No. 29, Original

In the Supreme Court of the United States

OCTOBER TERM, 1966

STATE OF TEXAS AND STATE OF NEW MEXICO,
PLAINTIFFS

v.

STATE OF COLORADO

MEMORANDUM FOR THE UNITED STATES

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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By order of February 13, 1967, this Court invited the Solicitor General to submit the views of the United States in this original action. One question, obviously, is whether the United States is an indispensable party. For the reasons explained below, we conclude that the United States is indispensable, but urge the Court not to act on the plaintiff's motion for leave to file a complaint until October 16, 1967 (six months hence), so as to encourage an administrative solution to the controversy. If by that time no substantial progress has been made toward such a solution, the Solicitor General will advise the Court whether the United States proposes to intervene as a party, thus permitting the suit to go forward.

1. The background and nature of the controversy may be described briefly. The Rio Grande River rises

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in Colorado and flows through New Mexico and thence, forming the international boundary between Texas and Mexico, to the Gulf of Mexico. Much of the region through which the river runs is arid, and the Rio Grande is an important source of waters for the irrigation of these lands.

On May 31, 1939, Congress consented to the Rio Grande Compact (53 Stat. 785; Exhibit "A" to plaintiffs' Motion for Leave to File Complaint), entered into by the three affected States to apportion the waters of the Rio Grande among them. The Compact establishes schedules which specify the amount of water that the States of Colorado and New Mexico are required to deliver in the river each year (Articles III and IV). The amount by which actual delivery falls short of scheduled delivery in any year is recorded as a debit of the delivering State (Article I(g)), but the debit is reduced whenever water is "spilled" (as that term is defined in Article I(p)) from Elephant Butte Reservoir—the major water-storage project in the Rio Grande river system, located in New Mexico (Article VI). The Compact provides that Colorado's total debit is not to exceed 100,000 acre feet (Article VI).

The complaint filed by Texas and New Mexico alleges that Colorado has exceeded its debit limit of 100,000 acre feet and has refused to make deliveries that would eliminate the excess debit. The plaintiffs ask this Court (1) to issue a decree requiring Colorado to deliver water in accordance with the requirements of the Compact and to eliminate the debit which has accrued, and, to this end, (2) to appoint "a water

master empowered to control the diversion, storage and use of Rio Grande Basin water within the State of Colorado."

In its brief in opposition to the motion for leave to file a complaint, premised on the alleged indispensability of the United States as a party to this suit, the State of Colorado argues (pp. 25, 28–29, 31) that New Mexico should be required to eliminate her debit by increasing her deliveries to the Elephant Butte Reservoir—this to increase the possibility of actual spill at that reservoir, which would reduce Colorado's debit without requiring additional water deliveries by Colorado (see p. 2, *supra*). Colorado also indicates that it may seek reformation of the Compact (p. 36) on the ground that the construction of a number of additional reservoirs since the Compact was approved has reduced the possibility of actual spill at Elephant Butte Reservoir—and so of relief to Colorado—in a manner not foreseen when Colorado first agreed to the schedule of deliveries provided in the Compact (see pp. 26–27).

2. The papers filed by the contending States in this Court indicate that the United States is an indispensable party to this suit. In *Texas* v. *New Mexico,* 352 U.S. 991, this Court, at the urging of the Solicitor General, dismissed a complaint based on the same Rio Grande Compact on the ground that the United States was an indispensable party which had not been joined—or consented to be joined—in the suit, and we submit that that ruling is dispositive on the issue of indispensability here as well.

In that case, to be sure, the suit was brought by Texas against New Mexico, alleging insufficient deliveries by New Mexico, rather than by Texas and New Mexico against Colorado. And since the more prominent interests and obligations of the United States relate to federal projects and Indian tribes located in Texas and New Mexico rather than in Colorado, it might at first blush appear that joinder of the United States is not essential because a decree requiring additional water deliveries by Colorado to the other States could only benefit the federal interest. But this ignores the contentions of Colorado. Its brief in this Court makes clear that, in resisting the suit by Texas and New Mexico, it will seek a ruling either that New Mexico is required to increase its deliveries in the river—the same relief sought by Texas in *Texas* v. *New Mexico, supra*—or that the Compact is unenforceable unless reformed to reduce Colorado's annual delivery obligations to Texas and New Mexico—a matter of obvious concern to the United States, in view of its admittedly very substantial water rights and responsibilities in those States.

Any ruling touching the delivery obligations of New Mexico, here, as in *Texas* v. *New Mexico,* would both entail control of the operations of the Middle Rio Grande Conservancy District, all of whose dams and others works are owned and operated by the United States, and affect the water rights of the Pueblo Indians, of whom the United States is the representative. See Memorandum for the United States under Order of October 17, 1955, *Texas* v. *New Mexico,* No.

9 Orig., O.T. 1956. See, also, Memorandum on Behalf of the United States, as Amicus Curiae, filed in April 1952, *Texas* v. *New Mexico,* No. 9 Orig., O.T. 1951. The ruling in *Texas* v. *New Mexico* therefore controls; the United States is indispensable.

The United States would be an indispensable party even if Colorado had raised no issue concerning the obligations of New Mexico under the Compact. Not only are the federal installations dependent on the waters of the Rio Grande—which include reclamation projects, military reservations, wildlife refuges, and national parks and forests—numerous and important, but the United States is obligated by treaty to furnish substantial quantities of those waters to the Indians and to Mexico (34 Stat. 2953). In view of these extensive interests in the waters of the Rio Grande, a decree apportioning those waters in the absence of the United States would lack any real finality. *Shields* v. *Barrow,* 17 How. 130, 139.

3. In *Texas* v. *New Mexico* the Solicitor General urged the indispensability of the United States as a bar to the suit, believing that an administrative solution to the controversy was imminent. The United States had undertaken a project for the rehabilitation of the Middle Rio Grande Conservancy District that would eliminate the shortages giving rise to the dispute, and work on the project was already far advanced. In the present case, too, the possibility exists of an administrative solution that would, if accomplished, moot the controversy. Just above the Rio Grande watershed in Colorado is the so-called Closed Basin, into which hundreds of thou-

sands of acre feet of water flow each year. At present, most of this water is not used beneficially. However, a project has been proposed (see Colorado's brief, pp. 47–51) that would, at moderate cost, enable the Closed Basin to be drained into the Rio Grande watershed and thereby greatly augment the annual flow of the Rio Grande. This would alleviate the shortages which gave rise to the present controversy.

Feasibility planning for the project is completed, but congressional authorization and appropriation are necessary before any federal construction could commence and the feasibility report has not yet been sent to the Congress for its consideration. The primary difficulty with the project, from the government's point of view, lies in the problem of determining how the financial responsibilities should be shared among those benefited. The principal beneficiary, the State of Colorado, has declined to share in the project's costs. If the authorization of the project is substantially delayed, the present inclination of the United States would be to intervene in this litigation as a party in order to enable a judicial resolution of the controversy. On the other hand, should definite progress be made in the coming months, indicating that the project (or other proposed projects under consideration) will soon become a reality and put an end to the controversy, then, as in *Texas* v. *New Mexico,* we would not intervene. This would abate the litigation if this Court agrees that the United States is an indispensable party.

We suggest, therefore, that the Court stay any further action in this case for six months, until October 16, 1967. That would afford a reasonable time for the interested parties to demonstrate the feasibility and imminence of an equitable administrative solution. In the meantime the United States will explore the matter of an administrative solution in conjunction with the three States. If at the end of this period it appears that the matter can be resolved only by litigation, we shall then inform the Court whether the United States will intervene.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

APRIL 1967.

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