

Supreme Court, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

NO. **65**, Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

—
THE STATE OF TEXAS, PLAINTIFF

V.

THE STATE OF NEW MEXICO, DEFENDANT

—
**MOTION FOR LEAVE TO FILE COMPLAINT,
COMPLAINT AND BRIEF IN SUPPORT OF
MOTION**
—

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OCTOBER TERM, 1973

NO. _____, Original

THE STATE OF TEXAS, PLAINTIFF

V.

THE STATE OF NEW MEXICO, DEFENDANT

MOTION FOR LEAVE TO FILE COMPLAINT

The State of Texas asks leave of the Court to file its complaint against the State of New Mexico submitted herewith.

JOHN L. HILL
Attorney General of Texas

LARRY F. YORK
First Assistant Attorney General

PHILIP K. MAXWELL
Assistant Attorney General

ROD E. GORMAN
Assistant Attorney General

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NO. _____, Original

THE STATE OF TEXAS, PLAINTIFF

V.

THE STATE OF NEW MEXICO, DEFENDANT

COMPLAINT

The State of Texas, by her Attorney General, John L. Hill, on behalf of her Pecos River Compact Commissioner, her Red Bluff Water Power Control District, and her citizens, brings this suit against the Defendant, State of New Mexico, and for cause of action respectfully shows the Court the following:

I.

The original and exclusive jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the Constitution of the United States, and 28 U.S.C. § 1251(a)(1).

II.

The Pecos River, one of the principal tributaries of the lower Rio Grande River, is an interstate river which

rises in North Central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas.

III.

In order to resolve existing and future controversies and to divide and apportion equitably the water of the Pecos River, the State of Texas and New Mexico, on December 3, 1948, signed the Pecos River Compact. The Compact was ratified thereafter by the legislatures of the respective States and was consented to and approved by the United States of America by Act of Congress, Senate Document 109, 81st Congress, 1st Session (1949). A copy of the Pecos River Compact is attached hereto as Exhibit "A" and made a part hereof by reference.

IV.

Article III (a) of the Pecos River Compact imposes upon the State of New Mexico the duty "not to deplete by man's activities the flow of the Pecos River at the New Mexico-Texas State Line below an amount which will give to the State of Texas a quantity of water equivalent to that available to the State of Texas under the 1947 condition". The "1947 Condition" is defined by Article II (g) of the Compact as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee". The term "report of the Engineering Advisory Committee" is defined in Article II (f) of the Compact as the report of said committee, dated January, 1948, together with all

appendices, which was approved and adopted by the Commissioners signing the Compact at a meeting in Santa Fe, New Mexico, on December 3, 1948. Commencing at page 145 of Senate Document 109 is the Manual of Inflow-Outflow Methods of Measuring Changes in Stream-Flow Depletion, which Manual is a part of the Report of the Engineering Advisory Committee and as such is an integral part of the Compact. Article VI (c)(i) of the Compact requires that the Manual of Inflow-Outflow Methods of Measuring Changes in Stream-Flow Depletion shall be used by the Commission to determine depletions by man's activities. This Manual has never been revised or amended by the Commission.

V.

Notwithstanding her duties and obligations under the Compact, the State of New Mexico has breached her duty under Article III (a) of the Compact by countenancing and permitting depletions by man's activities within New Mexico to the extent that from 1950 through 1972 there has occurred a cumulative departure of the quantity of water available from the flow of the Pecos River at the Texas-New Mexico State Line in excess of 1,200,000 acre-feet from the equivalent available under the 1947 condition applying the methods contained in the Manual of Inflow-Outflow Methods of Measuring Changes in Stream-Flow Depletion.

VI.

Article VI of the Compact provides principles governing the apportionment of the waters of the Pecos River pursuant to Article III of the Compact and specifies that the inflow-outflow method shall be used to determine the effect at the Texas-New Mexico State Line of depletion by man's activities. For more than 20 years, the Compact Commission has accumulated additional data and conducted studies for the purpose of revising the basic data upon which the Compact was predicated. During all this time there never has been an application of the Compact to provide Texas with the water to which it is entitled under the Compact. The State of New Mexico, through its Compact Commissioner, consistently has refused to apply the Compact's principles of water apportionment with the result that the State of Texas has been deprived of the water to which it is entitled. There is no remedy available to the State of Texas except that which may be granted by the Honorable Supreme Court of the United States.

VII.

Grave and irreparable injury to the State of Texas and her citizens who were entitled to receive and use the water apportioned to them by the Compact has been caused by the acts and conduct of the State of New Mexico, her officers, citizens and political subdivisions in failing, neglecting and refusing to deliver water in the Pecos River at the Texas-New Mexico State Line in accordance with the Compact. Grave and irreparable

injury will be suffered in the future by the State of Texas and her citizens unless relief is afforded by this Honorable Court to prevent the State of New Mexico, its officers, citizens and political subdivisions from withholding and using water which New Mexico heretofore has contracted and agreed to deliver under the terms and conditions of the Compact.

VIII.

The State of Texas respectfully contends that the only remedy available to her to enforce the terms and conditions of the Pecos River Compact against the State of New Mexico is through the original jurisdiction powers of this Honorable Court.

WHEREFORE, the State of Texas respectfully prays that the Court issue its decree commanding the State of New Mexico, its officers, citizens and political subdivisions to deliver water in the Pecos River at the Texas-New Mexico State Line in accordance with the provisions of the Pecos River Compact and providing for such other and further relief as the Court may decree appropriate including, but not limited to, the appointment of a special master empowered to control the diversion, storage and use of Pecos River Basin waters within the State of New Mexico.

Respectfully submitted,

JOHN L. HILL
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LARRY F. YORK
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Assistant Attorney General

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BY 
Philip K. Maxwell

EXHIBIT "A"

[PUBLIC LAW 91—81st CONGRESS]

[CHAPTER 184—1st SESSION]

[H. R. 3334]

AN ACT

To grant the consent of Congress to the Pecos River compact

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the compact, signed (after negotiations in which a representative of the United States, duly appointed by the President, participated and upon which he has reported to Congress) by the Commissioners for the States of New Mexico and Texas, on December 3, 1948, at Santa Fe, New Mexico, and thereafter ratified by the legislatures of each of the States aforesaid, which compact reads as follows:

PECOS RIVER COMPACT

The State of New Mexico and the State of Texas, acting through their Commissioners, John H. Bliss for the State of New Mexico and Charles H. Miller for the State of Texas, after negotiations participated in by Berkeley Johnson, appointed by the President as the representative of the United States of America, have agreed respecting the uses, apportionment and deliveries of the water of the Pecos River as follows:

ARTICLE I

The major purposes of this Compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos River; to promote interstate comity; to remove causes of present and future controversies; to make secure and protect present development within the states; to facilitate the construction of works for, (a) the salvage of water, (b) the more efficient use of water, and (c) the protection of life and property from floods.

ARTICLE II

As used in this Compact:

(a) The term "Pecos River" means the tributary of the Rio Grande which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas, and includes all tributaries of said Pecos River.

(b) The term "Pecos River Basin" means all of the contributing drainage area of the Pecos River and its tributaries above its mouth near Langtry, Texas.

(c) "New Mexico" and "Texas" mean the State of New Mexico and the State of Texas, respectively; "United States" means the United States of America.

(d) The term "Commission" means the agency created by this Compact for the administration thereof.

(e) The term "deplete by man's activities" means to diminish the stream flow of the Pecos River at any given point as the result of beneficial consumptive uses of water within the Pecos River Basin above such point. For the purposes of this Compact it does not include the diminution of such flow by encroachment of salt cedars or other like growth, or by deterioration of the channel of the stream.

(f) The term "report of the Engineering Advisory Committee" means that certain report of the Engineering Advisory Committee dated January 1948, and all appendices thereto; including, basic data, processes, and analyses utilized in preparing that report, all of which were reviewed, approved, and adopted by the Commissioners signing this Compact at a meeting held in Santa Fe, New Mexico, on December 3, 1948, and which are included in the Minutes of that meeting.

(g) The term "1947 condition" means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.

(h) The term "water salvaged" means that quantity of water which may be recovered and made available for beneficial use and which quantity of water under the 1947 condition was non-beneficially consumed by natural processes.

(i) The term "unappropriated flood waters" means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas.

ARTICLE III

(a) Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

(b) Except as to the unappropriated flood waters thereof, the apportionment of which is included in and provided for by paragraph (f) of this Article, the beneficial consumptive use of the waters of the Delaware River is hereby apportioned to Texas, and the quantity of such beneficial consumptive use shall be included in determining waters received under the provisions of paragraph (a) of this Article.

(c) The beneficial consumptive use of water salvaged in New Mexico through the construction and operation of a project or projects by the United States or by joint undertakings of Texas and New Mexico, is hereby apportioned forty-three percent (43%) to Texas and fifty-seven percent (57%) to New Mexico.

(d) Except as to water salvaged, apportioned in paragraph (c) of this Article, the beneficial consumptive use of water which shall be non-beneficially consumed, and which is recovered, is hereby apportioned to New Mexico but not to have the effect of diminishing the quantity of water available to Texas under the 1947 condition.

(e) Any water salvaged in Texas is hereby apportioned to Texas.

(f) Beneficial consumptive use of unappropriated flood waters is hereby apportioned fifty percent (50%) to Texas and fifty percent (50%) to New Mexico.

ARTICLE IV

(a) New Mexico and Texas shall cooperate to support legislation for the authorization and construction of projects to eliminate non-beneficial consumption of water.

(b) New Mexico and Texas shall cooperate with agencies of the United States to devise and effectuate means of alleviating the salinity conditions of the Pecos River.

(c) New Mexico and Texas each may:

(i) Construct additional reservoir capacity to replace reservoir capacity made unusable by any cause.

(ii) Construct additional reservoir capacity for the utilization of water salvaged and unappropriated floodwaters apportioned by this Compact to such state.

(iii) Construct additional reservoir capacity for the purpose of making more efficient use of water apportioned by this Compact to such state.

(d) Neither New Mexico nor Texas will oppose the construction of any facilities permitted by this Compact, and New Mexico and Texas will cooperate to obtain the construction of facilities that will be of joint benefit to the two states.

(e) The Commission may determine the conditions under which Texas may store water in works constructed in and operated by New Mexico.

(f) No reservoir shall be constructed and operated in New Mexico above Avalon Dam for the sole benefit of Texas unless the Commission shall so determine.

(g) New Mexico and Texas each has the right to construct and operate works for the purpose of preventing flood damage.

(h) All facilities shall be operated in such manner as to carry out the terms of this Compact.

ARTICLE V

(a) There is hereby created an interstate administrative agency to be known as the "Pecos River Commission." The Commission shall be composed of one Commissioner representing each of the states of New Mexico and Texas, designated or appointed in accordance with the laws of each such state, and, if designated by the President, one Commissioner representing the Un-

ited States. The President is hereby requested to designate such a Commissioner. If so designated, the Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission. All members of the Commission must be present to constitute a quorum.

(b) The salaries and personal expenses of each Commissioner shall be paid by the government which he represents. All other expenses which are incurred by the Commission incident to the administration of this Compact and which are not paid by the United States shall be borne equally by the two states. On or before November 1 of each even numbered year the Commission shall adopt and transmit to the Governors of the two states and to the President a budget covering an estimate of its expenses for the following two years. The payment of the expenses of the Commission and of its employees shall not be subject to the audit and accounting procedures of either of the two states. However, all receipts and disbursements of funds handled by the Commission shall be audited yearly by a qualified independent public accountant and the report of the audit shall be included in, and become a part of, the annual report of the Commission.

(c) The Commission may appoint a secretary who, while so acting, shall not be an employee of either state. He shall serve for such term, receive such salary, and perform such duties as the Commission may direct. The Commission may employ such engineering, legal, cleri-

cal, and other personnel as in its judgment may be necessary for the performance of its functions under this Compact. In the hiring of employees the Commission shall not be bound by the civil service laws of either state.

(d) The Commission, so far as consistent with this Compact, shall have power to:

1. Adopt rules and regulations;
2. Locate, establish, construct, operate, maintain, and abandon water gaging stations, independently or in cooperation with appropriate governmental agencies;
3. Engage in studies of water supplies of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;
4. Collect, analyze, correlate, preserve, and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries, independently or in cooperation with appropriate governmental agencies;
5. Make findings as to any change in depletion by man's activities in New Mexico, and on the Delaware River in Texas;
6. Make findings as to the deliveries of water at the New Mexico-Texas state line;

7. Make findings as to the quantities of water salvaged and the amount thereof delivered at the New Mexico-Texas state line;

8. Make findings as to quantities of water non-beneficially consumed in New Mexico;

9. Make findings as to quantities of unappropriated flood-waters;

10. Make findings as to the quantities of reservoir losses from reservoirs constructed in New Mexico which may be used for the benefit of both states, and as to the share thereof charged under Article VI hereof to each of the states;

11. Acquire and hold such personal and real property as may be necessary for the performance of its duties hereunder and to dispose of the same when no longer required;

12. Perform all functions required of it by this Compact and do all things necessary, proper, or convenient in the performance of its duties hereunder, independently or in cooperation with appropriate governmental agencies;

13. Make and transmit annually to the Governors of the signatory states and to the President of the United States on or before the last day of February of each year, a report covering the activities of the Commission for the preceding year.

(e) The Commission shall make available to the Governor of each of the signatory states any information

within its possession at any time, and shall always provide free access to its records by the Governors of each of the States, or their representatives, or authorized representatives of the United States.

(f) Findings of fact made by the Commission shall not be conclusive in any court, or before any agency or tribunal, but shall constitute prima facie evidence of the facts found.

(g) The organization meeting of the Commission shall be held within four months from the effective date of this Compact.

ARTICLE VI

The following principles shall govern in regard to the apportionment made by Article III of this Compact:

(a) The Report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.

(b) Unless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated floodwaters shall be determined on the basis of three-year periods reckoned in continuing progressive series beginning with the first day of January next succeeding the ratification of this Compact.

(c) Unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow

method, as described in the Report of the Engineering Advisory Committee, shall be used to:

(i) Determine the effect on the state-line flow of any change in depletions by man's activities or otherwise, of the waters of the Pecos River in New Mexico.

(ii) Measure at or near the Avalon Dam in New Mexico the quantities of water salvaged.

(iii) Measure at or near the state line any water released from storage for the benefit of Texas as provided for in subparagraph (d) of this Article.

(iv) Measure the quantities of unappropriated floodwaters apportioned to Texas which have not been stored and regulated by reservoirs in New Mexico.

(v) Measure any other quantities of water required to be measured under the terms of this Compact which are susceptible of being measured by the inflow-outflow method.

(d) If unappropriated floodwaters apportioned to Texas are stored in facilities constructed in New Mexico, the following principles shall apply:

(i) In case of spill from a reservoir constructed in and operated by New Mexico, the water stored to the credit of Texas will be considered as the first water to spill.

(ii) In case of spill from a reservoir jointly constructed and operated, the water stored to the credit of either state shall not be affected.

(iii) Reservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur.

(iv) The water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas.

(e) Water salvaged shall be measured at or near the Avalon Dam in New Mexico and to the quantity thereof shall be added a quantity equal to the quantity of salvaged water depleted by man's activities above Avalon Dam. The quantity of water salvaged that is apportioned to Texas shall be delivered by New Mexico at the New Mexico-Texas state line. The quantity of unappropriated floodwaters impounded under paragraph (d) of this Article, when released shall be delivered by New Mexico at the New Mexico-Texas state line in the quantity released less channel losses. The unappropriated floodwaters apportioned to Texas by this Compact that are not impounded in reservoirs in New Mexico shall be measured and delivered at the New Mexico-Texas state line.

(f) Beneficial use shall be the basis, the measure, and the limit of the right to use water.

ARTICLE VII

In the event of importation of water by man's activities to the Pecos River Basin from any other river basin the state making the importation shall have the exclusive use of such imported water.

ARTICLE VIII

The provisions of this Compact shall not apply to, or interfere with, the right or power of either signatory state to regulate within its boundaries the appropriation, use and control of water, not inconsistent with its obligations under this Compact.

ARTICLE IX

In maintaining the flows at the New Mexico-Texas state line required by this Compact, New Mexico shall in all instances apply the principle of prior appropriation within New Mexico.

ARTICLE X

The failure of either state to use the water, or any part thereof, the use of which is apportioned to it under the terms of this Compact, shall not constitute a relinquishment of the right to such use, nor shall it constitute a forfeiture or abandonment of the right to such use.

ARTICLE XI

Nothing in this Compact shall be construed as:

- (a) Affecting the obligations of the United States

under the Treaty with the United Mexican States (Treaty Series 994);

(b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters;

(c) Subjecting any property of the United States, its agencies or instrumentalities, to taxation by any state or subdivision thereof, or creating any obligation on the part of the United States, its agencies or instrumentalities, by reason of the acquisition, construction or operation of any property or works of whatever kind, to make any payment to any state or political subdivision thereof, state agency, municipality or entity whatsoever, in reimbursement for the loss of taxes;

(d) Subjecting any property of the United States, its agencies or instrumentalities, to the laws of any state to an extent other than the extent to which such laws would apply without regard to this Compact.

ARTICLE XII

The consumptive use of water by the United States or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state.

ARTICLE XIII

This Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams.

ARTICLE XIV

This Compact may be terminated at any time by appropriate action of the legislatures of both of the signatory states. In the event of such termination, all rights established under it shall continue unimpaired.

ARTICLE XV

This Compact shall become binding and obligatory when it shall have been ratified by the legislature of each State and approved by the Congress of the United States. Notice of ratification by the legislature of each State shall be given by the Governor of that State to the Governor of the other State and to the President of the United States, and the President is hereby requested to give notice to the Governor of each State of approval by the Congress of the United States.

In Witness Whereof, the Commissioners have executed three counterparts hereof each of which shall be and constitute an original, one of which shall be deposited in the archives of the Department of State of the United States, and one of which shall be forwarded to the Governor of each State.

Done at the City of Santa Fe, State of New Mexico,
this 3rd day of December, 1948.

JOHN H. BLISS,
Commissioner for the State of New Mexico.

CHARLES H. MILLER,
Commissioner for the State of Texas.

Approved

BERKELEY JOHNSON,
Representative of the United States of America.

BRIEF IN SUPPORT OF MOTION

The Pecos River, one of the principal tributaries of the lower Rio Grande River, is an interstate river which rises in North Central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande River near the town of Langtry, Texas. The rights of the State of Texas and New Mexico equitably dividing and apportioning the waters of the Pecos River are set forth in the Pecos River Compact of 1948, ratified and approved by Act of Congress, Senate Document 109, 81st Congress, 1st Session 1949.

Notwithstanding her duties and obligations under the Pecos River Compact, the State of New Mexico has breached her duty under the Compact by permitting and countenancing prohibited depletions by man's activities of the waters of the Pecos River within the State of New Mexico to the extent that since 1950 through 1972 there has been a cumulative departure of the quantity of water in excess of 1,200,000 acre feet at the Texas-New Mexico State Line from the available water the State of New Mexico compacted to deliver. Unless the relief prayed for is granted by this Court, the plaintiff State will be deprived in the future, as in the past years, of the benefits of the Compact and the waters of the Pecos River to which her citizens are entitled.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1) of the Judiciary Act. Under the decisions of this Court in

Nebraska v. Iowa, 406 U.S. 117 (1972), and *West Virginia ex rel. Dyer et al. v. Sims*, 341 U.S. 22 (1951), the present case is a proper one for the exercise of this jurisdiction.

The rights of the State of Texas to the waters of the Pecos River can be protected only by a decree of this Court granting the relief prayed for in the Complaint.

It is respectfully submitted that the Motion for Leave to File the Complaint should be granted.

Respectfully submitted,

JOHN L. HILL

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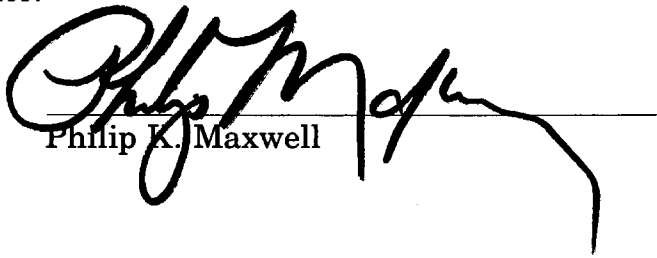
Austin, Texas 78711

BY: 

Philip K. Maxwell

PROOF OF SERVICE

I, PHILIP K. MAXWELL, one of the Attorneys for the Complainant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of June, 1974, I served copies of the foregoing motion for leave to file complaint by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the State of New Mexico.


Philip K. Maxwell

