outflows between Artesia and Brantley Reservoir did not result in a channel loss calculation of 10,800 acre-feet between those points as claimed by New Mexico.

The channel losses in all reaches of the Pecos River, including the Artesia to Damsite 3 sub-reach, are not gaged but must be computed from indirect data. Damsite 3 is located five river-miles below Brantley Dam. The River Master computed a channel loss of 13,800 acre-feet for the Artesia to Damsite 3 sub-reach using the equation in Section B.4.e. of the Manual. That equation could not be used for calculating Major Johnson Springs new water since the Manual requires that a water balance computation be used. The River Master's computation of Major Johnson Springs new water, assumed channel losses consistent with those derived using the equation in Section B.4.e. of the Manual.

New Mexico's claim of inconsistency is based upon erroneous assumptions. New Mexico assumes that the channel loss in the Artesia to Brantley Reservoir component of the Artesia to Damsite 3 sub-reach outflows must be 10,800 acre-feet (13,800 - 3,000 = 10,800), based upon New Mexico's computation of a channel loss between Brantley Dam and Damsite 3 of 3,000 acre-feet. The River Master properly did not agree with that computation since it ignores the ungaged runoff contribution from the drainage area between Brantley Dam and Damsite 3.

b. The River Master's calculation of Major Johnson Springs new water did not result in a channel loss of 3,000 acre-feet between Artesia and Brantley Reservoir as claimed by New Mexico.

New Mexico's computation of a 3,000 acre-foot channel loss between Artesia and Brantley Reservoir in computing inflows (Major Johnson Springs new water) is erroneous since it ignores ungaged flood flows and concomitant channel losses. The fact that the River Master assumed that the gaged flow at the Kaiser Channel gage was equal to the inflow into Brantley Reservoir does not mean that there were no flood flows and channel losses between those points. The Final Report correctly reflects that there would be additional flood inflows and channel losses in that sub-reach. The intervening flood inflows from runoff between the Kaiser Channel gage (located between Artesia and Brantley Reservoir) and Brantley Reservoir were reasonably estimated by the River Master to be equal to the channel losses:

> As noted by Texas in her comments on the draft computation, the channel losses and the local flood inflow may cancel out. My estimate of the probable magnitude of the quantities suggests that this will be approximately the case.

Preliminary Report for Water Year 1990 at B-4 (Preliminary Report).

Since New Mexico ignores the ungaged flood inflows between Artesia and Brantley Reservoir, it erroneously computes a channel loss of only 3,000 acre-

feet in computing inflows for that sub-reach. Then New Mexico compares this erroneous channel loss quantity with its erroneous channel loss computation of 10,800 acre-feet for flood outflows (see a., above) and characterizes the difference as an "inconsistency."

No inconsistency is present in the Major Johnson Springs new water value computed by the River Master. The River Master's computations reflect that after Brantley Reservoir began to impound water, Major Johnson Springs would be submerged and the spring flows (new water) would be reduced because of the pressure of water in Brantley Reservoir. The Major Johnson Springs new water was reasonably computed by the River Master as 100 acre-feet for Water Year 1990. *See* Final Report at 6, Table 7, and Preliminary Report at Appendix B, Table 1.

c. The Final Report does not overstate flood inflows since there is no inconsistency in the computed channel losses.

New Mexico's claim that the Final Report overstates channel losses by 7,800 acre-feet (10,800 - 3,000 = 7,800) in the Artesia to Brantley Reservoir sub-reach, and thus in the Artesia to Carlsbad reach, is the result of ignoring the ungaged flood inflows and the concomitant channel losses in both the Kaiser Channel gage to Brantley Reservoir sub-reach and the Brantley Dam to Damsite 3 sub-reach.[1] Since there is no inconsistency in the channel losses computed by the

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[1] Compare the diagram in New Mexico's Motion at Appendix la with the diagram in the River Master's Preliminary Report at B-5. New Mexico's diagram of the channel losses between Artesia and Damsite 3 omits several inflow and outflow components.

River Master for the Artesia to Damsite 3 sub-reach, the Final Report does not overstate flood inflows in the Artesia to Carlsbad reach.

2. The River Master's Computations Follow Manual Procedures and Did Not Result in Clearly Erroneous Findings.

The River Master applied his professional judgment and technical expertise to the accounting required by the Court's Amended Decree. The River Master did not perform Major Johnson Springs new water calculations in a vacuum but gave careful consideration to the provisions in the Manual and to each State's position on the matter. Before issuing his Preliminary Report, he invited the States' comments on his proposed methodology for computing Major Johnson Springs new water. River Master's Draft Major Johnson Springs New Water Computation, April 3, 1991. New Mexico objected to his proposed procedures. New Mexico's Comments on River Master's Draft Major Johnson Springs New Water Computation, April 29, 1991. The River Master addressed these objections in the Preliminary Report and explained his computations. Preliminary Report at Appendix B. New Mexico again objected to his procedures, which the River Master addressed at length in his Final Report, concluding with:

> In conclusion, New Mexico's objections to the Major Johnson Springs New Water computation present issues which will be considered further in the Third Motion process. These objections present New Mexico's advocacy for the Third Motion and for allowing retroactive adjustments to Final Determinations of annual delivery obligations. In the meanwhile, as

> far as I can determine, the MJS Springs New Water estimate provided in the Preliminary Report and in this Final Report follows current approved Manual procedures as closely as possible. New Mexico did not support her objections with any alternative computations that follow current Manual procedures. For these reasons I conclude that there is no reason to change the estimate of 0.1 TAF for the 1990 MJS New Water.

Final Report at 12.

New Mexico refers to its Third Motion to Modify the Manual which it filed on April 18, 1990. New Mexico argues that adoption of its Third Motion would avoid the inconsistencies alleged to this Court. Texas objected to the Motion and filed a Cross-motion to Modify the Manual on August 30, 1990. These motions, which are currently pending before the River Master, address many of the complex hydrological computations required for calculating inflows and outflows in this reach of the river, including Major Johnson Springs new water. Various technical reviews were exchanged by the States and the motions were the subject of a meeting with the River Master on January 22-23, 1991. After the exchange of additional technical reviews, the River Master issued a detailed analysis of all issues involved in the motions on July 15, 1991, and requested the States' comments by September 13, 1991, after which he intends to act on the Third Motion and Cross-motion. River Master's July 15, 1991, Analysis of Issues, New Mexico's Third Motion.[2]

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[2] With the addition of this document, Texas agrees to New Mexico's Statement of Record Before the River Master at 6a of New Mexico's Motion.

The sub-reach of the Pecos River involved in this dispute was impacted by the filling of Brantley Reservoir in 1988. Because it was recognized when the Manual was prepared that Brantley Reservoir had considerable potential to affect the hydrology of the Pecos River, the Manual could not address this sub-reach in detail. The resolution of the Third Motion and Cross-motion will allow the River Master to develop such detailed procedures. For the interim, however, the River Master has properly applied the water balance technique, as required by the Manual:

> For this reason I determined that the only avenue available was to use the approved Manual procedure, a water balance technique called for in B.4.b.(3). This procedure, while approved in the Manual, necessarily calls for the use of estimation parameters that are not in the Manual and involve judgement.
>
> While all water budget items called for in B.4.b.(3) are generally available, not all are fully and precisely measured. Water budget items such as channel losses, local runoff, stream channel evaporation and losses to deep aquifers are among the unmeasured items, and how to obtain accurate values for them will be considered in the Third Motion process.

Final Report at 11.

New Mexico cites principles of statutory construction to support its allegation that the Final Report is clearly erroneous. While the Final Report is certainly sustainable under statutory construction principles, such principles are clearly inapplicable to

the Final Report which is issued pursuant to the Court's Amended Decree.

3. There is No Legal Error in the Final Report.

New Mexico contends that the Court need not find that the Final Report is clearly erroneous in order to review it, since the alleged accounting error is a legal error. This is so, claims New Mexico, because the result is to require New Mexico to deliver more water than is due under the Compact.

New Mexico's argument of legal error is specious. The accounting that is the subject of New Mexico's motion for review was not based "upon a mistaken impression of applicable legal principles." *Inwood Laboratories v. Ives Laboratories,* 456 U.S. 844, 855 n. 15 (1982). The issue before the Court is one of pure fact. Factual accounting decisions by the River Master in the Final Report will almost always affect New Mexico's legal delivery obligation and Texas' legal delivery right under the Compact. Under New Mexico's theory, all accounting decisions in the Final Report would be subject to a claim of legal error by one or both States and the clearly erroneous review standard would be rendered meaningless.

The clearly erroneous standard is also the standard used by a district court in reviewing a special master's findings under Fed.R.Civ.P. 53(e)(2) and by a court of appeals reviewing a district court's findings under Fed.R.Civ.P. 52(a). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.,* 333 U.S. 364, 395 (1948).

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. [Citations omitted.] This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

Anderson v. City of Bessemer City, 470 U.S. 564, 574 (1985).

In performing his duties as a court-appointed official, including making accounting decisions, the River Master applies his expertise and professional judgment. The accounting decision which is the basis of New Mexico's motion for review involved the application of that expertise and judgment and his decision is reasonable, plausible, and supported by the record.

CONCLUSION

For the reasons stated above, the River Master's Final Report for Water Year 1990 is not clearly erroneous. New Mexico's Motion to Review the River Master's Final Report for Water Year 1990 should be denied.

Respectfully submitted,

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