

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant.

On Review of Pecos River
Master's Final Report for 1990

NEW MEXICO'S MOTION FOR LEAVE
TO FILE A REPLY

and

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

THOMAS S. UDALL
Attorney General of New Mexico

PETER THOMAS WHITE*
LAURA COLMAN HARPER
Special Assistant Attorneys General
New Mexico Interstate Stream
Commission
Post Office Box 25102
Room 101, Bataan Memorial Building
Santa Fe, NM 87504-5102
(505) 827-6150

**Counsel of Record*

August 23, 1991

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

No. 65, Original

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant.

**NEW MEXICO'S MOTION FOR LEAVE
TO FILE A REPLY**

On July 26, 1991, New Mexico filed its Motion to Review the River Master's Final Report for Water Year 1990. Texas responded by filing "Texas' Reply to New Mexico's Motion to Review the River Master's Final Report for Water Year 1990" on August 8, 1991 (Texas' Response). New Mexico received Texas' Response on August 12, 1991. New Mexico submits this motion requesting leave to reply to Texas' Response pursuant to Rules 17 and 21 of the Rules of the Supreme Court of the United States. In support of this motion New Mexico states:

1. Texas' Response misinforms the Court on the materiality of ungaged flood inflows in accounting for certain channel losses under the Pecos River Master's Manual, which determines New Mexico's water deliv-

ery obligation under Article III(a) of the Pecos River Compact;

2. Texas did not properly characterize New Mexico's legal position; and

3. Texas seeks to introduce a document which does not belong in the record before this Court.

New Mexico's proposed Reply is attached to this motion. Texas does not concur with this motion.

Dated: August 23, 1991.

Respectfully submitted,

THOMAS S. UDALL
Attorney General of New Mexico

PETER THOMAS WHITE*
LAURA COLMAN HARPER
Special Assistant Attorneys General
New Mexico Interstate Stream
Commission
Post Office Box 25102
Room 101, Bataan Memorial Building
Santa Fe, NM 87504-5102
(505) 827-6150

**Counsel of Record*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
NEW MEXICO'S MOTION FOR LEAVE TO FILE A REPLY	1
NEW MEXICO'S REPLY TO TEXAS' RESPONSE TO NEW MEXICO'S MOTION TO REVIEW THE RIVER MASTER'S FINAL REPORT FOR WATER YEAR 1990	1
1. Texas' Response Misinforms the Court on the Materiality of Ungaged Flood Inflows in Ac- counting for Certain Channel Losses	1
2. Texas Did Not Properly Characterize New Mexico's Legal Position	4
3. Texas Seeks to Introduce a Document Which Does Not Belong in the Record before this Court	5

TABLE OF AUTHORITIES**NEW MEXICO'S REPLY**

CASES:	Page
<i>Texas v. New Mexico</i> , 485 U.S. 388 (1988)	2

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

No. 65, Original

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant.

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

New Mexico's Motion to Review the Pecos River Master's Final Report for Water Year 1990 (New Mexico's Motion) was filed July 26, 1991. Texas responded by filing "Texas' Reply to New Mexico's Motion to Review the River Master's Final Report for Water Year 1990" (Texas' Response) on August 8, 1991. New Mexico received Texas' Response on August 12, 1991. New Mexico submits this reply to Texas' Response.

1. Texas' Response Misinforms the Court on the Materiality of Ungaged Flood Inflows in Accounting for Certain Channel Losses.

It is incorrect for Texas to assert that New Mexico should have included channel losses on ungaged flood

inflows in its calculations of the accounting error in the River Master's Final Report for Water Year 1990 (Final Report). *See generally* Texas' Response at 3-7. Texas cites no authority for this assertion because there is none. Texas' assertion is wrong because the Pecos River Master's Manual (Manual) does not instruct the River Master to consider channel losses on ungaged flood inflows. Furthermore, speculating as to such losses does not resolve the inconsistency in the Final Report which was identified in New Mexico's Motion.

The Supreme Court's Amended Decree directs the River Master to calculate on a yearly basis, "pursuant to the methodology set forth in the Manual," New Mexico's water delivery obligation under Compact Article III(a), the shortfall or overage in delivery, and the net shortfall, if any. 485 U.S. 388, 391 (1988), Article III.B.1, *quoted in* New Mexico's Motion, App. at 3a. In its Motion, New Mexico properly based its calculations of the 1990 accounting error on values for computational items which the River Master actually used under the Manual. The River Master stated that, in computing channel losses and Major Johnson Springs new water inflow for the reach of the river which is the subject of New Mexico's Motion, he did not account for ungaged flood inflow in 1990. Preliminary Report, App. B at B-4 (New Mexico's Motion, App. at 6a, Item 4).

The channel loss equation in § B.4.e of the Manual is used to compute the net channel losses on gaged flows at Artesia, measured flood inflows, and estimated Major Johnson Springs new water inflow. *See* New Mexico's Comments at 20 (New Mexico's Motion, App. at 6a, Item 2). Those net channel losses exclude

losses on unmeasured flood inflows. The Manual does not allow the River Master to consider channel losses on ungaged flood inflows, nor did the River Master use such losses in the 1990 accounting for this reach of the river. Therefore, New Mexico's explanation of the Final Report's accounting of channel losses under § B.4.e of the Manual for computing total outflow is correct. *See* New Mexico's Motion at 5-6 and App. at 1a.

The Major Johnson Springs new water procedure in § B.4.b.(3) of the Manual states that gaged inflows are to be used. Manual at 12, *quoted in* New Mexico's Motion, App. at 5a. Channel losses on ungaged flood inflows cannot be used because the ungaged inflows themselves are not used, and because to do so would create an internal inconsistency between § B.4.b.(3) and § B.4.e of the Manual. The River Master did not use such losses in the 1990 accounting for this reach of the river. Therefore, New Mexico's explanation of the Final Report's accounting of channel losses to calculate Major Johnson Springs new water inflow under § B.4.b.(3) of the Manual is correct. *See* New Mexico's Motion at 6-7 and App. at 1a.

For the reasons given above, it was misleading for Texas to argue that New Mexico omitted or ignored information in the calculations in its Motion. No ungaged flood inflow or losses on ungaged flood inflow can be used in those calculations. New Mexico's Motion simply identified inconsistent channel losses in the 1990 accounting for the same subreach of the Pecos River. Each channel loss value was used pursuant to a separate section of the Manual. New Mex-

ico did not express an opinion regarding the accuracy of either channel loss value but simply pointed out in its Motion that both values could not be correct. In the proceedings before the River Master, New Mexico presented consistent computations that followed current Manual procedures, but they were not used by the River Master. New Mexico's Comments at 20-21 and Table 1 (New Mexico's Motion, App. at 6a, Item 2) (computing Major Johnson Springs new water using the calculated channel loss value under § B.4.e of the Manual).

Texas also claimed that New Mexico's diagram of the channel losses between Artesia and Damsite 3 omitted several inflow and outflow components. Texas' Response at 6 n.1. New Mexico's diagram was intended to illustrate its objection to the Final Report by comparing the channel loss components used to calculate total inflow and total outflow for a particular reach of the river. The inconsistency in channel losses was the only item in the 1990 accounting to which New Mexico objected in its Motion. The diagram should not have included channel losses on ungaged flood inflows because the River Master did not use them and the Manual did not instruct him to do so; rather, the diagram is accurate because it is based on the River Master's actual accounting for 1990.

2. Texas Did Not Properly Characterize New Mexico's Legal Position.

New Mexico did not contend in its Motion that the accounting error was a legal error, nor does New Mexico seek to render the clearly erroneous standard meaningless as claimed by Texas. Texas' Response at 10. In its Motion, New Mexico asserted that the River Master's findings were internally inconsistent and,

therefore, clearly erroneous. *See generally* New Mexico's Motion at 4-12. The River Master's error was an accounting error, not a legal error. If this Court agrees, New Mexico is entitled to the relief it seeks, that is, an amendment of the River Master's Final Report for Water Year 1990. New Mexico argued in its Motion that the Final Report as it now stands results in legal error because New Mexico cannot be charged under the Compact for shortfalls at the state line which are not caused by man's activities and which are due solely to an accounting error. New Mexico's Motion at 12-13.

3. Texas Seeks to Introduce a Document Which Does Not Belong in the Record before this Court.

In its Response, Texas stated that it agreed with New Mexico's designation of the record before the River Master, with the addition of one document which it identified as "River Master's July 15, 1991, Analysis of Issues, New Mexico's Third Motion." Texas' Response at 8 n.2. This document is not part of the record for the River Master's Final Report because it was issued several weeks after the Final Report, and it concerns New Mexico's Third Motion to Modify the Pecos River Master's Manual, not the Motion pending before this Court. Furthermore this document is a selective and incomplete record of proceedings on a matter which is still pending before the River Master.

Dated: August 23, 1991.

Respectfully submitted,

THOMAS S. UDALL
Attorney General of New Mexico

PETER THOMAS WHITE*
LAURA COLMAN HARPER
Special Assistant Attorneys General
New Mexico Interstate Stream
Commission
Post Office Box 25102
Room 101, Bataan Memorial Building
Santa Fe, NM 87504-5102
(505) 827-6150

**Counsel of Record*

