IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 29, Original

STATE OF TEXAS AND
STATE OF NEW MEXICO,
Plaintiffs

v.

THE STATE OF COLORADO,
Defendant

RESPONSE OF TEXAS AND NEW MEXICO TO COLORADO'S BRIEF IN OPPOSITION, AND TO THE MEMORANDUM FOR THE UNITED STATES

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PRELIMINARY STATEMENT

The plaintiff States of Texas and New Mexico filed their Motion for Leave to File Complaint, and Complaint on October 3, 1966. Colorado then filed its Brief in Opposition to Motion for Leave to File Complaint, hereinafter referred to as Brief in Opposition. Thereafter, this Court invited the Solicitor General to file a brief stating views of the United States in this action. The Solicitor General submitted his Memorandum for the United States on April 13, 1967. This Response is therefore the first opportunity plaintiffs have had to respond to the Colorado Brief in Opposition and the Memorandum for the United States.

Colorado's Brief in Opposition contains three basic arguments against the Motion of the plaintiff States for Leave to File their Complaint: (1) indispensability

of the United States; (2) indispensability of the Middle Rio Grande Conservancy District and Elephant Butte Irrigation District; and (3) the "administrative solution." This response will discuss all three arguments because each bears to some extent on the question of the interests of the United States in this suit.

It should be recalled at the outset that the Complaint sought to be filed by Texas and New Mexico is quite uncomplicated. It is based upon facts which are found in the public records of the Rio Grande Compact Commission. In each and every year Colorado has approved and endorsed the accuracy of these records. The Complaint alleges the duty of Colorado under the Rio Grande Compact to deliver water in the Rio Grande at the Colorado-New Mexico state line according to the delivery schedules in the Compact; it further alleges that Colorado has in recent years failed to meet this obligation, thereby injuring the plaintiff States; and seeks a decree requiring Colorado to meet this obligation by whatever means the Court may find appropriate. In essence, the Complaint of Texas and New Mexico states an action to enforce an interstate contract obligation.

The State of Colorado in its Brief in Opposition has sought in a variety of ways to expand the issues raised by the Complaint and even change the nature of the suit into a general adjudication of water rights along the length of the Rio Grande. It should be clearly understood that no such adjudication of water rights is sought by the plaintiffs or needed to obtain the relief prayed for.

It can be discerned that the essential allegations of the plaintiffs' case have not been denied. Although the

Brief in Opposition embraces a variety of subject matter, ranging from Pueblo Indians to the Eleventh Amendment, there is nowhere a denial that Colorado 1) is obligated to deliver water in the Rio Grande at the Colorado-New Mexico state line in accordance with the Compact schedules and 2) that Colorado has violated the Compact by its failure to deliver water according to that schedule for more than a decade. *Nowhere in its Brief in Opposition does Colorado unequivocally deny the facts stated in plaintiffs' Complaint.* The Colorado brief is likewise devoid of any assertion that the plaintiffs' case is not one of sufficient importance to justify an assumption of jurisdiction by this Court.

The bulk of the Colorado response is, in fact, an intellectual exercise treating the question of the consequences, both legal and factual, of a hypothetical expansion of the issues in the plaintiffs' Complaint to include the rights and duties of parties *below* the Colorado-New Mexico state line. Assuming at the outset that the issues must be expanded, the Brief in Opposition goes on to explore, at some length and with some ingenuity, the consequences of such an expansion, concluding every avenue of argument at an inevitable dead-end: the Complaint must be dismissed by reason of the indispensability of the United States and the irrigation districts in New Mexico. Colorado suggests, in the alternative, the appointment of a Special Master.

In its Memorandum, the United States assumes without any discussion that the attempt by Colorado to broaden the scope of the case is an accomplished fact. The United States concludes from this, and from its construction of *Texas v. New Mexico,* 352 U.S. 991

(1957), that it is an indispensable party in the present case. The United States suggests further that the Courts stay any further action for six months in order to give the parties time to "demonstrate the feasibility and imminence of an equitable administrative solution." Plaintiffs disagree with the reasoning and conclusions of the United States Memorandum and oppose the suggestion that the Court delay action.

ARGUMENT

I. THE UNITED STATES IS NOT INDISPENSABLE IN THIS CASE.

A. TEXAS V. NEW MEXICO SUPPORTS THE ARGUMENT THAT THE UNITED STATES IS NOT AN INDISPENSABLE PARTY TO THIS SUIT.

The case of *Texas v. New Mexico,* supra, requires attention at the outset of this argument, because Colorado has attempted throughout its Response to put itself in a position parallel to that of New Mexico in the earlier suit on the Rio Grande Compact. The United States has likewise found that case controlling on the question of indispensability according to its Memorandum in the present case. Plaintiffs believe that Colorado and the United States misunderstand *Texas v. New Mexico* and its significance.

The case of *Texas v. New Mexico* may be summarized as follows: In late 1951, the State of Texas filed its Motion for Leave to File Complaint against the State of New Mexico and the Middle Rio Grande Conservancy District in this Court, alleging that the defendants

were in violation of the Rio Grande Compact, and seeking an injunction preventing the defendants from storing waters of the Rio Grande and its tributaries in reservoirs in New Mexico and to require the defendants otherwise to comply with the Compact. The original Texas Complaint specifically prayed for a preliminary injunction restraining New Mexico and the Middle Rio Grande Conservancy District from increasing the amount of water in storage in El Vado Reservoir, (the principal storage facility in New Mexico above Elephant Butte Reservoir), and for a final decree enjoining the defendants from storing water in El Vado or any other reservoir in the Rio Grande System in New Mexico above San Marcial, and further praying that the defendants be permanently enjoined from diverting, storing or using the waters of the Rio Grande in New Mexico above San Marcial until the accrued debit of New Mexico was no longer in excess of 200,000 acre feet.

These provisions of the Texas prayer for relief clearly raised the question of the necessity of the joinder of the United States as a party, inasmuch as the United States at that time operated (and later came to own) the works *specifically sought to be controlled by Plaintiffs' prayer.* New Mexico raised in its defense the indispensability of the United States and the issue was referred to a Special Master. The interests presented to the Special Master, by New Mexico, and by the United States in its Memorandum, Amicus Curiae, April 1952, in support of the indispensability of the United States were as follows: 1) the United States' obligation to Mexico under the Rio Grande Convention of 1906, 34 Stat. 2953, 2) the Federal correctional institution at La Tuna, Texas, 3) Elephant Butte and

Caballo Reservoirs, 4) the Bosque del Apache grant (wildlife refuge), 5) Kirtland Air Force Base, 6) the United States Veterans Hospital at Albuquerque, 7) the installations and activities of the Atomic Energy Commission at Albuquerque, New Mexico, 8) the Federal Middle Rio Grande Project, 9) control of navigation, 10) the national forests, 11) public domain grazing lands, 12) the interests of the Soil Conservation Service, 13) the installations and activities of the Atomic Energy Commission at Los Alamos, New Mexico, 14) the contract to acquire the facilities and works of the Middle Rio Grande Conservancy District, including El Vado and, 15) the rights of the Pueblo Indians.

At the outset on page 12 of his First Report (See page 43, of Appendix I, herein), the Special Master stated his point of view on indispensability:

> "It seems clear (notwithstanding the broad language used in some of the cases) that the United States does not become an indispensable party simply because it would be affected by the relief sought—the effect must be an injurious one. If the effect would be beneficial, then the United States is not an indispensable party; it can take what is given to it, without effort on its part and without obligation, and if it considers itself entitled to more, is still perfectly free to pursue its remedy. *Payne v. Hook,* 7 Wall. 425; *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U.S. 33; *United Shoe Mchy. Co. v. United States,* 258 U.S. 451; and see *Bourdieu v. Pacific Western Oil Co.,* 299 U.S. 65." (Report of Special Master Respecting Indispensability of the United States and of Elephant Butte Irrigation District as Parties, *Texas v. New Mexico,* supra.)

Employing this standard, the Special Master proceeded to dispose of all of the grounds for indispensability raised by New Mexico, except the last one listed above. The Special Master found as to each of the other asserted interests of the United States either that the impact on them was beneficial, or that the right in question was acquired under license of the State of New Mexico and that such rights of the United States would be represented by the State of New Mexico, as *parens patriae* under the rule of *Nebraska v. Wyoming,* 295 U.S. 40 (1935); 325 U.S. 589 (1945).

On the question of the Pueblo Indians, and only on that question the Special Master found that the relief sought by Texas would, in fact, require the presence of the United States in the suit as trustee for six communities of Pueblo Indians served by the Middle Rio Grande Conservancy District works. The rationale for the finding of indispensability on this point is immediately apparent. Texas was seeking a restraining order against New Mexico and the Middle Rio Grande Conservancy District to prevent any storage of water in El Vado Reservoir until such time as the New Mexico debit was repaid. The record was clear that the United States claimed on behalf of these six Pueblos a prior and paramount right to both natural flow and storage water in the Rio Grande system. It was unavoidable that in the absence of an adjudication of the right of the Pueblos, the relief sought by Texas could not be granted. The Special Master held that since the Compact, Article XVI, provided that nothing therein would impair the rights of the Indians, and that the rights of the Indians had not been defined, it was impossible to grant the relief sought by the plaintiff in the absence of the United States. *It should be clearly*

understood that the Indian water rights considered in that case were not based on permits from the State of New Mexico. They were, rather, undefined rights which, on the claim of the United States, antedated the sovereignty of the United States and the State of New Mexico, and the claims on behalf of the Indians specifically included a claimed right to store water in El Vado Reservoir with a priority over any Compact uses for both old and reclaimed Indian irrigation lands. The United States also claimed for the Indians a right prior and paramount to all Compact uses to the main flow of the Rio Grande for both old and reclaimed lands. Thus, in respect to storage of water for both classes of land and the right to divert for the same from the main stream, the claims of the Indians could not be reconciled with the relief prayed for in the Texas Complaint. The Special Master therefore concluded that these claims on behalf of the Indians made the United States an indispensable party.

Thereafter, Texas filed a Motion for Leave to Amend its Complaint and both Texas and New Mexico filed exceptions to the report of the Special Master. The proposed amendment acknowledged the priority of the Indian claims over the relief sought by Texas. This Court then referred to the Special Master the question whether the proposed amendment of the prayer for relief would cure any defect of parties. This Court did not at that time or later, overrule any part of the Special Master Report under Order of December 22, 1952, but instead treated it for the balance of the case as conclusive despite the exception filed by the parties. The State of New Mexico argued that the proposed amended prayer would not cure the party defect because even if Texas were to concede the prior right of the Indians, for the

purpose of that suit, to storage and stream flow in the Rio Grande, the *quantity of water,* that is, the number of acre-feet per acre that might be used, still remained undetermined and the presence of the United States as a party, for the adjudication of that element of the right of the Indians, was required. The Special Master, in his Report under Order of Oct. 14, 1954, recommended that the amendment proposed by Texas would cure the defect in parties and should be accepted. (See page 16, Report of Special Master, in Appendix II, pages 106-07)). This Court then requested another statement from the United States of its position. In response, the Government filed its second Memorandum, discussing the second report of the Special Master.

The United States argued in its final memorandum that at that time (1956), it had *taken title to all of the works of the Middle Rio Grande Conservancy District,* and that any manner of relief sought by Texas which included control over the gates of El Vado Dam would now be ineffective in the absence of the United States as owner of the works. In addition, the United States also made clear to the Court that an administrative solution to the plaintiff's problem was at hand by reason of the advanced stage of construction of the Middle Rio Grande Project.

At this point Texas abandoned its attempt to placate the United States and its Indian wards, withdrew its proposed amendment, and moved for the joinder of the Secretary of the Interior and his subordinates. By this action Texas admitted the United States was indispensable because of its ownership of the works sought to be controlled. Shortly thereafter the case was dismissed by a per curiam order of this Court,

presumably because the United States was immune from suit and had refused to intervene.

This review of *Texas v. New Mexico, supra,* demonstrates that all of the arguments raised by New Mexico in support of indispensability in that case have now been revived by Colorado and the United States *in this case.* It is the position of the plaintiff States that the reasoning of the Special Master in his first report, overruling all of the grounds alleged for indispensability except the claims of the Indians, applies with even greater force to the present case.

B. THERE ARE NO FEDERAL INTERESTS IN COLORADO WHICH MAKE THE UNITED STATES INDISPENSABLE IN THIS CASE.

In the present case the only Federal interests in Colorado raised by the Colorado brief, are the fish and wildlife refuges and Platoro Dam and Reservoir. The appendices to Colorado's brief show that the fish and wildlife refuges operate under rights *acquired from the State of Colorado.* (Brief in Response to Motion of Texas and New Mexico for Leave to File Complaint, Appendix, pp. 54-57). Such rights are certainly not comparable to the claims of the Indians in the last case. As the Special Master said at page 18 of his First Report (see Appendix I, page 50) in that case in discussing the Bosque del Apache wildlife refuge:

> "In any event the United States' right to water for the Bosque del Apache is derived from New Mexico and can rise no higher than the State of New Mexico; so that New Mexico stands in judgment for the United States as for any other appropriator in New Mexico. *Nebraska v. Wyoming,*

295 U.S. 40; *Nebraska v. Wyoming,* 325 U.S. 589, 629."

Since the rights of the United States in its wildlife refuges in Colorado are in the same position as were its rights in the Bosque del Apache wildlife refuge in the last case, we believe the Master's decision applies with equal force here. Colorado necessarily represents all the owners of rights which derive from the sovereignty of Colorado, as *parens patriae. Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). The Federal interest in its wildlife refuges in Colorado therefore does not make the United States indispensable in this case.

The only other interest of the United States within Colorado is Platoro Dam and Reservoir. Obviously, Colorado has attempted in its brief to equate Platoro Dam and Reservoir with El Vado Dam and Reservoir in the last case. The situations, are however, fundamentally distinct and dissimilar.

It will be recalled that the original and amended prayers of Texas in the *Texas v. New Mexico, supra,* expressly sought a decree *controlling the operation of the El Vado Reservoir gates.* New Mexico and Texas have not sought in the present case in any way to affect or interfere with the operations of Platoro Reservoir by the Corps of Engineers and the Bureau of Reclamation. Texas and New Mexico have, on the contrary, requested only, in general terms, that Colorado be required to comply with the Compact by whatever means the Court finds appropriate. Plaintiffs have not prayed for any manner of control or administration over the Platoro Reservoir works and it is this point

which Colorado is seeking to obscure in its attempt to confuse this case with the last one.

The Federal law which authorized Platoro Reservoir contains the express provision that it must be operated in compliance with the Rio Grande Compact, it has been so operated, and no change in its operations is now sought by the plaintiff States. Act of June 18, 1940, ch. 395, 54 Stat. 406. *By contrast, at the commencement of Texas v. New Mexico, supra, El Vado Reservoir was owned and operated by the Middle Rio Grande Convervancy District which refused to comply with the compact.*

Furthermore, as Colorado has conceded, at page 24 of its Brief in Opposition, it is in the interest of the United States that the State of Colorado should be out of debt under the Compact. Plaintiffs contend that Colorado is entirely correct in this respect. If Texas and New Mexico are successful in the present suit, the debit position of the State of Colorado, which debit has prevented for years the use of Platoro for irrigation would be erased and the United States might begin to recover under its repayment contract, the amounts it has invested in the construction of the reservoir. Plaintiffs believe these facts demonstrate that the United States can only be benefited in its capacity as owner and operator of the reservoir, if the relief sought by the Plaintiffs in this case be granted.

Plaintiffs believe that the language from the Special Master's Report, quoted above, on the point that a party is only indispensable if the effect upon him is adverse and not beneficial, applies with particular force here. Colorado quoted on page 13 of its Brief in Opposition from the case *Barney v. Baltimore City,* 6 Wall.

280, (1867), in an attempt to state the rule of indispensable parties as requiring the joinder of any party vitally interested in the outcome of the case. Plaintiffs believe that case supports the decision of the Special Master in the *Texas v. New Mexico* case that the effect must be injurious. This Court said at page 287 that a court of equity will refuse to enter a decree "where by reason of the absence of persons interested in the matter, the decree would be ineffectual, or would injuriously affect the interest of the absent parties." *Barney v. Baltimore City, supra.*

As pointed out above, the plaintiff States do not seek, in any way, control over Platoro Reservoir, and the granting of the relief we do seek will restore Platoro to operation as an irrigation storage facility. The effect of the relief sought would be only beneficial.

The argument of Colorado, at the bottom of page 19 of its Brief in Opposition, is fallacious because it assumes that the decree sought "would require this Court by use of a water master to substitute itself for the agency designated by Congress in the management and operation of Platoro Reservoir and the water rights of the United States." Our prayer for relief asks only for the water Colorado is obligated by the Compact to deliver at the state line. Texas and New Mexico are entirely satisfied with the manner in which Platoro Reservoir is operated. It has been operated by the United States as required by law, in conformity with the Compact, and therefore has not been used to release irrigation water while Colorado remains in debt. Act of June 18, 1940, ch. 395, 54 Stat. 406.

The situation was quite different in *Texas v. New Mexico,* supra. There, before the United States ac-

quired control of the Middle Rio Grande Conservancy District works, Rio Grande system water was stored and released for irrigation purposes in the Middle Valley in New Mexico although New Mexico under the terms of the Rio Grande Compact was then barred from such release by reason of its debit position.

C. THERE ARE NO FEDERAL INTERESTS IN NEW MEXICO WHICH MAKE THE UNITED STATES INDISPENSABLE IN THIS CASE.

Colorado contends throughout its brief that the fact that the United States is the owner of many different rights in New Mexico somehow makes the United States an indispensable party. In particular, Colorado argues that the United States is faced with inconsistent interests between Platoro Reservoir and the Elephant Butte Reservoir.

On the first point, we believe that the quotations above from the Special Master Report in the last case establish that an impact *per se* on the United States is not enough to make it indispensable, but that the impact must be injurious or adverse, or the relief sought must be ineffective in the absence of the United States. The reasoning of the Special Master in his First Report in that case, overruling the arguments of New Mexico and the United States that such interests as wildlife refuges, atomic energy installations, military bases, etc., would make the United States indispensable, applies even more forcefully to the present situation. This is because in *Texas v. New Mexico,* supra, relief was sought against the state in which all of these Federal uses existed; nevertheless, the Special Master found that they did not make the Government indis-

pensable. Surely the Government's ownership of these same interests is even less persuasive as an argument for indispensability where, as here, relief is sought not against New Mexico, but solely against Colorado.

It should be remembered that all of the Federal interests in New Mexico involve diversion of water. Each of them therefore stands to benefit from an enlarged supply of Rio Grande water in New Mexico and none of them can suffer any adverse effect by reason of the reduction of Colorado's debit by order of the Court, and the consequent delivery of larger amounts by Colorado at the state line. This argument particularly applies to Elephant Butte Reservoir. Colorado has stated that it is in the interest of the United States at Elephant Butte Reservoir to have a determination of the largest possible debit for the upstream states. We believe that this is patently wrong. The paramount interest of the United States in Elephant Butte Reservoir is clearly and simply to get as much *wet water* as possible into the reservoir, both for irrigation supply and power generation. It is certain that the interests of the United States in Elephant Butte Reservoir can only benefit from additional deliveries by Colorado to New Mexico at the state line. The obligation of New Mexico to deliver this additional water according to the Compact schedule means that an additional delivery at the Colorado-New Mexico state line will insure an enlarged delivery of water by New Mexico at San Marcial. The additional water reaching Elephant Butte Reservoir will permit larger sales of hydro-electric power by the United States and a larger supply for all other purposes below Elephant Butte Reservoir.

Colorado's argument on this point appears to be

based on a misconception of the interests of the United States and the water users below Elephant Butte Reservoir. Their interest is obviously in getting more *wet water* into the reservoir, not larger paper debits in the Rio Grande Compact Commission reports. It is therefore the position of plaintiffs that the interest of the United States in Elephant Butte Reservoir is entirely consistent with its interests in Platoro; that is, bringing Colorado out of debt and thereby delivering additional water to Elephant Butte Reservoir and other Federal installations in New Mexico and also permitting Platoro Reservoir to begin storage and delivery of irrigation water so as to recover the Government's investment in that reservoir.

D. THE RIGHTS OF COLORADO UNDER THE "ACTUAL SPILL" PROVISION OF ARTICLE VI, OF THE RIO GRANDE COMPACT, ARE FULLY PROTECTED, AND THIS PROVISION DOES NOT MAKE THE UNITED STATES INDISPENSABLE IN THIS CASE.

On page 25 of its Brief in Opposition Colorado has raised an argument concerning Article VI of the Compact. This argument relates to the desire of Colorado to extend the authority of a water master appointed under a decree in this case to include the operation of flood control or silt retention reservoirs constructed in New Mexico since 1929. The only such reservoirs existing in New Mexico are Abiquiu Reservoir on the Rio Chama, and Jemez Reservoir on Jemez River. Cochiti and Galisteo Reservoirs have been authorized but not yet constructed.

The Compact does not require that the member states

forego the construction of reservoirs for flood control or any other purpose in order that the prospects of actual spill remain as they were at the time the Compact was signed. It is only required that these reservoirs be operated in compliance with the Compact.

Colorado argues that it is entitled to the administration of these reservoirs in New Mexico by a water master appointed to enforce the decree, in order to secure to Colorado the maximum potential advantage under Article VI of the Compact, which provides for the cancellation of debits when Elephant Butte Reservoir spills. Colorado asserts that the extension of the scope of this case to include administration of reservoirs in New Mexico will necessarily make the United States indispensable due to its large interests in New Mexico and its ownership and control of storage and diversion works.

Plaintiffs believe the above argument does not withstand analysis. The Compact records disclose that Elephant Butte Reservoir has in fact spilled only once since its construction. That occurred in 1942 as a result of extraordinary floods in 1941 and 1942. At the present time, storage in Elephant Butte Reservoir and Caballo Reservoir combined is so far below their storage capacity that even if all of New Mexico's and Colorado's debts were suddenly repaid and the water were now in Elephant Butte Reservoir, there would still be substantial storage capacity and no spill would occur.

Not only is the prospect of actual spill extremely remote in practical terms, but in addition plaintiff States believe that Colorado has, by consenting to the construction of flood control dams in New Mexico and

by failing to make timely objection since their construction, waived any such argument as it raises now in its brief, and is equitably estopped to complain.

Both Abiquiu and Jemez Reservoirs are operated, and Cochiti and Galisteo Reservoirs will be operated, by the United States in conformity with the Rio Grande Compact. Indeed all such reservoirs are required to be so operated by Public Law 86-645, 74 Stat. 493. It would be an extraordinary result indeed if Colorado were to be permitted to deny or ignore the specific and implied consent it has given to the construction and maintenance of flood control reservoirs on the Rio Grande in New Mexico in order to secure to itself some extremely remote and hypothetical advantage under the provision of actual spill. Plaintiff States believe that by its consent to the construction of these reservoirs for flood control purposes in New Mexico and its subsequent failure to complain of their operation, Colorado has waived any right it might have had to insist that conditions most likely to cause an actual spill should be maintained on the river.

It is also necessary to point out here that any change in the present operation of these reservoirs implies the revival of a grave danger to many inhabited areas in the middle Rio Grande including the City of Albuquerque. Surely Colorado, after many years of express and implied consent to flood control on the river in New Mexico, in accordance with the Compact, cannot be heard to argue that Albuquerque and other cities should be placed in jeopardy of flood by a radical change in the operation of the river in New Mexico, merely to give Colorado the possible benefit of an extremely unlikely actual spill. In the opinion of the

plaintiff States this is an extraordinary and presumptuous defense to a suit on a contract.

E. THE RIGHTS OF COLORADO UNDER THE "MINIMUM UNFILLED CAPACITY" PROVISION OF UNNUMBERED PARAGRAPH 8, OF ARTICLE VI, OF THE RIO GRANDE COMPACT, ARE FULLY PROTECTED, AND THIS PROVISION DOES NOT MAKE THE UNITED STATES INDISPENSABLE IN THIS CASE.

Colorado seeks to give the impression that actual spill is the primary means of debt reduction. This is not true. Debt reduction by reason of the "unfilled capacity" provision of Art. VI of the Rio Grande Compact is the only likely source of relief. For reasons discussed below actual spill is merely the point in time at which all debts have already been erased by reason of application of the "minimum unfilled capacity" provision.

In addition to actual spill, Colorado's brief also speaks of "theoretical spill," (Colorado's Brief in Opposition, Pg. 28). Although it does not define that term, Plaintiffs assume that in its discussion of "theoretical spill" Colorado means to say that the provision of unnumbered paragraph 8, of Article VI of the Rio Grande Compact, will work in her favor if the Rio Grande is supervised or controlled by a water master in northern New Mexico.

Unnumbered paragraph 8 of Article VI provides that whenever the aggregate accrued debits of Colorado and New Mexico exceed the "minimum unfilled capacity" in project storage (Elephant Butte and Ca-

ballo Reservoirs), then the debits of the upper states are reduced proportionately to an aggregate amount equal to such minimum unfilled capacity. In simpler terms, this means that the total of accrued debits *can never be larger than the minimum unfilled capacity.* The practical meaning of this provision is that when the upper states are in debit status, and there is a large amount of water in storage in Elephant Butte and Caballo Reservoirs, and the aggregate debit of the upper states is equal to the unfilled capacity in project storage (which is defined as physical capacity less water actually stored), any additional water reaching Elephant Butte Reservoir, will reduce the debits of the upper states. It follows necessarily from this, that Colorado cannot be injured under the terms of the "minimum unfilled capacity" provision by New Mexico's debit, but in fact, is more likely to benefit from that provision if New Mexico does have a debit.

Assuming that in the use of the term "theoretical spill" Colorado is, in fact, alluding to this provision of "minimum unfilled capacity," then all the rebuttal required to this argument is found in Public Law 86-645, 74 Stat. 493. This is the Act of Congress authorizing the construction of flood control reservoirs on the Rio Grande in New Mexico, and setting out the conditions and limitations of their operation. In Section (c) of the Rio Grande Basin portion of this Act, there is the following language:

> "... And provided further, That when estimates of anticipated streamflow made by appropriate agencies of the Federal Government indicate that the operation of reservoirs constructed as a part of the Middle Rio Grande Project may affect the benefits accruing to New Mexico or Colorado, un-

der the provisions of the eighth unnumbered paragraph of article VI of the Rio Grande compact, releases from such reservoirs shall be regulated to produce a flow of ten thousand cubic feet per second at Albuquerque, or such greater or lesser rate as may be determined by the Chief of Engineers at the time to be the maximum safe flow, whenever such operation shall be requested by the Rio Grande compact commissioner for New Mexico or the commissioner for Colorado, or both, in writing prior to commencement of such operation."

This provision means that all the flood control reservoirs in New Mexico are not only operated by law in conformity with the Compact, but in addition are operated under the quoted language in such a way as to *guarantee to Colorado and New Mexico the maximum benefit available under unnumbered paragraph 8 of Article VI.* It follows from this provision that Colorado's insistence on the need of a water master to control the flood control reservoirs in New Mexico is superfluous. The benefit that Colorado professes to seek from the extension of a water master's authority into New Mexico is as illustrated above already embodied in the law as a condition of operation of both Abiquiu and Jemez Reservoirs, and the reservoirs have been so operated since the construction without complaint from Colorado.

F. IT IS NOT NECESSARY TO COLORADO'S ENJOYMENT OF THE BENEFITS OF THE "ACTUAL SPILL" AND "MINIMUM UNFILLED CAPACITY" PROVISIONS OF THE COMPACT, THAT THE UNITED STATES BE A PARTY TO THIS SUIT.

The "minimum unfilled capacity" provision of Ar-

ticle VI must be read together with the provision on actual spill in order to make understandable what the framers of the Compact intended. The two provisions are closely related in this way: If the two upper states have between them a large accrued debit, then the only way they can obtain benefit under Article VI is in a year of heavy run-off, when there is already a large quantity of water in project storage. If project storage actually spills, debits are completely erased, but this is, of course, an exceedingly unlikely occurrence. The more probable situation is that when debits are large and project storage is high, there will be reductions of debits by means of the "minimum unfilled capacity" provision of Article VI.

Under this provision, as project storage gets higher and higher, the unfilled capacity becomes smaller and smaller. Ultimately, if this process continues, the debits of the upper states will have been eliminated by the time "actual spill" occurs. "Actual spill" is merely the point at which the "minimum unfilled capacity" provision has erased all debits. We submit that the provision in Public Law 86-645, recited above, is in that law for the express purpose of insuring that the flood control reservoirs installed in the Middle Rio Grande since 1929 do not deprive the upper states of the benefits of the "unfilled capacity" provision of Article VI.

It should be particularly noted on this point that the underlying physical conditions which bring into play the possibility of actual spill are identical with those in which "minimum unfilled capacity" applies. Inasmuch as Colorado has consented to the operation of flood control reservoirs, and their operation under

the provision of Public Law 86-645 does guarantee a maximum advantage to New Mexico and Colorado under Article VI, we believe it is necessary to conclude that Colorado's threatened insistence on extending the authority of the water master below the Colorado-New Mexico state line would be a completely useless act which this Court should not require.

II. THE ELEPHANT BUTTE IRRIGATION DISTRICT AND MIDDLE RIO GRANDE CONSERVANCY DISTRICT ARE NOT INDISPENSABLE PARTIES.

Colorado argues (p. 38, Brief in Opposition) that the Middle Rio Grande Conservancy District and the Elephant Butte Irrigation District are indispensable parties, but may not be joined because of the Eleventh Amendment to the United States Constitution.

It is only necessary to point out in reply that both are political subdivisions of the State of New Mexico and represented by New Mexico in this case under the established rule of *parens patriae. Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* supra.

Colorado's argument is based on the assumption that this suit ". . . . will necessarily require the determination of the relative rights of the Elephant Butte Irrigation District on the one hand, and of the Middle Rio Grande Conservancy District, the Indians, and other New Mexico water users above San Marcial on the other hand." (Colorado's Brief in Opposition, p. 41)

This assumption is entirely incorrect. As stated above, Texas and New Mexico do not agree that the relative rights of water users *below the Colorado state line* are in any way at issue in this case. We are in

this Court seeking water deliveries at the Colorado-New Mexico state line by compelling Colorado's compliance with the Compact. All users below the state line can only benefit from such additional deliveries and no question of the relative rights of such users is before this Court.

III. THE SUGGESTED ADMINISTRATIVE SOLUTION DOES NOT RENDER THIS LITIGATION UNNECESSARY.

Colorado's Brief, as well as the Memorandum for the United States, raises the question of an administrative solution to the problem. Colorado argues that, just as one of the grounds for dismissal of the *Texas v. New Mexico,* supra, suit was the administrative solution at hand, so there is a parallel and sufficient solution at hand which makes the present litigation unnecessary.

In *Texas v. New Mexico,* supra, the United States informed the Supreme Court that there was *then under construction* a water salvage and river channelization project in the middle Rio Grande area. At page 6 of its Memorandum Under Order of October 17, 1955, the United States stated:

> "It prefers not to intervene at this time because it believes that its rehabilitation and reclamation work in the area will accomplish everything that can be done toward a solution of the problem. That work is proceeding expeditiously and satisfactorily. According to a report received from the Interior Department under date of October 10, 1956, a total of $11,121,000 was spent by the Bureau of Reclamation up to June 30, 1956, and work costing an estimated $11,400,000 remains to be done.

Of the latter, $3,365,000 is scheduled for the current fiscal year and $3,715,000 for fiscal 1958. Rehabilitation of the Middle Rio Grande Conservancy District facilities is slightly more than half completed; channelization has been completed for 84 miles of the river bed, and is planned for an additional 104 miles. It is estimated that work done in the San Marcial channel saved about 45,000 acre feet of water during the past year and that work in the Socorro channel when completed will save an equal amount. Removal of vegetation from canals is expected to save 25,000 acre feet, and certain flood prevention work another 8,300 acre feet. Other work on the irrigation and drainage canals is saving and will save indeterminate but substantial amounts. On the basis of present expectations, it seems that the deficit in deliveries at San Marcial will not exceed 30,000 acre feet for the current year, or 10,000 in the aggregate for the two years of federal operation, despite the fact that these have been two of the driest years on record. Late rains could reduce the year's deficit or eliminate it altogether. The present hope and expectation is that when the Government's work is fully completed, there will normally be no deficit at San Marcial."

This quotation makes clear that at the time of the dismissal of the earlier suit by the Supreme Court the Middle Rio Grande Project was well underway, considerable moneys had been expended in its construction, and there was an immediate prospect of relief to the plaintiff in the case by means of the project if the suit were dismissed. It is immediately apparent that the administrative solution suggested by Colorado and the United States in this case *is not analogous in terms of certainty, time, money or benefit.* According to the Bureau of Reclamation plan, the project would re-

quire eight (8) years to complete after commencement of construction, and Colorado admits that thirty-five years (35) of operation after completion would be required to erase Colorado's debit. (Colorado's Brief in Opposition, pages 61 and 66.)

Colorado's Brief in Opposition states at page 49 that the reconnaissance report of the Bureau of Reclamation on the proposed closed basin drain project has been endorsed by the local conservancy districts and the Colorado Water Conservancy Board. This illustrates the status of the "administrative solution" proposed by Colorado. Far from a project in being, the closed basin drain is merely a paper plan which by Colorado's own admission has been under discussion for many years and still has not even been introduced in Congress. In point of fact, the opposition or suspicion of water users within the San Luis Valley in Colorado has impeded and retarded the development of the closed basin drain plan. Although the interested conservancy districts have at last formally approved the plan, their approval is hedged about with qualifications and conditions which give rise to questions as to the warmth of their support for it. (Colorado's Brief in Opposition, Appendices 5, 6 and 7.) As the United States concedes on page 6, of its Memorandum:

> *"The principal beneficiary, the State of Colorado, has declined to share in the project's cost."*

Colorado also quotes at some length from the Bureau of Reclamation reconnaissance report on the closed basin drain and attaches a copy of the Regional Director's letter of transmittal describing the project in detail. Brief in Opposition, Appendix 2.

Since the filing of Colorado's Brief in Opposition there has been an additional development regarding the proposed closed basin drain project which must be weighed in considering its usefulness as an administrative solution to the present problem. At the February 16, 1967 meeting of the Rio Grande Compact Commission in Santa Fe, New Mexico, the commissioner for Colorado, Mr. Ralph Owens, invited Mr. Leon Hill, the Regional Director of the Bureau of Reclamation, to report to the Commission on the status of the closed basin drain project. Mr. Hill then spoke as follows:

> "I would like to read a couple of paragraphs from the letter from Phillip S. Hughes, Deputy Director, Executive Office of the President, Bureau of the Budget, to Secretary Udall, under date of August 6, 1966. 'The Bureau of the Budget notes that the report proposes that the allocation to water salvage be made nonreimbursable. The Bureau understands that water made available by the proposed project in the main stream of the Rio Grande would make a substantial contribution to the improvement of Colorado's debtor status under the Rio Grande Compact. A review of the legislative history of the Compact suggests no Federal responsibility to meet the obligations of States under the Compact. In view of this, it would seem appropriate that a repayment formula be proposed which reflects this fact. Water in excess of that required to assist Colorado in meeting its obligations under the Compact might be considered reimbursable under the standards generally used on reclamation projects but subject to a Secretarial finding that beneficiaries can be identified.
>
> " '*The Bureau of the Budget would not favor authorization of this project as presently proposed for the reasons discussed above.* However, should this report be transmitted to the Congress for its

information, the Bureau requests that its views be included in your letter of transmittal.'

"This hung around the Department from that time and, of course, while Congress was out of session, I didn't think too much about it, but when they went back into session, I began to make further inquiries as to when we were going to send this over to the hill. *My information at this time is, it is very doubtful that the Department, in view of this letter, will transmit the report to Congress at this time.* The problem, of course, is going up before the committees with the total bill nonreimbursable. That is the status of it at this time." [Emphasis added.]

This quotation indicates the current status of the project. The closed basin project is not close to completion as was the Middle Rio Grande Project in 1956. On the contrary, *it has not even been presented to Congress for authorization and, may never be,* as was made clear by Mr. Hill's statement above. This is certainly a far cry from the sort of administrative solution at hand in the middle Rio Grande in 1956.

The United States suggests at the conclusion of its Memorandum that this Court should stay further proceedings for 6 months to permit further exploration of the "administrative solution." Plaintiffs would like to point out that the proposed "administration solution" has already been under study for more then 25 years by Colorado and the United States. (Colorado Brief in Opposition, Appendix 2.)

Plaintiffs do not believe that a six month delay can produce any dramatic improvement in the prospects of the project as an administrative solution; nor do plaintiffs concede that the project's authorization and

construction of the closed basin drain would in fact constitute an administrative solution, which would "moot the controversy" as is suggested in the Memorandum for the United States at page 5.

CONCLUSION

Texas and New Mexico oppose the suggestion of the United States for a delay, and respectfully request this Court to grant their pending Motion For Leave to File Complaint at this time and, thereafter, to refer to a Special Master such issues as the Court may deem appropriate.

Respectfully submitted,

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PROOF OF SERVICE

I, Roger Tyler, one of the Attorneys for the Complainants (States of Texas and New Mexico) herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 12th day of May, 1967, I served copies of the foregoing Response of Texas and New Mexico to Colorado's Brief in Opposition, and to the Memorandum for the United States, on the Attorney General of the United States, the Solicitor General of the United States, and on the Governor and Attorney General of Colorado, by mailing a copy in a duly addressed envelope with first-class postage pre-paid, to each of the following in this cause:

Hon. Ramsey Clark
Attorney General of the United States
Washington, D. C. 20530

Hon. Thurgood Marshall
Solicitor General
Department of Justice
Washington, D. C. 20530

Hon. John A. Love
Governor of Colorado
State Capitol
Denver, Colorado 80203

Hon. Duke W. Dunbar
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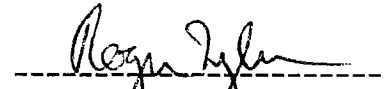

ROGER TYLER

APPENDIX I

FIRST REPORT OF SPECIAL MASTER

February 28, 1954

NOTE: * indicates pages of original report.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953.

No. 9, Original.

STATE OF TEXAS,

Plaintiff,

vs.

STATE OF NEW MEXICO et al.,

Defendants.

REPORT OF SPECIAL MASTER

Respecting Indispensability of the United States and of Elephant Butte Irrigation District, as Parties.

On December 22, 1952, the Court entered its order appointing me Special Master in this case and directing the Special Master "to hold hearings, take such evidence as may be necessary and, with all convenient speed, to submit a report with recommendations relative to the disposition of the questions raised by the pleadings."

The Court's order further recited that its order of April 28, 1952, had left open the question of indispensability of the United States as a party for decision after evidence; and directed the Master, in hearing the evidence, so far as was practicable to hear first evidence bearing on the indispensability* of the United States,

if the United States did not enter its appearance in the case. The Master was requested "to examine and report on that point, if practicable, separately and prior to his report on the other issues, determining particularly whether effective relief could be granted petitioner without affecting the interest of the United States." The Master was further ordered to "give like consideration to any other allegation of indispensability made by any party defendant."

Although representatives of the Department of Justice were present as observers at the hearings and the oral argument, the United States has not entered its appearance. And, prior to the Court's order of December 22, 1952, defendants Middle Rio Grande Conservancy District, its directors and chief engineer (hereinafter referred to collectively as "Middle Rio Grande"), had in their answer pleaded that Elephant Butte Irrigation District was an indispensable party to this suit. I therefore report now regarding (1) the indispensability of the United States, and (2) the indispensability of Elephant Butte Irrigation District.

A preliminary conference with counsel regarding procedure was held at Dallas, Texas, on February 6, 1953. On March 23, 24, 25 and 26 an inspection of the Rio Chama, commencing at El Vado Reservoir, just below the Colorado line, to its confluence with the Rio Grande, and of the Rio Grande from that point to Fort Quitman, approximately 100 miles below El Paso, was made by me, accompanied by the parties' counsel and engineers. This inspection included the irrigation and drainage systems and all points, installations and projects, whether on the Rio Grande or near by, which any party considered relevant to the issues.*

On March 27 a prehearing conference was held at El Paso, Texas. On April 6, 7 and 8 hearings were held at Santa Fe, New Mexico, following which the parties submitted briefs on the issues of indispensability. Oral argument was held in St. Louis, Missouri, on September 28, 1953.

All testimony on the issues of indispensability has been concluded and the transcript, the documentary exhibits and the three briefs presented to me have been filed with the Clerk. It was not practicable always to limit the testimony strictly to the issues of indispensability, but so far as possible this was done. No oral testimony offered by any party was in the end excluded.[1] With a single exception,[2] no proffered document was excluded from the record; although several documents were within the reach of judicial notice, they were nevertheless by agreement of the parties, for the sake of convenience, admitted as part of the record. The parties have had full opportunity to present all the evidence on the issues of indispensability, whether oral or written, that they desired. At the conclusion of all evidence offered by the parties, I deemed it necessary to call for additional evidence with respect to certain interests of the United States, in response to which call some additional evidence was introduced.

In this suit Texas complains of alleged violations by defendants of the Rio Grande Compact, which apportions and regulates the use of water of the Rio Grande above Fort Quitman, Texas. The Compact was signed in 1938, ratified by the States of Texas, New Mexico

[1]At the hearings at Santa Fe rulings on 17 objections were reserved. Subsequently four objections were withdrawn by Texas, and the remaining 13 were overruled.

[2]See Appendix.

and Colorado and consented to by the Congress in 1939 (53 Stat. 785). The State of Colorado is not a party to this suit and no complaint is made with respect to it.*

In its complaint (16-18) Texas asked for injunctive relief against the defendants, alleging that unless the rights of Texas under the Compact were enforced by this Court, defendants "will continue to wrongfully store, divert and use waters of the Rio Grande in violation of the rights of the State of Texas and its citizens under said Compact, to their irreparable injury," for which they had no adequate remedy except by this action.

At the outset I requested of Texas a statement of the relief which it considered would be effective, in as specific terms as possible (R. 8). Pursuant to that request Texas filed at the opening of the hearings in Santa Fe a "Statement as to Relief Sought by Texas" (R. 63-64), and subsequently filed an "Amended Statement as to Relief Sought by Texas" (R. 967-969). Objections to each of these were overruled, since I considered that they did not have the effect of enlarging the issues. In my opinion the decree sought by the Amended Statement would provide effective relief for Texas. This has accordingly been used to measure the impact of the relief sought upon the interests of the United States, although Texas has suggested "that if this Court should be of the opinion that some modification should be made in order to award to Texas the relief to which the facts may show her to be entitled under the allegations of the complaint, it may and will do so . . ."[3]

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[3]Brief of Texas before the Special Master, 9-10. The briefs before the Master will hereafter be referred to by the abbreviation "Defts.", followed by the page reference, for the

The Amended Statement asks that a decree be entered which (in addition to a provision for the retention by the Court of jurisdiction to make further orders and the usual prayer for other and further relief) will provide:

> "1. That the State of New Mexico and the other defendants herein be enjoined from storing water in* El Vado Reservoir or any other reservoir constructed on the Rio Grande or its tributaries after 1929 in New Mexico above San Marcial, whenever and so long as there is less than 400,000 acre-feet of usable water in Project storage as provided by Article VII of the Rio Grande Compact.
>
> "2. That said defendants be enjoined and restrained from incurring further annual debits as defined by the Rio Grande Compact until the accrued debit of New Mexico be reduced below the maximum amount permitted by the terms of the Compact.
>
> "3. That said defendants be required to release water from storage reservoirs constructed after 1929 in New Mexico above San Marcial to the amount of the accured debit of New Mexico at the greatest rate practicable under the conditions then prevailing whenever, at the beginning of any year, the quantity of water in Project storage is less than 600,000 acre-feet, and when the Commissioner for Texas during the month of January of any such year demands such release of New Mexico sufficient to bring the quantity of usable water in Project storage to 600,000 acre-feet by March 1, and to maintain this quantity in storage until April 30th of the same year.

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opening brief of the defendants; by "Defts. R.", followed by the page reference, for their reply brief; and by "Tex.", followed by the page reference, for the brief of Texas.

"4. That this Court appoint a Special Water Master to enforce the provisions of the decree of this Court with authority and directions to him to act in conformity therewith until such time as this Court may determine his services are no longer necessary, or until such time as all parties hereto may, by written stipulation, agree to his discharge, and that the Court instruct such Special Master to so allocate the waters under his control as to give priority to such lands under Indian ownership within the exterior boundaries of the Middle Rio Grande Conservancy District as have been determined by the Secretary of* the Interior to have priority over other lands of the Middle Rio Grande Conservancy District, or as may in the future be determined to have such priority by the final judgment of any court of competent jurisdiction; and that in making such allocation to prior right lands, the Water Master shall furnish to them such amount of water as may be demanded for said lands by the Area Irrigation Engineer of the Albuquerque Area Office, Bureau of Indian Affairs, Department of the Interior, Albuquerque, New Mexico."

Briefly stated, the general geography is as follows:

The Rio Grande rises in Colorado, and after entering New Mexico flows south through the entire length of the state. From a point about 15 miles north of the southern boundary of the United States, it forms the boundary between the states of Texas and New Mexico (see *New Mexico v. Texas,* 275 U. S. 279); thence it turns east at El Paso and becomes the boundary line between the United States and Mexico. Water deliveries by Colorado are measured at the Lobotos gaging station located just above the Colorado-New Mexico boundary (R. 99). The Compact gaging station at Otowi is located a short distance below the confluence

of the Rio Grande and the Rio Chama (R. 77), about 100 miles below the Colorado line. Under the Compact the flows at Otowi constitute an index from which are derived the quantities of water which are required to be delivered at San Marcial (R. 670).[4] El Vado Dam and Reservoir are located on the Rio Chama about 20 miles south of the Colorado line (R. 78).

Defendants' statement of the case (Defts. 2-20) is conceded by Texas (Tex. 1) to be substantially correct as far* as it goes and to present "a sufficient background for consideration of the points of law involved at this time in this litigation." A general description of the portion of the Rio Grande involved here appears in the stipulation of the parties (R. 76-80), and the historical background follows in the same stipulation (R. 80-87). Defendants' Exhibit 1 (R. 128) is a map of the area, which Texas agrees is correct "as far as it goes" (R. 1198).[5] A statement of the facts relevant to each of the grounds on which the assertion of the indispensability of the United States is rested will be made as these grounds are dealt with below.

This Court has often announced the general principles applicable in determining whether a suit must be dismissed because of the absence of an indispensa-

[4]The Rio Grande Compact Commission on February 24, 1948, adopted a new schedule to take the place of the one appearing in Article IV of the Compact (R. 1151-1155). This new schedule is for twelve months rather than nine months, and the Elephant Butte Effective Supply is substituted for the San Marcial Supply. The parties agree that these changes are irrelevant to the issues of indispensability (Defts. 3, Tex. 11).

[5]Texas' objections to the map were that it did not definitely show the outlines of the Middle Rio Grande Conservancy District, nor did it show all the diversion points below Otowi (R. 1197-1198).

ble party. Thus, it has said that indispensable parties are "those whose interests in the subject matter of the suit, and in the relief sought, are so bound up with that of the other parties, that their legal presence as parties to the proceeding is an absolute necessity, without which the Court cannot proceed" (*Barney v. Baltimore,* 6 Wall. 280). It has also observed that "there is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not" (*Niles-Bement-Pond Company v. Iron Moulders Union,* 254 U. S. 77, 80). The question must be determined on the basis of the particular situation. The factors requiring consideration include the plaintiff's right to obtain justice, the impact of the relief sought upon the absentee, and the effect of the absence upon the ability of the Court to do justice.

There are cases where an appropriate defendant cannot be sued. "It would be a misapplication of the rule," in such a case, "to dismiss the plaintiff's bill because he has not done that which the law will not enable him to do";* the rule is not inflexible, but is subject to the Court's discretion (Chief Justice Marshall in *Elmendorff v. Taylor,* 10 Wheat. 152, 166-168). In such situations the Court has referred to "the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in" (*Bourdieu v. Pacific Western Oil Company,* 299 U. S. 65, 71).

An effort will be made to do justice between the parties, shaping the relief in such fashion as to preserve the rights of absentees (*Waterman v. Canal-Louisiana Bank and Trust Co.,* 215 U. S. 33, 49; *Payne v. Hook,* 7 Wall. 425; *Omaha Hotel Co. v. Wade,* 7 Otto 13, 97

U. S. 13); provided (1) that the interest of those absent must not be affected; and (2) that it is possible to do justice between the litigants without "leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" (*Shields v. Barrow,* 17 How. 130, 139).

Indispensability of the United States.

In their return to the rule to show cause, in their answers and in their objections to the motion for appointment of a Special Master, defendants pleaded (Defts. 14) that the United States was an indispensable party to this suit because:

(a) There are within the Rio Grande Basin, in New Mexico above San Marcial, 13,600 Indians over whom the United States has plenary control.

(b) By the Convention of 1906 (34 Stat. 2953) the United States is obligated to deliver 60,000 acre-feet of water annually to Mexico.

(c) The Uuited States has constructed Elephant Butte and Caballo Reservoirs on the Rio Grande in New Mexico* and delivers water stored therein to irrigate lands within the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas.

(d) The United States has contracted to acquire the facilities and works of the Middle Rio Grande Conservancy District, including El Vado Reservoir.

At the invitation of the Court the United States as amicus curiae filed a memorandum in which the position was taken that the United States was an indis-

pensable party because of the first two matters pleaded by the defendants, that is, the obligation to Mexico under the Convention of 1906, and the position of the United States as protector of the rights of the Indians to water of the Rio Grande, of which they might be deprived by the relief sought by Texas. As to these, Article XVI of the Compact provides:

> "Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the rights of the Indian Tribes" (R. 677).

At the pre-hearing conference defendants suggested additional grounds for indispensability and at the hearings at Santa Fe still others.[6] All but Nos. 2, 5, 6, 7 and 13 of these additions were derived from a footnote in the amicus curiae memorandum filed by the United States, in which they were listed as "other interests of the United States in the area," upon which the indispensability of the United States was not rested because "it does not appear from present information how seriously those interests would be affected."*

What finally emerged as the interests of the United States on which defendants rested their assertion of its indispensability, were the following (R. 54-57; Defts. 31-64):

1. The Convention with Mexico.

2. The Federal Correctional Institution at La Tuna, Texas.

3. Elephant Butte and Caballo Reservoirs.

---

[6]Texas has not objected to the assertion of grounds for indispensability in addition to the four pleaded.

4. The Bosque del Apache Grant.

5. Kirtland Air Field.

6. The United States Veterans Hospital at Albuquerque, New Mexico.

7. The installations and activities of the Atomic Energy Commission at Sandia, New Mexico.

8. The Federal Middle Rio Grande Project for flood control.

9. Control of navigation.

10. The National forests.

11. Public domain grazing lands.

12. The interests of the Soil Conservation Service.

13. The installations and activities of the Atomic Energy Commission at Los Alamos, New Mexico.

14. The contract to acquire the facilities and works of the Middle Rio Grande Conservancy District, including El Vado.

15. The rights of the Indians.*

1. *The Convention With Mexico.*

As stated by the United States in its memorandum, the Convention of 1906 requires the United States to deliver 60,000 acre-feet of water annually in the bed of the Rio Grande at a point where the head works of the Acequia Madre, known as the Old Mexican Canal, now exists, near El Paso, Texas, and Juarez, Mexico. This water comes from Caballo and Elephant Butte Reservoirs (R. 1247-1249). The delivery point is more than 120 miles below Elephant Butte, and Elephant Butte in turn is below San Marcial, the point at which,

under the Compact, water was to be delivered by New Mexico. The Convention further provides (Article II) that in case "of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States" (R. 646, 1247-1248).

Since 1938, when measurement of the water delivered to Mexico first became possible, the deliveries have fallen below 60,000 acre-feet in the years 1940, 1941, 1947, 1951 and 1952, the delivery in 1951 having been only 43,000 acre-feet and the provisional figure for 1952 being 49,700 acre-feet (Defts. Ex. 47, R. 1251). The reduction in deliveries has been due to the shortage of water (R. 1252-1253).*

As defendants say (Defts. 50), any decrease in the availability of water for Elephant Butte storage will adversely affect the ability of the United States to perform its treaty obligation. But the relief sought by Texas in this suit is designed to bring more water into Elephant Butte Reservoir. To the extent that it is effective it would enable the United States to increase its deliveries of water to Mexico up to the 60,000 acre-feet called for by the convention (R. 1252-1253).

It seems clear (notwithstanding the broad language used in some of the cases) that the United States does not become an indispensable party simply because it would be affected by the relief sought—the effect must be an injurious one. If the effect would be beneficial, then the United States is not an indispensable party; it can take what is given to it, without effort on its part and without obligation, and if it considers itself en-

titled to more, is still perfectly free to pursue its remedy. *Payne v. Hook,* 7 Wall. 425; *Waterman v. Canal-Louisiana Bank & Trust Co.,* 215 U. S. 33; *United Shoe Mchy. Co. v. United States,* 258 U. S. 451; and see *Bourdieu v. Pacific Western Oil Co.,* 299 U. S. 65.

If this is so, the corollary must be that the United States does not become an indispensable party because denial of the relief sought would fail to give it the benefit which would result from the relief. In every case where relief beneficial to an absent party was sought, a successful defense would have this result.

Defendants urge, however, that the Mexican obligation renders the United States indispensable, because the construction which defendants by their answers seek to place upon the Compact (not the relief sought by Texas), would, if sustained by this Court, reduce the quantity of water available for Elephant Butte. The answers allege that the New Mexican debits and accrued debits in San Marcial deliveries are not as stated in the complaint and as determined by the Rio Grande Compact Commission, in that the New Mexico area above San Marcial should not be charged with all uses of water by Indians; that so to charge New Mexico's citizens above San Marcial having water rights would be to deprive them of their property without compensation, without due process of law, and to deny them the equal protection of the laws; that in addition the Compact was intended to protect uses of and rights to* water existing at the time of its negotiation; and that if the Ottowi flows "are reduced by the quantity of Indian use, then the deliveries at San Marcial are reduced accordingly under the schedule and the quantity of water available for the United States at Ele-

phant Butte is adversely affected" (Defts. 51-53).

If defendants were asking relief by way of cross-bill or cross-claim, the indispensability might be measured by the cross-relief sought; but they do not ask affirmative relief and indeed appear to consider that they cannot (R. 1242). Their interpretation of the Compact is therefore urged solely as a defense, and if sustained would result in nothing more than a dismissal of the suit, leaving the parties—so far as appears—where they are now. The United States would not be bound by any such dismissal, no matter what the reason for it. Framing a decree which would dismiss the suit, but which would not affect the interest of the United States in maintaining the interpretation heretofore and now given to the Compact by the Compact Commission, would appear to present no great difficulty.

Accordingly, I conclude that its obligation under the Convention with Mexico is insufficient to make the United States an indispensable party.

2. *The Federal Correctional Institution at La Tuna, Texas.*

3. *Elephant Butte and Caballo Reservoirs.*

Above Juarez on the Rio Grande lies El Paso County Water & Improvement District No. 1 (in Texas), above it lies Elephant Butte Irrigation District (in New Mexico), and above it Caballo and Elephant Butte Reservoirs, from which both Districts derive their water for irrigation. These comprise the Federal Rio Grande Reclamation Project (R. 77), the irrigable area of which is about 178,000 acres (R. 447).*

Elephant Butte Reservoir is located across the channel of the Rio Grande, the dam being approximately

100 miles north of the Texas-New Mexico boundary. The reservoir was constructed by the United States Bureau of Reclamation, at large cost, and was completed in 1916 with an original capacity of 2,638,860 acre-feet (R. 78, 81). The water-use facilities consist of approximately 610 miles of main canals, five diversion structures, 460 miles of drains and approximately 8,000 additional structures such as bridges, culverts, checks and terminals, the distribution system being constructed principally between 1914 and 1928 (R. 447).

Caballo Reservoir is located across the channel of the Rio Grande a short distance below Elephant Butte. This also was constructed by the United States Bureau of Reclamation, and was completed in 1938 with an original capacity of 345,900 acre-feet (R. 78).

The original purposes of Elephant Butte were (1) to assist in the delivery of water to Mexico as required by the Convention of 1906 and (2) to furnish a water supply for irrigation of the Project area (R. 81). Bebetween 1938 and 1940 (R. 448), a hydro-electric plant was constructed at Elephant Butte. This includes approximately 500 miles of transmission lines, the construction of which was commenced in 1939 and is still under way (R. 448). The Project is operated by the Bureau of Reclamation of the Department of the Interior (R. 448).

The construction of Caballo (originally conceived as a flood-control unit—R. 470) was substantially contemporaneous with the installation of the power generation facilities at Elephant Butte (R. 471). Caballo was required to recapture and restore water used for such generation of power, for subsequent use in irri-

gation (R. 82, R. 470; Defts. Ex. 12, R. 471, and Defts. Ex. 13, R. 489).*

The Bureau of Reclamation has contracts with the two Districts for the delivery of water for irrigation (Defts. Ex. 11, R. 460; Defts. Ex. 12, R. 471; and Defts. Ex. 13, R. 489). It also has a Warren Act[7] contract with the Hudspeth County Conservation & Reclamation District No. 1, giving to that District, which comprises 20,000 acres of irrigated land below the El Paso District, the right to use for irrigation purposes return flow and waste waters from the Rio Grande Project, when available (R. 79). No part of the Hudspeth District lies within the Project (R. 79). The Bureau has in addition contracts for the sale of electric power to municipalities (Defts. Ex. 14, R. 508); to REA Cooperatives (Defts. Ex. 15, R. 536); to privately-owned public utilities (Defts. Ex. 16, R. 565), and a contract with the War Department for the sale of power for the White Sands Proving Ground and the Alamogordo Air Field (Defts. Ex. 17, R. 600).

The water used at Elephant Butte comes from the Rio Grande (R. 625-626). To provide a water supply for the Project the United States filed its application for the right to appropriate and store 730,000 acre-feet of Rio Grande water in Elephant Butte, with a priority date of January 23, 1906 (R. 81, Tex. Ex. 3, R. 204). By amended application dated April, 1908, this claim was enlarged to include all the unappropriated water of the Rio Grande and its tributaries (R. 81-82; Tex. Ex. 3, R. 203-221).[8]

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[7]Act of February 21, 1911 (36 Stat. 925).

[8]New Mexico's position is that there is no issue at this time as to the validity of these filings (R. 281).

In the operation of the Project the use and operation of the hydro-electric plant is subordinated to the irrigation purposes, as required by law (R. 631). No water is released from Elephant Butte that cannot subsequently be released from Caballo for irrigation purposes at the time when required (R. 632). The power program is to release from Elephant Butte during the non-irrigating period,* from September 15th to March 15th, sufficient water to approximate the storage of 275,000 to 285,000 acre-feet in Caballo Reservoir by March 15th (R. 632-633). The power operation is not permitted to interfere with the primary purpose of furnishing water for irrigation (R. 633).

The La Tuna Correctional Institute, which is owned and operated by the United States, lies partly within and partly without the El Paso District (R. 627). The Institute has 400 acres of land which have water rights, assigned under the total water right area allotted to the El Paso District, under its contracts with the Bureau of Reclamation (R. 628-629). The water right is paid up as to construction costs, but the Institute pays the operational and maintenance charges precisely like the holder of any other water right in the District (R. 630, 637-638).

The amicus curiae memorandum of the United States, listed (in the footnote) Elephant Butte as an interest of the United States, upon which the indispensability of the United States was not rested because present information did not make clear how seriously it would be affected. The memorandum did not mention, even in the footnote, the La Tuna Correctional Institute, the irrigation of whose farm appears not to be a matter of great magnitude (*cf. Chance v. Buxton,* 163 F. 2d 989, 990).

The relief sought by Texas in this suit is designed to bring more water into Elephant Butte Reservoir. To the extent that it is effective, more water will be available for the irrigation of the Rio Grande Project area (including La Tuna) and for the generation of power (R. 636, R. 1253-1254). Defendants make the same argument here as is made with respect to the obligation under the Convention with Mexico (Defts. 47-54). I conclude that the same answer must be made, and that these interests are insufficient to make the United States an indispensable party.*

4. *The Bosque del Apache Grant.*

Immediately above Elephant Butte on the Rio Grande, and between it and San Marcial, the original Compact delivery point, lies the Bosque del Apache. The area thus lies between the southern limit of the Middle Rio Grande Conservancy District and Elephant Butte (R. 116). This has been acquired by the United States as a bird refuge and it is planned to devote some of the land to irrigation (R. 794). In File No. 2 in the New Mexico State Engineer's office is an application for 97 cubic feet of water per second of time for use on the Bosque del Apache Grant under a priority date of January 4, 1906, assigned by the applicant in 1924 to one Schrellkopf (R. 155, Defts. Ex. 8, R. 390).[9]

The Fish and Wild Life Service of the Department of

[9]With the exception of the rights of the Indians (referred to below), this is the only filing in evidence which appears to have priority over the Elephant Butte filings. The law of New Mexico is the appropriation doctrine, that he who is first in time is first in right (Const. of New Mexico, Art. XVI, Sec. 2). The New Mexico law further provides that non-use of appropriated water for a period of four years, not excused by circumstances beyond the control of the owner of the right, works a forfeiture (Laws 1941, Ch. 126, Sec. 16, p. 206).

the Interior is the present claimant of the water covered by this filing (R. 396). If continuous diversion were made a total of approximately 70,000 acre-feet would be diverted from the Rio Grande annually (R. 1184). There was no evidence with regard to the amount of water currently used or currently desired for the Bosque del Apache.

The amicus curiae memorandum of the United States lists the Bosque del Apache in the footnote.

The relief sought by Texas is designed to bring more water into Elephant Butte. This water cannot flow from San Marcial to Elephant Butte without passing the Bosque del Apache, so as to become physically available to it. From an engineering standpoint it may be theoretically possible that a 10 per cent diminution in the use of water by New Mexico above Elephant Butte might require some* diminution of the use by the Bosque del Apache (R. 1193-1194; Defts. 59), but there is no evidence which would suggest it. And the early priority date of the Bosque del Apache must be borne in mind.

In any event, the United States' right to water for the Bosque del Apache is derived from New Mexico and can rise no higher than the right of New Mexico; so that New Mexico stands in judgment for the United States as for any other appropriator in New Mexico. *Nebraska v. Wyoming,* 295 U. S. 40; *Nebraska v. Wyoming,* 325 U. S. 589, 629.

Accordingly, I have no difficulty in reaching the same conclusion with respect to this interest of the United States as has been reached above with respect to Nos. 1, 2 and 3. The interest of the United States, whatever that may be, in water for the Bosque del Apache is

insufficient to make the United States an indispensable party.

5. *Kirkland Air Field.*

6. *United States Veterans Hospital at Albuquerque, New Mexico.*

7. *The Installations and Activities of the Atomic Energy Commission at Sandia, New Mexico.*

North of San Marcial and south of the northern limit of the Middle Rio Grande Conservancy District are Kirkland Air Field, the United States Veterans Hospital at Albuquerque, and the installations of the Atomic Energy Commission at Sandia, New Mexico. These are not within the Middle Rio Grande District, whose width ranges from one-tenth of a mile up to a maximum of about six miles (R. 116). None of these interests was mentioned in the memorandum of the United States. The sole evidence with regard to them is that the first two derive their water supply from the City of Albuquerque (which derives its supply* from wells tapping ground water that is tributary to the Rio Grande—R. 111), and that the Sandia Base derives its supply from wells which tap ground water that is tributary to the Rio Grande (R. 114). Evidence is wholly lacking as to the amount of water currently used or currently required by these installations, although it was suggested that evidence of the impact of the relief sought by Texas should be adduced (R. 1236-1238).

The relief sought would, of course, not directly affect any of these interests. But defendants urge that any curtailment of water use above San Marcial to assure an Elephant Butte supply carries with it the haz-

ard of an adverse effect upon the water supply of these activities of the United States (Defts. 60). Texas replies that there is no evidence that any of them would be affected "to the extent of so much as one bucketful of water" by enforcement of the Compact, and that even if there were such evidence, the principle, *de minimis non curat lex,* applies (Tex. 44).

The rule laid down in *Nebraska v. Wyoming,* supra, mentioned under the preceding point, appears to apply with equal force here. I concluded that, on the record and on the law, these interests of the United States are insufficient to render it an indispensable party.

8. *The Federal Middle Rio Grand Project for Flood* Control.

The Federal Middle Rio Grande Project for flood control was originally approved and authorized by the Flood Control Act of 1948.[10] Among the components of this large project are a channel rectification program and floodway (R. 117-118), and other channel work (R. 119), the Chamita Reservoir on the Rio Chama, not yet constructed (R. 103), and a flood control and sediment detention reservoir near the mouth of the Jemez River (R. 1258). The acquisition* of El Vado Reservoir by the United States (which is dealt with below) is also a part of the Project. As to this Project (with the exception of the contract to acquire El Vado), the memorandum of the United States stated only (in the footnote), that it "is also interested in the control of floods on the Rio Grande" (R. 794).

The Project, a joint undertaking by the Army Corps of Engineers and the Bureau of Reclamation, is de-

[10]Act of June 30, 1948, 62 Stat. 1171.

signed for flood control and the rehabilitation of the Middle Valley (the area from Cochiti to San Marcial), and involves the expenditure of some $69,000,000 (R. 84).

Defendants' evidence is that if Texas obtains the relief it seeks, the Jemez Reservoir could not be used for the control of floods, whenever there was less than 400,000 acre-feet of usable water in Rio Grande Project storage (R. 1258). (Similar evidence with respect to El Vado is dealt with below.) Defendant urge that the effect of the relief sought by Texas would be to make impossible the operation of the Middle Rio Grande Project in accordance with the plan (R. 1239; Defts. 61-62).

It was conceded, however, that the operation of the Jemez Reservoir and the proposed Chamita Reservoir is "subject to the reservation of the Rio Grande Compact" (R. 1263). Indeed, the Flood Control Act of 1948 approves the Project subject expressly to the condition and limitation that "at all times all project works shall be operated in conformity with the Rio Grande Compact as it is administered by the Rio Grande Compact Commission."[11] The Act further provides that "construction of the spillway gate structure at Chamita Dam shall be deferred so long as New Mexico shall have accrued debits as defined by the Rio Grande Compact and until New Mexico shall consistently accrue credits pursuant to the Rio Grande* Compact."[12] Defendants admit that under the Act the works must be operated in conformity with the Com-

[11]Act of June 30, 1948, ch. 771, Tit. II, Sec. 203(d), 62 Stat. 1171, 1179.

[12]Sec. 203(a), 62 Stat. 1171, 1179.

pact, but urge that "the Compact is no justification for the relief sought by Texas" (Defts. R. 17). I think that that is answered by the fact that Texas is suing to enforce the Compact and can obtain no relief beyond its provisions.

The care which the Congress has taken to subordinate the Middle Rio Grande Project to the Rio Grande Compact seems decisive. I conclude that the interest of the United States in the Middle Rio Grande Project is insufficient to make it an indispensable party.

9. *Control of Navigation.*

The assertion of this ground of indispensability had its origin in the statement made in the memorandum of the United States (in the footnote) that "the Federal Government is also interested in . . . the control of navigation in the lower reaches of the Rio Grande where navigation is feasible." (R. 46, 54). Defendants do not assert that the Rio Grande is navigable in New Mexico, but in their briefs they do not expressly still confine this point to navigation in the lower reaches of the river.

The geography makes it clear that the effect of the relief sought by Texas upon navigation in the lower reaches of the river, if indeed it would have any effect at all there, would be beneficial rather than injurious. The relief is designed to bring more water to Elephant Butte, and thus to bring the return flow and waste waters developed from such additional waters, thence on down the river.

It is clear also that any additional water which may reach Elephant Butte would have to flow across New Mexico, instead of being consumed in the Middle Val-

ley. The same conclusion would therefore seem justified as to the effect the relief upon navigation above Elephant* Butte, if that section of the Rio Grande were navigable. But in my view the Court will encounter no difficulty in taking judicial notice that the river is not navigable within New Mexico. In 1899 the Court said that it was not "disposed to question the conclusion reached by the trial court and the supreme court of the territory, that the Rio Grande within the limits of New Mexico is not navigable." *United States v. Rio Grande Dam & Irrigation Co.,* 174 U. S. 690, 699. Since that time Elephant Butte and many other permanent dams have been constructed across the cannel of the river.

I conclude that the interest of the United States in the control of navigation is insufficient to make it an indispensable party.

10. *The National Forests.*

11. *Public Domain and Grazing Lands.*

12. *The Interests of the Soil Conservation Service.*

The memorandum of the United States stated (in the footnote):

> "Approximately 56 per cent of the land in the middle valley of the Rio Grande basin, which is above Elephant Butte Dam, is controlled by the Federal Government. A large portion of the Federal lands are national forests. The balance of the Federal land is in the public domain and is available for grazing. Some of this land comes within the jurisdiction . . . of the Soil Conservation Service (H. Doc. 653, 81st Cong., 2d sess., pp. 265, 266)." (Defts. Ex. 28, R. 790, 794.)

Defendants rest their case as to these alleged grounds

for the indispensability of the United States chiefly upon this paragraph. There is, however, evidence with respect to forty filings of the Forest Service of the Department* of Agriculture for diversion of small amounts of water, not from the Rio Grande, but from tributaries (chiefly springs) to the Rio Grande, above San Marcial (Defts. Ex. 4, R. 155-156).[13] There is no evidence regarding the use or non-use of water under these filings. There is brief evidence that the relief sought by Texas would have an adverse effect upon the use of water by the Forest Service (R. 942-943). There is also evidence that in 1938 the land in the Rio Grande Basin in New Mexico, above Elephant Butte, was owned by the National Forest Service, to the extent of 2,524,050 acres, or 20% of the total, and by Grazing Districts, to the extent of 1,588,700 acres, or 12% (R. 361; Defts. Ex. 6). There was no evidence whatever with respect to the interests of the Soil Conservation Service, and upon my call, at the conclusion of the case, for such evidence (R. 1235-1236, 1265-1271), none was forthcoming.[14]

The absence of any evidence (beyond that mentioned above) as to the character and extent of these interests of the United States, as to the amount of Rio Grande water currently used or currently required

[13]All but two of the filings have priority dates between May 21, 1936 and August 23, 1940. It is stated that the diversions "are for domestic, recreational, fire fighting and stock watering uses" (R. 155).

[14]Defendants suggested that judicial notice might be taken of the impact of the relief sought by Texas upon the interests of the Soil Conservation Service in the area, but in my view this was not possible (R. 1267-1268). After the conclusion of the hearings, by letter dated May 8, 1953, counsel for New Mexico advised me that it "was content to let the record stand as it is so far as this point is concerned."

by them, and as to the impact of the relief sought by Texas upon the availability of such water, appears to make it unnecessary to give extended consideration to these points. The paucity of the record determines them, without recourse to consideration of the rule laid down in *Nebraska v. Wyoming,* supra. I conclude that none of these interests of the United States is sufficient to make it an indispensable party.*

13. *The Installations and Activities of the Atomic Energy Commission at Los Alamos, New Mexico.*

At Los Alamos, which is not on the Rio Grande but is some distance northwest of the Middle Rio Grande District's northern limit (Defts. Ex. 1, R, 128), are the installations of the Atomic Energy Commission. The memorandum of the United States does not mention these. There is a filing (originally made by the Los Alamos Branch School and subsequently acquired by the Commission—R. 319) for the diversion from Los Alamos Creek, a tributary to the Rio Grande, of 0.79 cubic feet per second and for storage in two reservoirs of a total of 55.85 acre-feet, with priority date of March 14, 1922. This filing was "for municipal and industrial use" (Defts. Ex. 4, R. 154-155). The Commission has also filed its notice of intention to appropriate "from the Rio Grande" 3,000 acre-feet per ananum "for domestics, industrial and irrigation uses," with priority date of December 7, 1951 (R. 155), which is subsequent to the institution of this suit. There was no evidence as to the amount of water currently used or currently required by these installations.

The relief sought by Texas would of course have no direct effect upon the availability of water at Los Alamos from Los Alamos Creek. Texas urges that

there is no evidence that there would be any indirect adverse effect (Defts. 44). There is, however, some evidence that an indirect adverse effect might conceivably result from a 10% diminution of consumptive uses above San Marcial (R. 942-943, 1193). At the conclusion of the offerings by the parties I called for additional evidence with respect to this, but none was forthcoming (R. 1237-1238).

The rule mentioned with regard to the Atomic Energy Commission's Base at Sandia appears to apply with equal force here. Since the Commission's right to water for Los Alamos is derived from New Mexico, it can rise no* higher than the right of New Mexico; so that New Mexico stands in judgment for the Commission as for any other appropriator in New Mexico. *Nebraska v. Wyoming,* 295 U. S. 40; *Nebraska v. Wyoming,* 325 U. S. 589, 629. I conclude that, on the record and on the law, this interest of the United States is insufficient to make it an indispensable party.

14. *The Contract to Acquire the Facilities and Works of the Middle Rio Grande Conservancy District, Including El Vado.*

On September 24, 1951 (shortly before this suit was instituted), the United States and the Middle Rio Grande Conservancy District entered into a contract which provides, among other things, for the acquisition by the United States of certain works of the District, including El Vado Dam and Reservoir (Defts. Ex. 27, R. 760). The contract was made pursuant to the Flood Control Act of 1948 and 1950,[15] and is a part of the Federal Middle Rio Grande Project for Flood

[15]Act of June 30, 1948, 62 Stat. 1171, and Act of May 17, 1950, 64 Stat. 163.

Control, discussed above. The memorandum of the United States lists this contract in the footnote.

The contract recites that the Rio Grande has "aggraded its bed to the point where drainage and distribution works of the District are seriously impaired, resulting in the seepage of large areas of District lands and the consequent waste of water"; that a comprehensive plan for the control of the Rio Grande from approximately the Colorado boundary to the Caballo Reservoir has been developed, for the purposes, among others, of remedying the degradation of the river bed, and of the "saving of District water now wasting as a result of impairment of the District drains" (R. 763). The contract further refers to the lands and water rights of the six Pueblos within the exterior boundaries of the District, which "are not under the jurisdiction of, or subject to the laws of New Mexico governing the District," and for which payment has heretofore been made by the United States to the District, to cover the total share of the Pueblos of the cost of the works constructed by the District (R. 764).

The contract provides that "to the extent funds are, and may be made available," the United States will construct the Project, which includes the rehabilitation and extension of the irrigation and drainage systems of the District (including El Vado Dam and Reservoir) and the rectification of the channel of the Rio Grande in the Middle Valley (Art. 9, R. 766-767). The United States is to operate and maintain the District works during construction upon payment in advance by the District of the estimated cost; thereafter, at the option of the United States, operation and maintenance may be carried on by the District as agent of

the United States, the agency being terminable on six months' notice (Art. 13, R. 770-772).

Article 11 estimates the cost of the Project as not in excess of $18,000,000 "of which $1,467,000 is allocated as the estimated cost of the share of Indian lands within the District Area, which amount or any amount so allocated shall not be reimbursable" (R. 768-769).

Title to certain of the District works is to be conveyed to the United States (Art. 26, R. 778), and is to remain in the United States notwithstanding transfer of any of the works of the District for purposes of operation and maintenance, until otherwise determined by the Congress (Art. 29, R. 780-781). Provision is made for the assignment to the United States of all water filings "made in the name of the District," including filings for storage and use of water at El Vado, these to be held for beneficial uses in the Project and for Indian lands in the Project area, and also for such incidental development of hydro-electric* energy as the United States may make (Art. 28, R. 780). The status of Indian lands and water rights is protected against impairment [Art. 13 (e), R. 772; Art. 34, R. 782].

Article 37 provides that the expenditure of any money or the performance of any work by the United States shall be contingent upon appropriations by Congress, but "the failure of Congress to so appropriate funds shall not relieve the District from any obligations under this contract" (R. 783).

Article 40 requires the District to obtain confirmation of the contract by court decree and provides that the contract "shall not be binding upon the United States until the District has completed action to the satisfaction of the Contracting Officer" (R. 785).

At the time of the hearings in Santa Fe the New Mexico Conservancy Court had decreed that the contract was valid, but the matter was pending on appeal in the Supreme Court of New Mexico. On May 21, 1953, the court held that the provisions of the first sentence of Article 21 of the contract (R. 775) were contrary to law in that they gave to the Secretary of the Interior the power to "over-ride the decision of the Conservancy Court, or any other court, and enforce his mandate whether legal or illegal, and regardless even of what the Supreme Court of the United States may say." *Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy District,* 258 P. (2d) 391.[16] The opinion concludes with the statement that if the objectionable part of Section 21 were amended to conform to the Court's views the contract would be held legal and valid in its entirety.

Thereafter, on June 19, 1953, the District and the United States entered into an amendatory contract, eliminating the sentence found objectionable (Defts., Appendix B,* 112-116). On June 29, 1953, the Supreme Court of New Mexico, which had withheld its mandate for that purpose, entered its order confirming the contract as now amended (*Middle Rio Grande Water Users Assn. v. Middle Rio Grande Conservancy District,* supra, at 407, Defts., Appendix C, 117-119).

It is beyond doubt that the relief sought by Texas would interfere with the operation of El Vado. Defendants urge that El Vado is the property of the United States and that the United States is therefore an indispensable party (Defts. 58-59). But the Flood

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[16]The opinion is included in Defendants' Brief as Appendix A (Defts. 82-112).

Control Act of 1948 provided expressly that:

> "(d) At all times when New Mexico shall have accrued debits as defined by the Rio Grande Compact all reservoirs constructed as a part of the project shall be operated solely for flood control except as otherwise required by the Rio Grande Compact, and at all times all project works shall be operated in conformity with the Rio Grande Compact, as it is administered by the Rio Grande Compact Commission."[17]

Texas urges that any decree entered herein requiring the operation of El Vado in conformity with the Rio Grande Compact as administered by the Compact Commission would be in compliance with the statute authorizing the contract; and that even when the contract was fully consummated, it would be the District and not the United States which would continue to have the beneficial use of the water. It is urged also that the performance by the United States of its undertakings under the contract is contingent upon the appropriation of money for that purpose by the Congress [Arts. 13 (a) and 37 of the contract, R. 760, 770 and 783]; that the provisions of the contract show that there will be an indeterminable period during which the District will continue in full possession and* control of all operations before the United States begins construction, so that even if the United States would then have an interest which would be affected (which Texas denies) the relief should be granted until such time as the District surrenders full operation and control to the United States; and that title to El Vado Dam and Reservoir is still in the District (Tex.

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[17]Act of June 30, 1948, ch. 771, Tit. II, Sec. 203, 62 Stat. 1171, 1179.

42-43, citing R. 891-892, Tex. Ex. 9, R. 893, R. 894-914, Tex. Ex. 11, R. 919-920 and Tex. Ex. 12, R. 921-922).

While performance of the contract by the United States is contingent upon appropriations by the Congress and is thus, in my view, by no means certain, I think that it is not necessary to establish an impact upon the actual operation of El Vado by the United States. The adverse effect of the Texas relief upon the right given by the contract to the United States, to acquire and operate El Vado, might be sufficient, if that right were unconditional and unlimited.

But the right to operate El Vado is expressly limited by the statute under which the contract was made. As in the case of the entire Middle Rio Grande Project for Flood Control (No. 8 above), of which this contract is a part, the care which the Congress has taken to subordinate this Project to the Rio Grande Compact seems to be decisive. By the Act of Congress, the Government cannot operate El Vado except in conformity with the Rio Grande Compact as it is administered by the Compact Commission.[18] What Texas is suing for here is enforcement* of the Compact. In addition, this interest of the United States seems to be

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[18]There is much evidence in the record indicating the concern felt by Texas and the Elephant Butte District at the time when the Flood Control Project was under consideration, lest water be taken away from Elephant Butte by reason of the operation of the Project. See Tex. Ex. 17, R. 1030; Defts. Ex. 46, R. 1044; Tex. Ex. 17, R. 1048 (letter from Governor of Texas stating, at R. 1051, that Texas "insists that all construction, maintenance and operation of any adopted plan be in strict accordance with the Rio Grande Compact" and that these provisions be incorporated into any law authorizing the Project), and R. 1060-1061. This evidence was taken from H. Doc. 653, 81st Cong., 2nd Sess., pp. 31-39, 40-41, 42-80, map following p. 146, and pp. 213-216.

a plain case for the application of *Nebraska v. Wyoming,* 295 U. S. 40. I conclude that the interest of the United States arising from the contract to acquire the facilities and works of the Middle Rio Grande Conservancy District is insufficient to make the United States an indispensable party.

15. *The Rights of the Indians.*

The parties have stipulated that more than 900 years ago portions of the Rio Grande Basin in New Mexico were occupied by Pueblo Indians, who, using simple irrigation systems and methods, supplied water intermittently to land belonging to the Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, San Dia and Isleta, all of the irrigated lands of which are located within the Middle Rio Grande Conservancy District (R. 80, 365).

The first Spanish exploration of New Mexico was by Coronado in 1540, and the first Spanish settlement was made in 1598, some 30 miles north of Santa Fe. After the Indian revolt of 1680 and the reconquest for Spain by De Vargas in 1692, Spain then in order to settle the country made land grants to settlers, to individuals for services rendered, and to the Indian Pueblos. Mexico declared her independence from Spain in 1821. Trade with the United States commenced in 1823. Occupation by American settlers began in 1846. By the treaty of Guadalupe-Hidalgo of 1848, the United States obtained sovereignty over the entire area. In 1859 the Indian land rights were confirmed by the United States (R. 374, H. Doc. 653, 81st Cong., 2nd Sess., 283-287). New Mexico became a state in 1912 (R. 80, 365-367).

The early Spanish colonists used the same type of

irrigation methods practiced by the Indians. Each community constructed and maintained its own ditches, diverting* water directly from the river without benefit of storage (R. 80). Prior to American occupation there was well established irrigation development along the main stream from Fort Quitman to Albuquerque (R. 81, 368). There are estimates that by 1851 about 32,000 acres were in cultivation below El Paso and about 35,000 acres in the Mesilla Valley above El Paso, partly in Texas and partly in New Mexico. "It is reported" that in 1880, when maximum development in the middle Valley (between Cochiti and San Marcial) was reached, there were 124,800 acres in cultivation there (R. 81, but *cf.* R. 1183).

The Indians are wards of the United States, and under its protection; neither the Indians nor their lands are under the jurisdiction of New Mexico.[19] The United States has a duty to protect their rights to water. See *Winters v. United States,* 207 U. S. 564.

Pursuant to this duty the United States, through its Indian Service, in 1911 filed a Declaration of Water Rights on behalf of seventeen of the eighteen Pueblos in New Mexico, listing the acreage claimed to be entitled to water rights for each Pueblo except Taos. The total acreage for which water rights were claimed by the sixteen Pueblos was 19,014 acres (Defts. Ex. 5, R. 159-164). There has been no adjudication of the rights of the Indians to use the waters of the Rio Grande (R. 351).

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[19]New Mexico Enabling Act, Act of June 20, 1910, 36 Stat., 557, 559; Const. of New Mexico, Art. XXI, Sec. 2; Pueblo Lands Act. Act of June 7, 1924, 43 Stat. 636. See United States v. Sandoval, 231 U. S. 28; United States v. Candelaria, 271 U. S. 432.

The total Indian-owned acreage in the Rio Grande Basin in New Mexico above Elephant Butte consists of 1,426,380 acres in Pueblo grants and Indian reservations (being 11% of the area) and 440,300 acres in Pueblo Indian purchase areas [being 4% of the total area (R. 361)].*

The report of the National Resources Committee, covering the Rio Grande Joint Investigation made in 1936-1937, stated at pages 310-311 (Tex. Ex. 14, R. 982, 997):

> "The water rights for the Pueblo Indians of New Mexico are the oldest on the Rio Grande and its tributaries, and the United States claims priorities for such rights over any other claims whatsoever.
>
> "When the Spanish Conquistadores first arrived in this country, they found the Pueblo Indians diverting water from the streams and cultivating the irrigated lands. Today the Indians are doing this, very much as their forefathers did it, using the same general methods, diverting the water in the same ditches and irrigating the same lands as in 1540. The Government, through the Indian Service, has assisted the Indian in improving his ditches and providing structures for the diversion and control of the water."

The provision of Article XVI of the Rio Grande Compact that nothing in the Compact shall be construed as affecting the obligations of the United States to the Indian Tribes, or as impairing the rights of the Indian Tribes (R. 677) is taken verbatim from Article IX of the temporary Rio Grande Compact of 1929[20] (R. 657-658).

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[20] 46 Stat. 767.

The effect of the relief sought by Texas upon the rights of the Indian Pueblos having lands within the exterior limits of the Middle Rio Grande District, irrigated by water taken from the Rio Grande between Otowi and San Marcial, is quite different from its effect upon the water supply of the other Indian Pueblos, situate above Otowi or on tributaries of the Rio Grande. For convenience, the latter will be dealt with first.*

(a) *The Rights of the Indian Pueblos Beyond the Exterior Limits of the Middle Rio Grande District.*

On tributaries entering the Rio Grande in the area between Cochiti and San Marcial, but outside the limits of the Middle Rio Grande District, are the Indian Pueblos of Jemez, Zia, Acoma and Laguna. They irrigate their lands with water from these tributaries (R. 108-112). On the Rio Grande or its tributaries above Otowi are the Pueblos of Taos, Picuris, San Juan, Santa Clara, San Ildefonso, Pojoaque, Nambe and Tesuque and a portion of the Jicarilla Apache Reservation (most of whose lands lie in the basin of the Colorado River), all of which have lands irrigated by water from the Rio Grande (above Otowi), or from tributaries entering the Rio Grande above Otowi (R. 100-106, Defts. Ex. 1, R. 128).

Three of these Pueblos, Zia (which derives its water from the Jemez River), Laguna and Acoma (which derive theirs from the San Jose River) have small reservoirs for the storage of water for their irrigated lands (R. 172-173). None of them derives any water from storage in El Vado, nor from the Rio Grande itself below the Otowi gaging point (Defts. Ex. 1, R. 128).

As to the Indian lands outside of the Middle Rio Grande Conservancy District, a large part of the relief sought by Texas can have no effect. There is no question of storage rights, for these Pueblos still take water as they need it and as it is available, from the natural flow of the river or its tributaries. While the memorandum of the United States urged that the United States was an indispensable party because of the rights of the Indians, it appears from the discussion that the United States confines this point to the rights of the Pueblos within the District, nothing being asserted with regard to those beyond the District's exterior limits.*

The Compact, however (Art. IV, par. 6, R. 671), provides that in the event of depletion after 1929 in New Mexico of the natural run-off at Otowi, the Otowi index supply shall be adjusted accordingly. Greater uses of water above Otowi, in New Mexico, would require adjustment of the Otowi index upward by the amount of that increased depletion, in order to reflect additions as of 1929, so that New Mexico would be charged accordingly at Otowi (R. 1173-1174). It was conceded, however, that there had been no increased depletion above Otowi during the last ten years (R. 130-131). As to these Pueblos, it is urged by defendants that the relief sought by Texas might require some diminution in their water supply. But physically the relief cannot affect in the slightest the amount of water in the Rio Grande above Otowi or in its tributaries. And in view of Article XVI of the Compact and of the New Mexico Enabling Act[21] it seems clear that enforcement of the Compact in this suit could not result in

[21]36 Stat. 557, 559.

diminution of the water supply of these Pueblos. Moreover, it is admitted that the diminution required by the Texas relief can be achieved without diminishing the use of water by these Indian Pueblos in the least (R. 1218).

Much the same considerations apply to the four Pueblos below Otowi, whose water is derived from tributaries entering below that point, and whose consumption can have no effect upon the Otowi schedule. To the possibility of any diminution of their water supply as a result of the diminution in consumptive use above San Marcial required by the Texas relief, the considerations mentioned above apply with equal force (See Defts. Ex. 9, R. 400-401).

I conclude that the rights of the Indians of the twelve Pueblos and the Reservation outside of the Middle Rio Grande District, for water for irrigation, will not be affected by the decree sought, and that in consequence these* rights are insufficient to make the United States an indispensable party.

(b) *The Rights of the Six Indian Pueblos Within the Exterior Limits of the District.*

The Indian-owned lands within the exterior limits (but not part) of the Middle Rio Grande Conservancy District, belonging to the Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, San Dia and Isleta, aggregate 362,041 acres. The number of Indians living there is 3,786. All Pueblo land is tribally owned (R. 86). The source of water supply is the Rio Grande (R. 107-112).

In 1911 the United States Indian Service filed a Declaration of the water rights claimed by the six

Pueblos (Tex. Ex. 6, R. 326). The Superintendent of Irrigation's affidavits supporting these filings stated that all water rights claimed by the Pueblos had their origin prior to the enactment of Chapter 49, Laws 1907 (R. 326, 329, 332, 335, 339, 342). The affidavits of the Governors of the Pueblos each recited that the Indians had occupied their respective Pueblos so long that there was no record of the time of settlement, that they had cultivated the ground and irrigated it with water from the Rio Grande "for generations of time past," that ditches then used by them for irrigation had existed beyond the memory of man and each of them was believed to be not less than 200 years old (R. 327-328, 330-331, 333-334, 337, 340, 344). The acreage claimed was approximately 1,550 acres for Santo Domingo (R. 328, 331), 1,150 acres for San Felipe (R. 331), 500 acres for Santa Ana (R. 334), 1,950 acres for Cochiti (R. 337), 3,600 acres for Isleta (R. 340-341), and 600 acres for San Dia (R. 344)—a total of approximately 9,350 acres. The State Engineer of New Mexico (in whose office these filings were made) testified that the Constitution and the laws of New Mexico recognized all water rights existing prior to March, 1907, but* that the holders of such water rights were expected to make a filing or declaration in his office (R. 349).

The Act of March 13, 1928,[22] authorized the Secretary of the Interior to enter into a contract with the Middle Rio Grande Conservancy District, which would require the District to recognize the first priority of the lands which for generations the Indians had been irrigating, the acreage being tentatively set at 8,346 (R. 375, H. Doc. 653, 81st Cong. 2d sess., 283-287; R.

[22] 45 Stat. 312.

681). The Act further authorized the Secretary to include in the contract a provision for rehabilitation and irrigation of "newly reclaimed lands," the water rights for which the District should recognize "as equal to those of like District lands." It provided that the Indian acreage to be benefited be determined by the Secretary. It further provided that, in view of the extensive irrigation systems which the Indians had for the 8,346 acres, as to such lands they should not be required to pay their share of the cost of future operation and maintenance or betterment work by the District (R. 376).

The contract subsequently entered into on December 14, 1928 (several years before the construction of El Vado), embodied these provisions (Defts. Ex. 22, R. 678). As to the 8,346 acres, it provided expressly that their water rights, and as well the rights of the Indians to all water for domestic purposes and for their stock, should be prior and paramount to any rights of the District or of any property owner therein (R. 681). The contract contained a recital that the District comprised a gross area of 277,760 acres, of which 132,724 acres were subject to benefits by the construction of El Vado, which net area embraced (interspersed with District lands) 23,607 acres of Pueblo land, which were estimated to be irrigable (R. 682). The United States undertook to pay, on behalf of the Pueblo lands (R.* 687), not more than $1,593,311 for the construction of the conservation, irrigation, drainage and flood control work.

On September 4, 1936, the United States and the District entered into a contract with regard to the operation, maintenance and betterment charges on the

newly reclaimed Pueblo lands (Defts. Ex. 23, R. 697), which contract provided for the payment of cost of operation, maintenance and betterment work for newly reclaimed land "approximating 12,600 acres" on a proportionate basis (R. 705). The District again expressly recognized and reaffirmed that the original 8,346 acres had water rights prior and paramount to any rights of the District or any other property owner, and that the newly reclaimed acreage was to be on a parity with like District land (R. 711).

On April 8, 1938, the Secretary of the Interior and the District entered into a third contract (Defts. Ex. 24, R. 714). The original irrigated Indian acreage was now specified at 8,847 instead of 8,346, and the total irrigable Indian acreage (including newly reclaimed land) at 20,254, "or such portion thereof as may be determined hereafter by the Secretary of the Interior as being susceptible of economic cultivation and irrigation" (R. 717-718). This contract again obligated the District to recognize the prior and paramount water rights of the 8,847 acres (R. 728).

Shortly thereafter, on May 16, 1938, the Acting Secretary of the Interior determined that a total of 20,242.05 acres in the six Pueblos within the exterior limits of the District were "susceptible of economic irrigation and cultivation" (Tex. Ex. 7, R. 357, 358). His order classified this acreage as follows:*

	Acres
"Lands with recognized water rights not subject to operation and maintenance or betterment charges by the District and designated as 'now irrigated' ----------	8,847

Lands classified as 'newly reclaimed' lands (exclusively of the purchased area)	11,074.4
Lands classified as newly reclaimed lands (the area recently purchased)	320.65
Total irrigable area materially benefited	20,242.05"

(R. 359.)

This order was published in the Federal Register of July 2, 1938 (R. 357).

A fourth contract, dated May 6, 1943 (Defts. Ex. 25, R. 731), recited that the Secretary of the Interior had on May 16, 1938, as required by the Act of March 13, 1928, officially determined the acreage of Indian Pueblos lands as above (R. 734).[23] And on February 10, 1947, a fifth contract was executed covering operation and maintenance for the years 1945 to 1954, inclusive, with the usual recitals (Defts. Ex. 26, R. 745, 749).

There has thus been a determination—long drawn-out but in the end precise—of the Indian irrigable acreage, binding upon the United States and upon the Middle Rio Grande District, and not questioned here by Texas or New Mexico. But there has been no determination of the amount of water required for irrigation either of the entire acreage or of the 8,847 acres. There

[23]The area presently under cultivation appears to be even less than the original 8,847 acres. The affidavit of A. R. Fife, Area Irrigation Engineer of the Bureau of Indian Affairs, dated January 7, 1952, recited that as of that date the six Pueblos had "approximately 7,000 acres of land under cultivation and a minimum of approximately 7,500 additional acres of irrigable lands, a large portion of which had from time to time in the past been irrigated" (Defts. Ex. 9, R. 400, 404).

is, in fact, no substantial evidence in the record regarding the amount of water presently* required for either.[24] This may perhaps be due, in part, to the fact that the Middle Rio Grande District, which formerly had gages on each of its main canals and main laterals, removed these gages about 1937 or 1938, the reason for such removal being unexplained (R. 929-930), and the distribution procedure being—to the extent that water is available—to fill the ditches to the banks and let the Indians "take all they want" (R. 928).

It is urged by defendants that the lack of a determination of the amount of water required by the Indians makes the United States an indispensable party. So far as the right of the 8,847 acres to natural flow is concerned, this seems to have now been met by Paragraph 4 of Texas' Amended Statement as to Relief (R. 968-969), which accords priority over the Compact to this right. But the right of the 8,847 acres to store water in El Vado, recognized by the contracts between the United States and the District, is given no priority by Paragraph 4, and it is at least seriously

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[24]In 1927 (before El Vado was constructed) the Bureau of Reclamation estimated that the amount required for the entire area within the exterior limits of the District, on the basis of 215,000 acres valley area, of which 140,000 acres were to be irrigated, would be 570,000 acre-feet, or about 4 acre-feet per acre, including the water loss from the non-irrigable portion. This was based on the actual use of water in the Mesilla Valley below Elephant Butte, but included a 10% increase over Mesilla so as to allow for the greater water requirements of local crops (Tex. Ex. 13, R. 973, 976; *cf.* Texas Ex. 14, R. 984, which lists 1936 diversions of water at 10.48 acre-feet per acre irrigated and 9.08 per acre given water, for the Middle Rio Grande, against comparable figures of 6.26 and 5.77 for the Elephant Butte and El Paso Districts). Three witnesses stated that they could make no estimate of the amount of water required for the Indians (R. 441-444; R. 941 and R. 1230).

restricted by Paragraphs 1 and 3 of the Amended Statement. Paragraph 1 of the Amended Statement (R. 968) asks for an injunction against the storage of water in El Vado so long as there is less than 400,000 acre-feet of usable water in Project storage, as provided by Article VII of the Compact. Paragraph 3 asks that defendants be required to release from El Vado water to the amount of the accrued debit of New Mexico, at the greatest rate practicable, "whenever, at the beginning of any year, the quantity* of water in Project storage is less than 600,000 acre-feet," etc.

Texas asserts flatly that the 8,847 acres "have no right to stored water in El Vado Reservoir because the United States contributed nothing to its construction for them" (Tex. 24), and that the right to stored water given them by the contracts between the United States and the District (the first of which was December 14, 1928) is subordinate to the rights under the filings by the United States in 1906 and 1908 for the benefit of the Rio Grande Federal Reclamation Project (Tex. 31-32).

The United States has, however, made several assertions that the right of the 8847 acres to storage in El Vado has priority over the provisions of the Compact. The memorandum of the United States, as to indispensability arising from the rights of the Indians, is based solely on such priority of storage rights, although not confined to the 8847 acres (R. 797-799). Other assertions by the United States of such priority are in the record.[25]

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[25]See the Secretary of the Interior's letter to the Chairman of the Rio Grande Compact Commission, March 27, 1951, to the effect that the Commission's plan to keep the outlets of El Vado fully open during the 1951 season would violate the

Paragraphs 1 and 3 of the Amended Statement would definitely restrict the storage of water in El Vado, the conditions as to the amount of water in Project storage having existed for some time past (Defts. Ex. 30, R. 803). The United States has asserted quite vigorously that the Indians have a right to storage in El Vado having priority over the Compact. Whether this claim appears well founded, or otherwise, is, in my view, immaterial—it ought* not to be determined in the absence of the United States. It is true that neither the United States nor the Indians would be bound by such a determination. But a decree in conformity with Paragraphs 1 and 3 would necessarily affect adversely and immediately the United States, whose remedy would seem to be by suit against one or more of these defendants, for their compliance with the decree. I conclude that the United States is an indispensable party because of its interest in the rights of the Indians with respect to storage of water in El Vado for the 8847 acres. See *Arizona v. California,* 298 U. S. 558, 571.

The assertions of the United States, mentioned above, that the right to store water in El Vado has priority over the Compact, are not confined to the 8847 acres, but extend equally to the 11,395.05 acres of newly reclaimed land. Nor is the memorandum of the United

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prior vested rights of the Indians (apparently as to the full 20,242.05 acres) (Defts. Ex. 29, R. 800-801) ; see also affidavit of A. R. Fife, January 5, 1952 (Defts. Ex. 9, R. 400, 404; R. 813; Defts. Ex. 32, R. 821-822; Defts. Ex. 39, R. 859, 861). The Compact Commission's reply to the Secretary of the Interior, April 11, 1951, stated that the Pueblos had a prior and paramount right in the natural flow of the river as to the 8847 acres, as against the District or any property owner therein, but no priority as against the rights of Texas under the Compact, nor any rights to storage beyond the limits permitted by the Compact (Defts. Ex. 30, R. 803-805).

States so confined. The position asserted by Texas is that by the contracts with the United States, and the Act of Congress authorizing them, these newly reclaimed lands acquired a proportionate right in the stored waters of El Vado, but that that right is necessarily inferior to the right of Texas through the 1906 and 1908 filings for the Rio Grande Project, that the Compact does not enlarge the Indian rights but simply recognizes them for what they were at the time of the Compact, before El Vado was constructed (Defts. 24).

Whether the claim to priority over the Compact for the storage rights of the 11,395.05 acres appears well founded or not, is in my opinion not material. It is certain that the relief sought by Paragraphs 1 and 3 cannot be granted without seriously affecting the right claimed by the United States for this newly reclaimed land. The considerations mentioned above, as to the storage right of the 8847 acres, apply to the 11,395.05 acres also. I conclude that this interest of the United States makes it an indispensable party to this suit.*

There remains the question of the effect of Paragraph 4 of the Amended Statement upon the right of the 11,395.05 acres to the natural flow of the river, for which priority over the Compact has been asserted by the United States (see Note 25, supra), although the memorandum of the United States does not extend to this. I have said that in my view Paragraph 4 gives adequate protection to the priority of the right to natural flow of the 8847 acres, for which purpose it was obviously drawn. But that protection is limited to the 8847 acres, by the provision that the Special Water Master shall

"so allocate the waters under his control as to give

priority to such lands under Indian ownership within the exterior boundaries of the Middle Rio Grande Conservancy District *as have been determined by the Secretary of the Interior to have priority over the other lands of the Middle Rio Grande Conservancy District,* or as may in the future be determined to have such priority by the final judgment of any court of competent jurisdiction."

Texas insists that the newly reclaimed Indian lands have no prior right to the natural flow of the river, because they were not put in cultivation until many years after the natural flow had been fully appropriated by other lands (Tex. 24).

When the gates of El Vado are kept open and the natural flow passed through them, the right to that flow becomes of great importance. It is in fact all that the Indians had before El Vado was built. Since the United States has asserted priority over the Compact for this right, as to the entire 20,242.05 acres, and since that priority would almost certainly be adversely affected by the relief at present sought by Texas, I conclude again that this interest of the United States is sufficient to make it an indispensable party.*

The concluding clause of Paragraph 4 (evidently framed to meet the lack of information as to the quantity of water needed per acre) requires the Water Master to furnish to the lands so determined to have priority over the other lands of the District, "such amount of water as may be demanded for said lands by the Area Irrigation Engineer of the Albuquerque Area Office, Bureau of Indian Affairs, Department of the Interior." This large concession seems to be chiefly at the expense of the defendants. In my view it is not

consistent with equity and good conscience, in that it would limit defendants to receipt of such water only as was left after satisfaction of these demands, which might be excessive, and over which defendants would have no control. Defendants are not now under any burden such as this, and the necessity of it arises solely from the fact that the quantity of water required cannot be determined in the absence of the United States. For this reason also I conclude that the United States is an indispensable party. See *Shields v. Barrow,* 17 How. 130, 139.

On the other hand, there are some considerations to which the attention of the Court should perhaps be invited, if it should conclude that the United States is an indispensable party because of the rights of the Indians:

1. The evidence demonstrated that the Middle Rio Grande Conservancy District bore some responsibility at least for the water shortage, in that it had not done all it could to prevent wastage of water. It was admitted that there was a tremendous waste of water in non-beneficial use, between Otowi and San Marcial (R. 1209); that the District could, but did not, pump water into the river from drains which because of aggradation no longer functioned (R. 1214, R. 1232), although that was feasible and often practiced (R. 1214). There was persuasive evidence that the drains which were no longer effectively removing ground waters from beneath the irrigable area, because of* becoming clogged with vegetation, and the partial blockage of their outlets by deposits of sand and silt, might be restored, throughout most of their length, by cleaning and deepening (Tex. Ex. 17, R. 1048, 1074). It was

admitted that the dams built by the Middle Rio Grande District were a "major factor" in the aggradation of the river above San Acacia (R. 1216-1217).

2. There was competent testimony, not denied, that the effect of the relief sought by Paragraph 2 of the Amended Statement (an injunction against incurring further annual debits as defined by the Compact until the accrued debit of New Mexico was reduced below the maximum amount permitted by the Compact) would be to require that the consumption of water in New Mexico above Elephant Butte be diminished no more than approximately 10% below the present consumption (R. 1171-1172, 1177). Defendants' engineer testified that such 10% diminution would amount to approximately 50,000 acre-feet a year (R. 1215); that from an engineering standpoint it was feasible to make such diminution out of the non-beneficial uses without reducing at all the amount of water for beneficial uses on irrigated lands (R. 1215); and that such diminution, made up out of non-beneficial uses only, "was practical," assuming that the District had the funds required.[26] Texas' engineer testified that the 10% diminution might be achieved without any reduction of water deliveries to the Middle Valley lands, including the Indian lands, that it could be made up wholly by the elimination of non-beneficial consumption, "which has been permitted to increase beyond all reason" (R. 1179). This was not contradicted.

Against this was evidence that a factor of "major

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[26]The Manager of the District testified that while it had on hand in cash and in bonds about $2,100,000 (R. 1221), and total assets of $13,381,386.57 (R. 1232), the only portions of this which could be used for rehabilitation of the drains and canals and degradation of the river bed, totaled less than $300,000 (R. 1222).

importance'' in the delivery of water at San Marcial was the* non-beneficial consumption of water by the salt cedars in the Bosque del Apache and San Marcial areas, over which the District had no control (R. 1203); and that the aggradation of the river bed was also a matter of major importance and the District had no control over that (R. 1203).

3. Middle Rio Grande has about 90,000 acres of irrigated land (R. 87), of which the total Indian acreage (even including the newly reclaimed land), is only 20,242.05, or about 22%. On the basis that the diminution required is 10%, Texas could apparently obtain full relief even if the newly reclaimed lands were also given priority by Paragraph 4 of the Amended Statement. A first step toward meeting the difficulty arising from the lack of any determination of the quantity of water required for them might possibly be a decree ordering Middle Rio Grande to place gages and meters on all canals and laterals, and to measure its distribution as exactly as possible, separating the actual use of the Indian lands from that of the non-Indian.

4. The interests of the United States are large and important in this area, the reclamation of which has been a matter of national concern since a date prior to the Reclamation Act of 1902,[27] under which Elephant Butte was built. It is obvious from what has been said above that some interests of the United States lie with the area below Elephant Butte, and some above. The Compact here in suit was negotiated and completed while a former suit, between the same parties and involving claims to the same water, was allowed to remain pending, and upon the Special Master's

[27]Act of June 17, 1902, 32 Stat. 388.

reporting to the Court that the Compact had been ratified and the Congress had consented to it, that suit was dismissed. *Texas v. New Mexico,* 308 U. S. 510. The negotiation of the Compact was a matter of national, not simply regional, concern, a representative of the United States* being chairman of the negotiating commission (Tex. Ex. 15, R. 1008, 1009), and other representatives participating actively in its work (Tex. Ex. 15, R. 1008; Tex. Ex. 16, R. 1014, 1024; R. 1165-1166). The violations of the Compact which Texas alleges, and particularly the acute water shortage which these apparently reflect, would seem to be a matter of concern to the United States.[28]

5. Texas invites attention to the fact that a motion to dismiss the former suit, based in part on the ground that the United States was an indispensable party because of the rights of the Indians, was overruled by this Court. *Texas v. New Mexico,* 297 U. S. 698.

6. It is urged by defendants that if this suit were dismissed for want of the presence of the United States, Texas would still have a remedy by reason of Section 208 of the Act of July 10, 1952[29] (Defts. 79-80). I am unable to agree with this, because the language of Sub-Section (a) of Section 208 does not appear to

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[28]In this connection it may be suggested that, while the consent given by the United States to the present Compact does not bind it (*cf. Hinderlider v. LaPlata Company,* 304 U. S. 92, 109), nevertheless the approval of the Compact by the Congress under the circumstances here may be a little more than a determination that the Compact is not within the prohibited class of "Treaty, Alliance or Confederation"—it may also reflect a national interest in the solution reached by the Compact (*cf.* Frankfurter and Landis, The Compact Clause of the Constitution—a Study in Interstate Adjustments, 34 Yale L. J. 685, 694-695).

[29]66 Stat. 549, 560.

include a suit to enforce an interstate compact. If I am wrong as to this, I still come to the same conclusion, since it seems to me unlikely that the Act of June 25, 1948,[30] giving the Supreme Court "original and exclusive jurisdiction of all controversies between two or more states," has been repealed by implication by the later statute, which is an omnibus appropriations enactment. I am unable to see that Texas has any remedy for the breaches of the Compact which it alleges, if this suit is dismissed.*

With these considerations in mind, and having regard to the fact that this Court will "strain hard" to avoid dismissing a suit because of the absence of an interested party that cannot be brought in, and will be diligent to seek a way to adjudicate the merits of the case notwithstanding such absence (*Bourdieu v. Pacific Western Oil Co.,* 299 U.S. 65, 71), the rule of dismissal not being inflexible but subject to the Court's discretion (*Elmendorf v. Taylor,* 10 Wheat. 152, 166-168), it is respectfully recommended:

1. That the suit be dismissed because of the absence of the United States, an indispensable party because of the rights of the Indians, unless the existing situation is changed by action resulting from one or both of the following recommendations.

2. That the United States be invited to submit a statement of its views as to its dispensability, in the light of (a) the evidence now developed and (b) the Amended Statement as to Relief Sought by Texas.

3. That Texas be given an opportunity to amend further its prayer for relief, if it should so desire.

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[30] 62 Stat. 927.

Indispensability of Elephant Butte Irrigation District.

Defendant Middle Rio Grande pleaded in its answer that Elephant Butte Irrigation District was an indispensable party to this suit. That position was not taken by New Mexico until after the Santa Fe hearings, but New Mexico now takes it in the brief (Defts. 64).

This issue arises from the fact that the Federal Government, before New Mexico became a state, located the Elephant Butte Dam and Reservoir at a point some hundred miles above the New Mexico-Texas boundary. The selection of this location by the United States was presumably influenced by engineering considerations. From a date long* prior to the present Compact, the southern valley area in New Mexico has received a large part of the benefits of the Rio Grande Project.

The Elephant Butte Irrigation District is a political subdivision of the State of New Mexico, organized in 1917 (R. 88). I have referred above to the contract of the Bureau of Reclamation with the District, for its water supply (Defts. Ex. 10, R. 451). This District and the El Paso District together make up the Rio Grande Reclamation Project. As between the two Districts the distribution of water from Elephant Butte and Caballo is 57% more or less to the Elephant Butte District and 43% more or less to the El Paso District, this allocation being based on the acreages of the two Districts which are subject to irrigation (R. 638-639).[31]

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[31]The question here presented is not in my view to be determined by such percentages, but if it were, the percentages above should be modified to take into account the fact that while not quite half of the Rio Grande Project lies within Texas, other Texas lands, including the Hudspeth District (R. 79) of 20,000 acres, are dependent upon drainage and

It is stipulated by the parties that the land owners in the New Mexican portion of the Rio Grande Project are interested in the result of this suit, and that for that reason the Elephant Butte District, which includes all of them, "has agreed to contribute funds to pay part of the costs of the suit and has for this purpose already made contributions" (R. 79). It is further stipulated that before the institution of this suit the Rio Grande Compact Commissioner for Texas had discussed its filing not only with the Attorney General of Texas but with the attorney for the Elephant Butte District (R. 79).

The "indispensability" here asserted is essentially different from that asserted with respect to the United States. Although defendants urge (as in the case of the interests* of the United States below San Marcial) that if the construction of the Compact which they plead is upheld, the decree will affect the District injuriously (Defts. 66, 78), the chief contentions are that a decree herein will necessarily require the determination of relative rights of the Elephant Butte District (Defts. 64-68), on the one hand, and of the Middle Rio Grande District, the Indians and other New Mexico water users above San Marcial, on the other; that because of Elephant Butte's adverse interest New Mexico cannot represent it as *parens patriae* (Defts. 74-76); that it cannot be joined as a defendant because of its adverse interest (Defts. 72); and that it cannot sue New Mexico without the latter's consent

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return waters from the Project (Tex. Ex. 17, R. 1048, 1053, 1963). It is possible that of the waters received by the Hudspeth District as drainage and return flow from the Project, a portion, constituting Hudspeth's own drainage and return flow, in turn goes down the Rio Grande and is of some slight benefit to Texas.

(Defts. 72-73). And it is urged with much vigor that if the Compact is construed as a final determination of relative priorities, preferring junior users below San Marcial over senior users above, it has a vitiating infirmity, in that it violates Article XVI, Section 2, of the New Mexico Constitution, providing that priority of appropriation shall give the better right (Defts. 53-54, 69-70; Defts. R. 4, 8-10).

I do not go into the matter of the relative priorities of the Elephant Butte District and of upper New Mexico water users, because these seem to me to be settled and determined by the Compact. *Hinderlider v. La-Plata Company,* 304 U. S. 92, 106. And see *West Virginia v. Sims,* 341 U. S. 22, 35-36.

It is difficult to see why the considerations urged in support of the indispensability of the District do not apply with equal force to the water users of the District, who would benefit most materially by the relief sought by Texas. The District seems a conduit for the benefits as its canals are for the water. Yet it is not suggested that the large number of New Mexican individuals, municipalities and corporations within the District are necessary parties. And if the District is regarded as the beneficiary, it would* seem to be on the theory that it is a co-owner of the water, legally or equitably, with the two Texas Districts. But it has been held that one tenant in common of water rights may alone sue to enjoin diversion by a subsequent appropriator of any water to which either he or his cotenants are entitled. *Rodgers v. Pitt,* 129 Fed. 932.

What seems to me decisive, however, is that this is a suit by the State of Texas to enforce an interstate compact. At the time the Compact was made, and long before, the relative benefits derived by Texas and by

the Elephant Butte District from the distribution of water from Elephant Butte Reservoir, were substantially what they now are. New Mexico, though well aware of this, and of the conflicting interests of its two irrigation districts, entered into the Compact and in particular agreed to the sanctions now sought to be enforced. It is not possible for Texas to obtain relief for itself without benefitting either the Elephant Butte District, a non-party to the Compact, or the District's water users. But the rights given Texas by the Compact may be wholly ineffective if Texas cannot sue to enforce them. I conclude that the right of Texas to maintain this suit is not destroyed by the interest of the Elephant Butte District, and that that District is not an indispensable party.

Respectfully submitted,
JOHN RAEBURN GREEN.

Saint Louis, Missouri,
February 28, 1954.*

APPENDIX.

One document was excluded from the record. Defendant Middle Rio Grande Conservancy District offered what was described as "a letter dated October 26, 1927, as to Indian lands affected by the Middle Rio Grande Conservancy District." The witness said that this was part of the official files of the District, but he did not know who had prepared it—"all I know is what it says on top there." Objection being made, I excluded the document from the record "until it is further identified" (R. 822-825). No further evidence of identification was offered and the exclusion became permanent instead of temporary. In order that all documentary evidence may be available to the Court, a photostat of the document is attached.

INDIAN LANDS AFFECTED BY THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT.
DATA COMPILED FROM RECORDS OF INDIAN IRRIGATION SERVICE AND THIS DISTRICT.
Albuquerque, N. M., October 26, 1927

	Total Area† Under Proposed System	Area Deducted for Roads and Canals (Present and Proposed)		Net Area Under Proposed System	Non-Indian Land**			Indian Land			
					Cultivated	Non-Cultivated	Total	Cultivated	Non-* Cultivated	Desert	Total
Cochiti	2,104	3%	63	2,041	525	129	654	705	464	218	1,387
Santo Domingo	5,103	3%	153	4,950	224	140	364	1,440	2,725	421	4,586
San Felipe	4,356	5%	218	4,138	17	0	17	1,111	1,516	1,494	4,121
Santa Ana	1,632	3%	49	1,583	28	142	170	636	777	0	1,413
Sandia	5,230	7%	366	4,864	325	807	1,132	523	3,209	0	3,732
Isleta	7,500	3%	225	7,275	93	86	179	2,555	4,516	25	7,096
Total Indian Pueblo Lands	25,925		1,074	24,851	1,212	1,304	2,516	6,970	13,207	2,158	22,335
Indian School Lands	155			155				155			155
TOTALS	26,080		1,074	25,006	1,212	1,304	2,516	7,125	13,207	2,158	22,490

†Gross Area Less Railroad Right of way.
*Areas under present ditches but not now cultivated principally because the existing irrigation canals are inadequate.
**Non-Indian Land includes all tracts within Indian grants which are occupied by non-Indians. Titles to these lands are in question and they may ultimately be confirmed to Indians.

APPENDIX II

SECOND REPORT OF SPECIAL MASTER

January 31, 1955

NOTE: * indicates pages of original report.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 9, Original.

STATE OF TEXAS,

Plaintiff

vs.

STATE OF NEW MEXICO et al.,

Defendants.

REPORT OF SPECIAL MASTER.

(Under Order of October 14, 1954.)

On October 14, 1954, the Court entered its order referring to the Special Master the plaintiff's motion for leave to amend the prayer of its complaint, and directing me to hear the parties and report my opinion and recommendation "as to whether the motion should be granted and whether if granted it would cure any defect of parties herein."*

In my Report dated February 28, 1954,[1] it was recommended that the suit be dismissed because of the absence of the United States, which in my view was an indispensable party because of the rights of the Indian tribes. This seemed necessary because of the relief then sought by Texas. It was also recommended that Texas be given an opportunity to amend further

[1]Hereinafter referred to simply as "1954 Report."

its prayer for relief, if it should so desire. Texas' present motion is designed to meet the view expressed, that the presence of the United States was necessary because of the rights of the Indians.

A hearing was held at St. Louis, Missouri, on December 1, 1954, at which all parties were represented. Except for two documents offered by the defendants (Defts. Exs. 48 and 49, R. 1291-1296), no evidence was offered. The transcript of this hearing and the two documentary exhibits have been filed with the Clerk. There was extended oral argument, which was not transcribed. The parties filed no briefs or written argument, relying upon those heretofore filed with the Court (R. 1289).

In my view it was necessary to confine the hearing to the two questions referred by the Court's order of October 14, 1954, and for that reason I sustained an objection to the admission in evidence of the exhibits, both of which related to the progress of the contract between Middle Rio Grande Conservancy District and the United States for the acquisition of El Vado (R. 1300-1307).

If the Amendment now sought would have the result of making the presence of the United States no longer indispensable, I see no reason why the motion should not be granted. To this extent at least the two questions referred by the Court's order are related.*

The Relief Sought by the Proposed Amendment.

The conclusion that the United States was an indispensable party because of the rights of the Indians seemed inescapable (1954 Report, 39-43) from an analysis of the "Amended Statement As To Relief

Sought By Texas'"[2] (R. 967-969; 1954 Report, 4-6). A comparison of the relief then asked with that now sought by the Amendment follows:

1. Paragraphs numbered 1, 2 and 3 of the Amendment now sought, while in a different order, ask substantially the same relief as was asked in paragraphs 1, 2 and 3 of the Amended Statement, but in the Amendment each of these paragraphs is made expressly "subject to the provisions of Paragraph 4." The corresponding paragraphs in the Amended Statement lacked any such limitation. Aside from this limitation, these three paragraphs, in each document, reflect the general provisions of Articles VI, VII and VIII of the Rio Grande Compact, for the situations which Texas alleges have now arisen.

2. Paragraph 4 of the Amendment, and the two unnumbered paragraphs[3] immediately following it, differ widely from paragraph 4 of the Amended Statement, whose place they take. These new paragraphs read as follows:

> "4. Pending determination of the obligations of the United States of America to the Indian tribes and of the rights of the Indian tribes by final judgment in a court of competent jurisdiction and without prejudice to the rights of Texas and its citizens under the* Rio Grande Compact, the storage and diversion of water for beneficial use on Indian lands shall not be restricted by the provi-

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[2]Hereinafter this is referred to simply as "Amended Statement," while the amendment for which leave is now moved is referred to as "Amendment."

[3]The Amendment contains four numbered paragraphs, followed by four paragraphs which are not numbered. The unnumbered paragraphs are treated herein as separate from and not part of the paragraph numbered "4."

sions of Paragraphs 1, 2 and 3 of this decree.

"Plaintiff further prays that this Court appoint a Special Water Master to enforce the provisions of the decree of this Court with authority and direction to him to act in conformity therewith until such time as this Court may determine his services are no longer necessary or until such time as all parties hereto may, by written stipulation, agree to his discharge.

"Plaintiff further prays that this Court instruct such Special Water Master to require the measurement of the waters under his control, both natural flow and storage, and to require the allocation of such waters to Indian lands in the priorities which the Secretary of the Interior of the United States determines, pursuant to the Act of March 13, 1928 (45 Stat. 312, Chap. 219)."

3. The third unnumbered paragraph of the Amendment is new. It is as follows:

"Plaintiff further prays that if this Court should be of the opinion that some modification should be made of the above in order to award to Texans the relief which the facts may show her to be entitled under the allegations of the complaint, then the Court enter such decree as will afford such relief."

4. Both the Amended Statement and the Amendment conclude with the usual prayer for general relief, including other and further relief to which plaintiff may be entitled, and for the retention by the Court of jurisdiction to make such further orders as may be necessary to enforce its decree.*

The Impact Upon the United States of the Relief Sought by the Amendment.

In the 1954 Report (40-42) it was concluded that the United States was an indispensable party because:

1: The United States had made several assertions that 8847 acres of Indian land had a right to storage in El Vado which had priority over the provisions of the Compact, whereas the relief sought by Paragraphs 1 and 3 of the Amended Statement would definitely restrict the storage of water in El Vado.

2. The United States had asserted that the right to store water in El Vado, with priority over the provisions of the Compact, was not confined to the 8847 acres but extended equally to 11,395.05 acres of newly reclaimed Indian land, and this also would be seriously affected by a decree in conformity with Paragraphs 1 and 3 of the Amended Statement.

3. The right of the 11,395.05 acres to the natural flow of the river, for which priority over the Compact had been asserted by the United States, was not protected by Paragraph 4 of the Amended Statement, but would almost certainly be adversely affected by the relief then sought by Texas.

The Amendment now offered appears to eliminate these adverse effects upon the interest of the United States. The limitation placed upon Paragraphs 1, 2 and 3 by Paragraph 4 is in general terms, which are sufficiently broad to except from the operation of the relief sought by the three preceding paragraphs the rights, both to natural flow and stored water, of the entire 20,242.05 acres of Indian land. It is true that Texas urged in its Objections to the 1954 Report (20-21) that the 11,395.05 acres of newly reclaimed land had no priority over Texas, especially* as to stor-

age rights, and construed the Amendment as giving them no more than "equality with like lands of the District." But since then, in the argument, Texas has taken the position that the Amendment is to be construed to protect against restriction the rights of the newly reclaimed land, both to natural flow and to stored water. Paragraph 4 would afford protection to these rights only until a final adjudication of them in a court of competent jurisdiction, and is "without prejudice to the rights of Texas and its citizens under the Rio Grande Compact," but it seems evident that this reservation does not adversely affect the interest of the United States.

In the third unnumbered paragraph of the Amendment Texas asks that if this Court should be of the opinion that some modification should be made of the relief prayed for in the preceding paragraphs, "in order to award to Texans the relief which the facts may show her to be entitled to under the allegations of the complaint, then the Court enter such decree as will afford such relief." In the argument Texas stated that by this paragraph it was intended that Texas would consent to the elimination of any of the relief asked in the preceding paragraphs of the Amendment, if such elimination was necessary in order to prevent dismissal of the suit. In my view, it is not necessary to dwell on this, because the questions referred may be determined by examination of the relief prayed for specifically, without consideration of this paragraph (which is in effect the converse of the prayer for other and further relief), and because giving effect to it would raise a question as to the effectiveness of whatever relief might be obtained after any such elimination. But the concession, made by Texas in the argu-

ment, that the Amendment is to be construed to protect against restriction the rights of the newly acclaimed land, both to natural flow and to stored water, appears to reflect the attitude expressed by the third unnumbered paragraph.*

The only other portion of the Amendment which requires consideration as to its possible adverse effect upon the United States is the second unnumbered paragraph, which is not subject to the limitation of Paragraph 4. In this plaintiff prays that the Court instruct the Special Water Master to require the measurement of the waters under his control, both natural flow and storage, and to require the allocation of such waters to Indian lands in the priorities which the Secretary of the Interior determines, "pursuant to the Act of March 13, 1928."[4] That Act (see 1954 Report, 36), which authorized the Secretary to contract with the Middle Rio Grande Conservancy District for conservation, irrigation, drainage and flood control for the Indian lands within the exterior boundaries of the District, provided that in determining the share of the cost of the works to be apportioned to the Indian lands there should be taken into consideration only the Indian acreage benefited, "which shall be definitely determined by said Secretary," and should include only lands feasibly susceptible of economic irrigation and cultivation and materially benefited by this work. While the Act required the District to recognize that the Indian lands then irrigated (referred to as approximately 8346 acres) had water rights which should be prior and paramount to any rights of the District, or of any property holder therein, and further pro-

[4]45 Stat. 312.

vided that the water rights for the newly reclaimed lands should be recognized as "equal to those of like District lands," it gives the Secretary of the Interior no authority to make any determination other than that mentioned above. The possible application of the second unnumbered paragraph of the Amendment is therefore (as discussed below) quite limited. In my view the United States could not be adversely affected by relief in accordance with this paragraph.

I conclude, therefore, that the interest of the United States arising from the rights of the Indian tribes would* not be adversely affected by a decree in conformity with the Amendment now offered.

The Burden Placed Upon Defendants by the Amendment.

In the 1954 Report (43) it was concluded that the United States was an indispensable party for a further reason: the burden placed on defendants by the concluding clause of Paragraph 4 of the Amended Statement, when considered in connection with the other grounds of indispensability, was in my view not consistent with equity and good conscience. This clause required the Water Master to furnish to such lands under Indian ownership within the exterior boundaries of the Middle Rio Grande Conservancy District as had been determined by the Secretary of the Interior to have priority over the other lands of the District "such amount of water as may be demanded for said lands by the Area Irrigation Engineer of the Albuquerque Area Office, Bureau of Indian Affairs, Department of the Interior." The necessity for this clause arose from the fact that the quantity of water needed

per acre could not be determined in the absence of the United States.

This clause is not contained in the present Amendment. But, under the rule announced in *Shields v. Barrow,* 17 How. 130, 139, it remains necessary to examine the relief now sought by the Amendment in order to determine whether in the absence of the United States a decree could be framed without "leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

Paragraphs 1, 2 and 3 of the Amendment are prayers for the application of the provisions of Articles VI, VII and VIII, respectively, of the Compact, and appear to place no unconscionable burden upon defendants.*

The general language of Paragraph 4 of the Amendment is similar to the general provision of Article XVI of the Compact, that nothing in the Compact shall be construed as affecting the obligations of the United States to the Indian tribes or as impairing the rights of the Indian tribes. Article XVI did not undertake to define the extent of these obligations and rights, but simply left them undisturbed, whatever their extent. But Paragraph 4 of the Amendment appears to contemplate (pending determination of the obligations of the United States to the Indian tribes and of the rights of the Indian tribes by final judgment in a court of competent jurisdiction) full priority, as has been said, to the 20,242.05 acres of Indian land, both as to natural flow and stored water.

The storage and diversion of water for the newly reclaimed Indian land is protected by Paragraph 4

against restriction by the provisions of Paragraphs 1, 2 and 3, whereas the non-Indian lands whose water rights were, under the Act of March 13, 1928, and the agreements pursuant thereto, to be "recognized as equal" to the newly reclaimed Indian land, are given no such guaranty and must bear the unrestricted impact of the relief sought by Paragraphs 1, 2 and 3.

Nevertheless I conclude that the provision of Paragraph 4 of the Amendment, whether taken by itself or in conjunction with Paragraphs 1, 2 and 3, places no unconscionable burden upon the defendants. No provision respecting allocation of water to Indian lands is to be found in Paragraphs 1, 2, 3 or 4. Paragraph 4 provides only that the storage and diversion of water for beneficial use on Indian lands shall not be restricted by Paragraphs 1, 2 or 3. If Paragraph 4 should have the effect of preventing or from time to time suspending the injunctive relief under these paragraphs, or any of them, such prevention or suspension would, to that extent, apparently* leave defendants free to continue their present operations. It is conceivable that defendants might in fact be benefited by the operation of Paragraph 4, and in any event it is difficult to see that any unconscionable burden is placed upon them by its provision.

But the Amendment does not stop with Paragraph 4. In order to keep the limitation of Paragraph 4 from coming into play to bar the relief asked in Paragraphs 1, 2 and 3, Texas prays, in the second unnumbered paragraph of the Amendment, that the Special Water Master (to be appointed pursuant to the prayer of the first unnumbered paragraph, to enforce the decree) be instructed "to require the measurement of the

waters under his control, both natural flow and storage, and to require the allocation of such waters to Indian lands in the priorities which the Secretary of the Interior of the United States determines, pursuant to the Act of March 13, 1928." While there are a number of priorities which are conceivable, as between water for the 8847 acres of original Indian lands, for the 11,395.05 acres of newly reclaimed Indian lands, for the non-Indian lands in the District, and the rights under the Compact for the lands below San Marcial, the Secretary of the Interior has under the Act of March 13, 1928, as mentioned above, no power to make any determination other than that as to the Indian acreage benefited. That determination, which only indirectly was a determination of priority, was made in 1938 (Tex. Ex. 7, R. 357-359; see 1953 Report, 37-38). In the argument counsel for Texas said that the present tense was used for the determination, because it was possible that the Secretary might make some small modifiation or correction of the 1938 determination. But it was conceded that no change could be made in the agreement between the United States and the Middle Rio Grande District, without the consent of the District.*

Taking into account (1) the limited authority given the Secretary by the Act, (2) the determination made by him in 1938, (3) the concession made in argument by Texas that pending judicial determination the newly reclaimed Indian lands should have priority, and (4) the fact that this paragraph of the Amendment speaks of allocation only "to Indian lands" and is silent as to any allocation to the non-Indian lands of the District, it seems to me necessary to construe the allocation clause as simply meaning the water be allocated

by the Special Water Master to the entire 20,242.05 acres of Indian land (with perhaps a further priority to the 8847 acres over the 11,395.05) prior to any allocation to non-Indian lands of the District, if any allocation to the latter may still be made after application of the provisions of Paragraphs 1, 2 and 3. So far as defendants are concerned, the allocation clause might as well end after the word "lands," since the only effect, if any, of the words following is to establish a priority between the two classes of Indian lands, which is of no consequence to the lands which must follow both.

If this construction is correct, the effect of the second unnumbered paragraph of the Amendment is to place a substantial burden on defendants, for the rights of the non-Indian lands of the District are at present "recognized as equal" to those of the 11,395.05 acres of newly reclaimed Indian land. This burden is one which arises because of the absence of the United States.[5]*

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[5]In addition to this burden, it was urged also by defendants, in support of their offering of Defts. Exs. 48 and 49, that the burden placed on them by the relief sought by the present Amendment would be increased upon the consummation of the pending contract between the United States and the Middle Rio Grande Conservancy District, to acquire the facilities and works of the District (including El Vado), in this: The operation of El Vado would then be by the United States and be beyond the control of the defendants; yet if it were not in conformity with the decree, defendants would be in contempt. The answer to this seems to be the same as that made to a somewhat similar contention last year (1954 Report, 29). The Flood Control Act of 1948 (Act of June 30, 1948, ch. 771, Tit. II, Sec. 203, 62 Stat. 1171, 1179) provides expressly that "all project works shall be operated in conformity with the Rio Grande Compact, as it is administered by the Rio Grande Compact Commission." So far as El Vado is concerned, the Amendment seeks only the enforcement of Articles VI, VII

Consistency of the Burden With Equity and Good Conscience.

In my view the interest of the absent party, the United States, would not be adversely affected by the relief sought by the Amendment. A decree in conformity with the Amendment framed to avoid such adverse effect would, however, place upon defendants a new burden, that is, the priority accorded to the water rights of the newly reclaimed Indian land over the water rights of the non-Indian land of the District. Defendants urge that such a decree would be grossly inequitable and would deprive all non-Indian water users in New Mexico, above San Marcial, of property rights without due process of law (Objections to Motion for Leave to Amend, 15-19). The question now to be determined is whether there are equitable considerations sufficient, in the absence of any adverse effect upon the interest of the United States, to justify the imposition of the burden upon defendants, so that the final determination of the controversy will not be "wholly inconsistent with equity and good conscience."

Certain equitable considerations which seem to me relevant to the present question were set out in the 1954 Report (43-46). Without reviewing them in detail, there was evidence indicating that the Middle Rio Grande Conservancy District bore some responsibility for the water shortage, in that it had not done all it could to prevent* waste of water in non-beneficial use; and that the relief sought then and now would require no more than a 10% diminution of the present con-

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and VIII of the Compact. The care which the Congress has taken to subordinate the Middle Rio Grande Project for Flood Control to the Rio Grande Compact seems to be decisive of this contention.

sumption of water in New Mexico above Elephant Butte, which could be made up wholly by the elimination of non-beneficial consumption. And the removal of the gages on its main canals and laterals, by the District, has made it more difficult to determine the weight of the burden of the priority now proposed.[6]

Texas urges vigorously (Objections to 1954 Report, 25-27) that the Middle Rio Grande District has created the condition for which relief is now sought, that it is in a position to correct that condition, and that there is no inequity in placing on it the burden of doing so.

The alternative to permitting the case to proceed is to dismiss it. Texas urges (Objections to 1954 Report, 11-13) that in the former suit between the same parties, in which Texas sought relief from the alleged impairment of its rights to the waters of the Rio Grande, a motion to dismiss, based in part on the ground that the United States was an indispensable party because of the rights of the Indians, was overruled by this Court (*Texas v. New Mexico,* 297 U. S. 698). That controversy was settled by the negotiation and execution of the Rio Grande Compact on which Texas now sues, and the Court then dismissed the suit (*Texas v. New Mexico,* 308 U. S. 510). It is urged that should the present suit now be dismissed, the result would be "that Texas would be far worse off now than it would have been had it declined to enter into* the present Compact at all, and pursued its original action to final

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[6]See 1954 Report, 38-39. Middle Rio Grande about 1937 or 1938 removed the gages which it formerly had on each of its main canals and main laterals, the reason for such removal being unexplained (R. 929-930). The present distribution procedure is—to the extent that water is available—to fill the ditches to the banks and let the Indians "take all they want" (R. 928).

judgment on the merits at that time" (Objections to 1954 Report, 12).

This is no doubt speculative. But I am unable to see that Texas will have any remedy for the breaches of the Compact which it alleges, if this suit is dismissed.

In my opinion, the considerations mentioned are, so far as now appears, sufficient to render the burden which the proposed decree would place upon defendants, in the language of *Shields v. Barrow,* not "wholly inconsistent with equity and good conscience."

Difficulties of Framing and Enforcing the Decree.

Defendants urge that, because of the provisions of Paragraph 4 and the unnumbered paragraphs following, no decree could be entered in this case offering any prospect of finality; that one granting the relief prayed for in the Amendment "would leave the case in such a state of confusion as to be incapable of enforcement, and would subject the defendants to a multiplicity of law suits." It is also urged that a court of equity will not render a decree, the performance of which requires constant superintendence[7] or which is in any way dependent (as is, in their view, the relief asked by the second unnumbered paragraph) upon action by some other agency.[8]

Certainly it seems possible that framing the final decree may present difficulty and that the operation of the decree may require the supervision of this Court, possibly over an extended period of time. Indeed, it

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[7]Citing *Southex Trading Company, Inc., et al. v. Piankay Realties, Inc.,* 59 N. Y. S. 2d 362.

[8]Citing *Napa Valley Electric Co. v. Calistoga Electric Co.,* 68 Cal. App. 477, 176 P. 699.

may be necessary* to issue an interlocutory decree for the appointment of a Special Water Master who shall "require the measurement of the waters under his control, both natural flow and storage," and to take into consideration the results of such measurement, before any final decree can be framed. The information which would be thus developed might be of much value."[9]

But, in cases under its orginal jurisdiction, this Court has made clear its position with respect to the difficulties of framing and enforcing a decree. In *Nebraska v. Wyoming,* the Court stated:

> "The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution." (325 U. S. 589, 616.)

In that case (at 622-623) it was recognized that "the decree will not necessarily be for all time. Provision will be made for its adjustment to meet substantially changed conditions." Any party under such circumstances could apply for modification. The decree itself (325 U. S. 665-672) shows the complexities which the Court there undertook to face. In the oral argument, Texas cited other rulings by this Court in which decrees were entered which required further supervi-

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[9]It was suggested in the 1954 Report (45) that a first step toward meeting the difficulty arising from the lack of any determination of the quantity of water required for the Indian lands might be a decree ordering Middle Rio Grande to place gages and meters on all canals and laterals and to measure its distribution of water as exactly as possible, separating the actual use of the Indian lands from that of the non-Indian.

sion[10] and were of a flexible nature, adaptable to change.[11]*

Conclusion.

I conclude that a decree in conformity with the prayer of the Amendment, with the construction conceded by plaintiff as to priority for the newly reclaimed land, would have no adverse effect upon the interest of the United States arising from the rights of the Indians. Such a decree, so construed, would place upon defendants a new burden, arising because of the absence of the United States. The imposition of this burden, however, would on balance, so far as now appears, not be wholly inconsistent with equity and good conscience, in view of the considerations mentioned above. While such a decree might be difficult to frame and difficult to apply, possibly requiring continued supervision and modification from time to time, still such difficulties now appear no greater than those which have in the past not deterred the exercise of this Court's original jurisdiction in a suit between states.

Accordingly, having regard again to the rule that this Court will "strain hard" to avoid dismissing a suit because of the absence of an interested party that cannot be brought in, and will be diligent to seek a way to adjudicate the merits of the case notwithstanding such absence (*Bourdieu v. Pacific Western Oil Co.,* 299 U. S. 65, 70-71), the rule of dismissal not being inflexible but subject to the Court's discretion (*Elmendorf v. Taylor,* 10 Wheat. 152, 166-168), I am of the opinion that the plaintiff's motion for leave to amend

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[10]*Georgia v. Tennessee Copper Co.,* 240 U. S. 650.

[11]*United States v. American Tobacco Co.,* 221 U. S. 106; *Railroad Commission of Texas v. Pullman Co.,* 312 U. S. 496.

the prayer of its complaint should be granted and that if granted it would cure, for the time being at least, any defect of parties herein. That is respectfully recommended.

Respectfully submitted,

JOHN RAEBURN GREEN.

St. Louis, Missouri,

January 31, 1955.